THE SUPREME COURT OF BRITISH COLUMBIA

Citation: ***Aberdeen v. Township of Langley, Zanatta, Cassels,*** 2007 BCSC 993

Date: 20070706
Docket: M024554
Registry: Vancouver

Between:

James Aberdeen

Plaintiff

And:

Township of Langley, Joseph Zanatta, Ann Cassels and Ann Cassels d.b.a. Nathan Creek Nursey

Defendants

Before: The Honourable Mr. Justice Groves

Reasons for Judgment

Counsel for the Plaintiff:	M.J. Slater, Q.C. A.C.R. Parsons
Counsel for the Defendants Zanatta, Cassels and Nathan Creek Nursey::	R.F. Hungerford M. Giles
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Date and Place of Trial/Hearing:	October 10-13, 18-20, 23-27, 30-31, 2006, November 1-3, 6-10, 14-17, 20, 2006 December 7-8, 2006 and January 15-17, 22, 2007 Vancouver, B.C.

1. Introduction

[1] On the morning of June 29, 2002, the plaintiff James Aberdeen ("Aberdeen"), an accomplished triathlete and Ironman competitor, aged 50, began preparations for a lengthy cycle ride as part of his ongoing Ironman training. He was set to meet up with a friend, Mike

McGee ("McGee"), for this ride. Over the course of the day Aberdeen and McGee traveled throughout areas of the Lower Mainland familiar to them. Towards the end of their ride, they were cycling in the Township of Langley on a road maintained by Langley, being 272nd Street. Aberdeen was aware that around the 6000 block of 272nd Street, the road became steep and windy and potentially a challenge. Prior to encountering the downward winding slope of 272nd Street, Aberdeen conversed with McGee and it was agreed that Aberdeen would take the lead.

[2] What happened in the steep and windy portion of the 6400 block of 272nd Street is one of the significant issues before the court. It is Aberdeen's evidence that a cube van negligently driven by Joseph Zanatta ("Zanatta") and owned by Anne Cassels ("Cassels") (collectively the "Zanatta Defendants"), crossed over the yellow centerline of the road, causing Aberdeen to take evasive action, and swing wide around a curve. He then encountered some gravel on the roadside, and without time to brake, he was propelled against a metal guard rail.

[3] Aberdeen also alleges negligence on behalf of the Township of Langley ("Langley") based on the fact that Langley constructed a roadside barrier on 272nd Street in July 1999 and in doing so, created a gap between the metal barrier initially encountered by Aberdeen and a cement no-post barrier which continued on the downward slope of 272nd Street once the metal guard rail ended. Aberdeen was directed along the metal guard rail, through the gap, and over a bank.

[4] The entire incident took a matter of seconds. The consequences however are tragic and life-altering for Aberdeen. There is no dispute that as a result of the accident, Aberdeen suffered spinal cord injury in his neck at the C-6/C-7 level. He suffered what is called an incomplete ASIA B spinal cord injury. He has almost no sensation from the chest down and virtually no use of his body from the chest down. Aberdeen does not have use of his abdominal muscles to hold himself up. Of the three groups of muscles used to breathe, the intercostal, abdominal, and diaphragm muscles, Aberdeen has use of only his diaphragm muscles. Aberdeen does have use of his arms. Given the high level of his spinal cord injury, he has been described as a quadriplegic masquerading as a paraplegic. Although he has almost no sensation from the chest down, Aberdeen falls into the minority of spinal injured persons who suffer relentless and chronic neurogenic or neuropathic pain.

[5] There is some dispute as to whether or not Aberdeen has suffered a debilitating mild traumatic brain injury as a result of the accident. There is little doubt he suffered head trauma. The question is really whether or not he has recovered sufficiently from the brain trauma so as to not affect his ongoing cognitive ability or whether there are residual effects of the brain injury which affect his ability to function.

2. Liability

(i) Plaintiff's Evidence

[6] Aberdeen gave evidence about what happened at the accident. He recalled that he was towards the end of a lengthy cycle ride, which he referred to as slow long distance training, on the date of the accident. Prior to descending the hill on 272nd Street, he had a conversation, while riding with McGee, about the danger posed by the hill and the need for caution. It was agreed Aberdeen would lead and they would approach the hill single file. McGee testified that he followed Aberdeen about 10-15 metres behind, at a speed under the posted regulatory speed limit.

[7] Both McGee and Aberdeen testified to what was identified as the Zanatta's vehicle, being a large cube van, beginning to come into the lane occupied by Aberdeen and McGee. Aberdeen testified to the necessity of taking evasive action. He testified that the cube van began to cross over the yellow line around a very tight curve. His evasive action was to swing wide to the right hand side of the lane in which he was traveling. Because of the need to swing wide to avoid the perceived danger of the cube van, the curvature of the road, a small amount of gravel on the road, and the shortness of time, he could not effectively apply his brakes on the

pavement. Aberdeen was within the gravel almost immediately and within a split second up against the metal guard rail.

[8] McGee confirms Aberdeen's testimony as to what happened in the accident. McGee was able to confirm that he saw Aberdeen against the guard rail and then saw him disappear down the bank, eventually ending up on the rocky terrain below, having essentially been propelled down the embankment. He was found by McGee seriously injured and in a state of semi-consciousness.

[9] The evidence of McGee, and indirectly of Aberdeen, was challenged by he defendants in regards to a statement given by McGee to Constable Carlson ("Carlson") immediately after the accident. In that statement, McGee does not mention the cube van. When cross examined on this point, McGee emphasized that the cube van was over the center line but he did not know how far — the best that he could say was that he saw out of the corner of his eye. To challenge the suggestion of recent concoction, the evidence of Ron Rose, a friend of the plaintiff and McGee, was read in. This evidence is that Ron Rose saw McGee at the hospital on the date of the accident and McGee advised Rose that as he and Aberdeen were going down the hill a vehicle coming up the hill was coming wide on the corner, and that in reaction to this, Aberdeen swung wide, got into the gravel, went along the guard rail and down the bank.

[10] Additionally, and significantly, there is the evidence of the ambulance attendant Keith Parks ("Parks"). Parks was the Airvac ambulance attendant who arrived by helicopter near the accident scene on the 29th of June 2002. He described speaking to Aberdeen through the process of getting him into the Airvac ambulance and off to the hospital. Parks indicated that Aberdeen advised him that a vehicle was coming into his lane and that he went into the gravel to avoid an accident.

[11] In regards to the guard rail, the evidence is clear that the metal guard rail which Aberdeen encountered was a long established guard rail. The evidence is also clear that the defendant Langley installed a cement no-post barrier along part of the road in question during a reconstruction of the road in July of 1999, which replaced an earlier metal guard rail. The new cement no-post barrier and the remaining metal guard rail do not connect. There is a gap of anywhere between 12"-18" between where the cement no-post barrier stops and the metal guard rail begins, parallel to the driven roadway. This distance or gap, it is suggested by McGee, is what Aberdeen was propelled through, down a steep bank. The guard rails were intended to prevent vehicle access to this steep bank.

[12] In regards to the guard rail configuration, Jim Liseman ("Liseman"), an expert in highway safety engineering, testified on behalf of the plaintiff. Liseman described the guard rail in question, the cement no-post and metal guard rail configuration with a gap between the two, as a serious problem. He described the configuration as being particularly dangerous in light of what guard rails are generally supposed to do, which is to move the traffic along the road in a safe fashion, in a guided way, with the potential to slow the vehicle down. The problem in this configuration, according to Liseman, is that the guard rail did its job, in that the metal guard rail moved Aberdeen along its surface avoiding the hazard, the cliff, on the other side. However, rather than keeping Aberdeen on the road, as clearly would have been the intention of a guard rail, the existence of the gap propelled Aberdeen down the gap and into the gulley, projecting him into the hazard the guard rails were intended to prevent.

(ii) Zanatta Defendant's Evidence

[13] The evidence of the Zanatta Defendants in regards to the circumstances of the accident consisted of Zanatta, Cassels, and Bradley Williams ("Williams"), the son-in-law of Cassels. Cassels testified that she followed Zanatta up to 272nd Street, from property she owned at the base of the hill on the date in question. She testified that the cube van driven by Zanatta was loaded full of nursery items for a flea market in Cloverdale the next day. She described the cube van as incapable of going a fast speed. She described the Zanatta van as coming to a

stop close to the inside fog line of the road, prior to the curve in the hill. This testimony suggests that the Zanatta vehicle could not have crossed the center line.

[14] Zanatta testified in a similar fashion, that he was driving approximately 20 kmph. He described a bike flying through the air and disappearing over the edge of the road. His evidence was that he did not come close to crossing the center line of the road, that he simply came upon the accident scene. During his examination, Zanatta was confronted with a number of contradictory statements made by him since the accident. Zanatta gave contradictory evidence as to which cyclist came down the hill first, suggesting at discovery that it was in fact the second cyclist that went over the bank. In response to this inconsistency, Zanatta confessed that it was after reading transcripts and hearing from others that he changed his evidence as to who was first down the hill. Additionally, Zanatta gave contradictory evidence as to the speeds he was traveling. At discovery he indicated that it was between 3-5 kmph and at trial it was 20 kmph, although in fairness he explained this discrepancy as simple lack of knowledge as to what an effective speed was.

[15] Both Zanatta and Cassels were also challenged significantly about any conversation with Carlson, who took the statement from McGee. Zanatta said that he approached Carlson. Carlson does not recall being approached. Carlson testified that his practice was to ask anyone in the surrounding area about their knowledge of the accident. Cassels and Zanatta were also questioned about their leaving the scene of the accident and not identifying themselves to the police attending there, indicating that they had witnessed the accident.

[16] As noted, Williams also testified on behalf of the defendant as to the circumstances of the accident. Williams testified that McGee said to Aberdeen, as he laid on the rocks at the base of the hills, words to the effect: “don’t worry about it, you were going too fast, you missed the corner.” Williams was aware that Cassels and Zanatta were at the scene of the accident but admitted not telling Carlson or other police officers about Zanatta and Cassels. He also did not tell the police officer about the alleged conversation between McGee and Aberdeen.

(iii) Langley’s Evidence

[17] The defendant Langley called a number of its employees and former employees in regards to two issues, the issue of the guard rail installation and alignment and the issue of gravel on the roadway.

[18] In regards to their roadway gravel, it was the evidence of Terry Veer (“Veer”) at an examination for discovery that the gravel along the roadway through which Aberdeen travelled appeared from the photographs presented at the discovery to be the remainders of winter sand, placed on the road by Langley as part of ice-related winter road maintenance. At trial, Veer resiled from that testimony, indicating that upon reflection and discussion with those better in the know, the gravel along the roadway appears to be too large to constitute the winter sand used for de-icing purposes. Veer’s explanation at trial for the existence of the gravel appears to be normal gravel accumulation on the roadway.

