
CANADA / JUDGMENT

Ilett v. Buckley

2016 BCSC 1407

COURT

Supreme Court of British Columbia

DECIDED

28 July 2016

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2016 BCSC 1407 Ilett v. Buckley

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Ilett v. Buckley,

2016 BCSC 1407

Date: 20160728

Docket: M142140

Registry: Victoria

Between:

Kyle Ilett

Plaintiff

And

Leah Michelle Buckley

Defendant

Before: The Honourable Madam Justice Gray

Reasons for Judgment

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C.H. McDougall

Place and Date of Trial:

Victoria, B.C.

February 22-26 and March 2, 2016

Place and Date of Judgment:

Victoria, B.C.

July 28, 2016

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INTRODUCTION

- [1] Mr. Ilett was 19 years old on July 17, 2012, when he was injured in a collision between the bicycle he was riding and the car driven by Ms. Buckley. The accident occurred about three and one-half years prior to the trial.
- [2] At the time of the collision, Mr. Ilett had completed one year of study at the University of Victoria ("UVic"), and was working as a labourer at Victoria Shipyards ("Shipyards").
- [3] Mr. Ilett's claim for damages proceeded to a six-day trial.
- [4] Ms. Buckley denied liability, arguing that Mr. Ilett was fully or at least partially responsible for the collision. Mr. Ilett was cycling northbound on the shoulder straight through an intersection when he collided with Ms. Buckley's left-turning car, which turned from southbound to eastbound.

- [5] The parties also disagree about the extent of Mr. Ilett's symptoms now and in the future, their effect on his ability to work, and about whether he is likely to suffer any future wage loss. Mr. Ilett's position is that he suffered a number of injuries, including a right shoulder injury which has left him with chronic pain and impaired his function, rendering him incapable of labouring work or sustained typing.
- [6] I am grateful to counsel for their efficient presentation of the evidence and their thorough and helpful submissions.

ISSUES

- [7] The issues are as follows:
- a) Is Ms. Buckley wholly or partially responsible for Mr. Ilett's damages arising from the collision?
 - b) What was Mr. Ilett's income in 2014?
 - c) What is the extent of Mr. Ilett's ongoing symptoms?
 - d) What is Mr. Ilett entitled to recover for his damages?

FACTS

- a) Before the Accident (of July 17, 2012)
- [8] Mr. Ilett was born in December 1992 and grew up on Vancouver Island, first in Port Alberni, B.C. and later in Chemainus, B.C.
- [9] While in high school, Mr. Ilett was active in outdoor recreation, including hiking, baseball, off-road motor biking, swimming, kayaking, and mountain bicycling. He also worked out at a gymnasium several times a week.
- [10] During his high school years, Mr. Ilett worked in a variety of part-time jobs, including work in construction, at a gas station, as a barista, and doing lawn work. He performed labour work around the home, assisting his father with significant renovations.
- [11] Mr. Ilett reported about \$4,600 in income in his 2010 tax return.
- [12] Mr. Ilett graduated from high school in Chemainus in June 2011 and moved to Victoria.
- [13] Mr. Ilett was not sure what he wanted to do for a career. He had considered pursuing nursing. He decided to go to university because his girlfriend was attending university.
- [14] Mr. Ilett attended UVic starting in September 2011. He took general studies.
- [15] Dr. Dyson is a general practitioner physician who practices at UVic. He began caring for Mr. Ilett in September 2011, being about ten months before the accident.
- [16] Mr. Ilett reported about \$5,300 in income in his 2011 tax return.

- [17] Mr. Ilett completed four courses for 1.5 credits each in the fall 2011 term, and three courses for 1.5 credits each in the spring 2012 term. Three courses is a light semester. He started a fourth course in the second semester but dropped it when he found it uninteresting. His 2011-2012 sessional grade point average was 3.29, being about a C+.
- [18] Mr. Ilett began working for Shipyards on May 11, 2012, following the completion of his spring term of studies at UVic. He was pleased with the job because it was well-paid compared to other work available for someone with his level of education. He was earning \$24.28 per hour as a probationary employee, unless he was using tools, in which case the wage increased to about \$32.89 per hour for "semi-skilled" work. He was working full-time, Monday to Friday from 7:30 a.m. to 4:00 p.m.
- [19] Mr. Ilett's work at Shipyards was physical work. It included carrying heavy objects up and down ladders, lifting and lowering loads down holes to crews working at different heights, and manipulating tools, including a pneumatic (i.e. pressurized air) gun for removing rust and paint.
- [20] Mr. Ilett became friends with Mr. Esnouf, who also worked at Shipyards. Mr. Esnouf had started as a labourer and became an apprentice metal fabricator in June 2012. Messers. Ilett and Esnouf worked together on tooling crews at Shipyards. They went to the gym regularly after work and occasionally went dirt-biking on the weekends.
- [21] Mr. Ilett was considering working at Shipyards for a matter of years, and probably going to university afterwards. He estimated at the time of his examination for discovery that he thought he might have continued to work at Shipyards for one to three years. At trial, he initially estimated up to five years.
- [22] Mr. Ilett was very physically active before the accident. He rode his bicycle to work three or four days a week, when the weather was suitable. The ride took him nearly an hour each way. He also worked out at the gym three or four days a week for 45 minutes at a time.
- [23] Mr. Ilett is right hand dominant. He is about 6 feet tall.
- [24] Before the accident, Mr. Ilett was happy, hard-working, motivated, and active. Mr. Ilett was also very active recreationally. He enjoyed the outdoors, and was active in swimming, baseball, hiking, canoeing, kayaking, and rock climbing. There was no evidence that he suffered any physical limitations.
- [25] At the time of the accident, Mr. Ilett was six days short of completing his probationary period at Shipyards. The wage rates at the time at Shipyards following probation were \$36.00 per hour for unskilled work and \$40.21 per hour for semi-skilled work, being an average of \$38.10 per hour.
- b) The Accident (on July 17, 2012)

- [26] The accident occurred at the intersection of Admirals Road and Seenupin Road in Esquimalt, B.C. ("Intersection") at about 4:10 p.m., during rush hour. The weather was dry and sunny and the road conditions were good. Admirals runs northeast and southwest at that point, but I will refer to it as essentially northbound and southbound. The Intersection is a T-intersection, with Seenupin terminating at Admirals, and running essentially east from Admirals before it curves south. There is a stop sign facing westbound traffic from Seenupin, but there are no traffic controls facing traffic on Admirals at the Intersection. There is a traffic light north of the Intersection.
- [27] The Intersection is a short distance north of the intersection of Admirals and Maplebank, being more than several hundred yards but less than a mile away. The area of the Intersection is flat. At this point, Admirals has a single lane of travel both northbound and southbound, and on each side there is a fog lane with a paved shoulder.
- [28] Bicyclists commonly ride on the shoulders of Admirals, and treat the shoulders as bicycle lanes. The shoulders are wide and paved. They are not painted in a way suggesting that they are bicycle lanes. However, there was a warning sign for northbound traffic on Admirals at the curve which was about 300 yards south of the Intersection. The sign is yellow in colour and diamond in shape, and has a drawing of a pedestrian in the top half of the sign and a bicycle in the bottom half. This suggests a warning that pedestrians and bicyclists may be on the roadway.
- [29] Mr. Ilett was travelling in the direction I will refer to as northbound. He had finished work at Shipyards, cycled along Maplebank Road, and made a left turn onto Admirals. There was one lane of vehicle traffic travelling in the same direction as Mr. Ilett, and Mr. Ilett was riding on the shoulder.
- [30] Ms. Buckley had been driving her 1996 Dodge Neon car southbound on Admirals, and then turned left to go east onto Seenupin. Ms. Buckley's car was facing what was essentially east when Mr. Ilett struck it with his body and bicycle.
- [31] Three witnesses testified about the accident. Both parties testified about it, and in addition, Mr. Ilett called the evidence of Ms. Mattina. She was driving southbound on Admirals immediately behind Ms. Buckley. I will describe the evidence of each of them.
- [32] At the time of the accident, traffic northbound on Admirals was backed up, meaning it was moving very slowly or was stationary northbound. The evidence conflicted about whether the southbound traffic was stop-and-go or flowing.
- i. Mr. Ilett's Evidence

- [33] Mr. Ilett travelled on the right shoulder down a small hill towards a straight section of Admirals. He testified that there was a line of cyclists in front and behind him. He considered the shoulder to be a bike lane. He was passing stopped and slowly moving vehicles on his left. For about the last 300 yards that he cycled prior to the collision, the road was flat. He was not able to estimate his speed.
- [34] Mr. Ilett testified that he was scanning the traffic as he rode, and saw a large northbound vehicle just south of the Intersection, possibly a pickup truck with a dumping box, but he could not say if it was stopped or moving slowly. He saw a gap open at the Intersection in front of the northbound traffic, but he does not recall seeing a gap in front of the southbound traffic. He had never before seen a southbound vehicle turning left onto Seenupin.
- [35] Mr. Ilett testified that he did not see anyone turning left and did not have any warning about Ms. Buckley's vehicle. He did not apply his brakes. He testified that he heard screeching brakes and saw a green hood, and then he was on the ground. He apparently travelled over the hood and landed on the north side of Ms. Buckley's car. Mr. Ilett stuck out his right arm to protect his head. He felt most of the impact on his right arm, and he rolled over it. There was a small hole in his helmet. He was unable to stand owing to pain and the immobility of his hip. He went to hospital.

ii. Ms. Buckley's Evidence

- [36] Ms. Buckley testified that she was very familiar with the Intersection at the time of the accident, having turned left from Admirals onto Seenupin probably 60 times before. She knew that bicyclists frequently rode on the shoulders of Admirals.
- [37] Ms. Buckley testified that at the time of the accident, the southbound traffic was flowing and the northbound traffic was very congested and was not moving. She testified that she came to a complete stop at the Intersection and turned on her left turn signal. She testified that she remained stopped for about 45 to 60 seconds. She testified that the southbound traffic continued to advance so that there was a gap in front of her. She testified that the northbound vehicle just south of the Intersection was a large vehicle, and she thought it was a cube truck ("Large Vehicle"). She testified that it was stopped at the Intersection and the driver of the Large Vehicle waved at her, indicating she could make the turn.
- [38] Ms. Buckley testified that she looked for oncoming bicycle traffic, but her vision was impeded by the Large Vehicle. She testified that she leaned forward because there were a lot of cyclists and pedestrians on that road. Ms. Buckley testified that as she started to turn left, she carefully moved forward and stopped to check if there was anyone there. She testified that she moved slowly, and that at one point she could see down the passenger side of the Large Vehicle, which had been obstructing her view. She testified that at that point she was just about to accelerate when Mr. Ilett struck her car in the front passenger side quadrant.

