

CANADA / JUDGMENT

Howell v. Strutt

2021 BCSC 92

COURT

Supreme Court of British Columbia

DECIDED

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2021 BCSC 92 Howell v. Strutt IN THE SUPREME COURT OF BRITISH COLUMBIA Citation: Howell v. Strutt, 2021 BCSC 92 Date: 20210121 Docket: M151190 Registry: Vancouver Between: Brian Howell Plaintiff And Frederick Allen Strutt, Tom's & Merritt Towing Ltd. and Minister of Public Safety and Solicitor General of the Province of British Columbia Defendants Corrected Judgment: The cover page of this judgment was corrected on January 26, 2021. Before: The Honourable Mr. Justice Macintosh Reasons for Judgment Counsel for the Plaintiff: J.D. Boyd Counsel for the Defendants, Frederick Allen Strutt and Tom's & Merritt Towing Ltd: T. Kushneryk Counsel for the Defendant, Minister of Public Safety and Solicitor General of the Province of British Columbia: O.J. Kowarsky P.Y. Yeh Place and Dates of Trial: Vancouver, B.C. November 23-25, 27, 30 and December 1-4, 7-11, 2020 Place and Date of Judgment: Vancouver, B.C. January 21, 2021 Table of Contents Introduction. 3 The Accident. 3 The Claim against the RCMP. 11 Damages. 14 The Plaintiff's Background. 14 The Plaintiff's Physical Injuries and Future Treatment 18 Non-pecuniary Damages. 20 Past and Future Lost Earning Capacity. 30 Cost of Future Care. 37 Special Damages. 40 Summary. 41

Introduction

- [1] In this claim for damages arising from a motor vehicle accident, the threshold issue is the apportionment of liability for the accident among the Plaintiff, the Defendant Strutt and the RCMP. The Plaintiff says one or both Defendants are wholly responsible for the accident. The Defendants say the Plaintiff is wholly responsible. Additionally, the Plaintiff's claims under every head of damages are in dispute. The Accident
- [2] The Plaintiff, Brian Howell, now 54, is a photographer. On January 7, 2015, a weekday, he was driving south on the Coquihalla Highway, from Kamloops toward Merritt. With him in his 2006 Honda Odyssey was his friend Jake Wetzel. Mr. Howell had been taking pictures earlier in the day and Mr. Wetzel had been helping him.

- [3] The accident happened at about 2:45 in the afternoon. The sun was shining in a cloudless sky. The road was wet. (The evidence did not establish whether perhaps the warmth from the sun, or scattered salt, or both, had melted frost on the road to make it wet, but nothing turns on why the road was wet.) Mr. Howell was talking on his hands-free phone at the time of the accident, but no one suggested that contributed to the accident.
- [4] The Coquihalla Highway in the vicinity of the accident runs approximately north-south, but the direction changes somewhat from time to time, slightly more easterly or westerly. A combination of circumstances made the angle of the sun a dominant factor in the accident. The sun was more to the south, and lower to the horizon, than it would have been later in the year. The accident happened when Mr. Howell was driving up a hill, and the sun was perched at the top of the hill, shining directly down at the vehicles coming up. Because the road was wet, the glare of the sun reflected off the road and added to the light coming directly from the sun to further impair the visibility of those climbing the hill.
- [5] Before the accident, Mr. Howell came upon a large transport truck and trailer, often called an 18-wheeler, or a semi. The semi was travelling ahead of him, also heading toward Merritt. Mr. Howell's car was about the length of the semi behind it when he pulled out to pass it. Before he pulled out to pass, the sun was not a factor because the semi served as a complete shield against the sunlight. Before he pulled out to pass, Mr. Howell checked that the passing lane behind him to his left was clear of any traffic
- [6] At the location of the semi and Mr. Howell's car, just before Mr. Howell pulled out to pass, the southbound part of the Highway had three lanes, a middle lane, where the semi and Mr. Howell were, a passing lane to the left, which Mr. Howell was moving into, and a slow lane to the right. The semi had begun to lose speed as it climbed the hill, but it had made no signal or movement for changing into the slow lane. In deciding to pass the semi by moving left into the passing lane, Mr. Howell was doing what most drivers would have done, moving to pass a semi that was losing speed on a hill, when the semi was not changing to the slow lane and the passing lane appeared to be clear of all traffic. In addition, the semi was throwing up some spray from its tires on the wet road. Mr. Howell had his wipers on to deal with any spray.
- [7] What Mr. Howell did not, and could not, know was that a large, flat deck tow truck was parked just up ahead on the left, such that it extended 20 inches onto the passing lane. The tow truck, owned by the Defendant company, and operated by the Defendant Strutt, had parked there approximately 90 minutes earlier. Mr. Strutt had seen an accident in the immediate area, in the northbound lanes of the Highway, on the opposite side of the median. He had stopped to see if he could give assistance or get some work.
- [8] When Mr. Howell moved out to pass the semi, as he recalled, he was blinded by the sun and his car came to an abrupt stop from hitting the tow truck. He never saw the tow truck before impact because he was blinded by the sun. My note of his testimony was, "[w]hen I came out from behind the semi, there was a flash of light and my car stopped". The evidence of his

friend Mr. Wetzel, sitting in the passenger seat, was similar. He said, by my note, "I did not see the tow truck before the collision and there was no time for correction. Violent contact. Brian [Howell] let out a scream and the airbags opened".

- [9] The posted speed limit was 120 kph. Mr. Howell estimated he was travelling at between 100 and 110 kph behind the semi and that he slowed before making the lane change. Both the Plaintiff's and the Defendants' motor vehicle accident analysts estimated that Mr. Howell's car was travelling at between 52 and 74 kph at the moment of impact.
- [10] Orange safety lights on the top of the tow truck were on, but I accept the testimony of Mr. Rempel, the Plaintiff's accident analyst, that they were invisible to Mr. Howell for all intents and purposes because of the angle of the sun.
- [11] I find, from the evidence of Mr. Wetzel, Mr. Howell and Mr. Rempel, that the sun's location, coupled with the related problem of substantial road glare, rendered the tow truck practically invisible to Mr. Howell in the moments before impact. I will refer in more detail to Mr. Rempel's evidence on that point later in these reasons.
- [12] Mr. Strutt's discovery evidence entered at trial included the following: 94 Q And a portion of your vehicle remained in the left-most southbound lane? A Yes 123 Q And while you were waiting for police you hadn't put cones out behind your truck? A No, I hadn't. 124 Q And why was that? A I just didn't think of it. 152 Q And you told me you just didn't think about putting cones out on that occasion? A I just didn't think about it, no. 153 Q When you pulled over you did know that part of your vehicle was in the left-most southbound lane? A Yes. Yes, I did. 154 Q And I guess when you got out you weren't sure how long you were going to be on scene. Is that fair to say? A That's fair to say. 156 Q And in that time, the time that you were waiting for the police to arrive and then the time that the police officer was interviewing the couple in your truck, it just didn't occur to you that you may want to put cones out at that point? A It didn't occur to me. 157 Q I should clarify. You do carry cones on the tow truck with you? A I had cones on the truck. 159 Q Even without the sun, wouldn't it be protocol if you were going to park in a way that you were partially blocking lanes of travel that you would put cones out? A It would have been wise, thinking back at it. 272 Q And it was not a matter of it was too difficult or too much work to put the cones out. It was just something you forgot to do? A Just something I forgot. 276 Q The reason that you shouldn't be parked partially on the highway is because it was potentially dangerous to other motorists using the highway? A That's a possibility, yes. 277 Q And that was something that you knew at the time of the accident? A Well, I know you don't want to be on the highway if you can help it. 278 Q Because it is potentially dangerous to other drivers? A Yes.
- [13] Exhibit 1 in the discovery of Mr. Strutt was a photograph showing the tow truck and the Howell vehicle as they were positioned at impact. The same photograph is in the accident analyst reports from both sides.

- [14] From the photograph, it is probably the case that Mr. Strutt could have easily parked several feet further off the highway by driving onto the small mound of snow further to the left, toward the centre of the median. Mr. Strutt testified that he could not have parked further off the Highway, but I do not accept that. I find that he was negligent in parking the truck where he did, and that his doing so was a cause of the accident. If, contrary to my finding above, Mr. Strutt could not safely have parked the tow truck considerably closer to the centre of the median, he should not have parked anywhere in the immediate vicinity.
- [15] At the time of impact, the Howell vehicle's left tires were 10 inches over (to the left looking up the hill) the yellow line on the Highway, which most witnesses referred to as the fog line. His left tires however were not over to the rumble strip, the portion of the roadway intended to alert drivers they are too far over.
- [16] Regarding the fact that Mr. Howell's car was 10 inches over the fog line (but not to the rumble strip), I quote the following from Mr. Rempel's report, where he is responding to the expert report of Mr. Lawrence, the Defendants' accident analyst:
2. The roadway lines were not necessarily visible at all to Mr. Howell, but they are depicted as clearly visible in Figure 2 (and in the rest of Mr. Lawrence's report). This collision occurred mid-winter at a time when roadway lines were significantly degraded, as occurs in the winter on this highway (they are repainted annually in the spring). Degraded roadway lines are difficult to see in the winter when driving towards the sun on wet roads. It is important to note that roadway lines are retro-reflective, which means that they do not reflect sunlight efficiently. Rather, by design and construction they reflect headlight illumination back towards the driver and this design feature of roadway lines has low effectiveness during daylight when roadways are wet, particularly when the lines are degraded as is the case here.
 3. In the scene photographs it is apparent that the roadway lines are obscured to some degree by accumulated abrasives, which tend to collect between vehicle paths. This results in less well-defined lane corridors than the painted corridors. There is no basis in the photographs to conclude that the lanes were well defined by the roadway markings and they are certainly not as depicted in Mr. Lawrence's report figures.
 4. The affect of sun glare and reflection of the sun from the road surface on Mr. Howell's ability to identify the lane lines is not demonstrated in Mr. Lawrence's Figure 2 or in his report analysis.
- [17] It is understandable that Mr. Howell would be wanting to give the semi a wide berth, which further serves to explain his car's tires going over the fog line. Given the extreme difficulty for Mr. Howell even to see the fog line, and remembering that he had only a moment after being in the sun before the collision, I do not find he was negligent to cross the fog line to the extent he did.