[19] In regards to the gap in the guard rails, the various witnesses for Langley confirmed that the gap was in fact created by the crew of Langley during their reconstruction in 1999 of 272nd Street. The evidence for Langley also confirms that since the accident, the cement no-post barrier has been extended so that it forms a complete barrier in the affected area and there is no reliance on the metal guard rail.

[20] The reconstruction of 272nd Street in 1999 was undertaken because a leaking culvert had permitted water to leak into the road-base, causing it to become unstable such that portions of the bank had broken away. It was decided not to use more standard concrete lock block retaining wall because an engineering report stated that underlying soils in the area were too unstable to withstand extreme weight. A portion of the existing metal guard rail was removed to permit the bank stabilization project to proceed and, because of the method used to stabilize the bank, it was not possible to sink posts a sufficient distance into the ground to permit the metal guardrail to be replaced. Therefore, the cement no-post barrier was chosen instead. The

decision was made not to extend the no-post barrier further because of concerns about the excess weight of the barriers on the bank when a detailed geotechnical report had not been prepared for the portions of the hillside extending beyond the project area. Additionally, due to space constraints, it was not possible to align the new barrier with the existing metal guardrail. These decisions were made by the project supervisor, his supervisor, and the construction foreman.

[21] The witnesses for Langley also confirmed that the installation of a complete cement guard rail would have been a relatively nominal cost to Langley. They did not dispute the suggestion of approximately $1500 for such a cost in 1999 and Veer confirmed that for that modest amount of money for road safety or repair considerations, money is regularly available within the budget.

[22] Much was made in cross examination of some potential evidence in Langley's control going missing. Part of the guard rail against which Aberdeen came into contact was removed and is missing. The sign which indicated that 272nd Street was a designated cycle route has gone missing and has not been replaced. The road maintenance records of the traffic sweeper for the area were destroyed in about 2005 or early 2006. Nothing in my view turns on these concerns.

(iv) Contributory Negligence

[23] The defendants allege that the plaintiff was contributorily negligent in this case. They rely on the belief that Aberdeen was travelling above the advisory speed limit of 30 kmph, and on the presumption that a driver is negligent if his or her vehicle leaves the road (see *e.g.* ***Redlack v. Vekved*** (1996), 82 B.C.A.C. 313 at ¶ 17), to establish that the plaintiff was negligent in this case.

[24] In this case, there is some evidence to suggest that the plaintiff was traveling above the posted advisory speed. Specifically, McGee's evidence was that he was going 40 kmph coming into the curve, and that the plaintiff would have been traveling at approximately the same speed. In his original statement to Constable Carlson, he estimated their speed as being 30 miles per hour (which converts to 48 kmph). However, all of these speeds are estimates only, as neither Aberdeen nor McGee could recall looking at their speed at the relevant time.

[25] This evidence falls short of establishing that the plaintiff was traveling above the posted speed limit of 50 kmph at the time of the accident. The defendants agreed that the plaintiff could not receive a ticket for traveling above the advisory speed limit only, although he could receive a ticket for traveling above the posted maximum speed.

(v) Conclusions on Liability – Zanatta Defendants

[26] Having considered all of the evidence on the issue of the liability of Zanatta and the Zanatta Defendants for Zanatta's driving on the 29th of June 2002, I have concluded that Zanatta crossed the yellow center line of 272nd Street and in doing so, created a hazard which caused Aberdeen to take the evasive action he did, which resulted in the accident and Aberdeen's injuries. Zanatta as a driver on the road had a duty of care to others on the road, and this included a duty not to permit his vehicle to stray into the path of oncoming traffic so as to present a hazard to others. Zanatta breached that duty of care to Aberdeen, a user of the road, and as a result of that breach Aberdeen suffered injuries.

[27] I preferred the evidence of the plaintiff Aberdeen and McGee over that of the Zanatta Defendants and Williams. Despite the difficulties with McGee's evidence in terms of his statement to Carlson, I accept that his failure to advise Carlson about the Zanatta vehicle crossing the road was due to the stress of this circumstances and his overwhelming concern for his friend Aberdeen. After leaving the police officer's vehicle, McGee rode his bike home and attended at the hospital to see about Aberdeen's condition. Once there he encountered

Aberdeen's friend, Ron Rose. Ron Rose's evidence is that McGee at that point advised of the van being the initiator of the accident. Additionally, Aberdeen in potentially a slight coma, and in circumstances at the date of trial he could not recall, advised the ambulance attendant Parks, according to the evidence of Parks, that a vehicle coming into his lane was the source of the accident and that he went into the gravel to avoid the accident.

[28] Zanatta's testimony is ripe with inconsistencies and has clearly changed over time as a result of external influences. No realistic explanation is provided as to why Zanatta and Cassels, who say they simply witnessed the accident, did not stay to advise authority. They did not. Despite the significance of this accident and the immediate and apparent serious harm to Aberdeen, Zanatta and Cassels did not remain at the scene of the accident long enough to give their names to the police in attendance. Williams, who was notified of the accident by Cassels' return to the nursery, did not give the names of Cassels and Zanatta to the RCMP investigator. Cassels and Zanatta both noted in their testimony that when they returned home, an RCMP police officer was present in their driveway. Zanatta says that he approached the RCMP officer but the RCMP officer denies such an approach.

[29] Additionally, both Zanatta and Cassels struggled with their evidence. They at times seemed confused, and unable to recall details. In contrast, Aberdeen was clear and direct. McGee, despite considerable pointed cross examinations, was a straightforward believable witness.

[30] I have concluded, after considering all of the evidence, that the balance of probabilities lies on this point in the plaintiff's favour. I have concluded that the Zanatta vehicle in approaching the sharp curve began to cross over into the traffic lane for oncoming traffic. The effect of this was to cause Aberdeen, who was approaching a tight corner, to swerve away from a vehicle he anticipated, rationally, would be coming into his lane. In doing so, he swerved sufficiently wide around the corner and, before he could brake, encountered gravel, the gravel lessening the effect of any braking. He encountered the metal guard rail and was directed along it. The metal guard rail, as Liseman noted, did what it was supposed to do—it propelled Aberdeen along. Unfortunately, due to the configuration of the guard rails, Aberdeen was propelled through the gap and down the cliff that the guard rail placement was in theory designed to barricade from those using the road.

(vi) Conclusions on Liability – Langley

[31] Langley concedes that they operate and maintain 272nd Street. Langley concedes that in 1999, after reconstruction of the road, the guard rail configuration that existed at the time of the accident was put in place by the employees of Langley. This guard rail configuration resulted in the removal of what was a continuous metal guard rail prior to the reconstruction of the road, and the replacement in the place of the metal guard rail removed, of a cement no-post barrier. The cement no-post barrier did not connect with the metal guard rail barrier. The configuration of the two guard rails put in place by the employees of Langley created a gap. It is through this gap that I have found Aberdeen was propelled and as a result, Aberdeen was injured.

[32] Langley also concedes that 272nd Street was a road which Langley had dedicated as a designated bicycle route, although it says that the road was not accorded any special treatment by reason of this designation.

[33] Langley submitted with respect to the duty of care owed by a municipality to users of the road that the appropriate standard of care is as stated in ***Fafard v. City of Quebec*** (1918), 55 S.C.R. 615, 39 D.L.R. 717 at 717:

> A municipal corporation is not an insurer of travellers using its streets; its duty is to use reasonable care to keep its streets in a reasonably safe condition for ordinary travel by persons exercising ordinary care for their own safety.

[34] This same passage was cited by Owen-Flood J. in the trial decision in ***Ryan v. Victoria (City)*** (1994), 21 M.P.L.R. (2d) 148 (B.C.S.C.).

[35] Langley submits that the standard of care for a municipality in respect of liability will often be tempered by the availability of resources for any given activity, and that its barrier configuration represented an acceptable compromise among budgetary and environmental constraints. Langley also emphasized that 272nd Street is a relatively low volume road. However, Langley does not go so far as to argue that its decision in relation to the barrier configuration was a policy decision, and thereby immune from tort liability. Langley simply seems to be contending that the standard of care expected of it in these circumstances should be relatively low, given the context. Langley further argues that the barriers were constructed to protect cars, not bicycles, that to the extent that a hazard was present, it was adequately marked, and that there had been no complaints or accidents due to the barrier configuration, prior to Aberdeen's accident.

[36] The plaintiff, whose submissions on this issue are adopted by the Zanatta Defendants, counters that Langley had a duty to design and maintain its roadways such that they were reasonably safe for the purpose of travel, relying on the formulation of the duty of care of a municipality set out by Scarth J. in ***Rimmer (Guardian ad litem of) v. Langley (Township)*** (2006), 21 M.P.L.R. (4th) 288, 2006 BCSC 703 at ¶ 192:

> The duty of care imposed upon the Township was to make the roadway reasonably safe for the purposes of travel: ***Raymond v. Bosanquet [Township]*** (1919), 59 S.C.R. 452. This duty of care ordinarily extends to reasonable maintenance and includes the duty to take reasonable steps to prevent injury to users of the roads by reason of hazardous conditions: ***Just v. British Columbia***, [1989] 2 S.C.R. 1228; ***Just v. British Columbia***, [1991] B.C.J. No. 3328 (S.C.).

The plaintiff submits that Langley was negligent both in creating the gap, and in failing to recognize it during its inspections between July 1999 and June 2002. The plaintiff cites the case of ***English v. Chilliwack (District Municipality)*** (1985), 62 B.C.L.R. 81 (S.C.), in which the municipality was held 100% liable for injuries caused to a cyclist by reason of its inappropriate repair of a sewer grate that it had installed such that it protruded above the road surface. Spencer J. held that it was reasonably foreseeable that if the repair to the sewer grate failed, it would present a hazard to cyclists, and that this was an operational decision rather than a policy decision—the district, having embarked upon an activity, did it carelessly.

[37] The plaintiff points to the evidence of two expert witnesses to the effect that gaps such as the one created and left unrepaired on 272nd Street are considered to be unsafe, and should have been remedied.

[38] I have concluded that Langley owes a duty of care to those who travel on its roads to ensure that the roadways are reasonably safe for the purposes of travel. I have concluded that Langley breached its duty of care to Aberdeen, a reasonably foreseeable user of the road operating a bicycle on a dedicated bicycle route. As a result of the breach of the duty of care, Aberdeen was injured. I note that the guard rail configuration was a hazard put in place by Langley. It is something that with a relatively modest cost, approximately $1500 expended in July 1999, could have been avoided. Funds would have been available to eliminate this hazard, had it been properly identified as such. Even balancing environmental and financial constraints, Langley should not have left what two witnesses immediately described as an unsafe barrier configuration when the cost to remedy the situation was so low.

[39] In my view, Langley cannot rely on the line of cases which limit a municipal government's liability for negligence when they have a policy in place to regularly monitor their roads or facilities they maintain to check for hazards. Those lines of cases, for the most part, deal with hazards created by others or by weather or by wear and tear. Those cases do not apply in a circumstance where a municipality has actually created the hazard as is the case here. Further, Langley has not directly sought to argue that its decision as to how to place the concrete no-post barrier was a policy decision that should be exempt from tortious liability.

