

CANADA / JUDGMENT

Mackey v. British Columbia

2016 BCSC 1333

COURT

Supreme Court of British Columbia

DECIDED

19 July 2016

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

2016 BCSC 1333 Mackey v. British Columbia

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Mackey v. British Columbia,

2016 BCSC 1333

Date: 20160719

Docket: S076519

Registry: Vancouver

Between:

David Raymond Mackey, by his Litigation Guardian,

James Mackey

Plaintiff

And

The Provincial Capital Commission,

Her Majesty the Queen in Right of the Province of British Columbia,

John Doe Company

Defendants

And

Paradise Valley Unified School District No. 69,

Mary Segall, Deanne Spiesman, Debra Welch,

Kelly Schest, Kathleen Arner,

John Doe 1 and John Doe 2

Third Parties

Before: The Honourable Mr. Justice Macintosh

Reasons for Judgment

Counsel for the Plaintiff:

Alan M. Ross

Lanny N. Robinson

Rebecca Stanley

Counsel for the Defendants/Third Parties The Provincial Capital Commission and Her Majesty the Queen in Right of the Province of British Columbia:

Gregory J. Nash

Christopher Elrick

Counsel for the Third Parties Kelly Schest, Mary Segall, Deanna Spiesman, Debra Welch, John Doe 1, John Doe 2:

Geoffrey M. Bowman

Andrew J. Stainer

Place and Dates of Trial:

Vancouver, B.C.

April 5-8, 11-13, 15, 18-22,

25-29, 2016;

May 2-6, 9-13, 16-20, 24, 2016

Place and Date of Judgment:

Vancouver, B.C.

July 19, 2016

Table of Contents

INTRODUCTION. 4

LIABILITY. 5

Before the Accident 5

The Accident 6

Evidence from the Plaintiff's Two Expert Witnesses and from Former PCC Employees Concerning the Lamp Post and the Accident 12

Conclusions About the Cause of the Accident 17

The Legal Analysis of Liability. 18

The Claim Against the Third Parties. 26

Expert Evidence for Assessing the PCC's Conduct 28

Conclusions Regarding Liability. 29

DAMAGES. 29

Introduction. 29

A Comment About the Evidence for Assessing Damages. 30

David Mackey Before the Accident 31

David Mackey After the Accident 35

David Mackey's Academic Record. 41

The Plaintiff's Medical Evidence. 49

The Medical Evidence Called by The PCC. 54

The Expert Evidence Addressing the Plaintiff's Vocational Rehabilitation and Cost of Future Care. 57

Emma Mackey Did Not Testify. 60

Alleged Failure to Mitigate. 62

Conclusions to this Point Respecting Damages. 62

CALCULATION OF THE PLAINTIFF'S CLAIM.. 63

Non-pecuniary Damages. 63

In-trust Claim.. 64

Cost of Future Care. 66

Past Income Loss. 72

Loss of Future Earning Capacity. 72

Residual Income Earning Capacity. 78

SUMMARY. 79

INTRODUCTION

- [1] On March 31, 2007, when David Mackey was 17, he climbed onto a concrete baluster. The baluster formed part of a railing along the perimeter of a pedestrian plaza at 812 Wharf Street, overlooking the waterfront, in Victoria. On the baluster stood a lamp post. It was about 6 feet tall. David Mackey swung around the lamp post. It was corroded to the core. When David Mackey swung around it, the lamp post came loose. It tottered, and he fell two storeys onto the concrete walkway below. He suffered severe traumatic brain injury.
- [2] James Mackey, David's father, brings this action on his son's behalf. (When these reasons speak of the Plaintiff, the reference is to David Mackey.) James Mackey sues the Provincial Capital Commission (PCC), the Queen in Right of the Province and the John Doe Company. At the time of the accident, the PCC, a provincial crown corporation, owned and managed the plaza, including the railing and the lamp post. The PCC has since been dissolved by statute, but nothing turns on that. It is common ground that any liability on its part in this action is now that of the remaining government Defendant, the Queen in Right of the Province, i.e., the Provincial Crown. The evidence at trial treated the PCC and the Provincial Crown as one, and referred to them simply as the PCC. I will retain that designation in these reasons. (The Defendant, the John Doe Company, was never mentioned in evidence and will not be considered further.)
- [3] The Third Parties include a school district in Phoenix, Arizona, Mary Segall, a teacher employed by the school district, and other people who were serving as chaperones for David Mackey and others at the time of the accident.
- [4] On March 31, 2007, David Mackey was one of 24 students from the Paradise Valley High School choir visiting from Phoenix to perform and see the sights in Vancouver and Victoria. The PCC argues that the Third Parties were negligent in not planning the trip with enough emphasis on safety and in not chaperoning the students safely. (Before trial, the Plaintiff agreed not to seek recovery from the Third Parties for any portion of his losses which this Court attributes to the fault of the Third Parties.)
- [5] Liability and damages were both placed in issue in the 34-day trial. The Plaintiff called 18 witnesses. The PCC called 14, two of whom were Third Party chaperones, who testified as adverse parties.
- [6] The Plaintiff submits that most of the fault for the accident rests with the PCC, none with the Third Parties, and relatively little with himself. By contrast, the PCC submits that the accident was wholly the fault of David Mackey or David Mackey and the Third Parties.

- [7] Respecting damages, the central question is the extent to which the accident affected David Mackey's earning capacity. David Mackey submits there is a real and substantial possibility that, but for the accident, he would have become an orthopedic surgeon. The PCC responds that David Mackey's prospects after the accident are not greatly changed from what they were before, and that he was an average student who was and remains capable of relatively modest employment. Damages claimed under other headings are also in issue.

LIABILITY

Before the Accident

- [8] In March 2007, David Mackey was in the second semester of grade 12, his final year of high school in Phoenix. He was nearly 18. He was born on April 21, 1989.
- [9] The group travelling from Phoenix included 26 choir students, five chaperones and Mary Segall. Ms. Segall, the choir teacher at the school, served as the group's leader. Throughout its time in Vancouver and Victoria, the group was accompanied by a local tour guide, a Mr. Glenn Hanson.
- [10] The five chaperones were mothers of students who were on the trip. Each chaperone had one daughter in the group. While the group was in Vancouver, one female student was sent home as discipline because she was not in her room at curfew. Another female student and her mother returned directly from Vancouver to Phoenix because of a health problem that student had. In the result, when the group travelled from Vancouver to Victoria, on Saturday, March 31, 2007, it included Ms. Segall, four chaperones, 24 students (18 girls and six boys) and Mr. Hanson.
- [11] In Vancouver, the group had toured the well-known sights, including Gastown. Walking along a street in Gastown, two or three of the male students, including David Mackey, had swung around lamp posts a couple of times. The posts were stable and based at street level. One of the chaperones was concerned about injury from traffic given the proximity of the lamp posts to the street. Apart from whatever one makes of that incident, all accounts of David Mackey throughout the trip described him as being well-behaved and well-mannered. He has never in his life consumed alcohol or drugs.

The Accident

- [12] The pedestrian plaza where the accident happened, at 812 Wharf Street, is approximately where Wharf Street meets Government Street, adjacent to Victoria's inner harbour. A Victoria tourist information centre is located there. Standing on the plaza, looking south, a pedestrian faces the legislature on the other side of the harbour, with the Empress Hotel to the left. The drop from the plaza to the walkway below is two storeys and roughly 30 feet. Seaplanes dock in the harbour beyond the walkway. From its location, it is obvious that the plaza offers one of the best vantage points in Victoria. People come and go there all day and into the evening, and particularly, of course, in the tourist season. Several bars and other

tourist spots are nearby.

- [13] The railing along the perimeter of the plaza is built of horizontal metal rails intersecting at intervals with the concrete balusters. (The horizontal metal rails are supported by vertical metal piping.) The railing is sturdy. Different measurements were given for the vertical distance from the plaza deck to the top of the balusters. That distance is approximately 46 inches. There is no suggestion that the railing was not high enough to provide a safe barrier. The baluster where the accident happened is approximately 3 feet long, running north-south, by 2 feet wide, running east-west.
- [14] At the time of the accident, there were two metal lamp posts on the water side of the plaza, each about 6 feet high. Each of the lamp posts was based on top of one of the balusters. On the baluster where the accident happened, there was a space of 7 or 8 inches between the base of the lamp post and the edge of the baluster facing the water. David Mackey was holding the lamp post, swinging from it, when he fell to the concrete walkway below.
- [15] On the Saturday evening when the accident happened, the group had eaten dinner at a restaurant downtown. They walked from dinner to a church, a few blocks from the harbour, where they were scheduled to sing. However, the church was locked. The guide, Mr. Hanson, suggested that the group fill the time by walking down to the plaza. It was still daylight. Some of the students, including David Mackey, walked ahead of the rest of the group, but all of the students were always within sight of the chaperones.
- [16] At the plaza, one of the students, Ryan Ramsay, then 16, got up on the baluster where the accident later happened. He walked around the lamp post, putting his hand on it but only to serve as a guide and without subjecting it to any force. The lamp post was standing vertically. After he walked around the lamp post, he jumped down again.
- [17] Ryan Ramsay testified that after he jumped down, David Mackey got up on the same baluster. Ryan Ramsay, back down on the plaza, turned away. When he looked back, over to where David had been, David was not there anymore. Ryan Ramsay quickly learned that David had fallen to the concrete walkway below. Ryan went down to the walkway. He looked up from there. He could see that the lamp post on the baluster from where David had fallen was now leaning toward the water. He described it as leaning about a foot and a half. When he went back up to the plaza, he observed that the base of the lamp post was now tilted, and the side away from the water was raised about 4 inches above the baluster. That observation was consistent with his earlier testimony, that seen from below, the lamp post was tilted toward the water. A police photograph, taken within hours of the accident, corroborates the conclusion that the lamp post was leaning after the accident in the direction of the water and at the angle Ryan Ramsay described.
- [18] When asked in cross-examination what led him to want to get onto the baluster, Ryan Ramsay said that at the time, he was just a kid, goofing around.

- [19] He did not recall that any of the chaperones had arrived at the plaza by the time he got up on the baluster. However, one of the chaperones, whose evidence I will summarize below, testified that all the chaperones were on the plaza by the time Ryan Ramsay was on the baluster, and I accept that evidence.
- [20] It was suggested to Ryan Ramsay in cross-examination that he had leaned out from the pole and swung around it, instead of simply walking around it while using his hand only as a guide. When asked if that was a fair suggestion, Mr. Ramsay said, "I guess it's fair." However, I do not reach the conclusion that Mr. Ramsay did swing in a forceful way around lamp post. Watching and listening to him during his cross-examination, on a video system on which he testified from Phoenix, I observed him to be somewhat unsure of the process, and not always fully comprehending the import of the questions or the difference between his answers given then and what he had said in his evidence-in-chief. I find that Ryan Ramsay did not apply significant force to the pole when he went around it.
- [21] At the end of his cross-examination, Mr. Ramsay was asked to agree that at no point did he hear, "any chaperone say to the boys: 'Stay off the pillar. Get off the pillar.' Correct?" And he said that was correct. That is inconsistent with the testimony of one of the chaperones, which I will address below.
- [22] David Mackey testified but he had no memory of the accident.
- [23] The two chaperones called by the PCC as adverse witnesses were Kathleen Arner and Deanna Spiesman. Both impressed me as being sensible people and honest witnesses. Both were on the plaza when the accident happened.
- [24] Ms. Arner, in her peripheral vision, noticed three of the male students clustered around the baluster where the accident later happened. She saw Ryan Ramsay jump down from the baluster. She turned and talked to him. She was close to him. David Mackey was standing beside Ryan Ramsay. She said to Ryan not to do that (i.e., be on the baluster) because he would get hurt or someone else would get hurt. Although she addressed those remarks to Ryan, she emphasized that David Mackey was there too. After she said that, she turned away, and was talking to one of the female students, when she heard someone say, "He fell."
- [25] To the extent Ms. Arner and Mr. Ramsay differ in their recollections, I prefer and accept the evidence of Ms. Arner. She had a clear recollection of speaking to Ryan Ramsay after he came off the baluster. Mr. Ramsay had no memory of that conversation. Nothing in Ms. Arner's testimony led me to conclude that she fabricated the conversation or recalled it inaccurately. I find that the conversation probably took place, essentially as Ms. Arner recounted it.
- [26] Ms. Spiesman recalls that the whole group was on the plaza at the time of the accident, including the four remaining chaperones and Mr. Hanson. Hers is the only account of the accident itself, and I quote here portions of her testimony:

In Chief (with PCC Counsel)

Page 3, lines 24-44

Q And at the time of -- up to the time of and at the time of David's fall, you were looking out from that plaza to the water and looking at the boats, correct?

A I was.

Q And at some point, you looked across the plaza towards a concrete pedestal. Do you recall that?

A Yes.

Q And when you saw him swinging around the lamppost, his feet were off the pedestal, correct?

A Yes.

Q And at that moment, his arms were wrapped around the pole, correct?

A They were, yes.

Q And when I say "the pole", I mean that same lamppost we've been discussing, correct?

A Correct, yes.

Page 4, lines 37-47 to page 5, lines 1-16

Q Okay. Did you turn at some point, at the point of which you saw David Mackey swinging around the lamppost?

A I did, yes. So you're correct, I was facing away from the hotel when I saw him fall.

Q And you recall that facing away from the hotel, that David Mackey was swinging in a counter-clockwise direction --

A He was.

Q -- around the pole, correct?

A Yes.

Q So, from your vantage point, he was swinging from your right-hand side and swinging towards your left-hand side; is that right?

A Yes. Yes.

Q And his arms were hugged around the lamp post, correct?

A Yes.

Q And after David fell, sometime after, you spoke to the police. Do you recall that?

A Yes.

Q And the police asked you how the accident happened, that's right?

A Yes.

Q And you told the police that David Mackey was swinging on the pole and he fell, correct?

A. Correct.

In Cross-examination (By Counsel for the Plaintiff)

Page 7, lines 27-40

Q You turned around, and when you turned around, he was basically falling at that time, correct?

A Yes. He was going around the pole and then fell.

Q And you talked about his feet being in the air. That was when he was in the motion of falling, correct?

A The entire time I saw him, his feet were in the air.

Q Well, do you have your examination for discovery transcript, Ms. Spiesman?

A Yes.

Page 8, lines 14-35 of the trial transcript (addressing excerpt from examination for discovery transcript)

Q But you saw him on a pedestal, fair enough?

Answer -- or, sorry next page.

And he was there for a second before he fell?

A Yes.

Q And he was standing straight up when you saw him. Was he hunched over? Do you recall his body position?

A He was standing up straight, arms wrapped around the pole and feet off the concrete.

Q Feet off the concrete?

A He was in the motion of falling.

Do you see that?

A Yes.

Q You were asked those questions and you gave those answers?

A Yes.

Page 8, lines 46-47 to page 9, lines 1-25

Q Was it the case, Ms. Spiesman, that when you saw David's feet off the concrete, he was in the motion of falling?

A He was swinging and fall -- I consider that all the same motion. It was -- it was a fluid motion happening at the same time.

Q And go to line 10 on page 43, following up on what we've just talked about. It says [as read in] So he was swinging at that point?

A Yes.

Did you give that answer to that question, [Ms.] Spiesman?

A Yes.

Q And it was true?

A Yes.

Q So when you saw David Mackey at the time of the accident, there was one fluid motion. He was going around the pole and falling at the same time?

A Correct.

Q Now, when you first noticed David Mackey on what's been referred to as the concrete pedestal, the lamp post, or the lamp standard, was standing upright.

A It was.

Page 9, lines 36-47 to page 10, lines 1-11

Q Did you see the pole bend or lean out?

A The pole moved when David fell.

Q Take a look -- still on page 43 of your transcript, Ms. Spiesman, beginning [at] line 12.

Q And the pole, referring to the lamp standard, was standing up straight?

A As I turned, it was, yes.

Q When you first saw --

A When he fell, it fell.

Do you see that?

A Correct.

Q You were asked those questions and you gave those answers?

A Yes.

Q And those answers were true?

A Yes.

Q So when you say the pole fell, you didn't actually see it fall down. You saw it lean, is that fair?

A It moved approximately -- I would say 90 degrees. Where it went after that, I do not know. It was no longer in my vision after David fell off of it.

