

CANADA / JUDGMENT

Neufeldt v. Marcellus

2020 BCSC 427

COURT

Supreme Court of British Columbia

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2020 BCSC 427 Neufeldt v. Marcellus

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Neufeldt v. Marcellus,

2020 BCSC 427

Date: 20200324

Docket: M-28372

Registry: Chilliwack

Between:

Jeffery Theodore Neufeldt

Plaintiff

And

Jude Lincoln Marcellus, John Doe #1, John Doe #2,

and ABC Company

Defendants

And

Insurance Corporation of British Columbia

Third Party

And

Docket: M-32788

Registry: Chilliwack

Between

Jeffrey Theodore Neufeldt

Plaintiff

And

Insurance Corporation of British Columbia

Defendant

Before: The Honourable Mr. Justice Ball

Reasons for Judgment

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Place and Date of Trial:

New Westminster, B.C.

April 15 - 18, 2019

April 23 - 26, 2019

Place and Date of Judgment:

Chilliwack, B.C.

March 24, 2020

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Introduction

- [1] The facts concerning the two motor vehicle accidents which give rise to this action were not disputed or otherwise challenged. Both motor vehicle accidents occurred while the plaintiff, Jeffrey Neufeldt, was on duty as an RCMP Constable, and he claims damages arising therefrom. The first motor vehicle accident occurred on September 23, 2012, and counsel for ICBC described it as a breach claim. The second accident occurred on May 30, 2016, and counsel for ICBC described the file as an unidentified claim. Liability was denied in both accidents. In these reasons, judgment is granted in favour of the plaintiff for both accidents.

The First Accident

- [2] On September 23, 2012, the plaintiff was assigned to patrol in a Port Coquitlam neighbourhood as a result of a stabbing incident earlier that day. The police were concerned that there may be further criminal activity in retaliation for the stabbing.

- [3] During that patrol on night shift, the plaintiff received a dispatch call advising of a suspected violent domestic incident in progress at a private residence. The plaintiff arrived at the residence at or about 11:30 p.m. Upon Cst. Neufeldt's arrival at the residence, Jude Marcellus, the named defendant in the first accident, fled the residence in a 1990 Honda Civic, driving for several blocks. The plaintiff pursued the defendant in his police cruiser, a 2007 Crown Victoria. While pulling into a warehouse parking lot, Mr. Marcellus' Honda struck an unoccupied parked vehicle.
- [4] The Honda subsequently came to a stop and the plaintiff was able to use his vehicle to "box-in" the Honda with his police cruiser. When stopped, the two vehicles were about 15 to 20 feet apart. The plaintiff was wearing a three-point seat belt. Mr. Marcellus reversed his vehicle, striking the front end of the police cruiser driven by the plaintiff. The windows in Mr. Marcellus' vehicle were "smashed out" by the force of the collision and the rear end crumpled.
- [5] After the collision, Mr. Marcellus exited his vehicle and approached the plaintiff in a fighting stance. The plaintiff, who had exited the police cruiser, was able to verbally calm Mr. Marcellus, who was subsequently arrested by the plaintiff and another officer who arrived on scene shortly after the collision occurred. After the collision, the plaintiff felt light-headed and confused.
- [6] Police found that the defendant was intoxicated and was in possession of brass knuckles and stolen property. A search of his residence by police turned up a sawed-off shotgun and an improvised explosive device. Eventually, the defendant pled guilty to several charges and spent some time in jail and a psychiatric facility.
- [7] As a result of the collision, the plaintiff suffered musculo-skeletal injuries to the cervical, thoracic and lumbar regions of his spine as well as chronic, continuing headaches. He was totally disabled from returning to work for a period of approximately six months. When he began to return to work on a graduated basis, he was given administrative desk duties. The plaintiff remained partially disabled for a further 18 months and never fully recovered from the first accident. During the entire period of the graduated return to work, the plaintiff suffered pain in his lumbar, thoracic and cervical spine as well as chronic headaches. He took prescribed medication in the form of naproxen and Tylenol 3 on a daily basis while working and was unable to drive a police vehicle for extended periods of time due to pain and the need to stretch frequently.

The Second Accident

- [8] On May 30, 2016, after 11:00 p.m., the plaintiff was a front seat passenger in a 2014 Ford Taurus police cruiser being driven by Cst. B. Lindsay, then being trained by the plaintiff. Cst. Lindsay had stopped the police cruiser at a red light when the police cruiser was rear-ended. The plaintiff and Cst. Lindsay exited the police cruiser in an effort to engage the driver whose vehicle rear-ended the police cruiser. That driver immediately reversed his vehicle,

revved his engine and fled, driving away from the scene of the accident. Cst. Lindsay and the plaintiff re-entered their police vehicle and attempted to pursue the fleeing vehicle. As the fleeing vehicle crossed an overpass over the freeway, visual continuity was lost due to the change in elevation and the high speed of the fleeing vehicle. Cst. Lindsay turned on to another street for several blocks, but eventually had to terminate the chase and stop the police cruiser because of RCMP policy, which restricts police vehicle pursuits. The plaintiff was suffering significant pain and feeling dizzy (nauseous). The fleeing vehicle did not stop and Cst. Lindsay lost sight of the vehicle.

- [9] The Coquitlam RCMP dispatch broadcast a "be on the lookout for" ("BOLF") alert for the vehicle that struck the Ford Taurus with all police agencies across the Lower Mainland. The RCMP set up choke points at various significant intersections around Coquitlam and on approaches to the Port Mann Bridge to Surrey to try to intercept the vehicle that struck the police cruiser. The RCMP briefed members on the shift the morning after the crash and ran the license plate and the make and model of the vehicle through all of the databases available to the RCMP. Despite these efforts, the RCMP was unable to identify or locate the vehicle or the driver that struck the police cruiser.

Circumstances of the Plaintiff

- [10] Jeffrey Neufeldt was 40 years old at the time of trial and married to his wife, Julie, for more than 16 years. They reside with their four children, aged 4 - 11, in Mission, where they have lived for approximately ten years.
- [11] The plaintiff attended the Mennonite Educational Institute high school in Mission. After graduation from high school in 1997, the plaintiff took university training in geography and history, eventually earning a Bachelor of Arts from Trinity Western University on December 31, 2002.
- [12] After graduation, the plaintiff worked in construction for two years.
- [13] The plaintiff then followed a long-term interest in policing by applying to the Royal Canadian Mounted Police in 2005. The application took approximately one year and the plaintiff graduated from the RCMP training depot after a 24-week training programme in January 2007. The plaintiff found the first three months of training very challenging, but enjoyed the program after that. The training programme included marching; physical conditioning; hand-to-hand tactics; defensive tactics including use of baton and capsicum spray; driver training on city driving, obstacle, and track driving; firearms training for handguns and shotguns; and applied police sciences. Physical training required the successful completion of the PARE (physical ability requirement program) test, as well as other physical tests in timed circumstances. The plaintiff successfully completed all training modules without repeating any of them.

- [14] After completing RCMP training as a police officer, the plaintiff found he very much enjoyed police work and was supported by members of his family "knowing that he was making a difference in the community". On duty, he has been in hand-to-hand combat, high speed chases in vehicles, and has arrested over 100 people. His daily work as an RCMP officer included approximately 80% of on-duty time driving and a wide variety of other events. He had positive relationships with fellow officers, supervisors and officers in charge in the Coquitlam detachment.
- [15] The first child was born into the Neufeldt family in difficult circumstances and the plaintiff decided to take three months of paternity leave to assist his wife with those circumstances. He found the other RCMP officers very supportive of this life choice. He returned to work with the RCMP in June 2008 into general duty. On February 22, 2010, a second child was born. At that time, the plaintiff took five of the nine months available for paternity leave. During the paternity leave, Cst. Neufeldt assisted his wife caring for two children and worked on the building of a new home for his family.
- [16] The plaintiff aspired to be promoted through the RCMP ranks in general duty to road supervisor and ultimately watch commander. Advancement required the completion of police competencies and success with a written examination.
- [17] In July 2010, the plaintiff returned to work with the RCMP at the Coquitlam detachment in general duty as a radio room operator for a 46-hour eight day work week with overtime hours and working holidays. During the plaintiff's previous paternity leave, he had injured his right elbow. After some physiotherapy treatment, in mid- 2011, Dr. Regan, a surgeon specializing in elbow treatment, recommended that the plaintiff have surgery performed on his elbow.
- [18] In September 2011, a third child was welcomed into the Neufeldt family. The plaintiff arranged for nine months' paternity leave and the RCMP agreed to allow him to have expedited elbow surgery performed during the paternity leave. After surgery, the plaintiff received approximately three months of physiotherapy and laser treatment to treat scar tissue in his elbow. He was medically cleared to return to police duties prior to the end of the scheduled paternity leave. He was also required to requalify with use of force options training in use of OC (pepper) spray, baton, and other non-lethal force options. The plaintiff was eager to return to work at that time.
- [19] After the first accident on September 23, 2012, the plaintiff began writing the Report to Crown Counsel. While writing the report, the plaintiff began to feel stiffness and pain in his neck and upper back immediately, and began to suffer headaches. Cst. Neufeldt reported his involvement and injury to his supervisor, Daniel Redenbacher. The plaintiff was surprised and confused by the actions of the defendant.
- [20] RCMP policy requires that all officers in a police vehicle involved in an accident complete a report of the incident.