[39] Ms. Buckley testified that she was barely moving when Mr. Ilett struck her car very close to her passenger side door, damaging her radio antenna and her passenger side mirror.

[40] The evidence did not include photographs of Ms. Buckley's car. There was a photograph of a similar model, and it shows that the radio antenna and the passenger side mirror were both close to the front windshield.

iii. Ms. Mattina's Evidence

[41] Ms. Mattina testified at the request of Mr. Ilett. She did not know either Mr. Ilett or Ms. Buckley personally. She lives in Calgary, Alberta, and in the period between the collision and the trial, she was struggling with serious health problems.

[42] Ms. Mattina did not provide a statement at the scene of the accident and was first contacted by Mr. Ilett's counsel in 2014, being about two years after the accident.

[43] In about mid-2015, Ms. Mattina provided an oral statement to Mr. Ilett's counsel and signed a statement drafted by the lawyers. In the written statement, she wrongly described Admirals Road as "Esquimalt" Road, and wrongly described the date of the accident as July 13, 2012 instead of July 17, 2012.

[44] Defence counsel asked to speak to Ms. Mattina prior to the trial, but she responded that they had her witness statement and if there were any further questions for her, they could be asked when she was in the witness box. She testified that, mainly for personal reasons, she did not have time to talk to defence counsel in the several weeks prior to the trial.

[45] Ms. Mattina testified that she was travelling southbound on Admirals when she stopped her Nissan Sentra immediately behind Ms. Buckley's vehicle. Ms. Mattina testified that she saw Mr. Ilett riding down the road, and saw Ms. Buckley signal a left turn. She testified that Ms. Buckley inched forward, but there was no gap in traffic to permit her to drive through the intersection.

[46] Ms. Mattina testified that they were stopped about two minutes, during which she saw Mr. Ilett approaching.

[47] Ms. Mattina testified that the northbound traffic began to move, and a northbound driver stopped to let Ms. Buckley through. Ms. Mattina was not able to describe the vehicle that stopped. Ms. Mattina testified that Ms. Buckley immediately, without hesitation, made her left turn, and Mr. Ilett went over Ms. Buckley's hood.

c) Between the Accident (on July 17, 2012) and Trial

i. July 17, 2012 to December 31, 2012: Off Work and Fall Term UVic

[48] Mr. Ilett had x-rays of his right forearm, elbow, and wrist on July 17, 2012. They did not disclose any fractures. He was in a lot of pain in many places.

- [49] On the day following the accident, Mr. Ilett had pain through much of his body. It was worse on his right shoulder and right hip. He had trouble sleeping owing to pain, and had constant headaches.
- [50] Mr. Ilett saw Dr. Dyson on July 18, 2012, the day after the accident. Dr. Dyson noted that Mr. Ilett had a slow, shuffling gait, and was dragging his right leg to minimize hip movement. Mr. Ilett wanted to return to work the following day, but Dr. Dyson told him that it would not be safe for Mr. Ilett or his co-workers if he did so. In fact, Mr. Ilett did not work again at Shipyards.
- [51] Dr. Dyson noted abrasions to Mr. Ilett's forearms, especially the right, and abrasions on his sacral region. Mr. Ilett's right hand was swollen generally, particularly the thumb. Mr. Ilett was not able to raise his right arm higher than horizontal to the floor. He described pain in his right shoulder, both with movement and rest, especially over the AC (acromioclavicular) joint. He had pain in his right hand and a restricted range of motion. He described pain in his neck, especially on the right side, and had a restricted range of motion in his neck.
- [52] Dr. Dyson diagnosed Mr. Ilett with abrasions of both forearms and sacrum, moderate soft tissue strains, and contusions to his neck, torso, hips, and limbs. Dr. Dyson also diagnosed a severe sprain to the right hand with possible fracture, likely AC separation of the right shoulder, and likely fracture of the right lateral rib.
- [53] Dr. Dyson saw Mr. Ilett again on July 23, 2012, and found point tenderness to the scaphoid. He found localized chest wall pain, suggesting a fracture. Mr. Ilett reported that his shoulder continued to be painful, and x-rays showed a mild separation. Mr. Ilett's right hip was now better defined, with tenderness to the right gluteal muscles from the SI region to the greater trochanter. Mr. Ilett report that his neck was improving.
- [54] Dr. Dyson saw Mr. Ilett again on July 30, 2012. Dr. Dyson thought most injuries were largely resolved, except for the right hip and right shoulder. However, Mr. Ilett testified that his right wrist and elbow pain continued for over another month. At that point, Dr. Dyson thought Mr. Ilett needed at least a further four weeks to recover. Dr. Dyson prescribed medication for sleep and to reduce restlessness. Mr. Ilett used them only briefly because they caused him to suffer nausea and dizziness.
- [55] Dr. Dyson saw Mr. Ilett on August 7, 2012, being about three weeks after the accident. Dr. Dyson diagnosed him at that time with right shoulder and hip injuries with secondary mood disturbance (reactive depression). Dr. Dyson prescribed a small dose of Seroquel for sleep and to reduce restlessness.
- [56] Shipyards laid Mr. Ilett off on August 30, 2012 due to lack of work. Shipyards frequently lays off workers and later rehires them.

- [57] Mr. Ilett resumed courses at UVic in September 2012. Dr. Dyson suggested he take a light course load, so he only enrolled in four courses. As a result of his injuries, he found it difficult to study, sit through classes, and sleep, and his grades suffered. He dropped Math 102 in September 2012.
- [58] Dr. Dyson saw Mr. Ilett in September 2012. Mr. Ilett reported to Dr. Dyson that his hip was back to about 80% of normal activities. Studying seemed to aggravate Mr. Ilett's right shoulder and neck pain.
- [59] Mr. Ilett attended physiotherapy roughly twice weekly for about four months, taking 29 sessions. He also used ice packs and received five massage therapy treatments.
- [60] Mr. Ilett completed two courses for 1.5 credits each in the fall 2012 term, receiving one grade of B- and one grade of D. He took a third course which continued into the spring term. His transcript does not refer to a fourth 1.5 credit course in math which he took in the fall of 2012 but failed, because he satisfied UVic that his injuries had affected his academic performance.
- [61] Mr. Ilett reported about \$10,500 in his 2012 tax return, almost all from Shipyards.

ii. January 1, 2013 to April 30, 2013: Spring Term UVic

- [62] By January 2013, about six months after the accident, many of Mr. Ilett's symptoms had disappeared. He no longer had problems with his ribcage, right wrist, or right hand. The pain in his elbow and mid-back was less severe.
- [63] Mr. Ilett attended a work-hardening program at the Canadian Back Institute ("CBI") from about January to April 2013. CBI employees suggested exercises, which Mr. Ilett continues to do when he is sore. He did a lot of cycling in this program.
- [64] On February 15, 2013, Mr. Ilett suffered a scaphoid fracture in his left hand. He was attempting to start a friend's dirt bike, but was not familiar with the bike. He lost his balance and fell onto his left hand. His left wrist was in a cast for about three months.
- [65] There was a wage increase at Shipyards, effective March 1, 2013. The unskilled rate became \$38.65 per hour, and the semi-skilled rate became \$43.17 per hour, being an average of \$40.91 per hour.
- [66] Mr. Ilett completed four courses for 1.5 credits each in the spring 2013 term. He obtained a B-, a C, a D, and an F. His sessional grade point average for the academic year of 2012-2013 was 1.86, being closer to a C than to a D.

iii. May 1, 2013 to August 31, 2013: Cycling Trip

- [67] In May 2013, after his UVic courses were finished, Mr. Ilett embarked on what he hoped would be a cross-country cycling trip with his friend Mr. Hess. The plan was to cycle from Tsawwassen, B.C. to Newfoundland. The plan was to ride a steel-framed bicycle carrying a tent, mat, sleeping bag, food, water, change of clothes, and raingear. The plan was to sleep in tents or at the homes of friends.
- [68] Mr. Ilett wanted to make the trip because he thought it would improve his mood, strength, and confidence.
- [69] Mr. Ilett cycled from Tsawwassen, B.C. to near Calgary, Alberta, a distance of about 1,000 km. Mr. Hess rode with him for about a week, to Penticton or Kelowna, and then stopped the trip. Mr. Hess's evidence was that he argued with Mr. Ilett and decided to stop the trip as a result.
- [70] Mr. Ilett hitchhiked into Calgary, Alberta. He then travelled to Montreal, Quebec, through a combination of bicycling and hitchhiking. The parts that he cycled included Medicine Hat, Alberta to Maple Creek, Alberta; Winnipeg, Manitoba to Dryden, Ontario; and Mississauga, Ontario to Montreal, Quebec. He tried to cycle 100 km per cycling day.
- [71] Mr. Ilett found the cycling painful. He would cycle for a couple of days and then rest for a couple of days. The trip ended in Montreal after about two months.
- [72] Mr. Ilett returned to Victoria in August 2013. He saw Dr. Gershwin, who recommended that he increase his strength and activity. He took nine kinesiology sessions.
- iv. September 1, 2013 to April 30, 2014: Two Terms at UVic and Part-time Work in 2014
- [73] Mr. Ilett returned to UVic in September 2013 and his grades improved. His mood had improved, he felt stronger, and he was proud of what he had accomplished.
- [74] Mr. Ilett's symptoms have not changed significantly since around September 2013. The pain continues in his right shoulder, neck, and right bicep; he has periodic pain in his right knee, right hip, and lower back; and he suffers periodic headaches.
- [75] Mr. Ilett had an x-ray of his right AC joint on October 2, 2013, which showed no separation. He had a bone scan on October 4, 2013, which showed no significant abnormality in his shoulder.
- [76] In November 2013, Mr. Ilett went to hospital after hitting his head when a friend jumped on him in jest at a bar.
- [77] Mr. Ilett completed four courses for 1.5 credits each in the fall 2013 term, receiving grades of B, B-, C+, and D.
- [78] Mr. Ilett did not earn any income in 2013.