- [18] Given that Mr. Howell's car was 10 inches over the fog line, the Defendants argued that under the "but for test", the accident would have happened even if the tow truck had not been parked 20 inches into the passing lane. I do not accept that analysis, which the Defendants submitted should have absolved Mr. Strutt from liability. In my view, the tow truck was parked negligently, and dangerously, if it was parked anywhere near, on, or inside the rumble strip along the Highway with a posted speed limit of 120 kph. The fact that it extended 20 inches into the passing lane itself, well inside the fog line, remaining there for at least 90 minutes before the accident, made an accident like Mr. Howell's collision highly probable in the circumstances in place at the moment of impact.
- [19] Two paragraphs from Mr. Strutt's written argument cite case authority that is applicable:
- [19] The standard of conduct that will meet or breach the duty of care is measured by its reasonableness. Reasonableness is determined by all of the circumstances of the time and place. Again in *Ryan v. Victoria (City)*, [1999] 1 S.C.R. 201 Major J. described the formula to be used when assessing the reasonableness of a standard of care. He wrote:
- [28] Conduct is negligent if it creates an objectively unreasonable risk of harm. To avoid liability, a person must exercise the standard of care that would be expected of an ordinary, reasonable and prudent person in the same circumstances. The measure of what is reasonable depends on the facts of each case, including the likelihood of a known or foreseeable harm, the gravity of that harm, and the burden or cost which would be incurred to prevent the injury. In addition, one may look to external indicators of reasonable conduct, such as custom, industry practice, and statutory or regulatory standards.
- [25] As noted by Mr. Justice Rogers at paragraph 60 of *Borgford v Thue*, 2015 BCSC 1917:
- [60] To be actionable, there must be a causal link between the defendant's breach of a reasonable standard of care owed to the plaintiff - i.e.: the defendant's negligence - and the plaintiff's loss. It is not necessary that the defendant's breach be the only cause of the loss, or that the breach be the last cause in time. Gone is the old concept of liability falling entirely upon the party who had the 'last clear chance' to avoid the loss. The current approach to causation in negligence cases is to assess whether the claimant would have suffered the loss but for the defendant's breach of the relevant standard of care. [Emphasis added.]
- [20] In my view, Mr. Strutt parking the tow truck where he did created an objectively unreasonable risk of harm, and a risk which could easily have been avoided. But for his parking, not just too close to a high-speed highway, but 20 inches onto the passing lane of that highway, resulted in the accident that occurred on January 7, 2015.
- [21] The Defendants point to the fact that in the 90 minutes or so the tow truck was parked there before the accident, no other vehicle hit it. That of course is fortunate, but it does not mean that the tow truck's location was not an accident waiting to happen. Furthermore, the evidence does not indicate for what portion of those 90 minutes the sun's location constituted the severe problem it was at the time of impact. Also, how many other drivers

were behind a semi, shielded from the sun, in the vicinity of the tow truck and unable to see it, at the moment they were passing?

- [22] The two accident analysts, Mr. Rempel for the Plaintiff and Mr. Lawrence for the Defendants, shared several findings. The fundamental difference in their reports was that Mr. Lawrence was instructed to assume that sightlines between Mr. Howell and the tow truck meant that Mr. Howell could see the tow truck in accordance with the sightlines, whereas Mr. Rempel took into account the blinding light of the sun, and related road glare, which he calculated rendered the tow truck, at a minimum, 90% less visible, even though it was in a sightline.
- [23] Counsel for Mr. Strutt submitted that instead of attempting to pass the semi, Mr. Howell should have pulled back in behind the semi when he faced the glare of the sun in the passing lane. Hindsight makes that a tempting possibility to examine, but it does not follow that Mr. Howell was negligent in deciding to pass when he did. The semi was losing speed as it climbed the hill, and was not moving to the slow lane. Mr. Howell could not reasonably expect that the tow truck would be parked where it was, 20 inches into the passing lane. From the time Mr. Howell was in the path of the sun, coupled with the road glare, it was a moment, a matter of a few seconds, before impact.
- [24] The Defendants rely on this Court's decision in *Reddemann v. Bishop*, [1999] B.C.J. No. 1281 [Reddemann], for the finding in that case of negligence against the driver driving toward the sun when his vehicle struck and killed one road worker and injured two others.
- [25] The 53-page decision in *Reddemann* dealt entirely with the facts of that case, addressing only the question of liability. The detail of that factual analysis demonstrates how every finding of negligence, in every case, must turn on the facts unique to that case.
- [26] The deceased and the two plaintiffs in *Reddemann* were working on a road "patch" crew in the district of Chilliwack on Young Road at the west side of its intersection with Creamery Road. The area was relatively built up. The defendant vehicle struck and killed Mr. Reddemann when he was about halfway between the fog line of the road and the grass a few feet away from the road. Most important, in distinguishing *Reddemann*, are the following observations by the trial judge:
- [104] I have already noted that I am troubled by Bishop's [defendant driver] evidence. I find it most difficult to accept that he was suddenly, and immediately, blinded, without warning, as he describes.
- [106] However, I do not accept [Bishop's] evidence that the accident occurred almost immediately the sun affected his vision; that he barely had time to take his foot off the accelerator before he unknowingly struck Reddemann.
- [113] In any event, I would not be comfortable basing any finding of lack of negligence on his part, or more importantly, of negligence on the part of any of the plaintiffs, solely on the basis of his evidence. Upon a consideration of the whole of the evidence before me, I am

fully satisfied that the sole and effective cause of the motor vehicle accident was the negligence of the defendant, Bishop, in failing to heed visibility conditions, with particular regard to the brightness and location of the sun, in failing to keep any useful look-out whatsoever, in travelling at a speed in excess of the requirements of the circumstances then prevailing, and more importantly, in continuing to drive along the highway when his vision was impaired by the sun. [Emphasis added.]

- [27] In my view, those findings, particularly when they are read in the context of the detailed underlying factual analysis in Reddemann, make that case different from the one before me. Mr. Howell, unlike the defendant driver in Reddemann (see the extract from para. 104 above), was "suddenly, and immediately, blinded, without warning". Mr. Howell's accident, unlike the accident in Reddemann (see the extract from para. 106 above), in fact "occurred almost immediately the sun affected his vision; that he barely had time to take his foot off the accelerator before he unknowingly struck [the tow truck]." The Court in Reddemann did not find the defendant driver to be a reliable witness (see para. 113 quoted above). I do find that Mr. Howell was a reliable witness, who spoke candidly throughout his lengthy testimony. The Claim against the RCMP
- [28] I turn to the claim against the RCMP. (The Defendant Minister and Solicitor General is legally responsible for the conduct of the RCMP in this case. I will refer to the RCMP without continuing to make reference to the Minister.) Constable Grouhel, now retired, was the RCMP officer at the scene when the Howell accident happened. He was there investigating the accident that had taken place earlier on the northbound lanes of the Highway, roughly adjacent to where Mr. Strutt had parked his tow truck.
- [29] An elderly couple, the Whitakers, had been involved in the accident in the northbound lanes. Constable Grouhel wanted to interview them for his investigation of that accident. Mr. Strutt agreed that the Constable could use the tow truck for that interview. Constable Grouhel entered the tow truck through the driver's door, and sat in the driver's seat. Ms. Whitaker sat in the front passenger seat. Mr. Whitaker sat in the back. Constable Grouhel therefore had to be facing the southbound passing lane of the Highway in order to talk with the Whitakers.
- [30] The three had been meeting in the tow truck for 10 or 15 minutes when it was struck by the Howell vehicle. They were thrown about. Fortunately, the injuries they suffered were not too serious.
- [31] Mr. Howell claims Constable Grouhel breached a private law duty of care he owed to Mr. Howell by not requiring the tow truck to relocate to a safer place, such as a reasonable distance back from the passing lane, instead of remaining 20 inches inside the passing lane.