[40] As a result, I have concluded that Langley is liable to Aberdeen for the injuries he suffered.

[41] The presence of gravel on the roadway was not proven on the evidence to have materially contributed to Aberdeen's accident. While Aberdeen may have skidded slightly on the gravel, the outcome of the accident would probably not have been any different had the roadway been free of gravel.

(vii) Conclusions on Liability – Contributory Negligence

[42] I have also concluded that the suggestion of contributory negligence against Aberdeen must fail. There is no evidence that Aberdeen was driving above the posted speed limit. There is limited evidence that he may have been driving his bicycle above the advisory speed sign but of note that is simply an advisory speed. Additionally, I accept the evidence of Aberdeen that he was a well experienced cyclist. His discussion with McGee prior to entering the downward slope of 272nd Street suggests that he was cautious in his approach, choosing to discuss the concerns of the roadway with McGee and the two of them deciding cautiously to approach the hill single file. There is simply no evidence to suggest that Aberdeen was in any way not conscious of the difficulties that 272nd Street imposed for cyclists. The evidence of both he and McGee was that they were tapping their brakes as they proceeded downhill, an appropriate means of maintaining both control and caution.

[43] The defendants argue for contributory negligence based on what they view as two circumstances. First, it is their belief that Aberdeen was travelling too fast while driving his bicycle on 272nd Street. Secondly, they rely on a presumption of negligence raised by the fact that Aberdeen left the road.

[44] In regards to the first issue, there is a paucity of evidence as to the speed at which Aberdeen was travelling on 272nd Street. There is no evidence to suggest that Aberdeen was driving over the posted speed limit. There is a limited amount of evidence to suggest that he may have been driving over the advisory speed.

[45] The Supreme Court of Canada established in ***Canada v. Saskatchewan Wheat Pool***, [1983] 1 S.C.R. 205 that breach of a statute is neither negligence *per se* nor *prima facie* evidence of negligence. Rather, breach of a statutory provision is simply evidence of negligence.

[46] The Court in ***Saskatchewan Wheat Pool*** concluded that the statutory formulation of a duty may afford a specific and useful standard of reasonable conduct. However, the Court also concluded that the concept of fault inherent in negligence law, rather than the breach of a statute *per se*, should govern the imposition of civil liability. Thus, where a defendant has taken all reasonable care, breach of a regulatory provision will not of itself suffice to hold the defendant liable.

[47] In the case at bar, the evidence is that Aberdeen was traveling within the posted speed limit. While Aberdeen may have been traveling in excess of the advisory speed, he could not have received a ticket or fine for doing so. On its own, the possibility that the plaintiff was traveling above the posted advisory speed fails to establish that he was contributorily negligent.

[48] There is however evidence that Aberdeen was exercising caution as he drove his bicycle on 272nd Street. Aberdeen and McGee both testified to a conversation they had immediately prior to the accident, as they cycled beside each other, about the steepness and the danger associated with the descent on 272nd Street. Aberdeen exercised caution by agreeing with McGee to travel single file down the hill. Both Aberdeen and McGee testified to a circumstance of pumping brakes as a means of controlling speed and exercising caution as they descended the hill on 272nd Street.

[49] Based on the evidence of Aberdeen and McGee, and based on the lack of any evidence to suggest significant speed, I have concluded that the argument in regards to contributory negligence as it relates to speed must fail.

[50] The second aspect of contributory negligence is the suggestion of a presumption of negligence arising based on Aberdeen leaving the travelled roadway.

[51] While a number of cases have concluded that the fact a vehicle goes off the road raises a *prima facie* case of negligence, which the driver must then rebut, the strength of the inference of negligence to be drawn depends heavily on the facts of each particular case. The appropriate treatment of this presumption was examined by the Supreme Court of Canada in ***Fontaine v. British Columbia (Official Administrator)***, [1998] 1 S.C.R. 424. The impact of that decision is well-stated by Romilly J. in ***Steen v. British Columbia (Ministry of Transportation and Highways)*** (1999), 64 B.C.L.R. (3d) 111 at ¶ 46-47 (S.C.):

> The plaintiff suggests that the presumption that a driver whose vehicle leaves the road is *prima facie* negligent may no longer be applicable since the decision in ***Fontaine v. British Columbia***, [1998] 1 S.C.R. 424, which ousted the principle of *res ipsa loquitur*. The court in that case stated at paras. 20-21:
>
> > It has been held on numerous occasions that evidence of a vehicle leaving the roadway gives rise to an inference of negligence. Whether that will be so in any given case, however, can only be determined after considering the relevant circumstances of the particular case.
> >
> > Where there is direct evidence available as to how an accident occurred, the case must be decided on that evidence alone.
>
> And at para. 27:
>
> > It would appear that the law would be better served if the maxim [*res ipsa loquitur*] was treated as expired and no longer used as a separate component in negligence actions. After all, it was nothing more than an attempt to deal with circumstantial evidence. That evidence is more sensibly dealt with by the trier of fact, who should weigh the circumstantial evidence with the direct evidence, if any, to determine whether the *plaintiff has established on a balance of probabilities a prima facie case of negligence against the defendant. Once the plaintiff has done so, the defendant must present evidence negating that of the plaintiff or necessarily the plaintiff will succeed*. (Emphasis added)
>
> This suggests that the inference remains even though the concept of *res ipsa loquitur* should no longer be utilized by the courts. The circumstantial evidence may still be sufficient for the Court to draw the conclusion that the driver was negligent. However, the trial judge must weigh this evidence along with direct evidence, which may negate that inference and suggest a reason other than negligence for the accident.

[52] The Court in ***Fontaine*** also clarified that whether an inference of negligence can be drawn from circumstantial evidence is highly dependent on the facts of each case (at ¶ 20 and 35), and that the strength of the explanation the defendant must provide will vary in accordance with the strength of the inference sought to be drawn by the plaintiff (at ¶ 24).

[53] In this case, there is direct evidence that the cause of Aberdeen leaving the roadway was his observation of Zanatta's van crossing the centre line. I accept that as a fact under the circumstances, Aberdeen took the only action that he could in response to this real and perceived threat: he veered his bicycle away from the oncoming vehicle and onto the side of the roadway, where he hit gravel and then went off the road. In these circumstances, where there is a clear reason for why the plaintiff deviated from a normal course of travel, I conclude that any inference of negligence to be drawn against the plaintiff by reason of his leaving the roadway is not sufficient to establish his negligence on a balance of probabilities. He was as such not contributorily negligent.

(viii) Apportionment of Liability

[54] The parties are essentially in agreement with respect to the law on the apportionment of liability as discussed below. In particular, they agree that the apportionment of liability pursuant to the ***Negligence Act***, R.S.B.C. 1996, c. 333 should be made based on a consideration of the degree to which each party is at fault, and not the degree to which each party's fault caused the plaintiff's loss (as detailed by Lambert J.A. in ***Cempel v. Harrison Hot Springs*** (1997), 43 B.C.L.R. (3d) 219, 100 B.C.A.C. 212).

[55] Before an apportionment of liability can be considered, it must be established that each relevant act or omission was a legal cause of the plaintiff's loss (see *e.g.* ***Heller v. Martens*** (2002), 213 D.L.R. (4th) 124, 2002 ABCA 122 at ¶ 31; ***Vigoren v. Nystuen*** (2006), 266 D.L.R. (4th) 634, 2006 SKCA 47 at ¶ 89). In this case, as explained above, the negligence of both Langley and Zanatta caused the plaintiff's loss.

[56] The relevant provisions of the ***Negligence Act***, R.S.B.C. 1996, c. 333, provide as follows:

> **Apportionment of liability for damages**
>
> 1 (1) If by the fault of 2 or more persons damage or loss is caused to one or more of them, the liability to make good the damage or loss is in proportion to the degree to which each person was at fault.
>
> (2) Despite subsection (1), if, having regard to all the circumstances of the case, it is not possible to establish different degrees of fault, the liability must be apportioned equally.
>
> (3) Nothing in this section operates to make a person liable for damage or loss to which the person's fault has not contributed.
>
> **Liability and right of contribution**
>
> 4 (1) If damage or loss has been caused by the fault of 2 or more persons, the court must determine the degree to which each person was at fault.
>
> (2) Except as provided in section 5 if 2 or more persons are found at fault
>
> (a) they are jointly and severally liable to the person suffering the damage or loss, and
>
> (b) as between themselves, in the absence of a contract express or implied, they are liable to contribute to and indemnify each other in the degree to which they are respectively found to have been at fault.

[57] The significance of the difference between these sections is that where the plaintiff is contributorily negligent, under section 1 he will be able to recover from each defendant only to the extent that particular defendant was found to be at fault. In contrast, pursuant to section 4 of the ***Negligence Act***, where the plaintiff is not contributorily negligent the defendants will be jointly and severally liable, such that the plaintiff may recover the entire amount of his loss from one defendant, leaving that defendant to claim contribution from the second defendant in the amount the second defendant was found to be at fault. The parties' submissions and authorities focus primarily on section 1 of the ***Negligence Act***. However, the same principles with respect to the apportionment of damages on the basis of fault apply to section 4: see *e.g.* ***Cragg v. Tone***, 2006 BCSC 1020 at ¶ 178-179 (applying the reasoning in ***Cempel***, *supra*, to section 4 of the ***Negligence Act***); Cheifetz, *Apportionment of Fault in Tort* (Aurora, Ont.: Canada Law Book, 1981) at 232.

[58] The B.C. Court of Appeal established in ***Ottosen v. Kasper*** (1986), 37 C.C.L.T. 270 (B.C.C.A.) that the apportionment of fault under section 1 of the ***Negligence Act*** should be based on the weight of fault that should be attributed to each of the parties, not on the weight of causation. Lambert J.A. based this conclusion on the wording of the ***Negligence Act***, which

speaks of “fault,” and equated fault with blameworthiness. This approach to apportionment was subsequently confirmed in ***Cempel***, *supra*, as follows at ¶ 19:

> … The ***Negligence Act*** requires that the apportionment must be made on the basis of "the degree to which each person was at fault". It does not say that the apportionment should be on the basis of the degree to which each person's fault caused the damage. So we are not assessing degrees of causation, we are assessing degrees of fault. In this context, "fault" means blameworthiness. So it is a gauge of the amount by which each proximate and effective causative agent fell short of the standard of care that was required of that person in all the circumstances.

[59] The relative blameworthiness approach is therefore quite clearly established as the appropriate approach to apportionment of damages in British Columbia.

[60] Although assessing the relative blameworthiness of the parties is the correct approach, there is some difficulty in quantifying that concept. In this regard, the words of Lambert J.A. in ***Cempel***, *supra*, at ¶ 24 are instructive:

> In the apportionment of fault there must be an assessment of the degree of the risk created by each of the parties, including a consideration of the effect and potential effect of occurrences within the risk, and including any increment in the risk brought about by their conduct after the initial risk was created. The fault should then be apportioned on the basis of the nature and extent of the departure from the respective standards of care of each of the parties.