- [21] Cst. Neufeldt was scheduled to return to work on September 29, 2012. He returned for one shift, performing training of new officers for hearings before a judicial justice of the peace. On September 30, 2012, he woke to extreme pain in his neck and back with a significant headache. He could not move from bed and was unable to participate in his daughter's first birthday.
- [22] He saw Dr. Barnsdale, who was the doctor available at the office of Dr. Mansingh, the plaintiff's general practitioner. Dr. Barnsdale diagnosed the plaintiff with soft tissue injuries and prescribed naproxen. She also directed that the plaintiff should rest and not return to work for the rest of the block; a period of four days. Dr. Barnsdale provided an RCMP work absence certificate to the plaintiff. Physiotherapy was a prescribed treatment modality, which he attended at Oasis Physiotherapy for two or three appointments each week. He also attended chiropractic treatment every other week and received treatment from a registered massage therapist, John Ford, every other week.
- [23] The plaintiff continued to experience neck and lower back stiffness and pain symptoms, which migrated into his mid back. On a visit with Dr. Mansingh a week or so later, the plaintiff reported the same symptoms had worsened.
- [24] The plaintiff's back and neck symptoms continued for the following weeks and his headaches became more severe and occurred more regularly. The plaintiff was unable to play with his children and the symptoms put a strain on his relationship with his wife, including restricting his sex life due to pain. He was not able to take part in activities with friends or family such as golf.
- [25] Physiotherapy provided some relief to the plaintiff, but relief did not last beyond a day or two. The chiropractic treatment also provided relief for only one week. Massage therapy provided only limited relief. The RCMP paid for treatment of physiotherapy, chiropractic and massage after the first accident, and the plaintiff contributed \$5.00 for each massage.
- [26] The plaintiff returned to work on a graduated return to work program in March 2013 for four hours once or twice per week. Dr. Mansingh approved his return to work on a limited basis. The plaintiff testified he was still suffering headaches two or three times per week and neck and back pain daily and he did not think he was ready to return to work. He described his neck pain as continuous and his back pain made it difficult to sit to perform desk duties. In order to attend work, the plaintiff required naproxen and Tylenol 3s to cope. He was still attending physiotherapy, chiropractic treatments and massage therapies on a regular basis.
- [27] Sitting for long periods of time made stiffness and pain worse. By March 2013, the symptoms had only marginally improved. The duties assigned to the plaintiff were desk duties and safe schools program. The plaintiff reported that sitting and doing deskwork in the RCMP detachment was making symptoms worse in his neck and back, which aggravated his headache symptoms.

- [28] In March 2013, the plaintiff was assigned by RCMP Health Services to the Mission detachment on the advice of doctors who said the longer commute from his home to the Coquitlam detachment aggravated the plaintiff's symptoms.
- [29] The plaintiff testified that the time it took him to recover from four-hour shifts varied dependent on the amount of sitting at a desk against the amount of upright or standing activities. His graduated return to work continued from March 2013 to the end of December 2013. The number of hours worked increased gradually over that period, after consultation with the plaintiff's doctor and physiotherapist.
- [30] The return to work program was converted into an active rehabilitation program at the Apollo Clinic, which led to an increase to regular hours of police work. The active rehabilitation program mimics the RCMP PARE test. The plaintiff testified he had returned to full-time hours by the beginning of January 2014.
- [31] The plaintiff completed the active rehabilitation program in April 2014. While awaiting clearance from the RCMP for return to full active duty, the plaintiff was assigned to a school liaison unit and safe schools programme, which included design of school emergency response plans, police officer bicycle refitting and training and other light duty work. The plaintiff was working 40 hours per week on four ten-hour shifts. As he was not cleared for full active duty, the plaintiff was not permitted to work any overtime or on holidays.
- [32] Regular performance reviews are prepared by individual RCMP officers which are then reviewed by senior officers. The goals listed in the plaintiff's August 14, 2014 Performance Evaluation and Learning Plan included returning to full work duty and completing the PARE. He exhibited high morale while working on mundane duties such as photocopying, completing on-line courses, filing documents, and writing during non-active desk duties.
- [33] The plaintiff's fourth child was born August 21, 2014. The plaintiff took paternity leave at that time, having not yet been cleared to return to full police duties. The RCMP was facing the loss of a doctor and a resultant back-up in its review of medical records for return to active duty. The plaintiff continued various physical therapy sessions and attended gym workouts to be ready when approval for full return to active duty was given by the RCMP medical staff.
- [34] The plaintiff continued to experience neck, upper back and lower back pain as well as headaches while he was on paternity leave. He obtained temporary relief from each of the therapies for some days, but pain and stiffness would return. He took part in household chores to the best of his capability.
- [35] The last paternity leave concluded in May 2015 and the plaintiff testified that his neck, back and headache symptoms were the same as when he began the paternity leave. Nothing had changed over that nine-month period. He continued to take naproxen and Tylenol 3s, particularly on the days he was driving to work.

- [36] In May 2015, he returned to Coquitlam doing 40 hours a week of desk work because he had not been cleared for general duties by RCMP health services. Eventually he was assigned back to "E Watch" in the Coquitlam detachment, performing general duties in the office as a non-operational radio room constable.
- [37] Prior to obtaining clearance for full-time active police service, the plaintiff was required to attend a five-day Operational Skills Training course. After completing that course in June 2015, he was cleared for full active duties.
- [38] On returning to full active police duties, the plaintiff found that he had to adjust to shift work. When driving a police cruiser for long periods, his back and neck were painful and stiff. He had to continue taking naproxen and Tylenol 3 on every shift to cope with the pain and stiffness caused by driving. He was taking physiotherapy, chiropractic and massage therapy on days off.
- [39] Counsel for the defendants and ICBC submitted that the plaintiff had fully recovered from the injuries he experienced in the first accident prior to the second accident. This submission was made in reference to the evidence of Sgt. Pankratz, specifically a statement where he allegedly claimed the plaintiff was carrying out police duties "without any limitation". This was not a statement made by Sgt. Pankratz in his evidence, and the submission is simply incorrect.
- [40] Sgt. Pankratz testified that he was aware the plaintiff continued to suffer from neck and back injuries "that he (the plaintiff) was managing." Sgt. Pankratz confirmed he was not overseeing the plaintiff's return to work and recovery as he was working in a different zone within Coquitlam. He also noted the plaintiff was being accommodated by being assigned radio room duties, where the physical risk was less significant than being on duty in a police cruiser. Sgt. Pankratz testified the radio room was an opportunity for the plaintiff to be "less physically engaged." The radio room assignment was clearly a form of workplace accommodation for the plaintiff's limited physical abilities.
- [41] The plaintiff found he was very tentative in going "hands on" in situations requiring him to make physical contact. When a file required that he be involved in a physical way with a person being restrained or arrested in the course of police duties, he experienced stiffness or pain thereafter.
- [42] A Performance Evaluation and Learning Plan dated September 30, 2015 was completed with Cpl. S. Williams, the supervisor of the plaintiff. The plaintiff was looking forward to improving skills in property crime and was applying for promotion to road supervisor corporal. The plaintiff needed to re-write two further competencies. Cpl. Williams wrote he looked forward to assisting the plaintiff in continuing to advance his skills in general duty and to gain promotion. Promotion would come at about ten years for corporal, after which the plaintiff intended to apply for promotion to sergeant, staff sergeant and watch commander. As a training officer, Cst. Neufeldt hoped to help Cst. Lindsay to perform police duties at a high level.

