
CANADA / JUDGMENT

Ulmer v. Weidmann

2011 BCSC 130

COURT

Supreme Court of British Columbia

DECIDED

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2011 BCSC 130 Ulmer v. Weidmann

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Ulmer v. Weidmann,

2011 BCSC 130

Date: 20110203

Docket: M112336

Registry: New Westminster

Between:

Debra Ulmer

Plaintiff

And

Steven Patrick Weidmann,

Jakob Paul Weidmann

Defendants

Before: The Honourable Mr. Justice Truscott

Reasons for Judgment

Counsel for the Plaintiff:

E.P. Caissie

Counsel for the Defendants:

J.L. Lindsay, Q.C.

Place and Date of Trial:

New Westminster, B.C.

June 14-18, 21-25, and

October 6-8, 2010

Place and Date of Judgment:

New Westminster, B.C.

February 3, 2011

- [1] The plaintiff claims in this action under the Family Compensation Act, R.S.B.C. 1996, c. 126 [FCA], for the death of her husband Kenneth Albert Ulmer on August 18, 2006 as a result of a collision that occurred that day between a motorcycle he was operating and a motor vehicle owned by the defendant Jakob Paul Weidmann and driven with his consent by his son, the defendant Steven Patrick Weidmann.
- [2] In addition the plaintiff claims nervous shock and other psychological and emotional injuries as a result of her seeing the immediate aftermath of the collision when her husband lay bleeding and dying on the roadway, and later seeing him in the hospital when he passed away.
- [3] As well the plaintiff's two adult children make their own claims under the FCA.
- [4] The defendants submit that while they concede some liability for the collision of August 18, 2006, Mr. Ulmer also has liability for the collision and his resulting death.
- [5] While it is submitted that the plaintiff is entitled to an award for her loss of dependency on the basis of the defendants' degree of responsibility for Mr. Ulmer's death, it is submitted that the plaintiff has not proven that she suffers from any psychiatric or emotional injuries that would entitle her to any additional recovery for nervous shock as a result of the death of her husband.
- [6] Finally, it is submitted that her children are not entitled to any compensation under the FCA.

Liability for the collision of August 18, 2006

- [7] At the time of the collision, Mr. Ulmer was operating his motorcycle in a northerly direction on 176th Street in the City of Surrey, Province of British Columbia, when he came into collision with the defendants' sedan at the intersection of 96th Avenue. The defendant Steven Weidmann had been travelling south on 176th Street and was in the process of making a left turn to proceed east on 96th Avenue when the collision occurred.

- [8] At the time of the collision 176th Street at the intersection of 96th Avenue consisted of two lanes proceeding north with a dedicated left turn lane to proceed west on 96th Avenue, and with the same configuration of two lanes proceeding south with a dedicated left turn lane to proceed east on 96th Avenue.
- [9] 96th Avenue itself consisted of one lane proceeding west and one lane proceeding east.
- [10] A traffic light in the intersection governed traffic on both 176th Street and 96th Avenue.
- [11] The collision occurred at approximately 7:30 a.m. on a Friday morning when the area of this intersection was congested with vehicles carrying people to work.
- [12] The inside or centre lane of 176th Street proceeding northbound carried vehicles through the intersection that for the most part were feeding onto a ramp for Highway No. 1 to proceed westbound towards Vancouver.
- [13] The outside or curb lane of 176th Street proceeding northbound also carried vehicles through that intersection with some of those vehicles then feeding onto another ramp for Highway No. 1 to travel east towards Hope, and others merging back into the centre lane north of the intersection to proceed north or westbound towards Vancouver.
- [14] Mr. Ulmer's motorcycle was proceeding in the curb lane northbound on 176th Street when it struck the defendants' vehicle while it was in the process of crossing the curb lane to proceed east on 96th Avenue.
- [15] In the collision Mr. Ulmer's motorcycle struck the defendants' sedan immediately behind its right front wheel and he was catapulted over the roof of the vehicle in a northerly direction and over the roof of another vehicle that was stopped at the intersection facing west on 96th Avenue, landing on the asphalt roadway north of that vehicle near the far side of the intersection.
- [16] Mr. Ausma was following Mr. Ulmer on his own motorcycle and was also proceeding northbound on 176th Street in the curb lane.
- [17] The two of them had met earlier that morning at Tim Hortons for coffee and were heading back to Mr. Ulmer's place north of this intersection.
- [18] Mr. Ausma, who I find to be a very credible witness, says that Mr. Ulmer was a cautious rider.
- [19] Mr. Ausma was in the lead of the two motorcycles in the centre lane as they both started up a long hill from 91st Avenue towards 96th Avenue, with Mr. Ulmer following Mr. Ausma in that centre lane on the right side.
- [20] As Mr. Ausma proceeded up the hill he says traffic in that centre lane started to back up around 92nd Avenue and as he approached the traffic he slowed down waiting for Mr. Ulmer behind him to move over to the right curb lane.

- [21] Eventually Mr. Ulmer did move over to the curb lane but not before Mr. Ausma says he had to come to a complete stop in the centre lane behind traffic before he could move over to the curb lane behind Mr. Ulmer. The two motorcycles then proceeded up the curb lane thereafter and Mr. Ausma says there was a long line of cars to his left in the centre lane as they proceeded up the hill in the curb lane.
- [22] Mr. Ausma describes this as a kind of game that he and Mr. Ulmer played. I conclude from his remark that he meant it was a game of jockeying for position between the two of them that required him to stop initially behind the traffic in the centre lane.
- [23] He says that by the time he got close to Mr. Ulmer again in the curb lane near the top of the hill Mr. Ulmer was slowing down to what Mr. Ausma guesses was 60 or 70 kilometres per hour. The speed limit near the intersection was 60 kilometres per hour and Mr. Ausma's perception was that Mr. Ulmer was not speeding.
- [24] Mr. Ulmer was travelling on the far right-hand side of the curb lane about six inches to 12 inches from the fog line and Mr. Ausma assumes this was to allow him as much vision as possible of anyone who might be turning left to proceed east on 96th Avenue, such as the defendant was in the act of doing.
- [25] Mr. Ausma says he recognized the intersection as a potential danger to motorcycle riders.
- [26] He saw Mr. Ulmer go into the intersection ahead of him and he saw the defendants' vehicle moving for only a split second before Mr. Ulmer hit the vehicle. Mr. Ausma put his own motorcycle into a skid and just missed hitting the back end of the defendants' vehicle as it passed by proceeding east. He saw Mr. Ulmer fly through the air and land on the road on the far side of the intersection and he was the first person to attend to him.
- [27] He says the traffic light was green for through traffic on 176th Street at all times and never changed and there were no other vehicles in the curb lane northbound ahead of the two motorcycles before the intersection.
- [28] He assumed when Mr. Ulmer went into the intersection that everything must be safe as he did not see any brake lights from Mr. Ulmer's motorcycle.
- [29] Barry Sweet was the operator of a pick-up truck that was stopped on 96th Avenue at the intersection, facing west, waiting for his red light to turn green.
- [30] He says while stopped there he saw the defendants' vehicle in the far left turn lane on 176th Avenue proceeding south, and he saw a semi-trailer and truck unit in the near left turn lane on 176th Street proceeding north.
- [31] He says he saw the defendants' vehicle start its left turn to proceed east on 96th Avenue and come to a complete stop in front of the semi-trailer unit in the left turn lane that was waiting to turn west on 96th Avenue.

- [32] He cannot now recall what traffic there was in the centre lane on 176th Street either north or south of the intersection, proceeding north.
- [33] What he does remember is that after the defendants' vehicle stopped in front of the semi-trailer unit that was in the left turn lane to turn west, the defendants' vehicle edged forward and he saw the driver craning his head to see around the semi-trailer unit.
- [34] He says all of a sudden the defendants' vehicle darted out in what he describes as a "big swing" and it seemed to him that the vehicle was going quite fast crossing the northbound curb lane.
- [35] He says he only saw the motorcyclist momentarily and cannot say how fast the motorcycle was going but says he doesn't think there was sufficient time for its operator to stop before it hit the defendants' vehicle.
- [36] Mr. Bedford was proceeding north on 176th Street at the time as well. He was driving an expostal van that he refers to as a cube van, about nine feet high and 18 feet long, and pulling a utility trailer 10 feet long and four feet high.
- [37] He was in the curb lane of 176th Street as he started up the hill but changed over to the centre lane near the crest of the hill to go through the intersection. He says he had to stop for traffic in front of him that was backing up.
- [38] He says he stopped behind a smaller vehicle prior to the intersection. He doesn't think there was enough room on the north side of the intersection for that smaller vehicle to go through the intersection with the traffic backing up.
- [39] He believes there were also one or two vehicles in the left turn lane beside him proceeding north, including one small car. He doesn't recall any semi-trailer unit.
- [40] He believes there was quite a gap in traffic in the curb lane before he heard the motorcycles coming up the curb lane behind him and saw them in his side-view mirror.
- [41] The lead motorcycle was travelling on the right side of the curb lane ahead of the following motorcycle on the left side of that lane. When he looked forward again the defendants' vehicle was right in front of his lane at an angle. He assumes that vehicle came from the left turn lane proceeding south.
- [42] He says he had no impression of the speed of the defendants' vehicle but he says it was fairly quick. He says the defendants' vehicle did not edge into the curb lane, that it happened too quick to notice that.
- [43] He says when he saw the defendants' vehicle leaving from in front of his lane, the lead motorcycle was not in the intersection yet but was pretty much beside or maybe slightly ahead of his vehicle. From the time he saw the defendants' vehicle to the time of impact he says it was really quick, a matter of seconds.

- [44] He doesn't think there was any time for the motorcycle to stop in time. He didn't see any brake lights from it. His impression was that the two motorcyclists were travelling at the speed limit or around the speed limit.
- [45] The defendant Steven Weidmann was going to work that morning and turned off Highway No. 1 going east to proceed south on 176th Street to 96th Avenue. He says he observed heavy traffic in both directions on 176th Street. When he entered the designated left turn lane proceeding south on 176th Street to turn east on 96th Avenue he says the traffic light on 176th Street was green for through traffic.
- [46] He says he saw a big truck in the left turn lane facing him proceeding north and next to it in the centre through lane was a big van. He says there was a cube van behind this big van in the centre lane and he couldn't see around them.
- [47] He says the driver in the big van in the centre lane signalled him by hand to make his left turn. He says he passed in front of the van but couldn't see beyond it so he says he inched forward at a speed that he guesses to be two-three kilometres per hour to look down the curb lane. At that point his vehicle was hit really hard and it rolled through the intersection onto 96th Avenue before it stopped.
- [48] He says he never had a view down the curb lane completely as his view was blocked by the big van and the cube van behind. He never saw the motorcycle that hit his vehicle and he didn't realize it was a motorcycle until he got out of his vehicle after it had stopped.
- [49] He has no recall of the operator of the motorcycle catapulting over his vehicle.