[61] Finch J.A. (as he then was) expanded upon the concept of relative fault in ***Alberta Wheat Pool v. Northwest Pile Driving Ltd.*** (2000), 80 B.C.L.R. (3d) 153, 2000 BCCA 505 at ¶ 46 as follows:

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

[62] Thus, fault is to be determined by assessing the nature and extent of the departure from the standard of care of each of the parties. Relevant factors that courts have considered in assessing relative degrees of fault were summarized by the Alberta Court of Appeal in ***Heller v. Martens***, *supra*, at ¶ 34 as follows:

> 1. The nature of the duty owed by the tortfeasor to the injured person…
>
> 2. The number of acts of fault or negligence committed by a person at fault…
>
> 3. The timing of the various negligent acts. For example, the party who first commits a negligent act will usually be more at fault than the party whose negligence comes as a result of the initial fault…
>
> 4. The nature of the conduct held to amount to fault. For example, indifference to the results of the conduct may be more blameworthy… Similarly, a deliberate departure from safety rules may be more blameworthy than an imperfect reaction to a crisis…
>
> 5. The extent to which the conduct breaches statutory requirements. For example, in a motor vehicle collision, the driver of the vehicle with the right of way may be less blameworthy…
>
> [Authorities omitted.]

See also ***Vigoren v. Nystuen***, *supra*, at ¶ 90 (summarizing these same factors).

[63] Many of the above-noted factors are discussed in Chiefetz, *Apportionment of Fault in Tort*, *supra*, at pp. 102-104. Considering that, I conclude it would be appropriate to add the following as relevant factors:

6. the gravity of the risk created;

7. the extent of the opportunity to avoid or prevent the accident or the damage;

8. whether the conduct in question was deliberate, or unusual or unexpected; and

9. the knowledge one person had or should have had of the conduct of another person at fault.

[64] These factors were applied, for example, in ***Cempel***, *supra*, a case where the plaintiff had climbed over a fence onto the defendant's private property to access a hot spring pool, and suffered severe burns as a consequence. In that case, the defendant had created a serious hazard with the pool of hot water, bore sole responsibility for maintaining the fence around the hot pool to prevent access, failed to post signs warning of that hazard, and knew that young persons often went to the pool at night.

[65] However, the fact that the fault results from an active versus a passive act of a party should not impact on the assessment of the degree of relative fault. Lambert J.A. observed in ***Cempel***, *supra*, at ¶ 23:

> … I do not think that the fact that the fault on the part of the plaintiff was an active fault, whereas the fault on the part of the defendant was a passive fault, at least at the time of the incident itself, should form any basis in this case for attributing more of the fault to the plaintiff than to the defendant.

Liability was apportioned 60% to the defendant and 40% to the plaintiff, reversing the trial judge's apportionment of 25% and 75%, respectively.]

[66] Another important factor in assessing the relative degree of blameworthiness of the parties is the magnitude of the departure from the standard of care. For example, in ***Alberta Wheat Pool***, *supra*, the plaintiff's grain loading facility was destroyed by a fire caused by molten slag from the defendant's welding activities. The defendant was negligent in not thoroughly wetting the area in which welding was taking place. The plaintiff was contributorily negligent in having a fire protection system which did not meet recommended standards. On the issue of apportionment, Finch J.A. for a majority of the Court of Appeal found that both parties exhibited a substantial or significant departure from the standard of reasonable care expected of each. He noted at ¶ 55 that "[w]hile the fault of the two is different in kind, I do not see how one can justify a conclusion that their faults differ in degree." Thus, liability was apportioned equally pursuant to s. 1(2) of the ***Negligence Act***. McEachern C.J.B.C. in dissent found the owner's fault to be higher: the owner's failure was considered and deliberate, while the contractor's fault was accidental and unexpected. The contractor had failed to water sufficiently, but it did not fail to water at all.

[67] Thus, the key inquiry in assessing comparative blameworthiness is the relative degree by which each of the parties departed from the standard of care to be expected in all of the circumstances. This inquiry is informed by numerous factors, including the nature of the departure from that standard of care, its magnitude, and the gravity of the risk thereby created.

[68] The plaintiff argues that there is a large divide between the relative fault of the Zanatta Defendants and Langley. In particular, he argues that Zanatta's negligence arises from a momentary lapse in attention, and did not represent an extreme departure from the standard of care imposed on motorists. In contrast, the plaintiff argues that Langley's departure from the standard of care imposed on municipalities was extreme: Langley created the gap, failed to take action to remedy the gap for three years, and vehicles would have been redirected by the

metal barrier and then speared by the no-post barrier. Cyclists were at risk of being redirected by the barrier and directed through the gap into the ravine. The plaintiff submits that negligence should be apportioned 10-20% to Zanatta and 80-90% to Langley.

[69] The Zanatta Defendants deny that the van crossed the centre line, and submit that the relative fault of the Zanatta Defendants is negligible as compared with that of Langley and the plaintiff in light of the relative degrees of risk of harm and the seriousness of the effects associated with their respective actions and omissions. The Zanatta Defendants argue that the plaintiff's injuries would have been much less severe had he collided with a properly constructed barrier. The van never came in contact with the plaintiff, and the error, if it did occur, was at worst a "momentary or minor lapse of care in conduct" representing a minimal departure from the required standard of care, which should attract no damages. In this respect, the Zanatta Defendants rely on the case of ***Ford v. Henderson*** (2005), 138 A.C.W.S. (3d) 1075, 2005 BCSC 609 at ¶ 72-76.

[70] ***Ford v. Henderson*** involved a plaintiff who had been a passenger in the defendant driver's car. The defendant negligently accelerated when leaving a parking lot, losing control of the car and causing it to hit a hydro pole. The plaintiff had not been wearing his seatbelt, although he was trying to fasten it at the time of the accident. Wedge J. held that this was "closer to a minor lapse of care," and therefore she would have assessed the plaintiff's contributory negligence at 10% at most, had she found contributory negligence on the facts.

[71] Langley submits with respect to Zanatta's fault that his negligent driving initiated the chain of events, and that most driving negligence arises from a momentary lapse of attention, but often results in serious consequences. With respect to the plaintiff, Langley submits that the plaintiff was travelling over the advisory speed and approached a blind corner with reckless disregard for his own safety, which deprived him of an opportunity to react in a safe, appropriate and timely manner. Langley submits that, while the barrier configuration was not optimal, it represented a reasonable repair of a problem within difficult geographical and topographical conditions, the barriers were erected not for bicycles but for motor vehicles, there was no accident history at the site, and to the extent a hazard was present, it was marked. Further, Langley submits that the current barrier configuration would not necessarily have prevented serious injury to a cyclist. Therefore, Langley submits that the plaintiff and Zanatta Defendants should be held solely liable for the plaintiff's injuries. Alternatively, Langley submits that if it is found liable, 20% of the responsibility should be apportioned to it, with the remainder jointly divided between the plaintiff and the Zanatta defendants. Langley relies on several cases involving the apportionment of liability where municipalities have been found negligent, but have been held liable for a relatively low proportion of the damages.

[72] In ***Balan v. Newfoundland*** (1994), 128 Nfld. & P.E.I.R. 99 (Nfld. S.C.T.D.), the plaintiff had pulled out into a slush-covered passing lane when he lost control of his car. As a result, the car rolled down a steep embankment, just missing a guardrail. Expert evidence established that the guardrail should have been 17 metres longer than it was, and the Court held that the operational decision of the Crown employee to install the guardrail as he did was negligent. Liability was apportioned 80% to the plaintiff for his negligent driving and 20% to the Crown. However, the discussion in that case (at ¶ 143-154) suggests that the Court used a causation analysis, rather than considering relative degrees of fault, in determining the apportionment issue (Orsborn J. considered that the plaintiff's negligence was the effective cause of the accident, while construction of an appropriate guard rail would have reduced, but not eliminated, the plaintiff's loss).

[73] In ***Danco v. Thunder Bay (City)*** (2000), 13 M.P.L.R. (3d) 130 (Ont. S.C.J.), aff'd (2001), 21 M.P.L.R. (3d) 18 (Ont. C.A.), the plaintiff was held 70% liable for his own injuries and the defendant municipality and railway company were held jointly liable for 30% of his damages. That case involved injuries sustained by the plaintiff, an experienced cyclist, in crossing the defendant's railway tracks. The defendant railway company had not ensured that its tracks complied with the relevant regulations, and both the municipality and the railway company had failed to post adequate warnings of the danger. However, the plaintiff was held to

be primarily at fault, as he admittedly knew that he should have crossed perpendicular to the railway tracks, and gave no reason for failing to do so.

[74] In ***Bissell v. Rochester***, [1930] 3 D.L.R. 825, 65 O.L.R. 310 (S.C.), a municipality was held 50% liable where the highway was in a significant state of disrepair at a sharp curve which was not marked, and there was no guard rail to prevent cars from going into a ditch. The plaintiff was held to be contributorily negligent, because he was driving at an excessive rate of speed and should have seen the curve in time to avoid an accident. However, in that case, Wright J. held that he could not determine the respective degrees of fault, and therefore liability was apportioned equally.

[75] As the cases are highly fact-specific, I do not find the authorities relied on by Langley to represent more than a guide to the appropriate level of liability of the municipalities on the particular facts of those cases. Each case requires a careful assessment of the relative degree of fault of the parties, as outlined in ***Cempel***, *supra*, and the other authorities I have reviewed above.

[76] In the result, I have concluded that liability should be apportioned 75% to Langley and 25% to the Zanatta defendants for the reasons that follow. This involves a careful consideration of the nature and extent of each defendant's departure from the standard of care expected in all of the circumstances.

[77] In relation to Zanatta's negligence, his crossing the centre line was a momentary lapse in his attention while driving. As Langley observes, many serious traffic accidents are caused by momentary lapses in attention. A fairly serious risk was created by the presence of a large cube van within the lane normally occupied by oncoming traffic on a steep hill with a sharp curve, and this risk could have been completely avoided had Zanatta exercised proper care while driving. However, Zanatta did not actually strike the plaintiff, and his fault was due to inattention, rather than being an intentional act. Therefore, I conclude that Zanatta's conduct represented a moderate departure from the standard of care expected in the circumstances.

[78] In contrast, I have concluded that Langley's departure from the standard of care was considerably greater than Zanatta's: while Langley did not intentionally create a hazard, it knowingly created a serious risk when it decided not to replace the entirety of the existing guard rail in 1999, or to take measures to ensure that cyclists or cars would not risk injury due to the existence of a gap between the two guard rails. Langley knew that 272nd Street was frequently used by cyclists, and in fact was a designated bicycle route. Langley had over three years to take action to avoid the risk of injury due to the barrier configuration. The cost was not prohibitively high, and money could have been allocated from the existing budget to remedy the situation. The gravity of risk created by Langley's decision was high, both for cyclists and for cars that might have been redirected by the metal barrier into a collision with the no-post barrier. The expert witnesses of both the plaintiff and the Zanatta defendants thought that this gap was obviously "unsafe" and "constituted a violation of basic traffic safety practices." The departure from the standard of care expected of a municipality in these circumstances was considerably higher than Zanatta's departure from the relevant standard of care. Accordingly, I would apportion liability for the plaintiff's injuries 25% to the Zanatta defendants and 75% to Langley.