- [79] In January 2014, during his university term and after Dr. Dyson told him it was fine to do so, Mr. Ilett resumed part-time work. He worked for College Pro Painting for about three to five hours a week, for about two-and-one-half months, as a door to door salesman soliciting estimates to paint houses. He was paid a commission based on the number of customers obtaining estimates. He estimated that he earned about \$15.00 per hour.
- [80] In February 2014, Mr. Ilett met his current girlfriend, Ms. Banks. When they first met, Ms. Banks did not realize that he had any injuries, but by the time she lived with him, she observed that he suffered pain and it could affect his mood.
- [81] Around April 2014, Mr. Ilett quit his job at College Pro Painting because he found that it was increasingly difficult to solicit estimates, and he was earning less for the time he spent. Around the same time, he began working for STS Pain Pharmacy ("STS"). Initially, he worked about nine hours a week in shifts of three hours a time, earning \$12.00 per hour. His work involved meeting with people and working with other organizations in a program to help people reduce their use of pain medications. For example, Mr. Ilett organized a food drive.
- [82] After his UVic term completed, Mr. Ilett started working 13-14 hours a week for STS. He also began working part-time for his friend Mr. Bayley, who operates a business cleaning trucks and semi-trailers. Mr. Ilett usually worked a four-hour shift on Sundays and was paid \$20.00 per hour. He estimated that he earned about \$600.00 from Mr. Bayley in 2014.
- [83] Mr. Ilett usually suffered two or three days of pain following a shift of cleaning trucks. He would not use the pressure washer, instead sweeping the lower parts of trucks with a broom.
- [84] Mr. Esnouf also worked at Mr. Bayley's business. He described the pressure washing work as comparable in physical demand to the work at Shipyards. However, Mr. Ilett did not use the pressure washer. When Mr. Esnouf and Mr. Ilett worked together, they shared the duties so that Mr. Ilett did not have to reach up with a large, heavy scrubbing tool. Instead, Mr. Esnouf did that, leaving Mr. Ilett to clean the lower portions of the trucks.
- [85] Mr. Ilett completed four courses for 1.5 credits each in the spring 2014 term, receiving grades of A-, B, C+ and C. His grade point average for the 2013-2014 session was 3.75, being closer to a B- than to a C+.
- [86] Around the spring of 2014, Mr. Ilett also obtained a couple of odd jobs, including assisting in the moving of furniture and boxes, for a total of about six hours of work.
- v. May 1, 2014 to December 31, 2014: Island Savings Chemainus and Saltair Pub
- [87] Mr. Ilett decided to take time off from university after completing the spring 2014 term to make money.

- [88] Around June 2014, Mr. Ilett moved with Ms. Banks to Chemainus, B.C. Mr. Ilett obtained a job there with Island Savings, a bank. He worked about 36 hours a week, consisting of four days for seven and one-half hours per day, and a fifth day for six hours. His job title was "banking advisor" and he earned \$17.60 per hour. His duties included rolling coins, counting bills, and dispensing cash.
- [89] Mr. Ilett found the bank work manageable as long as he was able to move from his desk and stretch periodically. However, he experienced significant pain after tasks involving stretching his right arm forward, such as typing on a calculator.
- [90] In June or July 2014, Mr. Ilett did some casual jobs in Chemainus for Mr. Stanton, who is a contractor. Mr. Stanton employed Mr. Ilett to work on a job at a museum and a job at Mr. Stanton's residence. Mr. Ilett's work included moving lumber, weeding, and cleaning up. Mr. Stanton thought he paid Mr. Ilett \$15.00 per hour, while Mr. Ilett thought he was paid \$20.00 per hour. Mr. Ilett was in pain for nearly a week after helping Mr. Stanton.
- [91] Mr. Stanton did not notice Mr. Ilett displaying any physical difficulties in performing this work for him. However, Mr. Ilett's evidence is that this work aggravated his symptoms, and that is why he stopped doing it.
- [92] Mr. Ilett found some extra work at the Saltair Pub near Chemainus in August 2014. He worked as a bartender two or three times a week for shifts lasting two or three hours. He worked up to 18 hours a week, earning \$9.00 per hour plus tips. His tips ranged from a low of \$30.00 to a high of \$110.00 per shift. He was exhausted from working a total of about 45 hours a week, but was determined to pay off his debts and return to university.
- [93] Mr. Ilett decided not to return to UVic for the fall 2014 term and stayed at his job at Island Savings in Chemainus.
- [94] Mr. Ilett sprained his ankle in October 2014 when he was motorcycling on an unfamiliar motorcycle of a friend's and it fell hard on his ankle. He took one day off work and wore a brace for a period after that.
- [95] Mr. Ilett's gross income reported in his 2014 income tax return was \$19,980. The defence argued that his actual income was about \$25,000.
- vi. January 1, 2015 to December 31, 2015: Three Terms at UVic and Island Savings Victoria
- [96] Mr. Ilett returned to UVic in January 2015 for the spring 2015 term. He declared a major in economics.
- [97] Mr. Ilett transferred within Island Savings from the Chemainus branch to the Royal Jubilee branch in Victoria. He began working 11.75 hours per week, with occasional additional shifts at other Victoria branches.

- [98] Mr. Ilett's grades improved dramatically in the spring 2015 term. He took his heaviest course load, taking five courses and obtaining his best grades to date. He took five courses of 1.5 credits each. His grades ranged from A to B-, with a sessional grade point average of 6.20, being a little better than a B+.
- [99] Around May 2015, Mr. Ilett's relationship with Ms. Banks broke up temporarily. Also around that time, Mr. Ilett resumed the truck-cleaning work for Mr. Bayley, continuing it for one four-hour shift most weeks until the time of trial.
- [100] In the summer of 2015, Mr. Ilett ran an ad on the website "Used Victoria", offering to assist people with odd jobs. He found work two or three times a week for two to three hours per job over a period of about two months. The odd jobs included spreading top soil and bark mulch, trimming a hedge, pressure washing a driveway, painting a fence, cleaning a crawl space, and moving landscaping bricks. He was in a lot of pain after moving the bricks.
- [101] Mr. Ilett took UVic courses during the summer 2015 term, but his grades dropped. He took four courses of 1.5 credits each, achieving one B+ and three grades of C+.
- [102] Mr. Ilett resumed a relationship with Ms. Banks in September 2015, and the relationship continued at the time of trial. However, Ms. Banks moved to Port Alberni, and she and Mr. Ilett see each other only on weekends. Ms. Banks testified that she and Mr. Ilett's activities together include hiking, walking, swimming, and dirt-biking.
- [103] Mr. Ilett's grades recovered in the fall 2015 semester. He completed five courses of 1.5 credits each. He achieved an average of almost 80%, being an A-.
- [104] Mr. Ilett's gross income in 2015 was \$14,343.53.

d) At the Time of Trial

- [105] At the time of trial, Mr. Ilett was continuing his studies at UVic. He anticipated receiving his bachelor's degree in economics, with a minor in business, in May 2016. He was not sure what he would do after that. He was considering applying to become a certified public accountant, or applying for law school.
- [106] Mr. Ilett continued to work part-time for Island Savings and roughly twice a month for Mr. Bayley. He finds the work for Mr. Bayley to be substantially easier than his previous work at Shipyards, because his shoulder has been accommodated by working only at lower tasks. He was still in a relationship with Ms. Banks, who is a student in Port Alberni.
- [107] Mr. Ilett's biggest physical complaints at trial were of constant pain in his right shoulder and right bicep, and frequently in his neck. He also had some chronic pain in his right hip and intermittent low back pain. The pain is aggravated by labour work and can last one or two days. He also feels pain after tasks like writing and typing. He also suffers headaches, sometimes lasting weeks. He still has trouble sleeping owing to pain, often waking hourly to adjust his position. He no longer runs. He has trouble bending his right knee and it will be sore after long walks. He uses over-the-counter pain medications two to four times a

week.

[108] Mr. Esnouf testified that he worked for Shipyards for four years, and was laid off twice for no more than two months each time. Mr. Dardengo, who works in human resources for Shipyards, testified that it was common for laid-off employees to be hired back if they had the right skill set, and that hiring for a labourer like Mr. Ilett was not based on seniority. He testified that the factor affecting whether Mr. Ilett would have been re-hired was his displayed skill set.

[109] By the time of trial, Mr. Ilett was engaging in some recreation. However, he is far less physically active than he was prior to the accident. He has modified his activities, such as by swimming shorter distances, and he rests frequently. He stopped baseball, rock climbing and wrestling because of his injuries. He will occasionally go dirt-biking, but only for short periods of about 30 minutes. He suffers pain constantly. He is also less social and outgoing. He would no longer participate in renovations because it would increase his pain.

e) Expert Medical Evidence

[110] Mr. Ilett relied on the medical evidence of Dr. Graboski, a physiatrist; Dr. Dyson, a general medical practitioner; and Mr. Towsley, an occupational therapist. The defence relied on the expert medical evidence of Dr. Regan, an orthopedic surgeon.

i. Dr. Dyson, general medical practitioner

[111] Dr. Dyson is Mr. Ilett's family doctor and testified at his request. He was accepted as a physician expert in family practice. He initially diagnosed Mr. Ilett with the following:

- a) abrasions of both forearms and sacral region of low back;
- b) moderate soft tissue strains, contusions of the neck, torso, hips and limbs;
- c) severe sprains of the right hand with possible fracture;
- d) likely AC (acromioclavicular joint) separation of the right shoulder; and
- e) likely fracture of right lateral rib.

[112] Dr. Dyson diagnosed Mr. Ilett in August 2012 with secondary mood disturbance (reactive depression). In Dr. Dyson's opinion, Mr. Ilett's depression had cleared by April 2014. However, Mr. Ilett continued to have complaints of pain.

