

CANADA / JUDGMENT

Ward v. Thomas

2022 BCSC 1147

COURT

Supreme Court of British Columbia

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2022 BCSC 1147 Ward v. Thomas

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Ward v. Thomas,

2022 BCSC 1147

Date: 20220707

Docket: M185440

Registry: Victoria

Between:

Tracey Ann Ward by Her Litigation Guardian and Committee

Ellen Thelma Ward

Plaintiff

And

Anthony Leslie Jonathan Thomas, Aggatha Siah, and

Harris Victoria Chrysler Dodge Jeep Ram Ltd.

Defendants

And

Anthony Leslie Johnathan Thomas, Aggatha Siah, Farrah Sylvester and Insurance Corporation of British Columbia

Third Parties

Before: The Honourable Justice B. Brown

Reasons for Judgment

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Place and Date of Trial:

Victoria, B.C.

February 14-18, 22-25, 28, 2022

March 1, 3-4, 7-9, 2022

Place and Date of Judgment:

Victoria, B.C.

July 7, 2022

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- [1] On August 27, 2018 the plaintiff Tracy Ann Ward ("Ms. Ward") was walking along Central Saanich Rd. in Saanich, BC. She was struck from behind by a Jeep vehicle being driven by the defendant Anthony Thomas. She suffered catastrophic injuries, including a severe traumatic brain injury. Her litigation guardian is her mother Ellen Ward ("Mrs. Ward").
- [2] Ms. Ward was 48 years old. She lived alone and was a self-employed bookkeeper.
- [3] The nature of her injuries and damages are largely not in dispute. The most significant issue is which of the defendants are liable. At trial Mr. Thomas did not contest the claim against him. The claims against Aggatha Siah and Harris Victoria Chrysler Dodge Jeep Ram Ltd. ("Harris") are based on the vicarious liability provisions of s. 86 of the Motor Vehicle Act, R.S.B.C. 1996 c. 318 ("MVA") and are vigorously contested.

Parties and Issues

- [4] The plaintiff pleads s. 86 of the MVA: that Harris and/or Siah was an owner within that section; had possession of the vehicle as contemplated by that section at the time of the collision; consented to Ms. Siah operating the motor vehicle as part of her potential but uncompleted purchase of the motor vehicle; and consented to the defendant Mr. Thomas operating the vehicle at the time of the collision. The plaintiff says that as such Harris and/or Siah is vicariously liable for the negligence of Mr. Thomas. The plaintiff says that the defendants are jointly and severally liable for the plaintiff's damages pursuant to s. 4 of the Negligence Act, R.S.B.C. 1996, c. 333.
- [5] Ms. Siah pleads Mr. Thomas acquired possession of the vehicle without her consent express or implied. She says that she is not liable to the plaintiff for her injuries.
- [6] Harris says that it was no longer an owner of the vehicle at the time of the collision. If it was, it was not in possession of the vehicle at the time of the collision and had no right, power or ability to consent to a third party driving or operating the vehicle. Harris says that pursuant to s. 86(3)(b) of the MVA it is exempted from the definition of owner because the contract was in substance and in form a conditional sales contract. Title would be passed to Ms. Siah once she delivered payment for the vehicle.
- [7] ICBC filed a third party notice adding itself to the action. ICBC pleads that the plaintiff herself was negligent and denies any injuries arising from the accident. It denies that Mr. Thomas was negligent. It pleads that the plaintiff has not followed medical advice and has failed to mitigate her damages.

- [8] Harris has filed third party notice against Ms. Siah, pleading that the plaintiff's loss was caused in whole or in part by the negligence, breach of duty or fault of Ms. Siah. It seeks contribution in indemnity pursuant to s. 4 of the Negligence Act.
- [9] Harris has filed third party notice against Thomas seeking contribution or indemnity pursuant to s. 4 of the Negligence Act.
- [10] At trial Mr. Thomas appeared only as a witness. He made no submissions.
- [11] Although there was reference from time to time during the trial as to whether there was insurance to cover the losses suffered in this accident, that issue is not before me.

Issues

1. Injuries to Tracy Ann Ward
 2. Damages
 - a. Non-Pecuniary Damages
 - b. Past Income Loss
 - c. Life Expectancy
 - d. Future Income Loss
 - e. Cost of Future Care
 - f. Special Damages
 - g. Committeeship Fees
 3. Liability of Anthony Thomas
 4. Section 86 Insurance Motor Vehicle Act
 5. Contributory Negligence
 6. Negligence of Ms. Sylvester
1. Injuries and treatment of Tracy Ann Ward
- [12] Ms. Ward was active and healthy at the time of the accident. She lived alone and was saving to purchase a residence of her own. She operated her bookkeeping business from her home.
- [13] Her most significant injury in the accident was a severe traumatic brain injury. She has left hemiparesis as well as severe cognitive and behavioural disturbances as a result. She has left Cranial Nerve III Palsy which means that she lacks left eye movement and the left eye tends to drift out to the side. She has also likely lost vision in the left side of her visual field.

- [14] She had scalp and skin lacerations which have healed. She suffered a left ulnar wrist fracture that was treated by casting. She has been left with a reduced range of motion. She had multiple significant pelvic fractures. This has resulted in secondary heterotrophic ossification (described below). She suffered a left renal infarct but the left kidney is still functional. She had minor liver and bowel injuries that have healed. She had left 7th, 11th and 12th posterior rib fractures. She had left lumbar spine transverse process fractures of L-2, L-3, L-4 and L-5 which have healed.
- [15] She has hemiplegia and complete paralysis of the upper left extremity and minimal movement of the lower left extremity in the hip and knee. She has a severe equinovarus plantar flexion contracture spasticity (a dropped left foot) which is only reversible through corrective surgery. Ms. Ward was not given the appropriate AFO (ankle foot orthosis) for the management of spasticity. As a result, her left foot points downwards as do some of her toes. To correct this difficulty will require surgical lengthening of the Achilles tendon and release of the toe flexor tendons followed by casting and then wearing an appropriate AFO and shoes.
- [16] Ms. Ward had difficulty with swallowing but has become safer with eating different textured foods and can now eat a normal diet. She also has dysarthria which can make it difficult to understand what she says. She receives speech therapy.
- [17] As noted above, her primary deficits are cognitive. She has severe impairment of self-awareness, short-term memory, and attention. She is not able to self-regulate, plan or have a sense of time. She has outbursts and dysregulation, including perseveration, disinhibition, dysregulation of affect, irritability, anger outbursts, and a lack of insight. She is able to read to some extent and can do puzzles with her mother.
- [18] Ms. Ward was initially treated at Victoria General Hospital for one month in the ICU. She was then transferred to a neurological ward. Some months later she was taken to the rehabilitation floor. After a week on the rehabilitation floor her brain began to fill with fluid and she required surgery for the placement of a shunt. Following the surgery she was returned to the neurological ward. After about a year she was discharged from Victoria General Hospital to Saanich Peninsula Hospital. She was there for approximately one month before she moved to Sidney All Care, a long-term care facility.
- [19] Initially Ms. Ward was confused and distraught in the long-term care facility. She yelled and swore and would hit out at care workers. This has improved in recent months, although she still does require redirection when she is agitated.
- [20] In the summer of 2021, Ms. Ward's medications were changed which appears to have improved her behaviour as well as her pain. She has been able to participate more in her therapies.
- [21] I have been provided with the report of Dr. Jacqueline Purtzki, a physiatrist, who assessed Ms. Ward on July 19, 2021.[1] She described Ms. Ward's therapies as of July 19, 2021 as:

- Speech language therapy three times weekly. This led to some improvement in her speech production. Her speech was clearer. She was able to write.

- Physiotherapy for one hour per week. At that time Ms. Ward was described as extremely resistant to sitting up, putting any weight on her legs, transferring to a wheelchair or doing anything physical. The physiotherapy sessions were working on sitting on the edge of her bed and using a pole at the side of the bed to assist with transfer into the wheelchair. The nurses do not practice any pivot transfers with Ms. Ward and therefore she only gets this exercise once a week. The nurses use an overhead lift system to transfer Ms. Ward.

[22] Dr. Purtzki was shown a video of the physiotherapist and rehabilitation assistant trying to get Ms. Ward to walk to the wheelchair with two-person assistance. Ms. Ward was partially weight-bearing during this activity.

[23] Ms. Ward had no physiotherapy initially. She began physiotherapy in October and November 2019 but was interrupted because of gallbladder surgery. She then restarted some therapy until March 2020. There was no therapy between March 2020 and July 2020. Thereafter she had once weekly therapy.

[24] As to activities of daily living, Dr. Purtzki described Ms. Ward as "currently able to eat independently with a spoon or fork. She can drink from a cup. She is very keen to eat and seems to be quite hungry. Tracy can eat sandwiches, salads, cookies with nuts, burgers, and even a hotdog. She can drink thin liquids and she usually does not choke. This has been a steady improvement for her. She is now able to eat on her own with one hand, but someone needs to stabilize the plate and the dish. She can use her right hand well to drink from a cup".

[25] Dr. Purtzki diagnosed Ms. Ward as having a severe traumatic brain injury. She has cognitive emotional and physical disabilities related to her very severe traumatic brain injury.

[26] As of the date of Dr. Purtzki's assessment, her truncal control was apparently poor and she did not have independent sitting balance. Dr. Purtzki was of the view that this was permanent although she thought sitting balance could improve with exercises.

[27] Her main disability is related to her cognitive impairment, executive dysfunction and memory deficits.

[28] The most limiting aspects of her brain injury are her behavioural outbursts and her dysregulation. Dr. Purtzki was of the impression that she had no physical pain but a lot of disorientation and irritability. Dr. Purtzki said that from the way she was moving her legs and kicking as a result of agitation she did not get the impression that Ms. Ward had a significant limitation in her hip range of motion. Dr. Purtzki said that the main take-home message in respect of her brain injury is that she needs additional treatment by a skilled neuro-rehabilitation team to optimize medication and to decrease irritability. She also suggested an evaluation of her shunt because shunt dysfunction can lead to cognitive dysfunction.

[29] Ms. Ward suffers from heterotopic ossification, an unusual phenomenon related to hip and pelvic factors, especially if combined with traumatic brain injuries. It refers to a process by which the soft tissues around the hip become ossified. This can be removed with surgery but recurrence is possible. Initially, Ms. Ward's guardian, her mother Mrs. Ward, considered surgery to address the heterotopic ossification because that seemed to be causing the pain which prevented her sitting for periods of time in her wheelchair. However, after a medication change in the summer of 2021, this is no longer a problem. Ms. Ward is able to sit for extended periods of time in a wheelchair. Accordingly, her mother no longer considers the surgery to address heterotopic ossification to be appropriate or necessary.

[30] Dr. Purtzki recommended the following therapies:

1. Physiotherapy with a rehabilitation aide ("RA") three times weekly. Ms. Ward requires physical activation and range of motion exercises for her general health, breathing and cardiac health, and to prevent bedsores and stiffening of her joints.
2. Occupational therapy. An occupational therapist ("OT") should work with the team and is responsible for equipment such as wheelchairs, transfer slings, etc. The OT can work on optimization of self-feeding and use of the right hand. The OT would make weekly schedules with Ms. Ward and her team for recreation physio and other activities. The OT often acts as case manager.
3. Recreational therapy. Dr. Purtzki strongly recommended a recreation program with things such as a therapeutic dog, crafts, audiobooks, cooking etc.
4. Speech language pathology. Ms. Ward should see a speech language pathologist ("SLP") once per week, who would work on speech as well as swallowing.
5. Aquatic therapy. Dr. Purtzki suggested twice monthly sessions with Physiotherapist and recreational therapist or physiotherapist and an RA. This would be helpful for range of motion exercises.
6. Behavioural intervention. Dr. Purtzki recommended a consultation with a behavioural interventionist to provide guidance to the team of caregivers, therapists and Mrs. Ward, given Ms. Ward's challenging behaviour.