3. Damages

[79] Although the three parties to this litigation (Aberdeen, Zanatta Defendants, and Langley) took very different positions on the issue of liability for the accident, the Zanatta Defendants and Langley presented a combined case on the issue of damages. Like liability, however, the issue of damages was significantly contentious between the parties.

[80] A significant legal issue was raised in regards to the approach to be taken in an analysis of damages and the personal injury case. Below is an analysis of the appropriate principles to be applied in assessment of damages in a personal injury case.

(i) Principles

[81] Counsel for the plaintiff placed significant emphasis on the decision of the Supreme Court of Canada in ***Andrews v. Grand & Toy Alberta Ltd.***, [1978] 2 S.C.R. 229. I agree this was an appropriate starting point. Counsel for the plaintiff says the decision in ***Andrews*** can be read to emphasize that the plaintiff is to be fully compensated for his loss—his compensation is not to be limited by a concern for what it will cost the defendants.

[82] The defendants counter that future care costs must meet the test of "medical justification" set out by McLachlin J. (as she then was) in ***Milina v. Bartsch*** (1985), 49 B.C.L.R. (2d) 33 (S.C.). The defendants agree that "medical justification" is not limited to "medical necessity," and that items that will enhance the plaintiff's well-being should be awarded. The parties disagree, however, with respect to the characterization of the plaintiff's injuries used by the experts, and whether certain items which "would be nice" for the plaintiff meet the medical justification test.

[83] Because most of the divergence between the figures put forward for the cost of future care centres around differences in opinion as to what is required to make full compensation to the plaintiff, this analysis will go to significant effort to attempt to clarify what is meant by "full" compensation, as that term is used by the Supreme Court of Canada in ***Andrews***. This overview is important because the idea of "full" compensation is not sufficiently precise to assist in determining whether an expense for future care should be allowed, and this was the standard of compensation propounded by counsel for the plaintiff.

[84] The heart of the legal problem resolved by ***Andrews*** was the distinction between "fair and reasonable" versus "full" compensation for catastrophic personal injury cases, as derived from old English authorities. In short, and as ***Andrews*** affirmed, the English authorities actually do support the idea of "full compensation" for pecuniary losses, including the cost of future care, although many cases repeatedly state that full compensation should not be given, only compensation that is fair and reasonable as between the plaintiff and the defendant. A close reading of these cases shows that some cases clearly intended that "fair and reasonable" compensation was to be applied for non-pecuniary damages, while other cases (arguably mistakenly) applied these same principles to limit pecuniary damages. ***Andrews*** clearly stated that full compensation was to be made for pecuniary injury, and plaintiffs were not to make do with a lesser standard of care in order to save defendants money. This is exactly the error made by the B.C. and Alberta Courts of Appeal in ***Thornton v. Prince George School District No. 57***, [1978] 2 S.C.R. 267 and ***Andrews***, *supra*, where rulings granting the plaintiffs home care were overturned in favour of institutional care because the former would be unduly expensive for the defendants. The Supreme Court of Canada rejected this position.

[85] While the notion of making full compensation for pecuniary losses is clearly the goal, neither the English cases nor ***Andrews*** fully resolve the issue of what standard of future care is required to provide "full" compensation. Additionally, ***Andrews*** retained the requirement that compensation must be fair and reasonable, and stated that fairness to the defendant was to be achieved by ensuring claims were "legitimate and justifiable."

[86] The issue was subsequently clarified by McLachlin J.'s often-cited judgment in ***Milina v. Bartsch*** (1985), 49 B.C.L.R. (2d) 33. There, she clarified that (1) there must be medical justification for claims for the cost of future care, and (2) the claims must be reasonable. This is the test which has been repeatedly applied by subsequent courts in determining which expenses to allow for future care. Thus, although judges are to make "full" compensation for the cost of future care, in the sense of awarding what the medical evidence indicates is the appropriate standard of care, such claims must still be reasonable and justifiable.

[87] In the English authorities and in the lower court decisions leading up to the ***Andrews*** trilogy, there is a tension in the law relating to compensation for catastrophic personal injuries. Many judges urged that the courts should not attempt to give "perfect" compensation up to the full extent of the pecuniary injury sustained, but rather must give compensation that is "fair and reasonable," considering both the plaintiff's and the defendant's perspectives. As will be seen

from the following review of the English authorities, concerns with respect to fairness or reasonableness to the defendant often relate to poorly-articulated concerns directed to the impossibility of making full compensation for non-pecuniary losses or accounting for negative contingencies. Unfortunately, later cases picked up on these statements that the courts should not attempt perfect compensation in order to deny plaintiffs the entire sum of their pecuniary losses. For example, the full extent of the plaintiff's loss of future income was not awarded in ***Fletcher v. Autocar & Transporters, Ltd.***, discussed below, as the majority of the court considered this would have been unfair to the defendant: the plaintiff could not himself use the funds, and would not have saved any of it had he continued working without the accident.

[88] The fundamental principle in tort compensation is contained in an often-quoted statement of Lord Blackburn in ***Livingstone v. Rawyards Coal Company*** (1880), 5 App. Cas. 25 at 39:

> I do not think there is any difference of opinion as to its being a general rule that, where any injury is to be compensated by damages, in settling the sum of money to be given for reparation of damages you should as nearly as possible get at that sum of money which will put the party who has been injured, or who has suffered, in the same position as he would have been in if he had not sustained the wrong for which he is now getting his compensation or reparation…

[89] That case dealt not with personal injury, but with a claim for damages arising from the unauthorized taking of coal. Of note, Lord Blackburn also stated at 41:

> … It is always a difficult thing to ascertain the actual expenses, and you may go wrong, but you must come as near to it as you can.

[90] Straightforward though these guidelines appear, courts were slow to apply them in the context of damages for personal injury. Given the significant difficulties (or impossibility) of valuing damages for non-pecuniary losses and the difficulty of calculating precisely what position the plaintiff would have been in but for the defendant's negligence, courts resorted to the idea of "fair and reasonable" compensation for catastrophic personal injuries.

[91] The root of fair and reasonable compensation, rather than *restitutio in integrum*, as a goal of damage awards for catastrophic personal injuries stems largely from reliance by courts on a *dictum* of Brett J. in ***Rowley v. London and North Western Railway Company*** (1873), L.R. 8 Exch. 221 at 231. That case involved a claim brought under the *Fatal Accidents Act* by the mother, widow and child of the deceased. The deceased had been employed as a lawyer, and had been under a covenant to pay his mother an annuity of £200 during their joint lives. The Court held that the judge erred in directing the jury that they could take into consideration evidence of an accountant as to the average lifespan of a person the mother's age and the cost of purchasing an annuity for that lifespan. The judge should have noted that the annuity was for the joint lives of the mother and son, and that it was only secured by the personal covenant of her son. Honyman J. added that the judge also erred in not directing the jury to take into consideration the state of health of the annuitant, or point out the fact that the son's personal covenant to pay would be rendered meaningless by his ill-health or the loss of his business. In short, the court appeared to be concerned that negative contingencies had not been addressed by the judge's charge to the jury.

[92] Brett J. went much further, dissenting in holding that evidence as to the average lifespan and cost of an annuity was not properly before the jury. He stated at 231:

> To the best of my belief, the invariable direction to juries, from the time of the cases I have cited until now, has been "that they must not attempt to give damages to the full amount of a perfect compensation for the pecuniary injury, but must take a reasonable view of the case, and give what they consider, *under all the circumstances, a fair compensation*." I have a clear conviction that <u>any verdict founded on the idea of giving damages to the utmost amount, which would be an equivalent for the pecuniary injury, would be unjust</u>… I conclude that the direction that I have enunciated is the legal, and only legal, direction. A

> direction which leaves it open to the jury to give the present value of an annuity equal in annual amount to the income lost for a period supposed to be equal to that for which it would have continued if there had been no accident is a direction, as it seems to me, leaving it open to a jury to give the utmost amount which they think is equivalent for the pecuniary mischief done, and such a direction is a misdirection according to law.
>
> [Italics in original; underlining added.]

[93] The remainder of Brett J.'s judgment underscores some of his rationales for taking this position. He notes that, disregarding the failure to point out that the annuity was dependent on both lives and the many contingencies that might have rendered the son unable to pay the annuity, the judge's direction left it open to the jury to award "the fully calculated equivalent of the pecuniary loss sustained by the person on whose behalf the action is brought" (at 229-230). He felt this could ruin poor defendants. By "fully calculated equivalent of the pecuniary loss sustained," I suggest he may have been referring to an award that did not take into consideration negative contingencies.

[94] Brett J. also quoted from the judgment of Parke J. in ***Armsworth v. South Eastern Railway Co.*** (1847), 11 Jur. 758 (at 230). Below is the original quotation from ***Armsworth*** at 760; the italicized portions were omitted by Brett J. when quoting this passage. This same passage was also quoted in ***Blake v. Midland Railway Company*** (1852), 18 Q.B. 93, 118 E.R. 35, which is another case often cited for the proposition that damages should be fair and reasonable (decided in the context of a claim under the *Fatal Accidents Act*).

> *…you cannot estimate the value of a person's life to his relatives. No sum of money could compensate a child for the loss of its parent; and* it would be most unjust if whenever an accident occurs, juries were to visit the unfortunate cause of it with the utmost amount which they think an equivalent for the mischief done. *Here you must estimate the damage by the same principle as if only a wound had been inflicted*. Scarcely any sum could compensate a labouring man for the loss of a limb, yet you do not in such a case give him enough to maintain him for life; *and in the present case* you are not to consider the value of his existence as if you were bargaining with an annuity office; *for in that view you would have to calculate all the accidents which might have occurred to him in the course of it, which would be a very difficult matter*. *I therefore* advise you to take a reasonable view of the case, and give what you consider fair compensation.
>
> [Italics added.]

[95] The original passage from ***Armsworth*** appears to relate to concerns about the potentially unlimited value of human life, and how it would be unfair to inflict that full value on defendants. It also alludes to the difficulty involved in evaluating all of the contingencies which might have befallen the plaintiff in the absence of the accident. The dissenting statements of Brett J. in ***Rowley*** were subsequently relied on by courts in asserting that damages should not be perfect, only fair and reasonable.