[113] In his report of January 2, 2015, Dr. Dyson wrote that Mr. Ilett's pain complaints were not a matter of muscle conditioning or depression, since Mr. Ilett had recovered his muscle bulk and strength, and the depression had lifted.

ii. Dr. Graboski, physical medicine and rehabilitation specialist ("physiatrist")

- [114] Dr. Graboski is a physician with a specialty in physical medicine and rehabilitation, which focuses on management of pain and disabilities. Such physicians are commonly referred to as "physiatrists". Dr. Graboski was accepted as an expert in physiatry and in the diagnosis and treatment of brain injury, including reading films. Dr. Graboski saw Mr. Ilett for the purpose of providing a report to the Court and testified at Mr. Ilett's request.
- [115] In July 2015, Dr. Graboski diagnosed the following as a result of Mr. Ilett's injuries in the accident:
- a) soft tissue injury to the right shoulder, possible acromioclavicular joint separation;
 - b) proximal bicipital tendinopathy on the right, possible labral involvement;
 - c) musculoligamentous strain of the cervical spine with secondary myofascial pain disorder of the neck and shoulder girdle;
 - d) soft tissue injury to the right hip -- has seen good resolution but still has mild symptoms;
 - e) musculoligamentous strain of the low back -- majority of pain has resolved;
 - f) right rib probable fracture -- resolved;
 - g) right wrist soft tissue injury -- resolved;
 - h) right distal bicep tendinopathy;
 - i) abrasions to the right forearm, lateral hip and sacrum -- resolved; and
 - j) headache, most likely cervicogenic.
- [116] In Dr. Graboski's opinion, it is medically probable that these diagnoses are directly causal to the accident. Further, in her opinion, the post-accident fracture of the left scaphoid caused Mr. Ilett to have a delay in continuation of his CBI kinesiology program, but he was able to return to it.
- [117] In Dr. Graboski's opinion, unless there is a definable surgical lesion, Mr. Ilett is unfortunately going to be left with chronic shoulder pain. Despite his diligent participation in an active rehabilitation program, and his maintenance of his physical fitness, he still has chronic musculoskeletal injuries that have not recovered fully and in Dr. Graboski's opinion, will not recover fully in the future.
- [118] In Dr. Graboski's opinion, Mr. Ilett's soft tissue injuries will continue to limit him in physically demanding jobs and recreation.
- iii. Mr. Towsley, occupational therapist
- [119] Mr. Towsley was accepted at trial as an expert in occupational therapy, functional work capacity evaluation, and osteopathy. He conducted two days of functional capacity testing on Mr. Ilett and testified at his request. In Mr. Towsley's opinion:

- a) Mr. Ilett does not meet the strength requirements for a labourer job at Shipyards, although he meets the strength requirements for medium strength jobs, with select aspects of heavy strength capacity jobs;
- b) Mr. Ilett has difficulty with walking and climbing owing to his right hip symptoms, and they also affect his ability to work in confined spaces;
- c) there were no modifications which would accommodate Mr. Ilett's limitations;
- d) Mr. Ilett is doing well working at the bank, except for adding cheques and using his calculator;
- e) Mr. Ilett's pain, especially related to headaches, could interfere with his studies; and
- f) Mr. Ilett may have difficulty with typing and writing notes in class.

[120] Mr. Towsley made some observations to determine Mr. Ilett's level of effort, and concluded that Mr. Ilett appeared to be putting in good effort.

iv. Dr. Regan, orthopedic surgeon

[121] Dr. Regan testified at the request of the defence. He was accepted as an expert in orthopedic surgery, particularly of the upper extremities and knees. He saw Mr. Ilett once, for the purposes of giving an opinion for the Court.

[122] Dr. Regan's opinion included the following:

- a) Mr. Ilett had significant road rash and soft tissue injuries to his right upper extremity and right hip region associated with significant abrasions to his sacral and bilateral forearms as a result of the accident;
- b) Mr. Ilett had soft tissue injuries that would resolve;
- c) Mr. Ilett would not be limited in ladder climbing and lifting, and there would not be any impediment to him returning to work as a shipyard labourer or as a certified public accountant; and
- d) Mr. Ilett reasonably had difficulty with his first semester after the accident, arising from soft tissue pain caused by his injuries in the accident.

v. Discussion of Medical Evidence

[123] I accept Dr. Regan's opinion that Mr. Ilett reasonably had difficulty with his first semester after the accident, arising from soft tissue pain caused by his injuries in the accident.

[124] I do not accept Dr. Regan's opinion that Mr. Ilett can return to work at Shipyards. When he wrote his opinion, Dr. Regan did not have the benefit of Mr. Towsley's functional capacity evaluation. Dr. Regan is not expert in occupational health or functional capacity. Where it conflicts with Mr. Towsley's opinion, I prefer Mr. Towsley's opinion.

- [125] I also reject Dr. Regan's opinion that Mr. Ilett's soft tissue injuries are likely to resolve. Dr. Regan wrote that it was of note that Mr. Ilett went on a bike trip from Victoria to Montreal and felt that he had improved following the trip. Dr. Regan did not appreciate that much of the trip was hitchhiking. In addition, Dr. Regan's concern was whether Mr. Ilett would suffer further injury, such as an increase to a tear in a muscle, and he accepted that it was possible that Mr. Ilett would suffer pain during the trip.
- [126] Dr. Regan provides surgical treatment, and sometimes refers patients to physiatrists. He testified that he did not assert that Mr. Ilett was pain-free, but rather that there was no organic pathology that would be made worse with heavy labour. The question for the Court is how Mr. Ilett can reasonably function, and it is not appropriate to require him to work with significant pain just because it will not cause further damage.
- [127] Overall, I prefer the opinion of Dr. Graboski because she is a physiatrist, and has training and experience with a greater focus on managing pain.
- [128] I accept Dr. Regan's opinion that it does not appear that surgery will assist Mr. Ilett. However, I prefer the opinions of Drs. Graboski and Dyson and Mr. Towsley in respect of the continuing effect of Mr. Ilett's injuries on his functioning.

f) Expert Economic Evidence

- [129] Mr. Ilett relied on the expert evidence of Mr. Wickson, economist. The defence relied on the expert evidence of Mr. Hildebrand, economist.

i. Mr. Wickson, economist

- [130] Mr. Ilett relied on the evidence of Mr. Wickson, who was accepted at trial as an economist and expert on the valuation of loss. He provided tables estimating the present values for Mr. Ilett's past and future wage loss.
- [131] Mr. Wickson also provided calculations regarding average income of men with a baccalaureate level of education. He included data regarding men with a bachelor's degree in law.
- [132] Mr. Wickson considered the average earnings for a male, living in British Columbia, born around the same time as Mr. Ilett, who has a baccalaureate level of education (including law), after contingencies of unemployment, possible part-time work, non-participation in the labour force and for the average value of employer provided benefits, but without the possibility of working after the age of 70. In his opinion, the average annual earnings are \$76,482 annually, with the present value of lifetime earnings being \$2,449,800.

ii. Mr. Hildebrand, economist

- [133] The defence relied on the evidence of Mr. Hildebrand, who was accepted as an economist with expertise in calculating past and future wage loss. He too provided tables estimating the present values for Mr. Ilett's past and future wage loss.

- [134] Mr. Hildebrand's opinion was based on data for males with a baccalaureate level of education other than law. In his opinion, the labour market outcomes of law graduates are significantly above those of undergraduates in other major fields of study. As a result, he made calculations using data excluding a bachelor's degree in law, and his projection was about 11% lower than Mr. Wickson's.
- [135] Mr. Hildebrand's opinion, on that basis, was that the average annual earnings are \$68,220, and the lifetime earnings would be \$2,185,733. He estimated the impact of a one-year delay in entering the labour market to be \$53,488.

ANALYSIS

- [136] I begin by addressing the specific issues, and then consider the award under the different headings of damages.
- a) Liability for the Accident
- [137] Mr. Ilett argued that Ms. Buckley was solely responsible for the collision. He argued that she turned left when it was not safe to do so, and thereby caused the collision.
- [138] Ms. Buckley's position is that Mr. Ilett caused the collision wholly or partially when he overtook the northbound cars and passed them on the right.
- i. What Happened in the Accident
- [139] There are some conflicts in the evidence of the parties and Ms. Mattina. The most significant conflict is between Ms. Buckley's evidence and Ms. Mattina's evidence about the speed of Ms. Buckley's turn.
- [140] Ms. Buckley's evidence is that she moved slowly, and after she could see down the passenger side of the Large Vehicle obstructing her view, she was just about to accelerate when Mr. Ilett struck her. In contrast, Ms. Mattina testified that Ms. Buckley inched forward, and after a northbound driver stopped to let her through, Ms. Buckley immediately, without hesitation, made her left turn. Mr. Ilett testified that he heard screeching brakes at the time of impact.
- [141] I prefer Ms. Mattina's evidence to Ms. Buckley's evidence. Ms. Mattina is an independent witness who had a clear view of the accident. She appeared to have a clear recollection. She had no reason to favour either Mr. Ilett or Ms. Buckley in her evidence. While Ms. Mattina was mistaken in a written statement about the details of the date and the street name, those details are not important and do not show that she had forgotten the important aspects of what she saw. While Ms. Mattina did not agree to speak to defence counsel in the few weeks prior to trial, she had serious personal health issues requiring her time and attention.

[142] In addition, Ms. Buckley's evidence is improbable. If, as she testified, Ms. Buckley was in a position to see down the passenger side of the Large Vehicle obstructing her view, she should have seen Mr. Ilett. He was cycling on the shoulder, and so should have been visible to her, and Ms. Mattina saw him.

[143] Further, the location of the damage on Ms. Buckley's Dodge Neon car is not consistent with Ms. Buckley's evidence. If, as she testified, she was moving very slowly so she could see if there was a cyclist on the shoulder, Mr. Ilett and his bicycle should have struck her car near the front bumper. Instead, the damage was closer to the middle of her car, around the windshield.

[144] As a result, I conclude on the balance of probabilities that Ms. Buckley commenced her turn slowly, and after there was an opening in the northbound traffic, but before she could see whether there was a cyclist approaching on the shoulder, she accelerated and crossed the northbound traffic lane. Nearly half of her vehicle had crossed the shoulder at the time Mr. Ilett struck it.

ii. Law and Analysis

[145] Mr. Ilett relied on the following sections of the Motor Vehicle Act, R.S.B.C. 1996, c. 318:

- a) s. 144(1), requiring a driver to drive with due care and attention;
- b) s. 166(c), requiring a driver to determine, prior to turning left, that it can be done safely, having regard to the nature, condition and use of the highway and the traffic that actually is at the time or might reasonably be expected to be on the highway; and
- c) s. 174, requiring a driver to yield the right of way to traffic approaching from the opposite direction that is in the intersection or is so close as to constitute an immediate hazard.

[146] The defence relied on the following provisions of the Motor Vehicle Act:

- a) the definitions of "Laned Roadway" and "Roadway" in s. 119(1), as follows:

"laned roadway" means a roadway or the part of a roadway that is divided into 2 or more marked lanes for the movement of vehicular traffic in the same direction;

"roadway" means the portion of the highway that is improved, designed or ordinarily used for vehicular traffic, but does not include the shoulder, and if a highway includes 2 or more separate roadways, the term "roadway" refers to any one roadway separately and not to all of them collectively;

- b) s. 158 regarding passing on the right, as follows:

158 (1) The driver of a vehicle must not cause or permit the vehicle to overtake and pass on the right of another vehicle, except

- (a) when the vehicle overtaken is making a left turn or its driver has signalled his or her intention to make a left turn,
 - (b) when on a laned roadway there is one or more than one unobstructed lane on the side of the roadway on which the driver is permitted to drive, or
 - (c) on a one way street or a highway on which traffic is restricted to one direction of movement, where the roadway is free from obstructions and is of sufficient width for 2 or more lanes of moving vehicles.
- (2) Despite subsection (1), a driver of a vehicle must not cause the vehicle to overtake and pass another vehicle on the right
- (a) when the movement cannot be made safely, or
 - (b) by driving the vehicle off the roadway.
- c) s. 174, regarding yielding the right of way on the left turn, as follows:

174 When a vehicle is in an intersection and its driver intends to turn left, the driver must yield the right of way to traffic approaching from the opposite direction that is in the intersection or so close as to constitute an immediate hazard, but having yielded and given a signal as required by sections 171 and 172, the driver may turn the vehicle to the left, and traffic approaching the intersection from the opposite direction must yield the right of way to the vehicle making the left turn.