[31] Dr. Purtzki recommended a weight-supported walker and a reclining wheelchair. She also recommended a wheelchair accessible van for personal use.

[32] As to prognosis, Dr. Purtzki said "the focus of intervention is on quality of care, quality-of-life and potentially small gains in mobility as well as prevention of complications". Ms. Ward's cognition will not significantly improve. A second main goal is to improve her aggression with medication management and environmental management. She said "mobilization is key to longevity and good cardiorespiratory health."

- [33] Ms. Hillary Acosta, a physiotherapist who provides therapy to Ms. Ward, testified. She said that in about July or August 2021 Ms. Ward's behaviour improved. Her pain appeared to be better managed and she was able to participate more in her therapies. At the beginning of treatment, Ms. Ward needed two people to be able to get up into a sitting position and needed full support to sit. Over time she has required less assistance and can sit for longer. She can now sit unsupported on the edge of her bed for about 60 seconds.
- [34] In March 2021 Ms. Acosta used a standing sling to work with Ms. Ward on standing and taking steps. The sling takes a portion of Ms. Ward's weight. She started with about 50% of her weight being taken by the sling and this was reduced over time. With assistance of two people to move her left leg, Ms. Ward was able to walk a total of 15 metres in the sling by July 2021.
- [35] Her ability to mobilize is limited by the contracture in her left foot and ankle. Following Dr. Purtzki's recommendations, Mrs. Ward anticipates that Ms. Ward will have a tendon release surgery on her left foot and ankle to release the contractures. She has had x-rays in anticipation of this procedure and a surgeon has been found to perform the surgery.
- [36] Ms. Ward has been working on pivot transfers from her bed to her wheelchair and back. Ms. Ward uses a pole installed next to the bed to pull herself up and stand on her right leg, twist and sit down in her wheelchair. She can also do the process in reverse. In the summer of 2021 she could only do two transfers in a one hour session and required two-person assistance. By November 2021 she only required one person's assistance and at present can do 11 transfers in about one hour.
- [37] Ms. Acosta testified that Ms. Ward can do leg lifts, leg openings and bridges. If Ms. Ward receives the tendon release surgery, Ms. Acosta intends to include weight bearing on both feet and taking some steps or walking short distances in the treatment plan.
- [38] I accept the evidence and opinion of Dr. Purtzki and the evidence of Ms. Acosta.

2. Damages

- [39] Ms. Siah advanced the defence position with respect to injuries and damages. I understand that the other defendants do not take issue with her position.
- a. Non-pecuniary damages
- [40] The parties agree that given her injuries, Ms. Ward is to be awarded damages at the upper limit, \$414,000. Ms. Ward has had catastrophic injuries. She is entitled to the maximum award, \$414,000.
- b. Past Income Loss
- [41] The parties also agree that the award for past income loss is \$195,600. I accept the evidence of Ms. Ward's past income and agree that \$195,600 is the appropriate award.

c. Life Expectancy

- [42] I have been provided with two opinions with respect to Ms. Ward's life expectancy. The first is that of Dr. Tom Elliott dated October 27, 2021. The second is the opinion of Dr. Navraj Heran dated December 23, 2021.
- [43] Dr. Elliott is a specialist in internal medicine with a subspecialty in endocrinology and metabolism. In addition, he has certification on mortality statistics and actuarial methods.
- [44] Dr. Heran is a neurosurgeon.
- [45] Neither of the experts assessed Ms. Ward in person. Each relied on medical records and the opinions of other experts.
- [46] Both recognize and rely on publications of Dr. David Strauss' group from San Francisco. The group has studied the survival of a cohort of approximately 5000 individuals with traumatic brain injuries. These studies categorize patients by their ability to feed themselves and to ambulate (walk). They assess life expectancy for individuals within their categories. For example, the 2015 study reported that a female aged 50 who could self-feed but could not walk had a life expectancy of approximately 16-17 years, whereas if she were able to walk well she had a life expectancy of 27-29 years.
- [47] Dr. Elliott and Dr. Heran agree that the best predictors of prolonged survival are the ability to feed oneself and the level of ambulatory function (ability to walk). They differ on their assessment of Ms. Ward's abilities, i.e. where she falls within the spectrum studied by the Strauss group.
- [48] Dr. Elliott referred to Strauss studies published in 2007 and 2015. He concluded that the category which best pertained to Ms. Ward's case is "cannot walk, fed by others". He said that based on her ability to do some self-feeding with her mother's encouragement he considered her to fall somewhere between fed by others and self-feeds. He concluded on this basis that her life expectancy is 13.6 years.
- [49] Dr. Heran did not take issue with the methodology used by Dr. Elliott. He took issue rather with the "inputs". In his view Ms. Ward did not come within the categories of "cannot walk, fed by others" or "cannot walk, self-feeds".
- [50] Dr. Heran said "a criticism with his ambulatory declaration I have is there is little to support that she does not walk to a degree, albeit with assists, and that with optimization of her medical care that she will likely have. Even as it stands now, Ms. Ward has demonstrated some walking ability but cannot be declared to walk well alone. Walks well with support or unsteadily alone at least 10 feet but does not balance well is the best descriptor for her demonstrated in the table below taken from the authors articles referenced by Dr. Elliott." Dr. Heran referred to tables in the 2007 study where self-feeds is described as "can feed self with fingers or utensils, with assistance and/or spillage." And some walking ability is described as "walks with support, or unsteadily alone at least 10 feet but does not balance

well."

[51] He went on to say:

It is clear that Ms. Ward has had little physiotherapy and little appropriate management of contractures and preservation of normal alignment during her later care. The extent of her equinovarus deformity is supportive of this . in my opinion as a surgeon in a very busy trauma centre, patients with hemiplegia with any preservation of leg motion generally do walk. I share the enthusiasm of Dr. Purtzki that mobilization independently with Ms. Ward should be, indeed, feasible. Neurological recovery is typically plateaued by two years, however, adaptive mechanisms and optimization of any associated complications such as spasticity either through physiotherapy, Botox and tendon lengthening procedures is integral.

Therefore the category that she would best fit in is at least the category of Some Walking Ability in the chart utilized by Dr. Elliott on page 6 of his report. She demonstrates some walking ability now this would be expected to be independent or nearly so with aids and a degree of imbalance with appropriate medical management of the overall neglect in her care to date. It would be unreasonable to disclude this and put her in the poor category of "cannot walk". She will never reach the category of "Walks Well Alone", a category which requires her to walk at least 20 feet, and balances well.

With respect to feeding aspects, it is clear that Ms. Ward is reasonably independent in feeding and would self feed as long as appropriate substrates are provided to her. Therefore she meets the criteria of "self-feeds".

[52] Dr. Heran concluded that Ms. Ward has a 24.5 year life expectancy.

[53] I prefer the opinion of Dr. Heran with respect to life expectancy. First, I agree with his opinion that Ms. Ward is able to feed herself. On the evidence of her mother and of Dr. Purtzki, she fits within that description as set out in the Strauss 2007 study. She also is able to walk to some extent, even without the surgery to address the contractures in her left foot. She has made dramatic improvements in recent months in her physical abilities. She has gone from not being able to self-transfer from her bed to her wheelchair to being able to do it 11 times in one hour. In my view it would not be representative to place Ms. Ward in the category of does not walk. Indeed, she walks now and is likely to walk better as Dr. Heran opines, after surgery to address the equinovarus contracture. I accept Dr. Heran's opinion that patients with Ms. Ward's residual abilities generally do walk and that once the contractures caused by neglect are addressed and Ms. Ward receives appropriate therapy she will be able to walk to some extent with assistance.

[54] Some confusion resulted at trial from the collapse of categories between the 2007 study and the 2015 study. The more refined "some walking ability" which is described in the 2007 study and is included by Dr. Elliott in his opinion is lost in the 2015 study. There is no explanation for this, although the 2015 study itself says the "walking, feeding" disability groups are relatively broad, and the severity of a particular individual's disability may be significantly

better or worse than the average in any one of these groups. The authors themselves describe the categories as "coarse". As I have said, I do not have an explanation as to why the more refined distinctions in walking ability as described in 2007 have been abandoned. Most importantly, there is no evidence to suggest that the life expectancy of the group "walks with support or unsteadily alone" would no longer apply. That category, described in table 17(2) of the 2007 study, gives Ms. Ward the life expectancy of 24.5 years estimated by Dr. Heran.

[55] Accordingly, I accept that her life expectancy is 24.5 years.

d. Future Income Loss

[56] The plaintiff and the defendant Ms. Siah each offered expert reports offering pecuniary projections. The plaintiff's expert witness was economist Robert Wickson and Ms. Siah's expert witness was economist Mark Gosling.

[57] The plaintiff argues that she would have worked until age 70. She has a history of earnings as a bookkeeper. She was motivated to continue to work and build her business and one day sell it. The plaintiff submits that using an average income of \$73,310 (Mr. Wickson's table 1(a) from his expert report results in an award of \$959,202.70.)

[58] The plaintiff argues that from this amount the court should deduct the cost of basic living expenses which she would have incurred but for the cost of future care which she has been awarded. The plaintiff says that this is \$19,017 per year based on Mr. Gosling's expert report. The plaintiff says that this should be further reduced by 10% to account for the substantial possibility that she would have maintained an interdependent relationship in her remaining years and thus reduced her personal basic living expenses. The plaintiff says the amount to be deducted is \$310,694.04, leaving an award of \$648,508.

[59] The plaintiff says that because her life expectancy of 24.5 years goes beyond her expected retirement date I need not consider an award for lost years of income.

[60] Ms. Siah argues that it is not possible to say whether absent the accident the plaintiff would have worked as a full-time bookkeeper until age 70. Most self-employed B.C. females retire at age 66.5. She argues that using the employment multiplier for age 66.5, applying a reduced life expectancy of 13.59 years, before taking into account a lost years award, results in an award of \$585,894. Ms. Siah suggests that the appropriate personal living expenses deduction in the case at bar during the lost years should be 80%. She says that the present value of the future loss would be \$642,950. The defence reduces cost of future care rather than lost income capacity for normal living expenses.

[61] I am satisfied that Ms. Ward was likely to work until age 70. She discussed this with both her mother and her boyfriend Curt Fetterly. At the time of the accident she was 48 years old. She had been living with her sister and then moved to Galiano Island in an effort to reduce her living expenses so that she could save for a larger deposit and purchase her own home. She would have had a mortgage. Being self-employed, she would be responsible for savings for her retirement. She enjoyed being a bookkeeper. Bookkeeping is not physically demanding

work and can be done from home, as and when the person wishes. All of this satisfies me that she would have continued to work until age 70.

[62] The proper approach to assessment of future loss of earning capacity is set out in *Uy v. Dhillon* 2020 BCSC 1302 at paras. 110-111:

[110] The Court of Appeal has discussed the principles governing claims for future loss of earning capacity in numerous cases. In *Morgan v. Galbraith*, 2013 BCCA 305 at para. 53, the Court of Appeal, citing its earlier decision in *Perren v. Lalari*, 2010 BCCA 140, described the approach to be taken by the trial judge as follows:

in *Perren*, this Court held that a trial judge must first address the question of whether the plaintiff had proven a real and substantial possibility that his earning capacity had been impaired. If the plaintiff discharges that burden of proof, then the judge must turn to the assessment of damages. The assessment may be based on an earnings approach or the capital asset approach

[Emphasis in original.]