Evidence from the Plaintiff's Two Expert Witnesses and from Former PCC Employees Concerning the Lamp Post and the Accident

- [27] The Plaintiff called two engineers, Mark Bailey, a failure analyst, and Dennis Chimich, a biomechanical engineer. From their evidence, including photographs in Mr. Bailey's report, came the following conclusions.
- [28] The steel lamp post was about 6 feet high. The post was about 4 inches in diameter. The steel wall of the pipe forming the post was slightly under 1/10 of an inch in thickness. The lamp post was designed to be welded to a steel base plate, which was in turn bolted to the top of the baluster. The bottom 1 ½ feet of the post was covered with an aluminum skirt. The skirt served as a cover over the electrical wiring at the base of the lamp post.
- [29] The base of the aluminum skirt contained three indentations intended as locations where holes could have been drilled through. At those three points, the skirt could then have been bolted to the baluster. The holes were never drilled and the skirt was never bolted in that manner. Mr. Bailey opined that had that been done, the lamp would not have been dislodged when David Mackey swung on it. I accept that opinion.
- [30] There were other shortcomings in the lamp post which were at least as serious as the skirt not having been bolted to the baluster. The post itself, under the skirt, was corroded to virtually nothing but flakes of rust. The post had rusted away entirely, or almost entirely, from the base plate to which it had been welded originally. By the time of the accident, the lamp post was so poorly supported that it was almost free-standing, waiting for something, perhaps even a strong wind, to topple it. Mr. Bailey calculated that a force of only 12.5 pounds applied horizontally 4 feet up the lamp post from its base would have caused it to fall.
- [31] A problem for steel fixtures in that location is the salt air. Mr. Bailey spoke of the climate on the Victoria waterfront as a significant contributor to the extensive corrosion. The PCC had warning of the corrosive effects on metal from the salt air at 812 Wharf Street. The 80 foot tower on that property, originally part of an Imperial Oil gas station, had been surveyed the year before the accident, in 2006. Workers had noticed exposed rebar and spalled and cracked concrete in the tower. The 2006 survey revealed metal corrosion in numerous places in the tower. Several steps were recommended to effect repairs. That information, however, never led to any inspection of the steel lamp posts on the adjacent plaza. Set out here are the seven conclusions in the Bailey report, all of which were supported in the body of the report

and through Mr. Bailey's testimony:

1. The lamp post was attached with four fasteners to the top of a concrete baluster. The connection between the post (a 4" pipe) and the steel base had corroded through before the accident. The lamp post was essentially free standing before the accident.
2. The lamp post had an aluminum skirt and base. Though there were locations where the aluminum base could have been secured to the baluster, it was not. Had the aluminum base been secured to the baluster then it is likely that the post would not have fallen when David Mackey applied force to it in the manner that led to his fall.
3. It is estimated that the observed corrosion at the point of failure would have taken about 13 to 20 years. If moisture accumulated within the skirt, or if there was an interaction between the dissimilar metals (aluminum and steel), then the corrosion could have happened in less time.
4. The junction where the pipe exited the top of the skirt had corroded. The corrosion was on the steel pipe in the form of a large ring of flakes and would have been visible to the unaided eye.
5. An annual or bi-annual inspection of the fasteners by removing or raising the aluminum skirt would have revealed the dangerous extent of corrosion at the base.
6. An inspection that involved pushing on the lamp post to gage its compliance would have revealed its looseness.
7. Rust flakes on the pipe above the top of the skirt had been painted over with black paint. Brush strokes can be seen in the paint and the paint is clearly over top of the rust.

[My emphasis.]

- [32] The three witnesses who testified as former PCC employees sought to minimize the presence or extent of the corrosion. Generally speaking, they described the corrosion as merely being surface rust. However, photographs in the Bailey report show deep pitting and corrosion on the lamp post itself, just above the aluminum skirt. Given how thin the steel was in the post originally, less than 1/10 of an inch, the visible corrosion and pitting should have sounded warning bells for those in charge of maintenance. Instead however, the PCC staff were oblivious to the corrosion problem. They spoke of their pride in their operation, and of how conscientious they had been in caring for the properties in Victoria under their charge. For example, they spoke frequently of having installed seismic upgrading in some of their other properties. However, the reality concerning the two lamp posts on the water side of the plaza was nothing like that. No one ever inspected the condition, or the stability, of those lamp posts in the 20 years they had stood there under the responsibility of the PCC. Each year in the spring, the PCC contracted with painters to paint the lamp posts, and the painters did so. It is apparent, however, from the Bailey evidence, and from the extensive corrosion, that the painting year after year simply painted over the problem.

- [33] The PCC in 2007 had a total staff of 12, but only two of them worked out of the office, in the field, where they might have addressed maintenance directly. Usually, maintenance work was contracted out. The PCC administered six commercial tenant sites, including 812 Wharf Street, two parking lots and seven parks, three of which were leased to municipalities.
- [34] The two lamp posts on the water side of the plaza had thinner walls than the 30 to 40 other lamp posts for which the PCC was responsible, most of which were made of cast iron. Mr. Ramsbottom, one of the former PCC staff who testified, had mistakenly assumed that the lamp post in the accident was, in his word, "beefier", like the other ones, such that even if he had noticed the corrosion, it would not have concerned him. To summarize in part, no one from the PCC, or any engineer hired by the PCC, ever inspected the two lamp posts on the balusters on the water side of the plaza. From the evidence of Mr. Bailey, and the photographs, it is apparent that even a cursory inspection would have revealed concerns.
- [35] Given the location of those two lamp posts, in a busy tourist area, where people young and old would be expected to congregate at all hours of the day, the two lamp posts were accidents in waiting.
- [36] The PCC witnesses testified that there had been no reports in the past of people getting up on the balusters. That is not surprising because there were no signs on the plaza of any kind, including any signs naming an entity to contact for reporting problems. Obviously from the evidence of Ryan Ramsay, at least one person had mounted a plaza baluster before David Mackey did. The observation of Macfarlane J., at para. 24, in *Niblock v. Pacific National Exhibition*, 1981 CanLII 765 (BC SC), has application:

I do not think that an occupier can be relieved of responsibility for a failure to keep his premises reasonably safe by saying that he turned a blind eye to the danger because no one had yet been hurt and because no one else had warned him of the danger. If the unsafe condition was there to be seen by someone who was applying his mind to the relevant risks, then it was a duty of that occupier to take reasonable steps to remedy the problem. It could have been done easily and economically.

The PCC simply removed the two lamp posts immediately after the accident, and eventually replaced them with small, peaked metal capping, which serves in part to discourage people from climbing on to the balusters.

- [37] Returning to the testimony of the former PCC employees, and the condition of the lamp post, two emails written just after the accident are informative. One of the emails, written the day after David Mackey fell, included the following:

...

Someone had apparently swung out on the west side upper patio lamp standard and the base detached under the load. Person fell to concrete below and was injured. Ian said he lashed the standard to the railing and it was secure.

I went down to 812 on Sunday morning. The attached pictures show a complete corrosion of the steel base inside the standard. It is difficult to determine what the original structure was and it is puzzling as to why the base was not bolted using the outer flange holes but there must have been a good reason at the time.

The fabric canopy was damaged at the corner.

We need to remove the standard at the east side to determine its condition as well as remount the old standard or remove both as a potential attractors of risky behaviour. ...

The other email, from the same former PCC staff, sent the morning of April 4, 2007, read in part:

...

The standard that failed is anomalous. All of the other globe standards on our properties are heavy wall cast iron. The ones at 812 were seamed tube steel with what appeared to be a magnesium aluminum decorative base. The decorative base is made up of a sections track welded to an upper and lower ring so in my opinion it doesn't have much structural strength. I had to break one apart with a hammer and my hands to get the second unit off the wall.

I suspect that the dissimilar metals caused electrolytic corrosion since the decorative part appeared to be hardly corroded at all and the entire steel base, from the mounting ring at the bottom to the contact fit at the top (about a two foot length inside the decorative section) was just a mass of exfoliated flakes. In terms of what not to do in a salt air environment it doesn't get any better than this. ...

(The author of both emails had been an electrical engineer before working for the PCC, but he did not testify as an expert witness and the emails are relevant for showing the condition of the lamp post as opposed to the scientific basis for the corrosion.)

[38] The biomechanical engineer who testified for the Plaintiff, Dennis Chimich, addressed the forces needed to topple the lamp post. He calculated that David Mackey would have needed to weigh five times more than he did in order to topple the lamp post when he swung around it if it had not been corroded. Conversely, regarding the corroded lamp post, as it was at the time of the accident, Mr. Chimich calculated that the forces from David swinging around it were far too great for the pole to bear. That is consistent with Mr. Bailey's evidence, referred to earlier, that a force of only 12.5 pounds applied horizontally 4 feet up the lamp post would have been enough to topple it.

Conclusions About the Cause of the Accident

[39] From the evidence above, I reach the following conclusions.

- [40] The lamp post was severely corroded when David Mackey fell. The lamp post had never been inspected or maintained to see that it was intact. The annual painting did little or nothing to protect it because the corrosion was allowed to continue unchecked, both under the skirt and immediately above it. Further, the skirt of the lamp post was never bolted to the baluster, which would have provided the necessary support.
- [41] But for the corroded state of the lamp post, and but for the skirt not having been bolted, I find that the accident probably would not have happened. What probably happened was that as David Mackey was swinging around the lamp post, the lamp post came loose and gave way. Probably, the lamp post coming loose and giving way caused David Mackey to fall to the concrete walkway below. I adopt here what McLachlin C.J. wrote for the majority at paras. 9 and 10 in *Clements v. Clements*, [2012] 2 S.C.R. 181:
- [9] The "but for" causation test must be applied in a robust common sense fashion. There is no need for scientific evidence of the precise contribution the defendant's negligence made to the injury. [Citations omitted.]
- [10] A common sense inference of "but for" causation from proof of negligence usually flows without difficulty. Evidence connecting the breach of duty to the injury suffered may permit the judge, depending on the circumstances, to infer that the defendant's negligence probably caused the loss. [Citations omitted.]
- [42] Also, however, it is obvious that but for David Mackey getting up on the baluster, and swinging around the lamp post, the accident would not have happened.

The Legal Analysis of Liability

- [43] Applying the findings above to the applicable law, I find that the PCC was negligent and that David Mackey was contributorily negligent in causing the accident. The resulting question is the apportionment of liability as between the parties. (Beginning at para. [61], below in these reasons, I examine and dismiss the claim against the Third Parties.)
- [44] To succeed in negligence, a plaintiff must prove that:
1. the defendant owed him a duty of care;
 2. the defendant's behaviour breached the standard of care;
 3. the plaintiff sustained damage; and
 4. the damage was caused, in fact and in law, by the defendant's breach.

Mustapha v. Culligan of Canada Ltd., [2008] 2 S.C.R. 114, at para. 3.

- [45] While each of the four elements must be established in order for a claim to succeed, the parties focused their dispute on the second element, that is, whether the PCC breached the applicable standard of care.

[46] That question, whether the standard of care was breached, must be examined having regard to the following provisions in the Occupiers Liability Act, R.S.B.C. 1996, c. 337:

Application of Act

2(1) ... [T]his Act determines the care that an occupier is required to show toward persons entering on the premises in respect of dangers to them, or to their property on the premises, or to the property on the premises of persons who have not themselves entered on the premises, that are due to the state of the premises, or to anything done or omitted to be done on the premises, and for which the occupier is responsible by law.

...

Occupiers' duty of care

3(1) An occupier of premises owes a duty to take that care that in all the circumstances of the case is reasonable to see that a person, and the person's property, on the premises, and property on the premises of a person, whether or not that person personally enters on the premises, will be reasonably safe in using the premises.

(2) The duty of care referred to in subsection (1) applies in relation to the

(a) condition of the premises,

(b) activities on the premises, or

(c) conduct of third parties on the premises.

(3) Despite subsection (1), an occupier has no duty of care to a person in respect of risks willingly assumed by that person other than a duty not to

(a) create a danger with intent to do harm to the person or damage to the person's property, or

(b) act with reckless disregard to the safety of the person or the integrity of the person's property.

...

(4) Nothing in this section relieves an occupier of premises of a duty to exercise, in a particular case, a higher standard of care which, in that case, is incumbent on the person because of an enactment or rule of law imposing special standards of care on particular classes of person.

...

Application of Negligence Act

7 The Negligence Act applies to this Act.

Crown bound

8(1) Except as otherwise provided in subsections (2) and (3), the Crown and its agencies are bound by this Act. ...

[47] The Negligence Act, R.S.B.C. 1996, c. 333, named in s. 7 of the Occupiers Liability Act, provides in part, as follows:

Apportionment of liability for damages

1(1) If by the fault of 2 or more persons damage or loss is caused to one or more of them, the liability to make good the damage or loss is in proportion to the degree to which each person was at fault.

- (2) Despite subsection (1), if, having regard to all the circumstances of the case, it is not possible to establish different degrees of fault, the liability must be apportioned equally.
- (3) Nothing in this section operates to make a person liable for damage or loss to which the person's fault has not contributed.

...

Further application

8 This Act applies to all cases where damage is caused or contributed to by the act of a person even if another person had the opportunity of avoiding the consequences of that act and negligently or carelessly failed to do so.

[48] It is common ground that the PCC was the occupier of the plaza, the railing and the lamp post, and that they were premises within the meaning of the Occupiers Liability Act.

[49] Both the Plaintiff and the PCC rely on our Court of Appeal's decision in *Cempel v. Harrison Hot Springs Hotel Ltd.*, 1997 CanLII 2374 (BC CA), addressing liability under the Occupiers Liability Act. The defendant Harrison Hot Springs owned a natural pool of very hot water which was the source for its hot springs facilities. A structure consisting of a low wall and a fence in disrepair served as the barrier to the pool. One night, 16-year-old Ms. Cempel, in the company of friends, attempted to scale the wall and the fence to access the pool. When she was on the fence, it partly collapsed. She fell into the pool up to her waist and suffered serious burns.

[50] The trial judge apportioned liability 25% to Harrison and 75% to Ms. Cempel. On appeal, Lambert J.A. wrote the majority judgment. Esson J.A. agreed with him. They apportioned 60% of the fault to Harrison and 40% to Ms. Cempel. Southin J.A., writing in dissent, would have dismissed the plaintiff's claim on the ground that the wall and fence demonstrated that the pool was off limits.

- [51] David Mackey argues that Ms. Cempel assumed the risk associated with the fence being unable to sustain her weight, whereas David Mackey never assumed the risk that the lamp post was unstable. I note that in *Cempel*, Lambert J.A. found, at para. 13: "[T]hat the risk of falling into hot water was within the ambit of the general kind of risk the plaintiff chose to take."
- [52] The PCC, in response, argues that the plaza railing, including the baluster, was a solid and satisfactory protection against the danger of falling, contrasted with the rickety fence at the Harrison pool.
- [53] The reasoning of the majority in *Cempel* emphasizes the need to focus on the degree of fault, or blameworthiness, of each party, as opposed to the extent to which their conduct caused the accident:
- [18] ... I consider that the trial judge reached his conclusion on apportionment by deciding that the apportionment should be based on an assessment of relative degrees of causation as between the plaintiff as an active causative force at the moment of the injury and the defendant as a passive causative force at the moment of the injury.
- [19] I think that such an approach to apportionment is wrong in law. The Negligence Act requires that the apportionment must be made on the basis of "the degree to which each person was at fault". It does not say that the apportionment should be on the basis of the degree to which each person's fault caused the damage. So we are not assessing degrees of causation, we are assessing degrees of fault. In this context, "fault" means blameworthiness. So it is a gauge of the amount by which each proximate and effective causative agent fell short of the standard of care that was required of that person in all the circumstances.
- [20] The approach to apportionment that I have described is supported by the decisions of this Court in *Ottosen v. Kasper* (1986), 37 C.C.L.T. 270 (see particularly at p.277) and *Dao v. Sabatino* (1996), 29 C.C.L.T. 2d 62 (see particularly at p.75). In the *Ottosen* case the point was put in these words:

The words used are the words of fault. The question that affects apportionment, therefore, is the weight of fault that should be attributed to each of the parties, not the weight of causation.

See also G. Fridman, *The Law of Torts in Canada* (Toronto, Carswell: 1989) vol.I pp.384-385; L. Klar, ed. *Studies in Canadian Tort Law* (Toronto, Butterworth's: 1977) p.156; and D. Cheifetz, *Apportionment of Fault in Tort* (Aurora, Canada Law Book: 1981) p.100-101.

- [21] In *Clyke v. Blenkhorn* (1958), 13 D.L.R. (2d) 293 (N.S.C.A.), it was said at p.304 that the courts are "to see in what degrees the parties departed from the norm of reasonable conduct". In my opinion that is the same approach as was adopted by this Court in *Ottosen v. Kasper* and in *Dao v. Sabatino*.
- [22] So, with respect, I consider that the trial judge made an error in law when he apportioned fault on the basis that the plaintiff was "primarily the author of her own misfortune". ...

...

[24] In the apportionment of fault there must be an assessment of the degree of the risk created by each of the parties, including a consideration of the effect and potential effect of occurrences within the risk, and including any increment in the risk brought about by their conduct after the initial risk was created. The fault should then be apportioned on the basis of the nature and extent of the departure from the respective standards of care of each of the parties. In making that apportionment in this case I would apportion 60% of the fault to the defendant, Harrison Hot Springs Hotel, and 40% of the fault to the plaintiff, Cassandra Cempel.

[Emphasis in the original.]

[54] To that analysis should be added the observation of Finch J.A., as he then was, writing for the majority in *Alberta Wheat Pool v. Northwest Pile*, 2000 BCCA 505, at para. 46:

Fault or blameworthiness evaluates the parties' conduct in the circumstances, and the extent or degree to which it may be said to depart from the standard of reasonable care. Fault may vary from extremely careless conduct, by which the party shows a reckless indifference or disregard for the safety of person or property, whether his own or others, down to a momentary or minor lapse of care in conduct which, nevertheless, carries with it the risk of foreseeable harm.