- [32] Under s. 187 of the Motor Vehicle Act, R.S.B.C. 1996, c. 318 [MVA], a person must not park a vehicle so as to obstruct the free passage of traffic on a highway. The RCMP are permitted to require a motor vehicle to be moved if it is parked in a position that causes it to interfere with the normal flow of traffic on a highway: MVA, s. 188.
- [33] The RCMP argued that Constable Grouhel owed no private law duty of care to southbound motorists on the Highway when he was in the tow truck investigating the earlier accident on the northbound lanes. I do not accept that an officer's duties are so confined. In my view, an officer in Constable Grouhel's position has what the case law speaks of as a direct relationship of proximity, or neighbourhood, with the motoring public in his immediate vicinity on the highway, sufficient that the officer owed a duty of care: *Hill v. Hamilton-Wentworth Regional Police Services Board*, 2007 SCC 41 [Hill] (duty of care between the police and the subject of a criminal investigation); *Schacht v. O'Rourke*, [1976] 1 S.C.R. 53 (duty of care between the police and a motorist injured by driving into an unmarked pit); and *Knox v. Eastman*, [1999] B.C.J. No. 586 [Knox] (duty of care between the police and a motorist who died driving into a parked grader).
- [34] Of the cases cited above, Knox is most analogous to the case at bar. In Knox, an 18-ton grader was parked on a street in Burnaby, contrary to a by-law that prohibited "on street" parking of vehicles weighing more than 8000 lbs. for more than two hours between 1:00 am and 6:00 am. The deceased driver was driving a pick-up truck weighing just over two tonnes, and collided with the grader at approximately 5:30 am. The grader was effectively undamaged, but the driver's truck was demolished and he died instantly. At the time of the accident, the grader had been parked on the street for approximately 24 hours. The defendant RCMP officer testified that he had driven by the grader at least a dozen times during his shift the evening before and hid behind it to monitor speeding drivers. The RCMP officer was unaware of the by-law and did not consider the grader as a traffic hazard.
- [35] The driver's family brought the action on his behalf. They claimed that the RCMP officer owed a duty to the driver and was negligent in not having the grader removed. Justice Collver found the RCMP officer owed a duty of care to motorists on the street, which included a duty to remove obstructions on the roadway that put the safety of motorists at risk: Knox at paras. 18, 19. However, on the particular facts of the case, Justice Collver found that the RCMP officer did not breach the standard of care.
- [36] The standard of care Constable Grouhel had to meet was "the overarching standard of a reasonable police officer in similar circumstances," recognizing that officers may exercise discretion, and are allowed to make errors in judgment but not "unreasonable mistakes breaching the standard of care": Hill at para. 73. In my view, it was unreasonable for Constable Grouhel to allow the tow truck to remain where it was. For 10 or 15 minutes he sat in it, interviewing the Whitakers, allowing the truck to remain on a portion of the passing lane where the speed limit was 120 kph. Constable Grouhel does not recall checking whether the truck was parked partly in the passing lane. He had a duty to check. Had he ordered the tow truck to relocate, there would have been no accident.

- [37] The RCMP argued that no finding can be made against them without expert evidence addressing the standard of care. It is the general rule that claims against police officers call for expert standard-of-care evidence, but there are cases where the question of a breach will be apparent without expert evidence: *Bergen v. Guliker*, 2015 BCCA 283 at para. 131 [*Bergen*]. The circumstances of the tow truck being dangerously close to traffic cannot be said to be outside the knowledge and experience of the ordinary person: *Bergen* at paras. 129-130.
- [38] To conclude, from the above facts, I do not find Mr. Howell to have been negligent. I find that liability should be divided between the Defendants, 85% against Mr. Strutt and 15% against the RCMP. Mr. Strutt parked the tow truck where he should not have, extending onto the passing lane, and left it there for about an hour and a half, without placing safety cones, which he had with him. Constable Grouhel was in the tow truck for 10 to 15 minutes, with the Whitakers, without having determined whether it was parked partly on the passing lane. He should have seen that it was not in a safe place, and ordered it to be removed. Damages
- The Plaintiff's Background
- [39] Mr. Howell was 48 when the accident happened.
- [40] He was born in Burnaby, and grew up in Coquitlam. I adopt here the summary of his working life to the time of the accident, as set out in his counsel's closing submissions, at paras. 33-57 and 60-63:
- [33] His father worked for a magazine distributor in a management position. His mother worked as a cashier for Safeway and later at the UFCW. He is the middle of three siblings. Growing up he played sports with his brother, enjoyed skateboarding and music, according to the testimony of the Plaintiff's brother, Michael Howell.
- [34] The Plaintiff graduated from high school in 1984 and spent some time working as a waiter and doing some travel before enrolling in a Bachelor of Arts degree program at Ryerson University in Toronto, majoring in Film and Photography. During his years at university the Plaintiff worked as a photographer for the school newspaper, assisted a professional photographer in the fashion industry and commenced his own self-directed photography projects focusing on the collapse of the north Atlantic cod fishery in Newfoundland in the summer of 1992. He was inspired by live music and developed a strong social conscience which is reflected in his photography and art work. During his time as a photography assistant he discovered that product and catalogue work was "not his cup of tea" and he later tended towards social justice and politically motivated art projects.
- [35] Following his graduation from Ryerson in 1994, the Plaintiff attended the prestigious "Barn Storm" workshop in New York. He was one of only two Canadians selected to attend this workshop for the top 100 photojournalist prospects in the world as judged and selected by the photo editor of the New York Times. Photojournalism

- [36] The Plaintiff then commenced his career in Toronto with a variety of jobs including assisting photographers, photography for newspapers and magazines, and pursuing his own art projects. He was described by his brother as being very ambitious, a "real student of the profession" who was excited to pursue a career in photography. He was very likeable, funny and light hearted, and people gravitated to him, as further observed by his brother.
- [37] In 1995, the Plaintiff returned to Coquitlam and took a job at the Maple Ridge Times. He also had his first gallery show in Vancouver which exhibited the photographs he had taken in Newfoundland as a student. He continued to work for a variety of community newspapers from 1995 to [the end of 2010], using that time to hone his craft, while further pursuing self-directed projects. In 2000 he caught the eye of Saturday Night Magazine and travelled extensively in Canada with this magazine.
- [38] Also in 2000, while on assignment for the Royal City Record, the Plaintiff met Order of Canada recipient Jean Buchan who had spent her lifetime providing medical care to impoverished women in northern India. In 2001 the Plaintiff, on his own dime save a small grant from CIDA, travelled to India to photograph Canada's version of Mother Theresa. These were exhibited in Toronto and published along with a story written by the Plaintiff in Maclean's. This opened up a long-standing relationship with the magazine that lasted until 2016.
- [39] He began seeing his now wife, Kate Marshall, in 2001 and they married in 2002. They later had two children, Charlie and Lucy, who were aged 10 and 8 at the date of the accident.
- [40] The Plaintiff continued to work for community newspapers including the Surrey Now, and fostered ongoing work relationships with several magazines including Maclean's, Vancouver Magazine and BC Business. The Plaintiff was regularly called upon to shoot portrait photographs of politicians, musicians and Olympians for these magazines. He shot innumerable cover photographs including a feature story that sent him to Alaska for a week on assignment with the Guardian Weekend in 2006.
- [41] In 2008 the Plaintiff was picked up by the Winsor Gallery and in the period between 2009 and 2016 he had a number of solo exhibitions at the gallery discussed below.
- [42] In about 2009/2010 the Plaintiff commenced a business relationship with UBC Sauder School of Business, whereby he was commissioned to photograph classes and fake portraits of professors. He continues to receive work from Sauder to this day. Other regular "work for hire" clients at this time included the SFU Beatty School of Business and a couple of law firms.

- [43] In 2010, the Plaintiff took leave from the Surrey Now newspaper to exclusively shoot the Olympics for Maclean's magazine. Following the Olympics the Plaintiff's art projects were taking off and he found he did not have the time to devote to his art, newspapers, and freelance work for various magazines. He resigned from his post at the Surrey Now around the end of 2010 and made the decision along with his wife that he would pursue his art career, and continue with his freelance work as the assignments arose.
- [44] His transition from the journalism world to the art world was described by Michael Howell as being unique. Michael Howell testified to photographers over Canada still asking him how the Plaintiff made that transition. Michael Howell's response to those questions was that the Plaintiff was a self-starter and people recognized this quickly. Art
- [45] The Plaintiff has worked on self-directed art projects since he commenced his Bachelor of Arts Degree in 1992. All his projects are a combination of art and social commentary. He was inspired by social justice issues and brought these issues to light in his art work.
- [46] In 2001 he embarked on the art project he titled "One Ring Circus" also referred to through this trial as "the wrestling project". The Plaintiff's photographs, shot in a photojournalistic style, were published in Maclean's, the Global Mail and various newspapers. This led to the Plaintiff being offered a book publishing deal by Arsenal Press. This project later became the first exhibition shown in his commercial gallery in 2009 (Winsor Gallery, which opened in 2002), and his most well-known photograph from this exhibition is currently on rent with the Vancouver Art Gallery.
- [47] In 2007 the Plaintiff completed a further project which was published in another book by Arsenal Press. This impersonators project titled "Fame Us" was also later exhibited In Vancouver in 2010.
- [48] Throughout the early 2000s the Plaintiff shot a series of photographs of abandoned houses in Surrey. When these photographs were shown it caught the attention of a staff member from the Winsor Gallery in Vancouver, which led to the Plaintiff forming a commercial relationship with this gallery.
- [49] His first exhibition at the Winsor Gallery in 2009 was predominantly a show of the "One Ring Circus" project, along with three to four prints of the Surrey Houses project. 25 prints of One Ring Circus were exhibited and marketed for sale at \$3,000 each. One of the photographs was purchased by Douglas Coupland, arguably Canada's current most prolific and successful artist, who testified at trial that when he saw it he thought "Oh my god, that image is fantastic, I've got to have that image".
- [50] Jennifer Winsor, owner of the Winsor Gallery, appeared as a witness and spoke to her relationship with the Plaintiff. Ms. Winsor has a considerable background in the art world and had owned the Winsor Gallery for about six years before taking on the Plaintiff as one of her artists. Ms. Winsor testified to what she looks for in an artist that she is prepared to represent. She wants artists with a strong sense of commitment to their art, and wants to get