[111] The earnings approach is generally appropriate where the plaintiff has some earnings history and where the court can reasonably estimate what his or her likely future earning capacity will be. This approach typically involves an assessment of the plaintiff's estimated annual income loss multiplied by the remaining years of work and then discounted to reflect current value, or alternatively, awarding the plaintiff's entire annual income for a year or two: *Pallos v. Insurance Corp. of British Columbia* (1995), 100 B.C.L.R. (2d) 260 at para. 43 (C.A.); *Gilbert v. Bottle*, 2011 BCSC 1389 at para. 233. While there is a more mathematical component to this approach, the assessment of damages is still a matter of judgment, not mere calculation.

[63] Ms. Ward has a history of earnings and using the earnings approach is appropriate in this case.

[64] The plaintiff says that her earnings to age 70 would be $\$73,310 \times 13.082 = \$959,041.42$. The defendant's multiplier is slightly higher, $\$73,310 \times 14.177 = \$1,039,315.87$.

[65] However, some of Ms. Ward's living expenses that she would have paid from her income are included in the cost of future care. To avoid double recovery, courts have developed the "total lifestyle approach" or the "incremental approach". In *Uy* the court said at paras. 57-58:

[57] In order to avoid the duplication in compensation identified by Justice McLachlin, two different approaches to assessing damages have been developed: the total lifestyle approach and the incremental approach. The difference between the two approaches was summarized in *Andrews v. Grand & Toy Alberta Ltd.*, [1978] 2 S.C.R. 229 at 250-251:

It is clear that a plaintiff cannot recover for the expense of providing for basic necessities as part of the cost of future care while still recovering fully for prospective loss of earnings. Without the accident, expenses for such items as food, clothing and accommodation would have been paid for out of earnings. They are not an additional type of expense occasioned by the accident.

When calculating the damage award, however, there are two possible methods of proceeding. One method is to give the injured party an award for future care which makes no deduction in respect of the basic necessities for which he would have had to pay in any event. A deduction must then be made for the cost of such basic necessities when computing the award for loss of prospective earnings: i.e. the award is on the basis of net earnings and not gross earnings. The alternative method is the reverse: i.e. to deduct the cost of basic necessities when computing the award for future care and then to compute the earnings award on the basis of gross earnings.

The trial judge took the first approach, reducing loss of future earnings by 53 per cent. The Appellate Division took the second. In my opinion, the approach of the trial judge is to be preferred. This is in accordance with the principle which I believe should underlie the whole consideration of damages for personal injuries: that proper future care is the paramount goal of such damages. To determine accurately the needs and costs in respect of future care, basic living expenses should be included.

The costs of necessities when in an infirm state may well be different from those when in a state of health. Thus, while the types of expenses would have been incurred in any event, the level of expenses for the victim may be seen as attributable to the accident. In my opinion, the projected cost of necessities should, therefore, be included in calculating the cost of future care, and a percentage attributable to the necessities of a person in a normal state should be reduced from the award for future earnings.

[58] In *Paur v. Providence Health Care*, 2015 BCSC 1695, var'd in part 2017 BCCA 161, Madam Justice Griffin, then of the Supreme Court, observed at para. 419:

The cases illustrate that the total lifestyle approach to damages is preferred in cases of catastrophic injuries; the incremental approach is preferred in cases where the plaintiff will lead basically the same life as before but needs some additional assistance: *Milina*; *Andrews*; *MacEachern*; *Morrison (Committee of) v. Cormier Vegetation Control*, [1998] B.C.J. No. 3279(S.C.) [*Morrison*].

[66] The plaintiff has used the total lifestyle approach, the defence the incremental approach. Ms. Ward has suffered catastrophic injuries. I am satisfied that the total lifestyle approach should be followed, deducting basic living expenses from future income to avoid duplication in recovery. Mr. Gosling's report indicates that one person households in Canada spend an average of \$19,017 per year on shelter and food (2017 StatsCan Survey updated). Using this estimate as a factor by which to reduce Ms. Ward's future income loss results in an income loss of \$613,825.82 $\$959,041.42 - (\$19,017 \times 18.153) = \$\$613,825.82$).

- [67] I am not persuaded that the total lifestyle deductions which Ms. Ward is anticipated to have incurred should be reduced by 10% to account for the possibility that she would have maintained an interdependent relationship in the remaining years. In my view it is simply speculative to suggest that she would have maintained an interdependent relationship. She was previously married for seven years. She also had a relationship with Mr. Fetterly for approximately three years. While it is possible that she may have formed an interdependent relationship, in my view this does not amount to a substantial possibility.
- [68] These calculations provide a measure of Ms. Ward's future income loss. However, I must assess Ms. Ward's loss in light of all of the evidence. Ms. Ward may not have worked as much between the ages of 65 and 70. Her basic living expenses may be higher than the national average. There may be other negative or positive contingencies. As best I am able to assess these, I conclude that Ms. Ward should be awarded \$550,000 for future loss of income capacity.
- [69] In calculating future income loss, if a plaintiff's injuries have reduced his or her life expectancy below the determined age of retirement, the court must perform a lost years deduction. In that event, the court will determine the deduction as the income which the individual would have earned between the anticipated age of death and the age of retirement. As Justice McLachlin (as she then was) explained in *Toneguzzo-Norvell v. Burnaby Hospital* (1994), 1 SCR 114, 1994 CanLII 106 (SCC), at para 28: "in order to earn an income one must live and incur the attendant expenses".
- [70] Because I am satisfied that Ms. Ward's life expectancy exceeds the age at which she would have retired, I do not need to make an award to compensate for lost years of income.

e. Cost of Future Care

- [71] The rationale behind an award for cost of future care was summarized by Justice Savage in *Gao v. Dietrich*, 2018 BCCA 372 at paras. 68-70:
- [68] An award for damages for cost of future care is based on the principle of restitution. In *Andrews v. Grand & Toy Alberta Ltd.*, 1978 CanLII 1 (SCC), [1978] 2 S.C.R. 229 at 241-242, Dickson J., as he then was, explained the purpose of an award for cost of future care:

In theory a claim for the cost of future care is a pecuniary claim for the amount which may reasonably be expected to be expended in putting the injured party in a position where he would have been in had he not sustained the injury. Obviously a plaintiff who has been gravely and permanently impaired can never be put in the position he would have been in if the tort had not been committed. To this extent, "restitutio in integrum" is not possible. Money is a barren substitute for health and personal happiness but to the extent, within reason, that money can be used to sustain or improve the mental or physical health of the injured person it may properly form part of the claim.

- [69] An award for cost of future care is based on what is reasonably necessary, on medical evidence, to promote the mental and physical health of the claimant: *Milina v. Bartsch* (1985), 1985 CanLII 179 (BC SC), 49 B.C.L.R. (2d) 33 (S.C.) at 78, *aff'd* (1987), 49 B.C.L.R. (2d) 99 (C.A.); *Aberdeen v. Zanatta*, 2008 BCCA 420 at para. 41; *Gignac v. Insurance Corporation of British Columbia*, 2012 BCCA 351 at para. 30. An award for future care must (1) have medical justification, and (2) be reasonable: *Milina* at 84; *Aberdeen* at para. 42.
- [70] In *Gregory v. Insurance Corporation of British Columbia*, 2011 BCCA 144, this Court clarified that the medical necessity of future care costs may be established by a health care professional other than a physician, such as an occupational therapist, if there is a link between a physician's assessment of pain, disability, and recommended treatment, and the health care professional's recommended care item (at para. 39).
- [72] An inquiry into cost of future care is case-specific and the award is to be determined on the particular care needs of the plaintiff. The award is subject to contingency adjustments based on the prospect of improvements in the plaintiff's condition or requirements of additional care required in the future: *Gilbert v. Bottle*, 2011 BCSC 1389 at para 253.
- [73] There is much agreement between the parties with respect to Ms. Ward's cost of future care. I will address only those areas where the parties do not agree.
- [74] The plaintiff says that her cost for future care will be \$4,098,250.59 based on a life expectancy of 24.5 years. The defence says that the appropriate award is \$1,881,211 based on a life expectancy of 13.6 years.
- [75] As I have found above, in my view Ms. Ward's life expectancy is 24.5 years and I will base cost of future care on that life expectancy.
- [76] Turning to the individual items where the parties differ:

Long-Term Care

- [77] The defence argues that Ms. Ward should remain where she currently resides, at Sidney All Care. The plaintiff seeks an award which will permit her to live at Sidney All Care until her mother is no longer able to assist in her care and then move to a rehabilitative facility.
- [78] The plaintiff has provided me with the report of Margherita Bracken, occupational therapist. The care currently provided to Ms. Ward is described in Ms. Bracken's opinion:

The care provided in the facility is based on a care provision model only. There is minimal focus on functional activation or rehabilitation. There is no access to on-site occupational therapy, physical therapy, speech language pathology or rehabilitation aids. The facility has minimal programming and no same age peers with whom Ms. Ward can interact. Ms. Ward spends the majority of her days watching television with minimal social interaction other than her mother and care providers.

I accept this evidence. It is consistent with evidence of other witnesses.

[79] She opines that once Mrs. Ward is no longer able to assist in Ms. Ward's care, Ms. Ward will benefit from transition into a long-term care placement in a rehabilitation focused facility that provides care in a facilitation and maintenance framework and allows for on-site access to OT, PT, SLP and RAs.

[80] Dr. Purtzki said:

Her current placement is completely ineffective in being able to support the type of behaviour management she requires. The placement appears to be one for elderly patients with dementia. Nurses and staff appear to be not skilled or trained in the management of someone with Tracy's injuries. If Tracy stayed in an institutional environment, she will need to be in a specific placement for someone with severe TBI where nurses and staff are trained in behaviour management of patients like her. This can be in a group home placement preferably, as it is more akin to a home environment .

[81] In my opinion it is preferable for the plaintiff to reside in the facility contemplated by Dr. Purtzki. It may be that as long as her mother is alive, her mother can fill the gaps left in the treatment provided at Sidney All Care. But once her mother is no longer able to provide that care, it is in the plaintiff's best interests to move to a care facility as contemplated by Dr. Purtzki.

[82] I do not accept the submission of the defence that Ms. Ward is better placed in Sidney All Care with external support services to provide recommended therapies, that the plaintiff has poor awareness and capacity for meaningful interaction with others. Although the plaintiff does have limitations, she is able to socialize with her mother and with those who attend regularly to provide therapy. I anticipate that in the group home environment contemplated by Dr. Purtzki, Ms. Ward's behaviour would be better controlled and she would be able to engage to some extent with regular care-givers and other residents. I also do not accept the argument that if she remains at Sidney All Care she will have more timely access to nursing, pharmacy and medical care. I expect that at a rehabilitation type facility nursing, medical and pharmacy supports are readily available.

[83] Finally, this may be of little practical import, given the plaintiff's calculations that the costs of Sidney All Care and a rehabilitation facility are close to equal.

Occupational Therapy

[84] Ms. Ward is currently living in the Sidney All Care Residence in Sidney, B.C., which only provides care based on a "care provision model". There is limited focus on functional activation or rehabilitation. There is no access to on-site OT, PT, SLP, or RA. Ms. Ward spends the majority of her days watching television with minimal social interaction other than with her mother and care providers.