[55] Pursuant to what is said in Cempel, I must therefore determine who, as between David Mackey and the PCC, was more at fault, more blameworthy, instead of determining whose conduct was more the cause of the accident. The PCC provided a safe railing, including the balusters, but with lamp posts on top that it never inspected and that it allowed to become extremely unstable. David Mackey got himself on top of the railing and swung on the lamp post in a dangerous location. Pursuant to my earlier finding, at paras. [24] and [25] above, he also probably heard the warning given to Ryan Ramsay, and should have heeded that. In my view, his conduct was more blameworthy than that of the PCC. The PCC however cannot escape liability. Although it provided a safe railing, unlike the defendant Harrison in Cempel, the PCC neglected entirely the maintenance of lamp posts in a prominent and central location, frequented by visitors of all ages. The PCC was at fault, but in my view, less so than was the defendant in Cempel.

[56] Both sides cited many authorities in addition to Cempel. Most of those, however, contained largely fact-driven analyses, applying what I will call the Cempel principle to the particular facts in each of the cases. In the result, I will endeavour to restrict the consideration of further authorities to those which, in my view, amplify the legal analysis in some respect.

[57] In *Bendzak v. Bohnet*, 2013 BCSC 435, two 13-year-old boys on a farm were requested by a parent of one of them to reposition the irrigation pipes. The boys also hunted gophers, and were paid a small bounty for killing them. When they were moving the pipes, the boys tilted a pipe upward to dislodge a gopher. The pipe contacted an overhead electrical line. The boys were seriously injured from the electric current. Schultes J., in finding the husband and wife

who owned and operated the farm liable to the plaintiff (one of the boys) under the Occupiers Liability Act, provided a survey of applicable law, which I respectfully adopt here:

[39] Section 3(1) of the Occupiers Liability Act requires an occupier of premises to take that care that is reasonable in all the circumstances of the case to see that a person on the premises will be reasonably safe in using the premises. This duty applies to, among other considerations, the condition of the premises and the activities on it.

...

[41] The standard of care set out in s. 3(1) is comprehensive, and it is not necessary to refer to standards set out in general negligence cases, as that is "likely to be more confusing than helpful in the analysis": *Weiss v. Young Men's Christian Association of Greater Vancouver* (1979), 11 B.C.L.R. 112 (C.A.) at 118; *Foley v. Imperial Oil Limited*, 2011 BCCA 262, at para. 62.

[42] The standard of care is one of reasonableness and not perfection. The occupier is definitely not an insurer against any possible risk of harm: *Carlson v. Canada Safeway* (1983), 47 B.C.L.R. 252 (C.A.); *Sulmona v. Serraglio*, [1986] B.C.J. No. 413 (C.A.).

[43] The duty is not to ensure that those using the premises will be absolutely safe but to use reasonable care to prevent injury or harm from danger that is or ought to be known: *Milina v. Bartsch* (1985), 49 B.C.L.R. (2d) 33 (S.C.), *aff'd*, 49 B.C.L.R. (2d) 99 (C.A.).

[44] The test is not "whether anything could have been done to prevent the injury using 20/20 hindsight, but rather whether the steps taken by the occupier were reasonable in all the circumstances": *Duddle v. Vernon (City)*, 2004 BCCA 390 at para. 16.

[45] Although it is not specifically mentioned in the section, the common law requirement of reasonable foreseeability of harm remains part of the analysis of liability under the act: *Rendall v. Ewert* (1989), 38 B.C.L.R. (2d) 1 (C.A.) at 9.

[46] For a risk to be foreseeable it is not required that it be more likely than not to occur or that there needs to be some particular degree of statistical probability attaching to it. In *Mustapha v. Culligan of Canada Ltd.*, 2008 SCC 27, at para. 13, Chief Justice McLachlan described the correct approach:

Much has been written on how probable or likely a harm needs to be in order to be considered reasonably foreseeable. The parties raise the question of whether a reasonably foreseeable harm is one whose occurrence is probable or merely possible. In my view, these terms are misleading. Any harm which has actually occurred is "possible"; it is therefore clear that possibility alone does not provide a meaningful standard for the application of reasonable foreseeability. The degree of probability that would satisfy the reasonable foreseeability requirement was described in *The Wagon Mound (No. 2)* as a "real risk", i.e. "one which would occur to the mind of a reasonable man in the position of the defendan[t] . . . and which he would not brush aside as far-fetched" (*Overseas Tankship (U.K.) Ltd. v. Miller Steamship Co. Pty.*, [1967] A.C. 617 (P.C.), at p. 643). [Emphasis in original.]

[47] It is also not necessary that the exact type of injury that occurred be foreseen. As Mr. Justice Dickson explained in *Assiniboine School Division No. 3 v. Hoffer* (1971), 21 D.L.R. (3d) 608 (Man. C.A.), at page 614:

It is enough to fix liability if one could foresee in a general way the sort of thing that happened. The extent of the damage and its manner of incidence may not be foreseeable if physical damage of the kind which in fact ensued is foreseeable.

[48] In *R. v. Côté*, [1976] 1 S.C.R. 595, at p. 604 Mr. Justice Dickson elaborated on this principle:

It is not necessary that one foresee the "precise concatenation of events"; it is enough to fix liability if one can foresee in a general way the class or character of injury which occurred.

...

[61] ... I do not think it is actually necessary to go so far as to find the Bohnets ought to have foreseen that the boys would gopher hunt by tipping up a pipe, although that is certainly within the reasonable range of activities that they might get up to. It is, rather, that with a highly dangerous power source 40 feet or less above them, with a means of making contact ready at hand, the Bohnets depended only on Connor's remaining within the four corners of the chore itself to keep him and Tanner safe, despite the self-evident immaturity and unpredictability that are attributes of children of that age.

[62] I think that represents a real risk, one that a reasonable person would regard as anything but farfetched. It is an example of a possibility of serious harm, one that would occur to the mind of a reasonable person. ...

[58] I cite just two further authorities in addressing liability, both decided by our Court of Appeal. In *Sall v. Coquitlam School District 43*, [1996] B.C.J. No. 2768 (C.A.), the 21-year-old plaintiff climbed onto the roof of a school to retrieve a soccer ball. He fell and injured himself severely. There was no defect in the roof. The Court of Appeal upheld the trial judge's summary dismissal of the plaintiff's claim. Lambert J.A. wrote reasons. Esson J.A. agreed with him, but also added his own reasons. Finch J.A., as he then was, agreed with the reasoning and the conclusions of both the other judges. The point David Mackey makes from *Sall* is that there was no defect in the school roof, contrasted with the defect in the lamp post. Esson J.A. addressed that at para. 15 of the reasons:

The risk that eventuated here was that of falling from the flat roof. There is no indication in the evidence of any particular risk in the nature of a hazard on the roof other than the risk inherent in every flat roof, that of falling off the edge. The plaintiff cannot explain why it happened to him on this occasion out of the many others on which he was up there. That absence of hazard distinguishes this case from all of the other cases which have dealt with the matter of liability to trespassers such as the decision in the Supreme Court of Canada in *Waldick v. Malcolm*, (1991) 83 D.L.R. (4th) 114.

- [59] Finally, I refer to *Paquette v. School District No. 36 (Surrey)*, 2014 BCCA 456, which relied on *Cempel*. In *Paquette*, a 12-year-old boy climbed a cherry tree to gain access to a school roof. He jumped or fell from the roof to avoid being caught, and injured himself severely. The trial judge found the defendant School Board 75% liable and the boy 25% liable. The Court of Appeal upheld that finding. The School Board knew of the risk and was at fault under the Occupiers Liability Act for allowing the cherry tree to grow too close to the school, without trimming it in order to control access to the roof, or without installing a guard of some sort to serve the same purpose. At para. 26 of its reasons, the Court cited one of its earlier decisions as authority for the point that the age of a young plaintiff in a negligence action can affect the apportionment of fault as between a plaintiff and a defendant. As I noted earlier, David Mackey was nearly 18 at the time of the accident.
- [60] When applying the provisions of the two statutes, the Occupiers Liability Act and the Negligence Act, as they have been considered in *Cempel*, *Bendzak*, *Sall* and *Paquette*, cited above, I find the PCC to be 35% at fault and David Mackey to be 65% at fault for the accident. David Mackey was nearly 18. He mounted a safe railing where there was a dangerous drop below. He had probably also heard Ms. Arner's warning to Ryan Ramsay. On the other hand, the PCC had neglected entirely the adequate, or indeed any, maintenance of the lamp post, apart from subcontracting an annual paint job. The lamp post, on top of the railing, was its own accident waiting to happen. As noted earlier, it could have been pushed over by a force of only 12.5 pounds.

The Claim Against the Third Parties

- [61] Implicit in the conclusions above is a finding that the Third Parties are not liable. In my view, they behaved reasonably throughout. To employ the reasoning from *Cempel*, they were not at fault.
- [62] At the time of the accident, all of the chaperones were probably on the plaza. Clearly, Ms. Arner and Ms. Spiesman were. Earlier, when some of the students approached the plaza, ahead of the others, the chaperones always had them in sight.
- [63] Chaperoning 10-year-olds might have called for closer supervision than the chaperones exercised here, but the students were not 10-year-olds; they were all about 16 or 17. David Mackey was nearly 18.
- [64] When Ryan Ramsay was seen on the baluster, or descending from it, Ms. Arner immediately spoke to him. David Mackey was standing beside Ryan Ramsay at the time. The chaperones cannot be held as guarantors for the students' welfare, and that is particularly so for older students, such as these.

- [65] All the chaperones were mothers. Their own children were on the trip, in their care. One of the chaperones testified that she tried to be especially vigilant because she was looking after children who were not her own, in addition to looking after her own daughter. As I noted earlier, the two chaperones who testified at trial, Ms. Spiesman and Ms. Arner, impressed me as being sensible and responsible people.
- [66] Ms. Arner has another daughter who is three years older than the one who was with her on this trip. Ms. Arner taught elementary school for 35 years and high school for one. She had served as a chaperone on two previous trips for this choir, one to New York City and one to Disneyland in California.
- [67] Ms. Spiesman is a mother of three. Her daughter on the trip is her middle child. Ms. Spiesman had been a kindergarten teacher. She sat with David Mackey at dinner on the evening of the accident. She found him to be well-mannered and well-behaved. Other witnesses gave similar evidence about David Mackey on the trip. In other words, he was not someone who required particular monitoring.
- [68] From all the evidence, in my view, it would have been difficult to find chaperones better suited to the task than the five who came on this trip. The PCC stressed that the guidelines for Paradise Valley High School trips called for male chaperones to be included when there were male students on the trip. However, the evidence addressing the gender of chaperones generally had more to do with them being able to properly supervise in the students' bedrooms at night. In my view, the absence of a male chaperone had nothing to do with the accident.
- [69] The PCC submits that safety was not adequately addressed in meetings before or during the trip. It appears to be correct that there was little in the way of formal consideration of safety. It does not follow, however, that the chaperones, or the planners, neglected their responsibility to protect the students' safety. Evidence of discipline being maintained on the trip is found in one of the students having been sent home from Vancouver for missing curfew. That was not necessarily a matter of safety, at least not directly, but the response to the incident is indicative of a sense of responsibility on the chaperones' part.
- [70] The PCC called Stewart Ladyman as an expert witness addressing safety for school field trips. Mr. Ladyman was a long-time educator in this province, now retired. He was a candid witness who responded directly and honestly to the questions put to him in cross-examination. Taking his evidence as a whole, I do not find that it supports the PCC's case against the Third Parties.
- [71] Mr. Ladyman accepted that the correct legal test for assessing the responsibility of a chaperone is that of a careful and prudent parent (per *Myers v. Peel County Board of Education*, [1981] 2 S.C.R. 21, pp. 31-32). He said that there are three levels of supervision for chaperones, being, from highest to lowest, constant visual supervision, on-site supervision and "in the area" supervision. In a guideline published in 2005, which Mr. Ladyman referred to as part of his testimony, in-the-area supervision is defined to mean, "that while any

supervisor may not be able to see all of the students at one time, the students know where the supervisors are and can contact one if necessary. Example: Geography students mapping a forested park area are out of sight for periods of time." The criteria for deciding which level should apply include the location, the age of the students and the type of activity. Mr. Ladyman accepted that students coming from an urban setting require less supervision when visiting an urban setting than would students with only a rural background. He accepted as well that the lowest of the three levels of supervision was the one called for on the facts of this case. From the evidence before me, the chaperones achieved that level of supervision at the time the accident happened, and throughout the trip generally.

- [72] To summarize, in my view, the Third Parties complied with the standard of care required of them, and are not at fault.

Expert Evidence for Assessing the PCC's Conduct

- [73] Finally, in regard to liability, the PCC submits that the Plaintiff was required to present expert evidence about the standard of care to be employed in maintaining the lamp posts. Neither side presented such evidence. (Ironically perhaps, the PCC objected to even the Bailey report being admitted, in part with the argument that anyone can see if something is rusted.)
- [74] I do not accept the PCC's submission that further expert evidence was needed. In my view, a court, after hearing evidence such as that tendered by Mr. Bailey and the three former PCC employees, and seeing the related photographs, is capable of deciding whether the PCC met an acceptable standard of care, without requiring the assistance of further expert evidence.
- [75] The PCC cited numerous cases addressing the standard of care in professional negligence claims, the findings of which, generally speaking, were that expert evidence is ordinarily required for determining whether a standard of care was satisfied. Many of the decisions the PCC cited addressed negligence claims against professional home inspectors. However, the PCC conceded that expert evidence is not required when a court is addressing matters of which an ordinary person may be expected to have knowledge, or when the defendant's actions, or inactions, are such that it is obvious the conduct has fallen short. In my view, both of those exceptions have application on the facts of this case.

Conclusions Regarding Liability

- [76] I have found (above at para. [60]) that the PCC is 35% at fault and David Mackey is 65% at fault for this tragic accident. Liability is apportioned accordingly. The Third Parties are not liable.

DAMAGES

Introduction

- [77] Is there a real and substantial possibility that David Mackey would have become an orthopedic surgeon had he not had the accident? The Plaintiff says yes. His counsel asserts that he was a young man with exceptional potential. The PCC says no, relying substantially, but not exclusively, on David Mackey's school marks, which were only average, and which, at least in high school, were often in relatively easy, non-academic subjects. The PCC similarly points to his low scores in school admission tests.
- [78] The second question, closely linked to the first, is how much David Mackey's earning capacity diminished because of the accident. His counsel submits that the accident ruined his career chances, and that he is now confined to working for low wages. The PCC submits, to the contrary, that from the accident, there is not a great difference in the Plaintiff's earning capacity, that he had relatively modest employment potential before the accident, which he largely maintains today.

A Comment About the Evidence for Assessing Damages

- [79] The best evidence of David Mackey before and after the accident came from his family and family friends. His father and mother, one of his sisters, and two of his brothers testified. The Court also heard the testimony of Mrs. Fawn Lazenby, a family friend, and of Joseph Collins, who had been David's scoutmaster and Sunday school teacher. All of those witnesses made a favourable impression when they testified. They were articulate. They did not appear to overstate David's capacities and achievements before the accident, or the extent to which his opportunities are diminished as a result of it. Of course, all of them, through their testimony, wanted to assist the Plaintiff, but I found them to be restrained and measured in their testimony nonetheless.
- [80] David Mackey had some difficulties in giving his evidence, sometimes having an incomplete or no recollection of events, and sometimes lacking the ability to formulate responses promptly. He sounded much younger, less mature, than a 27-year-old. From all the evidence at trial, some of which will be referred to later in these reasons, I have concluded that his impairments in testifying were the result of the accident. None of his impairments, however, undermined his integrity as a witness.
- [81] The PCC sought to portray David Mackey before the accident as having had psychological shortcomings. That portrayal, however, is not consistent with the description of him before the accident given by his family and friends, and by expert witnesses who testified on his behalf. Overall, I preferred, as being more accurate, the description of the Plaintiff pre-accident as given by the witnesses called on his behalf.
- [82] There are, in evidence, hundreds, if not thousands, of pages of psychiatric and psychological test results, studies, interviews and reports of David Mackey, to describe him at every stage of his relatively young life. Sentences can be selected in isolation from all that data to paint differing and somewhat contradictory portraits of the Plaintiff before his accident. The

Court's task, of course, is to assess all the evidence, and view it in its full context, in order to determine what should be accepted and preferred for getting at the truth. The defence experts were sometimes unable to give an accurate description of the Plaintiff and his condition. They had far less opportunity than the Plaintiff's family, friends and experts to interact with the Plaintiff in order to learn the full picture. The defence experts were usually confined to having had one, or perhaps two, relatively brief meetings with him. Further, in their reports, they were often relying on factual assumptions which were not supported by the evidence as a whole.

David Mackey Before the Accident

- [83] David Mackey's biological mother, Cynthia, was diagnosed with cancer during her pregnancy with him. David was born several months pre-mature, by caesarian section. His mother died the day he was born, April 21, 1989. He was the youngest of nine children by Cynthia and James Mackey.
- [84] The Plaintiff, and all his siblings, have been raised in the Mormon faith. His mother, Cynthia, was Mormon, and his father, James, was raised and lives as a devoted Mormon. James Mackey remarried. His second wife, Eileen, is the only mother David Mackey has known. She too is Mormon. From her previous marriage, she brought six children to her marriage with James Mackey, and she and James Mackey have had four more children. David Mackey, therefore, is one of 19 siblings. All the family live within the Mormon faith, in The Church of Jesus Christ of Latter-day Saints.
- [85] The Mormon faith, and the Mackey family's devotion to it, form an important backdrop to David Mackey's claim. The Mormon faith places strong emphasis on education. All of David Mackey's eight, older, full siblings are well educated. Morgan, his oldest brother, is a doctor, practising in Oklahoma City. Amanda, his oldest sister, who testified, has a Bachelor of Science degree and a law degree. At the time of trial, she had just written her bar admission exam. She is a teacher. The other six older siblings all have at least an undergraduate degree and three of them have graduate degrees. Of the five, older, full siblings closest to him in age, one is an engineer and two are dentists. The one closest to David Mackey in age is trained as an accountant, with an undergraduate degree in accounting, but she is married and is not practising. The two brothers who testified, Trevor Sexton (David's step-brother), and Jacob Mackey (David's full sibling), are a doctor and a dentist respectively. James Mackey's brothers are also professionals or successful in business. James Mackey himself inherited the family plumbing business and did not want his children pursuing that work. He has drummed the pursuit of higher education into all his children throughout their upbringings. It is only reasonable to conclude that in the home where he grew up, David Mackey was expected to achieve a substantial education. As the evidence will show, that was also part of his own plan before the accident.