- [43] After the first accident, the plaintiff filed a claim for lost wages with Veterans Affairs, the equivalent of WorkSafeBC for federal employees. The claim was for injuries to the plaintiff's neck, upper and lower back. Dr. Mansingh included myofascial pain on the claim form. The plaintiff asserted in that claim that he had difficulties participating in play activities with his children. He asserted he could not perform tasks such as exterior maintenance and yard work such as mowing lawns. He needed assistance to complete some chores, such as putting heavy items in a cart, pushing a grocery cart when loaded, and loading from a cart onto a cashier's station. He also could not play soccer or football at family gatherings or golf.
- [44] Dr. Mansingh wrote under medical history that the plaintiff experienced diffuse non-radicular pain, daily "diffuse constant neck pain" and that the plaintiff used Robaxacet and Tylenol regularly as well as Tylenol 3 and naproxen. The plaintiff's claim was ultimately denied.
- [45] The plaintiff remained on full active duty from June 2015 until the second accident on May 30, 2016, although he was still subject to the limitations and pain symptoms noted above.
- [46] The plaintiff suffered a concussion in the second accident as well as sore hips and pain in his lower, mid, upper back and neck. He was taken to Royal Columbian Hospital emergency department by ambulance for treatment and was, among other things, injected with pain medication over the next few hours. The plaintiff also suffered severe headaches. Pain in his neck made his headaches worse.
- [47] The emergency room doctor told the plaintiff to rest the next day, a day off, and then to see his family doctor. The plaintiff saw Dr. Andrew Johnson at a walk-in clinic on June 7, 2016 because Dr. Mansingh had moved his practice to Vancouver. The plaintiff reported neck and back pain and headaches to Dr. Johnson, who prescribed physiotherapy and naproxen.
- [48] The plaintiff's symptoms developed over the next week with headaches and neck and back pain that was constant and from which there was no relief. The plaintiff found it very difficult to function at his home. The plaintiff was asked to balance on one foot at physiotherapy and fell against a wall. The physiotherapist directed the plaintiff to go back to his general practitioner and seek treatment for concussion, which the physiotherapist believed he had observed in the failed balance test. This occurred approximately three weeks after the second accident. The plaintiff had been inactive and uncomfortable and was not aware of concussion symptoms.
- [49] On June 15, 2016, the plaintiff attended an appointment with a general practitioner, Dr. Yokoyama, who referred the plaintiff to a concussion specialist, Dr. Dadachanji at the Fraser Orthopaedic Institute in New Westminster. The plaintiff had reported his balance problems to Dr. Yokoyama. Dr. Dadachanji referred the plaintiff to a vestibular physiotherapist who dealt with the symptoms of sensitivity to loud noise and bright light, irritability and mood swings reported by the plaintiff.

- [50] The plaintiff attended with the vestibular physiotherapist, Jeremy Bensler at ProMotion Physiotherapy in Abbotsford. The plaintiff was told not to attend the gym to work out.
- [51] The plaintiff continued to work with two physiotherapists, Jeff Brown and Jeremy Bensler. Mr. Brown worked on physical back and neck symptoms. Mr. Bensler worked on concussion symptoms including eye movement and headaches. A variety of therapies were applied to the plaintiff. Some of these therapies provided slight relief, but others were not successful and increased the plaintiff's unreasonable anger and irritability against family members. Communication, socialization and computer messages all became difficult for the plaintiff and triggers for frustrated, angry outbursts.
- [52] The second accident changed the relationship between the plaintiff and his wife for a period to time. While the plaintiff's physical symptoms were familiar, the concussion symptoms of anger, frustration and irritability were new and damaged family relationships. The plaintiff testified he considered suicide at the time of the first anniversary of the second accident. He felt very frustrated because he had expected to be back at work shortly after the second accident.
- [53] He was referred to Dr. Linley, a psychologist, with whom he discussed how to alleviate symptoms of anger and frustration related to concussion.
- [54] The plaintiff was referred by Dr. Yokoyama to a psychiatrist who, according to the plaintiff, diagnosed the plaintiff as having post-traumatic stress disorder, anxiety and depression. Dr. Yokoyama prescribed escitalopram, which improved symptoms of anxiety and mood swings. The plaintiff thereafter had fewer incidents where he lost emotional control to anxiety and depression. That prescription was first prescribed for the plaintiff a year and five months after the second accident.
- [55] The plaintiff testified that his short-term memory is not working well and everything from shopping lists to appointments have to be written down or are forgotten. This lack of memory has caused problems with family arrangements.
- [56] The plaintiff testified that since the second accident, he has a hard time focusing his vision on written material or computer screens. He is unable to focus on both of the sights on his firearm. Jeremy Bensler conducted an assessment for the RCMP and found that the plaintiff had an inability to visually track an object.
- [57] The plaintiff returned to work briefly in April 2018. The plaintiff's doctor and the RCMP doctor decided to try a graduated return-to-work program for four hours per week from 6 AM to 10 AM on Monday mornings. The plaintiff was excited by this opportunity. He found it took a day to recover from his symptoms after his shift. This shift pattern persisted for the next three weeks, during which time the plaintiff could not operate a computer or sit still at a desk. After the third week, the plaintiff was given a program which required him to return to full duties within 12 weeks, including driving. A telephone conference confirmed a full return within 12 weeks was the intention of the RCMP doctor, but the return to full active

duties within 12 weeks was not approved by the plaintiff's doctor. Dr. Yokoyama suggested that a different, less rigorous return-to-work program would be more appropriate.

- [58] The plaintiff testified he would be a hazard driving a police vehicle while also trying to detect driving infractions, listen to and respond to radio calls, and deal with the in-vehicle computer. He was also concerned about attending specific calls with split-second decision-making, particularly those involving decisions to arrest an individual or to use deadly force options.
- [59] The plaintiff can only read for brief periods before becoming nauseous. He also said he sometimes has trouble sleeping continually, which was not a problem prior to the second accident.
- [60] The plaintiff cannot do squats or shoulder exercises, but lifts weights to the extent that he can. If he exerts himself too much, he becomes too dizzy to stand.
- [61] The plaintiff finds that regular exercise in the gym, modified to his limited physical capacity, is essential to his well-being. He is able to control the movements of his body in the gym, which he is unable to do when he is on active police duties, where things like sitting in a car, sitting at a desk or engaging in physical confrontations are essential to police duties but have caused him significant physical pain since the first accident occurred.
- [62] The plaintiff intended to work in the RCMP until he was 62 years old, which would provide him a full pension. He enjoyed work as an RCMP officer and "could not believe he got paid to do this work".
- [63] The plaintiff has investigated the potential for further educational training but does not believe he would be physically able to read sufficient material to complete a university course.
- [64] During cross-examination, the plaintiff agreed with defence counsel when asked if the pain in his low back, mid back and neck continued with significant headaches following the first accident and remained unresolved at the time of the second accident. The plaintiff also agreed with counsel during cross-examination that the symptoms of low back pain, mid-back pain and neck pain with headaches were aggravated by the second accident.

Issues

[65] Plaintiff's counsel framed the four major issues in this case as follows:

- A. the nature and extent of the injuries to the plaintiff caused or contributed to by the negligence of the defendants;
- B. whether the plaintiff's injuries are divisible for the purposes of assessing damages;
- C. the assessment of damages for pain and suffering and loss of enjoyment of life; past and future wage loss; costs of future care; subrogation; and special damages; and

D. Whether the plaintiff complied with the provisions of section 24(5) of the Insurance (Vehicle) Act, R.S.B.C. 1996, c. 231.

Medical Evidence

[66] The first doctor to see the plaintiff was Dr. Barnsdale. The first appointment was on October 1, 2012. Dr. Barnsdale noted that the plaintiff had been in a motor vehicle collision and was suffering pain and stiffness in his neck and throughout the cervical, thoracic and lumbar segments of his back. He was taking Tylenol and Robax. Dr. Barnsdale ordered the plaintiff to cease working and prescribed physiotherapy treatments (See Exhibit 19, page 18).

Dr. Mansingh

[67] Dr. Sohan Mansingh was the plaintiff's general practitioner, and provided treatment to the plaintiff from the date of the first accident until Dr. Mansingh moved his practice to Vancouver prior to the second accident. Dr. Mansingh was not involved in diagnosis nor treatment of the plaintiff for the second accident. Dr. Mansingh's expert report concerning the first accident, dated August 29, 2018, was filed in these proceedings, and was based on his observations and notes of the plaintiff after the first accident.

[68] The plaintiff's first appointment with Dr. Mansingh after the first accident was on October 5, 2012 at which time Dr. Mansingh performed an examination of the plaintiff's neck, back, trapezius bilaterally, para-spinal area, thoracic and lumbar spine. Prior to the accident on September 23, 2012, Dr. Mansingh understood that the plaintiff had a pleasant family life and was involved in multiple recreational activities without any significant problems with his neck, mid back or lower back.

[69] After the first accident, Dr. Mansingh found that the plaintiff had back pain and a reduced range of motion. In May 2013, Dr. Mansingh diagnosed the plaintiff with chronic neck pain, myofascial pain and facet joint pain as part of a Veteran's Affairs pension application. On April 7, 2014, Dr. Mansingh completed a health assessment for the RCMP which indicated the plaintiff could return to work, but that he had recurrent headaches, neck and back pain and stiffness, and restrictions which could interfere with more strenuous activities.