- d) s. 183, regarding the application of provisions governing motorists to cyclists, as follows:

183 (1) In addition to the duties imposed by this section, a person operating a cycle on a highway has the same rights and duties as a driver of a vehicle.

- (2) A person operating a cycle
- (a) must not ride on a sidewalk unless authorized by a bylaw made under section 124 or unless otherwise directed by a sign,
 - (c) must, subject to paragraph (a), ride as near as practicable to the right side of the highway,
- (3) Nothing in subsection (2) (c) requires a person to ride a cycle on any part of a highway that is not paved.
- (14) A person must not operate a cycle
- (a) on a highway without due care and attention or without reasonable consideration for other persons using the highway,

- [147] The defence position is that Mr. Ilett contravened s. 158 by passing the line of vehicle traffic on his right. The defence argued that s. 158 governs passing on the right, and prohibits doing so with the three listed exceptions. The defence argued that none of the exceptions applied here, and that the exception for passing when there is an unobstructed lane on the side of the roadway cannot apply because a paved shoulder does not fall within the definition of either "Roadway" or "Laned Roadway".
- [148] The defence relied on *Smeltzer v. Merrison*, 2012 BCCA 13. In that case, the plaintiff driver had been southbound and was turning left across the northbound traffic. The defendant driver was driving north but passing another vehicle on the right. The Court of Appeal held that the passing on the right could be dangerous, and the trial judge was wrong to have concluded that there was an unmarked but de facto lane that allowed passing on the right. The Court of Appeal held that the drivers were equally responsible for the accident.
- [149] The defence also relies on *Ormiston v. Insurance Corporation of British Columbia*, 2014 BCCA 276 [Ormiston]. In that case, the plaintiff cyclist and the defendant unidentified driver were travelling in the same direction. The defendant driver passed the plaintiff cyclist, slowed down, and abruptly and inexplicably veered to the right over the fog lane before continuing. The vehicle struck the bicycle in the fog lane.
- [150] The majority held that the cyclist passing the vehicle in the right fog lane was entirely responsible for the accident, while the minority would have upheld the trial judgment that the motorist was 70% responsible.
- [151] The majority judgment included the following at para. 17 and 21:
- [17] The fact that the vehicle slowed while descending the hill bearing caution signs, even to a near stop approaching the bottom, and then moved abruptly to the right side of the lane in which it was travelling, up to two feet over the fog line, before carrying on cannot of itself be an act of negligence
- [21] It is contended that the driver should not have moved across the lane in which the vehicle was being driven without checking the rear-view mirrors, although there is of course no evidence and for that matter no finding that was not done. But, while vehicles must always be driven with due care and attention, in the absence of an evidentiary basis on which to find the driver knew or ought to have known a cyclist may have been behind the vehicle, and would attempt to pass on its right side, in the same lane, as Ormiston did, it is difficult to see why the driver should be faulted for moving across the lane without checking the vehicle's mirrors in this instance. In any event, while it is apparent the driver did not see Ormiston accelerate to pass on the right, it cannot be said that if he or she had seen him in the rear-view mirrors following behind, the vehicle's move to the right of its lane, for whatever reason may have been, would not and should not have been made. It was the vehicle's lane.

[Underlining added.]

- [152] The majority discussed the cyclist using the shoulder as a cycling lane as follows at paras. 23-25:
- [23] Under the Motor Vehicle Act a cyclist is required to ride as near as practicable to the right side of the highway (s. 183(2)(c)). "Highway" is broadly defined to include any right of way designed to be used by the public for the passage of vehicles (s. 1). That, it is said, includes the shoulder such that sometimes cyclists must ride on it to be as near as practicable to the right side of the highway. Vehicles are required to travel on the right-hand half of the roadway (s. 150(1)). "Roadway" is defined as the improved portion of a highway designed for use by vehicular traffic but does not include any shoulder (s. 119). Vehicles cannot travel on the shoulder.
- [24] The contention is that because cyclists must sometimes ride on the shoulder while vehicles cannot travel on that part of a highway, the shoulder must, where practicable, be a lane for cyclists within the meaning of s. 158(1)(b) such that, when riding on the shoulder, they are able to take advantage of the exception it provides and pass vehicles on a roadway on their right. It does appear that what may be practicable could vary considerably having regard for the differing widths of the shoulder over any given stretch of a highway, or from one highway to the next, as well as the condition of the surface. One cyclist may have a much different view than another as to what is practicable in any given instance.
- [25] While I doubt the legislative intention was to create by this somewhat convoluted statutory route what would be thousands of miles of unmarked and ill-defined bicycle lanes across the province, I do not consider s. 158 (1)(b) constitutes an applicable exception to the prohibition against passing on the right in any event. As defined, the exception applies to a laned roadway being a roadway divided into marked lanes for vehicles travelling in the same direction. The markings divide the roadway; the lanes marked are on the roadway. A roadway does not include the shoulder. The shoulder could not be an unobstructed lane on a laned roadway. The "laned roadway" exception has, as the judge said, no application here. It does not permit cyclists to pass vehicles on the right by riding on the shoulder. It must follow the driver of the vehicle would have had no reason to expect a cyclist like Ormiston would attempt to pass on the right by riding on the shoulder. That must be particularly so here when the shoulder was not fit for a bicycle because it was strewn with gravel and Ormiston was riding as far to the right of the highway as he considered practicable.
- [Underlining added.]
- [153] In Ormiston, the majority of the Court of Appeal concluded that there was no evidentiary basis for the finding that the driver knew or ought to have known a cyclist may have been behind the vehicle and would attempt to pass on its right side in the same lane.
- [154] However, in this case, Ms. Buckley knew that cyclists frequently travelled on the shoulder of Admirals in the area of the Intersection. Further, there was a hazard sign indicating the presence of cyclists on Admirals, although it was for northbound traffic.

- [155] Kimber v. Wong, 2012 BCSC 783 [Kimber], is a case which bears many factual similarities to this case. In Kimber, Mr. Justice Pearlman found a left-turning driver and a straight-going cyclist each 50% responsible for an accident at a T-intersection. There was one lane of travel in each direction, and cars were parked on the shoulder.
- [156] The plaintiff cyclist approached the intersection to the left of the parked cars and to the right of the vehicles in his lane. The defendant was approaching in the opposite direction, intending to turn left across oncoming traffic. The defendant stopped at the intersection for about one minute before commencing her left turn, when a motorist driving a small Hyundai Accent in the oncoming lane waved to the defendant to indicate she could make her left turn. The Accent blocked the driver's view of potential bicycle traffic to the right of the stopped vehicles. The cyclist was traveling at about 28-30 km/hr when he struck the right front side of the defendant driver's vehicle.
- [157] In contrast to the facts in Kimber, Ms. Buckley knew that cyclists often rode on the shoulder at the Intersection. A hazard sign indicated the presence of cyclists on Admirals. The shoulder was effectively being used as a cycling lane, and the area Mr. Ilett was travelling in was not filled with parked cars as in Kimber. The cyclist in Kimber ought to have been able to observe stopped vehicles to his left at the uncontrolled intersection, which in the circumstances suggested a left-turning vehicle. In contrast, Mr. Ilett was riding beside a lane of stationary and slow-moving vehicles, and the fact that vehicles were stopped indicated heavy traffic and not necessarily a turning vehicle.
- [158] The defence argued that Ms. Buckley met the standard of care required of her on the basis that she drove into her left turn slowly. However, as stated, I have concluded that Ms. Buckley drove into the turn quickly and without hesitation.
- [159] Ms. Buckley had a duty pursuant to s. 174 to yield in making her left turn to traffic so close as to constitute an immediate hazard. As a result, she had a duty to yield to Mr. Ilett. The Large Vehicle may have impeded her view of the shoulder that Mr. Ilett was travelling on. However, if she had moved slowly enough, she would have seen Mr. Ilett and stopped, avoiding the accident.
- [160] I conclude that Mr. Ilett breached s. 158 of the Motor Vehicle Act, because he passed the lane of traffic which was on his left while he rode on the shoulder. However, while breaching statutory duties can be taken into account in setting the standard of care and as evidence of negligence, breaching of statutory duties is not proof of negligence. See *The Queen (Can.) v. Saskatchewan Wheat Pool*, [1983] 1 S.C.R. 205.

- [161] The first overriding question concerning liability for this accident is whether Ms. Buckley took reasonable care for the safety of Mr. Ilett, and if not, whether her failure to do so was one of the causes of the accident. Similarly, the other overriding question is whether Mr. Ilett took reasonable care for his own safety, and if he failed to do so, whether his failure was one of the causes of the accident. See *Bradley v. Bath*, 2010 BCCA 10 [Bradley] at para. 27.
- [162] Ms. Buckley did not take reasonable care for the safety of Mr. Ilett. Section 166(c) required her not to turn unless she had ascertained that her left turn could be made safely, having regard for the nature, condition and use of the road and the cyclists that might reasonably be expected to be on the northbound shoulder. Ms. Buckley failed to do that, and thereby caused the accident. Ms. Buckley drove into her left turn without hesitation when she did not have a clear view of the northbound shoulder, and when she knew that cyclists frequently rode on the shoulder. She was making a left turn at an intersection which did not require traffic on Admirals to stop. The fact that she drove without a clear view of where she was driving caused the accident. It was reasonably foreseeable that she would collide with a cyclist by turning left without a clear view of the northbound shoulder.
- [163] Mr. Ilett did not fail to take reasonable care for his own safety. Cyclists frequently rode on the shoulder at the Intersection and many were doing so that day. Mr. Ilett was visible to Ms. Mattina for a significant distance prior to the Intersection. There were no signals requiring northbound traffic on Admirals to stop. Although Mr. Ilett passed the slowly moving and stopped lane of traffic which was on his left while he rode on the shoulder, it was commonplace for cyclists to do so.
- [164] As a result, Ms. Buckley is entirely responsible for Mr. Ilett's injuries.
- b) Mr. Ilett's income in 2014
- [165] The defence argued that the \$19,980 which Mr. Ilett reported as income in his 2014 income tax return was incorrect, and that he earned about \$25,000.
- [166] Mr. Ilett's 2014 income tax return included \$17,767.79 from Island Savings, and \$2,012 from a numbered company which was probably the Saltair Pub. It also included \$200 in "other employment income", which Mr. Ilett suggested were tips from the Saltair Pub.
- [167] The evidence does not permit a precise determination of Mr. Ilett's earnings in 2014. However, the evidence suggests that he earned about \$4,225.00 more than he reported in his 2014 income tax return, consisting of the following:
- a) about \$600.00 from College Pro Painting, assuming an average of four hours work per week for 10 weeks (40 hours) at about \$15.00 per hour;
- b) about \$600.00 from Mr. Bayley for one four-hour shift per week for seven or eight weeks at \$20.00 per hour;

- c) about \$650.00 from Mr. Stanton;
- d) about \$650.00 from STS for six weeks of nine hours a week at \$12.00 per hour;
- e) about \$50.00 from odd jobs he obtained through Used Victoria; and
- f) about \$1,675.00 in further tips from Saltair Pub, calculated as 2.5 days per week for about 15 weeks at about \$50.00 per day less the \$200.00 reported as other income.