Analysis of Liability

- [50] It is not unexpected that the witnesses who saw this accident on August 8, 2006 no longer have consistent memories of what they saw at the time. In the first place the events undoubtedly happened very quickly and the witnesses were not aware there was going to be any accident before it happened so there was no reason for them to focus on what was happening around them at the time. In addition the accident was four years ago and memories fade over time.
- [51] Finally the configuration of the area of this accident has changed since the accident so its former configuration could not be revisited to refresh any witnesses' memory.
- [52] The evidence I do accept from the witnesses and the conclusions I reach are as follows.
- [53] Mr. Ulmer and Mr. Ausma were travelling north up the hill on 176th Street in the curb lane as they approached 96th Avenue.
- [54] Mr. Ulmer was on the lead motorcycle in the curb lane travelling on the right side of that lane and Mr. Ausma was travelling behind in the same lane on the left side.

- [55] Traffic northbound on 176th Street at 96th Avenue was backed up northbound before 96th Avenue and congested on the north side of 96th Avenue as well.
- [56] The traffic light on 176th Street at the intersection was green for north and southbound traffic at all relevant times.
- [57] Mr. Weidmann was in the dedicated left turn lane proceeding south and in the act of turning left to proceed east on 96th Avenue when the collision occurred.
- [58] There was traffic in the centre lane on 176th Street northbound, stopped prior to the intersection, leaving the intersection clear.
- [59] Mr. Weidmann began his left turn and crossed in front of the traffic in the centre lane.
- [60] As he was doing so Mr. Ulmer was about even with Mr. Bedford's cube van that was stopped in the centre lane second in line.
- [61] Mr. Ulmer was travelling at no greater than the speed limit of 60 kilometres per hour and was staying over to the right edge of the curb lane to get a better view of anyone turning left as Mr. Weidmann was in the act of doing.
- [62] Mr. Weidmann started to edge the front of his vehicle into the curb lane but did not edge forward far enough to obtain a clear view down the curb lane south before he assumed the lane was clear. He took the chance it was clear and proceeded to pass through the curb lane without any further caution.
- [63] Mr. Weidmann never saw the Ulmer motorcycle because he turned his attention back to what was ahead of him on 96th Avenue, having assumed nothing was coming up the curb lane.
- [64] Mr. Ulmer never applied his brakes because Mr. Weidmann came across the curb lane so quickly there was no time for him to do so or otherwise avoid the collision.
- [65] Section 174 of the Motor Vehicle Act, R.S.B.C. 1996, c. 318 [MVA], requires a driver intending to turn left at an intersection to yield the right of way to traffic approaching from the opposite direction that is in the intersection or so close as to constitute an immediate hazard.
- [66] Mr. Ulmer's motorcycle was so close to the intersection as to constitute an immediate hazard when Mr. Weidmann's vehicle entered the curb lane.
- [67] Mr. Ulmer was not driving any faster than the speed limit as he entered the intersection.
- [68] He was aware he was passing a long line of stopped vehicles to his left in the centre lane and he was aware the intersection itself was clear.
- [69] He was also aware of the possibility of a left-turning vehicle and that is why he was riding so far over to the right side of the curb lane.

- [70] However, he was entitled to proceed on the basis that any left-turning vehicle would comply with the rules of the road and yield the right of way to him as the dominant driver in the position of an immediate hazard proceeding through the intersection.
- [71] The principle laid down in *Walker v. Brownlee*, [1952] 2 D.L.R. 450, is applicable here. Where the driver in the servient position disregards his statutory duty to yield the right of way and a collision results, if he seeks to cast any portion of the blame on the driver having the right of way he must establish that after that driver became aware, or by the exercise of reasonable care should have become aware of his disregard of the law, that driver had a sufficient opportunity to avoid the accident of which a reasonably careful and skilful driver would have availed himself. Any doubts are to be resolved in favour of the driver having the right of way.
- [72] The decision of the Court of Appeal in *Pacheco (Guardian ad litem) v. Robinson*, [1993] B.C.J. No. 154; 75 B.C.L.R. (2d) 273 at para. 15 of that judgment is also applicable. There Legg J.A., writing for the Court, said:

In my opinion, a driver who wishes to make a left hand turn at an intersection has an obligation not to proceed unless it can be done safely. Where each party's vision of the other is blocked by traffic, the dominant driver who is proceeding through the intersection is generally entitled to continue and the servient left-turning driver must yield the right of way. The existence of a left-turning vehicle does not raise a presumption that something unexpected might happen and cast a duty on the dominant driver to take extra care. Where the defendant, as here, has totally failed to determine whether a turn can be made safely, the defendant should be held 100 percent at fault for a collision which occurs.

- [73] It is my conclusion that Mr. Ulmer was not negligent in proceeding into the intersection in reliance on his rights as the dominant driver and there was no opportunity for him to avoid the collision with the defendants' vehicle that was proceeding into and across the curb lane in complete disregard of the driver's obligation to yield the right of way. Mr. Ulmer was not obliged to presume that the defendants' left-turning vehicle would not yield the right of way to him nor cast any duty on him as the dominant driver to take any extra care as there was no sufficient opportunity for him to be aware of the defendant driver's disregard of the law before the collision occurred.
- [74] This claim of contributory negligence of Mr. Ulmer is denied and I hold the defendants totally responsible in law for the accident and Mr. Ulmer's death.

Abuse of Process

[75] The plaintiff claims damages in the amount of \$20,000 for what is alleged to have been an abuse of process by the defendants in failing to admit full liability at the outset of these proceedings and instead continuing that formal denial of liability in their pleadings until shortly before trial, when they conceded their own negligence but continued to assert that Mr. Ulmer was contributorily negligent.

[76] As a result of this collision the defendant Steven Weidmann was charged in Provincial Court with driving without due care and attention contrary to s. 144(1)(a) of the MVA, and on May 8, 2008 was found guilty following trial.

[77] Mr. Weidmann did not give evidence at his Provincial Court trial. The evidence of how the collision occurred came from the other eye witnesses including Mr. Sweet. With that evidence, and without Mr. Weidmann's evidence, the Provincial Court judge was left to speculate whether Mr. Weidmann saw the motorcycles and decided he could make it safely across the curb lane before they arrived, or whether he never saw them at all.

[78] As I have also concluded, the trial judge concluded that Mr. Weidmann had proceeded when Mr. Ulmer was an immediate hazard when it was unsafe to do so, and he found Mr. Weidmann guilty as charged.

[79] The plaintiff argues that with Mr. Weidmann being convicted under s. 144(1)(a) of the MVA, it was an abuse of process for him to re-litigate the issue of liability in these proceedings, and it was a further abuse of process for him to only admit part liability shortly before trial and continue to assert the contributory liability of Mr. Ulmer through to the trial itself.

[80] In the Provincial Court decision, [2008] B.C.J. No. 1101, the trial judge quoted from *R. v. Funk*, 2005 BCSC 1873, a decision of this Court, where it was said:

Driving without due care and attention is a strict liability offence. The parties agree that the objective standard of the reasonable man is the basis for determining whether the offence has been established. The Crown must show a manner of driving which, in all the surrounding circumstances, departs from the accustomed sober behaviour of a reasonable man.

It is then open to the accused to avoid liability by proving he took all reasonable care. This again is judged objectively, by what a reasonable man would have done in the circumstances. If the accused reasonably believed in mistaken facts which, if true, would have made the act innocent, or if he took all reasonable steps to avoid the event, he will not be convicted.

[81] Accordingly the result of a charge of driving without due care and attention focuses on the manner of driving of the accused according to the objective standard of a reasonable man, and any evidence from the accused that he did exercise reasonable care, again judged objectively.

[82] In finding Mr. Weidmann guilty the Provincial Court judge said this:

39 The issue then is whether the accused, Mr. Weidmann, can avoid liability by proving he took all reasonable care. This is judged objectively. The issue, as pointed out by Judge Quantz of this court in *R. v. Kowalewich*, [2005] B.C.J. No. 2911, is not the speed of Mr. Ulmer's approaching motorcycle but whether in all the circumstances the accused took reasonable steps to avoid the collision. Mr. Weidmann has not demonstrated that he took those reasonable steps. ...

- [83] In my opinion the finding of driving without due care and attention in Provincial Court was akin to a finding of negligence against Mr. Weidmann, because his manner of driving was found to have departed from the standard of a reasonable man and he failed to avoid liability by proving he took all reasonable care in the circumstances.
- [84] I agree with plaintiff's counsel that it was an abuse of process for the defendants to deny full liability in their statement of defence as this constituted an attempt to re-litigate the findings of the Provincial Court that were necessary for Steven Weidmann's conviction of driving without due care and attention. This was an attempt to undermine the integrity of the adjudicative process which is not to be allowed.
- [85] I do not conclude however that the findings essential to Mr. Weidmann's conviction in Provincial Court prevented Mr. Weidmann from alleging contributory negligence against Mr. Ulmer in this action.
- [86] The Provincial Court judge did consider s. 174 of the MVA and did conclude that Mr. Ulmer was an immediate hazard so that s. 174 did not provide a defence for Mr. Weidmann.
- [87] However, that did not rule out the possibility of Mr. Ulmer being found contributorily negligent, even if he was an immediate hazard in the circumstances.
- [88] In *LeSavage v. Lee*, 2000 BCSC 115, Mr. Justice Low, as a judge of this Court, found the plaintiff's approaching vehicle to be an immediate hazard and nevertheless found that the plaintiff was 20% contributorily negligent for driving a little too fast for the circumstances, and for not keeping an adequate lookout.
- [89] In her submissions before me, defence counsel submits that Mr. Ulmer was driving too quickly and not taking reasonable care for his own safety, and on the evidence of Mr. Ausma, had proceeded up the hill very quickly, passing a long line of stopped traffic on his left. She submits that even at speeds approaching 120 kilometres per hour Mr. Ausma was not able to catch Mr. Ulmer before the intersection.
- [90] It is submitted that Mr. Ulmer approached the intersection at too high a speed and without an adequate lookout for vehicles that might want to make a left turn.
- [91] While I have decided that there was no negligence on Mr. Ulmer contributing to the collision, based upon the evidence that I have accepted, I cannot say that this was a defence advanced in bad faith for the ulterior purpose of emotionally disturbing the plaintiff and putting pressure on her to settle at a figure favourable to the defendants.

- [92] Although I have concluded that it was an abuse of process by the defendants to deny liability completely, they were not guilty of an abuse of process in maintaining the defence of contributory negligence of Mr. Ulmer at all times.
- [93] The plaintiff says in her evidence that she could not understand how the defendants could deny any liability for the collision. She says she attended the examination for discovery of Steven Weidmann and says he took the position he didn't do anything wrong. This made her really mad and it upset her for a time. She agrees she attended his examination voluntarily.
- [94] When the defendants admitted some liability one week before trial it upset her again that Steven Weidmann would think her husband was responsible at all.
- [95] In my opinion it is just as likely if not more likely that maintaining the defence of contributory negligence disturbed the plaintiff just as much as the complete denial of liability, and I am unable to conclude that the plaintiff has sustained any damages for abuse of process caused by the total denial of liability.
- [96] This claim is denied.