- [85] Ms. Bracken recommends 40 hours of occupational therapy initially and then four to six hours per month ongoing until the plaintiff enters into a long-term care facility. In her report, Ms. Bracken contemplated the plaintiff living with her mother and receiving private care at her mother's residence until her mother was no longer able to accommodate her. Thereafter, Ms. Ward would move to a long-term placement in a rehabilitation focused facility that provides care in a facilitation and maintenance framework and allows for on-site access to OT, PT, SLP and RA.
- [86] At the time that Ms. Bracken provided her opinion, Mrs. Ward was of the view that she would like to bring Ms. Ward to live at her home and care for her there. This would, of course, require private care providers. Mrs. Ward has subsequently changed her mind and is of the view that it is best for Ms. Ward to remain at Sidney All Care until Mrs. Ward is no longer able to assist in her care and at that point for her to be transferred to a rehabilitation based long-term care facility.
- [87] In that context, Ms. Bracken recommended 40 hours initially of occupational therapy then four to six hours per month ongoing until Ms. Ward entered an extended care facility that operates in a rehabilitation and functional maintenance model. At that point she would no longer require external occupational therapy because that would be provided by the facility.
- [88] Ms. Siah retained Ms. Tania Percy, an occupational therapist to provide an opinion. Ms. Percy recommended 12 hours initially then 24 hours per year to provide supervision and oversight to healthcare aids, rehabilitation assistants, review equipment needs etc. In the scenario contemplated by Ms. Percy, Ms. Ward would remain at Sidney All Care for the remainder of her life.
- [89] In my view it is appropriate that Ms. Ward have 12 hours initially of occupational therapy. Ms. Bracken contemplated a move to Mrs. Ward's residence which likely would have required a significant input from an occupational therapist who would be overseeing and making recommendations with respect to Ms. Ward's various therapy providers. That is no longer contemplated. Nora Dunn has been acting as Ms. Ward's occupational therapist for some time. I do not anticipate that reviews and recommendations arising from this judgment will require as many hours as contemplated in Ms. Bracken's report. Therefore, I will award the hours contemplated by Ms. Percy, that is 12 hours initially and 24 hours per year until Ms. Ward moves to a rehabilitation facility in approximately two years. The plaintiff offered this time estimate based on Mrs. Ward's anticipated incapacity, as derived from Mrs. Ward's age in relation to the average life expectancy of Canadian women.

Physiotherapy

- [90] Ms. Bracken recommended one to three sessions per week for two years and then monthly sessions thereafter until she is moved into a rehabilitative facility, where the sessions would be included. Ms. Percy recommended 12 to 18 sessions per year for life.

- [91] As is apparent from the evidence before me, Ms. Ward has benefited significantly from physiotherapy. Although she had long periods of time when physiotherapy was not available, due to COVID-19 restrictions or due to pain restrictions, now that the COVID-19 restrictions have been lifted and her pain level appears to have decreased due to changing medication, she is benefiting significantly from physiotherapy. As Dr. Heran and Dr. Purtzki noted, physical activity is critical to Ms. Ward's well-being and life expectancy. Accordingly, in my view the number of sessions per week sought by plaintiff is appropriate.

Speech Language Pathologist

- [92] The plaintiff seeks one session per week until she is moved into a rehabilitative facility, where the sessions would be included. Ms. Percy recommended 12 hours initially to determine specific purposeful activities. Thereafter 12 hours per year to provide input and direction to the RA and personal support worker.
- [93] Speech language pathology has been very helpful to Ms. Ward. However, I agree with the position taken by the defence that these can be provided with the assistance of a rehabilitation assistance/personal support worker, on instruction from the speech language pathologist. I will award the amount recommended by Ms. Percy.

Psychologist

- [94] The plaintiff seeks an award for the provision of a psychologist to assist with behaviour management. As is noted in various expert reports, Ms. Ward's behaviour has been challenging at times. In my view it is appropriate to provide services of a psychologist to better manage Ms. Ward's behaviour. The amount sought by the plaintiff of \$1,250 per year, until she is moved into a rehabilitative facility where the sessions would be included, is reasonable.

Equipment

- [95] The plaintiff seeks the cost of the commode chair with tilt feature. The defence says this is not recommended. Given the progress that the plaintiff has made recently in physical rehabilitation I agree it is appropriate that she be provided with a commode chair.
- [96] The plaintiff seeks provision for both wrist splints and foot splints. The defendant says these are not recommended. Ms. Ward has been removing her wrist splint and I do not see that the provision of a wrist splint is appropriate. As to a foot splint, I understand that this will be in addition to the AFO and worn when the AFO is not in place. It is appropriate.
- [97] The plaintiff also seeks provision for an active passive trainer, a standing frame and an AFO for her left foot. This is all to promote her ability to walk, rehabilitatively, not functionally. As I have discussed above, it is beneficial for Ms. Ward's general health and for her longevity that she is able to increase her mobility and in particular to mobilize to some degree, although she will never be able to walk independently. Given the opinions of Dr. Purtzki and

Dr. Heran, in my view these are appropriate expenditures and it is appropriate to award these sums to Ms. Ward.

[98] None of the other line items are in dispute. They appear appropriate.

[99] Assuming a life expectancy of 24.5 years and assuming Ms. Ward will be moved into long-term care after two years, the present value of Ms. Ward's cost of future care claim is:

Cost & Frequency of Care Item

Multiplier

Present Value of Future Care Amount

Maintenance Care

(\$11,350/month)

\$136,200.00/year until moved into rehabilitative facility

1.918

\$261,231.60

Occupational Therapy

\$138.99/hr

\$1,667.88 for initial 12 hrs

0.995

\$1,659.54

\$3,335.76 for 24 hrs/year for 2 years

1.918

\$6,397.99

Physiotherapy

\$180/hr

\$18,720.00 for 2 sessions/week for 2 years

1.918

\$35,904.96

Speech Language Pathologist

\$101.67/hr

\$1,220.04 for initial 12 hrs

0.995

\$1,213.94

\$1,220.04 for 12 hrs/year for 2 years

1.918

\$2,340.04

Psychologist

\$1250/year for 2 years

1.918

\$2,397.50

Sub-total: \$49,913.97

Disputed Equipment note: cost per item is median amount within price range given by plaintiff

Commode chair

\$2847.5/5 years

4.148

\$11,811.43

Foot splint

\$750/2-5 years

9.584

\$7,188.00

Active passive trainer

\$3750

0.995

\$3,731.25

Standing frame

\$6000

0.995

\$5,970.00

AFO for left foot

\$212.50/2-3 years

9.584

\$2,036.60

Sub-total: \$30,737.28

Undisputed Equipment

Note: cost is as requested by plaintiff

Adapted cup with long straw

\$23.21/year

18.153

\$421.33

Low air loss mattress

\$5,500.00

1

\$5,500.00

Hospital Bed

\$3417.00

0.995

\$3,399.92

Adjustable overhead table for hospital bed

\$195.00

0.995

\$194.03

Bumpers for hospital bed rails

\$80.00

0.995

\$79.60

Wheelchair fall alarm

\$50.45

0.995

\$50.20

Bed fall alarm

\$50.45

0.995

\$50.20

Crash pads for side of hospital bed

\$291.75

0.995

\$290.29

Manual tilt wheelchair with seating supports

\$9,500/5 years starting in 2025

3.148

\$29,906.00

Budget for seating adaptations

\$2,000/year

18.153

\$36,306.00

Electronic tablet

\$275.00/5 years

4.148

\$1,140.70

Depends briefs

\$973.16/year

18.153

\$17,665.77

Wipes

\$125.96/year

18.153

\$2,286.52

Sub-total: \$97,290.56

Medications

\$4,671.40/year

18.153

\$84,799.92

Transportation

\$3000/year

18.153

\$54,459.00

Long Term Care Facility

\$576.43/day (weighted average of \$505 on weekends and \$605 on weekdays) until death

\$210,541.06/year

16.238

\$3,418,765.69

Total: \$3,997,198.02

[If there are arithmetic errors in these calculations which the parties are unable to resolve, the parties may appear and make further submissions.]

f. Special Damages

[100] The plaintiff seeks special damages of \$333,235.55. The defence does not take issue with this claim. I have reviewed the list of special damages. I accept them. I will award the amount sought.

g. Committeeship Fees

[101] The parties have asked that I leave this item.

3. Liability of Anthony Thomas

[102] Mr. Thomas testified that his last memory was of some mailboxes on Central Saanich Rd. He came to with the airbag from the Jeep in his face. He believes that he fell asleep. The vehicle was stopped on the wrong side of the road, on the shoulder against a concrete block. He could not say how the accident happened.

[103] No other witnesses were called who had observed the accident.

[104] *Brooks-Martin v. Martin*, 2010 BCSC 1708 summarized the law regarding determining liability in negligence at para. 27:

[27] A plaintiff who sues for damages for personal injury allegedly caused by the defendant's negligence, must prove:

- a) That the defendant owed him or her a duty of care;
- b) That the defendant did an act or failed to do an act, which act or omission fell below the standard of care required of the defendant; and
- c) That the defendant's said act or omission caused an accident (which caused injury to the plaintiff).

(See *Linden & Feldthusen*, *Canadian Tort Law*, 8th edition (2006), page 108)

[105] As a driver on the road, Mr. Thomas owed a duty of care to Ms. Ward, a pedestrian walking alongside the roadway, to take reasonable care in operating the Jeep.

[106] As Mr. Thomas does not remember the last moments leading up to the accident nor the accident itself, and cannot offer an explanation as to how he came to be on the wrong side of the road in the Jeep, I must examine the circumstances of the accident alone to determine whether Mr. Thomas' actions fell below the required standard of care, and were thus negligent. This is not a novel approach. In *Baines v. Innes*, 2021 BCSC 2037, after making findings of fact using evidence strictly related to the circumstances of the accident, Justice Giaschi determined that the sole cause of the collision was the negligence of the defendant.

[107] The facts of the case find some parallels in *Lee v. Chan* (1997), 29 B.C.L.R. (3d) 27, 1997 CanLII 4201 (BC SC). In *Lee*, a car left the road resulting in catastrophic brain injuries by the passenger plaintiff. The defendant driver offered no explanation as to why he drove off the road, and once his car started down the hill he had no memory of the accident. As the defendant was unable to explain how the accident could have occurred with no negligence on his part, he was found liable.

[108] The plaintiff must establish on a balance of probabilities that the defendant's negligence caused or materially contributed to an injury.

[109] Mr. Thomas owed Ms. Ward, a pedestrian, a duty of care. Based on the circumstances of the accident, he breached that duty when he fell below the standard of care of a reasonable motorist by crossing onto the wrong side of the road and continuing onto the opposite shoulder. But for the operation of a motor vehicle in this manner, Ms. Ward would not have been struck by the vehicle, and would therefore not have suffered her injuries. On a balance of probabilities, I find that Mr. Thomas was negligent, and therefore liable to Ms. Ward

4. Section 86 of the Motor Vehicle Act

[110] Mr. Thomas did not own the Jeep at the time of the collision. The issue between the parties is who, if anyone, is vicariously liable for his negligence pursuant to s. 86 of the MVA. Are either or both of Ms. Siah or Harris vicariously liable?

[111] Section 86 provides:

86 (1) In the case of a motor vehicle that is in the possession of its owner, in an action to recover for loss or damage to persons or property arising out of the use or operation of the motor vehicle on a highway, a person driving or operating the motor vehicle who

(b) acquired possession of the motor vehicle with the consent, express or implied, of the owner, is deemed to be the agent or servant of, and employed as such by, that owner and to be driving or operating the motor vehicle in the course of his or her employment with that owner.