[86] David Mackey's friends before the accident also later achieved academic success, as will be seen below.

[87] David Mackey excelled in extra-curricular activities.

[88] He became an Eagle Scout, the highest achievement possible in American scouting. His largest project in scouting, completed in August 2006, was to organize, supervise, and arrange to finance, the construction of saw horses to be used by Habitat for Humanity. He recruited about 20 friends and family for the project, which he designed, administered and successfully completed.

[89] In the course of his scouting, the Plaintiff was required to describe his ambitions and life purpose. He wrote the following, unassisted, in August 2006, less than a year before the accident:

A. Briefly describe your ambitions and life purpose.

1. Ambition - My ambitions in life are to finish high school and leave at a good note. After that I will have the opportunity were [sic] I will go to college. I will go to a community college for one year, then I will leave on my mission for two years. When I have honorably returned from my mission for my church I will directly go to college and work my way to become an orthopedic surgen [sic]. During this time I will be looking for a wife and hopefully get married and raise children. I want to watch my children grow up righteously and into good people.
2. Life Purpose - My life purpose is to serve my community and my church. Also it is to raise children righteously and to share my talents. I have to endure to the end and to become like Jesus Christ!

All the ambitions expressed there are emphasized in the Mormon faith; higher education, community service, marriage and raising children.

[90] David Mackey became focused on orthopedic surgery when he broke his wrist at the age of 12. He was impressed by how the orthopedic surgeon looked after him. He began to research orthopedic surgery. He read that a popular hobby for orthopedic surgeons is woodworking. That is why he adopted woodworking as his own hobby. He became an accomplished woodworker, winning a prize for furniture he built, which is now in the family home.

[91] A school counsellor, in the fall of 2005, noted that David wanted to be a doctor, and that he would first undertake his mission.

[92] David Mackey was the captain of the high school wrestling team. In his senior year, in the Arizona state-wide competition, where over 100 schools participated, he stood 6th in his weight class.

- [93] He was a gifted musician, both as a pianist and a singer. Ms. Segall, the choir teacher and leader of the trip to British Columbia, encouraged David to join the choir because of his talent.
- [94] The Mormon faith is strict in prohibiting the use of alcohol and recreational drugs. David Mackey has never taken either.
- [95] On Sundays, David normally went to church for three to four hours, attending service and helping others. For four years, he attended seminary before school, for an hour every weekday morning, beginning at 6:15 a.m.
- [96] David Mackey had, and continues to have, a high I.Q. His impairments from the severe traumatic brain injury suffered in the accident have more to do with the loss of what is called executive function than with any substantial diminishment of intelligence. His I.Q., measured seven years after the accident, places him in the 97th percentile for non-verbal intelligence, the 91st percentile for composite memory, the 87th percentile for composite intelligence, and the 73rd percentile for verbal intelligence. Not surprisingly, the expert evidence uniformly supported the view that the accident, if it affected his I.Q., could only have lowered it, not raised it.
- [97] David Mackey's marks and school admission test results before the accident will be addressed later in these reasons, under a separate heading. His marks generally, as noted above, were average. The PCC rests a substantial part of its case on that. Apart from average marks, however, David Mackey was exceptional in his achievements. The evidence, taken as a whole, also shows that he was a generally well-adjusted, polite and popular teenager. He worked hard and well in his summer jobs, he generally did his chores at home and he was close to his large family. I noted earlier that the PCC submits David Mackey had psychological shortcomings in his teenage years. It submits, for example, that he was cocky or somewhat overconfident. If that was so, and if the evidence also shows that he later could have become a surgeon, he would not have been the first surgeon in history who was overconfident while growing up. But the larger point is that the evidence, taken as a whole, did not reveal a significant psychological problem of any kind in David Mackey's makeup as a teenager. No one is perfect, especially teenagers perhaps. The personality traits David Mackey exhibited as a teenager, in my view, fit well inside the realm of normal teenage behaviour.
- [98] Joseph Collins, named earlier, testified as David Mackey's former scout leader and Sunday school teacher. Today, he is a lawyer practising in Phoenix. He described David Mackey as having been bright, driven and goal-oriented, with a strong work ethic. He also spoke of David Mackey's strong faith and dedication to the church. David had told Joseph Collins before the accident that he was planning to become an orthopedic surgeon. Mr. Collins also testified about David's good nature and popularity among his friends.

- [99] David Mackey's ambitions, in August 2006 (see para. [89] above), were to attend community college for one year after high school, followed by a two-year mission and then undergraduate studies en route to professional school. Those were all the steps most of the older Mackey children had taken in their careers. It was relatively easy to be accepted in community college, where formal school admission tests were not a pre-requisite.
- [100] The mission is a vital step in a Mormon's upbringing. From the evidence, I gather the mission is undertaken by both young men and young women. Clearly on the evidence, for the young men, it is an essential part of maturing while giving community service. The applicant for a mission, once approved by the church, is accepted in order to devote himself, or herself, to teaching the Mormon faith and to helping others for two years. Missions can be served in South America, Europe and elsewhere. Mission life is rigorous. A missionary rises early and works hard throughout the day. He, or she, lives modestly. He, or she, may phone home only twice yearly, on Christmas day and Mother's day. I will address David Mackey's own missionary work in the next part of these reasons.

David Mackey After the Accident

- [101] David Mackey's fall, from the baluster to the concrete walkway, was two storeys, approximately 30 feet. He suffered severe traumatic brain injury, with damage to his frontal and temporal lobes. When the Plaintiff's father arrived in Victoria after the accident, the doctors were uncertain whether David Mackey would survive. He remained in a coma for the first week. On April 13, he was transferred by air ambulance to the Barrow Neurological Institute at St. Joseph's Hospital in Phoenix.
- [102] From the accident, David Mackey was permanently injured. Most of the expert evidence at trial supported the view that whatever recovery occurs after severe traumatic brain injury comes within the first two or three years.
- [103] David Mackey today sounds considerably less mature than a 27-year-old, both in the way he speaks and in what he says. His mother, Eileen Mackey, gave her assessment of David Mackey's apparent age from the time of the accident until now. (Mrs. Mackey took David into her house, and her care, at his birth, even before she married James Mackey.) When she was with the Plaintiff in Victoria, after he regained consciousness, she testified that he seemed like a two-year-old or a three-year-old. He was "four" or "five" when he was at the Barrow Neurological Institute and "six" when he was discharged. By February of 2008, when he was admitted to CTN (see below) he was "nine" or "ten". When asked about the seeming contradiction of the Plaintiff achieving high marks in his studies after the accident (also see below), Mrs. Mackey replied that, "Yes, in some things, he was like an 18-year-old, in others like an eight-year-old." When the Plaintiff completed CTN, she said he was "12" or "13", and that he has remained there; he left for his mission as a "13"-year-old (aged 21) and returned as a "13"-year-old (aged 23). That is the mother's assessment of her son.

[104] David Mackey has lost his friends from before the accident. Mrs. Fawn Lazenby described the close relationship between the Mackey and the Lazenby families, who lived near one another. She knew David Mackey from his birth. She saw him almost daily throughout his upbringing. Her son Chase was David Mackey's close friend. Two of Mrs. Lazenby's older sons, David and Christopher, were, and remain, close friends of two of the Plaintiff's older brothers, Orrin and Jacob. David Lazenby is now in his final year of his four-year residency in trauma emergency medicine. Christopher Lazenby is a lawyer. The Plaintiff's brothers, Orrin and Jacob, are both dentists. David Mackey's boyhood friend, Chase, is now in his third year of medical school. Chase Lazenby and David Mackey rarely communicate now. Before the accident, they had everything in common, but today they have nothing to keep them close. When they are together, Chase Lazenby feels like David Mackey's babysitter. Today, David Mackey is able to form friendships with only young children. Trevor Sexton, an older step-brother of the Plaintiff, gave the following testimony of his time as David Mackey's personal counsellor during the summer after the accident:

I had to get comfortable with a new personality in my brother. I had to explain to people why he was wearing a helmet and why he would say things that made other people uncomfortable ... Most of the time he was like a sweet, childlike person which was quite endearing to everyone that met him but estranged him from his close friends who didn't appreciate his "truthfulness to a fault." It was sad to see a lot of his old friends who didn't know how to handle him. He was kind of all alone.

[105] The Plaintiff's friends and family, named above at para. [79], told largely the same "before and after" story of David Mackey's life. Before and after the accident, he was a hard worker. Before, however, he could take charge of work situations and exercise judgment as to the required sequence of the tasks to be undertaken. After, as his work record demonstrates (see below), he is capable of only low-wage, repetitive work, requiring no initiative.

[106] Today, David Mackey is impulsive and gullible. He is candid to a degree that is socially unworkable. As Mrs. Lazenby put it in her testimony, his filter is gone. He embarrasses himself by asking people in public about deeply personal matters. His family are concerned that this will lead to misunderstandings resulting in the Plaintiff being hurt physically as well as emotionally. In the courtroom, David Mackey appeared to be gentle, amiable and child-like. While his I.Q. appears from testing to be largely undiminished, he demonstrates, by what he is now lacking, how much else is required in a person's makeup, in addition to I.Q., in order to lead a conventional and professionally successful life.

[107] The full picture of the Plaintiff's condition is perhaps not as one-sided as the facts set out above might suggest. For example, he married in July 2013, and he and his wife, Emma, had a boy in 2014 and a girl in 2015. He is able to drive a car. His piano playing ability came back relatively soon after the accident. But none of those achievements, substantial though they are, overcome the reality that David is now very immature, and unable to work in jobs requiring significant executive function, intellectual dexterity, and full emotional stability.

- [108] While the findings above are drawn largely from the evidence of the lay witnesses named earlier, many of the expert witnesses, whose evidence is discussed later in these reasons, corroborated those findings.
- [109] As noted earlier, after the accident, David Mackey was eventually moved by air ambulance from the hospital in Victoria to the Barrow Neurological Institute at St. Joseph's Hospital in Phoenix. He was there for about three weeks and then sent home.
- [110] In February 2008, he was admitted to the Centre for Transitional Neurorehabilitation (CTN) in Phoenix. He had the good fortune there to come under the care of Dr. Pam Klonoff, a clinical neuropsychologist who specializes in rehabilitating brain-injured people. David Mackey attended CTN, as a day patient, from February 2008 until his discharge on May 26, 2009.
- [111] CTN is funded by the Arizona government. It was established and operates to assist brain-injured people in their recovery, with a view to them becoming employable at their maximum potential. At CTN, Dr. Klonoff, and many other specialists, worked intensively with David Mackey and his family.
- [112] The Plaintiff took community college courses, both while attending CTN and in the years following. He benefitted from accommodations while writing the exams for those courses, such as having longer times for writing the exams, and he generally did well academically.
- [113] Because of his brain injury, David Mackey and his family, and his church, were uncertain whether he was capable of going on his mission. In July 2009, he therefore went on a shortened mission, of only three weeks, not far from Phoenix. In December 2010, he went on the two-year mission. He served that within the United States, in Minnesota, to ensure that he could always obtain two medications he had been prescribed to address depression and impulsiveness, which he experienced periodically as a result of the accident. He received psychological and psychiatric treatment during his mission. He encountered difficulties but generally performed adequately, and received a glowing certificate of discharge when the mission concluded, late in 2012.
- [114] Throughout his time since the accident, David Mackey from time to time has expressed career ambitions which are beyond his capacity. In about 2009, he decided he wanted to become a nurse as a stepping stone to studying and practising medicine. He took courses at a community college as preparation for nursing school. However, at least three doctors advised David Mackey and his family that he was not capable of nursing. One of those doctors worked on behalf of the Arizona state government, and his opinion resulted in there being no state funding available for the Plaintiff's nursing education. His family decided to bear the nursing tuition costs and let him try. He passed the courses in first year, albeit with accommodations, but he was told in the second year he could not continue in the program unless he repeated a semester. He felt overwhelmed, and was incapable of carrying on. He withdrew from nursing.

- [115] The Plaintiff's work history since his accident demonstrates his incapacities. While he has approached jobs with enthusiasm, he has succeeded only in basic, low-paying jobs, when the work has not required decision-making or mental agility. The defence submits that the Plaintiff's post-accident work history shows he is reasonably capable of relatively high-level employment. The facts, however, do not support that submission.
- [116] The staff at CTN helped David Mackey get a job at Safeway early in 2010. He kept that job until he left on his two-year mission. At Safeway, he carried grocery bags to people's cars. He got a job in the meat department as well. After his mission, early in 2013, the Plaintiff worked as a stock clerk, between 30 and 35 hours a week, at a business called Honeyville Farms. In 2014, following his unsuccessful attempt to become a nurse, he worked for Valley Interiors, a company owned by the Lazenby family in the business of renovating hotels. The Plaintiff earned \$12 an hour in that work. Mrs. Lazenby described his diminished working capacity resulting from the accident because she had seen him work at Valley Interiors before and after the accident. The Plaintiff quit Valley Interiors in the fall of 2014 to work for a company called Dry Force, where he first earned \$14 an hour and eventually \$17 an hour, until he was laid off in December 2015. At Dry Force, he answered phones and performed low-level clerical work. After his lay off, he applied to become a police dispatcher, where he would have earned \$18.25 an hour, but he was overwhelmed with stress and anxiety while processing sample incoming calls. He applied for other jobs after that, all of which were low paying. Eventually, in March 2016, the Plaintiff was hired for his present job, installing vanity tops, where he is paid \$6 per top, and installing cabinet door handles, at 25¢ a piece.
- [117] The PCC submits that the Plaintiff's work record after the accident shows his capacity to be permanently employed. The evidence does not support that conclusion. His work history since the accident has been irregular. The other important question is the quality of his post-accident employment. The PCC submits that the Plaintiff can obtain at least somewhat better employment than he has to this point, and that there is little, if any, difference between his job prospects before and after the accident. I cannot accept either of those submissions. The Plaintiff is doing the best he can. He is not capable of better-paying or more demanding work. If he was, that is what he would be doing. It is true that his jobs today are similar to those he had while he was in high school, but he was 17 or younger then, and he is 27 today. But for the accident, David would not now be in the low-paying job market he has occupied in the past six or seven years, and will continue to occupy.
- [118] Before turning specifically to the Plaintiff's academic history, I set out here a paragraph from his counsel's closing argument, describing his ongoing and permanent cognitive and, more particularly, psychological and behavioural deficits. The evidence from the lay witnesses, above, and the expert witnesses, whose testimony will be addressed below, establishes that these deficits are present:
- personality change due to brain injury;

- executive function disorder, including deficits in planning and problem solving, decision-making, flexible thinking, organization, priority setting and ranking, initiation and follow through, seeing the big picture, multi-tasking, strategy generation, judgment and time management;
- decreased impulse control and inhibition;
- low frustration tolerance;
- mood lability with episodes of depression, anxiety and possibly hypomania;
- social inappropriateness or lack of "cuing";
- decreased attention concentration;
- perseveration [repetitive response despite the cessation of the stimulus];
- long-term memory and verbal memory problems;
- problem with self-regulation physically (does not recognize when overheated or cold), mentally and socially;
- dependence on parents, wife and other family members;
- financial mismanagement; and
- decreased awareness of ... psychological deficits.

David Mackey's Academic Record

- [119] The Plaintiff's school marks call for consideration under a separate heading because they were a primary focus of the defence in the damages analysis. The Court was shown the Plaintiff's every grade in high school, and many of his results from earlier years. His marks were average, mostly Bs, with some As and some Cs. (He received a D in music theory, despite his high musical aptitude, because he skipped a number of music classes.) A number of his better high school marks were in easier courses. Also, in 2006, the year before the accident, the Plaintiff had mixed results in the ACT (American College Testing) score and the SAT (formerly called the Scholastic Assessment Test) score. The Plaintiff's score in the ACT placed him in the 73rd percentile in science and the 69th percentile in mathematics, but only in the 49th percentile in his composite score. His SAT score placed him in the 36th percentile in math and the 32nd percentile in critical reading among all high school "college-bound seniors" in the nation. (The evidence is uncontradicted that the SAT and other similar admission tests can be re-written. An expert witness for the PCC recalled knowing a woman who wrote the MCAT, for medical school, eight times before succeeding.)
- [120] From the Plaintiff's academic results in high school, the PCC asks me to conclude that the Plaintiff never could have become a doctor.