[96] Some clarification as to the meaning of Brett J.'s *dictum* was provided in ***Phillips v. London & South Western Railway Company*** (1879), 5 Q.B.C. 78 (C.A.), a judgment in which Brett L.J. concurred. In that case, the plaintiff, a doctor who was seriously injured by the defendant's negligence, sought a new trial on the basis that the damages awarded were so small the jury must have omitted relevant considerations. The plaintiff argued that the rule set out by Brett L.J. in ***Rowley*** was being disputed, and that the proper rule was that a jury must not attempt to give a man full compensation for bodily injury, for which there would be no limit, but that full compensation should be made for pecuniary loss. James L.J. agreed in his discussions with counsel that the trial judge, Field J., had meant to say that full compensation must be made for pecuniary loss, but damages for suffering cannot proceed on the principle of making full compensation (at 84). James L.J. agreed that the proper direction to the jury in ***Rowley*** would have been (at 84):

> [t]o tell them to calculate the value of the income as a life annuity, and then make an allowance for its being subject to the contingencies of the plaintiff retiring, failing in his practice, and so forth.

[97] Thus, the principle, even in 1879, appeared to be that full compensation was to be made for pecuniary loss, although the amount awarded should be reduced based on a consideration of negative contingencies. In contrast, with respect to damages for pain and suffering, full compensation was not possible, and such damages were not to be awarded on the principle of making full compensation. Despite this clarification and the apparent distinction between pecuniary and non-pecuniary damages, both ***Rowley*** and ***Phillips v. London & South Western Railway Company*** continued to be cited for the proposition that courts should not attempt to award perfect compensation. Some of these cases clearly dealt with non-pecuniary damages. However, other cases applied this principle to reduce pecuniary damages.

[98] Another case which was often cited for the proposition that a court must not attempt to give perfect compensation, but must give fair compensation, is ***H. West & Son v. Shephard***, [1963] 2 All E.R. 625 (H.L.). In that case, an award of general damages of £17,500 to a 41-year old woman rendered permanently disabled but with some limited mental capacity remaining was upheld (Lord Reid and Lord Devlin dissenting). £2,500 of this award was attributable to the fact that the woman might have some awareness of her plight. The case deals mainly with the issue of the appropriate quantum of non-pecuniary damages, for which moderation and reasonableness are urged. However, all of the speeches delivered seem to indicate that compensation for pecuniary losses is to be made in full. For example, Lord Reid stated (at 628):

> On the other hand, no one doubts that damages must be awarded irrespective of the man's mental condition or the extent of his suffering where there is financial loss. That will cover the cost of treatment or alleviation of his condition just as much as it covers the cost of repairing or renewing his property. And it will cover loss of earning power…

[99] Lord Morris of Borth-y-Gest, in a judgment read and concurred in by Lord Tucker, stated (at 631):

> … A money award can be calculated so as to make good a financial loss. Money may be awarded so that something tangible may be procured to replace something else of like nature which has been destroyed or lost. But money cannot renew a physical frame that has been battered and shattered. All that judges and courts can do is to award sums which must be regarded as giving reasonable compensation…

[100] Lord Devlin (dissenting) stated at 636 that the injury:

> …may bring with it three consequences. First, it may result in loss of earnings and they can be calculated. Secondly, it may put the victim to expense in that he has to pay others for doing what he formerly did for himself; and that also can be calculated. Thirdly, it produces loss of enjoyment, loss of amenities as it is sometimes called… This is incalculable and at large.

[101] This passage still supports the notion of full compensation for pecuniary losses. However, Lord Devlin went on to quote from and approve the jury direction given by Field J. in ***Phillips v. London and South Western Railway Company*** (1879), 5 Q.B.D. 78 at 79 (at 637):

> "…it has been pointed out for centuries, and it is the principle of foreign jurisprudence as well as ours, that in actions for personal injuries of this kind, as well as in many others, it is wrong to attempt to give an equivalent for the injury sustained. I do not mean to say that you must not do it, because you are the masters and are to decide; but I mean that it would operate unjustly, and in saying so I am using the language of the great Baron Parke (in ***Blake v. Midland***

> ***Railway Company*** (1852), 18 Q.B. 93) whose opinion was quoted with approval in ***Rowley's*** case ((1873), L.R. 8 Exch. 221 at 231). Perfect compensation is hardly possible, and would be unjust."

[102] As explained above, the Court of Appeal in ***Phillips*** made clear that the trial judge's charge to the jury had meant that full compensation should be made for pecuniary loss, but that full compensation could not and should not be made for the bodily injury. Lord Devlin continued at 638 in relation to what would be fair compensation in such a case:

> What is meant by compensation that is fair and yet not full?... [it will be a sum] that will enable him to say that he has done whatever money can do. He has ex hypothesi already provided for all the expenses to which the plaintiff has been put and he has replaced all the income which she has lost. What more should he do…?
>
> I think that he would say in an extreme case like this that he would provide such a sum as would ensure that for the rest of her life the plaintiff would not within reason want for anything that money could buy. That would not be perfect; it would not be full; but it would be as much as money could fairly do…

[103] This passage still supports the idea of full compensation for pecuniary loss, even where the plaintiff has only a limited awareness of his plight. It recognizes the impossibility of restoring the plaintiff to her original position (which would arguably be full compensation as the term is used by Lord Devlin), and instead places a premium on ensuring that the plaintiff will be properly looked after for the rest of her life (which would arguably be fair compensation). Thus, all of the judgments in ***H. West & Son v. Shephard*** still support the notion of full compensation for the pecuniary loss.

[104] Another case, ***Warren v. King***, [1963] 3 All E.R. 521 (C.A.), emphasized the importance of ensuring fairness as between the plaintiff and the defendant. That case dealt with a misdirection resulting in a jury award the court considered excessive; however, the speeches in that case still appear to confirm the principle of full compensation for pecuniary losses. Sellers L.J., while citing the comments of Lord Morris of Borth-y-Gest and Lord Devlin in ***H. West & Son v. Shephard*** that awards must be reasonable and must be assessed with moderation, stated (at 526-527):

> Since that day, it has been the practice to assess under the Fatal Accidents Acts…the actual financial loss as accurately as possible, but I do not understand that, at common law, Lord Devlin was of the opinion that something less than full damages should be given… Damages must not be assessed on the basis that everything in life would go most favourably for a plaintiff… Damages for personal injuries should always be reasonable, because they have no solid and certain basis of assessment.

[105] This passage makes clear that full damages should be given, but taking into account negative contingencies. Harman L.J., after quoting extensively from the reasons of Brett J. in ***Rowley***, stated (at 528-529):

> …the first element in assessing such compensation is not to add up items such as loss of pleasures, of earnings, of marriage prospects, of children and so on, but to consider the matter from the other side, what can be done to alleviate the disaster to the victim, what will it cost to enable her to live as tolerably as may be in the circumstances? This will involve, first, an estimate of the infant plaintiff's expectation of life, and next an estimate of the cost of such help as she needs… It is perfectly possible to have an estimate first of expectation of life, and next of what would be the cost of an annuity over that period…

[106] Pearson L.J. delivered a judgment along similar lines, noting at 531:

> It should have been said that, as it was impossible to give a sum of money truly equivalent to the health and amenities of life of which the infant plaintiff had been deprived, the jury should not attempt to do that, but should give a reasonable and moderate sum, fair and adequate for the infant plaintiff, but also fair and not oppressive to the defendants.

[107] Again, this passage appears to be primarily directed at placing a limit on non-pecuniary damages. Thus, the judgments in ***Warren v. King*** similarly support the notion that full compensation should be made for pecuniary losses (taking into account contingencies), while only fair and reasonable compensation should be given for non-pecuniary losses.

[108] A case which perhaps best illustrates the effect of awarding "fair and reasonable" compensation on pecuniary damages is ***Fletcher v. Autocar & Transporters, Ltd.***, [1968] 1 All E.R. 726 (C.A.). In that case, Lord Denning, M.R. criticised the trial judge for totalling up damages under four headings and awarding the entire figure, even though the trial judge recognized that it was a daunting figure. He stated at 733:

> …I think that his conclusion was erroneous. In the first place, I think that he has attempted to give a perfect compensation in money, whereas the law says that he should not make that attempt. It is an impossible task. He should give a fair compensation. That was settled ninety years ago by the case of ***Phillips v. London & South Western Ry. Co.*** (1879), 4 Q.B.D. 406, 5 Q.B.D. 78…
>
> …
>
> …In order to give him fair compensation, I should have thought that he should be given a sum which would ensure that he would not, within reason, want for anything that money could buy; and that his wife should be able to live for the rest of her life in the comfort that he would have provided for her; and that any savings that he would have made if uninjured would be available for his family.

[109] Denning L.J. went on to note that a man who saved nothing should not receive his entire loss of income for the remainder of his life, but agreed that the plaintiff should receive compensation for expenses such as the cost of extra help in the house while he remained there, for his future earnings to the extent they would have been used to support his wife, including any savings he would have made, and for pain and suffering and loss of amenities. Allowances were made for contingencies and the fact that compensation was to be paid as a lump sum. Diplock L.J. gave a judgment that was substantially similar. While casting into doubt the appropriateness of full compensation for loss of future earnings, neither of these judgments supports the idea that anything less than the full cost of future care should be awarded. In this case, that included help around the house while the plaintiff's wife cared for him, and the cost of care in a private institution when she would no longer be able to care for him.

[110] Salmon L.J. dissented in ***Fletcher***, holding that each head of loss should be calculated and added together to arrive at the true amount of the total financial loss. He would have upheld the result reached by the trial judge. At 750, he noted that he accepted the *dicta* to the effect that the court should award fair and reasonable compensation, and that such comments were particularly applicable to damages for pain and suffering and loss of amenities. However, he put these comments into their original context, noting that modern defendants tended to be insured, whereas defendants were often uninsured at the time that ***Rowley*** and ***Phillips v. London & South Western Railway Company*** were decided. Therefore, he suggested that compensation should be "realistic," while not being extravagant. He also noted that, in relation to pecuniary loss, it was difficult to appreciate the difference between "the full amount of perfect compensation" and "fair and reasonable compensation."

[111] In sum, while the English courts may have disagreed on how damages should be calculated and to what degree they should be limited out of a concern for fairness to the defendant, none of the personal injury cases appear to take issue with the concept of providing to the plaintiff the entire anticipated cost of future care, taking into account appropriate contingencies. Indeed, in some of these cases, the cost of a home attendant to care for the

plaintiff or the cost of care in a private institution were awarded, without apparent discussion of whether a cheaper alternative should be used.

[112] The trial judge in ***Andrews*** reviewed the old English authorities in reaching the same conclusion, affirmed by the Supreme Court of Canada, that full compensation should be made for pecuniary loss, while fair and reasonable compensation should be awarded for non-pecuniary loss. ***Andrews*** clearly stated that full compensation is to be made for pecuniary losses without regard to the financial position of the defendants, which in that case meant home care for the plaintiff despite its very high cost compared with institutionalization. In contrast, awards for non-pecuniary losses may be limited by broader social concerns.

[113] Dickson J. also clarified that a claim for the cost of future care is a pecuniary claim (at ¶ 25), and that full compensation for the cost of future care is to be provided:

> 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 the position he would have been in if he had not sustained the injury… 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 a claim.