[168] As a result, I conclude that Mr. Ilett's actual earnings in 2014 were about \$24,000.00.

c) Likelihood and Timing of Mr. Ilett Achieving Full Recovery

[169] The defence argued that, while Mr. Ilett's account of his injuries was generally consistent with the surrounding evidence, some of Mr. Ilett's evidence was exaggerated. In particular, the defence argued that Mr. Ilett's testimony wrongly suggested that the truck-washing work Mr. Ilett did for Mr. Bayley was less physically demanding than it actually is, and wrongly suggested that Mr. Ilett was not able to participate in many outdoor activities.

[170] The case of *Price v. Kostyba* (1982), 70 B.C.L.R. 397 (S.C.), is often cited as a reminder of the approach the Court must take in assessing injuries which depend on subjective reports of pain. At 397-399 of the reasons for judgment, Chief Justice McEachern wrote:

The assessment of damages in a moderate or moderately severe whiplash injury is always difficult because plaintiffs, as in this case, are usually genuine, decent people who honestly try to be as objective and as factual as they can. Unfortunately, every injured person has a different understanding of his own complaints and injuries, and it falls to judges to translate injuries to damages.

...

Perhaps no injury has been the subject of so much judicial consideration as the whiplash. Human experience tells us that these injuries normally resolve themselves within six months to a year or so. Yet every physician knows some patients whose complaint continues for years, and some apparently never recover. For this reason, it is necessary for a court to exercise caution and to examine all the evidence carefully so as to arrive at fair and reasonable compensation. Previously decided cases are some help (but not much, because obviously every case is different).

...

In *Butler v. Blaylock*, decided 7th October 1981, Vancouver No. B781505 (unreported), I referred to counsel's argument that a defendant is often at the mercy of a plaintiff in actions for damages for personal injuries because complaints of pain cannot easily be disproved. I then said:

I am not stating any new principle when I say that the court should be exceedingly careful when there is little or no objective evidence of continuing injury and when complaints of pain persist for long periods extending beyond the normal or usual recovery.

An injured person is entitled to be fully and properly compensated for any injury or disability caused by a wrongdoer. But no one can expect his fellow citizen or citizens to compensate him in the absence of convincing evidence - which could be just his own evidence if the surrounding circumstances are consistent - that his complaints of pain are true reflections of a continuing injury.

[171] Overall, Mr. Ilett has been stoic. He has worked hard, not only in his studies but also in his physical conditioning and in obtaining part-time work. He demonstrates a determination to accomplish things despite the pain.

[172] I do not accept that Mr. Ilett has exaggerated his injuries, either at trial, or to the medical professionals. If anything, Mr. Ilett has tried to minimize his difficulties. He has done some physical labour, including the truck-washing and odd jobs, but he has paid a price in resulting pain even when some accommodations have been made. Similarly, he has engaged in some outdoor activities, such as dirt-biking, but only after making accommodations like shortening the duration of the activity, and only with resulting pain.

[173] I accept the medical evidence of Drs. Graboski and Dyson and Mr. Towsley. In the event of conflict between their evidence and that of Dr. Regan, I prefer the evidence of Drs. Graboski and Dyson and Mr. Towsley.

[174] I conclude that Mr. Ilett suffered the following injuries in the accident:

- a) soft tissue injury to the right shoulder, possible acromioclavicular joint separation;
- b) proximal bicipital tendinopathy on the right, possible labral involvement;
- c) musculoligamentous strain of the cervical spine with secondary myofascial pain disorder of the neck and shoulder girdle;
- d) soft tissue injury to the right hip -- good resolution but with some mild symptoms;
- e) musculoligamentous strain of the low back -- majority of pain has resolved;
- f) right rib probable fracture -- resolved;
- g) right wrist soft tissue injury -- resolved;
- h) right distal bicep tendinopathy;
- i) abrasions to the right forearm, lateral hip and sacrum -- resolved; and
- j) headache, most likely cervicogenic.

[175] Mr. Ilett also suffered a secondary mood disturbance, reactive depression, for less than a year.

[176] I conclude the following regarding Mr. Ilett's current condition and ability to function:

- a) Mr. Ilett does not meet the strength requirements for a labourer job;

- b) Mr. Ilett has difficulty with walking and climbing owing to his right hip symptoms, and they also affect his ability to work in confined spaces;
 - c) there are no ergonomic modifications which would accommodate Mr. Ilett's limitations;
 - d) Mr. Ilett is doing well working at the bank, except for adding cheques and using his calculator;
 - e) Mr. Ilett's pain, especially related to headaches, could interfere with his studies; and
 - f) Mr. Ilett may have difficulty with typing and writing notes in class.
- [177] Unfortunately, it is probable that Mr. Ilett will be left with chronic shoulder and neck pain, chronic right hip pain, and chronic intermittent low back pain. Despite his diligent participation in an active rehabilitation program, and his high level of physical fitness, he still has chronic musculoskeletal injuries that have not recovered fully in the three-and-one-half years since the accident, and likely will not recover fully.
- [178] Mr. Ilett may experience some modest improvement in the next few years, as suggested by Drs. Dyson and Graboski. However, the improvement is not likely to be significant, and is not likely to enable him to work as a labourer.
- [179] It is probable that Mr. Ilett's soft tissue injuries will continue to limit him in physically demanding jobs and recreation, and in jobs that require him to engage in frequent or sustained forward and overhead reaching with his right hand.
- d) Assessment of Damages
 - i. Non-pecuniary Damages
- [180] Mr. Ilett claims non-pecuniary damages of \$120,000, arguing that he was a young and very energetic man who was just starting out in life at the time of the accident, and that his injuries have completely altered his life.
- [181] Ms. Buckley's position is that the appropriate award for non-pecuniary damages is in the range of \$60,000 to \$90,000.
- [182] Mr. Ilett's counsel relied on these cases:
- a) *Chahal v. Righele*, 2014 BCSC 1086. In that case, the plaintiff suffered chronic back pain, sleep disturbance, secondary headaches, and residual depression, all of which were anticipated to be ongoing. Affleck J. awarded \$120,000 for non-pecuniary damages. In contrast, Mr. Ilett's depression has lifted;
 - b) *Karlsson v. Noormohamed*, 2015 BCSC 911. Abrioux J. awarded \$120,000 for non-pecuniary damages to a plaintiff who suffered a fracture dislocation of the shoulder requiring surgery, anxiety and depression, and chronic pain and severe limitation in the right arm. In contrast, Mr. Ilett has not undergone surgery, and he does not have ongoing depression or anxiety;

- c) *Ferguson v. McLaughlin*, 2015 BCSC 2432. Griffin J. awarded \$80,000 for non-pecuniary damages to a young man whose career prospects were diminished due to ongoing back pain; and
- d) *Hong v. Wagner*, 2014 BCSC 373 [Hong]. In that case, B. McKenzie J. awarded \$85,000 for non-pecuniary damages to a plaintiff who suffered persistent shoulder pain contributing to a lower mood.

[183] The position of the defence is that an appropriate award for Mr. Ilett's non-pecuniary damages is in the range of \$60,000 to \$90,000. Mr. McDougall, for the defence, relied on these cases:

- a) Hong also cited by Mr. Ilett's counsel;
- b) *Chabot v. Chaube*, 2014 BCSC 300, in which N. Brown J. awarded \$80,000 in non-pecuniary damages to a 34-year-old plaintiff for a shoulder injury. Her injury affected her career as a research scientist and caused her to change to a less lab-intensive and less lucrative career. As a result of her activities, she gave up canoeing, kayaking, and swimming, and had to modify her participation in skiing and hiking;
- c) *Dorosh v. John*, 2013 BCSC 1442, in which Power J. awarded \$90,000 in non-pecuniary damages to a 35-year-old plaintiff. She suffered chronic shoulder pain, as well as headaches. Her injury impaired her relationship with her youngest daughter during the critical years of the daughter's development, and caused the plaintiff to retrain. She became a nurse but was not able to work full-time; and
- d) *Jorgensen v. Coonce*, 2013 BCSC 158, in which Baird J. awarded \$60,000 in non-pecuniary damages to a 42-year-old plaintiff for chronic pain in his right shoulder. The injury played a role in his loss of a job he had held for 23 years in the paving business. He was expected to continue to experience chronic pain, and there was a substantial possibility that his career in paving would be cut short. The injury also negatively affected his relationship with his children, and changed him from a happy to a downcast individual.

[184] The purpose of an award for non-pecuniary damages is to compensate Mr. Ilett for his pain, suffering, and loss of amenities of life. Mr. Ilett is entitled to an award to provide solace and to make his life more endurable with the injuries that he lives with.

[185] *Stapley v. Hejslet*, 2006 BCCA 34 at paras. 45-46, leave to appeal ref'd [2006] SCCA No. 100, is often cited regarding non-pecuniary damages and the principles behind them. Those paragraphs are as follows:

[45] ... 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*, *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.).

[46] 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 (QL), 2005 BCCA 54).

[Emphasis in original.]

[186] I would summarize the significant factors regarding Mr. Ilett as follows:

- a) At the time of trial, Mr. Ilett was 23 years old. He was about 19 years old at the time of the accident;
- b) Mr. Ilett suffered soft tissue injuries. He continues to suffer pain chronically in his shoulder, neck, and right hip, and intermittently in his lower back, and to suffer secondary headaches. His other injuries have largely resolved;
- c) Mr. Ilett's pain in his shoulder, neck, and right hip has been relatively continuous and severe, and it is unlikely that this pain will resolve completely or even to the point that he will be able to work full-time in labouring jobs;

- d) As a result of the accident, Mr. Ilett is disabled from work as a labourer, and is limited in work involving frequent forward or overhead reaching with his right hand and in work involving static positioning of his right arm, such as typing;
- e) There was no medical evidence that Mr. Ilett is presently suffering a psychiatric illness such as depression, although he suffered reactive depression for a period of less than one year. However, Mr. Ilett has suffered from the loss of his sense of well-being; and
- f) Mr. Ilett's life has changed dramatically as a result of the accident. Before the accident, he was very physically active, including working as a labourer, cycling to work, hiking, and swimming and dirt-biking on his non-work hours. He can now only participate in a minor way in those activities.