- [121] James Walter was an informative witness in addressing whether the Plaintiff would have been able to get into medical school, and later obtain a residency position.
- [122] Mr. Walter is the Director of Admissions at Midwestern University in Phoenix. Midwestern University offers 13 programs in various medical fields. The PCC called Mr. Walter and I qualified him as an expert on the question of admission to medical school.
- [123] Mr. Walter was unbiased. He fulfilled the duty of an expert witness to assist the Court without regard to which side called him. In my view, his testimony, taken as a whole, was more helpful to the Plaintiff than the defence. (As was the case for other defence experts, Mr. Walter had been given factual assumptions for his written report which, in the end, were not entirely supported by the evidence.) Set out below are the Plaintiff's written submissions summarizing the Walter testimony, which I adopt. The underlining is mine:
241. Although Mr. Walter's report (Ex. 31, Tab 10) deals with admission to Allopathic Medical Schools, Mr. Walter himself is the Director of Admissions to an Osteopathic Medical School. Coincidentally, David's brother Morgan Mackey attended the school where Mr. Walter works.
242. Mr. Walter's opinion (from his report) can be summarized as follows:
- (a) Medical Schools do not take high school marks or test results into account.
 - (b) Mr. Walter simply took David's high school marks and test results and extrapolated them out to undergraduate GPA and MCAT scores, (i.e. assuming the same level of performance).
 - (c) Based on Mr. Walter's extrapolation, David would have had an undergraduate GPA of 3.00 and an MCAT score of 23 - 25.
 - (d) The student average for entry into the University of Arizona was a 3.6 GPA and a 30 MCAT. Hence, David would have had a difficult time getting into Medical School.
 - (e) After medical school, entry into an Orthopedics Residency would be subject to an application and matching process. The ratio of residency positions per applicant is .7. (Mr. Walter mistakenly interpreted that figure as representing a 7% chance of obtaining a residency position. In fact, it represents a 70% chance of obtaining a residency position in Orthopedics (Ex. 25 and 26).
246. Mr. Walter accepted with the following facts from Ex. 24, pp. 1 and 4:
- (a) Acceptance rates range between 31% and 36%:
 - (i) 2012: 5,327/14,945 were accepted (36%)
 - (ii) 2015: 6,392/20,447 were accepted (31%);
 - (b) The majority of applicants had undergraduate majors in the life sciences;
 - (c) Average GPA was between 3.42 and 3.47. However, Mr. Walter testified that if students had a science degree, then the average was slightly lower;

- (d) Average MCAT scores were between 25 and 26;
- (e) The Tables at pp. 4 and 5 of Ex. 24 show the following:
 - (i) At p. 4: Although the mean GPA was between 3.42 and 3.44, the standard deviation was ".35". Hence, the GPA of the majority of acceptees fell in a range from 3.03 to 3.79. (David's high school GPA that Mr. Walter extrapolated was actually 3.094.)
 - (ii) At p. 5: Although the mean MCAT score ranged from 25.73 to 26.38, the standard deviation was between "4.17" and "4.26". Hence the MCAT score of the majority of acceptees fell between 22 and 30. As noted, David's SAT and ACT scores extrapolated by Mr. Walter, were in the range of 23 - 25.)
- 247. Using Mr. Walter's "extrapolation" method (assuming no increase in David's grades or test results after high school), David would have been within the group that was admitted to an Osteopathic medical school between 2012 and 2015. Of course, we say that David's marks would have increased significantly in college as he applied himself, matured and learned the habits taught while on a mission. Given David's high I.Q. and work ethic, significantly improved marks were, we say, a certainty.
- 248. Mr. Walter testified that students who apply to Osteopathic medical schools also apply for Allopathic schools. In discussing Mr. Sims' evidence we analysed the statistics regarding admission to Allopathic Medical Schools. Exhibit 18 showed an overall acceptance rate of 44%. Based on Ex. 18, for the year 2014 - 2015, there were 49,474 applicants and 21,355 acceptees. We note the following:
 - (a) If we combine the total number of spaces available in both Allopathic and Osteopathic medical schools using 2015 figures from Ex. 18 and 24 (21,355 + 6,392), then the total is 27,747 available spots.
 - (b) If we assume that the same cohort of applicants applied to both types of schools in 2015 (i.e. assume that the same cohort of people applying to Osteopathic schools in 2015 also applied to Allopathic schools), then the total number of applicants was still 49,474 (Ex. 18 Total Applicants to Allopathic schools in 2014-15.) On that basis there were 27,747 spots available for 49,474 applicants.
 - (c) On that basis, 56% (a comfortable majority) of applicants were accepted into one of the two types of schools.
- 249. The entirety of Mr. Walter's statistical analysis was performed on the basis that David's marks would not have improved in college. We know for a fact that (even with his brain injury) his marks did improve when he went to college (with accommodations and with the CTN program acting as his frontal lobe).
- 250. We know that David had a high I.Q., strong motivation and a great work ethic. Given these factors it is near a certainty that he would have obtained entry into medical school (even if one ignores his siblings' accomplishments and family expectations).

251. Mr. Walter then testified about other factors that would be considered in an application for admission to Midwestern's medical school. We say that all of these factors would have worked strongly in David's favour:
- (a) A reference by a parent of close family member who was an alumnus (Morgan Mackey is an alumnus).
 - (b) A key element of the application and the interview relates to community service. Mr. Walter said that they are interested in people who have "actually done" things, as opposed those who "talk about" doing things.
 - (c) In the interview, schools are looking for well-rounded individuals and applicants with diverse interests such as music and athletics would be viewed more favourably.
 - (d) They want students who can relate to other people and who approach medicine from the position that they want to help people, not from the position of helping themselves.
 - (e) They put more weight on a science undergraduate degree and the GPA of science students who were accepted was lower than the general GPA.
 - (f) They put more weight on the third and fourth years of the undergraduate degree. They recognize that students may be finding their way in the first couple of years.
 - (g) Midwestern has a disproportionate number of Mormon male medical students. Mr. Walter noted:
 - (i) The men usually have families to support by the time they get to Medical school. They are interested in a profession that will support their families at a high income level.
 - (ii) The applicants have usually returned from their Mission. The school considers the Mission to represent 2 years of intensive service to the community. In that respect, the Mormon candidates are substantially ahead of the average candidates.
252. Mr. Walter then discussed the application process for residency programs following graduation. He had researched the issue by reviewing an analysis contained in a document called "The Match" for the years 2014 and 2015. This document contains statistics derived from the computer matching of medical school graduates to residency programs. "The Match" document contained the statistics contained in Ex. 25, 26 and 27.
253. In 2014 (Ex. 25):
- (a) There were 695 "Positions Offered" for First Year Orthopedic Surgery residents.
 - (b) The total number of applicants was 994 consisting of 838 graduates of US Medical schools and 156 "Independent Applicants". The 838 figure is 648 + 190 taken from the "Matched and Not Matched" columns.

- (c) Overall the acceptance rate for Orthopedic residency positions was 70% (695 positions with 994 applicants).
- (d) The acceptance rate for US medical school graduates was 77% (648 acceptances out of 838 total applicants).
- (e) Similarly, in General Surgery, .871 US graduates obtained positions while 158 did not (an acceptance rate of over 84%).

254. In 2015 (Ex. 26) the data is slightly more detailed:

- (a) There were 703 "Positions Offered" for First Year Orthopedic Surgery residents.
- (b) The total number of applicants to Orthopedics positions was 1062 consisting of 885 graduates of US Medical schools and 177 "Independent Applicants". The 177 figure is (1062 - 885 = 177) taken from the "No. of Applicants" columns.
- (c) Overall the acceptance rate for Orthopedic residency positions was 66% (703 positions with 1062 applicants).
- (d) The acceptance rate for US medical school graduates was higher: 75% (663 acceptances out of 885 total US Senior applicants).

255. Ex. 27 shows pie-charts describing the placement of US Medical School graduates in residency programs. Mr. Walter explained that most graduates apply to several different residency programs. The students then receive interviews in some of the specialties to which they have applied. He testified that students usually rank all specialties which interview them. It is the matching program that really decides the future specialty of the medical student graduate. If you are matched into a program, you go into that program.

256. Ex. 27 shows that:

- (a) More than 50% (51.6%) of graduates get their first choice in residency;
- (b) 16.5% get their second choice;
- (c) 10.3% get their third choice;
- (d) 6.7% get their fourth choice; and
- (e) 14.9% are matched to a program that is below their fourth choice.

257. Most importantly, overall, 94.5% of US medical school graduates are matched to a residency program.

258. The statistics that Mr. Walter used for his report establish the following:

- (a) The probability of a US medical school graduate obtaining a spot in an orthopedic residency program was above 75%.

- (b) The chance of a US medical school graduate obtaining a spot in any residency program was 94.5% in 2015.
259. If David gained entry into medical school he would probably have become an orthopedic surgeon (greater than 75% probability).
260. If David had not become an orthopedic surgeon, he would have been accepted into another residency program (94.5% probability).
261. As noted in *Tucker v. Asleson* (1993), 78 B.C.L.R. (2d) 173 at para. 187 (C.A.), below (under the heading "Loss of Future Earning Capacity"), the Court should be generous when predicting possible educational attainment and future losses.
262. Hence, the finding should be that David would have become an Orthopedic Surgeon. All of the evidence supports this conclusion. The statistics above simply provide a guide.
- [124] The Plaintiff's academic performance in high school, in my view, must be weighed against other factors which are unique when they are taken together.
- [125] Some of the Plaintiff's I.Q. test results are noted above, at para. [96]. In addition, in the Plaintiff's neuropsychological testing, conducted by Dr. Nockleby, a doctor in Arizona who examined the Plaintiff to assess his employability, his full-scale I.Q., post-accident, fell within the 84th percentile. Dr. Rehan Dost, a neurologist called by the Plaintiff, conducted an independent medical examination of the Plaintiff. I accept the following from Dr. Dost's report, dated March 17, 2014:

The most recent neuropsychological testing in 2013 that had been filed shows a Full Scale IQ at the 84th percentile. As articulated above, IQ is the single best predictor of job performance and maintenance. If we make the assumption that his IQ is not changed (if anything it would have decreased due to the severe brain injury) then his intellect is better than 84% of the population and therefore his goal of becoming a medical doctor pre-incident was a realistic one.

- [126] As the Plaintiff said in 2006, as an Eagle Scout, he planned to attend community college for one year, followed by his two-year mission, and then undergraduate studies. As I noted earlier, that has been the trajectory most of his older siblings have successfully pursued. Several witnesses spoke about the maturing influence on a missionary from the two-year mission. The Plaintiff's determination to succeed when he focused on a project was also broadly corroborated in the evidence.
- [127] When the Plaintiff took courses after the accident, he usually achieved high marks. It is true that he had accommodations then, such as longer times for exam writing, but the accommodations were designed only to alleviate his deficits from the accident, not to give him an advantage. In the spring of 2008, the Plaintiff took one community college course. He earned an A. In the fall of 2008, he took four more courses at a community college. He achieved an A in each of them. In 2009, in further community college courses, he earned three As, seven Bs and one C. In the spring of 2010, he earned Bs in each of three more

community college courses, and an A and a C in two courses in the spring of 2013. Even taking the accommodations into account, those results were exceptional, in my view, keeping in mind the neurological deficits (see below) David faced in those years. They are results serving to corroborate that he has high intelligence.

- [128] The expert evidence was divided in assessing the influence of family on someone's academic prospects. That evidence will be addressed below. I prefer the view that a climate of academic achievement in a household cannot help but induce a child in the same direction. If all of one's older brothers and sisters have gone to graduate school, the youngest sibling is more likely to go that route too. Obviously, there are exceptions. But the Plaintiff's family track record of graduate school attendance, reflecting the emphasis placed on higher education by followers of the Mormon faith, cannot be ignored as a factor in predicting the Plaintiff's own future.
- [129] The defence endeavoured to parse the high school marks of the Plaintiff's siblings, to show that on the whole, they fared better academically than he did at that stage. However, from my own examination of all the marks, and particularly the courses taken and results achieved by Vernon, Joseph, Orrin, Jacob and Amanda Mackey, I do not conclude that the Plaintiff's academic record in high school was much below that of his older siblings. As important, the regime of high school, followed by community college, then the mission, followed by undergraduate studies, appears to have provided a successful entry for graduate studies.
- [130] In conclusion with respect to the Plaintiff's academic future, in my view, but for the accident, it was a bright one. I do not accept the defence submission that David Mackey's scholastic performance up to the accident would have barred him from achieving the qualifications needed to eventually become an orthopedic surgeon. I respectfully adopt what McEachern C.J.B.C. said in his dissenting judgment in, *The Public Trustee as Guardian Ad Litem on behalf of Brandi Helen Tucker v. Wayne Robert Asleson et al*, 1993 CanLII 2782 (BC CA) at paras. 186 and 187:

This Court noted at p. 317 of *Cherry v. Borsman*, that the educational potential of a child can sometimes be measured by evidence about parental education, sibling achievement, and other factors.

In this connection, the Court will be generous. Doubts must be resolved in favour of the victim rather than the tortfeasor because all of the risk of not obtaining university standing must not be imposed upon the Plaintiff. ...

The Plaintiff's Medical Evidence

- [131] The most important medical witness was Dr. Pam Klonoff at CTN, first named above at para. [110]. She saw and treated David Mackey more than any other medical witness did, probably having had considerably more time with him than did all the other medical witnesses combined. Dr. Klonoff has excellent credentials, and her testimony demonstrated the extent of her knowledge about the Plaintiff's condition and circumstances. In her cross-examination, I found her to be fair-minded and honest in defending her opinions.
- [132] Dr. Klonoff, as noted earlier, is a clinical neuropsychologist with particular training in rehabilitating brain-injured people. Clinical neuropsychology focuses on the relationship between the brain and behaviour. Testing and rehabilitation are the two subspecialties of clinical neuropsychology. Dr. Klonoff works in both, but with more emphasis on rehabilitation.
- [133] Dr. Klonoff met David Mackey in June of 2007, to screen him for his eventual admission to CTN. (CTN, incidentally, is a relatively small organization. In 2008-2010, it had about 25 staff and 25 patients.) CTN coordinates its work with the Barrow Neurological Institute, where the Plaintiff arrived initially after being flown by air ambulance from British Columbia. Dr. Klonoff saw the Plaintiff three to four hours each day from February 2008 into the summer of that year. After that, when he was taking community college courses, she saw him two days a week, for two to four hours each time, until his discharge from CTN in May of 2009.
- [134] Dr. Klonoff later conducted two neurological assessments of David Mackey, one in 2010 and the other in 2014. She also saw him, as a patient, in 2015. Dr. Klonoff is one of the several doctors who recognized that the Plaintiff was not capable of becoming a nurse in light of his post-accident disorders.
- [135] She observed the Plaintiff to be affable and congenial, but also to be extremely goal-oriented and driven for the best outcome when a goal had been identified. However, she had to rein him in when treating him, because his goals were sometimes unrealistic in light of his behavioural deficits. His ambition to be a nurse was unrealistic, and when David Mackey saw Dr. Klonoff initially, he still hoped to eventually become an orthopedic surgeon. Dr. Klonoff recognized, as all the experts did, that David Mackey suffered a severe traumatic brain injury, with frontal lobe damage. That damage has impaired his executive functions. More specifically, in Dr. Klonoff's opinion, David Mackey's capacity is diminished in the following functions:
- planning;
 - problem solving;
 - flexibility;
 - organization;

- priorities;
- seeing the big picture;
- thinking in the grey zone;
- multi-tasking;
- strategy generation;
- judgment;
- time management;
- sequencing;
- impulse controls;
- self-monitoring; and
- socially appropriate behaviour.

[136] In her view, the Plaintiff suffers from arrested development as a result of the accident.

[137] The PCC submits that if David, since the accident, had taken the medications prescribed for him, in the quantities and at the times prescribed, for offsetting depression and impulsiveness, he could have done better in all of his post-accident endeavours. Dr. Klonoff did not accept that proposition. In her view, which I accept, his medications, which the Plaintiff took sometimes, and tried to go off at other times, were only intended to improve his ability to cope with his deficits. They would not have enabled him to perform relatively demanding work, such as nursing.

[138] The Plaintiff also called three other medical experts.

[139] Dr. Rehan Dost, first referred to above at para. [125], is a neurologist. He saw the Plaintiff in March of 2014. He opined that David Mackey's problems are not to do with his cognition, or intelligence, which is high, but instead with behaviour. Dr. Dost made the following observation in his written report:

I do acknowledge that one does not have a clear understanding of the plaintiff's pre-accident conscientiousness to provide a baseline; however, this is of limited import. Conscientiousness takes time to develop as an individual matures from adolescence to adulthood. The plaintiff was an adolescent at the time of the event. Thus if one assumes he was not conscientious at the time of the event, this does not predict future maturity.

That observation is relevant for deciding that David Mackey, after his two-year mission, would have probably applied himself to his studies, when that became the necessary priority, and would have left behind, to varying degrees, the scouting, and other pursuits in which he had excelled as a teenager. Dr. Dost's observation has been supported by most of the marks the Plaintiff has achieved in community college since the accident.

[140] Dr. Christopher Robertson, a psychiatrist, saw the Plaintiff in 2014. In his opinion, which I accept, the Plaintiff's severe traumatic brain injury impaired his executive function, causing symptoms of personality change. I also accept the following conclusions in Dr. Robertson's report:

Mr. Mackey's primary diagnosis is the severe traumatic brain injury that he sustained in the fall that occurred in 2007.

...