Nervous Shock/PTSD Claim

- [97] A very good analysis of the elements of the cause of action for nervous shock is found in the decision of Mr. Justice Joyce of this Court in *Kotai v. Queen of the North (Ship)*, [2009] 2009 BCSC 1405, B.C.J. No. 2022.
- [98] In his judgment Joyce J. recites passages from two decisions of our Court of Appeal, being *Devji v. Burnaby (District)*, 1999 BCCA 599, 180 D.L.R. (4th) 205, and *Rhodes Estate v. C.N.R.* (1990), 50 B.C.L.R. (2d) 273. In addition he also recites passages from the Supreme Court of Canada in *Mustapha v. Culligan of Canada Ltd.*, 2008 SCC 27, [2008] 2 S.C.R. 114.
- [99] From the reasoning in these cases and other cases cited therein the following elements of the cause of action for nervous shock have been established:
- (a) the defendant must take reasonable care not to injure those persons who are so closely and directly affected by his/her actions that he/she ought reasonably to have them in contemplation as being so affected;
 - (b) proximity factors inform the foreseeability analysis for claims of psychiatric injury where there is no physical injury;
 - (c) the relevant proximity factors are the relational proximity (the closeness of the relationship between the claimant and the victim of the defendant's conduct), locational proximity (being at the scene of a shocking event and observing it or observing its immediate aftermath), and temporal proximity (the relation between the time of the event and the onset of the psychiatric illness);

- (d) the claim must be for actual psychiatric injury caused by the actionable conduct of the defendant;
 - (e) it must be concluded as a matter of law that a reasonable person should foresee that his/her conduct is such that for it could create a risk of direct psychiatric injury to a person of normal fortitude and thereby give rise to a duty of care to avoid such a result;
 - (f) a claimant must prove not just psychological disturbance or upset as a result of the defendant's negligence but also that his/her psychological disturbance rises to the level of a recognizable psychiatric illness. Mere grief or sorrow caused by a person's death is not sufficient to support any compensation. The law does not recognize upset, discord, anxiety, agitation or other mental states that fall short of a recognizable psychiatric illness.
- [100] While defence counsel does not appear to dispute the fact that the plaintiff was owed a duty of care by the defendant Steven Weidmann not to operate his vehicle in a negligent fashion, the evidence does support such a duty of care existing.
- [101] The evidence is that Ms. Ulmer was telephoned from the scene of the accident by Mr. Ausma. He says he telephoned her after the ambulance arrived and she arrived in a matter of minutes. She ran up crying and he stopped her. She saw them working on her husband on the roadway but she was not allowed to approach him. Mr. Ausma describes her as shivering so much that a jacket was put on her and she was somewhat stressed.
- [102] Ms. Ulmer says that Mr. Ausma telephoned her and told her that her husband was in a motorcycle accident, that it was serious and to come quick to the intersection of 176th Street and 96th Avenue. She jumped in her car and sped to that intersection with her hand on the horn. When she arrived she jumped out and ran to the corner of 96th Avenue screaming "my husband". A fireman wouldn't let her approach but she saw her husband lying on the road with blood pouring out of his mouth. She says she was shaking and crying and felt so cold.
- [103] She saw her husband for a second at the ambulance and said she loved him and don't die.
- [104] A police officer took her to the hospital where she was told they didn't think her husband was going to make it and she was present when he passed away.
- [105] A witness to the aftermath of the accident who was in a car in the centre lane on 176th Street, Ms. Johnstone, recalls Ms. Ulmer attending after the paramedics had arrived and they were working on her husband. She describes Ms. Ulmer as obviously hysterical and screaming "my husband".
- [106] Ms. Johnstone was emotionally affected herself in seeing blood pouring out of Mr. Ulmer's ear and knowing he was close to death and she says she has been affected by this moment every time she has passed that intersection thereafter until the configuration of the intersection was changed.

- [107] Ms. Johnstone's husband also saw Ms. Ulmer at the scene and says she was obviously distressed.
- [108] Candice Ulmer, a daughter, was also telephoned by Mr. Ausma from the scene and was told to go directly to the Royal Columbian Hospital. On arrival the doctors were working on her father. Her mother was shaking and they were told that her father was unconscious and bleeding internally. He died at the hospital. She says she had intensive grief over her father's death and was in shock herself and her mother was in shock, crying and howling.
- [109] It is obvious that Ms. Ulmer falls into that class of claimants whom Mr. Weidmann should reasonably have foreseen would be at risk of a psychiatric illness by reason of his negligent conduct and thereby to whom he owed a duty of care not to be negligent in his driving conduct.
- [110] Ms. Ulmer was the wife of the victim Mr. Ulmer, and she was at the scene very shortly after the accident occurred where she saw her husband lying on the roadway with blood pouring out of his mouth. Relational proximity, locational proximity and temporal proximity have all been established.
- [111] Defence counsel focuses her submissions on whether Ms. Ulmer's emotional disturbances rose to the level of a recognized psychiatric illness, and are therefore compensable, or alternatively whether her emotional disturbances amount to nothing more than grief or bereavement.
- [112] Ms. Ulmer says in her evidence that she and her husband were married 38 years at the time of his death, having married in 1968 when she was 16 years of age. They have two children, a boy and a girl, the girl now in her late 30s and the boy 40. The evidence indicates that she and her husband were emotionally bonded during their marriage.
- [113] When she gave her evidence in court four years later of seeing her husband at the accident scene before he was transported to the hospital, she was crying and stuttering. She also continued to cry and stutter during other parts of her evidence as well.
- [114] She says in the months following her husband's death she was not eating and by the end of 2006 had lost 30 pounds. This continued to the point where she lost a total of 65 pounds and she says only in the last year or so she has regained 10 of those pounds.
- [115] With losing so much weight, including off her face, her facial skin became loose and this made her depressed. She underwent a minimal facelift in 2007.
- [116] In 2006 she says she rarely slept more than two hours at a time. The night of the accident she had nightmares of seeing her husband flying through the air and lying on the street with blood pouring out. These nightmares lessened over time to the point where she says that last year there were only about eight of them except for the week prior to trial when she had three or four.

- [117] She took a trip to Hawaii in December 2006 where her father lived and was ill. She says she didn't want to be in the house alone for upcoming New Year's Eve.
- [118] She saw a psychologist, Mr. Vaness, shortly after the accident and continued to see him on a regular basis until she returned to work. She did not return to work as a postal employee until February 2007 and then only on a graduated basis. She says she needed to return to work because she was becoming a recluse. She continued to see Mr. Vaness until December 2009 but has only seen him one time in 2010 as she feels she has progressed as far as she can go with him.
- [119] She enjoyed karaoke singing prior to her husband's death and she returned to that following his death and continues with it to the present day. She even travelled to Florida in 2007 to perform karaoke singing.
- [120] The first time she drove to Mr. Vaness's office she had to drive by the scene of the accident and despite telling herself not to look, she did so, and started to cry and had to pull over to the side of the road to collect herself. When she gave this evidence in court she stuttered.
- [121] Thereafter, when travelling that route to see Mr. Vaness she says she always felt bad inside and had some anxiety but it was never as bad as the first time and she never had to pull over again.
- [122] She says in 2007 and 2008 she started to eat better but never as much as she had before her husband's death. Presently she definitely feels better but says she needs more help. She felt she was getting better with Mr. Vaness but she says she can't take stress at all now and is a bundle of nerves. If she accomplishes something in the house she gets a good night's sleep; if she has to do much, she gets overwhelmed and sleeps only two hours.
- [123] She says she still has emotionally bad days at work at least two days of the week.
- [124] Her mother passed away prior to the trial. She had been fighting cancer for the last four years and the plaintiff says it was actually a pleasant relief when she died because she had time to prepare for it.
- [125] She took antidepressants for a while after her husband's death but stopped when her doctor approved. She also took natural medication for relaxation. She took neither of these medications prior to her husband's death.
- [126] Her emotional support now is obtained from her live-in friend Mr. Crowie whom she met in 2007 at dance classes she was taking. He moved in with her at her house on June 1, 2007 and still lives with her at the time of trial. She says he paid no contribution to the house expenses to start with, as she wouldn't take anything from him, but is now paying \$600 per month because he rents out his own house that he has kept for that amount.
- [127] She and Mr. Crowie keep their incomes, assets and finances separate, although she has coverage under his extended medical plan from work.

- [128] As far as marriage is concerned she says he won't guarantee that and she doesn't know herself at the present time.
- [129] She believes in the institution of marriage but he does not think that is necessary. She does however consider him her common-law spouse but with no long-term commitment. She says he gives her emotional support and listens to her and is concerned for her. She considers him a wonderful man and says she really loves him.
- [130] Mr. Crowie also describes the plaintiff and himself as common-law spouses but he is unable to say where that relationship is going. He says emotionally the plaintiff has not changed too much but has gotten worse with the trial approaching. She breaks down and starts to act childish. Her early years come out that do not include her husband. Her childhood seems to have been a calmer time for her. This childish behaviour of hers can last all day until she gets some rest and it is always preceded by her agitation which can be triggered itself by anything.
- [131] He says in the last three months it has gotten worse since her mother has died and with the court case coming on. Her speech will become immature and he describes her as like a deer in the headlights. Her stuttering was very bad when they first met but he got her to take deep breaths and relax. As the trial approached he says it has gotten worse. He says the effect on their relationship is very trying. He says her work seems to mellow her out.
- [132] She does talk about the accident on quite a few occasions and why Mr. Weidmann did what he did. She gets hysterical when talking about the accident and this builds on itself. She also talks about her husband she dearly loved and lost, but not too much.
- [133] When she goes through old pictures she breaks down and gets really emotional and anxious and uptight and then other things start to bother her.
- [134] Candice Ulmer, the daughter who was with the plaintiff in hospital when her father died, says she was the one who had to plan her father's funeral because her mother wasn't able to do it. Her mother lost weight in the following months and was not healthy. She was stuttering and in shock and couldn't function. This deep shock and stress lasted for three to six months before her mother started to function again. She had severe stuttering for six months to one year and she still stutters presently every couple of months if under stress. She was also shaking at the time and still does to some extent. In her view she is not the same mother now and sometimes acts like a child.
- [135] In the last six to 12 months she says her mother doesn't seem to have the strength she used to and can't seem to handle the day to day issues.
- [136] She also describes Mr. Crowie as her mother's necessary emotional support. She says if he leaves it won't be good for her mother.

- [137] Ms. Fitzgerald, a fellow postal worker and friend of the plaintiff, says that after her husband's death the plaintiff was a really different person, a recluse who didn't eat or sleep and lost a lot of weight which was worrisome. For the first couple of months her stuttering and shaking, especially when she talked about the accident, was bad and there was a point in time each day when she became babbling and incoherent.
- [138] Presently she says the plaintiff has still not recovered completely. In fact she has been worse in the past year but Ms. Fitzgerald didn't know that the court proceedings were ongoing.
- [139] Darryl Ulmer, the son, has lived in Alberta since the year 2000 and has seen his mother twice a year since his father's death. He also refers to her loss of a lot of weight and describes her as emotionally a mess, going into fits and acting like a child. Prior to his father's death she was cheerful and outgoing, fun to be around, with lots of energy. Last Christmas when he visited her she was babbling and didn't make sense.
- [140] Mr. Kochet was the plaintiff's supervisor at the post office before his retirement on October 31, 2007. He says the plaintiff was not quite the same after her husband's death. She was stuttering a lot but she was starting to relax more and getting better before his retirement. He never had any concerns about her work.
- [141] Dr. Wadge was the plaintiff's general practitioner in 2006 and 2007. He saw the plaintiff on August 22, 2006, four days after this accident, and describes the plaintiff at that time in his notes as upset, tearful, speaking quickly and tremulous. However she had normal thought but with flat affect. She was prescribed antidepressants and referred to Mr. Vaness.
- [142] The plaintiff was seen again on September 6, 2006 when she still had flat affect and some problems talking but again with normal thought. On September 21, 2006 she was not stuttering but reported that her mother was ill and her dog sick and she was eating and sleeping poorly. She had a slower speech pattern at that time and still had flat affect. On October 30, 2006 the plaintiff reported driving again and walking and had better affect. She was still tearful and had lost 25 pounds but had good speech and thought.
- [143] On November 28, 2006 there was a setback in the plaintiff's depression after the coroner's report was received. She had flat affect again and was tearful but had normal speech and thought. She was about to go to Hawaii.
- [144] On January 25, 2007 the plaintiff was described as having good insight and making slow and steady progress. She was taking line dancing.
- [145] On March 8, 2007 the plaintiff had a slight flat affect but again normal speech and thought. She felt overwhelmed at times and slept poorly at times.