[187] No two cases are alike. I have considered the cases cited by both counsel and Mr. Ilett's particular circumstances.

[188] Mr. Ilett is entitled to \$100,000 for non-pecuniary damages.

ii. Past Loss of Earning Capacity

[189] Mr. Ilett claims \$226,492.23 for lost past earning capacity, before deductions for tax.

[190] Ms. Buckley's position is that Mr. Ilett is entitled to \$19,824 to \$20,537 net for past lost earnings, calculated as about \$6,800 to \$7,500 for 2012 and about \$13,000 for 2013.

[191] The award for past loss of earning capacity is designed to compensate Mr. Ilett for what he would have earned if he had not been injured in the accident. This was explained as follows in *Bradley v. Bath* at para. 32 by Tysoe J.A.:

[32] this head of damages, both pre-trial and post-trial is properly characterized as a loss of earning capacity. This was explained in *The Queen v. Jennings*, [1966] SCR 532 at 54, 57 DLR (2d) 644, referring to the 7th Report of the Law Reform Committee (August 1958):

Damages should, so far as any monetary award can do so, restore the plaintiff to the position in which he would have stood but for the defendant's wrongdoing. On this basis they should represent compensation for loss of earning capacity and not for loss of earnings. In a case of personal injuries, what the plaintiff has lost is the whole or part, as the case may be, of his natural capital equipment

[192] The principles for evaluating a claim for past loss of earning capacity were summarized by Saunders J. as follows in *Falati v. Smith*, 2010 BCSC 465 at para. 43:

Having said that, one cannot lose sight of the rule that the determination of what has in fact happened in the past is on the balance of probabilities - *Steenblok v. Funk*, [1990] 5 W.W.R. 365, 46 B.C.L.R. (3d) 133 (BCCA); see also *Smith v. Knudsen*, at para. 36. In the present case the plaintiff must prove that each of the various claimed losses of opportunity by which he says the loss of earning capacity is to be evaluated was, more likely than not, actually caused by the accident. If the plaintiff succeeds on that issue, then the potential value of each of these opportunities,

adjusted for various contingencies, may be weighed in determining the value of the plaintiff's lost earning capacity, both past and future.

- [193] Mr. Ilett's position is that, if he had not been injured in the accident, he likely would have worked at Shipyards for three years before returning to UVic in September 2015. Instead, he has continued his schooling, except for the periods he has taken off to earn income to continue his studies.
- [194] The defence position is that Mr. Ilett's wage loss for the period from July 18, 2012 to August 30, 2012 is fully compensable, being either \$6,804 or \$7,517.
- [195] The defence argued that, because Mr. Ilett was laid off at the end of the summer of 2012, he likely would have returned to studies at UVic in September 2012 if he had not been injured in the accident, and worked in part-time jobs during university terms and full-time between terms. The defence's position is that Mr. Ilett is entitled to compensation for 2013, but that in the following years, he earned what he would have earned even if he had not been injured in the accident.
- [196] The defence's position is that, if Mr. Ilett had not been injured, he would have been able to earn as much in 2013 as he in fact earned in 2015. The defence's position is that the difference is a net amount of about \$13,000.
- [197] Mr. Ilett's counsel, Mr. Oss-Cech, offered two alternate options for quantifying Mr. Ilett's past wage loss.
- [198] First, Mr. Oss-Cech argued that the Court could calculate three years of earnings at Shipyards, on the assumption that Mr. Ilett would have returned to university in September 2015. Using the hourly rates set out in the collective agreements, Mr. Oss-Cech calculated \$260,815.76 for Mr. Ilett's past wage loss before taxes and mitigation. That calculation was on the basis of eight hours of work per day at an hourly rate which was the average wage rate of unskilled and semi-skilled labourers for the relevant period.
- [199] The alternative suggested by Mr. Oss-Cech was to use the calculations of Mr. Wickson, an economist. Mr. Wickson was asked to assume that Mr. Ilett would have returned to university after his lay-off on August 30, 2012, and would have worked at Shipyards while he was not attending university. Mr. Wickson calculated a loss on that basis of \$58,700.
- [200] The evidence shows that, as a result of his injuries in the accident, Mr. Ilett has been unable to work at Shipyards. His injuries have meant that he is not capable of working in any labouring jobs, and is limited even in office jobs because of the limitation on his ability to type and use a calculator.
- [201] Mr. Ilett is entitled to be put into the financial position he would have been in if the accident had not occurred.

- [202] Mr. Ilett was injured before he had established a career or even a career path. He was pleased to be working at Shipyards because the job was lucrative and physical.
- [203] Mr. Ilett's work history demonstrates that he has a strong work ethic, as well as ambition. Even if he had not been injured in the accident, he would likely have decided to pursue a university degree. However, he enjoyed physical work, and likely would have worked at Shipyards for a period, in order to save money for his education and his future generally.
- [204] It is likely that, if he had not been injured in the accident, Mr. Ilett would have spent some time working at Shipyards. While temporary lay-offs were common at Shipyards, Mr. Ilett is a hard worker and he would likely have been re-hired when Shipyards needed more workers. He would not likely have been troubled by periods of temporary lay-off, because he was adept at finding short-term work whenever he had available time.
- [205] Mr. Ilett was not able to give a precise plan for how long he would have worked at Shipyards. His estimates varied from one year to five years. It is not surprising that Mr. Ilett could not provide a precise plan, because the accident occurred when Mr. Ilett had worked at Shipyards for only about two months.
- [206] It is appropriate to begin the assessment of Mr. Ilett's loss of past earning capacity by assuming that, if he had not been injured in the accident, he would have worked for three years at Shipyards, and returned to UVic in September 2015.
- [207] I begin with the figure of \$260,815.76 calculated by Mr. Oss-Cech. That was based on the average wage rate between the unskilled and semi-skilled labour category.
- [208] That figure requires modification upon consideration of positive and negative contingencies.
- [209] Mr. Ilett's position is that the positive contingencies, that he might have earned overtime, obtained a promotion into a trade, or worked on other jobs in addition to Shipyards, are roughly equal to the negative contingency that he would have been laid off from time to time.
- [210] One negative contingency is that Mr. Ilett would have earned less owing to periodic lay-offs. Mr. Ilett was laid off on August 30, 2013. Mr. Esnouf was laid off for only about four months in four years, being less than 10% of the time, but Mr. Esnouf was an apprentice metal fabricator and his work opportunities at Shipyards would have differed from Mr. Ilett's. There is also the chance that Mr. Ilett would have worked for less than three years at Shipyards.
- [211] There are also positive contingencies. Mr. Ilett was hard-working and motivated. There is a strong likelihood that he would have achieved promotions at Shipyards.
- [212] In the circumstances, a reduction by 15% reflects the positive and negative contingencies. That reduces the figure to \$221,693.40 ($\$260,815.76 \times .85$).

[213] Mr. Ilett's actual earnings in those three years must be deducted from that figure. They were a total of about \$38,000, as follows:

- a) nothing in 2013;
- b) about \$24,000 in 2014; and
- c) about \$14,000 in 2015.

[214] That reduces the amount to \$183,693.40 (\$221,693.40 less \$38,000).

[215] The award for past lost earning capacity is an assessment, and in this case, requires significant assumptions. As a result, it is appropriate to round the figure to \$183,500.00.

[216] Mr. Ilett is entitled to the amount, net of taxes, reflecting an award for gross past wage loss of \$183,500.00. If counsel cannot agree on the amount net of tax, the calculation is referred to the registrar for determination.

iii. Lost Future Earning Capacity

[217] Mr. Ilett claims \$297,900 for lost future earning capacity.

[218] Ms. Buckley's position is that Mr. Ilett is not entitled to anything for lost future earning capacity. In the alternative, it is her position that the lost earning capacity award should be less than \$53,488, on the basis that Mr. Ilett's education was delayed for one year by his injuries.

[219] The law with respect to loss of earning capacity was summarized by Mr. Justice MacKenzie in *Stull v. Cunningham*, 2013 BCSC 1140, as follows:

[131] In *Wong v. Hemmings*, 2012 BCSC 907, at paras. 146-151, Fitch J. summarized the legal principles pertaining to this head of damages:

[146] A claim for loss of future earning capacity raises two key questions: 1) has the plaintiff's earning capacity been impaired by his or her injuries; and, if so 2) what compensation should be awarded for the resulting financial harm that will accrue over time? The appropriate means of assessment will vary from case to case: *Brown v. Golaiy* (1985), 26 B.C.L.R. (3d) 353 (S.C.); *Pallos v. Insurance Corp. of British Columbia* (1995), 100 B.C.L.R. (2d) 260 (C.A.); *Pett v. Pett*, 2009 BCCA 232.

[147] The assessment of damages is a matter of judgment, not calculation: *Rosvold v. Dunlop*, 2001 BCCA 1 at para. 18.

- [148] Insofar as possible, the plaintiff should be put in the position he or she would have been in but for the injuries caused by the defendant's negligence: *Lines v. W & D Logging Co. Ltd.*, 2009 BCCA 106 at para. 185. The essential task of the Court is to compare the likely future of the plaintiff's working life if the accident had not happened with the plaintiff's likely future working life after the accident: *Gregory v. Insurance Corp. of British Columbia*, 2011 BCCA 144 at para. 32.
- [149] There are two possible approaches to assessing of loss of future earning capacity: the "earnings approach" from *Pallos*; and the "capital asset approach" in *Brown*. Both approaches are acceptable. Reliance on the capital asset approach will be more useful where, as in this case, the loss in question is not easily measureable: *Perren v. Lalari*, 2010 BCCA 140.
- [150] The earnings approach involves a form of math-oriented methodology such as: (i) postulating a minimum annual income loss for the plaintiff's remaining years of work, multiplying the annual projected loss by the number of remaining years and calculating a present value; or (ii) awarding the plaintiff's entire annual income for a year or two: *Pallos*; *Gilbert v. Bottle*, 2011 BCSC 1389 at para. 233.
- [151] The capital asset approach involves considering factors such as: i) whether the plaintiff has been rendered less capable overall of earning income from all types of employment; ii) is less marketable or attractive as a potential employee; iii) has lost the ability to take advantage of all job opportunities that might otherwise have been open; and iv) is less valuable to herself as a person capable of earning income in a competitive labour market: *Brown*; *Gilbert* at para. 233.
- [132] In *Andrews v. Grand & Toy Alberta Ltd.*, [1978] 2 S.C.R. 229 at 251, the Court said:
- We must now gaze more deeply into the crystal ball. What sort of a career would the accident victim have had? What were his prospects and potential prior to the accident? It is not loss of earnings but, rather, loss of earning capacity for which compensation must be made: *The Queen v. Jennings*, [1966] S.C.R. 532, *supra*. A capital asset has been lost: what was its value?
- [133] In *Reilly v. Lynn*, 2003 BCCA 49 at para. 101, the court stated:
- The standard of proof in relation to future events is simple probability, not the balance of probabilities, and hypothetical events are to be given weight according to their relative likelihood: *Athey v. Leonati*, [1996] 3 S.C.R. 458 at para. 27. A plaintiff is entitled to compensation for real and substantial possibilities of loss, which are to be quantified by estimating the chance of the loss occurring: *Athey v. Leonati*, *supra*, at para. 27, *Steenblok v. Funk* (1990), 46 B.C.L.R. (2d) 133 at 135 (C.A.).
- [134] The court in *Bhadlawala v. Baxter*, 2012 BCSC 366, at para. 138, stated:

The assessment of loss of future earning capacity is not a mathematical exercise, and must deal to some extent with the unknowable. As Huddart J.A. put it in *Rosvold v. Dunlop*, 2001 BCCA 1 at para. 9, "[p]ossibilities and probabilities, chances, opportunities, and risks must all be considered, so long as they are a real and substantial possibility and not mere speculation."