Mr. Mackey will be at significant risk of developing mood and anxiety disorders in the future. He will likely have ongoing difficulties with recurrent brief episodes of depressive symptoms and it is likely that in the future, these will last for longer periods of time, meet diagnostic criteria for a Major Depressive Disorder, be potentially disabling and require treatment.

People who have sustained a severe traumatic brain injury are at higher risk of developing Alzheimer's disease (approximately four times the risk of the general population) and substance abuse disorders. He is protected from the latter by his strong religious beliefs and practice.

Mr. Mackey's symptoms and limitations have and will impact significantly on his social and recreational functioning. He has lost many friends following the accident and has had difficulties maintaining friendships. His limitations have placed significant demands on his family have and will place significant demands on his marital relationship.

As he has difficulties with executive functioning, he has had to rely on others to provide these roles in his life since the accident. His parents took on this role, along with the significant oversight of the CTN program, in the first couple of years after the accident. While he was on the mission, it appears that he received a fair degree of supervision and support. Since his return, he has had contributions from his family and also more recently his wife. His religious community has also played a role.

He will likely require external input and supervision to supplant the limitations in his executive functioning indefinitely, but hopefully less so over time as he continues to develop adaptive strategies. This role will hopefully continue to be provided by family and his religious community but it will also require help from supervision at work and from health care professionals. This will put increased strain on his relationships and at work. ...

[141] Finally, from the Plaintiff's medical evidence, I refer to the testimony of Dr. Christina Kwasnica, a specialist in physical medicine and brain injury rehabilitation employed at the Barrow Neurological Institute. (Chronologically, Dr. Kwasnica's evidence could have been

presented earlier in these reasons, because she worked with the Plaintiff from April 2007 to 2011, as well as having seen him after that. However, her conclusions are to do with the Plaintiff's ongoing condition and care, and therefore serve as a conclusion to the Plaintiff's medical evidence.)

[142] I adopt paragraphs 131-135 from the Plaintiff's written argument concerning Dr. Kwasnica's testimony:

131. Dr. Kwasnica's opinion in her February 24, 2010 report is that:

(a) David has the following long-term deficits:

(i) Difficulty with structure and ranking priorities;

(ii) Decreased awareness of cognitive deficits;

(iii) Decreased impulse control; and

(iv) Decreased attention and concentration.

(b) Regarding David's vocational future she advised against nursing but said that he is capable of gainful employment below that level [i.e. nursing].

(c) Regarding treatment, Dr. Kwasnica recommended:

(i) Monitoring by a Rehab Physician 3-4 times a year;

(ii) Psychiatric monitoring (once stable); and

(iii) Psychotherapy from a neuro-psychologist (2-4 sessions a month for 2-3 years).

132. In her second report (Ex. 9, Tab 2b) (undated, but delivered in late 2015), Dr. Kwasnica answered a number of specific questions. She described David's injury as follows:

(a) He had a Glasgow coma, scale of 3 at the scene which was later measured at 5 and 6. All of those measurements would meet criteria for severe traumatic brain injury. He sustained diffuse axonal injury with shearing on imaging in the left frontal and temporal lobes (at p. 2).

(b) Mr. Mackey has consistently had issues with impulsivity. He has shown concrete thinking and difficulty with reasoning. (At trial she described David's difficulties with the concept of obtaining health insurance.) His difficulties in judgement and recognition of how his cognitive deficits affect decision making are still easily seen, especially in his interpersonal relationships.

(c) Mr. Mackey aspired to be a nurse. However, his deficits in new learning, flexible thinking and judgement made him unable to pursue this option. He had previously had some success working a very simple job with specific tasks given by a supervisor. He was hard working but had difficulty learning new procedures.

- (d) She believes Mr. Mackey's ongoing deficits were solely caused by the accident.
133. We pause to note that the above sentence caused some debate during the course of the trial. The Defence was proffering the theory that David had pre-existing psychological issues that were causing his ongoing problems. This theory was based on Dr. Schmidt's and Dr. Janke's reports. We deal with those reports elsewhere in these submissions, but we note that the evidence ultimately exposed that Dr. Janke held the same opinion as Dr. Kwasnica.
134. Dr. Kwasnica (in 2015) recommended that David have a vocational specialist and limited therapy involvement to help him secure simple employment much like he did at the grocery store. She does not recommend continued small business ownership. (In her testimony, she reiterated her prior recommendations as well.)
135. Of note from Dr. Kwasnica's testimony:
- (a) She is David's treating/prescribing doctor.
- (b) She is aware that he is not on Zoloft and Tegretol at this time and, although she recommends them, she is "OK" with him not being on the medication.

The Medical Evidence Called by The PCC

- [143] The PCC led evidence from a neurologist, a psychiatrist and a neuropsychologist.
- [144] The neurologist, Dr. Andrew Woolfenden, saw the Plaintiff in 2014. He gave his evidence in an even-handed manner. He agreed with the suggestions of Plaintiff's counsel in cross-examination when that was called for. In the result, in my view, his evidence overall was not harmful to the Plaintiff's case.
- [145] Dr. Woolfenden agreed with other expert witnesses that following severe traumatic brain injury, conditions become relatively permanent after the first two years. In cross-examination, he was shown his notes of his conversation before trial with defence counsel. In those notes, he wrote that it was, "hard to say [whether the Plaintiff could have been an] MD before [the accident] although [his] I.Q. now plus motivation now good despite SAT's." Dr. Woolfenden is clear that the Plaintiff cannot be a doctor now, and he made the further point that the best predictor of work potential is the work one actually is doing. He added that the Plaintiff cannot work in what he called an autonomous position, meaning one where he would have to make decisions.
- [146] Dr. Woolfenden said in his report that the Plaintiff exhibited with him no child-like demeanour. He said however, when I asked him, that his observation of demeanour was a lay opinion and not a neurological expert opinion. In any event, the Plaintiff, at least at trial, exhibited a genuine child-like demeanour.

- [147] Dr. Woolfenden accepted that executive dysfunction is linked to frontal lobe injury. He further agreed that he would rely on neuropsychologist testing, and observations and collateral history, for assessing executive capacity. That is part of why, in my view, Dr. Klonoff's evidence is particularly important.
- [148] The testimony of the defence psychiatrist, Dr. Paul Janke, caused me sufficient concern that I am not prepared to rely on his opinion insofar as it is damaging to the Plaintiff's case. In summary, what happened is this. Dr. Janke saw the Plaintiff once, in January 2014. He then prepared two draft reports. Those draft reports, in many respects, were supportive of the Plaintiff's position. After submitting those draft reports to defence counsel, Dr. Janke had extensive discussions with defence counsel. After that, he received a letter from defence counsel presenting 19 new assumptions for him to incorporate in his final report. The new assumptions, duly incorporated by Dr. Janke, changed his opinion radically, very much to the prejudice of the Plaintiff's position. Speaking generally, his thesis changed from the accident having damaged the Plaintiff, to the Plaintiff having now largely recovered to his pre-accident condition. The new assumptions were too selective, to the point that they cannot be said to present an accurate overall picture of the Plaintiff's pre-accident condition. Dr. Janke had to have known that the new assumptions were unrealistic given his prior work on the file. Dr. Janke confirmed, in response to a question from me, that his own work, prior to receiving the 19 new assumptions, had led him to conclude that it was the injury from the accident which had diminished the Plaintiff's executive functions.
- [149] In other respects, Dr. Janke's opinion assisted the Plaintiff because he agreed that frontal lobe injury can leave intelligence largely unaffected, while damaging executive function, including planning ability, emotional control, motivation and social inhibition. He also accepted that executive function is best assessed by observation as opposed to testing. He accepted that the Plaintiff suffered severe traumatic brain injury, carrying with it long-term deficits.
- [150] The defence neuropsychologist, Dr. James Schmidt, spoke with the Plaintiff on two occasions, both in March 2014. Dr. Schmidt performed the I.Q. tests of the Plaintiff which are summarized at para. [96] in these reasons. He estimated the Plaintiff's I.Q. as being "high average", which is between the 75th and 89th percentile. The 90th percentile and above is "superior", and I note that the Plaintiff scored in the 91st and 97th percentiles in two of the four I.Q. measurements which Dr. Schmidt obtained (composite memory and non-verbal intelligence, respectively).
- [151] The following extract from Dr. Schmidt's report describes five levels of psychosocial recovery from severe traumatic brain injury:

Psychosocial recovery following severe TBI is more uncertain. Individuals with such injuries typically move through a progression of stages in psychosocial recovery, typically plateauing at a level of psychosocial functioning at least somewhat below their pre-injury level. Five general levels of psychosocial competence can be identified. First, there is absence of competence. In

such cases, the individual needs constant care. Individuals in this category range from the comatose individual to the individual who is conscious and ambulatory, but unable to avoid dangerous or self-injurious behaviour. Occasionally, the need for constant care is created by medical or physical problems, but more often it is created by behavioural dangers that the person poses, such as danger of elopement, suicide, aggressive behaviour or some other form of acting out. The individual at this level may or may not be able to perform self-care activities. Second, there is basic competence. At this level, the individual can perform most or all basic self-care activities, such as bathing, dressing and eating. The individual may also perform basic functions within the home such as simple cleaning or meal preparation. The individual at this level poses no immediate danger to themselves or others, and can often be left alone for a few hours at a time, or sent out on trips into the immediate community on their own. However, there is always a degree of risk, in that such individuals seldom have the skills to handle even minor disruptions to their daily routine or problematic situations, such as a persistent salesman arriving at the door or calling on the telephone. Hence individuals at this level of functioning typically require placement in a group home or the presence of a constant care giver in the environment. The third level can be termed day-to-day competence. Individuals at the level are able to do most or all self-care activities, including preparing meals, shopping, and so on. They can also handle minor interpersonal situations or crises. However, they need regular monitoring and support in performing more complex, abstract or difficult tasks such as diet planning, interpersonal relationships, and financial management. Without such care, they are at risk of being taken advantage of or showing rapid deterioration of functioning in the face of a crisis. Such individuals generally need visits on a daily to weekly basis by a care worker. The fourth level can be termed general competence. Individuals at this level can handle all but the most difficult interpersonal situations or crises, such as dealing with the end of a relationship or having to move. Further, they are able to recognize such situations as crises, and to access appropriate help. Such individuals need to have a referral network available to them on an "as-needed" basis, but generally require no ongoing monitoring. The final level is full competence wherein the individual is able to maintain a life style, without help, that is satisfying and stable. At this point in time, Mr. Mackey is certainly at the general competence and quite possibly at the full competence level.

[Emphasis in the original.]

[152] I accept Dr. Schmidt's description of the five levels of recovery. I cannot accept, however, the conclusion he expressed in the final sentence in the quoted extract above. I find that David Mackey has reached no more than the third level of recovery, that is, day-to-day competence. Dr. Schmidt reached the wrong conclusion, perhaps for two reasons. First, he had limited access to the Plaintiff, seeing him only twice. Second, the assumptions he was given for his report do not present the true picture of David Mackey's circumstances. Dr. Schmidt did not have the benefit, which the Court had, of hearing what David Mackey's family and friends had to say about his circumstances in the many days of testimony they presented. It is clear from the evidence as a whole that David Mackey has achieved no more than the third level of recovery, day-to-day competence. There is no basis from which to

conclude that he will reach a higher level.

The Expert Evidence Addressing the Plaintiff's Vocational Rehabilitation and Cost of Future Care

- [153] I will summarize here only briefly the evidence presented by both sides, and my related findings, under this heading. More of this evidence will be addressed later in these reasons, when the heads of damages are examined.
- [154] Robert Taylor for the Plaintiff, and Niall Trainor for the PCC, testified with respect to the Plaintiff's earning potential. Mr. Taylor was qualified as an expert in vocational counselling and evaluating lost earning capacity, Mr. Trainor as an expert in vocational rehabilitation.
- [155] Mr. Taylor stressed the positive influence on the Plaintiff of being in a family of high achievers, and having high-achieving friends before the accident. Mr. Taylor relied on a well-established methodology, named PEEDS-RAPEL, which takes into account the influence of family and friends on a young adult. Mr. Trainor acknowledged that the PEEDS-RAPEL approach is well respected as a tool for predicting a young person's career prospects.
- [156] In Mr. Taylor's opinion, it is probable that David Mackey, but for the accident, would have obtained the career he wanted. Also in his view, post-accident, the Plaintiff is incapable of nursing, let alone becoming a doctor.
- [157] Mr. Taylor also pointed out that SAT tests can be re-written.
- [158] Mr. Trainor was a thoughtful and honest witness. As was the case for other defence witnesses, he was burdened by the assumptions he was asked to make for his written report, and by what was not included in the assumptions he was given. For example, he had no knowledge of the Plaintiff's IQ, although he acknowledged that there is a correlation between a high IQ and a high MCAT score, used for entry to medical school.
- [159] Mr. Trainor concluded that there was not a significant change in the Plaintiff's employment potential before and after the accident. That conclusion, however, was based on the conclusions of Dr. Janke, whose testimony I criticized earlier in these reasons, and on other assumptions not supported by the evidence taken as a whole.
- [160] The PCC also called Matthew Sims as a vocational economist to address the Plaintiff's earning capacity. I did not find Mr. Sims' conclusions to be reliable. He concluded that the Plaintiff can still become a nurse. He said that he could occupy a "lesser" nursing position where "sophisticated communication" between nurse and patient is not required. He did not take into account the opinions of Dr. Klonoff, Dr. Kwasnica and Dr. Nockleby, all of whom worked with the Plaintiff in his recovery and concluded that any nursing position for the Plaintiff post-accident was out of reach. Mr. Sims dismissed the Plaintiff's high IQ as being irrelevant, on the ground that it is not a limiting factor. However, the Court's task, in assessing the Plaintiff's real and substantial career possibilities, must take IQ into account

in assessing the Plaintiff's pre-accident potential. Mr. Sims dismissed the academic and professional success of the Plaintiff's siblings as irrelevant because the "studies" are inconclusive. It is common ground however that the PEEDS-RAPEL methodology, referred to earlier, does take sibling success into account. Quite apart from methodologies, I repeat here my own view that a home full of achievers induces the youngest siblings to themselves achieve.

[161] In the academic assessment, Mr. Sims conceded that SAT results are not required for entering community college and that the Plaintiff did not need better marks in high school for getting into community college. He agreed that the Plaintiff, pre-accident, could have obtained a BSc., and agreed that a BSc. is the number one prerequisite for entering medical school.

[162] In his report, Mr. Sims said that only 2.9% of applicants are admitted to medical school. In cross-examination, he accepted that his calculation was wrong, and that the acceptance rate is 44%.

[163] Dorothy Fune, for the Plaintiff, and Lora White for the PCC, testified as experts in life care planning and the cost of future care. Both witnesses were well qualified and credible, and addressed their topics in a practical manner. Ms. Fune based a number of her conclusions on her interviews with Dr. Klonoff and Dr. Kwasnica, and on her interviews with the Plaintiff in 2009 and 2014. Ms. White had to rely, to a considerable degree, upon findings of Dr. Schmidt and Dr. Janke.

[164] As a result, given my earlier findings that Dr. Klonoff and Dr. Kwasnica were credible witnesses, as contrasted with my criticisms of the conclusions reached by Dr. Janke and Dr. Schmidt, I generally found the conclusions of Ms. Fune more reliable than those of Ms. White. However, because Ms. White herself was credible, I will be taking into account portions of her testimony in reducing some of the Plaintiff's claims for future care costs as presented by Ms. Fune.

[165] Mark Szekely, an economist, testified for the Plaintiff. He calculated the present value of future care costs and the future income streams for orthopedic surgeons and other medical practitioners in the United States. He also gave a present value calculation for the Plaintiff's earnings post-accident to age 65, assuming an income of \$30,000 per year.

[166] Robert Carson, for the PCC, calculated the present value of the cost of future care as determined by Ms. White. He was not asked to calculate the present value of a future income stream for orthopedic surgeons.

Emma Mackey Did Not Testify

[167] Emma Mackey and the Plaintiff married in July 2013. They have two children.

[168] Emma Mackey did not testify. To my recollection, no witness at trial was asked why she did not testify. The PCC asks that an adverse inference be drawn against the Plaintiff for his failure to call Emma Mackey as a witness.

[169] The Plaintiff replies that Ms. Mackey did not know the Plaintiff before his accident and did not meet him until nearly seven years afterward. That is four or five years after his deficits became permanent according to nearly all the expert testimony.

[170] Ms. Mackey could have given no evidence addressing either liability, or the Plaintiff as he was before the accident. Defence counsel, however, points out that her evidence would have been relevant in assessing the claim for non-pecuniary damages, the cost of future care and residual earning capacity.

[171] The PCC cites *Buksh v. Miles*, 2008 BCCA 318, at para. 31. Paragraphs 30-32 from *Buksh* provide as follows:

[30] The notion of adverse inference is related to the best evidence rule. The observation in *Wigmore's Evidence in Trials at Common Law*, Chadbourne Rev. (Toronto & Boston: Little Brown & Company: 1979) vol. II, §287, at 202-3, offers valuable guidance:

Furthermore, it seems plain that possible witnesses whose testimony would be for any reason comparatively unimportant, or cumulative, or inferior to what is already utilized, might well be dispensed with by a party on general grounds of expense and inconvenience, without any apprehension as to the tenor of their testimony. In other words, put somewhat more strongly, there is a general limitation (depending for its application on the facts of each case) that the inference cannot fairly be drawn except from the non-production of witnesses whose testimony would be superior in respect to the fact to be proved.