[70] In his expert report in 2018, Dr. Mansingh diagnosed the plaintiff with chronic myofascial pain to the cervical, thoracic and lumbar spine, which he opined was caused by the first motor vehicle accident. With respect to prognosis, Dr. Mansingh stated:

Mr. Neufeldt was involved in an accident in 2012, and he has ongoing symptoms involving his neck, mid and lower back. He has ongoing pain, reduced mobility and problems with sitting or standing for extended periods of time. He is unable to participate or perform activities that he used to previously do. He has increased pain and flares of symptoms after doing certain activities, as well. It has been almost 6 years since the motor vehicle accident; therefore I am of the opinion his current injuries are also permanent in nature.

- [71] Dr. Mansingh further opined that while the plaintiff had returned to full duties after extensive treatment, including physiotherapy, rehabilitation and continuing medication, the plaintiff continues to have ongoing symptoms as a result of the first accident. He has chronic neck, mid and lower back pain. He still has difficulty sitting or standing for extended periods of time, and if he does so, he has increased pain and reduced mobility as a result. He has also been unable to participate in recreational activities like golf and baseball since the first motor vehicle accident. With regard to household chores and yard work, Dr. Mansingh opined that Mr. Neufeldt is able to perform these activities; however, he does have increased pain and stiffness and reduced mobility if he overdoes it.
- [72] On the subject of future care needs, Dr. Mansingh opined that Mr. Neufeldt will likely require ongoing physiotherapy to treat myofascial pain, and may require more focused intensive physiotherapy and rehabilitation if he has any further injuries to his neck or back.

Dr. Yokoyama

- [73] Following the second accident, the plaintiff was treated by Dr. Benjamin Yokoyama at the Cedar Care Clinic. Mr. Neufeldt initially reported the May 30, 2016 accident to Dr. Johnson, another doctor at the clinic, on June 7, 2016. He complained of lower back pain, headaches, and difficulty focusing and concentrating. At that time, Dr. Johnson assessed his lower back with decreased flexion to about 75% and decreased rotation and lateral flexion to about 75%.
- [74] On June 15, 2016, Mr. Neufeldt saw Dr. Yokoyama and complained of hip pain, neck pain, headaches, light sensitivity, nausea, vertigo, fatigue and memory difficulty. He said he had no prior history of concussion. Dr. Yokoyama diagnosed the plaintiff with a concussion and soft tissue injuries and referred the plaintiff to Dr. Dadachangi, a rehabilitation medicine specialist.
- [75] Mr. Neufeldt saw Dr. Yokoyama next on June 21, 2016, where he reported similar symptoms to his prior visit. He was prescribed Nortriptyline and an MRI was ordered. Ultimately, the MRI revealed no evidence of intracranial trauma or disc herniation in the cervical spine.
- [76] Dr. Yokoyama saw the plaintiff again on October 24, 2016. He was still suffering ongoing symptoms with respect to the concussion. He was prescribed Ketorolac at 10 milligrams to be taken four times a day. He was also referred to Dr. Heather Underwood, a rehabilitation medicine specialist in concussion, diagnosis and treatment.
- [77] On January 25, 2017, Mr. Neufeldt was seen again by Dr. Yokoyama, where the plaintiff reported vestibular disturbance. Dr. Yokoyama gave a prescription for acetaminophen with codeine and naproxen. Dr. Yokoyama referred Mr. Neufeldt to the Back in Motion physiotherapy clinic to obtain a customized head injury program.
- [78] Dr. Yokoyama saw the plaintiff again on April 25, 2017. After the plaintiff had been discharged from the physiotherapy program, he was given a further prescription for six sessions of physiotherapy.

- [79] Dr. Yokoyama saw the plaintiff again on May 31, 2017. The GAD-7 assessment tool was used in an assessment and his score indicated a moderate generalized anxiety disorder. He also had an assessment performed on the PHQ-9 depression assessment tool which indicated moderate depression. He was given a referral to a counsellor.
- [80] The plaintiff was seen by Dr. Yokoyama again on July 17, 2017 and on July 25, 2017 where he reported no change in the symptoms, and that his headaches made working on a computer difficult.
- [81] The plaintiff saw Dr. Yokohama several more times between November 2017 and May 2018. The plaintiff was examined by Dr. Yokohama on May 15, 2018, with his GAD-7 assessment score revealing severe anxiety and the PHQ-9 score demonstrating a moderate degree of depressed mood. He reported having flashbacks of the motor vehicle accident, at which point Dr. Yokoyama referred him to Dr. Sherazi, a physiatrist, for assessment of post-traumatic stress disorder.
- [82] Dr. Yokohama supported the plaintiff's attempted gradual return to work program in April 2018, but did not support the return to full-time work by the summer of 2018. He noted the plaintiff had developed anxiety since commencing his return to work program.
- [83] Dr. Yokoyama was of the opinion that the musculoskeletal injuries discussed in his report were a result of the second accident on May 30, 2016 and symptoms were consistent with concussion as well as post-concussion syndrome. It was also Dr. Yokoyama's opinion that the plaintiff had symptoms consistent with major depression and generalized anxiety disorder.
- [84] On the subject of prognosis for return to work, Dr. Yokohama said that his prognosis for the plaintiff returning to full work as a general duty police officer was guarded. He further opined that Mr. Neufeldt would benefit from monthly massage therapy, physiotherapy on his lower back, using IMS treatments on a monthly basis, as well as chiropractic treatments. The doctor was also of the view that Mr. Neufeldt would require further counselling with regards to post-traumatic stress disorder, depression and general anxiety disorder by a registered psychologist on a one-to-one basis.
- [85] Dr. Yokoyama referred Mr. Neufeldt for consultations with several medical specialists to bring other medical knowledge to assist with Mr. Neufeldt's persistent symptoms. These consultations are referred to in Dr. Yokoyama's report as follows:
- On November 28, 2017, Mr. Neufeldt was assessed by Dr. Sass, a doctor of optometry, as a treating consultant. In his consultant's report, Dr. Sass stated that Mr. Neufeldt was experiencing a number of visual problems which are typically seen following brain injury. Dr. Sass also summarized a number of Mr. Neufeldt's complaints, including headaches, light sensitivity, headaches and nausea when watching motion on a screen, difficulty reading, and drifting while driving or walking.

-The consultant's report from Dr. Dadachangi was that Mr. Neufeldt had a concussion with a mild traumatic brain injury caused by the second accident. He recommended rest with a prescription for vestibular physiotherapy. That report was based on an appointment on July 11, 2016. On August 3, 2016, Dr. Dadachangi saw the plaintiff again and at that time was of the view that the plaintiff's symptoms had been subjectively improving but a SCAT3 symptom assessment showed there had been a worsening of symptoms. It was recommended he remain off work due to the persistence of his symptoms and undergo continuing physiotherapy.

- Mr. Neufeldt was then referred to Dr. Barron, a sports medicine specialist on September 21, 2016. Dr. Barron recommended no return to work as Mr. Neufeldt was continuing to be dizzy with nausea, headaches and anxiety.
- On February 27, 2017, Dr. Azadi, a specialist in rehabilitation medicine, had assessed the plaintiff. Dr. Azadi reported she considered Mr. Neufeldt experienced multiple physical cognitive and emotional symptoms and that while there had been some improvement in the symptoms, they continued to be ongoing. Dr. Azadi recommended a home exercise program and if symptoms did not improve, she suggested injections of local anaesthetic into the muscles involved in the cervical spine. She also recommended a neurophysiological assessment prior to any attempt to return to work.
- Mr. Neufeldt was again assessed by Dr. Azadi on November 6, 2017 where she noted the continuation of symptoms with post concussion syndrome which affected his tolerance at work, presenting difficulties with concentration, multitasking, planning and executive function. Her opinion was his limited tolerance for mental and visual activity were barriers to a return to work.

Dr. Eytan David

[86] The plaintiff presented the evidence of Dr. Eytan David, an otolaryngologist. Dr. David prepared a report dated October 10, 2018. Dr. David conducted a series of specialized tests from his field of medical expertise and came to a number of conclusions upon which he opined as follows:

- a) the mechanism of injury symptoms and the objective test results were typical of a diagnosis of post-traumatic inner ear hearing and balance injury due to the second accident;
- b) the temporal connection to the second accident was suggestive of a causal connection between that motor vehicle accident and the symptoms reported; and
- c) the plaintiff's ongoing symptoms including imbalance have negatively affected his day-to-day activities and that his current level of balance was below his pre-second accident baseline.