a sense that they are going somewhere as an artist so that the investment she makes as a gallerist is likely to pay off. These are the qualities she saw exhibited in the Plaintiff and considered him to be one of her top five artists (out of the 3040 artists she represented). She described how the Plaintiff fell into a usual pattern of having a good show every 18 months or so and how, prior to his accident, they had lots of conversations about what project he was going to work on next. Ms. Winsor also testified that it is rare for an artist to be as successful as the Plaintiff as early as he was in his career. It is accepted that an artist's career may wax and wane, but in her 18 year career in the art world, Ms. Winsor had never seen an artist go into a quiet period and then never re-emerge.

- [51] The Plaintiff's notoriety and professional networks continued to expand and he was invited to participate in a group show at the Surrey Art Gallery in 2010.
- [52] In the lead up to shooting the Olympics for Maclean's Magazine in 2010, the Plaintiff was asked to participate in an exhibition at the Bloedel Conservatory where over 100 of his photographs were displayed. It was while shooting the Olympics and preparing for the Bloedel Conservatory project that the Plaintiff became inspired for his next project, Shopping Carts.
- [53] Shopping Carts was a social commentary on society and attitudes towards waste and value. As the Court has heard from the Plaintiff, Douglas Coupland, Jennifer Winsor and Michael Levin, another successful Vancouver artist, the Shopping Carts exhibition at the Winsor Gallery in April 2011 was a sell-out event, with several of the photographs selling in more than one edition, and was a turning point in the Plaintiff's art career. Not only was this exhibition financially lucrative (one picture alone selling for \$21,000), it also enhanced his reputation and exposure in the art community. Douglas Coupland testified that the two things that are the change point in an artist's career are a museum show, or a gallery show that everyone talks about. It is the shows that makes or breaks an artist's career. The Plaintiff testified that following the success of Shopping Carts the magazines he had completed work for in the past began to write articles about him instead, and his success was like being "invited into a special club". Shopping Carts sold out of the first edition and several further editions sold after that. The work was taken by his gallerist to the Toronto Art Fair in 2011 and 2012. This critically acclaimed work introduced him into the institutional art world and the Vancouver Art Gallery. The Shopping Carts photographs continue to sell. As explained by the Plaintiff, this work becomes more financially valuable over time and as fewer editions remain.
- [54] Along with his wife, the Plaintiff made the decision to focus primarily on his art after the success of Shopping Carts. He reinvested a significant portion of his earnings from that show into new camera equipment.
- [55] In 2012, the Plaintiff completed a smaller project of an airstream trailer which he later donated to the Art's Umbrella "Splash" auction. A print of this work was recently sold again in 2020.

- [56] In about 2013, the Plaintiff embarked on a more accessible project entitled "99 Stars of Occupy". This Work was exhibited in the Winsor Gallery and continues to sell.
- [57] Also in 2013 the Plaintiff shot and exhibited his critically acclaimed work "Printing Press", which established him as an artist in public galleries. One piece went to the Surrey Art Gallery and another to a private collector. Jennifer Winsor testified that she had hoped to make this work into a coffee table book. The Plaintiff on cross testified that the intention of that project was to move towards institutional representation. Douglas Coupland testified that for him a turning point in his own career was getting a solo show at the, Vancouver Art Gallery, as validation from a well-respected museum led to other shows around the world. He further noted that this was built on a lot of work for a lot of years.
- [60] The Plaintiff briefly branched into sculptural work in 2014 with an exhibition "Through the Trapdoor". He also spent this time researching and planning major future works, the projects known as "Burnt Forest" and "Beautiful Chainsaw".
- [61] The Plaintiff testified about the preparation work that went into these projects. He spent days and weeks hiking and snowshoeing in the British Columbia back-country, scouting locations for Burnt Forest which was a look at climate change and was inspired by the work of Jackson Pollock. He drove around the interior B.C., following the Fraser River, looking for shooting locations for Beautiful Chainsaw. His vision for Burnt Forest was that it would be a highly saleable work of art that would then finance Beautiful Chainsaw, which he intended to make into a coffee table book.
- [62] The Plaintiff shot photographs on the Burnt Forest project on the day of the accident and five of these were exhibited in the Winsor Gallery in August 2015, the exhibition supplemented with one photograph from his Beautiful Chainsaw project. Despite the sparse and incomplete show, it was very well received and the Plaintiff estimated that 11 photographs sold following the exhibition. These pieces have continued to sell and two are currently available for rental at the Vancouver Art Gallery.
- [63] Since the Plaintiff's career shift to focus on art in 2011 up until the time of his accident in 2015 he has been extremely active in the arts community; attending gallery openings up to three times a week, networking, and donating works to the Arts Umbrella Splash auctions and exhibiting at Capture Festivals. The Plaintiff's Physical Injuries and Future Treatment
- [41] Mr. Howell's physical injuries from the accident were relatively minor. His psychological injuries were relatively serious.
- [42] At the accident scene, he was able to extricate himself from his car. He walked around the scene and photographed it. His mobility was largely unrestricted, partly as a result of adrenaline and the shock of the accident.

- [43] Mr. Howell suffered a small fracture in his left hip, described in the medical records as an acetabular left hip fracture. It was an undisplaced fracture of the posterior wall of the left hip. His doctor told him to refrain from weight bearing, and to use crutches for eight weeks, which he did.
- [44] He also suffered an injury to his left knee. That was a Grade 1 (Grade 1 the lowest, Grade 3 most severe) posterior cruciate ligament ("PCL") tear of the left knee.
- [45] The PCL injury is likely to result only in some potential limitations in high level sporting activities. As an adult, the Plaintiff's sporting pursuits have been relatively modest.
- [46] Mr. Howell also complained of left shoulder pain, but that was years after the accident. There was no structural injury to his shoulder. There was too much delay in the onset of shoulder pain to allow me to conclude, on the balance of probabilities, that physical injury to the shoulder was caused by the accident. That accords with the opinion of Dr. Jordan Leith, called by the Defendants, whose opinion on that point I accept. Mr. Howell's shoulder pain was measured by the Plaintiff's occupational therapy expert, in October 2019, as being much less than 1 out of a maximum of 10.
- [47] There was a dispute between the Plaintiff's two experts on the one hand, and the Defendants' expert on the other, as to whether the Plaintiff is likely to suffer arthritis later in life in the hip or the left knee, and whether knee or hip replacement will eventually be needed. I accept the opinion of Dr. Leith, testifying on behalf of the Defendants, that the hip injury is unlikely to lead to hip joint arthritis, given that the hip joint was displaced minimally, if at all, at a location that is in the non-primary weight-bearing portion of the hip; and that the knee injury may result in some arthritis which, if it develops, is unlikely to occur before age 70, and will be unlikely to call for surgical intervention. Also in accordance with Dr. Leith's opinion, I accept that knee or hip replacement down the road probably will not be required.
- [48] I will address Mr. Howell's psychological injuries below, in assessing his claim for non-pecuniary damages. Non-pecuniary Damages
- [49] Mr. Howell claims \$190,000 under this head. The Defendants submit that \$80,000 is the right amount.
- [50] Dr. Chris Babbage, a psychiatrist, testified for the Plaintiff. He assessed the Plaintiff in a 3½-hour clinical interview on March 12, 2019.
- [51] Dr. Babbage is of the opinion that, as a result of the accident, the Plaintiff meets the DSM-V criteria for post-traumatic stress disorder ("PTSD"), which has caused him to have decreased interest, confidence and motivation, and in the result has reduced his ability to create artwork. Dr. Babbage is of the opinion that Mr. Howell's PTSD and his left shoulder pain are related, each influencing the other.