(2) Nothing in this section relieves a person deemed to be the agent or servant of the owner or lessee and to be driving or operating the motor vehicle in the course of his or her employment from the liability for such loss or damage.

(3) In this section:

"owner"

(a) includes a purchaser of a motor vehicle who is in possession of the motor vehicle under a contract of conditional sale by which title to the motor vehicle remains in the seller, or the seller's assignee, until the purchaser takes title on full compliance with the contract,

(b) if a purchaser of a motor vehicle is in possession of the motor vehicle, does not include the seller of that motor vehicle under a contract of conditional sale described in paragraph (a) or the assignee of that seller

a. Harris' Liability under s. 86 of the MVA

[112] I will first address Harris' liability.

[113] Harris argues that to be vicariously liable pursuant to s. 86 it must be an owner in possession at the time that Mr. Thomas acquired the Jeep and Harris must have consented to Mr. Thomas driving the Jeep, explicitly or implicitly. Harris says that these conditions are not met.

[114] This issue requires some background.

[115] The plaintiff has summarized Harris' business, the 'normal' car purchase and Ms. Siah's transaction.

i. The normal car purchase

- [116] Harris aims to get the customer into the dealership, have the deal negotiated, the paperwork signed, the car insured and off the lot in one day. The process can sometimes take four to five hours. Many people are involved in a particular deal, especially on a busy Saturday.
- [117] The salesperson is the usual first person contacted by a customer. The salesperson completes a "guest sheet" to gather information about the customer, what they are looking for, what they can afford and information about the trade-in vehicle.
- [118] This information is given to the sales manager who runs a credit check. The sales manager then directs the salesperson about which vehicles to show the customer. The goal is to find the customer a vehicle they like.
- [119] Once the customer selects a vehicle a worksheet is completed. The salesperson fills in the client's name, the vehicle description and takes the form to the sales manager. The sales manager then completes the back of the form, which includes the price of the vehicle, the value of the prospective trade-in and payment options for the customer.
- [120] The salesperson then returns to the customer and discusses the options with them. The customer and the salesperson settle on terms that the customer is prepared to accept. The salesperson does not have the authority to agree to terms on behalf of the dealership. The sales manager does not inform the salesperson about the profit margin on a particular vehicle. The salesperson takes the customer's terms to the sales manager for approval. If the sales manager approves the deal, the sales manager puts the file together with the offer to purchase worksheet, a copy of the customer's driver's licence, the credit check, the guest sheet and the trade-in evaluation form. That file is then given to the finance director.
- [121] The finance director receives and reviews the file and then takes it to the finance manager who obtains the credit information from the client and gives that information and the file back to the finance director.
- [122] The finance director submits a finance application to banks or lenders through the dealer track system to try and obtain credit approval for the client.
- [123] If financing approval is not obtained, the finance director will work with the application to obtain an approval, a process which sometimes takes days. If further information is needed from the customer, the finance manager will typically handle this. If no financing approval can be obtained, the customer may walk away from the deal.
- [124] If the customer is approved for financing on terms that fit within what the client agreed to on the worksheet, the file is returned to the finance manager to complete all of the paperwork with the client, including the MVPA [standard form Motor Vehicle Purchase Agreement], financing documents, and transfer forms for the new vehicle and for the trade-in. The finance manager is responsible for explaining the documents to the client.

[125] Once the paperwork is completed the customer sees an insurance agent at the dealership to assist them in insuring the new vehicle. After this is done, the salesperson puts the licence plates on the vehicle and the customer leaves.

[126] The dealership submits the financing documentation to the lender so that funds can be paid to the dealership for the vehicle and for the payout of any lien on the trade-in.

ii. Harris's Car Sales Business

[127] One of the ways in which Harris generates new business is through other people seeing, driving, and liking the new vehicles purchased by customers. This is part of their overall marketing and business strategy.

[128] It is also important to Harris to have the customer leave the lot in the car they are interested in purchasing while their financing is pending. It is Harris's goal to get a prospective sale completed in one afternoon. It is Harris's business plan to ensure that the customer leaves in the vehicle. If the customer cannot complete the transaction fully on that day, part of Harris's process is to make sure that the customer can go home in the car until their financing is approved. The purchaser or proposed purchaser is most likely to purchase a car if they leave the lot with the car the first time they come in.

[129] Harris also wants to move cars off their lot. They aim to sell 100 or more cars per month. They want their customers approved for financing as quickly as possible. Ideally this approval process takes a few hours. However it can take longer, up to a week.

[130] At Harris the salespeople are paid entirely on commission. The dealership receives volume sales incentives on a monthly basis from the manufacturer for meeting or exceeding particular sales volume targets on new vehicles. A typical payout would be \$80,000-\$100,000 per month.

[131] Car dealerships can also make money through financing of vehicles. The lender will pay out a portion of its reserve to the dealership. Longer term loans payout higher, as the bank earns more interest on these.

[132] The manufacturer of Harris' vehicles, Fiat Chrysler, also had a program with lenders for what is called a sub-vented interest rate. This is a preferable interest rate for financing of new vehicles.

[133] In August 2018 Harris was selling 80-100 vehicles per month. The average time that a new vehicle spent on the lot was three to four months.

iii. Ms. Siah's transaction with Harris

- [134] Ms. Siah dealt with various employees of Harris with respect to the purchase of the Jeep. Wes Harrison was a salesperson at Harris. He had previously assisted Mr. Siah when she bought her Cruze from Harris in January 2018. Brody Harris was a sales manager at Harris. Allison Fryer was a finance director employed by Harris. Brittani Ison was the sub-prime director employed by Harris. Ms. Ison also assisted Ms. Siah with financing when she purchased the Cruze. Shane Heslop was a finance manager at Harris on August 18, 2018.
- [135] In the weeks leading up to August 18, 2018 Ms. Sylvester and Ms. Siah were considering buying a larger vehicle for the family. Although Ms. Siah was happy with her Cruze, they contemplated trading Ms. Siah's Cruze in and purchasing a larger vehicle in her name because Ms. Siah had a better credit record than did Ms. Sylvester. However, Ms. Siah did not have a strong credit rating. She was described as a sub-prime borrower.
- [136] Ms. Siah started communicating with Wes Harrison. He suggested that she might purchase a Jeep Cherokee. He knew that she would require financing, as she had for the Cruze purchase. He took some credit information from Ms. Siah so that the dealership could initiate a financing application before she attended the dealership. He gave the information to Ms. Ison. In the days before August 18, 2018 Harris continued to look for credit approval for Ms. Siah and postponed having Ms. Siah attend at the dealership because they were still working on financing but did not have something concrete from the lenders. Ms. Siah suggested that perhaps she should wait until she had owned the Cruze for a year. On August 17, 2018 Mr. Harrison spoke with Ms. Siah and told her that she would need a co-signer to obtain financing. Ms. Siah's mother-in-law, Hellen Jack, agreed to act as a co-signer for the vehicle loan.
- [137] Ms. Ison submitted the loan application to Scotia Dealer Advantage ("SDA") on August 17, 2018. The initial application erroneously indicated that Ms. Jack was Ms. Siah's spouse. SDA pre-approved a loan on terms, the most significant:
1. No income verification required up to maximum monthly payment of \$800
 2. Term 84 months, interest rate of 12.99%
 3. Both Ms. Siah and Ms. Jack to sign financing documents
 4. No vehicle or amount to be financed was specified.
- [138] When SDA noticed a discrepancy with respect to Ms. Jack's age and residence they sought further information from Harris. Harris advised SDA that Ms. Jack was Ms. Siah's mother-in-law, not her spouse. SDA revoked the credit pre-approval at 3:40 am on August 18, 2018. The dealership was to correct and resubmit the application.
- [139] Ms. Siah and Ms. Sylvester arrived at the dealership at approximately 3:00 pm on August 18, 2018. It was a Saturday, a busy day at the dealership.

- [140] Ms. Siah and Ms. Sylvester met with Mr. Harrison. They discussed trading the Cruze in for a Jeep. They completed a work sheet. Mr. Harrison entered information regarding the proposed new vehicle and the trade in and took it to a sales manager to get pricing and payment options. The dealership proposed down payments which were rejected by Ms. Siah. Ms. Siah said that she was prepared to pay \$38,000 for the Jeep. Her trade-in allowance would be \$15,000. She was not prepared to make a down payment. The document notes on the front "deal okay at 350 BW OAC at 84M" which means "the deal is okay at payments of \$350 biweekly on approved credit over 84 months". Ms. Siah and a sales manager signed the document.
- [141] Ms. Siah testified that it was her understanding that these were the numbers that she would be paying if she were approved for a loan.
- [142] Later on August 18, 2018 Ms. Fryer received a second approval from SDA on the following terms:
1. A total financed amount of \$32,147.43
 2. a term of 84 months
 3. an interest rate of 16.29%
 4. a maximum monthly payment of \$645
 5. \$20,800 cash down payment
 6. both the applicant Ms. Siah and the co-applicant Ms. Jack needed to sign the financing documents;
 7. proof of the payout of Ms. Siah's trade-in lien was required.
- [143] Ms. Fryer recognized that this did not match what Ms. Siah had agreed to on the worksheet. She knew that Ms. Siah's co-signer was not available. Mr. Harris had told her that Ms. Siah was in a hurry. Ms. Fryer was optimistic that they could come up with financing that would meet Ms. Siah requirements.
- [144] Mr. Harris, the sales manager, understood that Ms. Siah had been conditionally approved but that nothing was fully signed. He stated that he was confident that the deal would work out and they would be able to obtain a financing approval that matched her offer to purchase but decided to wait until Monday for Ms. Ison, the sub-prime specialist to take over.
- [145] He testified that dealer plates were typically put on cars where financing had not yet been arranged. However, the policy at the dealership at the time was that if there were no dealer plates available, they could 'swap' a customer's trade-in plates onto the new vehicle to get the person in the car.

- [146] Mr. Harris did not recall looking for dealer plates and thought that Mr. Harrison had told him there were no dealer plates available. Mr. Harris directed Ms. Fryer to prepare a "cash bill of sale". Mr. Harris described the "cash bill of sale" document as an interim measure: "She needed something when she drove off". There was no financing in place when Ms. Siah left. When financing was eventually arranged, a new bill of sale would be prepared which reflected those terms. If the financing offered was not acceptable to Ms. Siah, the deal would be at an end. This situation did not happen often.
- [147] Ms. Fryer then gave the file to the finance manager, Mr. Heslop to prepare the "cash bill of sale" and have Ms. Siah sign it. Mr. Heslop had a very limited recollection of his interaction with Ms. Siah. He testified that Ms. Fryer told him that Ms. Siah was in a hurry to leave so he needed to have everything prepared and ready to go. He understood that Ms. Siah and the dealership had come to an agreement on terms for her purchase and that she was buying the Jeep. Mr. Heslop's understanding when he reviewed the cash bill of sale with Ms. Siah was that the lender had approved the loan. He would not normally do a bill of sale until the customer was approved for financing. He relied on Ms. Fryer who brought the deal to him for his understanding that there was an approval in place which would allow them to sell the customer the car. By approval he meant that the lender had agreed on lending a certain amount of money that fit in or matched the terms on the worksheet. He did not recall Ms. Fryer telling him that they were still working on the loan to obtain financing.
- [148] He agreed that the cash bill of sale in this case was an interim document in that there would be information which would change in the final bill of sale, such as Ms. Siah's First Nations status (which would mean that she would not pay PST and GST as indicated on the cash bill of sale), and there would normally be financing terms in a bill of sale. He reviewed the numbers in the cash bill of sale with Ms. Siah. He had her sign the cash bill of sale and he signed on behalf of the dealership. His understanding of the cash bill of sale was that it would be done if the dealership did not have enough time to complete everything but the purchase was "final enough" for transfer and insurance. He said that he would not normally have generated a cash bill of sale and had Ms. Siah sign it if he had known that there was not an approved loan in place. He stated that (in hindsight) it was not the right time to have Ms. Siah sign the cash bill of sale. He agreed with his statement to the Vehicle Sales Authority that he "printed up the bill of sale went over the numbers with her, explaining that these were the numbers that would be seen on the final bill of sale with the finance information." That was his understanding at the time.
- [149] Ms. Siah said that she and Ms. Sylvester waited for a while after signing the worksheet. Ms. Siah testified that she then met briefly with a man, perhaps for two minutes, to go over the paperwork. She saw the numbers on the document and commented to Ms. Sylvester "that's a lot of money". She said to Mr. Heslop "this is what I'll be paying if I'm approved for credit?" He said yes. He did not tell her that this was a binding agreement, that she was agreeing to purchase the vehicle on these terms, even if financing was not available.