[146] Two psychiatrists and one psychologist gave evidence at trial on the issue of whether or not the plaintiff suffers from post-traumatic stress disorder (PTSD), a recognized psychiatric illness, as a result of her observation of her husband lying on the ground with blood pouring out of his mouth and later watching him die in the hospital.

[147] Mr. Vaness is the psychologist. He saw the plaintiff for the first time on August 24, 2006, six days after the accident, when she was brought in by a friend because she was so distraught.

[148] In his first report of September 24, 2007 he described her on the first visit in the following way:

She was suffering from a series of symptoms including sleeplessness, lack of ability to eat, weight loss, severe stuttering, difficulty focusing and concentrating, severe moodiness, continuous crying and tearfulness, physical agitation as well as fatigue, increasing isolation and flashbacks to the accident. She also showed a very marked disinterest in her former hobbies and interests and suffered black moods on a daily basis; in fact she displayed this array of symptoms continuously.

...

Further she was agitated and had difficulty focusing, talking and stuttered to the point of incoherence at times. She looked exhausted, her eyes were bloodshot and she appeared haggard.

...

Debra also complained of being overwhelmed by the subsequent paperwork and general yard and house upkeep as she was unable to perform even the most basic tasks for a number of weeks and relied on friends, neighbours and family to help her with the chores.

[149] After months of therapy leading up to this report he said in this report:

She is a bright, insightful and sincere client. She has responded well to treatment but still suffers residual effects of the above trauma. She still has flashbacks of the death scene although these are not as intense or as emotionally exhausting as they were several months ago.

She finds she is much more emotional than she was prior to the death of her husband and has a much lower tolerance for emotional issues. She still reverts to severe stuttering, shaking and tearing at very little provocation and finds this disturbing and even embarrassing.

... She has also met a man who also lost his wife to illness a couple of years ago and has over the past three months become quite close to him and this relationship has had a powerful impact on her recovery as she feels he truly understands her loss as he too has had a similar loss in his life. They are now very close to each other and Debra feels very much supported and encouraged in this relationship. It has been very helpful in her efforts at recovery.

[150] His diagnosis in this report was that the plaintiff is suffering from PTSD according to the criteria of the Diagnostic and Statistical Manual of Mental Disorders, 4th Ed. ("DSM-IV").

- [151] The treatment he recommended was that she work closely with Dr. Wadge on antidepressant medication and other possible medication to help with anxiety and sleep problems and further that she attend regular weekly sessions with him to provide supportive cognitive behavioural psychotherapy.
- [152] He also said in that report that her degree of disability initially had been marked and severe but she had shown a general improvement in mood, ability to focus and concentrate, and was much more socially involved. However she still had bouts of moodiness, intermittent flashbacks and nightmares, general fatigue and intermittent sleep and diet problems, i.e. could not sleep and/or found eating difficult at times.
- [153] He said in the report that she had suffered an intense and prolonged grieving period that included significant and prolonged impairment to even basic functioning for four to six months but she had improved and he was optimistic she would continue to do so. His prognosis was positive and he was hopeful that she would recover in time to her former robustness but he said he would continue to see her for another six months to one year for weekly sessions to help her continue to recover, followed by a period of withdrawing of support over a course of a few months leading to termination.
- [154] In his follow-up report of April 10, 2010 he said she had attended on a weekly basis until approximately early summer 2009 whereupon they moved to twice a month frequency and after December 2009 on an as-needed basis.
- [155] He said in that report the effects of the nervous shock were profound and lasted from the accident date to the present but that she had met Mr. Crowie and their relationship had become very close which had a very positive impact on her ongoing efforts at recovery.
- [156] Emotionally she had shown improvement over time, her moods had become more stabilized although she still had significant bouts of sadness, tearfulness and anger. She also had improved focus and concentration but she still suffered from flashbacks and nightmares again reduced in frequency and intensity but increased during special times such as Christmas, birthdays, Father's Day, anniversaries of her marriage and the accident date.
- [157] She had returned to work and was slowly beginning to cope with all the tasks, paperwork and responsibilities thrust upon her by her husband's death. Upon his death she had become overwhelmed by all these requirements and it was only in the prior 12 months with Mr. Crowie's help that she had slowly regained some semblance of control over these issues.
- [158] In that report he described her partial recovery as still fragile and said she was still dependent. She still struggled with the grieving process and it was difficult for her to move forward with her life as she was currently involved in this lawsuit and continuously having to review and relive the accident and ensuing trauma, and being interviewed by various parties was prolonging her efforts at regaining her emotional balance and coming to terms with her loss.

- [159] Again however he was optimistic that she would in time be successful in her efforts.
- [160] He commented in his final report of May 22, 2010 on the statements of Dr. Levin, a psychiatrist retained by the defence who opines that the plaintiff does not have PTSD, that the plaintiff had a history of significant resilience to different stressors in her life such as to a motorcycle accident of her own when she flew over her husband's shoulders and to a horrific home invasion when she developed only transient psychological difficulties and evidenced a robust personality. He offered his opinion that the key element in these incidents was the presence of her husband who was a very significant cornerstone of the plaintiff's support system whom she relied on for real, emotional and substantive support in huge areas of her life which was all lost on his passing, leaving her with a vastly reduced ability to cope, even a fragility.
- [161] He disagreed with Dr. Levin that the cause of the plaintiff's emotional disturbance is bereavement and nothing more and he took issue with Dr. Levin's statements of the plaintiff's improvements when he did not include the fact that her return to work after the accident was only part-time for at least one year, her optimism was only transient and short-lived for at least two and one-half years, and her social activity required constant encouragement and did not include many former activities and people associated with her or her husband even three years later when she was still avoiding some people and events.
- [162] He did agree that grief or bereavement plays a role but it is only in his view one of many more factors such as shock, avoidance, emotionality, stuttering and isolation for the plaintiff.
- [163] He did agree that she has come a long way in her recovery but there appeared to be a strong residual emotionality now towards stressors and intermittent problems of avoidance and emotionality when confronted with memories of life with her husband.
- [164] In his evidence at trial Mr. Vaness says the plaintiff's stuttering has diminished over time. When she is talking about everyday life it is very rare but if she is talking about the accident it is there and she is highly emotional and cries.
- [165] He says she is still vulnerable today and will be for a long period of time, perhaps for the rest of her life. In his view it is not grief as that should only last three months or so. However he says she is pretty much in remission now although he also says that with PTSD she can be in remission for many years and then experience it again.
- [166] He says the process of litigation is an aggravating feature for her symptoms and a resolution of the litigation will certainly relieve some of the stress.

- [167] He says her new relationship with Mr. Crowie that he spoke of in his report is a sign of her remission which also involves her return to karaoke, gardening and socializing. However in his view it does not mean the end of PTSD. He agrees her flashbacks are reduced in number to an infrequent basis. Memories are not flashbacks in his view and he admits that as of 2010 he does not know if she is still suffering from flashbacks as he has only seen her once this year.
- [168] He refers to her going to Hawaii to see her father as necessary for her and he says her dancing had to be encouraged and was hard for her.
- [169] Dr. Ancill is the psychiatrist who was retained by plaintiff's counsel to assess the plaintiff. He filed two reports for trial. He saw the plaintiff for the first time on May 27, 2007 and in his first report of June 15, 2007 described her as being extremely distraught, sobbing, stuttering and wailing. She said to him "I still don't believe it happened. I have to go that way to work every day and when I go and see the psychologist."
- [170] The plaintiff told him that one month prior to her visit to him she had been in a motor vehicle accident and when an ICBC adjuster asked her why she didn't get the licence plate of the other driver she "just lost it and started screaming at him".
- [171] In his first report he described the plaintiff's mental state as showing great distress and agitation when talking about the scene of the accident, the events at the hospital and the consequences. She was subjectively depressed and objectively had depressed mood, had suicidal thoughts less frequent over the previous month, some initial insomnia improved with medication, middle insomnia with frequent awakenings, and late insomnia with early awakening. She also suffered from agitation and anxiety, psychological and somatic, and had significant weight loss by history.
- [172] She was nevertheless alert, oriented and globally cognitively intact.
- [173] In this report he concluded that she suffers from PTSD and meets the required criteria under DSM-IV. He also was of the opinion she suffers from a related major depression of moderate severity.
- [174] He expressed the view that at that point in time the plaintiff had not had the most optimal treatment of antidepressant medications and cognitive behavioural psychotherapy. In his view counselling alone was not enough to produce any sustained remission.
- [175] In his view even with appropriate treatment her prognosis was quite poor given the chronicity of the disorder, the lack of remission to date and the impossibility of the plaintiff avoiding triggers to her anxiety.

- [176] In his follow-up report of April 6, 2010 he described the plaintiff when he saw her on April 1, 2010 as becoming tearful and distressed as soon as he reviewed the details of the accident and aftermath with her. She was still not taking any antidepressants and had not been referred to a psychiatrist. He repeated his opinion that she was still not getting the most optimal treatment.
- [177] In this report he confirmed his diagnosis of PTSD on the basis of the criteria of DSM-IV, although he acknowledged some minor improvements. He also expressed the view that she still suffers from a related major depression of moderate severity.
- [178] At trial he says that in his opinion a psychiatrist would begin with 12 sessions of treatment with her and given her age and four years of symptoms treatment would have to continue for one year and then be subject to further relapse occurring which in his view is likely to be an ongoing problem.
- [179] He reiterates counselling is not particularly helpful as endlessly going on about the incident is to trigger a relapse instead of enabling her to get on with life. Psychotherapy would teach avoidance of the incident.
- [180] He disagrees that the plaintiff only suffers from grief over the death of her husband. He agrees that grief is not a mental disorder but he says it is time-limited to about one year at most with an acute period of grief for the first four to six weeks.
- [181] In his view Dr. Levin has diagnosed pathological grief, grief that one is stuck in where new relationships would be transient, brief and unsuccessful because the plaintiff would not be able to move on with her life. He considers pathological grief to be a psychiatric disorder but again he does not believe the plaintiff suffers from this.
- [182] He recognizes that the plaintiff has a new man in her life as of May 2007 and has maintained that relationship to the present day. He also recognizes that she has returned to her previous level of work, has continued her karaoke, travelled for karaoke purposes, travelled to Hawaii, redecorated her home and had plastic surgery to improve her appearance. However to him this suggests only that she was in remission during these times as she does have a chronic remitting condition.
- [183] He says people with PTSD can still work and get on with life as it is not all disabling and some people can go on for many years and be fine and then relapse.
- [184] He agrees the plaintiff did suffer from grief over her husband's death and he says if he had seen her shortly after the accident he would have found grief. Even nine months later she could still have elements of grief present but in his view they were swamped at that time by her PTSD and depression so the grief would have been immaterial. Even four years later there may still be some grief present in his view but again not to the level of the anxiety, agitation, stuttering, nightmares and flashbacks of which he was told.