[114] However, the judgment of Dickson J. (as he then was) still retains the qualification that compensation must be moderate and fair to both parties. While stating that there is no duty to mitigate, in the sense of accepting less than a real loss, he emphasized that "there is a duty to be reasonable," and that there cannot be "complete" or "perfect" compensation (at ¶ 26). Later, he clarified that fairness to the defendant was to be achieved by ensuring that the claims against him are "legitimate and justifiable" (at ¶ 33).

[115] The judgment in ***Andrews*** was subsequently interpreted by McLachlin J. in ***Milina v. Bartsch***, *supra*. She noted at ¶ 192-195 and 201:

> The plaintiff submits that the consideration which must govern the award of damages for cost of future care is the "functional" consideration, which he interprets as requiring the award of "the cost of such items as may be used by the plaintiff in substitution for the pleasures of life taken from him by his injury." It is on this basis, he submits, that the cost of a house was awarded in ***Thornton***, *supra*. The question is not what will provide the plaintiff with adequate housing, but what will mitigate the misery of quadriplegia. To the extent that money can, within the bounds of reason, serve to increase the plaintiff's sense of happiness and well being, it may properly be awarded under the head of cost of future care, it is submitted.
>
> The defendants' approach is quite different. The defendants submit that there must be medical justification or vindication of the award for cost of future care. To the extent that money can be used to sustain or improve the mental or physical health of the plaintiff, it should be awarded under the head of cost of future care. But in so far as it serves only as solace by providing substitute pleasures, it falls under the head of non-pecuniary loss, not cost of future care, the defendants submit.
>
> The distinction is important, because damages for non-pecuniary loss, unlike damages for cost of future care, are limited by the so called "$100,000 limit".
>
> The authorities support the defendants' position on this issue…
>
> …
>
> It follows that I must reject the plaintiff's submission that damages for cost of future care should take into account the cost of amenities which serve the sole function of making the plaintiff's life more bearable or enjoyable. The award for cost of care should reflect what the evidence establishes is reasonably

> necessary to preserve the plaintiff's health. At the same time, it must be recognized that happiness and health are often intertwined.

[116] She concluded at ¶ 199 that for costs for future care: (1) there must be a medical justification for such claims; and (2) the claims must be reasonable. She also noted that Dickson J. stated in ***Andrews*** that (at 586):

> An award must be moderate, and fair to both parties… But, in a case like the present, where both courts have favoured a home environment, "reasonable" means reasonableness in what is to be provided in that home environment.

[117] Thus, in ***Andrews***, the notion of full compensation in relation to damages for the cost of future care meant the cost of home care for the plaintiff, rather than institutionalization. What these judgments seem to indicate is that claims must be reasonable, but compensation is full in the sense that the plaintiff should not make do with less than what is medically justified to provide him with optimal care in order to save the defendant money, which was the route taken by the Alberta Court of Appeal.

[118] In this case, as in ***Milina***, the plaintiff appears to be urging a functional approach to replacing what has been lost to make full compensation, while the defendant is urging a medical justification approach to urge that awards not be made for certain items that the plaintiff is unlikely to use (based on ***Izony v. Weidlich***, 2006 BCSC 1315) or that are experimental. I do not think that the principles of making full compensation set out in ***Andrews*** provide the complete answer to this problem.

[119] ***Andrews*** clarified the law by making clear that "fair and reasonable" compensation should not be used to reduce pecuniary compensation, nor to make the plaintiff make do with care at a level lower than that indicated by the medical evidence simply because that would be cheaper for the defendants. However, Dickson J. made clear in ***Andrews*** that the Court had been forced by counsel to choose between 24-hour home care and institutionalization – an unacceptable alternative. He did not address how choices are to be made between acceptable alternatives to make full compensation.

[120] Thus, I think the solution is to consider "full" compensation espoused in ***Andrews*** in the context of the more pragmatic and widely-followed test set out in ***Milina***, namely that there should be medical justification for a cost of future care expense, and the expense must be reasonable. In this sense, the inquiry is more directed to the fact-based determination of whether each individual item is medically justified, rather than approaching the question from a purely functional analysis of whether a particular item will make the plaintiff whole again. The difference is in many respects semantic, but the former question maintains the focus on the pecuniary loss aspect of the cost of future care, and helps to prevent the Court from extending the award to fulfill the non-pecuniary goal of providing solace for what has been lost. Even in ***Andrews***, Dickson J. recognized that *restitutio in integrum* was not possible (at ¶ 25). If the plaintiff fails to demonstrate that a particular future care item is medically justified, the plaintiff in essence has failed to prove his damages, and therefore cannot receive compensation on that ground. That said, the analysis of what is "medically justified" is not as narrow as what is "medically necessary," and all of the parties agree with this proposition.

(ii) The Plaintiffs' Circumstances as it relates to Damage Claims:

[121] The parties agree that Aberdeen sustained a spinal cord injury and a mild traumatic brain injury as a result of the accident. The parties disagree on whether Aberdeen continues to experience cognitive and emotional problems attributable to the brain injury or whether such problems that he still experiences are attributable to pain and or depression. The parties also disagree on the amount of future care Aberdeen will require to optimize his mental and physical well being.

[122] Noted below is a summary of the evidence I accept as to the circumstances of the plaintiff and from which the appropriate compensation for losses is to be drawn, keeping in mind that ultimately the test of whether or not an item of cost of care is medically justified is the test that must be met.

(a) Dr. Hugh Anton, Physiatrist

[123] Dr. Anton was qualified as an expert in physical medicine and rehabilitation. He has had a long time association with GF Strong Rehabilitation Center in Vancouver where he has in the past been Chief of Staff.

[124] Dr. Anton examined Aberdeen on the 23rd of May 2006. He described Aberdeen's injuries as injuries to the C-6/C-7 and T1 vertebrae at the base of the neck as well as bone and ligaments damage. He cited compression and damage to the spinal cord. He described Aberdeen as having no function in his trunk and abdominal areas and incomplete function of his breathing muscles. Additionally Dr. Anton described Aberdeen as suffering a mild traumatic brain injury.

[125] Dr. Anton gave useful information to the Court as to the typical nature of problems suffered by persons with Aberdeen's level of disability. Primary concerns centered around pressure sore problems, urinary tract infections, and bowel function problems. Dr. Anton noted that to date, Aberdeen has not had specific pressure sore problems or bowel function problems common to most people in his condition. Until recently, urinary tract infections had been a concern.

[126] Dr. Anton commented on the chronic pain, described as neuropathic pain from which Aberdeen suffers. He notes that despite specific and multiple investigations, the source of this pain has yet to be determined although it is clearly related to his injury and clearly a significant factor for Aberdeen. His opinion concludes with the following:

> Given Mr. Aberdeen's medical problems since the accident, I think his biggest specific risk factor for early mortality is his neurogenic bladder. If further urologic treatment can reduce his risk for complications, then his risk for early mortality will be less. At this time I think his risk for early mortality will probably be slightly increased, but in the best case it is possible he will live as long or longer as similar individuals without spinal cord injury.

(b) Dr. Izabella Schultz, Neuropsychologist

[127] Dr. Schultz is a clinical psychologist and neuropsychologist. Dr. Schultz conducted an assessment of Aberdeen. She described Aberdeen as stoic but someone at high risk for suicide, meeting a number of the traditional suicide factors for persons of his age and suffering from his level of pain. She described his pain as neuropathic pain which she described as pain resulting from nerves being cut off or severed and sending misguided signals to the brain as a result.

[128] Dr. Schultz commented on Aberdeen's athletic activities prior to his accident and how these were at his core or what defined him.

[129] In regards to the disputed diagnosis of consequences of a mild traumatic brain injury, Dr. Schultz commented on the lack of consciousness after the accident or better put, a period of disrupted consciousness after the accident. She cites a potential lack of oxygen during this time as having contributed to the difficulties associated with a closed head injury.

[130] She described Aberdeen as suffering from a chronic pain disorder in the groin area and having a limited success on treatment. She further describes him as requiring extensive support services to become more independent. Despite the cross examination of Dr. Schultz and her opinions, I found her evidence compelling. Despite the extensive cross examination,

she was not seriously challenged in her opinion about the level of chronic pain suffered by Aberdeen as a result of the accident and the risk that chronic pain imposes on Aberdeen's mood behaviour and his possible potential for suicide.

[131] As for the mild traumatic brain injury, Dr. Schultz's testing identified neuropsychological and psychological problems which she divided into cognitive and emotional categories. She identified numerous cognitive difficulties and impairments in the areas of attention and concentration, processing speed and accuracy, language auditory perception, and in executive functions. To quote from her report:

> Overall, Mr. Aberdeen presents with mild to moderately severe cognitive difficulties and impairments in processing speed and accuracy, particularly in speech sounds processing; in selected nonverbal intellectual abilities; in general memory including immediate visual memory, single trial auditory learning and delayed auditory memory; and in executive functions: higher order concept formation, learning from feedback, rule generalization and selective integrative functions of the brain.

[132] Dr. Schultz makes the following observations of the impact of Aberdeen's neuropsychological and psychological impairment on his function:

> It has now been almost four years since the accident. From a neuropsychological perspective, those cognitive functions that have been adversely affected by Mr. Aberdeen's mild traumatic brain injury, are not expected to further recover in any significant way. Most of the recovery occurs in the first two years after the injury.
>
> From a psychological perspective, however, Mr. Aberdeen's emotional status cannot be considered stable at this time. It fluctuates with pain intensity, escalation of depression and with suicidal ideation during Mr. Aberdeen's recurrent bladder infections. Mr. Aberdeen's chronic pain is currently poorly controlled and unstable.
>
> There are several scenarios with respect to Mr. Aberdeen's prognosis for his emotional distress:
>
> (1) Optimistic scenario: assuming that effective pain management is medically achieved for Mr. Aberdeen's severe neurogenic pain, his depression will lessen and suicidal ideations will likely subside, particularly if Mr. Aberdeen is assisted with development of new personal, social and recreational goals through occupational therapy and psychological counselling. Under this scenario, Mr. Aberdeen is likely to be left with mild depressive tendency and emotional vulnerability that will become activated under stress.
>
> (2) Pessimistic scenario: assuming that no effective pain management is identified for Mr. Aberdeen (as it is currently the case), or his pain worsens, Mr. Aberdeen's depression is likely to deepen, with onset of Major Depressive Disorder and high-risk, active suicidality.
>
> There is also middle-of-the-way scenario, where partial pain relief may be obtained thus leading to some improvement in emotional status.
>
> It is also important to note that severe levels of pain, fatigue and emotional distress do tend to have an impact on cognitive functioning. Therefore, in times of pain, emotional aggravation and when tired (afternoon and evening), Mr. Aberdeen's cognitive functioning is expected to further decline, below the levels identified in current assessment.

(c) Dr. Raymond Ancill, Psychiatrist

[133] Dr. Ancill was qualified as an expert in psychiatry. Dr. Ancill testified as to his examination of Aberdeen prior to his report of June 1, 2006. Dr. Ancill's assessment concluded that Aberdeen continued to suffer from the effects of a mild traumatic brain injury.