- [150] She and Ms. Sylvester then returned to the lobby and waited. Ms. Siah said that she understood that she was waiting for the bank to approve her loan. She was not in a hurry and was prepared to wait.
- [151] Mr. Harrison appeared and told them that the Jeep was ready. Ms. Siah was surprised. She had not, to her mind, completed the required documents and had not seen an insurance agent. Ms. Siah questioned Mr. Harrison about this and was told "everything is good, you are good to go. You can drive the Jeep for 10 days." Ms. Siah understood that the dealership was still working on obtaining financing.
- [152] The dealership was not able to arrange acceptable financing before the accident on August 27, 2018.
- [153] I accept the evidence set out above. Although Mr. Heslop describes a longer review of the documents than Ms. Siah describes, their evidence is otherwise quite consistent. Mr. Heslop did not say: "by signing the document you are committing to purchase the Jeep regardless of whether you receive financing". That was not what he thought was happening.

iv. Was Harris an owner?

- [154] Section 86 of the MVA does not define owner, apart from subsection (3) which I will discuss below.
- [155] Harris argues that it was not an owner because the MVPA signed by Ms. Siah was a binding agreement: that Ms. Siah was bound to purchase the vehicle for \$50,372.89 even if Harris was not able to arrange acceptable financing for her.
- [156] I am not persuaded that the parties intended to enter a binding agreement by signing the document. All of the Harris employees who dealt with Ms. Siah knew that she could purchase the Jeep only if Harris was able to arrange financing that Ms. Siah could afford. Mr. Harris instructed Ms. Fryer to prepare a "cash bill of sale", i.e. an MVPA that did not include financing terms, because he understood that Ms. Siah was in a hurry and wanted her to be able to leave the dealership driving the Jeep, she needed something to be able to drive off the lot. He expected that acceptable financing could be arranged eventually, at which point appropriate documents would be prepared including a new MVPA which would reflect the financing, financing documents, a transfer of title to Siah and insurance documentation. Ms. Fryer in turn told Mr. Heslop to prepare the document. She knew that financing was still being negotiated but did not advise Mr. Heslop. Mr. Heslop understood that financing was in place that would permit the dealership to sell the car, as the dealership would not have prepared the MVPA in this form unless it knew that the loan would be funded. He would not have had Ms. Siah sign the MVPA without an approved loan in place.
- [157] In my view this combination of misunderstandings and misinformation cannot constitute an intention by Harris to enter a legally binding agreement.

- [158] The MVPA was drawn up on Mr. Harris' instruction. He described it as an interim measure which would be ripped up when financing was obtained. Mr. Harrison told him that there were no dealer plates available so they could not put a dealer plate on the Jeep to permit Ms. Siah to drive it. The cash bill of sale was simply an alternative when dealer plates were not available. Mr. Harris said that he had been told by management that in those circumstances, where no dealer plate was available and financing was still being negotiated, it was appropriate to swap the plates, that insurance would be temporarily transferred to the new vehicle. He described the practice as Harris policy, although it did not happen often. He said that he did not know if the MVPA was necessary, but agreed that Ms. Siah needed some documentation when she drove off in the Jeep.
- [159] While it may be that a signed document is normally a reflection of the intention of the executing parties, these circumstances are unusual. Mr. Harris did not expect this to be a binding agreement. He described it as an interim measure which would be torn up when the financing was arranged. Mr. Heslop would not have proceeded as he did (executing the document) had he known that no acceptable financing was in place. Harris itself had no intention of enforcing the cash bill of sale, as it acknowledges in its submissions.
- [160] Moreover, the 'agreement' was missing essential terms. Financing was key to Ms. Siah's purchase as the Harris employees knew. Yet Harris argues that the MVPA binds Ms. Siah to purchase even if no financing is available.
- [161] Parties, price and property may be the common essential terms for the purchase of a chattel, but Harris cannot maintain this position in the face of its knowledge that financing was essential to Ms. Siah's purchase.
- [162] The Harris employees and representatives acknowledged that Ms. Siah would have understood, when signing the MVPA, that she would be purchasing the Jeep only if acceptable financing was arranged.
- [163] If Harris is correct that the MVPA constituted a binding agreement, then that agreement is unconscionable and void both at common law and pursuant to the Business Practices and Consumer Protection Act, S.B.C. 2004, c. 2 ("BPCPA").
- [164] As the Supreme Court of Canada has recently discussed in *Uber Technologies Inc. v. Heller*, 2020 SCC 16, unconscionability requires both an inequality of bargaining power and a resulting improvident bargain. There are no rigid limitations on the type of inequality. The weaknesses may be personal or circumstantial. The disadvantages need not be so serious as to negate the capacity to enter a technically valid contract. In many cases, the relevant disadvantages impaired a party's ability to freely enter or negotiate a contract, compromised the party's ability to understand or appreciate the meaning and significance of the contractual terms or both. A second common example of inequality of bargaining power is where, as a practical matter, only one party could understand and appreciate the full import of the contractual terms.

- [165] Here, there was a decided inequality of bargaining power. Harris was in control of generating the documents. The MVPA was a standard form document. The terms on the reverse are in tiny print and are in dense legalese. Many aspects of the document are confusing. Notably, the front of the document indicates that it is "subject to financing" but Harris asserts that that provision, whatever it may mean, is for its benefit only. Harris executes hundreds of these documents on a monthly basis. Ms. Siah was very much the weaker party. She had no ability to negotiate the terms of the arrangement, beyond the value attributed to her trade-in, the purchase price for the Jeep and financing. There was a cognitive asymmetry caused both by her personal vulnerability, having only a grade 12 education and because of the disadvantages specific to the contracting process. This was Harris's document provided to her for signature. There was at most a review of the numbers. There was no review of the contractual terms on the reverse of the document. Whatever was said, she was not told that by this document she was bound to pay Harris more than \$50,000 for the Jeep, even if no financing was available.
- [166] A bargain is improvident if it unduly advantages the stronger party or unduly disadvantages the more vulnerable. Where the weaker party did not understand or appreciate the meaning and significance of important contractual terms, the focus is on whether they have been unduly disadvantaged by the terms they did not understand or appreciate. These terms are unfair when, given the context, they flout the reasonable expectation of the weaker party. In this case, Ms. Siah understood that the dollar figures were those that she would pay if, and only if, she was approved for financing. As the Harris witnesses candidly admitted, that would be the purchaser's expectation in Ms. Siah's shoes.
- [167] Instead, Harris submits that the purport of the document was that Ms. Siah was bound to purchase this vehicle for more than \$50,000 regardless of whether financing was obtained by Harris to permit her to complete the transaction. That "flouts the reasonable expectation of the weaker party". It is an unfair surprise. Accordingly, the transaction would be unconscionable and invalid.
- [168] Furthermore, the transaction would constitute an unconscionable act pursuant to the BPCPA at ss. 8 and 10:

8 Unconscionable acts or practices

- (1) An unconscionable act or practice by a supplier may occur before, during or after the consumer transaction.
- (2) In determining whether an act or practice is unconscionable, a court must consider all of the surrounding circumstances of which the supplier knew or ought to have known.
- (3) Without limiting subsection (2), the circumstances that the court must consider include the following:

- (a) that the supplier subjected the consumer or guarantor to undue pressure to enter into the consumer transaction;
- (b) that the supplier took advantage of the consumer or guarantor's inability or incapacity to reasonably protect his or her own interest because of the consumer or guarantor's physical or mental infirmity, ignorance, illiteracy, age or inability to understand the character, nature or language of the consumer transaction, or any other matter related to the transaction;
- (c) that, at the time the consumer transaction was entered into, the total price grossly exceeded the total price at which similar subjects of similar consumer transactions were readily obtainable by similar consumers;
- (d) that, at the time the consumer transaction was entered into, there was no reasonable probability of full payment of the total price by the consumer;
- (e) that the terms or conditions on, or subject to, which the consumer entered into the consumer transaction were so harsh or adverse to the consumer as to be inequitable;
- (f) a prescribed circumstance.

10 Remedy for an unconscionable act or practice

- (1) Subject to subsection (2), if an unconscionable act or practice occurred in respect of a consumer transaction, that consumer transaction is not binding on the consumer or guarantor.
- (2) If a court determines that an unconscionable act or practice occurred in respect of a consumer transaction that is a mortgage loan, as defined in section 57 [definitions], the court may do one or more of the following:
 - (a) reopen the transaction and take an account between the supplier and the consumer or guarantor;
 - (b) despite any statement or settlement of account or any agreement purporting to close previous dealings and create a new obligation, reopen any account already taken and relieve the consumer from any obligation to pay the total cost of credit at a rate in excess of the prevailing prime rate;
 - (c) order the supplier to repay any excess that has been paid or allowed by the consumer or guarantor;
 - (d) set aside all or part of, or alter, any agreement made or security given in respect of the transaction and, if the supplier has parted with the security, order the supplier, to indemnify the consumer;
 - (e) suspend the rights and obligations of the parties to the transaction.