- [185] He disagrees it is difficult to distinguish PTSD from grief but he also agrees it is hard to describe PTSD except to say that when one sees it one knows what it is.
- [186] Dealing specifically with the criteria of DSM-IV, he points out that it cautions against being used as a cookbook for a diagnosis as he says some people can have all of the criteria and still not suffer from PTSD while others can have only some of the criteria and have PTSD. DSM-IV is only a guideline.
- [187] Whether or not a person has PTSD in his view is ultimately a matter of clinical judgment of the psychiatrist and not merely a matter of application of the DSM-IV criteria.
- [188] One of the criteria of DSM-IV is persistent avoidance of stimuli associated with the trauma and numbing of general responsiveness. Voluntarily reading the coroner's report he agrees is not an effort to avoid but he says that perhaps the plaintiff was required to do this. Driving by the scene many times he agrees is also not 100% avoidance but again says perhaps she was required to do this. Attending the defendant Steven Weidmann's examination for discovery voluntarily and attending his Provincial Court trial he agrees is not consistent with persistent avoidance.
- [189] Another criterion of DSM-IV is a marked diminished interest. Dr. Ancill does not consider the plaintiff's attendance at dance class and karaoke to be inconsistent with this criteria. It was his understanding she did this to avoid being a hermit.
- [190] Also he understands having a man in the house was only because she did not want to be alone.
- [191] He does however allow that all of these activities may or may not be consistent with a marked diminished interest.
- [192] Dr. Levin was retained by defence counsel to do an independent psychiatric examination. He saw the plaintiff on April 21, 2010.
- [193] He said in his report of April 26, 2010 that the plaintiff was intermittently tearful throughout his interview but was also able to smile and laugh on quite a few occasions. She acknowledged that most of the time she feels happy but frequently experiences ups and downs. She denied any spontaneous recollection of her husband's death. She did not present him with any cognitive distortions that are frequently seen in patients with major depressive disorders such as pervasive negativism, or pathological feelings of guilt.
- [194] He also said in his report that she reported a very brief period of perceptual distortions after her husband's death that would not constitute delusions or hallucinations. She reported isolated experiences of flashbacks but otherwise did not seem to have any spontaneous intrusive experiences of reliving or witnessing the aftermath of her husband's accident. During the interview she also did not present with any symptoms of hypervigilance or startle responses.

- [195] He reviewed collateral documentation from other caregivers for her including Dr. Wadge, Mr. Vaness and Dr. Ancill. He said he did not find any clinically significant evidence of PTSD symptomatology in the collateral documentation but only found evidence of severe persistent grief and related emotional disturbances.
- [196] In his opinion Ms. Ulmer presented with a history of significant resilience to different stressors in her life such as her motorcycle accident with her husband when she did not develop any psychological or emotional disturbances, and when she suffered only transient psychological difficulties after a home invasion attempt that left her son stabbing and bleeding.
- [197] In his opinion Ms. Ulmer's clinical presentation was characterized by psychological/emotional disturbances non-specific for PTSD in the context of her bereavement and grief reaction. In his view in the acute stage of bereavement it is difficult to differentiate one from the other.
- [198] From the history he took from her it was evident to him that with time she had regained her appetite for life and was able to return to gainful employment, seemingly unimpaired social functioning and interpersonal relationships. She told him about her new friend Dan, about her other friends, about her karaoke, and about her trip to Florida for karaoke.
- [199] In his opinion Ms. Ulmer's progress in her clinical presentation was characterized by unremarkable progression through the stages of normal grief, achieving restitution and reorganization. Quoting from a textbook on psychiatry by Kaplan and Sadock:

In restitution and reorganization, the bereaved recognizes the extent of the loss and realizes that grieving has been accomplished. Attention shifts to life apart from the deceased. The hallmark of restitution is the survivor's recognition that they can return to work, resume old roles, acquire new ones, experience pleasure, and seek companionship and love.

[200] Overall he concluded:

... her psychological-emotional reaction to such stress did not seem to consist of any "pathological" symptoms of adequate duration for a separate diagnosis of post-traumatic stress disorder or major depressive disorder. She did present with some post-traumatic stress disorder features, which accompanied her bereavement. However, these symptoms seemed to be transient and did not cause her any long-term disabilities.

- [201] In his view she had gradually improved and had returned to a more productive lifestyle and did not need any further psychopharmacological or psychotherapeutic intervention.
- [202] In his evidence at trial dealing with the criteria of DSM-IV he says persistent avoidance of stimuli associated with the trauma and numbing of general responsiveness is an important requirement for PTSD. He did not see any avoidance behaviour in Ms. Ulmer. She did not avoid the scene of the accident. She did not avoid talking about other traffic accidents that might have reminded her of her husband's accident. She did not avoid hospitals when her

husband had died in one, but instead went in for plastic surgery. She also did not have any feelings of numbness in terms of not being able to think about the future. She did react severely initially but given the magnitude of her loss he considers this to have been normal. He did not see any sign of this when he saw her.

- [203] He says she did not appear to be stressed by a motor vehicle accident she saw on the way to see him and if she was suffering from PTSD he would have expected her to say that she had a flashback of her husband's accident at that time. She did not.
- [204] She had no spontaneous or intrusive recollection of the accident when going through the intersection after the first time, or when looking at old pictures of her husband, necessary for a diagnosis of PTSD. He says if a recollection is in response to a trigger it does not fit the requirement for PTSD as it is not spontaneous.
- [205] She told him she does not spontaneously recall her husband's death and she does not stutter anymore unless she was very anxious.
- [206] When he asked her what went through her mind when she said she sometimes gets depressed and bitchy, she did not refer to the accident but referred to how much responsibility she now has in keeping up the house, going to work, paying the bills and making major decisions alone. She concluded "I had 38 years of somebody who was taking care of me." Dr. Levin considers this to be a normal reaction.
- [207] She said she initially had nightmares that gradually diminished. He does not consider that this meets the requirement for PTSD either.
- [208] He agrees that a diagnosis of PTSD does not require compliance with all DSM-IV criteria and even if all criteria are satisfied it does not necessarily result in a diagnosis of PTSD. It is a matter of clinical judgment.
- [209] He acknowledges that he did have difficulty deciding whether the diagnosis amounted to PTSD or bereavement or depression and there was some post-traumatic stress in the continuum, but in his opinion it was in the spectrum of bereavement.
- [210] In his view if Ms. Ulmer sobs and stutters even now it is not PTSD but continuing bereavement. She has prolonged severe bereavement that gives her distress but it is not complicated and not pathological as it does not affect her functioning in other areas of her life.
- [211] He allows that if she was sent to Hawaii by her psychologist for her health and also to see her sick father, that would change his opinion about the first six months after the accident but he says she apparently enjoyed her trip to Hawaii and was not paralyzed there.
- [212] He considers it normal bereavement to have spent a few months of not going out and remaining in bed after a traumatic death of a loved one.

- [213] He agrees she has components of PTSD that exist together with depression and bereavement but in his view not enough to make a full diagnosis of PTSD. In his view it is not a depression of disabling proportions.
- [214] He says Mr. Vaness cannot be faulted for diagnosing PTSD in the initial period and the plaintiff could have very well had PTSD over the first month. When he saw her it doesn't mean she never had PTSD initially.
- [215] Again he says that it is his clinical judgment that the plaintiff suffers from only bereavement and that she doesn't need treatment as she has picked up her life and is no longer disabled.

Analysis of the Claim of Nervous Shock/PTSD

- [216] It is my conclusion from considering all the evidence of the medical experts and the lay witnesses that the plaintiff did suffer from PTSD in the early period after her husband's death but this was significantly mingled with her grief and bereavement which is understandable after 38 years of marriage, and was completely overtaken and replaced by that continuing grief and bereavement in the long-term.
- [217] I recall Mr. Vaness's observation made in his report of April 10, 2010 that Ms. Ulmer was still dependent and struggling with the grieving process as she was involved in a lawsuit and continually having to review and relive the accident and ensuing trauma. Being interviewed by various parties was prolonging her efforts at regaining her emotional balance and coming to terms with her loss.
- [218] I agree that the existence of this lawsuit is prolonging her grief by requiring her to dwell on the accident and her husband's death during the entirety of this litigation. In my view this has had a profound significant effect on her ability to recover from her ongoing grief.
- [219] I accept Dr. Levin's opinion that it is prolonged grief and not pathological grief and she does not need any further treatment as what she needs is an end to this lawsuit and the freedom to move on with her life.
- [220] I do not accept that she presently suffers from PTSD nor has done so for some time now since she has returned to work, continued her karaoke and formed a relationship with Mr. Crowie. She has however continued to suffer significantly from her grief associated with her husband's death and that continues up to the present day.
- [221] I do not accept the opinions of Mr. Vaness and Dr. Ancill that the plaintiff's ability to engage in her activities is a matter of mere remission of her PTSD which at some point in the future is likely to recur. I do not look on her return to these activities as only being a matter of necessity for her from a psychological perspective. It may be that there was some necessity for her to travel to Hawaii to see her sick father but the fact is that she demonstrated the ability to do that which is an indication of her ability to that extent to partake in the real world with all its trials and tribulations.

- [222] She may also have had to be encouraged to return to karaoke and dancing but again she was able to do that as part of moving forward with her life and as an indication that her PTSD had ended.
- [223] I agree with the opinions that taking Mr. Crowie into her life is another sign of her progression and if that makes her happy, which she says it does, I sincerely hope that that relationship continues.
- [224] I do not find a reference to the DSM-IV criteria on this issue of PTSD to be helpful to me at all. There are many incidents involving the plaintiff that do not fit some of the criteria and the evidence of Dr. Ancill and Dr. Levin is that it is not a particularly helpful diagnostic tool. I agree that diagnosis is a matter of clinical judgment and I accept Dr. Levin's judgment on this issue.
- [225] I am prepared to compensate the plaintiff for approximately six months of PTSD.
- [226] I consider \$10,000 to be an appropriate award to her for this claim.

Loss of Financial Dependency and Loss of Household Services

- [227] It is the FCA that gives the plaintiff and her two children the right to claim damages for the injury they have suffered from the death of Mr. Ulmer.
- [228] In *Cox v. Takahashi*, [1977] B.C.J. No. 1071, 5 B.C.L.R. 162, McFarlane J.A. said this:
- It is well established that the measure of damages under the statute as interpreted by the Privy Council in *Nance v. B.C. Elec. Ry.*, [1951] A.C. 601, 2 W.W.R. (N.S.) 665, [1951] 3 D.L.R. 705, is the pecuniary loss suffered by the dependant, as a consequence of the death. That pecuniary loss is the actual financial benefit of which they have been deprived and includes financial benefit which might reasonably be expected to accrue in the future if the death had not occurred.
- [229] Mr. Ulmer was 60 years old at the time of his death on August 18, 2006. His date of birth was July 28, 1946. He is survived by his spouse, the plaintiff Ms. Ulmer, and by his two children, Candace, age 34 years at the time of her father's death, and Daryll, age 37 years at the time of his death.
- [230] Ms. Ulmer was 54 years old at the time of her husband's death, her date of birth being July 31, 1952. They had been married for 38 years.
- [231] Mr. Ulmer was unemployed at the time of his death. He had worked for Titan Steel & Wire Co. Ltd. for 38 years until February 28, 2005 when his employment as manager of plant operations for the prior 18 years was terminated by his employer.
- [232] Terms of his severance that he agreed to entitled him to his base salary for the period March 1, 2005 to January 26, 2007, paid in semi-monthly instalments and subject to all necessary statutory withholdings to be paid regardless of any other income he may receive during this period.