- [52] Dr. Babbage also diagnosed Mr. Howell as having persistent depressive disorder ("PDD"). He noted some record of the Plaintiff having feelings of depression before the accident, due to significant life stressors, but was of the opinion that those symptoms did not meet the criteria for PDD, and resolved without treatment. Dr. Babbage is of the view that the Plaintiff would not be suffering from PDD but for the accident.
- [53] He recommended antidepressant medication to reduce the severity of Mr. Howell's symptoms of fluctuating mood and hyperarousal, depression, decreased motivation, difficulties concentrating and lack of interest. He recommended the Plaintiff continue his psychotherapy sessions with Dr. Owen James, with an initial 12-24 sessions, followed by 6-12 sessions annually over the long term. He further recommended exercise to further manage depressive and anxiety-related symptoms. With respect to prognosis, Dr. Babbage wrote as follows in his written opinion: Mr. Howell's PTSD can be considered chronic as it has persisted for more than 2 years. He is likely to have long-term symptoms of PTSD persisting with a waxing and waning quality despite appropriate treatment interventions. It is difficult to predict the severity of these long-term PTSD symptoms and their impact and contributions to functional impairments. Mr. Howell's long-term ability to cope with internal and external stressors is likely compromised due to the disabling effects of PTSD. He will almost certainly have long-term difficulties in social aspects of his life as well as chronic impairments in his ability to work as a photographer/artist at the level he did prior to the MVA due to his decreased creativity, interest, and reduced cognitive flexibility. Given the chronicity of Mr. Howell's PDD and PTSD, residual problems with motivation and cognition are likely to continue even with evidence-based treatment. Mr. Howell's PTSD, PDD, and family history increases his risk of suicide and Major Depressive Disorder (MDD). Development of MDD can lead to further function deterioration.
- [54] Dr. Paul Latimer, the psychiatrist called by the Defendants, agreed with the diagnoses of Dr. Babbage, and that Mr. Howell has suffered these disorders as a result of the accident. Dr. Latimer in his written opinion said that with effective psychiatric therapy, Mr. Howell has a good prognosis of returning to a productive photography career. In direct examination, he described it as a "reasonable possibility" that Mr. Howell would recover and return to his job as a photojournalist. In cross-examination, he did not want to commit to a timeframe for Mr. Howell's recovery, saying that it would depend on what treatments are tried and how responsive he is to them. He accepted that when PTSD has lasted longer than two years, the likelihood of persistence is increased, and he accepted that there is a high likelihood of recurrence.
- [55] Dr. Owen James testified as the Plaintiff's treating psychologist, from December 2018 to the present. When Mr. Howell began seeing Dr. James, he expressed a concern about his disconnection from his work. As Dr. James put it, "he had lost his muse," and Dr. James needed to understand why. Mr. Howell had lost interest and energy, and socialized much less. At first, he made no progress, but in early 2020, he found new medication which enabled him to sleep better. Dr. James has found the Plaintiff to have improved over the time

he has treated him, believing that Mr. Howell has some degree of renewed optimism.

- [56] I found the three doctors, Babbage, Latimer and James, to be reasonable witnesses, not apparently attempting to overstate the position of the side who retained them. The psychiatrists had honest disagreements to some extent over Mr. Howell's prospects, but that is inevitable. When the testimony of the three doctors is taken with that of the Plaintiff, summarized below, I conclude that the accident not only resulted in PTSD and PDD, with the risk of MDD, but also, as Dr. James put it, deprived him of his muse, his source of artistic inspiration. Whether that was the direct result of the PTSD and the PDD, or instead occurred independently of them, I do not know. The debate between the psychiatrists, touched on earlier, has mostly to do with the prognosis, as to both the extent and the speed of Mr. Howell's recovery.
- [57] From the time of the accident, six years ago, to the present, Mr. Howell has been a changed man from the man he was before the accident.
- [58] Before the accident, from the time he discovered photography, it consumed him, and he was very good at it. He became recognized, and sought after, as a photojournalist, first by local newspapers and then by national magazines. Through that period, he also began to experiment in art photography, and then to develop that as a separate body of work. His art projects ordinarily were built around themes, usually including a political component providing social commentary. It was apparent from hearing Mr. Howell testify, for approximately a week in the trial, that creative photography was his life, from before 2011 to the time of the accident. On the day of the accident, he had been shooting pictures for what he was planning as his Burnt Forest show, pictures of the forest after devastation by fire, taken in winter, inspired in part by the works of the American painter, Jackson Pollock, offering a commentary on climate change. The photos from Burnt Forest in evidence were aesthetically engaging as well as a medium of social commentary.
- [59] Mr. Howell's art photography began well before he largely transitioned from photojournalism to artistic work full time in late 2010 or 2011. In 2002, he had published a book, *One Ring Circus, Extreme Wrestling in the Minor Leagues*. It explored through pictures the carnival and the spectacle of small-time professional wrestling. *Fame Us*, in 2007, was Mr. Howell's book photographing "celebrity impersonators and the cult(ure) of fame" to quote from the cover subtitle. For each of those books, *One Ring Circus* and *Fame Us*, Mr. Howell received \$3,000.
- [60] By far, Mr. Howell's most successful exhibition, financially and reputationally, was *Shopping Carts*, in April 2011. That work was inspired from what Mr. Howell saw on the streets of Vancouver in 2010, while he was photographing the 2010 Olympics for *Maclean's* magazine. The *Shopping Carts* exhibition, at the Winsor Gallery, in Vancouver, included dozens of beautifully-photographed pictures of shopping carts, filled with all that their owners had put in them. It explored the commercial subculture of "binners", often on the downtown Eastside. It did so by letting the carts with their contents speak for themselves.

- [61] Mr. Howell's work to create the Shopping Carts exhibition was painstaking and protracted. He was meticulous. It is clear, from his testimony, and that of his wife, his brother, and the two successful artists, Doug Coupland and Michael Levin, who testified on his behalf, that Mr. Howell was a creative, dedicated and talented artist. For work he undertook in photographing bees and beehives, he learned beekeeping. I cite that as a measure of his artistic discipline and dedication, although the work with bees was some years after the accident.
- [62] In his artistic career, Mr. Howell received the unqualified support of his wife, Kate Marshall, an accomplished and successful set designer in the film and TV industry. The couple agreed, in about 2011, after the success of the Shopping Carts show, that Ms. Marshall would be the breadwinner for the family while Mr. Howell nurtured his talent and ambition as an art photographer.
- [63] Mr. Howell's psychological condition since the accident was addressed in the testimony of Mr. Howell, his wife Ms. Marshall, Jake Wetzel, who was in the accident with him, Mr. Howell's brother, Michael Howell, and one or two other witnesses, in addition to the expert testimony addressed earlier in these reasons. The accident caused significant psychological change. From being highly-engaged and dedicated to his photography, and socializing enthusiastically as part of Vancouver's artistic world, Mr. Howell became passive, unmotivated to work creatively and productively, and artistically and socially insecure. His physical decline has been comparatively slight and is now largely behind him. It is his state of mind that was altered, and has been for six years. His first signs of psychological progress were not until 2020.
- [64] Mr. Howell's Burnt Forest show proceeded in 2015, but with only five or six pictures having been completed and available for display. He has done two or three projects since the accident, but the creative light has dimmed for him. From the expert evidence, particularly that of the psychiatrist, Dr. Latimer, and the treating psychologist, Dr. James, 2020 was better for Mr. Howell than the 2015-2019 period, but he is not cured, and the prognosis is uncertain.
- [65] Turning to the applicable law, in *Stapley v. Hejslet*, 2006 BCCA 34, Justice Kirkpatrick, writing for the majority, discussed the purpose of non-pecuniary damages:
- [45] Before embarking on that task, I think it is instructive to reiterate the underlying purpose of non-pecuniary damages. Much, of course, has been said about this topic. However, given the not-infrequent inclination by lawyers and judges to compare only injuries, the following passage from *Lindal v. Lindal* (No. 2), *supra*, at 637 is a helpful reminder: Thus the amount of an award for non-pecuniary damage should not depend alone upon the seriousness of the injury but upon its ability to ameliorate the condition of the victim considering his or her particular situation. It therefore will not follow that in considering what part of the maximum should be awarded the gravity of the injury alone will be determinative. An appreciation of the individual's loss is the key and the "need for solace will not necessarily

correlate with the seriousness of the injury" (Cooper-Stephenson and Saunders, *Personal Injury Damages in Canada* (1981), at p. 373). In dealing with an award of this nature it will be impossible to develop a "tariff". An award will vary in each case "to meet the specific circumstances of the individual case" (Thornton at p. 284 of S.C.R.). [Emphasis in original.]

[66] Justice Kirkpatrick then identified the commonly-cited factors that influence an award of non-pecuniary damages:

[56] The inexhaustive list of common factors cited in *Boyd* that influence an award of non-pecuniary damages includes:

- (a) age of the plaintiff;
- (b) nature of the injury;
- (c) severity and duration of pain;
- (d) disability;
- (e) emotional suffering; and
- (f) loss or impairment of life; I would add the following factors, although they may arguably be subsumed in the above list:
- (g) impairment of family, marital and social relationships;
- (h) impairment of physical and mental abilities;
- (i) loss of lifestyle; and
- (j) the plaintiff's stoicism (as a factor that should not, generally speaking, penalize the plaintiff: *Giang v. Clayton*, [2005] B.C.J. No. 163, 2005 BCCA 54 (B.C. C.A.)).

[67] From the above factors, emotional suffering, impairment of mental abilities and loss of lifestyle are of particular significance in assessing non-pecuniary damages for Mr. Howell.

[68] In *Gabor v. Boilard*, 2015 BCSC 1724 [Gabor], the plaintiff brought an action against the defendants as a result of a motor vehicle accident. In *Gabor*, as in the case at bar, the plaintiff was an aspiring artist. Because of the motor vehicle accident her career aspirations as an artist were impaired.