[Emphasis in the original.]

[31] The general proposition long applied in British Columbia, stated by Mr. Justice Davey in *Barker v. McQuahe* (1964), 49 W.W.R. 685 (B.C.C.A.), is that an inference adverse to a litigant may be drawn if, without sufficient explanation, that litigant fails to call a witness who might be expected to give supporting evidence. Further, said Mr. Justice Davey at 689, a plaintiff seeking damages for personal injuries "ought to call all doctors who attended him in respect of any important aspect of the matters that are in dispute, or explain why he does not do so".

[32] It seems to me that the tactic of asking for an adverse inference is much over-used in today's legal environment, and requires, at the least, a threshold examination by the trial judge before such an instruction is given to the jury.

[172] The Court in *Buksh* was examining a charge to the jury where plaintiffs had failed to call a number of treating physicians.

[173] The Plaintiff cites *Koltai v. Wang*, 2015 BCSC 1346 at para. 232:

The defendant said that an adverse inference should also be drawn because the plaintiff failed to call his sister, brother-in-law and father to testify about his condition in October 2014. The plaintiff's wife was able to testify about his circumstances from the date of the accident forward and the plaintiff is not obliged to call every person who had knowledge of his pre-and post-accident circumstances. These witnesses are simply not the type of witness contemplated in the adverse inference rule.

[174] Emma Mackey not testifying was somewhat surprising, but I do not reach the conclusion that I should draw an adverse inference against the Plaintiff from his not calling her. The Court heard from more than a dozen witnesses, lay and expert, who gave detailed evidence, normally including lengthy cross-examination, addressing the Plaintiff's injuries and loss of capacity from the accident. While Ms. Mackey's evidence would have been relevant in assessing parts of the damages claim, the absence of that evidence does not give rise to an adverse inference when the volume and quality of the evidence the Court did receive for the damages assessment is taken into account.

Alleged Failure to Mitigate

[175] The PCC says this in its written submissions:

179. Here, the Plaintiff has failed to take medications prescribed by his physicians, and has not sought the therapy and counselling recommended. Had he done so for the past three years, he would have been in a much better position to cope with the exigencies of everyday life and much further along the path of achieving an achievable life goal.

[176] In my view, however, the Plaintiff has taken steps in mitigation which are more than adequate to rebut this charge against him. Instead of sitting around after his release from the Barrow Neurological Institute, in the spring of 2007, David Mackey undertook extensive treatment at CTN, pursued community college courses over several years, undertook a three-week mission and a two-year mission for his church, married, had children and has attempted all the employment of which he is capable. The Plaintiff from time to time has gone off his medications when he has felt they were affecting him adversely. Dr. Klonoff testified that brain-injured people often reject the continuous prescription of medications. They can fail to accept their limitations, and they struggle to become normal. Dr. Kwasnica has discussed the Plaintiff's medications with him, and she testified that, in her view, it is satisfactory that he is now off medications.

[177] In the context of a failure-to-mitigate argument, I cannot find that the Plaintiff has acted unreasonably. Further, it is highly speculative to suggest that the Plaintiff's life, with the addition of continuous medication in recent years, would have been much different from the one he has led. In summary, I do not find that the Plaintiff has failed to mitigate against the losses he has suffered. (These conclusions find support in the Supreme Court of Canada's decision in *Janiak v. Ippolito*, [1985] 1 S.C.R. 146.)

Conclusions to this Point Respecting Damages

- [178] First, in my view, there is a real and substantial possibility that David Mackey would have been able to achieve his goal of becoming an orthopedic surgeon, were it not for the accident.
- [179] Second, as a result of the accident, the Plaintiff has substantial, permanent injury, primarily the extensive loss of executive function. The result is that his future employment prospects are only in work similar to the jobs he has found in his post-accident employment to this stage.

CALCULATION OF THE PLAINTIFF'S CLAIM

Non-pecuniary Damages

- [180] David Mackey seeks \$250,000 as non-pecuniary damages. The PCC submits that an award in the range of \$180,000 - \$200,000 is called for.
- [181] From the fall, David Mackey suffered physical injury. Nine of his teeth were broken. His left arm was broken. His scalp, chin and tongue were lacerated and he received contusions to his chest, arms and legs. In hospital after the accident, he developed pneumonia, although that did not linger. These physical injuries resolved themselves within a few months. His ongoing physical problems are relatively minor. He still has difficulties with his teeth and occasional pain in his wrist. He spent about five weeks in hospital, first in Victoria and then in Phoenix, followed by his intensive rehabilitation program at CTN, which lasted 15 months.
- [182] Obviously, the worst burdens for the Plaintiff are the results of the traumatic brain injury. Those results are permanent. The worst of them is the diminished executive function, addressed at length earlier in these reasons. Instead of being in medical school now, or in a residency program, David Mackey is installing door handles on cabinets. Equally important, the Plaintiff's social life is altered forever. He used to be popular, but he no longer has friends his age.
- [183] Non-pecuniary damages are intended to compensate a plaintiff for pain, suffering, loss of enjoyment of life and loss of amenities. What is appropriate for such an award is determined by a comparison of awards in similar cases, with the over-riding recognition that the outcome is to be driven by the particular facts of the case at bar. See for example, *Danicek v. Alexander Holburn Beaudin & Lang*, 2010 BCSC 1111 at para. 253. Danicek lists factors to consider in awarding non-pecuniary damages:
- [252] In *Stapley v. Hejslet*, 2006 BCCA 34, 263 D.L.R. (4th) 19, leave to appeal refs'd [2006] S.C.C.A. No. 100, Kirkpatrick J.A. provided "an inexhaustive list of common factors" that influence an award of non-pecuniary damages:

- age of the plaintiff;

- nature of the injuries;
- severity and duration of pain;
- disability;
- emotional suffering;
- loss or impairment of life;
- impairment of family, marital and social relationships;
- impairment of physical and mental abilities;
- loss of lifestyle; and
- the plaintiff's stoicism, as a factor that should not generally speaking penalize the plaintiff.

[184] All of the factors listed in Stapley, above, have been addressed at length earlier in these reasons, perhaps with the exception of the last one, stating that a plaintiff should not be penalized for stoicism.

[185] Each side before me cited approximately a half dozen decisions of this Court and our Court of Appeal granting different awards for non-pecuniary damages based on the particular facts in each case. Linking those awards to both the facts in those cases, and the facts at bar, I conclude that an award here of \$250,000 for non-pecuniary damages is appropriate.

In-trust Claim

[186] Under this head, the Plaintiff seeks \$150,000. The PCC submits that no claim for any amount payable in trust has been established.

[187] This Court recently summarized the law associated with in-trust claims in Grassick (Guardian ad litem of) v. Swansburg, 2015 BCSC 2355, at paras. 173 and 174:

[173] The Court of Appeal in Bradley v. Bath, 2010 BCCA 10, stated at para. 43:

[43] An in-trust award is one made to a plaintiff in trust for one or more of his or her family members, who are not named as parties to the action, as compensation to the family members for additional work done by them as a result of the impaired capacity of the plaintiff to perform housekeeping chores or to care for themselves. It was affirmed as a recoverable award by this Court in Kroeker v. Jansen (1995), 123 D.L.R. (4th) 652, 4 B.C.L.R. (3d) 178 (B.C. C.A.).

[174] One of the factors to be considered in determining whether an in-trust award should be made, is whether the service rendered by a family member is over and above what would be expected from the family relationship: Bystedt v. Hay, 2001 BCSC 1735, at para. 180.

- [188] The love and support David Mackey's parents have given him, from the time of the accident to the present, cannot be questioned. In keeping with the evidence the Court heard of the Mormon faith's strong emphasis on family, James and Eileen Mackey's care for their son has been constant. It does not follow, however, that an award under this head follows automatically. David Mackey was living at home before the accident. Without the accident, he would have continued to live at home after March of 2007, at least until the end of the school year, and probably for some time afterward, perhaps during a summer job in 2007 for example. With the accident, in the fall of 2007, David Mackey took courses at a community college near his home, which he might also have done if the accident had not occurred. The point, for the purpose of assessing the in-trust claim, is that the Plaintiff was probably not at home, for at least the first nine months after the accident, as a result of the accident. He likely would have been at home anyway.
- [189] Thankfully, David Mackey made rapid physical recovery from the accident. His mother spoke of him being on the trampoline within four or five months.
- [190] From that evidence, it is difficult to conclude that the efforts of David Mackey's parents, in looking after him post-accident, can result in a large in-trust award. His mother testified that when he returned home from the Barrow Neurological Institute, approximately in early May 2007, the Plaintiff needed help with everything, including at least some toilet re-training. His rapid physical recovery, however, meant that exceptional physical assistance for him did not last long. The evidence is unclear as to the degree and the duration of such assistance. His father drove him to CTN each day when he was attending there, but I believe the evidence also shows that the Plaintiff was able to resume driving in 2008.
- [191] Were it not for his parent's care, David Mackey probably would have needed some form of nursing assistance, or similar care, beyond normal parenting, for approximately two or three months after his release from the Barrow Neurological Institute. No evidence was tendered for the cost of such care, had it been required. Under this head, I award the Plaintiff \$15,000.

Cost of Future Care

- [192] Under this head, the Plaintiff seeks \$433,300 (USD).
- [193] The PCC filed the report of Ms. White (see paras. [163] and [164] above in these reasons). The cost of future care recommended by Ms. White has a total present value of only \$151,895 (USD).
- [194] There are three components in the Plaintiff's claim of \$433,300 (USD):
- (1) \$356,343 (USD) based on the opinion of Ms. Fune (see paras. [163] and [164] above in these reasons);
 - (2) \$66,957 (USD) as the cost of vocational counselling; and

(3) \$10,000 (USD) for dental care.

[195] The most substantial dispute under this head is between the respective recommendations of Ms. Fune and Ms. White.

[196] To summarize the legal principles underlying cost of future care awards, I adopt paras. 354-356 from the Plaintiff's submissions and paras. 152-157 from the submissions of the PCC:

Plaintiff's Submissions:

354. Any award for future care is based on what is reasonably necessary on the medical evidence to promote the mental and physical health of the plaintiff.

Milina v. Bartsch, (1985) 49 B.C.L.R. (2d) 33 at 70 (S.C.),

Plaintiffs Book of Authorities, Tab 10.

355. In Krangle (Guardian ad litem of) v. Brisco, McLachlin C.J. stated:

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

22 The resulting award may be said to reflect the reasonable or normal expectations of what the injured person will require. Jane Stapleton, "The Normal Expectancies Measure in Tort Damages" (1997), 113 L.Q.R. 257, thus suggests, at pp. 257-58, that the tort measure of compensatory damages may be described as the "normal expectancies' measure", a term which "more clearly describes the aim of awards of compensatory damages in tort: namely, to reposition the plaintiff to the destination he would normally have reached . . . had it not been for the tort". The measure is objective, based on the evidence. This method produces a result fair to both the claimant and the defendant. The claimant receives damages for future losses, as best they can be ascertained. The defendant is required to compensate for those losses. To award less than what may reasonably be expected to be required is to give the plaintiff too little and unfairly advantage the defendant. To award more is to give the plaintiff a windfall and require the defendant to pay more than is fair.

2002 SCC 9 at paras. 21 - 22, Plaintiffs Book of Authorities, Tab 9.

356. Mr. Justice Weatherill further explained in Wallman:

[532] The amounts claimed for future care costs must have some evidentiary link to a physician's assessment of pain, disability and recommended treatment, and the care recommended by a qualified health care professional: *Gregory v. Insurance Corporation of British Columbia*, 2011 BCCA 144 at para. 39. In that regard, the Court must perform an analysis of each item of future care cost being sought by the plaintiff: *Gignac v. Insurance Corporation of British Columbia*, 2012 BCCA 351 at para. 32.

Wallman, *supra* at para. 521.

Submissions of the PCC:

152. In *Milina v. Bartsh*, Madam Justice McLachlin (as she then was) set out the guiding principles for an award of damages for cost of future care:

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

199 These authorities establish (1) that there must be a medical justification for claims for cost of future care; and (2) that the claims must be reasonable.

...

201 The award for cost of care should reflect what the evidence establishes is reasonably necessary to preserve the plaintiff's health. At the same time, it must be recognized that happiness and health are often intertwined."

[1985] B.C.J. No. 2762 (S.C.) at paras. 198-201

(Defendants' Book of Authorities, Tab 51)

153. Services that a plaintiff has not used or sought out in the past may not properly be the subject of an award of cost of future care, as it is unlikely the plaintiff will avail him or herself of such services in the future.

Sahota v. Ho, 2013 BCSC 639 at para. 229

(Defendants' Book of Authorities, Tab 74)

154. The future care costs must be reasonable both in the sense of being medically justified, and in the sense of being expenses that a plaintiff will, on the evidence, be likely to incur. In *Izony v. Weidlich* the Court stated:

I therefore do not think it appropriate to make provision for items or services that the plaintiff has not used in the past (see *Courdin* at [paragraph] 35), or for items or services that it is unlikely he will use in the future. The evidence at trial and the clinical records clearly indicated Mr. Izony has expressed resistance to using items or availing himself of services that were medically recommended.

2006 BCSC 1315 at para. 74

(Defendants' Book of Authorities, Tab 35)

155. Measures that provide solace but are not likely to result in medical benefit should properly be compensated under the heading of non-pecuniary damages, rather than as a compensable cost of future care

Harrington at para 153

(Defendants' Book of Authorities, Tab 33)

156. In *Penner v. Insurance Corporation of British Columbia*, the BC Court of Appeal provided a reminder that common sense should inform awards of costs of future care. The Court stated:

[13] Ms. Katalinic drew our attention to the Court's comments in *Travis v. Kwon*, 2009 BCSC 63, where Johnston J. said this about claims for damages for future care costs:

[109] Claims for damages for cost of future care have grown exponentially following the decisions of the Supreme Court of Canada in the trilogy of decisions usually cited under *Andrews v. Grand & Toy, Alberta Ltd.*, [1978] 2 S.C.R. 229, [1978] 1 W.W.R. 577.

[110] While such claims are no longer confined to catastrophic injury cases, it is useful from time to time to remind oneself that damages for future care grew out of catastrophic injuries and were intended to ensure, so far as possible, that a catastrophically injured plaintiff could live as complete and independent a life as was reasonably attainable through an award of damages.

[111] This is worth mentioning because the passage of time has led to claims for items such as, in this case, the present value of the future cost of a long-handed duster, long-handed scrubber, and replacement heads for the scrubber, in cases where injuries are nowhere near catastrophic in nature of result."

This is a reminder that a little common sense should inform claims under this head, however much they may be recommended by experts in the field."

2011 BCCA 135 at para. 13

(Defendants' Book of Authorities, Tab 62(b))

157. The cost of future care award must be moderate and fair to both parties and must be based on the evidence at trial.

Brito v. Wolley, 2001 BCSC 1178 at para. 424-425

(Defendants' Book of Authorities, Tab 10)

- [197] Ms. Fune prepared a Life Care Plan ("Plan") for David Mackey. Mr. Szekely, the economist, calculated the present value of the Plan, resulting in the claim of \$356,343 (USD). The elements in Ms. Fune's plan are as follows:

ITEM

TOTAL PRESENT VALUE OF RELATED LIFETIME COSTS

Annual visits with a psychiatrist

\$

7,063

Reducing psychiatrist visits as outlined

\$

10,154

Individual sessions with psychologist

\$

32,521

Couple sessions with psychologist

\$

6,145

Sessions with psychologist involving parents

\$

3,532

2 Neuropsychological evaluations

\$

4,000

Cognitive training

\$

32,110

Day planner

\$

1,586

Financial advisor (24 hours per year)

\$

130,525

Life Coach/Counsellor

\$

99,606

Parenting classes

\$

2,977

Psychotropic Medications/Lab

\$

26,164

TOTAL

\$

356,343 (USD)

[198] Although I recognize that Ms. Fune based her conclusions, in large part, on the advice of Dr. Kwasnica and Dr. Klonoff, whose evidence was sound, it does not follow that the Court can endorse Ms. Fune's conclusions without question. One concern is that the extent of the ongoing consultation she recommended may be counter-productive for the Plaintiff. Further, the evidence did not always draw a clear link between the Plaintiff's problems suffered as a result of the accident and the ongoing consultation Ms. Fune recommends. With those concerns in mind, and taking into account some of Ms. White's observations in response to Ms. Fune, I make the following reductions in the Plaintiff's claim as it is set out in Ms. Fune's Plan.

[199] Referring to the Plan, summarized above at para. [197], I am disallowing the psychiatrist claim because I did not find the ongoing need for a psychiatrist to be supported by the evidence, particularly when the Plaintiff's excellent physical recovery is kept in mind. I also disallow the claim for couple sessions with a psychologist. The Plaintiff's wife did not testify. All the evidence at trial supported the conclusion that she is a loving wife who provides strong support. David and Emma Mackey have not had couple sessions with a psychologist in the past. The couple did not meet until six or seven years after the accident.

[200] I allow only \$43,508 (USD), equal to one-third of the claim advanced, for a financial advisor. That leaves the Plaintiff with advice from a financial advisor eight times per year in one-hour sessions. The absence of evidence from Emma Mackey makes it difficult to know whether she manages the family's accounts, but I accept in any event that the Plaintiff requires from a financial advisor the extent of consultation I have allowed here.