- [233] In addition his extended benefits coverage was continued until August 31, 2005.
- [234] He was receiving the semi-monthly instalment payments of his base salary at the time of his death, but otherwise was not earning any income.
- [235] Ms. Ulmer was a long-standing permanent part-time employee of Canada Post at the time of her husband's death. She was earning in the order of \$32,000 per year from that employment at that time.
- [236] The plaintiff says that when her husband was laid off he was not planning to retire anytime soon. She says she had been planning to retire at her age 55.
- [237] She says her husband was initially very angry about being laid off but when that anger had subsided he talked about perhaps retiring. However they spoke to a financial advisor who indicated that their financial picture did not make it possible for both to retire at that time. She agreed with her husband to keep working after her age 55 which would have been on July 31, 2007, until her husband found another job. If he found another job around the time she turned 55, she still would have retired then.
- [238] The plaintiff says her husband was not looking for work yet during the severance period because of the tax implications of adding more income to his severance income. She says this additional tax was a big issue for him.
- [239] During the severance period Mr. Ulmer acquired a forklift operator's certificate and made out a resume, initially dated March 30, 2006.
- [240] It appears that he used this resume to apply to the GVRD on May 10, 2006 for part-time or full-time work in the parts area.
- [241] His resume indicated an objective of part-time (80 hours/month) or possible full-time work.
- [242] In the resume he said "I have taken advantage of my severance and now I am ready to start filling in the days with something away from the house."
- [243] A second undated application to the Surrey School District was found by the plaintiff on the home computer after her husband had died. She did not know about this application prior. The same resume was used for this application.
- [244] Neither of these applications resulted in a job offer.
- [245] The plaintiff says that her husband was looking for full-time work to replace his former income of approximately \$90,000 annually as it was not possible for them to live on a part-time income from him. She says he thought he could get a job back in the steel industry as he had good people skills. She says he was going to get serious about a new job in September 2006 as she thinks he wanted to enjoy the summer and complete his home projects first. He did tell her he might have to take more courses, but nothing specific.

- [246] The letter of March 9, 2005 from Titan Steel offering the severance package also offered Mr. Ulmer career transition services through a management consulting company to support his employment search efforts. A contact and telephone number was provided for this management consultant company.
- [247] There is no evidence that Mr. Ulmer ever contacted this consulting company and the plaintiff says he never told her that this service had been offered.
- [248] During the severance period the plaintiff says he met his friends for coffee, walked and exercised, shopped for collectibles that they liked, and rode his motorcycle. He also built shelves, gardened, and prepared every meal for them.
- [249] Mr. Nash was a long-time friend of Mr. Ulmer's and says Mr. Ulmer telephoned him right away when he was laid off. Mr. Nash was a commercial fisherman with his own boat and Mr. Ulmer asked him if there was a spot on the boat for him. There wasn't at that time as fishing was not that good.
- [250] Mr. Nash says he and Mr. Ulmer talked of different plans including operating a gravel truck or purchasing property to build spec houses. Mr. Ulmer didn't have the necessary licence for driving a gravel truck but Mr. Nash says the plan was that Mr. Ulmer would be the manager and he would be the driver.
- [251] In any event, he says they didn't think that plan looked very good at that time.
- [252] After Mr. Ulmer passed away, Mr. Nash did buy his first truck and the majority of his income is now trucking.
- [253] He confirms that Mr. Ulmer didn't want another job right away because of the tax consequences. They did discuss him getting back into management, although nothing specific.
- [254] In Mr. Nash's view Mr. Ulmer would not have been looking for part-time work as he was an "all in" guy.
- [255] He knows Mr. Ulmer applied for a custodial position at a school board, but he never saw Mr. Ulmer's resume.
- [256] Mr. Lahm was another long-time friend of Mr. Ulmer's. He is a union representative working at Roper Industries.
- [257] When Mr. Ulmer was laid off he says Mr. Ulmer told him he could not afford to retire. He believes Mr. Ulmer was going to take the summer of 2005 off but look for work shortly afterwards.
- [258] He also believes Mr. Ulmer was going to look for full-time work earning him around the same income that he had earned at Titan Steel.

- [259] Mr. Lahm says Mr. Ulmer talked to him about a management position at Roper Industries and he believes he remembers Mr. Ulmer coming into his workplace. He assumed Mr. Ulmer put in an application for a management position at his workplace but he doesn't recall if he ever confirmed that with Mr. Ulmer nor with anyone at Roper Industries.
- [260] Mr. Fraser was a co-worker with Mr. Ulmer at Titan Steel from 1970 to 1986, when Mr. Fraser became the business agent for the union. Mr. Ulmer was in the position as a supervisor/foreman when Mr. Fraser became the business agent in 1986.
- [261] As business agent he says he dealt with Mr. Ulmer in his position as production manager on negotiations for collective agreements and on grievance matters. He says Mr. Ulmer was fair and willing to listen and Mr. Fraser respected him as a manager.
- [262] He says he was not a friend of Mr. Ulmer's and didn't socialize with him but he put Mr. Ulmer at the top end of the category of those managers he dealt with in other companies.
- [263] After Mr. Ulmer was let go in February 2005, Mr. Fraser says he saw Mr. Ulmer a couple of months later and told him to call if he was looking for a managerial job. Mr. Ulmer told him that he was enjoying his unemployment for a while before getting back to work. Mr. Ulmer never contacted Mr. Fraser about a management job.
- [264] In Mr. Fraser's position he says he always knew when management people were being terminated in most companies he was dealing with and he was often asked if he knew of anyone good to let the company know. He says this occurred approximately four to six times per year.
- [265] He doesn't now recall what management positions became available between September 2006 and February 2007, but he thinks there was lots of opportunity and he feels confident that he could have obtained a position for Mr. Ulmer if Mr. Ulmer wanted it.
- [266] Mr. Fraser says he did not recommend anyone else for a management position in that time period because there was no one else on whom he was prepared to stake his reputation. Mr. Ulmer was the only manager he says he was prepared to recommend around that time and he doesn't believe Mr. Ulmer's age would have been a hindrance to him.
- [267] He says a manager in a manufacturing place could make \$70,000 or so. He says a forklift operator could make \$30 per hour and he says there were lots of 60-year-old forklift operators.
- [268] Mr. Nanson was Mr. Ulmer's supervisor at Titan Steel. Mr. Nanson was plant manager and Mr. Ulmer was operations manager.
- [269] It was Mr. Nanson who had to let Mr. Ulmer go. He says there was no issue with Mr. Ulmer's performance but the new owners of Titan Steel simply wanted the union to know they intended big changes and Mr. Ulmer was sacrificed because he was the representative of the company that dealt with the union.

- [270] Mr. Nanson says Mr. Ulmer was always considered competent and had lots of influence with the employees. He had good people skills.
- [271] He was also prepared to give Mr. Ulmer a good recommendation for another job in management, but he says Mr. Ulmer never asked him for one. He has no idea what opportunities were available for Mr. Ulmer after he was let go.
- [272] In the last 10 to 15 years there has been a downturn in the industry. He says however that the hiring age for a supervisor position would not be a factor if the applicant had experience and did not have to be trained.
- [273] Mr. Ulmer made income of \$87,849 in 2003 and \$88,273 in 2004. 2005 and 2006 incomes were made up of severance monies for the most part. In the year of severance in 2005 Mr. Ulmer made \$84,753.
- [274] In addition to being the chief income-earner in the household, Mr. Ulmer was also the chief gardener and home handyman.
- [275] He had started re-painting portions of the house inside, as well as building shelves and renovating the bathroom and had started finishing the basement, all before his severance started.
- [276] The plaintiff says he did not do any painting on the house during his severance period.
- [277] He was responsible for maintaining the extensive flower and plant gardens that he had installed in their yard. The photographs entered into evidence show these extensive gardens in the backyard area that he developed and maintained.
- [278] He also washed windows, power-washed the deck, pruned bushes and fertilized, mowed the lawn and washed their vehicles.
- [279] He was the one to arrange for outside contractors, such as roofers.
- [280] Inside the house he was the chief chef, being the one to cook most of the meals, although the plaintiff says she cooked as well. He also shared the house-cleaning with her.
- [281] Ms. Ulmer says the house is about 4,000 square feet, sitting on about one-quarter of an acre. She and Mr. Ulmer had just moved there in 1993 when he enlarged the patio and wired it for lights. He also cut out the flagstone paths around the flower beds and wired a fountain that he bought. He built a proper landing out the back door and built a front fence and gate. He also built a gardening shed attached to and matching the house.
- [282] The plaintiff says she did more weeding of the gardens than he did but they shared washing the dishes and grocery-shopping, although because he cooked more he did most of the shopping. She did the laundry and most of the vacuuming.
- [283] She says that he spent more time in the garden during the severance period because he had so much energy.

- [284] While Mr. Ulmer was still working he spent a couple of hours a day in the gardens during the week and six to ten hours a day on the weekends.
- [285] Since Mr. Ulmer's death the plaintiff says the flower gardens have become overgrown and she pays someone to weed the vegetable garden. She says she has no time to do the gardens herself as she is taking care of the inside of the house.
- [286] Her friend Mr. Crowie does very little around the house. He cuts the lawn and removes one particular troublesome weed and washes the vehicles. He doesn't paint or trim hedges or do any gardening. He doesn't do any cooking or shopping or maintenance of the house inside. He only pays room and board. Mr. Crowie confirms all this.
- [287] He maintains his own house in Aldergrove which he rents out.
- [288] The parties each retained economists to assist the Court in assessing the claims for loss of dependency and loss of household services.
- [289] These losses include the loss of that portion of the income that Mr. Ulmer would have earned beyond the date of his death that would have accrued to the benefit of the plaintiff as well as the loss of his assistance with the household duties that have been left as the responsibility of the plaintiff.
- [290] Mr. Carson, a well-known and respected economist, produced reports and gave evidence at the request of the plaintiff.
- [291] Mr. Hildebrand, an equally well-known and respected economist, also produced reports and gave evidence at the request of the defendants.
- [292] Mr. Carson was asked by plaintiff's counsel to assume that Mr. Ulmer would have found employment again effective February 1, 2007, and retired at age 65 or at age 70, and his new employment income would have been similar to what he had earned at Titan Steel.
- [293] Mr. Carson was also asked to assume the plaintiff would have retired six months after her age 55, on January 31, 2008.
- [294] He prepared a detailed table of nine calculations of figures based upon these assumptions and based upon the assumption that each of Mr. and Ms. Ulmer had personal consumption of 31.9% of disposable family income, leaving a dependency factor for Ms. Ulmer of 68.1%.
- [295] His figures for Ms. Ulmer's past and future economic dependency loss based upon his assumptions range from \$403,100 assuming Mr. Ulmer earned \$60,000 per year from 2010 to age 65 and then retired, to \$633,700 if Mr. Ulmer earned \$94,800 from 2010 to age 65, and then \$129,800 from age 65 to age 70, and then retired. These calculations all assume Ms. Ulmer would have retired on January 31, 2008 at age 55 years plus six months.
- [296] In addition he prepared a separate table of figures using the same assumed incomes for Mr. Ulmer to retirement at age 65, but now assuming Ms. Ulmer would not retire until age 60.