[69] The plaintiff was 29 years old at the time of the accident in 2011. She is the only child of her well-educated parents. Her father was the Associated Dean of the Faculty of Social Work at the University of Calgary. Her mother has a Master's degree in counselling and administration and a doctorate in child and youth studies. The plaintiff's mother also instructed at several post-secondary institutions: *Gabor* at para. 5.

[70] Prior to the accident, she had proven herself to be an exceptional art graduate student and a talented emerging young artist. After high school, she completed a diploma program in fashion design and merchandising at Lethbridge College. Following the completion of the

program, she showed her portfolio to faculty members in the Fine Arts Department at the University of Lethbridge and persuaded them to waive the usual prerequisite photography course and allow her to enroll in the Bachelor of Fine Arts program. Her focus in this program was on digital media. She became engaged in Lethbridge's thriving fine arts community and actively developed her profile within it. While still an undergraduate student, the plaintiff created art and sold her work, organized an art exhibition, obtained a solo exhibition of her work, and partnered with a university professor in a co-exhibition: Gabor at paras. 27-29.

- [71] After graduating from the undergraduate program, she worked at the university's art gallery and continued to create and promote her art. She secured a solo show in Calgary and participated in group exhibitions. She also was accepted as an artist-in-residence in Budapest, Hungary: Gabor at paras. 32, 33.
- [72] After that, the plaintiff was accepted in the Master of Applied Arts program at Emily Carr in Vancouver, continuing to focus on visual arts: Gabor at paras. 45, 46, 55-57. Her plan after graduation was to pursue a career in academia and continue to create art: Gabor at paras. 92-94. She called many witnesses, including several professors, who spoke highly of her work and her potential as an artist.
- [73] Through the accident, the plaintiff suffered soft tissue injuries, which aggravated a pre-existing condition, though they did not limit her recreationally or vocationally. She also suffered psychological injuries, which also aggravated her pre-existing psychological problems of depression and anxiety.
- [74] After the accident, the plaintiff was no longer her former self. Several witnesses testified that she no longer possessed the creativity and productivity that she had demonstrated previously. Justice Ballance summarized the plaintiff's injuries and described the post-accident plaintiff as follows:
- [562] I do not propose to reiterate my findings concerning the nature and progression of Ms. Gabor's Accident-induced injuries. Suffice it to say, in overview, that she sustained a mild traumatic brain injury with its attendant psychological, behavioural and emotional symptoms, severe fatigue and cognitive deficits in the areas of attention, information processing, memory and high demand executive functioning. In addition, she has for years now endured a constellation of soft tissue injuries of diminishing frequency and intensity that have left her with chronic pain, together with psychological injuries that include an Adjustment Disorder (now in partial remission). Her Adjustment Disorder encompassed a cluster of adverse symptoms, including depression, anxiety, an inability to cope with stress, being easily overwhelmed, anxiety with driving and being a passenger, reduced self-confidence and intrusive images and nightmares of the Accident, some of which have persisted.

- [563] Despite improvements over time to Ms. Gabor's soft tissue injuries and headaches, she has residual problems with her neck and back and remains susceptible to periodic flares of her symptoms for years to come, and potentially indefinitely. Those episodes are frequently triggered from performing commonplace tasks or assuming objectively innocuous postures such as prolonged sitting and doing sustained work at a computer. Although Ms. Gabor's pain no longer poses limitations recreationally or vocationally, it is nonetheless chronic in nature.
- [566] There continues to be a sadness about Ms. Gabor that was not present before the Accident. In her mother's words "the wind has been knocked out of her sails". She remains vulnerable to a relapse of her depression and anxiety symptoms when faced with stress or failure, and is susceptible to developing a full-blown major depressive disorder once she comes to fully appreciate the extent and implications of her likely permanent cognitive deficits. She is also at increased risk of developing a post-traumatic stress, anxiety or depressive disorder in the event she were to be involved in another motor vehicle accident. There is some evidence that further counselling may help ameliorate Ms. Gabor's psychological symptoms. As she has already been in counselling for years, it remains to be seen whether she will gain from additional sessions.
- [567] Fortunately for Ms. Gabor, she experienced improvement of her cognitive deficits and the extreme fatigue associated with it in the two-year window after the Accident. However, her residual cognitive symptoms and the companion fatigue continue to be significant and are her most impairing symptoms from a vocational standpoint. The medical evidence I accept strongly indicates that they are probably permanent because the period within which she was expected to achieve her maximum cognitive recovery has long passed.
- [573] In the wake of the Accident, this young woman no longer brims with creative ideas and enthusiasm for art. Her once buoyant personality, which distinguished her as the happiest person in the room, has been overcome by a lingering sadness. Immediately following the Accident and continuing until approximately the fall of 2013, Ms. Gabor, a formerly outgoing woman, was very reclusive and isolated. She avoided the art events that she had previously revelled in and withdrew from other social situations. I accept Ms. Gabor's testimony that it has only been in the last year or so that she has become somewhat more social. Even then, she generally limits herself to one-on-one interactions and still avoids larger and noisier social settings, including the vibrant local art scene.
- [574] Once intellectually inquisitive, high-functioning, driven and successful, Ms. Gabor has trouble getting motivated, staying on task and following through with plans. She finds multitasking difficult and struggles with things that require her concentrated attention such as reading, working on her computer and producing art. Tasks that were once simple and required little conscious effort, now feel like daunting endeavors that can readily overwhelm her unless they are broken down into micro-steps and implemented with the assistance of others. Even then, they may be left unfinished.

- [575] The ill-effects of the Accident have been life-altering for Ms. Gabor and it is most unlikely that she will ever fully recover to her former self. Her injuries have likely crushed her ability to successfully pursue a career in academia and have broken the artistic spirit that played a part in how she defined herself. Her ability to produce art to the high standard that she achieved previously is in doubt. In the aftermath, Ms. Gabor is left to confront the grim reality that she has chronic pain and a probable permanent brain injury that manifests as an array of cognitive impairments with companion fatigue and psychological sequelae.
- [576] In sum, the whirlpool of symptoms caused by the Accident has substantially and detrimentally affected the quality and enjoyment of Ms. Gabor's life and the lives of those she loves.
- [75] Taking into account the factors from Stapley, Justice Ballance awarded the plaintiff \$200,000 in non-pecuniary damages: Gabor at para. 577.
- [76] In *Gill v. Apeldoorn*, 2019 BCSC 798 [Gill], the plaintiff claimed damages from a motor vehicle accident in 2015.
- [77] At the time of trial, the plaintiff was 49. He left high school with most of his Grade 12 credits. He went to work at Richmond Plywood and was employed there for 16 years. In 2005, he was hired as a longshoreman, and continued to work in that position until the accident.
- [78] From the accident, the plaintiff suffered a whiplash-associated disorder, and lumbar spine sprain. He also suffered psychological injuries including a "major depressive order with predominant anxious features" and post-traumatic stress disorder. The experts generally agreed that the plaintiff would be unable to return to work due to his psychological injuries. Justice Gropper summarized one of the expert's opinion as follows:
- [44] Dr. Tarzwell is of the view that Mr. Gill has been completely vocationally disabled since the accident due to his psychological injuries. He further opines that Mr. Gill's PTSD has led to a "widespread loss of interests, effectively eliminating his recreational life." Dr. Tarzwell describes Mr. Gill's detachment from others, particularly friends and family, and that his loss of motivation results in Mr. Gill not showering, shaving, getting his haircut, or engaging in other aspects of self care.
- [79] In assessing non-pecuniary damages, Gropper J. analyzed the Stapley factors as follows:
- [51] Applying those factors, Mr. Gill is now 49 years old and he has been suffering from his injury for almost four years. The treating doctors and Dr. Tarzwell opine that Mr. Gill's psychological problems continue and will not be cured. Mr. Gill is isolated from his peers. Mr. Gill's ambition and drive towards his career goals have dissipated. Mr. Gill's future career prospects, if there are any, will likely include work that is less challenging, interesting or rewarding for him. Mr. Gill has lost his own sense of self-worth and confidence. Mr. Gill's degree of emotional suffering has been extreme and reflects a lonely, frustrated, and frightened individual. Mr. Gill's family, marital and social relationships have been directly impaired, as have his physical and mental abilities. Mr. Gill has completely lost his pre-

accident lifestyle. Mr. Gill is unable to bear his loss stoically.