(Emphasis added)

- [169] At the time this consumer transaction was entered into, Ms. Siah had no reasonable probability of full payment of the total price on the basis that Harris asserts she was bound: i.e. whether or not Harris obtained financing. The transaction was unconscionable.
- [170] As such, the transaction is not binding on Ms. Siah.
- [171] Section 9(2) of the BPCPA puts the burden of proof on the supplier to show that the allegation of an unconscionable act or practice is untrue. Harris says that only a finding of unconscionability pursuant to the BPCPA could have resulted in a rescission of the contract. Remedies for deceptive practices include damages but no ability to make a declarative or injunctive order. Harris says that before a claim of unconscionability could arise, Ms. Siah would have had to suffer injury. Harris says that she has not suffered injury and would not have suffered any loss because Harris would not have enforced the agreement against her.
- [172] While Harris concedes that the "essence of unconscionability is a sophisticated party taking advantage of a vulnerable party by entering into a contract which is grossly unfair and in the sophisticated party's favour", it argues that the contract was unremarkable, contained terms and pricing advantageous to Ms. Siah and she did not suffer any loss, and therefore the contract was not unconscionable nor illegal
- [173] In response, the plaintiff contends that Harris has insufficiently disproven the allegation of unconscionability under the BPCPA. The plaintiff argues Harris' approach to negotiating the contract with Ms. Siah was markedly similar to *Skymark Finance Corporation v. Toraman* (2020), 2020 CanLII 51091 (ON SCSM), in which the seller's sales tactics were found to be unfair and unconscionable representations and practices. Techniques employed by both Harris and the sellers in *Skymark* included: exploiting the consumer's inability to understand the terms of the contract (amplified by illegibly small print); drawing up unreasonably inequitable transactional terms in favour of the seller (who was also the drafting party); and misleading the customer by creating a detrimental reliance on the statements of the seller.
- [174] The plaintiff argues that, motivated by their business model of getting the customer in the car, Harris made a flagrant omission knowing that a customer would believe that they did not have to purchase the vehicle if they were not approved for financing.
- [175] Harris attempts to argue that approved financing was not a true condition precedent and does not delay the binding nature of the underlying contract. Harris submits that financing conditions are not true conditions precedent but are promissory conditions. The contract remains enforceable until one or both of the parties elects to rescind it. Therefore, Harris submits, the contract was intact and enforceable at the time of the accident.
- [176] Harris says that the contract was neither void nor voidable despite Ms. Siah's lack of financing, as a condition precedent which relies on one or both of the parties to obtain financing to pay for the underlying goods in the contract does not render the underlying contract void. Harris refers to *Dynamic Transport Ltd. v. O.K. Detailing Ltd.*, 1978 CanLII

215 (SCC) as the "bedrock authority for the proposition that a condition precedent which requires the efforts of the parties does not delay the binding nature of the underlying contract".

- [177] Although obtaining the financing approval was unilaterally Harris', it purports that because it would have gone out of its way to secure the financing, Ms. Siah is therefore the owner of the Jeep. This speculation ignores the realities of Ms. Siah's financial situation. Harris' additional argument that Ms. Siah did not suffer and would not have suffered any loss because Harris had no intention of enforcing the MVPA is approbating and reprobating at the same time. Their position in this action depends on the court finding that the MVPA is a binding agreement. In doing so, they are enforcing the agreement, even though they may never seek payment of the purchase price from Ms. Siah. There are legal ramifications for Ms. Siah from this position.
- [178] In conclusion, I am not persuaded that Harris had any intention of entering a binding agreement when it and Ms. Siah signed the piece of paper that Mr. Harris believed to be necessary to permit her to leave the dealership driving the Jeep. It was in Harris' interest, not Ms. Siah's, to drive the Jeep off the lot that day. As described above, Harris wants people to drive their vehicles. They are more likely to purchase vehicles when they are driving those vehicles. Thus Mr. Harrison and Mr. Harris wanted Ms. Siah to leave driving the Jeep. Because there were no dealer plates available, Mr. Harris understood that an alternative was to have the "cash bill of sale" executed which would permit them to swap the plates from the trade-in to her vehicle and let her drive away for 10 days. That they were prepared to do either suggests that these were alternatives, that there was no intention that the MVPA constituted a binding agreement. Moreover, the MVPA was missing essential terms regarding financing of the purchase. Everyone in the transaction knew that Ms. Siah required financing. Obtaining the financing was in Harris' hands. Only Harris could negotiate to arrange terms for financing that would permit Ms. Siah to conclude the transaction. If there were a binding agreement created by the execution of the MVPA, that agreement, as asserted by Harris, would be an unconscionable transaction and invalid.
- [179] Next, Harris refers to the definition of "owner" under s. 86(3)(a) of the MVA and argues that Ms. Siah was a purchaser of a motor vehicle who "is in possession of the motor vehicle under a contract of conditional sale by which title to the motor vehicle remains in the seller, or the seller's assignee, until the purchaser takes title on full compliance with the contract". As I have found that the agreement was unconscionable, unenforceable and invalid, this argument is academic.
- [180] Harris acknowledges that conditional sales agreements do not exist in practice any longer. It argues however that s. 86 does not limit the meaning of contract of conditional sale to a conditional sales agreement. Harris also acknowledges that the contract does not specify what the purchaser must do to become in full compliance with the contract. It argues that the financing proceeds were going to be used to pay the purchase price and repay Harris for the cost of the lien on the Cruze. Harris had the right to retain title until that obligation

was met. On the day that Ms. Siah signed the loan documents, title would have been transferred to her via registration of the Jeep. Harris reserved title until the lien was paid. Harris says that these facts qualify as a contract of conditional sale and therefore Harris would not be an owner within s. 86(3).

[181] In response, the plaintiff submits that the purchase agreement cannot be characterized as a conditional sales agreement within the meaning of s. 86(3) but rather was an agreement to purchase with a condition precedent that had not been satisfied or waived at the time of the accident. Ms. Siah argues that there were no clear or specific conditions contemplated for completion of the sale, including, importantly, conditions relating to the financing of the Jeep. Ms. Siah could not agree on a price or payment terms, because she had not been privy to any of the discussions around financing between Harris and SDA at the time of the accident. Such conditions cannot be implied as they would contradict the express terms of the purchase agreement.

[182] I am satisfied that when Ms. Siah left with the Jeep on August 18, 2018 she and Harris believed that the Jeep belonged to Harris; that she would purchase the Jeep for the agreed price only if Harris were able to arrange financing acceptable to Ms. Siah. A conditional sales agreement would require terms as Ms. Siah argues which were not included in the MVPA that Ms. Siah signed.

[183] Given my conclusions, it is not strictly necessary for me to consider the common law indicia of ownership. However, because Harris points to the common-law meaning of "owner" in the context of the MVA in its defence, it may be helpful to demonstrate that Harris was indeed the owner of the Jeep at the time of the accident under the common law indicia of ownership as set out in *Singh v. Brar* (1998), 55 B.C.L.R. (3d) 82 (S.C.):

1. the Jeep was not registered, but Harris held title documents
2. the vehicle was not registered to Ms. Siah
3. no one applied for registration or insurance
4. the vehicle was not paid for by Siah
5. no one sought payout after the vehicle was damaged
6. both parties held keys
7. Ms. Siah and Ms. Sylvester normally drove the vehicle while they had access to it
8. The car was normally at the Siah/Sylvester residence while they had access to it.

[184] In summary, I am satisfied that Harris was an owner within s. 86 of the MVA.

[185] I turn to the other requirements of s. 86 of the MVA. Are the other requirements of s. 86 met with respect to vicarious liability against Harris? Was Harris in possession of the Jeep? Did Harris impliedly or expressly consent to Mr. Thomas driving the Jeep?

- [186] To determine liability pursuant to s. 86, I must look at the circumstances of Ms. Siah and Ms. Sylvester's acquisition of the Jeep leading to Mr. Thomas driving the Jeep on the day of the accident.
- [187] Ms. Sylvester and Ms. Siah were partners, living in a common-law relationship. They had been together some seven years at the time of the accident. Two of Ms. Sylvester's children lived with them. Ms. Sylvester's mother, Hellen Jack, lived nearby. Ms. Sylvester's other children, Wayne Sylvester and Justice Sylvester lived at Hellen Jack's house as did Justice's partner Leonard Paul and their baby. Anthony Thomas was a relative of the Jack family. He worked with Wayne Sylvester and was often at Hellen Jack's house, working outside with Wayne, fixing dirt bikes and tinkering on vehicles. He lived elsewhere with his own family.
- [188] Mr. Thomas frequently ran errands for the Jack/Sylvester family because he was one of the few members of the family with a valid driver's license. He would often drive a vehicle owned by one of the other members of the family such as Hellen Jack or Farrah Sylvester.
- v. Was Harris in possession of the Jeep?
- [189] Harris submits that the concept of possession under s. 86(1), i.e. "a motor vehicle that is in possession of its owner", is broader than simply having direct physical control of the vehicle at any given moment. Harris says it is likely that provided the owner has the right to control who drives a vehicle and controls its keys, the owner is in possession.
- [190] Harris points to the dictionary definition of possession: the state of having, owning or controlling something.
- [191] I agree with Harris' position on this point. To limit the definition to owners with physical possession would severely limit the application of s. 86. It would not apply to third parties driving the vehicle with the implied consent of the owner. Thus where an owner expressly gives consent to driver A, who drives off and later gives consent to driver B to drive the vehicle, the issue which arises is whether the owner impliedly consented to driver B driving the vehicle. If possession means physical possession when driver B started driving, implied consent would never arise because the owner did not have physical possession at the time that driver B drove the vehicle.
- [192] Moreover, if possession was limited to physical possession, there would be no need for the limiting definition of owner in s. 86(3)(b) because a vehicle in the physical possession of the purchaser under a contract of conditional sale would not be in the physical possession of the seller. To limit possession to physical possession for the purposes of s. 86 appears to run counter to the legislative intent of the MVA.
- [193] In my view Harris was within the wider definition of possession. Harris was in physical possession of the Jeep when it handed the Jeep to Ms. Siah. Harris retained a set of keys for the vehicle and knew where it was normally to be found. Harris could easily have picked up the Jeep if it wanted to. Harris was in communication with Ms. Siah over the days when she and Ms. Sylvester were driving the Jeep. Ms. Siah and Ms. Sylvester believed that Harris

owned the Jeep and would follow Harris' direction, for example, returning the Jeep if asked. They would have also followed Harris' directions with respect to who could drive the Jeep. Harris was the owner and had some control over the Jeep.

[194] I find that Harris was in possession within s. 86 of the MVA.

vi. Did Harris consent to Anthony Thomas driving the Jeep?

[195] Section 86 makes an owner vicariously liable when the car is driven by another if the owner expressly or implicitly consented to the vehicle being driven by another.

[196] There is no suggestion that Harris expressly consented to Mr. Thomas driving the vehicle.

[197] The BCCA considered implicit consent in *Godsman v. Peck* (1997), 29 B.C.L.R. (3d) 37, 1997 CanLII 4030 and said:

[26] The appropriate test that must be applied whenever the issue of implied consent is to be considered pursuant to s. 79(1) of the Motor Vehicle Act is that approved by the Supreme Court of Canada in *Palsky v. Humphrey*, *supra*, at 662:

It seems to me that consent can be implied because it is clear that had it been sought it would have been granted as a matter of course.

[27] In concluding whether or not the test is met in the circumstances of a case of that sort (where the vehicle was driven by a third party), an important and relevant consideration is whether or not the evidence supports the conclusion that, at the time the motor vehicle was loaned to the original driver, the owner granted possession of it under circumstances that clearly show that it was acquired with both the willingness and the expectation on the owner's part that it would be driven by a third person. I agree with Verchere J. in *Hartley v. Saunders*, *supra*, at 469, where he says:

On the question of implied consent to some person other than the actual borrower operating a motor vehicle, the owner's expectation and willingness to operation by another are material factors to be considered.

[28] There should be evidence to show, or support the inference, that the owner turned his mind to the likelihood of that further transfer of possession. If there is no such evidence, a court finding liability on the owner's part is not implying consent so much as deeming it. One of the commendable goals of s 79(1) may be to induce owners of motor vehicles to exercise discretion when transferring control of them to others, but to impose liability in a case where such a transfer was not within the contemplation of the owner would do nothing to further that goal, and simply goes too far.

[29] The concept of consent, even though it be implied, is not satisfied by general evidence of willingness that another may drive. Willingness is an attitude that must be crystallized by an expectation that another will drive. For general willingness to amount to consent, certain specific circumstances must be within the owner's contemplation. These are the

circumstances expected to arise in which possession may be transferred to a third person, and in which the owner would be willing for such a transfer to occur. This willingness and expectation must be in the owner's mind at the time when the vehicle is transferred to the original borrower.