- [297] In this table his range of past and future economic dependency loss is between \$360,500 assuming Mr. Ulmer's income of \$60,000 per year to age 65 and Ms. Ulmer's income of \$37,500 to her age 60, to \$423,500 assuming Mr. Ulmer's income of \$94,800 to age 65 and Ms. Ulmer's income again at \$37,500 to her age 60.
- [298] In his evidence at trial Mr. Carson acknowledged not taking into account the employment severance amounts that Ms. Ulmer continued to receive following the death of Mr. Ulmer. He estimated the value to her would have been approximately \$27,000 which should be deducted from her loss of economic dependency claim.
- [299] On the issue of the lost value of Mr. Ulmer's contribution to household duties, Mr. Carson assumed Mr. Ulmer's household work would be valued at \$15.40 per hour and would consist of 2.1 hours per day until he retired at age 65, 3.6 hours per day from retirement to his age 80, and 2.4 hours per day after age 80, all taken from Statistics Canada data.
- [300] On this basis he calculated the net present value of past and future household services, using a discount rate of 2.5%, to be a total of \$273,412, made up of \$41,394 for the value of the lost services up to the trial date and \$232,018 for future losses after trial.
- [301] In his report Mr. Carson gives an example of the use of his assumptions of hourly rates and hours worked for Mr. Ulmer, in which he assumes 20% of the work that Mr. Ulmer did would have been of no value to Ms. Ulmer or would have been offset by time savings by her.
- [302] Taking his number of \$273,412 for the present value of the past and future loss of Mr. Ulmer's household services, he deducted 20% to come up with a figure of \$218,700 for the loss of his household services.
- [303] Employing Mr. Carson's calculations, plaintiff's counsel submits that an award of \$450,000 for the plaintiff's loss of economic dependency would be a fair award, on an assumed salary for Mr. Ulmer of \$75,000 from February 1, 2007, retirement somewhere between age 65 and 70, and deducting \$27,000 for the severance monies Ms. Ulmer received after Mr. Ulmer's death.
- [304] For the claim of loss of household services, plaintiff's counsel submits that while the entire process of assessing the value of household services is somewhat arbitrary, a fair approach to the value of Mr. Ulmer's household work, on the basis that it was of exceptional quality and magnitude, would be to double the values used by Mr. Carson in his report for both hourly rate and hours.
- [305] He accounts for any contribution Mr. Crowie might make to the household services by suggesting that these double values assumed could be adjusted somewhat downwards to reflect Mr. Crowie's contribution.

- [306] He submits that taking into account a value for Mr. Ulmer's services of 1.5 times the values assumed by Mr. Carson and deducting 20% for the work that Mr. Carson assumes Mr. Ulmer did that was of no value to Ms. Ulmer, and allowing for a further 10% reduction for any additional negative contingencies, an award of \$300,000 for loss of past and future household services would be appropriate.
- [307] Mr. Hildebrand prepared tables on the assumption that Mr. Ulmer would have retired at age 60 around the time of his death, or alternatively would have returned to employment at \$50,000 per year salary and both he and Ms. Ulmer retired at their respective same ages between age 61 and 65. Using a discount rate of 3.5% to determine the present value of the loss of economic dependency, he reaches figures for past and future dependency loss based on his assumptions ranging from \$266,347 if they both retired at age 60 to \$349,343 if they both retired at age 65.
- [308] He says the application of an average divorce contingency reduces the multiplier by about 4% and application of the average remarriage contingency reduces the multiplier by about 5%.
- [309] He agrees with Mr. Carson that each of Mr. Ulmer and Ms. Ulmer's exclusive use consumption should be set at 31.9% of family income, leaving a dependency factor of 68.1% for Ms. Ulmer.
- [310] On the issue of the loss of Mr. Ulmer's household services he assumes Mr. Ulmer would have provided household services in line with an average employed Canadian with a partner and no children, of 2.1 hours per day, as had Mr. Carson. After retirement he assumed 3.4 hours per day while Mr. Carson had assumed 3.6 hours per day. Mr. Hildebrand provided no number for assumed hours of household services after Mr. Ulmer's age 80.
- [311] He also assumes household services provided by Ms. Ulmer at 3.1 hours per day while employed and 4.4 hours per day while retired.
- [312] He assumes a replacement wage rate of \$15.09 per hour compared to Mr. Carson's \$15.40 per hour.
- [313] Mr. Hildebrand also makes reference to what he terms as non-replaceable time, being time spent on activities that would not technically be considered to be household services such as trips to the doctor, dentist or hairdresser, time on activities that one spouse could complete alone in about the same time, like grocery shopping, and time spent on leisure times such as for some shopping and gardening.
- [314] He applies a 15% reduction to the statistical domestic work and shopping services data for this non-replaceable time.

- [315] He deducts 20% for what he says is family domestic work and shopping services for Mr. Ulmer's exclusive benefit and says the remaining 80% is assumed to be for the benefit of Ms. Ulmer as her "dependency factor".
- [316] Using his assumed values of work per day for men and women and excluding non-replaceable time for both, and applying the "dependency factor" he has assumed for Ms. Ulmer, he produces annual dollar amounts for loss of household services that he put in tables at discount rates for present valuation of 2.5% and 3.5%, to determine the present value of Ms. Ulmer's loss of household services from the death of her husband at assumed different retirement ages between 60 and 65. His conclusions result in present values of less than \$100,000 for loss of household services from Mr. Ulmer.
- [317] In his view 3.5% is a more appropriate discount rate to use than 2.5%.
- [318] Defence counsel submits that the evidence does not support a finding that Mr. Ulmer would have continued working until age 65 or 70 and Ms. Ulmer would have retired at age 55.
- [319] She submits that at any new employment Mr. Ulmer would not have earned a salary commensurate with what he had been earning at Titan Steel if he decided to seek further employment, which she questions.
- [320] She submits he would have experienced a lengthy period of unemployment or would have had to accept a substantial pay-cut to regain any employment. Either scenario would have required Ms. Ulmer to continue working past her age 55.
- [321] She submits the evidence only supports an award for loss of economic dependency based on Mr. Ulmer obtaining employment in 2007 at a salary of between \$40,000 to \$60,000, based on average earnings of BC males working full-time as janitors or landscapers, with and without high school certificates.
- [322] She points out that assuming Ms. Ulmer worked to her age 60 and Mr. Ulmer earned \$60,000 per year to a retirement at age 65, Mr. Carson put the loss of past and future economic dependency at approximately \$333,000, after deducting the \$27,000 of severance money Ms. Ulmer had received following Mr. Ulmer's death.
- [323] If both Mr. and Mrs. Ulmer worked to their ages 65 and Mr. Ulmer earned \$50,000 per year, Mr. Hildebrand estimated the loss of dependency at \$350,000.
- [324] Counsel submits on the contingency for remarriage that Mr. Crowie's presence in the household in an intimate relationship cannot be ignored.
- [325] It is submitted that the contingency should be considered higher in this case than the statistical figures as the plaintiff and Mr. Crowie are already in a common-law relationship that requires as a matter of law that Mr. Crowie provide the plaintiff with financial support.
- [326] It is submitted that with Mr. Crowie paying to the plaintiff \$600 per month or \$7,200 per year he is already providing some financial support.

- [327] Counsel submits that the loss of economic dependency claim should be assessed at less than \$300,000.
- [328] For the loss of household services claim counsel points to Mr. Hildebrand's figures that the total loss should be considered as less than \$100,000.
- [329] It is submitted that for this claim the presence of Mr. Crowie cannot be ignored as well because he does do some tasks such as cutting the grass, washing the cars and cleaning the gutters, and he is certainly capable of doing more. She submits that if Mr. Crowie only did the average there would be no loss sustained by the plaintiff on this claim from the time in 2007 when Mr. Crowie began living with her.
- [330] However, recognizing that Mr. Ulmer provided extra effort it is submitted that the award for loss of household services should be in the order of \$50,000.
- [331] Defence counsel also submits that a 3.5% discount rate should be applied to obtain the present value of any award for loss of household services relying on the decisions of *Dzemkiw et al v. Shawn Leroy Smith et al*, December 2, 2005, and *Smith Estate v. Fast*, 2001 BCSC 57, where the discount rate of 3.5% was applied by judges of this Court to the claim for loss of household services.

Analysis of the Claim for Loss of Economic Dependency and Loss of Household Services

- [332] The plaintiff's evidence is that she was planning to retire at her age 55 around July 31, 2007, were it not for her husband's loss of employment from Titan Steel.
- [333] With that happening she says her intention was still to retire at age 55 as long as her husband found another job by that time. Otherwise she would not retire until he found another job. I assume from her evidence that she was at all times speaking about another job for her husband at relatively the same income he was making at Titan Steel.
- [334] The plaintiff says that after her husband got over his anger from being laid off he talked about perhaps retiring but they then took advice from a financial advisor who convinced them that they should both continue working. However, Mr. Ulmer was not looking for work during the severance period because, according to the plaintiff, the additional tax he would have to pay if that was added on to his severance amount was a very big issue for him.
- [335] Prior to his death Mr. Ulmer did not take advantage of the career transition services offered by Titan Steel to him.
- [336] He also did not telephone Mr. Fraser, the business agent for the union, as Mr. Fraser asked him to do if he was looking for a managerial position.
- [337] In addition he never asked his supervisor, Mr. Nanson, for a reference.

- [338] In my view the evidence of Mr. Ulmer wishing to get back into the management field is not strong. He was not enhancing his chances of that by failing to follow-up on the references and looking for such employment soon after he was terminated, but instead deciding to take an extended period of time off during the severance period for tax reasons.
- [339] The tax bite to him would have been greater if he had to add employment income to severance income, but that tax bite would never have eaten up the entirety of any additional employment income, and seeking another management position at an early stage would have in my opinion significantly increased his chances of getting back into the management field.
- [340] If Mr. Ulmer was still intending to maximize his income in the management field, in my view it was a highly risky way to go about it to take a significant period of time off, at age 60, and not pursue references that were available to him as soon as possible after his termination.
- [341] It is my conclusion that Mr. Ulmer did not have any great desire to go back to any employment that required the same level of responsibility. He enjoyed his time off and was continuing to enjoy his time off and the only employment that he was really interested in was a less responsible employment. Nevertheless I accept that at some point he would have taken another job.
- [342] The questions still remain as to when he would have found alternative employment, what it would have paid him, when he would have retired from it and when Ms. Ulmer also would have retired.
- [343] I am prepared to accept that Mr. Ulmer would have taken new employment effective February 1, 2007 when his severance income ran out.
- [344] However, assessing all the evidence on his intentions and his prospects as time went on during the severance period, I am only prepared to accept an average income for him from that time on of \$50,000 per year.
- [345] As he had already indicated to the plaintiff that he might retire at age 60 but also accepting that he and the plaintiff decided that they both would have to continue working, it is my conclusion that he would have retired at age 65 at the latest.
- [346] I also conclude that he and the plaintiff would have decided the plaintiff had to continue working beyond her expected retirement age of 55 until her age 60, to supplement the family income.
- [347] Both Mr. Carson and Mr. Hildebrand prepared tables setting out different assumptions of retirement ages for both and different incomes for both, but neither has provided figures for retirement for Mr. Ulmer at age 65 at \$50,000 per year and retirement for Ms. Ulmer at age 60 at \$37,500 per year.