- [80] Justice Gropper also noted that the plaintiff's physical symptoms had been secondary to his psychological injuries and that the plaintiff was no longer his former self. She awarded the plaintiff \$200,000 in non-pecuniary damages.
- [56] Mr. Gill's physical symptoms have been secondary to his psychological injuries. The psychological injuries have had a devastating impact on every aspect of his life. He was a happy, healthy, ambitious person. He was involved in a loving marriage and had close relationships with both his children. He was pursuing a job that he loved. He enjoyed socializing, he was concerned about his appearance, and he was physically active. His future was bright. That is no longer the case. Mr. Gill is a shadow of his former self. His interaction with his friends and family is non-existent. The effect of these injuries on his day-to-day functioning is profound. Some of his family, friends, and the experts described that Mr. Gill is unable to even engage in basic health self-care and personal hygiene.
- [57] Mr. Gill has suicidal ideation that manifested itself in his attempt to take his own life in January 2018.
- [59] I have taken a global approach to non-pecuniary damages and consolidate both Mr. Gill's physical and psychological injuries in assessing Mr. Gill's non-pecuniary damages at \$200,000.
- [81] Both judgments above, Gabor and Gill, are supportive of Mr. Howell's claim for non-pecuniary damages, given the numerous similarities in their facts to those in the case at bar, and the award of \$200,000 for non-pecuniary damages in both cases. I am awarding Mr. Howell the \$190,000 he seeks under this head of damages. He lost the focus necessary to do what he loved doing, suffering depression along the way, and deserves that compensation as a result. Past and Future Lost Earning Capacity
- [82] Lost earning capacity must of course be distinguished from the claim for non-pecuniary damages. That is particularly so on the facts of this case, where I was satisfied, in the analysis of the non-pecuniary damages claim, that Mr. Howell lost the urge to do what he loved doing, as distinct from necessarily suffering financially as a result of the accident.
- [83] As damages for past lost earning capacity, Mr. Howell claims \$306,635. For future lost earning capacity, he claims \$1,397,211. The Defendants submit he is entitled to no recovery.
- [84] The legal principles guiding this analysis are not in dispute. The Plaintiff must demonstrate there is a real and substantial possibility, as distinct from mere speculation, that a future event will occur leading to an income loss. He is to be put into the position he would have been but for the accident and be compensated for any loss of his capacity to earn: *Rosvold v. Dunlop*, 2001 BCCA 1 at paras. 8-11; *Perren v. Lalari*, 2010 BCCA 140 at para. 30. This requires a consideration of his financial track record in relation to his art.

- [85] It will be recalled from earlier in these reasons that after Mr. Howell's reputation in art photography was enhanced from the Shopping Carts exhibition in 2011, he and his wife agreed that he should explore his creativity in photography while her income supported the family. That is largely what has happened from 2011 to the present.
- [86] Mr. Howell's net business income and net income from 2010 to 2019 were as follows: Year Net Business Income Net Income 2010 \$4,166 \$39,519 2011 \$48,624 \$51,630 2012 -\$1,750 \$12,959 2013 \$11 \$3,511 2014 \$20 \$4,711 2015 \$584.18 \$7,896.45 2016 \$7,469 \$14,071 2017 \$39,687.82 \$43,710 2018 \$35,803.69 \$39,754.02 2019 \$30,998.27 \$34,076.89 In 2010, Mr. Howell was still working as a photojournalist. 2011 was the year of the Shopping Carts show. For assessing the past lost earnings claim, Mr. Strutt cites s. 98 of the Insurance (Vehicle) Act, R.S.B.C. 1996, c. 231, for his submission that the Plaintiff is entitled to recover only his net income loss. Section 98 reads as follows: 98 Despite any other enactment or rule of law but subject to this Part, a person who suffers a loss of income as a result of an accident or, if deceased, his or her personal representative, is entitled to recover from designated defendants, as damages for the income loss suffered after the accident and before the first day of trial of any action brought in relation to it, not more than the net income loss that the person suffered in that period as a result of the accident. [Emphasis added.]
- [87] Mr. Howell's one relatively successful year financially as an art photographer was 2011, when his net business income was \$48,624 and his net income was \$51,630. That money came largely from the success of the Shopping Carts show. That explains Mr. Howell's gross business income from sales in 2011 of \$167,145, when the corresponding numbers (gross business income from sales) for other years have been much lower; \$41,916 in 2010 and \$52,127 in 2012 for example.
- [88] From Mr. Howell's net business income, and net income figures for 2010-2019, it can be seen that, apart from 2011 with the Shopping Carts show, his annual income has generally been better after the accident than before.
- [89] The difficult fact for Mr. Howell, on this part of his claim, is that he has enjoyed only a single relatively successful year for earnings, that being 2011 with the Shopping Carts show, almost four years before the accident. He has no other record of financial success before the accident. As noted earlier, he received only \$3,000 each for the wrestling book in 2002 and the celebrity impersonation book in 2007.
- [90] Mr. Howell testified that Jennifer Winsor, owner of the Winsor Art Gallery until it closed, took him before the accident to the Toronto Art Fair two times and attempted unsuccessfully to place his work in the Museum of Contemporary Art in Toronto. Nothing came of those efforts. From Mr. Howell's series of photographs, Printing Press, Ms. Winsor was unable to persuade the Vancouver Art Gallery to give him a one-man show. The Printing Press show, in 2012, did not have a catalogue and only two pieces sold. Mr. Howell donated one picture from Printing Press to the Vancouver Art Gallery and another to the Surrey Art Gallery.

- [91] In 2013, Mr. Howell created four dioramas from found objects for a show he and others put on. They were not intended to be sold, and did not sell.
- [92] Mr. Howell acknowledged that the payments he was offered for his magazine work and other commercial photography did not increase as a result of his work as an art photographer. The rates earned for magazine work are set industry rates. Over the last several years, the demand for journalistic photography has dropped as the hard copy print media have declined.
- [93] I set out above that unfortunate financial track record of Mr. Howell before the accident with reluctance, because I do not doubt his artistic dedication and talent, as evidenced for example by the Shopping Carts show. But the gap between financial success and talent in the arts is notorious. The evidence at trial pointed to many artists in this province, better-known than Mr. Howell, who depend on a second job, in addition to their art, to make ends meet. Mr. Howell's record is a case in point. The art market, always fickle, has not recognized his talent in financial terms. Perhaps fine arts comprise the most difficult work sector in which to hope for financial success. A very few artists, in music, painting, photography, literature and elsewhere, make a living, while the others do not. In a sense, the arts are at the opposite end of the spectrum of financial security from careers in medicine, law and other professions. The reality is that profitable careers in the fine arts are notoriously difficult to attain.
- [94] Counsel for the Plaintiff presented the claim for past lost earning capacity on the assumption that Mr. Howell would have duplicated the financial success of 2011 (the Shopping Carts year) in 2015 (using the Burnt Forest show), and again in 2018, with another big show, plus adding 10% in earnings in 2015 over the 2011 earnings, and adding 10% to the earnings for every year after 2015. His chart for the claim is as follows: Year Absent MVA Earnings Actual (Alleged) Earnings Absent MVA Earnings less Actual (Alleged) Earnings Net of Expenses (at 25% of earnings) 2015 150,000 36,868 113,132 84,849 2016 57,000 46,296 10,704 8,028 2017 62,700 42,059 20,641 15,481 2018 175,000 21,696 153,304 114,978 2019 68,970 19,207 49,763 37,322 2020 75,867 14,564 61,303 45,977 Total Gross Past Loss \$306,635
- [95] Counsel for Mr. Howell employed the same approach for future lost earning capacity, to age 70 in 2036: Year Absent MVA Earnings Actual (Alleged) Earnings Absent MVA Earnings less Actual Net of Expenses (at 25% of earnings) Multiplier ($\div 1000$) PV of Net of Expenses Loss 2021 200,000 30,000 170,000 127,500 0.974 124,185 2022 83,454 30,000 53,454 40,090 0.955 38,286 2023 91,799 30,000 61,799 46,349 0.936 43,383 2024 225,000 30,000 195,000 146,250 0.918 134,258 2025 100,979 30,000 70,979 53,234 0.899 47,858 2026 111,077 30,000 81,077 60,808 0.880 53,511 2027 250,000 30,000 220,000 165,000 0.861 142,065 2028 122,185 30,000 92,185 69,138 0.842 58,215 2029 134,403 30,000 104,403 78,302 0.823 64,443 2030 275,000 30,000 245,000 183,750 0.804 147,735 2031 147,843 30,000 117,843 88,382 0.784 69,292 2032 162,628 30,000 132,628 99,471 0.764 75,996 2033 300,000 30,000 270,000 202,500 0.744 150,660 2034 178,890 30,000 148,890 111,668 0.724 80,847 2035 196,779 30,000 166,779 125,085 0.703 87,934 2036 325,000 30,000 295,000 221,250 0.355 78,544 Total Future Loss \$1,397,211