- [87] Based on the review, Dr. David concluded the plaintiff had a right inner ear hearing and balance injury, as well as moderately severe tinnitus that was worse on the plaintiff's right side. Dr. David opined that Mr. Neufeldt's tinnitus should be considered moderate to moderately severe and permanent.
- [88] Dr. David opined that Mr. Neufeldt should be considered to have a moderate and permanent injury of the right inner ear balance mechanism. The doctor also noted that if there was also a diagnosis of post-concussion syndrome, this would worsen the outlook for his imbalance and tinnitus.
- [89] Dr. David was of the view that the results of his examination constituted an absolute contraindication to Mr. Neufeldt's return to full duties within his prior law enforcement job description. In particular, Dr. David found he would be unable to engage in pursuits or reliably use firearms given the results of his inner ear balance testing.
- [90] The results did not suggest the plaintiff would be unable to return to modified sedentary work with frequent breaks and pauses as required. However, Dr. David opined that the plaintiff would be less likely to return to work as a police officer in a sedentary role if he was also diagnosed with post-concussion syndrome.
- [91] Dr. David noted that any ongoing hearing and balance complaints the plaintiff experiences after 24 months should be considered permanent. Mr. Neufeldt is also at a risk of worsening balance and tinnitus as he ages.
- [92] Finally, Dr. David opined that Mr. Neufeldt may require ongoing treatment in the form of medications, tinnitus retraining therapy, and/or bilateral hearing aids with or without masking devices for tinnitus and hyperacusis. The cost of hearing aids is expected to be \$3000 to \$5000 per ear and expected to be renewed every two to three years with advances in technology. He also opined that Mr. Neufeldt would benefit from a dedicated trial of vestibular physiotherapy.

Derek Robins, Occupational Therapist

- [93] Mr. Robins prepared a functional capacity evaluation dated August 21, 2018. In preparation for his report, Mr. Robins reviewed documents provided to him containing records from 2008 to 2018. Mr. Robins noted a series of previous diagnoses made by other experts, including Dr. Cameron, Dr. Sass and Dr. Yokoyama.
- [94] Mr. Robins reviewed a number of referral questions and noted a number of the questions called for answers beyond his scope of practice. He limited himself to commenting on permanent functional limitations affecting work, homemaking and recreation. With respect to those limitations, it was beyond his scope of practice to determine if the limitations are permanent. However, based on the functional capacity evaluation results, Mr. Robins concluded that Mr. Neufeldt would have difficulty tolerating the physical demands required of a police officer due to his concussion symptoms. He was not able to test the limits of Mr.

Neufeldt's musculoskeletal injuries because of these symptoms. Mr. Robins noted that throughout the functional capacity evaluation, Mr. Neufeldt consistently provided high levels of effort.

- [95] Mr. Robins further opined that Mr. Neufeldt may be limited in his ability to perform desk work due to his concussion symptoms and his decreased sitting tolerance. It was also anticipated that he would not be able to tolerate physically exerting recreational activities and a number of housekeeping and gardening activities without aggravating his symptoms.
- [96] Mr. Robins recommended that should he return to work, Mr. Neufeldt would benefit from an ergonomic assessment of his workstation. It was recommended that he continue rehabilitation with a chiropractor, physiotherapist, and an eye specialist to treat musculoskeletal injuries and concussion syndromes. Mr. Robins also recommended vocational counselling and seasonal assistance for yard maintenance.

Dr. Donald Cameron, Neurologist

- [97] Dr. Cameron reviewed the circumstances of both accidents and provided a report dated August 17, 2018. Following his neurological assessment of Mr. Neufeldt and a review of numerous clinical records, Dr. Cameron concluded that Mr. Neufeldt suffered a soft tissue injury and musculoskeletal injuries principally involving a type II whiplash injury at the time of the accident on September 23, 2012 which resulted in post-traumatic pain and discomfort.

- [98] Dr. Cameron summarized his opinion in relation to the first accident as follows:

It is my opinion that Mr. Neufeldt was rendered completely disabled from September 2012 through March 2013. He then returned to work in the RCMP office performing light duties until the fall of 2013. He then remained off work to intensify the rehabilitation therapy in the fall of 2013. In January 2014 he returned to work again in the RCMP office performing light duties only until August 2014. He then went on parental leave. He then returned to work in June 2015, full-time with unrestricted duties as an RCMP officer. It is my opinion that Mr. Neufeldt remained partially disabled at least through August 2014 but he was subsequently able to return to work in an unrestricted fashion in June 2015 after he was off for parental leave. Mr. Neufeldt was also partially disabled because of having to decrease or discontinue some of his recreational activities following the first accident.

It is my opinion that Dr. Neufeldt did not suffer injury to the central nervous system or his peripheral nervous system at the time of the accident on September 23, 2012.

- [99] Dr. Cameron's opinion that Mr. Neufeldt was able to return to work in an unrestricted fashion by June 2015 appears to be based on the duties Mr. Neufeldt was assigned, not Mr. Neufeldt's actual condition in June 2015. Dr. Cameron does not refer to the difficulties Mr. Neufeldt faced at work after his full return, including the fact he was taking naproxen and Tylenol 3s to deal with pain and stiffness and was receiving a variety of treatments to deal

with his symptoms. In his testimony, Dr. Cameron indicated that he did not have access to the reports of Drs. Mansingh and Yokohama and Mr. Robins when he wrote his report, and would defer to those experts regarding the musculoskeletal injuries suffered by the plaintiff as those injuries were outside his area of expertise.

- [100] Dr. Cameron later opined that Mr. Neufeldt fulfilled the clinical criteria in order to make a diagnosis of mild traumatic brain injury sustained at the time of the accident of May 31, 2016. Dr. Cameron was satisfied that Mr. Neufeldt had developed and continued to suffer with the symptoms of post-traumatic brain injury syndrome as a result of the second accident. These symptoms include headaches, dizziness, blurred vision, decrease in balance, decreased memory, decreased concentration, decreased attention span, decreased ability to make decisions, decreased multitasking ability, irritability, mood swings, decreased libido, fatigue and poor sleep habits.
- [101] At the date of his assessment, Dr. Cameron opined that "Mr. Neufeldt is probably significantly partially disabled or possibly permanently completely disabled and unable to return to work in a competitive fashion at any alternate job or his previous job as an RCMP officer." Dr. Cameron explained this opinion included the effects caused by injuries from the 2012 and 2016 motor vehicle accidents because even if a patient recovers to some degree from a first accident and its sequelae, the second injury to the same area of the body will have a cumulative effect with greater symptomatology, with longer or incomplete recovery, if any. When a patient refers to returning to normal function, the cumulative effect will be triggered by a subsequent injury, notwithstanding that some level of "normal" function had been achieved prior to the subsequent injury.

Customized Head Injury Program - Interdisciplinary Assessment Report

- [102] On November 28, 29 and 30 of 2016, Mr. Neufeldt participated in a customized head injury program interdisciplinary assessment at Back in Motion consisting of neurophysiological occupational therapy and physical therapy assessment. The assessment was conducted by a psychologist, two occupational therapists, and a physical therapist. The goal of the assessment was to clarify his physical, cognitive, psychological and functional abilities and rehabilitation needs. The report was not meant to be a full functional capacity evaluation for legal purposes.
- [103] After summarizing Mr. Neufeldt's performance in a number of tests, the report concludes that the plaintiff was not fit to return to work at the time of the assessment. The report found Mr. Neufeldt was likely to experience the following limitations at work: decreased cognitive and physical endurance; exertional headaches; decreased tolerance for driving, including fast-paced manoeuvres; difficulty managing multiple demands at once; difficulty completing work at a rapid pace; decreasing tolerance for sustained computer use and associated cognitive demands; difficulty sustaining high levels of attention for periods of time greater than two hours; decreased tolerance for manual handling tasks (lifting, carrying, pushing or pulling); and decreased tolerance for postural demands (alternating

and sustaining postures, climbing, manoeuvring obstacles).

- [104] The report recommended that Mr. Neufeldt would benefit from an interdisciplinary program on clinic days to address outstanding barriers through general conditioning, injury-specific exercises, graded and monitored functional activities, remedial cognitive tasks, work simulation tasks, development of work strategies to minimize deficits, counselling sessions, and education on various injury-related topics. The report also recommended job site visits, planning and monitoring of a gradual return to work and job coaching.
- [105] A medical discharge from the RCMP was in active consideration at the time of trial but the issue was unresolved.

Defence

- [106] The defendants submitted that the plaintiff's injuries from the first accident were fully resolved prior to the second accident because the plaintiff had returned to full-time work.
- [107] This submission is without merit because, while a return to work may be a feature in assessing recovery from injury, it is not a medical diagnosis. The plaintiff also continued to experience pain after his return to work which continued to the date of the second accident and was aggravated thereafter. As noted by the BC Court of Appeal in *Bradley v. Groves*, 2010 BCCA 361 at para. 37, "While it will lie for the trial judge to decide in the circumstances of each case, it is difficult to see how the worsening of a single injury could be divided up." I do not find that the injuries to the plaintiff's lower and upper back and neck coupled with ongoing headaches are divisible. The defendants are therefore jointly and severally liable for the plaintiff's neck and back injuries.
- [108] The evidence of the plaintiff and the medical evidence related above are clear that there was no complete resolution of the symptoms of the first accident by the time of the second accident. The evidence of Dr. Mansingh and Dr. Cameron supports this conclusion, particularly given the proximity of the injured areas of the plaintiff's body. The plaintiff experienced neck pain and chronic headaches after the first accident. While he developed additional symptoms related to balance, vision, and other areas of mental capacity after the second accident, I do not find it possible to separate the role played by the first accident in these injuries from the role played by the second accident. As such, the injuries from the two accidents are not divisible on the particular facts of this case.