- [220] The threshold question is whether Mr. Ilett has proven a real and substantial possibility of a future event leading to an income loss. Mr. Ilett argued that he has proven that, and Ms. Buckley argued that he has not.
- [221] Ms. Buckley's position is that Mr. Ilett is not limited in his capacity to engage in desk work, because only the occupational therapist Mr. Towsley suggested that, and none of the doctors did so. As discussed above, I have accepted Mr. Towsley's evidence on that point.
- [222] Ms. Buckley's further position is that, even if Mr. Ilett is limited in future work as a labourer, he is still capable of working in an office environment, and will likely earn more in such a job than as a labourer.
- [223] The evidence shows that, as a result of his injuries in the accident, Mr. Ilett is no longer able to work as a labourer, and is not able to comfortably perform work which requires prolonged static positioning of his shoulder, such as work requiring typing and handwriting. Although he has obtained some labouring work since the accident, such as the truck-washing for Mr. Bayley and some of the odd jobs, they have been for short working periods and are sometimes followed by significant pain.
- [224] Mr. Ilett is the kind of person who will work with pain when he needs the money, and who has demonstrated an ability to find work from a variety of sources. It is likely that if he had not been injured, he would have worked for various people at various times in his life depending on the money he wished to earn and the opportunities he found. He is now far more restricted in the work he can reasonably perform, and he likely will be restricted for the rest of his life.
- [225] In addition, the pain he suffers may limit him from working long hours in an office job, and this may limit his opportunities as well.
- [226] As a result, there is a real and substantial possibility that Mr. Ilett will earn less income in the future than he would have earned if he had not been injured in the accident.
- [227] Having satisfied the threshold burden, the next question is how to quantify Mr. Ilett's loss.
- [228] At the time of the accident, Mr. Ilett had not decided on his career path. His opportunities are now more limited because of the accident. At the time of trial, he expected to complete his economics degree in the spring. He may pursue accounting or law, but his career path was not entirely clear at trial.

- [229] Mr. Ilett is likely to pursue an office job. He may have some difficulties in such a job owing to his problems with prolonged typing. He is likely to struggle and experience pain if he needs to work long hours. In addition, he no longer has the ability to work as a labourer, either for extra income or in times when he cannot work in an office job.
- [230] The Court of Appeal discussed the method of assessing the loss of future earning capacity in two relatively recent cases.
- [231] In *Pett v. Pett*, 2009 BCCA 232, Hall J.A. wrote as follows at paras. 18 and 19:
- [18] In the recent case of *Lines v. W & D Logging Co. Ltd.*, 2009 BCCA 106, Saunders J.A. said this:
- [57] There are two major components to an assessment of loss of future earning capacity. One is the general level of earnings thought by the trial judge to be realistically achievable by the plaintiff but for the accident, taking into account the plaintiff's intentions and factors that weigh both in favour of and against that achievement, and the other is the projection of that earning level to the plaintiff's working life, taking into account the positive and negative vagaries of life. From these two major components must be applied an analysis that produces a present value of the loss, adjusted for all appropriate contingencies.
- [19] I think this to be a helpful framework for a court to follow in fixing a measure of damages for future loss. Some cases speak of the loss of a capital asset and some of the loss of future earnings, but the essential matter that engages the attention of a court making an assessment in this area is to endeavour to quantify the financial harm accruing to the plaintiff over the course of his or her working career.
- [232] In *Mackie v. Gruber*, 2010 BCCA 464, Neilson J.A. wrote as follows at paras. 18 and 19:
- [18] Quantifying an award for loss of future earning capacity is a notoriously difficult judicial task given the multitude of factors and future uncertainties at play. It is not a mathematical calculation, but a matter of assessment and judgment, guided by the basic principle that a plaintiff is entitled to be placed in the same position she would have been in but for the accident, and directed at producing an award that is reasonable and fair to all parties: *Rosvold v. Dunlop*, 2001 BCCA 1, 84 B.C.L.R. (3d) 158.
- [19] In *Pallos*, the case referred to by the trial judge, Mr. Justice Finch set out a number of approaches to this task:
- [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 years 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.

- [233] In *Miller v. Lawlor*, 2012 BCSC 387, Mr. Justice MacKenzie made an award for lost future earning capacity to a young man who was left with permanent impairments which limited his capacity at work, but who was able to return to his pre-injury employment. The award was for the equivalent of three years of annual income as a journeyman sprinkler-pipefitter.
- [234] In *Hoy v. Williams*, 2014 BCSC 234, Mr. Justice Kent awarded three years of annual income to a 36-year-old firefighter for lost future earning capacity. He had continued to work as a full-time firefighter, but stopped his "side job" as a mortgage broker, and there was a risk that in the future he might not be able to meet the physical requirements of being a firefighter.
- [235] Mr. Ilett's position is that an award equal to earnings of \$10,000 per year until Mr. Ilett reaches the age of 65 appropriately reflects his loss. That reflects a reduction of about 13% in his lifetime income. Using Mr. Wickson's figures, the present value is about \$307,000. Using Mr. Hildebrand's tables, the figure is about \$297,900. I will use the figure of about \$300,000.
- [236] Alternatively, Mr. Ilett's position is that 3.9 years of income, calculated at \$297,900, on the basis of Mr. Wickson's calculation of about \$76,400 annually, appropriately reflects his loss.
- [237] Ms. Buckley's position is that if Mr. Ilett is entitled to anything for lost future earning capacity, it should consist of one year of earnings, on the basis that his education was delayed for that period by his injuries. Mr. McDougall argued on Ms. Buckley's behalf that Mr. Ilett will be completing his degree after five-and-one-half years, not including the term he took off to work in Chemainus.
- [238] The above analysis of Mr. Ilett's lost past earning capacity was on the basis that, if the accident had not occurred, he likely would have worked for three years at Shipyards and then returned to UVic in September 2015. If so, and if he completed his degree in a total of four or five years of studies, he would have graduated in spring 2018 or 2019 respectively. In fact, Mr. Ilett is scheduled to graduate two or three years earlier, in spring 2016.
- [239] As a result, it is not appropriate to value Mr. Ilett's loss on the basis that his post-university career was delayed. In fact, on this analysis, it has been accelerated.
- [240] The most appropriate way to value Mr. Ilett's loss is using an earnings approach. This is particularly appropriate because he is a man who, if he had not been injured in the accident, might have taken on periodic casual work alongside his main career. After that, it is necessary to consider both positive and negative contingencies.
- [241] It is appropriate to begin with the suggestion that Mr. Ilett will lose about \$10,000 per year in income owing to his injuries. He earned \$14,000 in 2015 while pursuing full-time studies at UVic. As a result, \$10,000 is a reasonable starting figure for what Mr. Ilett would have

earned in extra work. This figure also reflects the likelihood that, because of his injuries, he will be unable to work long hours in his career, will be unable to do periodic casual work, and may be unemployed longer between jobs without being able to do alternate work as a labourer.

[242] It is appropriate to deduct \$75,000 on the basis that Mr. Ilett is likely to commence his post-university career two or three years earlier than he would have done if he had not been injured in the accident. That sum reflects the uncertainty over how much earlier he will have finished his courses, and that if he had not been injured, he might have continued to work part-time at Shipyards or at some other job during his studies.

[243] On those calculations, Mr. Ilett would be entitled to an award of \$225,000 for lost future earning capacity. I note that such a sum is roughly equal to almost three years of earnings on the basis of Mr. Wickson's calculation of about \$76,400 annually, and about 3.3 years on the basis of Mr. Hildebrand's calculation of about \$68,000 annually.

[244] The award cannot be a precise calculation. It is an assessment made after considering the relevant factors.

[245] Mr. Ilett is entitled to \$225,000 for loss of future earning capacity.

iv. Special Damages

[246] Mr. Ilett claims \$1,968.75 for special damages. The defence position is that he should receive \$1,904.72, being about \$65.00 less.

[247] The defence argued that the \$90.00 cost of the UVic recreation pass should not be included in the award for special damages. Mr. Ilett testified that after the accident he started working out at a different gym from the one he had used before the accident, because there was different equipment available to him in the new gym, and he incurred the fee to attend the new gym. I accept his evidence on that point, and accept that the pass was an appropriate expense for Mr. Ilett's efforts to recover. I also accept his other claims.

[248] Mr. Ilett is entitled to \$1,968.75 for special damages.

COSTS

[249] Mr. Ilett's position is that he may have submissions on costs, depending on the trial decision.

SUMMARY

[250] In summary, Mr. Ilett is entitled to the following:

- a) \$100,000 for non-pecuniary damages;
- b) the amount net of tax equivalent to the gross amount of \$183,500 for lost past earning capacity;

- c) \$225,000 for lost future earning capacity;
- d) \$1,968.75 for special damages; and
- e) applicable pre-judgment interest.

[251] If the parties cannot agree on the figures relating to pre-judgment interest or the amount of past lost earning capacity net of tax, the question or questions are referred to the registrar for determination. If either party wishes to make submissions on costs, counsel should estimate the time required and schedule a hearing before me through the registry. If neither party wishes to make submissions on costs, Mr. Ilett is entitled to his costs on Scale B, for matters of ordinary difficulty.

"Gray J."

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Prepared on 29 October 2026 · Esheria