- [96] For the future lost earning capacity claim, one sees, from the above chart, earnings from a big show every three years, beginning in 2021. Each of the big shows brings in \$25,000 more than the last big show. The in-between years, 2022 and 2023 for example, indicate a 10% increase in earnings over the year before.
- [97] I must conclude that the assumptions and calculations in the two charts above are only optimistic speculations as opposed to being real and substantial possibilities for what the art market will do with Mr. Howell's work over the years. The two charts were simply the submissions of Plaintiff's counsel with no realistic evidentiary base to support the "Absent MVA Earnings" column. The stated earnings, absent the accident, in 2015, of \$150,000, were stated, if I understood the argument, as being a 10% increase over the earnings from Shopping Carts in 2011. However, there is not the evidentiary base from which one can find a real and substantial possibility that another exhibition like Shopping Carts, which was about four years before the accident, would again be produced and enjoy support in the art market. At best, one could only hope, and speculate, that the future would unfold in that way. There was too little financial success before the accident for there to be a real and substantial possibility of increased earnings from Mr. Howell's art photography after the accident. To repeat somewhat, the two books, on wrestling and celebrity impersonators, each brought Mr. Howell only \$3,000; a show at the Winsor Gallery in 2009, based on the wrestling photographs, was not a commercial success; a show at the Winsor Gallery of the celebrity impersonators in 2010 was not a commercial success; the Printing Press show in 2013 was not a commercial success; a show in late 2013, 99 Shot Stars for Occupy was not a commercial success; and three other projects were not commercially viable, although they were not intended to be.
- [98] In summary, Mr. Howell, from all the available evidence for the time before the accident, cannot demonstrate any financial track record from which I can find the necessary real and substantial possibility of any lost earning capacity resulting from the accident. As noted above, I found Mr. Howell lost the focus necessary to do what he loved doing. However, this impairment, for which Mr. Howell is being compensated by non-pecuniary damages, does not directly translate into a loss of earning capacity, which requires a demonstrated financial gain from the capital asset that is absent in this case. In my view, the past and future lost earning capacity claims must be dismissed. Cost of Future Care
- [99] Mr. Howell seeks \$179,836 as the cost of future care. The Defendants submit that the correct figure is \$8,200.
- [100] The Plaintiff set out the applicable legal principles, which I accept, as follows from *Milina v. Bartsch*, [1985] B.C.J. No. 2762 (S.C.) at paras. 198, 199 and 201:
- [198] If there was any doubt as to whether the award for cost of future care must be justified on a medical basis, it was dispelled by *MacDonald v. Alderson*, [1982] 3 W.W.R. 385, leave to appeal to the Supreme Court of Canada refused. In that case it was suggested that the plaintiff, a quadriplegic, should be awarded sufficient funds to purchase and maintain his

own house on the non-medical grounds that this would give him a greater sense of " 'autonomy, privacy, financial stability and pride of ownership . . . and greater opportunities for gardening, owning a pet, and more space for hobbies' ". The Manitoba Court of Appeal rejected this evidence as "subjective theorizing" and reduced the award made at trial. The test for determining the appropriate award under the heading of cost of future care, it may be inferred, is an objective one based on medical evidence.

- [199] These authorities establish (1) that there must be a medical justification for claims for cost of future care; and (2) that the claims must be reasonable. On the latter point, Dickson J. stated in *Andrews [v. Grand & Toy (Alta.) Ltd.]*, [1978] 2 S.C.R. 229 at p. 586: An award must be moderate, and fair to both parties . . . But, in a case like the present, where both courts have favoured a home environment, "reasonable" means reasonableness in what is to be provided in that home environment.
- [201] It follows that I must reject the plaintiff's submission that damages for cost of future care should take into account the cost of amenities which serve the sole function of making the plaintiff's life more bearable or enjoyable. The award for cost of care should reflect what the evidence establishes is reasonably necessary to preserve the plaintiff's health. At the same time, it must be recognized that happiness and health are often intertwined.
- [101] Counsel for Mr. Howell cautioned against there being a legal requirement for the claimed amounts to be "medically necessary", so long as there is medical justification and reasonable necessity, for which he cited *Brennan v. Singh*, [1999] B.C.J. No. 520 (S.C.) at paras. 80-88. Further, the opinion of a medical doctor is not essential for supporting the particular claims, so long as there is a medical justification on the evidence as a whole: *Jacobsen v. Nike Canada Ltd.*, [1996] B.C.J. No. 363 (S.C.); *Gregory v. Insurance Corporation of British Columbia*, 2011 BCCA 144.
- [102] Ms. Sellick, the occupational therapist called by the Plaintiff to give cost of future care evidence, saw Mr. Howell once, at his home, for 3-4 hours, in October 2019. She did not perform a functional capacity evaluation or a home activities evaluation. She recorded that Mr. Howell was complaining of no pain in his left knee, and .25 out of 10, or much less than one out of a maximum of 10, pain, intermittently, in his left hip and left shoulder. Her "cognitive assessment" of the Plaintiff was recorded as "average" in tests measuring for cognitive functions, and her physical assessment also showed average or positive results.
- [103] Before examining the particulars of the cost of future care claim, I observe, speaking generally, that Ms. Sellick tended to overstate the claim by appearing to include every possible claim, often at relatively high rates. Her total figure for cost of future care, as presented in her evidence, was over \$196,000.
- [104] She recommended from \$1,260 to \$1,680 for couples, or family, counselling. The Plaintiff has never pursued such counselling, and the evidence from his testimony and that of his wife leads to the conclusion that they have an unusually strong and healthy relationship, with two children who appear to be coping well. Counsel for Mr. Strutt cited *Sahota v. Ho*,

2013 BCSC 639 at para. 229, for the submission that services a plaintiff has not used, or sought, in the past may not properly be the subject of a cost of future care award. Ms. Sellick recommended from \$2,600 to \$4,800 for vocational training, but that was not based on any conversation with Mr. Howell, and the evidence did not disclose how such training would benefit him. Future care costs cannot be justified if a plaintiff is unlikely to incur them: *Izony v. Weidlich*, 2006 BCSC 1315 at paras. 73-74. Similarly, Ms. Sellick recommended between \$9,000 and \$11,550 for time with an occupational therapist, but Mr. Howell, on all the evidence, only intends to pursue photography, either commercial photography or art photography, and he has the physical capacity to pursue those endeavors.

[105] Those examples are indicative of what I find to be a heavily-inflated cost of future care report.

[106] Mr. Strutt presented the expert report of occupational therapist Matt Gregson. I adopt his criticisms of several of Ms. Sellick's conclusions, as summarized at para. 197 (e) of the Strutt closing submissions:

- (e) Mr. Gregson says Ms. Sellick's objective test findings do not substantiate the volume or frequency of support services she has recommended. He points out, for example (See Exhibit 10. Tab 4. Matt Gregson Report. Page 5. Paragraph 3):
 - (i) on page 58 of Ms. Sellick's report the results of Mr. Howell's cognitive assessment indicated 'average' scores for memory, language, attention and visuospatial/constructional abilities.
 - (ii) on page 59 of Ms. Sellick's report it indicates that Mr. Howell performed kneeling and crouching slowly/cautiously and held onto a stool while kneeling. It also notes that he reported that crouching was "not too bad".
 - (iii) on page 58 of Ms. Sellick's report a functional range of motion screen test indicated "no difficulties noted (neck, shoulders, back, knee)".
 - (iv) on page 58 of Ms. Sellick's report it states he was functional within the home for sitting and standing. He was also functional within the home and yard for walking.
 - (v) on page 59 of Ms. Sellick's report it is indicated the Plaintiff scored in the normal range for static one-legged balance, and, (vi) on page 59 of Ms. Sellick's report it noted "going up garden steps no difficulty, when coming down more cautious and held on to side".

[107] I also adopt para. 200 from the Strutt closing submissions: Ms. Sellick agreed her report was stale dated. If the Plaintiff had, in the subsequent time period:

- (a) reported to his treating counsellor that he felt more energetic;
- (b) reported to his treating counsellor he was sleeping better;
- (c) reported to his treating counsellor he was more motivated to assist around the house;
- (d) reported to his treating counsellor he was more motivated to pursue his art;
- (e) completed some art projects;

- (f) taken steps to have his art projects put on display;
- (g) taken steps to have his art projects advertised on the internet; and,
- (h) taken steps to have his art sold in auctions and to local businesses. Then Ms. Sellick agreed the validity of her opinion may no longer be reliable and she would want an opportunity to reassess the Plaintiff. The evidence at trial showed that the Plaintiff did report, and take steps, as recorded in para. 200 quoted above.

[108] Counsel for Mr. Strutt submitted that the cost of future care award should be limited to Mr. Howell's (1) ongoing counselling costs; (2) the cost of his depression medication; and (3) an exercise program. Dr. Latimer recommended that Mr. Howell continue with his medication and with counselling therapy. Dr. Babbage also recommended ongoing counselling therapy. Both doctors recommended an exercise program. I accept those three claims. I quantify their cost, together, at \$33,000, and make that award. The figure is rough because there are several options for counselling therapy and for an exercise program, and I do not want to restrain Mr. Howell unduly in selecting the right regimes for his needs. I can be contacted if counsel require me to allocate the \$33,000 among the three heads of the future care costs, although I hope that will be unnecessary.

[109] I do not find in the evidence medical justification and reasonable necessity for the other cost of future care claims. Special Damages

[110] Mr. Howell claims \$21,705 under this head. The Defendants submit the correct number is \$13,620.28. The difference between those numbers is largely due to the Plaintiff buying an Electric Schwinn bike in January 2016 for \$7,140. The Defendants question the medical justification for the bike (the Plaintiff's physiotherapist agreed that it was useful for him to have it) and the extravagance of the particular bike. I am awarding Mr. Howell \$4,000 toward the bike purchase, and total special damages of \$17,620. Summary

[111] Mr. Strutt is 85% responsible for the accident. The RCMP are 15% responsible.

[112] Mr. Howell is entitled to the following damages: Non-pecuniary damages: \$190,000 Past and future lost earnings: \$0 Cost of future care: \$33,000 Special damages: \$17,620 .

[113] Costs were not spoken to. I can be contacted if costs are in issue. "Macintosh J."

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