Damages

- [109] The plaintiff claims the following damages:

(a)

Non-pecuniary damages

\$200,000.00

(b)

Past wage loss:

\$39,557.00 - \$43,066.00

(c)

Future loss of income:

\$1,800,802 - \$2,516,290

(d)

Costs of future care:

\$223,457 - \$307,815

(e)

Special damages:

\$80,770.80

(f)

Subrogated loss:

\$306,374.00

TOTAL:

\$2,650,960.80 - \$3,454,315.80

[110] The defendants and third party submitted the following are appropriate awards for damages:

Total damages for the first accident:

Non-pecuniary damages

\$50,000.00 - \$70,000.00

Past wage loss:

\$39,835.78

Special damages:

\$24,596.62

Subrogated loss:

\$306,374.00

TOTAL:

\$114,432.40 - \$134,432.40

Total damages for the second accident:

Non-pecuniary damages

\$90,000.00 - \$120,000.00

Past wage loss:

\$205,447.44

Future loss of income:

\$500,000.00

Costs of future care:

\$24,964.00

Special damages:

\$56,174.18

TOTAL:

\$876,585.62 - \$906,585.62

Non-Pecuniary Damages

[111] As noted in the table above, the plaintiff seeks an award for non-pecuniary damages in the amount of \$200,000. The factors to be considered are those set forth in *Stapley v. Hejslet*, 2006 BCCA 34 at para. 46:

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

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

- (g) impairment of family, marital and social relationships;

- (h) impairment of physical and mental abilities;
- (i) loss of lifestyle; and
- (j) the plaintiff's stoicism (as a factor that should not, generally speaking, penalize the plaintiff: *Giang v. Clayton*, [2005] B.C.J. No. 163, 2005 BCCA 54).

[112] The plaintiff at age 40 suffers from chronic neck pain, back pain, headaches, vestibular disturbance, hearing issues, depression and anxiety. His efforts to return to full-time employment after the first accident were limited by chronic pain, frequent headaches and a need to stop regularly during his duties to stretch and walk, even though most patrol duties were carried out behind the wheel of a police cruiser. The plaintiff asserts that the second accident exacerbated the chronic neck and back pain and headaches, adding additional symptoms of mild traumatic brain injury and vestibular injury. There was no pre-accident history of any physical or emotional complaints prior to the second accident. The plaintiff has since considered suicide on at least two occasions.

[113] The injuries have placed significant strain on the plaintiff's marriage and family dynamics. The plaintiff has had to remove himself from various family events, including a Christmas party where lighting and noise were too irritating for him to remain. Among other difficulties, the plaintiff has difficulty reading, using screens, multi-tasking, and balancing. The plaintiff's physical symptoms have also prevented him from participating in sports he used to enjoy, either at or separate from family events.

[114] The plaintiff cited a number of cases for the purpose of fixing the award of non-pecuniary damages, including *Young v. Anderson*, 2008 BCSC 1306. In that case, Boyd J. awarded \$200,000 to a plaintiff in a single accident having found that the accident caused a constellation of symptoms, the main features of which were in a mild traumatic brain injury with personality changes and cognitive deficits, chronic pain, headaches and depression. The plaintiff was to remain chronically unemployable for the rest of his life.

[115] The defendants and the third party in this case made a submission that the non-pecuniary damages for both accidents together, although treated divisibly, should be \$190,000.

[116] Based on the similarity of the quantum of the submissions for the two accidents on the subject of non-pecuniary damages, and based on the variety of difficulties the plaintiff has faced due to his injuries, the non-pecuniary damages awarded in this case are \$200,000.00.

Past Wage Loss

[117] The plaintiff's line 150 total income (Exhibit 6) was as follows:

2009

\$76,257

2010

\$78,442 (EI benefits of \$10,054 for paternity leave)

2011

\$80,335 (EI benefits of \$4,212 for paternity leave)

2012

\$87,362 (EI benefits of \$12168

2013

\$83,446

2014

\$83,816 (EI benefits of 7,710 for paternity leave)

2015

\$85,636 (full base income)

2016

\$91,641

2017

Pay stub as of August 29, 2017 \$64,429.08

[118] The plaintiff has been paid by the RCMP at his base salary for all time off as a result of accidents without pay for overtime or for shift differentials. The evidence before this court was that circumstances where overtime is logged by RCMP officers are often beyond the control of the officers and are dictated by the particular investigative and policing needs of the file upon which an officer may be working at any given time. While performing desk duties or administrative office functions for the RCMP, Cst. Neufeldt cannot earn either overtime or shift differentials. While working as a general duty constable, there was evidence noted above that Cst. Neufeldt worked overtime and worked holidays. The evidence of past overtime and holiday work supports a conclusion that such work by Cst. Neufeldt would have continued in the future.

[119] The expert report of Ms. C. Clark, filed as Exhibits 35 and 36 (updated to actual trial dates) at the trial, calculates the loss to Cst. Neufeldt of overtime and shift differential benefits as 15.5% more than his regular earnings, which amounts to \$65,278. This amount is subject to deduction of income tax and Employment Insurance contributions of approximately 34%, resulting in a past wage loss of \$43,066. This deduction complies with the provisions of Section 98 of the Insurance (Vehicle) Act. Counsel for the defendants and third party suggested that an amount for income tax and Employment Insurance should be deducted from the \$43,066.00. That suggestion would amount to double counting of taxes and would therefore be an inappropriate deduction.

[120] The past wage loss for overtime and shift differentials to the date of trial is at a minimum \$43,066.43, without further deduction for income tax or EI contributions.

Subrogation Claim

[121] The RCMP and the plaintiff entered into a Subrogation Agreement and Undertaking to Hold On Trust (the "Subrogation Agreement") (Exhibit 9) for the purpose of the RCMP being subrogated to the right of any form of wages, salary, medical expenses or other income that would accrue to Cst. Neufeldt in the performance of his duties. The basic salary for all periods that Cst. Neufeldt was injured and unable to work was paid by the RCMP. But for that payment, the plaintiff would have had a loss equal to that amount for basic salary and would have claimed that sum from the defendants and the third party.

[122] The RCMP is entitled that all such wages and other benefits be repaid pursuant to the Subrogation Agreement. The submission of counsel for the defendants and third party to the effect that the subrogation claim should be subject to a further deduction for income tax is not well considered. Whatever monies were paid by the RCMP to the plaintiff when he was not working due to injury were subject to income tax because those sums were income to the plaintiff. Exhibit 8, the most recent cheque stub for monies paid to the plaintiff, demonstrates that income tax was deducted from the payment to the plaintiff during the first eight months of 2018. The plaintiff is, based on Exhibit 9, required to repay the net sum he received to the RCMP; that sum is net of income taxes.

[123] The amount of the subrogated claim in this case, based on the evidence of Ms. Clark calculated for the periods when the plaintiff was unable to work with input taken from tax returns, was (a) for the first accident, a total of \$35,933 for the period from September 23, 2012 to March 3, 2013; plus (b) for the second accident a total of \$270,441 for the period from May 31, 2016 to the first day of trial. The total of (a) plus (b) is \$306,374.00 in damages for the subrogated claim.

Future Loss of Income

[124] Damages for future loss of income are of necessity an evaluation of hypothetical events measured as simple probability, rather than a balance of probabilities. The case of *Rosvold v. Dunlop*, 2001 BCCA 1, is a case in which, because of errors by a trial judge, the Court of Appeal revisited the basis for evaluation of future loss of income, as follows:

8 The most basic of those principles is that a plaintiff is entitled to be put into the position he would have been in but for the accident so far as money can do that. An award for loss of earning capacity is based on the recognition that a plaintiff's capacity to earn income is an asset which has been taken away: *Andrews v. Grand & Toy Alberta Ltd.*, [1978] 2 S.C.R. 229; *Parypa v. Wickware* (1999), 65 B.C.L.R. (3d) 155 (B.C. C.A.). Where a plaintiff's permanent injury limits him in his capacity to perform certain activities and consequently impairs his income earning capacity, he is entitled to compensation. What is being compensated is not lost projected future

earnings but the loss or impairment of earning capacity as a capital asset. In some cases, projections from past earnings may be a useful factor to consider in valuing the loss but past earnings are not the only factor to consider.