- [348] Accordingly, until such calculations are provided to me I am unable to determine an appropriate amount for the plaintiff's loss of economic dependency. That will have to await further calculations from the economists and further evidence and submissions to me if there was any disagreement on the calculation.
- [349] I do observe that Mr. Hildebrand did his calculations of present value based on a discount rate of 3.5%. I am not sure that is the correct percentage to use as I discuss further in these reasons. I rather think it should be discounted for present value at 2.5%.
- [350] Mr. and Ms. Ulmer were married 38 years when Mr. Ulmer died. There is no evidence there was any trouble in their marriage prior to his death. Mr. Ulmer was 60 years old at his death and I do not think that at his age and after 38 years of marriage to the plaintiff that there was any realistic chance they would ever have divorced.
- [351] I decline to apply any contingency for divorce in these circumstances.
- [352] With respect to the contingency of remarriage of the plaintiff, she was 58 years of age at trial. She had taken up a relationship with Mr. Crowie in 2007 and they were still living together at the time of trial.
- [353] Initially they probably got together for mutual support over the loss of their respective spouses, but after three years there was more of an emotional bond that exists between them.
- [354] The plaintiff says she loves Mr. Crowie. He is more reserved about his feelings for the plaintiff and their overall relationship. He is being very careful not to get deeply involved with the plaintiff either emotionally or financially until he determines whether she can recover from her emotional grief. He does little around her house and only contributes \$600 per month for room and board. They do not mix their incomes, assets or financial matters. He says she has become worse emotionally as the trial date approached and he says that it has become very trying on their relationship.
- [355] I can only hope that Mr. Crowie will help the plaintiff overcome her grief. As I have said I consider it quite probable that the end of this litigation will bring closure for the plaintiff and she can then get on with a new life with Mr. Crowie.
- [356] Applying any contingency for remarriage to reduce an economic dependency award necessarily requires a conclusion that in any remarriage there will be an inter-dependency between the plaintiff and her new husband, whether that is Mr. Crowie or someone else.
- [357] The fact is, however, some marriages nowadays do not involve any great level of inter-dependency, at least financially. Both spouses often work, both often keep their own separate finances and only contribute to one pot for common expenses for the house or other joint expenses. This is especially so when couples marry at a later stage in life after a first marriage, when they have already achieved some financial security themselves that they want to keep as their security, and as the security for their children.

- [358] Defence counsel submits that being in the common-law relationship presently Mr. Crowie already owes Ms. Ulmer financial support as a matter of law.
- [359] That may be so on a separation between the two, but while they continue to live together in a common-law relationship they can structure their financial affairs as they wish and so far they have kept them separate.
- [360] Mr. Carson puts the general statistical probability of remarriage at 6.7%.
- [361] Mr. Hildebrand says that application of an average remarriage contingency reduces the multiplier from the trial date throughout the remaining assumed lives of Mr. and Ms. Ulmer by about 5%.
- [362] I will use 5% as the appropriate discount for the contingency of remarriage.

Loss of Household Services

- [363] I agree with plaintiff's counsel that the entire process of assessing the value of the loss of household services is somewhat arbitrary because no one has determined in the past with any accuracy what Mr. Ulmer's hours of household services were, to include outside services, and no one knows what he would have done in the future.
- [364] I agree, however, looking at the photographs of the exterior grounds of the home and listening to the evidence of the effort and accomplishments of Mr. Ulmer around the home, that the quality of his efforts should be considered as beyond the statistical average as should the amount of time that he was spending.
- [365] However, I am not prepared to consider the quality of Mr. Ulmer's work as being worth twice the statistical average hourly rate while at the same time I am not prepared to apply much of a contingency for Mr. Crowie's expected contribution when it is so uncertain whether the relationship will continue.
- [366] Considering all of the evidence and all of the considerations involved in assessing this claim and preferring Mr. Carson's method of calculation over Mr. Hildebrand's method, I assess the value of this claim at \$250,000.
- [367] Although perhaps not necessary to determine whether the appropriate discount rate to use should be 2.5% or 3.5%, because this award is an assessment of the value of the loss and not a calculation of the loss, I conclude that 2.5% would be the appropriate discount rate to use for the following reasons.
- [368] Section 56 of the Law and Equity Act, R.S.B.C. 1996, c. 253, authorizes the Chief Justice of the Supreme Court to make regulations under subsection (2)(a) prescribing a discount rate that is deemed to be the future difference between the investment rate of interest and the rate of increase of earnings due to inflation and general increases in productivity.

- [369] In B.C. Regulation 352/1981 the Chief Justice prescribed a discount rate of 2.5% per annum under subsection (2)(a).
- [370] Subsection (3) prescribes that under subsection (2)(a) the discount rate must be used in calculating the present value of future damages for loss of dependency under the Family Compensation Act.
- [371] Admittedly there is some confusion in the case law on this issue. *Dewhurst Estate v. Schmidtke*, 1995 CarswellBC 2946, and *Boechler v. Edwards*, 2004 BCSC 301, both apply 2.5% as the discount rate for the claim for loss of household services.
- [372] *Smith Estate v. Fast*, 2001 BCSC 157, and *Dzenkiw et al v. Shawn Leroy Smith et al*, December 2, 2005, Kamloops, 35522, both apply 3.5% discount rate to the loss of household services claim.
- [373] In *Boechler v. Edwards*, the trial judge considered *Smith Estate v. Fast* but must have implicitly rejected it in following the reasoning in *Dewhurst Estate*.
- [374] In *Dzenkiw v. Smith*, the trial judge distinguished the decision in *Dewhurst* as based on the peculiar fact that in *Dewhurst* there was an actual need to hire a replacement person which was not the situation in *Dzenkiw*.
- [375] I agree that the trial judge in *Dewhurst* did say that it made a considerable amount of sense to use 2.5% when someone had to be hired to replace the deceased, but as I understand the ratio of that case 2.5% was applied because the loss of services claim was considered to be another element of the claim for dependency as it related to services which the plaintiff was dependent on the deceased to provide.
- [376] I agree with this reasoning and I am satisfied that 2.5% would be the appropriate discount rate to use. Unless convinced otherwise by further submissions I also think that 2.5% is an appropriate discount rate to apply for the claim for loss of economic dependency as well.

Past Wage Loss

- [377] As I have determined that the plaintiff did suffer from PTSD for the first six months after her husband's death, and as the parties have agreed to past wage loss in the amount of \$17,500, I award this amount.

Future Care Costs

- [378] These costs are claimed in the amount of \$28,823 based on recommendations of the occupational therapist who gave evidence.
- [379] These amounts include the cost of more psychological counselling, the cost of the therapeutic recreational activity of dancing, and the cost of nutritional supplements and prescription medication.

- [380] It is conceded that the cost of dance classes and nutritional supplements are all in the past and cannot form part of the claim for future costs.
- [381] I deny the claim for further psychological counselling because the plaintiff has already had 111 visits with Mr. Vaness for psychological counselling and has said she has got as much out of it as she could.
- [382] I also decline the claim for prescription medication as there is no evidence the plaintiff will take these in the future.
- [383] In any event as already determined any emotional disturbance the plaintiff presently suffers from is related to her ongoing grief and bereavement and not to any psychiatric illness that is compensable.
- [384] I decline this claim in its entirety.

Loss of Future Capacity of the Plaintiff to Earn Income

- [385] As I have already determined that the plaintiff no longer suffers from any compensable psychiatric illness, I decline to award any amount for any loss of future capacity to earn income related to a psychiatric illness.

Loss of Care and Guidance and Loss of Inheritance

for the Children Candice and Daryll

- [386] Plaintiff's counsel concedes that as these children are both adults who lived away from home at the time of their father's death their claims are modest. However it is submitted that Mr. Ulmer had a profound influence on their lives and was the cornerstone of the family unit. He was very close in particular to daughter Candice and her two children, since she was a single mother. Son Daryll testified to having received a lot of support and guidance from his father on his career and investments in the past prior to Daryll moving to Edmonton.
- [387] Most awards of this nature for loss of guidance and support are for children who are still children at home and not for children who have become independent adults living apart prior to a parent's death.
- [388] The award can only be for the loss as a consequence of Mr. Ulmer's death so that the kind of father who he was when they were growing up is not helpful on this issue unless his guidance and support would have continued were it not for his death.
- [389] The only evidence here of a loss of guidance and support to either or both after they became adults and had moved out on their own is Candice's evidence of emotional support for her during her divorce and some extra cash she received of an unknown amount, as well as Daryll's evidence of advice on investments.

- [390] In *Nattrass v. Dolezal Estate*, [1994] B.C.J. 111, Mr. Justice Hood of this Court gave \$3,500 each to a 25-year-old daughter and a 27-year-old son. He said it was doubtful that much guidance would have been required from the deceased on the evidence before him but he gave that award of \$3,500 each for what he said was a nominal sum.
- [391] In *Donetti v. Veillette Estate*, 2000 BCSC 959, Madam Justice Loo declined to make an order for adult children aged 29 and 30 where it was found they were close to their father and both benefited from his guidance and advice. She did not consider the facts before her to merit an award under this head.
- [392] I also do not consider that the quality of the evidence before me is sufficient to make any significant award under this head and I decline to award a nominal sum.

Special Damages

- [393] These damages are claimed in the total amount of \$46,354.94. They include funeral expenses and related expenses along with household expenses since Mr. Ulmer's death, medications for the plaintiff and therapy counselling.
- [394] It is conceded that there is an element of duplication of approximately \$30,000 for household expenses such as painting and landscaping, having been included in the loss of housekeeping services dependency claim as part of the past loss of services from the time of Mr. Ulmer's death to trial.
- [395] I am therefore unable to award any of the household expenses because of duplication.
- [396] I will allow the funeral and related expenses and Dr. Wadge's fee in the total amount of \$5,482.58. I will also allow the medication costs and counselling fees as claimed in the amount of \$247, but with respect to the counselling services of Mr. Vaness I restrict this claim to six months of services commencing October 4, 2006.
- [397] This is not a complete judgment because included in any final judgment must be any awards for management fees and tax gross up which are deferred by agreement for any further evidence and submissions until after these reasons are issued.
- [398] A summary of my findings to date is as follows:
- (a) full liability on the defendants for the accident and death of Mr. Ulmer;
 - (b) nil damages for abuse of process;
 - (c) \$10,000 for nervous shock/PTSD;
 - (d) loss of economic dependency to be determined;
 - (e) \$250,000 for loss of household services;
 - (f) \$17,500 for past wage loss;

- (g) nil damages for future care costs;
- (h) nil damages for loss of future capacity to earn income;
- (i) nil damages for loss of care and guidance;
- (j) \$5,729.58 plus six months' past counselling services for special damages.

"The Honourable Mr. Justice Truscott"

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