- [30] The court must then go on to examine the circumstances in which the vehicle was actually passed on to the third party, and relate those circumstances back to the owner's state of mind at the time he gave up possession. The question that must be answered is whether the circumstances in which the vehicle was actually loaned to the third party were included within the range of circumstances referred to in the paragraph above, and to which the owner's expectation and willingness applied at the time he initially gave possession of the vehicle to the first taker. If it has been determined that it would not be in regard to everyone and under every circumstance that one could say "consent would be granted as a matter of course", would it have been granted in regard to a person with these characteristics, and under these circumstances? Alexander may have expected, at the time he gave the motorcycle into Godsman's care, that Godsman might have occasion to allow another qualified, experienced and competent rider to drive the vehicle, in reasonably safe circumstances, and may have been willing for this to occur. Would he have expected and been willing, though, that Godsman might lend it to Peck, in the way that he did? The mere possibility of such expectation and willingness is not enough. Such a finding must be supported by the evidence.

(Emphasis added)

vii. Did Harris expect that a third party would drive the vehicle?

[198] I am satisfied that Harris expected others beyond Ms. Siah to drive the vehicle.

[199] Harris is in the business of selling cars. Salespeople are paid on a commission basis: the more cars they sell, the more they make. Part of the business model is to encourage a potential customer to enter the car, take it for a test drive. Harris wants people to drive their cars. It is in their interest to permit a prospective customer to take a car for an extended test drive, leaving the dealership with the vehicle overnight. The dealership places no limits on who may drive the vehicle in these circumstances.

[200] The plaintiff read in from the discovery of Brittani Ison, who was examined as Harris' representative. She said that in Ms. Siah's case (where the purchaser takes the vehicle pending financing) the dealership expected that she would drive the vehicle as would her family members and acquaintances. It might be a friend who wanted to see how the vehicle drove. Ms. Ison believed that the Jeep was covered by Ms. Siah's insurance when it left with the plates from her trade in. The insurance issue is not before me. Ms. Ison may be mistaken as to whether Ms. Siah's insurance covered the Jeep but that does not affect Harris' expectation that others would drive the Jeep.

[201] Glen Shorter, an owner of Harris testified that in circumstances such as Ms. Siah's where a "bill of sale" has been signed, but financing has not yet been finalized, the dealership is ok with whomever driving the car. The spouse could lend it to their cousin to go get milk. The dealership would be fine with that. It would be possible to say to Ms. Siah "financing is pending, please don't let anyone else drive the car" but they don't because they're ok with whomever driving the car.

[202] I am satisfied from this evidence that Harris expected that others such as family members and friends would drive the Jeep.

viii. Did Harris' expectation extend to the circumstances in which Thomas acquired the vehicle?

[203] I am also satisfied that Mr. Thomas driving the vehicle fell within the circumstances contemplated by Harris in which a third party would drive the vehicle. Had Ms. Siah asked Harris when she acquired the Jeep or when Mr. Thomas was about to drive the Jeep whether a family member who regularly drove the family vehicles to run errands, who was 25 years old, an experienced driver with a full driver's licence, could drive the Jeep, Harris would have said "of course".

[204] In my view, those are the circumstances that are to be considered in determining whether Harris gave implied consent to Mr. Thomas driving the Jeep.

[205] Harris says that it would not have agreed to a driver who was fatigued or had consumed Xanax or methamphetamine driving the car. However these are circumstances that were learned after the accident. This is akin to the argument made in *Vancouver Motors U-Drive Ltd. v. Walker*, [1942] S.C.R. 391, 1942 CanLII 210 (SCC) where possession of the vehicle was induced by false statements. The owner argued that had it known the statements were false, it would not have given possession of the car. The Supreme Court rejected the argument. Harris says had it known of factors not known by those handing over the keys, it would never have given consent. This is after the fact reasoning.

[206] Ms. Sylvester was not aware of this information when she asked Mr. Paul to ask Mr. Thomas to drive the Jeep. There is no suggestion that Mr. Paul knew or believed Mr. Thomas to be impaired. There is no evidence that Mr. Thomas appeared to be impaired. Ms. Sylvester herself would not have imparted that information to Harris if seeking Harris' consent because she did not know of it. When she asked Mr. Thomas to drive the vehicle she clearly thought he was competent to do so. She was asking him to drive her son. Harris cannot know more than those who delivered the keys to Mr. Thomas.

[207] Nor are the circumstances such that Ms. Sylvester should have made inquiry of Mr. Thomas. Mr. Thomas drove Ms. Sylvester's son Wayne to and from work daily as well as regularly driving other family member's vehicles. He drove to and from work that day. Nothing in the circumstances would alert Ms. Sylvester to a potential problem if Mr. Thomas drove the vehicle.

- [208] Although Ms. Siah said that Mr. Thomas was a known drug user, I do not accept this evidence. Ms. Sylvester and her family would not have permitted Mr. Thomas to drive their vehicles and their family members to ride with him if he were a notorious drug user, such that their vehicles and family members would be at risk. I accept Ms. Sylvester's evidence that she did not know about his drug use on the day of the accident, or otherwise. There is no evidence that Mr. Thomas appeared intoxicated before driving the Jeep.
- [209] The thrust of Harris' argument is that Mr. Thomas was intoxicated by drugs and so fatigued that it was obvious that he should not be driving. Had this been brought to Harris' attention, Harris would not have consented to Mr. Thomas driving the Jeep. Again, it is my view that s. 86 does not extend to circumstances unknown by those giving the keys to Mr. Thomas.
- [210] In any event, I am not persuaded that it was apparent to anyone at the Jack residence, including Mr. Thomas, that he should not be driving, that his ability to drive was impaired.
- [211] I do not have evidence of the effect of the drugs he consumed when he received the keys to the Jeep. One may be a sedative, the other a stimulant, but I have no evidence on this point. I do not know what effect they may have in combination. They may have affected him, but I cannot say that Mr. Thomas was impaired by consumption of drugs at the time he received the keys.
- [212] Mr. Thomas impressed me as a witness. He gave his evidence in a straightforward manner and was not defensive. In my view he is not a cavalier or reckless person.
- [213] He said that in the night before the accident he had been at the hospital, visiting his father who was very ill. He slept for a maximum of three hours in his car outside the hospital. He returned home and drank four beers between 1:00 and 3:00 am and did not get any more sleep that night.
- [214] He went to work on Friday August 27. He picked up Wayne from the Jack house. They started work at 7:00 am and finished at 3:00 pm. He and Wayne each consumed a Xanax pill at the band property after work. Mr. Thomas also consumed some methamphetamine, smoking one "hit" from a pipe, upon arriving at the Jack residence, around 3:15 pm.
- [215] Leonard Paul came out of the house shortly after 3:30 pm asking if anyone could go to pick up Allison, who was sleeping at the Sylvester residence and bring him for dinner. Mr. Thomas was the only one with a licence so he volunteered to go. He was willing to take his own car, but Mr. Paul brought out the keys for the Jeep and said that Ms. Sylvester had sent these, so he took the Jeep. He believed that the Jeep belonged to Ms. Sylvester because Wayne had said that his mother was getting a new vehicle. The drive would take about ten minutes.

- [216] There was some confusion arising primarily from statements to police about whether Mr. Thomas had been asked to move the Jeep and take Ms. Jack's van or whether he had been willing to drive his own vehicle. Little turns on it. After hearing all of the evidence, I accept Mr. Thomas's evidence on these points.
- [217] He had a very minor rear-end accident en route. As I understand, no damage was done. Mr. Thomas continued to the Sylvester residence. Allison wanted to keep sleeping. Mr. Thomas felt tired himself and considered not driving back to the Jack residence. At trial he testified that he was totally fine when he left the Sylvester residence. He was asked whether the drugs and fatigue affected his ability to drive and said it was possible, but he operated a vehicle everyday. In cross-examination he was pressed with respect to his level of fatigue and said that he rarely gets much sleep, normally around five hours. From his evidence I am satisfied that Mr. Thomas turned his mind to his ability to drive before leaving the Sylvester residence and concluded that he was able to drive.
- [218] In short, there is no evidence that Mr. Thomas appeared impaired and the circumstances did not lead anyone to conclude that Mr. Thomas was not able to drive when he received keys to the Jeep.
- [219] If the 'circumstances of the transfer' are as broad as Harris suggests, including information learned after the accident, it would dramatically narrow implied consent within s. 86. As the plaintiff argues, a new mother who borrowed a car to drive to get milk would be excluded because the owner didn't know she hadn't slept the night before. A driver with a fear of bees would be excluded if one flew in the window of the car, causing the driver to react. A person driving with their small lap dog would be excluded if the lap dog jumped in the driver's lap.
- [220] I am satisfied that if asked for its consent, given the knowledge of Ms. Sylvester when she conveyed the keys to Mr. Thomas, Harris would have said "of course". Harris impliedly consented to Mr. Thomas driving the Jeep.
- b. Liability of Ms. Siah: s. 86 of the MVA
- [221] I am satisfied that Ms. Siah did not expressly or impliedly consent to Mr. Thomas driving the Jeep, and therefore is not vicariously liable. She was asleep when the keys were given to Mr. Thomas. There is no suggestion that she expressly agreed to him driving the Jeep.
- [222] Various witnesses testified that Ms. Siah did not like anyone other than Ms. Sylvester driving her vehicle. I accept this evidence. There were very few occasions when she let someone else drive her vehicle.
- [223] I do not accept Ms. Siah's evidence that she would never have let Mr. Thomas drive or that she expressly told Ms. Sylvester that only she and Ms. Sylvester could drive the vehicle. However, there is no evidence that she was willing and expected that anyone other than Ms. Sylvester would drive the Jeep.

[224] That Ms. Sylvester sometimes let others drive Ms. Siah's vehicles, despite Ms. Siah's views, does not mean the Ms. Siah expected and was willing that others would drive the Jeep.

[225] Parenthetically, that Ms. Siah didn't like others driving her vehicle and may not have consented to Mr. Thomas driving does not affect the consent of Harris. As I have found, Harris owned the Jeep at the time and if asked if Thomas could drive, would have said "of course".

5. Contributory Negligence

[226] Although contributory negligence is pleaded there is no evidence of contributory negligence by Ms. Ward.

6. Negligence of Ms. Sylvester

[227] Harris argues that Ms. Sylvester was negligent in providing the keys and asking Mr. Thomas to drive the Jeep. Ms. Sylvester argues that there is no legal basis for finding negligence, that she did not owe a duty of care to Harris. There is no basis in law, or on the facts I have found to find Ms. Sylvester liable.

Conclusion

[228] I am satisfied that Mr. Thomas is liable for the damage suffered in this case. Harris is vicariously liable pursuant to s. 86 of the MVA. Ms. Siah is not liable.

[229] Mr. Thomas is liable to Harris, who has sought contribution or indemnity pursuant to s. 4(2) (b) of the Negligence Act, R.S.B.C. 1996, c. 333.

[230] Ms. Ward is not contributorily negligent.

[231] I award:

1. Non-pecuniary damages of \$414,000
2. Past loss of income of \$195,600
3. Damages for loss of future earning capacity \$550,000
4. Damages for cost of future care as set out above, with further submissions if necessary
5. Special damages of \$333,235.55
6. Costs in this case are complicated by the positions advanced by and between the defendants. If the parties are not able to agree, they may make submissions.

"B. Brown J."

[1] Dr. Purtzki's opinion was obtained by Ms. Siah, but led by the plaintiff. The opinion is relied upon by other experts. None of the parties challenged the opinion.

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