9 Because damage awards are made as lump sums, an award for loss of future earning capacity must deal to some extent with the unknowable. The standard of proof to be applied when evaluating hypothetical events that may affect an award is simple probability, not the balance of probabilities: *Athey v. Leonati*, [1996] 3 S.C.R. 458. Possibilities and probabilities, chances, opportunities, and risks must all be considered, so long as they are a real and substantial possibility and not mere speculation. These possibilities are to be given weight according to the percentage chance they would have happened or will happen.

10 The trial judge's task is to assess the loss on a judgmental basis, taking into consideration all the relevant factors arising from the evidence: *Mazzuca v. Alexakis* (September 20, 1994), Doc. Vancouver B905414 (B.C. S.C.) at para. 121, *Mazzuca v. Alexakis* (September 24, 1997), Doc. Vancouver CA019456 (B.C. C.A.). Guidance as to what factors may be relevant can be found in *Parypa v. Wickware*, supra, at para. 31; *Kwei v. Boisclair* (1991), 60 B.C.L.R. (2d) 393 (B.C. C.A.); and *Brown v. Golaiy* (1985), 26 B.C.L.R. (3d) 353 (B.C. S.C.) per Finch J. They include:

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

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 (B.C. 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* (March 6, 1995), Doc. CA018742, CA018743 (B.C. C.A.); *Parypa v. Wickware*, supra. The overall fairness and reasonableness of the award must be considered taking into account all the evidence.

- [125] The capital asset Cst. Neufeldt has lost as a result of two on-duty motor vehicle accidents is his ability to perform as a member of the RCMP, with its implicit physical requirements. Before the first accident, he had earned the salary of an RCMP officer together with overtime hours and other benefits, without periods of physical difficulty. His ability to continue to work as an RCMP officer has been closed to him by the indivisible consequences of the two accidents.
- [126] The plaintiff in this case has demonstrated that there is a real and substantial possibility a future or hypothetical possibility will take place: *Athey* at para. 27.
- [127] In the case at bar, the first question from Brown must be answered that the plaintiff has been rendered less capable overall from earning income for all types of employment. As a result of the injuries from the two accidents, the plaintiff has been unable to continue to work and seek advancement or promotion as an RCMP officer. He testified that he would have expected to achieve the rank of corporal within ten years working in the general duty section of the RCMP. The RCMP officers who testified considered that the plaintiff would achieve promotion based on his calm and thoughtful performance as a police officer with a strong academic understanding of the legal process.
- [128] Opposing counsel suggested that the plaintiff might become a personal trainer or an employee at a retail big box store, but no evidence was led to support any ability of the plaintiff to take those positions or that any employer would hire someone with the symptoms which the plaintiff continues to experience. In his present circumstances, the plaintiff is clearly less marketable or attractive to potential employers than he would have been if he did not experience the negative symptoms such as pain, imbalance, interrupted vision and inability to concentrate, which are now his lot. The comparison of the income as an RCMP officer to that of a minimum wage employee working part time at a retail store demonstrates beyond any doubt that the plaintiff is less valuable to himself as a person earning income in a competitive labour market.
- [129] The submission of the defendants and ICBC that Sgt. Pankratz suggested the plaintiff did not stand out from other candidates for promotion does not accurately reflect the testimony of Sgt. Pankratz.
- [130] Sgt. Pankratz testified that he personally challenged the plaintiff to seek out promotional opportunities. Sgt. Pankratz testified that he considered the plaintiff had the academic knowledge, skills and abilities that would make him a suitable candidate for promotion, particularly in the general duty section of the police department.
- [131] Sgt. Pankratz testified that the plaintiff could be relied upon to complete any task which was assigned to him in a competent way. Sgt. Pankratz regarded the plaintiff as someone who would be a competent supervisor capable of teaching and providing guidance to constables as they began their careers.

- [132] The plaintiff led evidence that he worked some overtime and on statutory holidays and premium shifts. Cst. Lindsay, an RCMP officer called by the defence, also testified that he worked overtime hours. The economist called by the plaintiff, Ms. Clark, testified that she had reviewed a full, uninterrupted year of the overtime and other work-based benefits the plaintiff received. She calculated that based on the evidence, the plaintiff was paid 15.5% above basic salary for overtime and shift differentials. Opposing counsel challenged the percentage but Ms. Clark did not resile from her opinion that 15.5% was the best evidence she could assemble without spending an inordinate amount of money on auditing procedures. No contrary evidence was offered by the defence. I find that Ms. Clark's opinion is sound and consistent with Rule 1-3(2) of the Supreme Court Civil Rules.
- [133] I find the evidence supports the conclusion that there is a real and substantial possibility, weighed strongly towards likely, that the plaintiff has lost significant opportunity to earn future income. I find on the evidence of the plaintiff and Sgt. Pankratz that the plaintiff would have been promoted to the rank of corporal and later to the rank of sergeant in the general duty section of the RCMP before his retirement. I broadly accept the opinion and calculation of Ms. Clark that the plaintiff's "without-accident" future income loss is in the amount of \$2,380,160.00.
- [134] I must also consider positive and negative contingencies, such as the probability the plaintiff would have been promoted sooner or to a higher rank, or that the plaintiff would not have been promoted or would have pursued a different career. Ms. Clark noted that the RCMP provides a stable work environment, and there are fewer labour contingencies to apply to RCMP jobs relative to other jobs. My award is also not a precise mathematical calculation, and must be fair in all the circumstances. After considering possible contingencies, I find the amount of \$2,400,000.00 is an appropriate award of damages for the plaintiff's future loss of income.
- [135] I have reviewed the small amount of evidence about the possibility that the plaintiff might be able to work part-time in a big box store for minimum wage, but given the lack of any concrete evidence supporting this possibility, I decline to make any order in that regard.

Special Damages

- [136] Payments made by the RCMP on behalf of the plaintiff were listed in a document filed as Exhibit 12, called a "special schedule". The payments contained in the schedule reflect various treatments including fees for physiotherapy, chiropractic treatment, psychology, dermatology, hospital and ambulance services, massage therapy, occupational therapist, a transcutaneous electrical nerve stimulation ("TENS") unit prescribed by Dr. Azadi, and various prescription medications. The special schedule covers a range of dates from shortly after the first accident until February 2019.

[137] The parties agreed to delete certain items from Exhibit 12, and then agreed that the total amount of the payments made by the RCMP contained in Exhibit 12 was \$80,770.80. This amount is awarded as special damages.

Costs of Future Care

[138] A report prepared by Jennifer Lane, an expert in occupational therapy was filed as Exhibit 34. This report provided a summary of future care recommendations to assist the plaintiff's recovery. However, as the recommendations are frequently projections based on potential future usage by the plaintiff of a particular therapy or service, evidence of a medical justification and reasonableness of the expenditure is required: *Milina v. Bartsch*, 49 B.C.L.R. (2d) 33, 1985 CanLII 179 at 51.

[139] Other recommendations in the report deal with a single item being purchased on one occasion for use in therapy by the plaintiff.

[140] The difficulty which arises with the projections is that when present value calculations of the cost of future care are performed, as contained in Exhibit 30, the duration of projected costs were dictated, not by medical practitioners, but by legal counsel. Regretfully, those instructions cannot be considered evidence. As a result, the duration of projections for present value calculations claimed by the plaintiff at the equivalent of five years must be taken as unproven. There is evidence of past use of certain therapies as set out in Exhibit 12 from the date of the first accident up to shortly before the trial, which is probative of future use. Without a medical justification for patient use for a specified duration of a particular therapy, the court would have to engage in speculation and would be unable to determine the reasonableness of a particular recommendation.

[141] In this case, however, the following therapies and services have been agreed by the defendants and third party:

- a) Botox at a fixed cost of \$ 2,300.00;
- b) a psychologist for one year as a fixed cost of \$5,200.00;
- c) a home-based assessment by an occupational therapist in the amount of \$2,464.00;
- d) an ergonomic equipment allowance in the amount of \$1,500.00;
- e) a Vocational Assessment in the amount of \$3,500.00;
- f) a Vocation Contingency Fund in a fixed amount of \$10,000 (in the midrange of estimated cost); and,

- g) Bi-lateral hearing aids prescribed by Dr. David. Hearing aids had been fitted for the plaintiff prior to the time of trial but had not been purchased. Clearly hearing aids were a medically justified expense. Defence counsel consented to payment for these hearing aids at the average of the high and low costs. The high and low figures were displayed at page 31 of the plaintiff's final submissions at paragraphs 159 and 160. The average of the low amount of \$57,912 and the high amount of \$142,270 is \$100,091.

[142] The total of sub-paragraphs (a) to (g) above, inclusive, is \$125,055.00.