- [201] I disallow the claim for a life coach/counsellor. The Plaintiff benefits from his large family, including of course his wife Emma, and he will have the ongoing assistance of a psychiatrist, a psychologist, two neuropsychological evaluations and cognitive training. I am unable to conclude that a life coach/counsellor is a required additional advisor. Finally, I disallow the claim for parenting classes. Again, the absence of evidence from Emma Mackey is relevant. Although undoubtedly the Plaintiff will not father his children in the same way he would have without the accident, the evidence does not indicate a basis for concluding that parenting classes are reasonably necessary.
- [202] I allow the elements in Ms. Fune's Plan which I have not expressly eliminated or reduced above. Counsel can agree on the adjusted value of the Plan, or appear before me in order to settle it.
- [203] The Plaintiff called Robert Taylor in part to support a claim for vocational rehabilitation and counselling. The economist, Mr. Szekely, calculated the present value of the vocational rehabilitation and counselling claim to be \$66,957 (USD). The evidence has demonstrated that the Plaintiff has worked only in low wage jobs since the accident. It is part of the Plaintiff's case that his earnings for the rest of his life will come only from similar work. It is probably the case that conferring with a vocational counsellor occasionally will assist the Plaintiff in seeking and keeping work. The evidence, however, does not support the conclusion that more extensive vocational counselling will raise David Mackey's employment to a higher grade. Vocational counselling is likely to perform only a more modest role. On that basis, I award the Plaintiff \$15,000 (USD) for vocational rehabilitation and counselling.
- [204] Finally, under this head, the Plaintiff seeks \$10,000 (USD) to compensate him for future dental costs, given that he required nine crowns on fractured teeth as a result of the accident. The Plaintiff acknowledges there is "scant evidence" to support that claim. I will allow \$5,000 (USD) for ongoing dental costs.
- [205] In summary with respect to the cost of future care, the Plan advanced by Ms. Fune is allowed, as reduced in paras. [199] to [202] above. The claim for vocational rehabilitation and counselling is allowed in the amount of \$15,000 (USD). The claim for future dental care is allowed in the amount of \$5,000 (USD).

Past Income Loss

- [206] Under this head, the Plaintiff claims \$140,000 (USD).
- [207] G.C. Weatherill J., in *Wallman v. John Doe*, 2014 BCSC 79, summarized the applicable law for past income loss as follows, at para. 485:

Loss of past income is a hypothetical assessment guided by the plaintiff's earnings prior to the Accident. It is not an exact calculation: *Smith v. Knudsen* 2004 BCCA 613 at para 34. The Court must consider both positive and negative contingencies that, but for the Accident, the plaintiff's income between the Accident and trial would have been more or less than it was prior to the Accident.

[208] The Plaintiff, before the accident, had worked in a few summer jobs that were typical for a high school student. He submits that but for the accident, he would have embarked on his path to orthopedic surgery. That would have entailed years of academic training. That extensive period without employment income would have been followed by the two-year mission. On that trajectory, David Mackey would likely only be in medical school at this stage. In the result, I am unable to conclude that he would have earned more money than he has in fact earned, from 2007 to the present. The low paying work he has undertaken since the accident is similar to the low paying work a student undertakes during summers in university. In short, the claim for past income loss is not established.

Loss of Future Earning Capacity

[209] Above, at para. [178], I concluded that but for the accident, there is a real and substantial possibility that David Mackey would have achieved his goal of becoming an orthopedic surgeon. Given his current and future capacity, as established by the medical evidence, that goal is now an impossibility. Before assessing the Plaintiffs' lost earning capacity, I cite the guiding legal principles as summarized by Garson J.A. in *Perren v. Lalari*, 2010 BCCA 140:

[30] Having reviewed all of these cases, I conclude that none of them are inconsistent with the basic principles articulated in *Athey v. Leonati*, [1996] 3 S.C.R. 458, and *Andrews v. Grand & Toy Alberta Ltd.*, [1978] 2 S.C.R. 229. These principles are:

1. A future or hypothetical possibility will be taken into consideration as long as it is a real and substantial possibility and not mere speculation [*Athey* at para. 27], and
2. It is not loss of earnings but, rather, loss of earning capacity for which compensation must be made [*Andrews* at 251].

...

[32] A plaintiff must always prove, as was noted by Donald J.A. in *Steward*, by Bauman J. in *Chang*, and by Tysoe J.A. in *Romanchych*, that there is a real and substantial possibility of a future event leading to an income loss. If the plaintiff discharges that burden of proof, then depending upon the facts of the case, the plaintiff may prove the quantification of that loss of earning capacity, either on an earnings approach, as in *Steenblok*, or a capital asset approach, as in *Brown*. The former approach will be more useful when the loss is more easily measurable, as it was in *Steenblok*. The latter approach will be more useful when the loss is not as easily measurable, as in *Pallos* and *Romanchych*. A plaintiff may indeed be able to prove that there is a substantial possibility of a future loss of income despite having

returned to his or her usual employment. That was the case in both Pallos and Parypa. But, as Donald J.A. said in Steward, an inability to perform an occupation that is not a realistic alternative occupation is not proof of a future loss.

[210] Further guidance from our Court of Appeal is found in Rosvold v. Dunlop, 2001 BCCA 1, at para. 11:

The task of the court is to assess damages, not to calculate them according to some mathematical formula: Mulholland (Guardian ad litem of) v. Riley Estate (1995), 12 B.C.L.R. (3d) 248 (C.A.). Once impairment of a plaintiff's earning capacity as a capital asset has been established, that impairment must be valued. The valuation may involve a comparison of the likely future of the plaintiff if the accident had not happened with the plaintiff's likely future after the accident has happened. As a starting point, a trial judge may determine the present value of the difference between the amounts earned under those two scenarios. But if this is done, it is not to be the end of the inquiry: Ryder (Guardian ad litem of) v. Jubbal, [1995] B.C.J. No. 644 (C.A.) (Q.L.); Parypa v. Wickware, supra. The overall fairness and reasonableness of the award must be considered taking into account all the evidence.

[Emphasis added.]

[211] The Plaintiff's counsel also relied on a brief passage from Gill v. Bhuller, 2015 BCSC 851, at para. 38:

... The hallmark of the law for determining future lost earning capacity is flexibility. That cannot be surprising. Determining what will happen, as opposed to what has happened, let alone measuring what will happen in compensation, is inherently difficult.

[212] The Plaintiff, through Mark Szekely, the economist, presented evidence addressing the earnings of orthopedic surgeons in the United States. The PCC elected not to tender any report to show the career earnings of orthopedic surgeons.

[213] Mr. Szekely employed conservative (i.e., relatively low) average annual earnings of orthopedic surgeons in the United States to determine the present value of David Mackey's future career earnings. Had the Plaintiff worked to age 65, when 74.1% of orthopedic surgeons are still employed, his career earnings would have been \$8,679,762 (USD) based on Mr. Szekely's conclusions.

[214] Mr. Szekely assumed a residency of six years for orthopedic surgery.

[215] The cross-examination of Mr. Szekely focused on the fact that part of the data he employed reported median earnings whereas other data he employed reported average earnings. Mr. Szekely explained that employing both median and average data is "suboptimal" but that doing so here was necessary in order to properly derive the earnings of orthopedic surgeons in the United States. I found Mr. Szekely's explanation to be sensible. Further, as I noted earlier, his conclusions were not contradicted by alternative numbers presented by the defence. A defence expert said that one should avoid employing both median data and

average data in this context, but did not go on to say that there was a better approach that could have been taken in this case, let alone what conclusion that approach might have led to.

[216] I accept Mr. Szekely's assumptions, and his finding that the present value of an orthopedic surgeon's earning capacity in the United States, to age 65, is \$8,679,762 (USD). For ease of reference, I will round that number to \$8,680,000 (USD).

[217] In *Rosvold*, cited above at para. [210], the Court of Appeal observed that the inquiry should not end with a present value calculation, such as the one performed in this case by Mr. Szekely. The Court added that "[t]he overall fairness and reasonableness of the award must be considered taking into account all the evidence."

[218] For this final part of the future earnings analysis, I also respectfully adopt the summary of the legal principles found by Kelleher J. at paras. 306-311 in *Danicek*, cited above at para. [183]:

[306] According to *Palmer*, a trial judge should not calculate a plaintiff's "future loss of income", but should determine the plaintiff's future loss of earning capacity. Accordingly, economic projections of a plaintiff's income stream with and without the accident are not dispositive. I should not calculate Ms. *Danicek*'s future loss of income on an arithmetical basis, but rather must assess her loss of earning capacity by taking into account all relevant evidence.

[307] This is in accord with what a majority of the court held in *Parypa v. Wickware*, 1999 BCCA 88, 65 B.C.L.R. (3d) 155. *Cumming J.A.* noted that extrapolating a present income into the future and discounting it to a present value is only an indicator of loss of capacity, and is not the compensable loss itself. The court's task is to ultimately:

70 ... base its decision on what is reasonable in all of the circumstances. Projections, calculations and formulas are only useful to the extent that they help determine what is fair and reasonable. *Macfarlane J.A.* in *Friesen v. Pretorius Estate* (1997), 37 B.C.L.R. (3d) 255, identifies the importance of using estimates to arrive at a figure that is reasonable in all the circumstances, at 263:

In *Morris v. Rose Estate*, (1996), 75 B.C.A.C. 263 (B.C.C.A.) Mr. Justice Donald, writing for the court said, at para. 24:

Assessing damages in this area involves an estimate based on prophecies. Mathematical certainty is impossible in virtually all cases. While a comparative scenario approach will often be useful, the judge must step back and look at all the relevant factors, especially general incapacity, before fixing an amount. See the remarks of *Lambert J.A.* in *Ryder v. Paquette*, [1995] B.C.J. No. 644 (C.A.)

...

- [308] As noted by Mr. Justice Hall in *Pett v. Pett*, 2009 BCCA 232, 93 B.C.L.R. (4th) 300, the ultimate task of the court is to quantify the financial harm sustained by the plaintiff:
- [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.
- [309] When assessing the impairment of a plaintiff's future earning capacity in accordance with the principles summarized above, the court must take into account all relevant contingencies.
- [310] Generally speaking, an allowance for positive and negative contingencies should be modest: *Kern v. Steele*, 2003 NSCA 147 at para. 59, 220 N.S.R. (2d) 51. In *Trites v. Penner*, 2010 BCSC 882 at para. 228, Ker J. held that relevant contingencies can include such things as the potential for improvements in health, opportunities for advancement, decline in the economy and loss of employment, as well as the usual chances and hazards of life.
- [311] In *Campbell-MacIsaac v. Deveau*, 2004 NSCA 87, 224 N.S.R. (2d) 315, the court described the use of contingencies as an "exercise of prediction, based not on guesswork but on proper proof [requiring] a careful consideration of the evidence and a healthy dose of common sense." Saunders J.A. endorsed the following approach to this issue:

101 ... When assessing contingencies the court is engaged in the exercise of examining possibilities, probabilities and chances against the likelihood that they might prevail in any given factual situation. The evidence upon which such estimations are based must be "cogent evidence and not evidence which is speculative" (*Schrump, et al v. Koot et al* (1977), 82 D.L.R. (3d) 553 (Ont. C.A.)). Evidence which supports a contingency must show a "realistic as opposed to a speculative possibility" (*Graham v. Rourke* (1990), 75 O.R. (2d) 622 (Ont. C.A.)). Justice Oland also endorsed the approach in *Graham*, *supra*, which was to distinguish general contingencies from special ones. Into the category of general contingencies fall those features of human experience that are likely to be common to all of us, things like the aging process, sickness, or promotions at work; whereas circumstances falling into the category of special contingencies are peculiar to that particular claimant. For example, remarkable talents, education, a unique illness or a poor

employment history would be characterized as special contingencies.

102 ... the impact of general contingencies may not be easily susceptible to formal proof. A trial judge has a discretion whether to adjust an award for future pecuniary loss in order to take into account general contingencies, but any such adjustment ought to be a modest one. Where, however, a party relies upon a specific contingency, whether negative or positive, there must be sufficient proof on the record which would support an allowance for that type of contingency...

[Emphasis added.]

[219] The Plaintiff has established the real and substantial possibility that he would have become an orthopedic surgeon.

[220] However, the real and substantial possibility of David Mackey becoming an orthopedic surgeon, but for the accident, is not the same as him being an orthopedic surgeon. \$8,680,000 (USD), representing an orthopedic surgeon's earnings, must be reduced, as a measurement of David Mackey's income earning capacity, to recognize his circumstances before the accident, and how far he was at that time from achieving his goal of practising orthopedic surgery, let alone having a successful lifetime career in that field.

[221] Our Court of Appeal, in *Kathuria v. Wildgrove*, 2015 BCCA 186, reduced by 50% an award for the plaintiff's loss of future earning capacity to reflect the substantial possibility that the plaintiff would not qualify as a physician. I quote paras. 15, 18 and 19 from *Kathuria*:

[15] The appellants say the evidence at trial required the trial judge to apply significant contingencies to reflect the uncertainty that the plaintiff's future income would have resulted in the amounts used by the economist. The appellants say it was an error not to make allowance for significant negative contingencies and to thereby have ensured the overall reasonableness of the award: *Steward v. Berezan*, 2007 BCCA 150.

...

[18] There is merit in the first ground of appeal; the trial judge applied a wrong principle of law by leaving out of account a relevant factor in the assessment of the damages caused by delayed entry into the workforce: the real and substantial risk the plaintiff would not qualify as a physician.

[19] Because the assessment of future or hypothetical past losses requires the trial judge to weigh possibilities as well as probabilities, it is an error to treat an injured person's anticipated career to be a certainty where there is evidence of considerable uncertainty with respect to the plaintiff's prospects. As this Court noted in *Reilly*, account should be taken of the possibility a person might not realize his or her professional dreams.

[Emphasis added.]

- [222] Taking that direction from the Court of Appeal into account, I reduce, by 40%, the calculation of an orthopedic surgeon's earnings to age 65 in the United States, in order to determine David Mackey's future lost earning capacity. A 40% reduction from \$8,680,000 (USD) results in an award of \$5,208,000 (USD).
- [223] David Mackey was only in high school at the time of the accident. He needed to complete high school, his mission and community college; and be accepted for, and complete, undergraduate work, medical school and a residency before then being able to maintain a lifelong career in orthopedic surgery.
- [224] Were it not for his exceptional drive and determination before the accident, the influence upon him of his family and church, his high I.Q., his focus from an early age on orthopedic surgery, and his high levels of achievement in several extra-curricular pursuits, I would have reduced his award under this part of the analysis by more than 40%. However, in my view, David Mackey was unique. In essence, at least in economic terms, I find that he had what amounts to a 60% probability of fulfilling his ambition to work and serve his community as an orthopedic surgeon throughout his working life.

Residual Income Earning Capacity

- [225] I addressed earlier in the reasons (see paras. [115] to [117]), David Mackey's limited employment future after the accident. If David Mackey is able to obtain work generating in the range of \$25,000-\$30,000 (USD) per year until age 65, the present value of residual employability is \$857,000 (USD). (That latter number was derived by Mr. Carson, called by the PCC.) Mr. Szekely, for the Plaintiff, derived the figure of \$930,000 (USD), assuming David Mackey can earn on average \$30,000 (USD) per year to age 65. Those estimates of future annual earnings are based roughly on the Plaintiff's post-accident pay scale to date. Both of those numbers, \$857,000 (USD) and \$930,000 (USD), are too high, in my view, in that they assume steady employment, albeit at a relatively low wage. The evidence does not support the conclusion that the Plaintiff will have continuous employment in future years. He is more likely to go from one job to another, from time to time, as he has over the past six or seven years. Inevitably for the Plaintiff, changing jobs will carry with it periods between jobs when he is earning nothing. I am adopting the figure of \$675,000 (USD) as reasonably representing the present value of the Plaintiff's capacity to earn income in the future, taking into account how sporadic his employment is likely to be. Mr. Mackey's net loss of future earning capacity is therefore \$5,208,000 (USD) less \$675,000 (USD), i.e., \$4,533,000 (USD).

SUMMARY

- [226] In summary, the damages to be awarded to the Plaintiff, before adjusting downward to take the Plaintiff's contributory negligence into account, are as follows:

Non-pecuniary damages

CDN

\$

250,000.00

In-trust claim

CDN

\$

15,000.00

Cost of future care

USD

Fune Plan as adjusted (USD) plus

\$20,000 (USD)

Past income loss

0

Loss of future earning capacity

USD

\$

4,533,000.00

[227] The parts of the award expressed in U.S. funds will be subject to exchange rates between Canadian and American currency, in accordance with the Foreign Money Claims Act, R.S.B.C. 1996, c. 155.

[228] The Plaintiff's claims related to management fees and a tax gross up are adjourned and can be spoken to.

[229] The damages awarded will be reduced to take into account the Plaintiff being found 65% contributorily negligent.

[230] Costs can be spoken to.

"MACINTOSH J."

Source & reproduction note

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

ORIGINAL SOURCE <https://www.bccourts.ca/jdb-txt/sc/16/13/2016BCSC1333.htm>

CASE PAGE <https://chat.esheria.ai/case-law/canada/mackey-v-british-columbia-2016>

Prepared on 29 October 2026 · Esheria