[143] With respect to the claim of the plaintiff for the cost of vision therapy and eye glasses, the consultation report of Dr. Sass demonstrates visual problems typically seen in other patients following brain injury. The plaintiff also gave evidence concerning visual disturbances; discussed at length during the cross-examination surrounding the admission of Exhibit 9, together with the need for vision therapy. The range of cost for visual therapy is \$4,800.00 to \$7,200.00, with a midrange of \$6,000.00. This sum is medically justified and reasonable as a one-time charge as acknowledged by the defendants and third party. Eye glasses at an annual cost of \$150.00, which were not agreed to by the defendants and third party, were proven on the evidence to be medically justified and reasonable. This expense is payable for the plaintiff's life expectancy. Applying a two percent discount rate as required by s. 56 of the Law and Equity Act, R.S.B.C. 1996, c. 253 results in a present value of \$4,103 for the plaintiff's eye glasses claim.

[144] The plaintiff made a claim for home maintenance, and this claim falls into the unproven category with the exception of the danger to the plaintiff when he attempts to climb a ladder, which was agreed to by the defendants and third party. The cost associated with hiring someone to climb a ladder is fixed at the rate of \$250.00 per year to the plaintiff's age 70. Applying a two percent discount rate results in a present value of \$5,599.

[145] The plaintiff has demonstrated through the report of Dr. Cameron dated August 17, 2018, that he requires ongoing pain relief medication for headaches. Based on prescriptions provided by Dr. Mansingh prior to the second accident, the plaintiff was prescribed similar pain medications. I am satisfied that such prescriptions are medically justified and reasonable, given the evidence of previous usage by the plaintiff, at an annual cost of approximately \$400 for a period of five years, or \$2,000.00.

[146] Several therapies, including physiotherapy, chiropractic treatment and massage, were prescribed by various medical practitioners for the plaintiff. The plaintiff testified that he had given up massage therapy because of funding issues, as he prioritized the physiotherapy over the massage. He believes he should have physiotherapy once per week and chiropractic treatment once every two weeks and massage once per week. These treatments are not fully paid by the RCMP.

[147] These treatment modalities have limited temporal effect, and therefore should not be provided for the rest of the plaintiff's life: *Ho v. Dosanjh*, 2010 BCSC 845 at para. 91. That said, the evidence of the plaintiff was that the treatment modalities of physiotherapy,

chiropractic and massage did provide a therapeutic effect, admittedly not a permanent solution. I agree with the approach in Ho that the defendant should not supply such modalities for an unlimited time period, but that for a shorter, reasonable period of time these treatments are medically justifiable. These treatments were prescribed by properly qualified medical practitioners, some of whom provided expert evidence in this trial, during the period from the first accident until late in 2018. On the facts of this case, each of the therapies noted shall be continued for a further year for a total amount of \$2880.

[148] The total award of damages for costs of future care is \$145,637.00.

Section 24(5) of the Insurance (Vehicle) Act

[149] Counsel for ICBC raised an argument based on s. 24(5) of the Insurance (Vehicle) Act, R.S.B.C. 1996, c. 231. Section 24(5) provides that where the identity of a defendant is not ascertainable, a judgment against ICBC must not be given unless the court is satisfied that the claimant made reasonable efforts to ascertain the identity of an unknown owner or driver.

[150] The question of whether a plaintiff has taken "all reasonable efforts" is a question of fact to be determined in the circumstances of each case, including consideration of the position and condition of the plaintiff: *Nicholls v. Insurance Corporation of British Columbia*, 2011 BCCA 422 at paras. 26-30. Plaintiffs are not required take actions that, while possible, are "highly unlikely" to produce any result: *Gonclaves v. Doe*, 2010 BCSC 1241.

[151] In the second accident, the unknown driver collided with a police vehicle lawfully stopped at a red traffic light. The plaintiff and Cst. Lindsay exited the police vehicle to investigate.

[152] The unknown driver then revved the engine of his vehicle and reversed away from the police car and fled from the scene of the collision. This was a violation of s. 68(1) of the Motor Vehicle Act, R.S.B.C. 1996, c. 318, which requires drivers involved in an accident to remain at the accident scene, render reasonable assistance, and exchange information with the other people involved.

[153] The plaintiff and Cst. Lindsay returned to their vehicle. Cst. Lindsay turned his vehicle around and attempted to catch up to and identify the unknown driver using a police vehicle exhibiting emergency lights and sirens. Their pursuit was ultimately halted because of RCMP policy against high-speed car pursuits. The plaintiff was also experiencing acute pain and nausea.

[154] The fleeing vehicle was quickly out of sight as it travelled at high speed south bound on King Edward Street, climbing the overpass of the Lougheed Highway and then descending towards United Boulevard and the industrial area beyond.

[155] Sgt. Pankratz was responsible for sending out a description of the fleeing vehicle over the computer dispatch system. The Sergeant was also involved in ordering the establishment of a perimeter of chokepoints at strategic locations including on the Port Mann Bridge Plaza

west of the Bridge; on the Lougheed Highway approaching the United Boulevard exits; and at the entries to Coquitlam and Port Coquitlam in an attempt to detect and apprehend the fleeing vehicle. A partial license plate number was searched together with the vehicle description on the Police Records Information Management Environment system, Law Enforcement Information Portal system, National Crime Data Base system, as well as the Canadian Police Information Computer system.

- [156] In addition, a BOLF computer dispatch describing the fleeing vehicle was issued to all Lower Mainland RCMP detachments and municipal police departments. Notwithstanding these efforts, the fleeing vehicle could not be located nor identified.
- [157] Counsel for ICBC argued the plaintiff should have returned to the accident scene or another public location to post signs looking for people who might have observed the unknown driver's full license plate. Counsel for ICBC did not, however, call any evidence to support the argument advanced by counsel. The Court, for instance, had no information as to the size or number of signs recommended, or if such signs at a high volume intersection such as King Edward Street and Lougheed Highway would be effective. Recently, in *Ghuman v. ICBC*, 2019 BCSC 3, the court dealt with s. 24(5) and said:
- [72] I wish to make it very clear that there is no admissible evidence before me that those efforts (canvassing for video surveillance and/or seeking records of potential witnesses that may have come forward to nearby businesses) were made. However, in the circumstances of this case, I would not consider such extensive efforts necessary in order for this plaintiff to comply with s. 24(5). Given the distances of the surrounding businesses from the Collision site and the layout of the area, I accept there would have been little benefit in contacting businesses for video surveillance and/or records of people who may have come forward to those businesses. Such efforts would be highly unlikely to produce any results.
- [73] In the end, Mr. Ghuman is not to be held to the standard of perfection. Even if the timing of his telephone call to police and his lack of follow up with police could be viewed as something less than reasonable in and of themselves, I agree with the plaintiff that what is reasonable in all of the circumstances of one case does not rise and fall on a single effort. What sets this case apart from other cases provided is that Mr. Ghuman was faced with a driver who immediately fled the scene of a low impact type of accident in an area with transient traffic, surrounded by parking lots. Despite these obvious limitations in obtaining information regarding that vehicle's identity, Mr. Ghuman nevertheless chose to take several positive steps to investigate. He was proactive from the outset. That he was unsuccessful is of no consequence. All that is required is that he take all reasonable steps to ascertain the identity of the unknown driver and owner of the SUV. I find that he did in the circumstances of this case.
- [158] In the case at bar, Cst. Lindsay, in company with the plaintiff, were rear-ended at a busy highway intersection and exited their vehicle to communicate with the unknown driver. He reversed his vehicle to flee; obviously, there was no vehicle close behind his vehicle. Then

he fled at high speed across a highway overpass crossing above Highway 1 and out of sight crossing United Boulevard, another busy thoroughfare. The police officers had to re-enter their vehicle and then reverse its direction to begin a pursuit. Immediately, Cst. Lindsay was on the police radio advising others of the circumstances of the collision, including Sgt. Pankratz, then on patrol. His response is detailed above, but he summoned an array of RCMP and municipal police resources at logical locations where a fleeing vehicle might be detected. As noted, those resources included at least the next shift of police officers on duty.

[159] I find in the unique circumstances of this case that the efforts of the plaintiff, the Lower Mainland RCMP detachments and Lower Mainland police departments to identify and locate the fleeing vehicle exceeded the level of "reasonable effort" required of a plaintiff under s. 24(5), and as result there was compliance with s. 24(5) of the Act.

Summary of Awards of Damages

[160] The damages awarded to the plaintiff in this case are summarized below:

(a)

Non-pecuniary damages

\$200,000.00

(b)

Past wage loss:

\$43,066.43

(c)

Future loss of income:

\$2,400,000.00

(d)

Costs of future care:

\$145,637.00

(e)

Special damages:

\$80,770.00

(f)

Subrogated loss:

\$306,374.00

TOTAL:

\$3,175,847.43

Costs

[161] The plaintiff is also awarded the costs of this action payable by the defendants and third party forthwith after assessment pursuant to Appendix B, Scale B, as a matter of ordinary difficulty. Liberty to apply.

"Ball, J."

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