[134] Dr. Ancill is of the opinion that Aberdeen suffered a mild traumatic brain injury as a result of the accident. He has developed a persistent post-concussion syndrome, a personality change and pain disorder. It is his opinion that Aberdeen continues to suffer from a number of cognitive, neuropsychiatric, functional, and emotional deficits as a result of the injuries sustained in the accident. He sets out his opinion at page 29 of his report:

> 1. It is my opinion that the persistent complaints and functional impairments suffered by Mr Jim Aberdeen are a direct result of the motor vehicle accident in which he was involved in June of 2002.
>
> …
>
> 3. It is also my opinion that among his other injuries, Mr Aberdeen suffered a concussive injury in the accident, and developed a post concussion syndrome - now persistent type.
>
> 4. It is my opinion that Mr Aberdeen sustained a traumatic brain injury in the accident and I would estimate the severity of his brain injury as mild. However, Mr Aberdeen has indictors of a poorer outcome – he was aged 50 when injured, psychiatric symptoms have emerged and he still has dizzy episodes.
>
> 5. It is my opinion that Mr Aberdeen suffers from a Personality Change Due to General Medical Condition (Mild TBI) - Aggressive Type, and that this is a direct consequence of his brain injury.
>
> …
>
> 7. It is also my opinion that this man suffers from a Pain disorder with psychological factors associated with a general medical condition and this relates to his headaches and other chronic pain complaints. Chronic pain will also exacerbate the persistent problems from the MTBI.
>
> 8. Further, it is my opinion that Mr. Aberdeen continues to suffer from a number of cognitive, neuropsychiatric, functional and emotional deficits that derive from this cluster of post-MVA syndromes. Given the complexities of his post-MVA problems, it is not possible to specifically attribute each symptom to a specific diagnosis and that many of his complaints have contributions from more than one etiology.
>
> 9. It is my opinion that Mr Aberdeen will continue to have disruption of his life and given his obvious physical injuries, he is not able return to being a bus driver and it is unlikely that he will be able to sustain any form of competitive employment.

(d) Ms. Barbara Baptiste

[135] Ms. Baptiste was qualified as an expert in rehabilitation science and life care planning. Rehabilitation science is the systematic study of physical and psychosocial dimensions of disability, impairment and handicap over the lifespan of an individual. Life care planning is a highly specialized area of study, and it focuses on the comprehensive needs of an individual following either a traumatic injury or chronic health condition, and the specialization is with regard to service needs, devices and associated costs. Ms. Baptiste presented a detailed cost of future care report.

[136] Ms. Baptiste appeared particularly qualified to provide such evidence. She has worked with people who have suffered catastrophic injuries since 1975. Her evidence was that she had directly conducted approximately 800 assessments of persons requiring care plans. She has a Masters degree in Rehabilitation Science from the University of Toronto.

[137] In completing the cost of future care report, Ms. Baptiste followed a systematic approach to the formulation of a life care plan, which is set out in her report as follows:

> Mr. Jim Aberdeen has specific care needs as a result of his involvement in the motor vehicle collision on June 29, 2002. This document provides a comprehensive examination of the data available to me, in order to determine his future extraordinary needs and the associated costs. The objective is to ensure that Mr. Aberdeen is able to maintain a quality of life which resembles, as closely as possible, that which he would have led but for the injuries he sustained in the aforementioned collision.
>
> Recommendations adhere to the concepts of reasonableness and quality of life, and take into consideration the expected natural course of the impairment as Mr. Aberdeen ages. Goods and services are also recommended to prevent future complications. This document addresses reasonable and optimal predicted needs, and not necessarily realized access or use.

[138] Baptiste testified that approximately 100 hours was required to complete the analysis and write her report. She explained her approach in some detail, setting a systematic approach to costing including contacting a number of sources for all potential cost of items.

[139] Like Dr. Schultz, Ms. Baptiste was cross examined at length by counsel for the defendants. The part of her opinion to which the defence takes the strongest objection is the personal support worker at page 19 of her report, which reads as follows:

> Personal Support Worker (also known as Attendant Care/Home Health Aide): Mr. Aberdeen will require significant supports, which will include a range of personal care services, i.e. assistance with bowel and bladder routines, bathing, skin-care, complex meal preparation, and generally looking after his health. He will require driving assistance for longer distances, and possibly, local driving from time-to-time. He will require assistance getting equipment in and out of his car and with some transfers. He will require assistance with laundry, shopping, and errands. At times of illness or complications, he may require a second worker; however, this has been considered in providing the nursing services. In order to ensure his optimal function and safety, 24-hour care is recommended. From time-to-time, there will be hours in the day when Mr. Aberdeen could be left alone, and may prefer this; however, he will require assistance with most aspects of community access and household management, and therefore access to such care, especially with ageing, is critical. Sub-section 8 - Living Arrangements, provides a recommended scenario for accommodating this caregiver. The PSW will require (by law and personal need) breaks throughout the day and this enables Mr. Aberdeen time to himself. This provider would be supervised through a Case Manager and/or a Nursing Care Supervisor through the organization for which they work. Mr. Aberdeen's children currently provide almost all of these services, with some assistance from other friends; however, this is not a long-term solution, as they will need to move on with their own lives. His daughter, Jenny, had an injury from an automobile collision prior to her father's injury, and her capacity to manage is already compromised. In addition to assistive support with aspects of ambulation, bathing and other aspects of personal hygiene (some details provided below), this person is also a personal companion to ensure that social isolation and marginalization are prevented. This person is considered a valued motivator for Mr. Aberdeen in accessing the community, and ensures that other family members can move forward with their lives and personal plans.

[140] As noted earlier, counsel for the defendants cross examined Ms. Baptiste at length. Despite this, Ms. Baptiste was an impressive witness. She seems to give competent answers and appeared eminently qualified for the task assigned to her. Her credentials were particularly impressive. She appeared professional and focused on addressing what she in her experience believed would be the ongoing medical needs of Aberdeen. She did not appear to be an advocate.

[141] Ms. Baptiste explained fully and frankly her view as to why it was medically necessary for Aberdeen to have attendant home care, needs related to care and safety. In doing so, she fully recognized that Aberdeen was an independent-minded individual before the accident but also recognized, fairly, that since the accident he has relied primarily on members of his family and his former wife to provide him with the care he needs.

[142] I have concluded that there is much merit in the report of Ms. Baptiste. She appeared to draw a balance between providing care necessary for a quality lifestyle as opposed to complete pampering. She was attuned to his immediate needs and through her experience was able to grasp effectively what his long term needs will likely be.

(e) Dr. James Schmidt, Neuropsychologist

[143] Dr. Schmidt was qualified as a clinical psychologist and neuropsychologist.

[144] Dr. Schmidt testified that Aberdeen demonstrated neuropsychological deficits in areas of cognitive and executive functioning. However, he was of the opinion that the positive findings were likely a result of such factors as pain and the emotional reaction to his spinal cord injury, rather than a result of long term consequences of a mild traumatic brain injury.

[145] After hearing the testimony of Dr. Schmidt, there was some residual concern as to the basis of Dr. Schmidt's opinion. It appeared that Dr. Schmidt assumed that the records from GF Strong Hospital of Aberdeen did not reflect any concern regarding cognitive or emotional problems, yet those records on entries of December 3, 2002, and February 13, 2003, make such a notation.

[146] Dr. Schmidt was of the opinion that suicidal thoughts were normal following a spinal cord injury but that they would go away, usually within the first year as the injured person adjusted to the spinal cord injury. This concern as an ongoing concern was clearly featured in the report of Dr. Schultz. Dr. Schmidt makes no reference to any suicidal thoughts in his report.

[147] Dr. Schmidt agreed that there is not much likelihood of any improvement regardless of whether the cognitive and emotional changes are attributable to brain injury or to psychological problems arising from the pain and adjustment to the spinal cord injury.

[148] Additionally, Dr. Schmidt confirmed that Aberdeen had acknowledged to him changes in areas of executive functioning since the accident and that Aberdeen demonstrated problems with processing speed and impulsivity in the testing, particularly on the second day of testing. Dr. Schmidt agreed that Aberdeen was a stoic type of person who would not easily talk about his problems.

(f) Dr. Peter Rees, Neurologist

[149] Dr. Rees was qualified as an expert neurologist. Dr. Rees conducted a 1½-hour independent medical examination of Aberdeen including the physical exam. He conceded, as did all other experts, that Aberdeen was a stoic individual.

[150] Though somewhat quick to dismiss the mild traumatic brain injury suffered by Aberdeen as a cause of the cognitive deficits, Dr. Rees did concede that cognitive deficits could be due to a mild traumatic brain injury, pain, depression, or a combination of all three.

[151] Dr. Rees was clearly not a proponent of, or perhaps a believer in, the long term consequences of mild traumatic brain injuries. He suggested that newer literature was of the view that only a small percentage of those who suffered from a mild traumatic brain injury end up having long term consequences of it.

(g) Dr. N.K. Reebye, Physiatrist

[152] Dr. Reebye was qualified as a physiatrist, qualified to give opinion evidence in the area of physical medicine and rehabilitation. Dr. Reebye agrees the neuropathic pain Aberdeen experiences every day will not go away. Unfortunately when asked what he as a physiatrist could do to help Aberdeen, he was unable to offer anything of assistance except the possibility of further medication in an attempt to ease the level of Aberdeen's pain.

[153] Dr. Reebye was asked to review the report of Ms. Baptiste and provide his comments. He was very critical of it. That being said, I agreed with counsel for the plaintiff in their submissions that Dr. Reebye does not have the expertise to comment on specifics of the future care that Aberdeen will need during the remainder of his life. I further agree that it appears that Dr. Reebye's frame of reference is a "medical necessity" model, rather than a "medically justified" model.

[154] Dr. Reebye did not appreciate that since Aberdeen's discharge from GF Strong his daughter had been living with him and looking after him. In his report dated November 13, 2006 Dr. Reebye was asked to comment on the care needs of Aberdeen. He stated:

> Based on my interview and assessment of Mr. James Aberdeen on March 14, 2005, he was independent in activities of self care and daily living and should be able to continue doing so in the foreseeable future.
>
> As he ages and becomes generally weaker (beyond 65 years or so) he may require help for transfers and some activities of daily living. At that time, home care help for two to four hours a day will be sufficient.
>
> Mr. Aberdeen does not require and will not require 24 hour home care support services for his deficits arising from his spinal cord injuries.

[155] Dr. Reebye diagnosed a traumatic brain injury but he testified that he was not in a position to assess whether or not Aberdeen had any residual sequelae from the brain injury.

(h) Mr. Richard Carlin

[156] Mr. Carlin is an expert in vocational rehabilitation. He agreed that the combination of a brain injury and spinal cord injury would make rehabilitation more difficult. His initial view was that Aberdeen could get back to work on an almost full-time basis.

[157] While Mr. Carlin did not feel qualified providing an opinion regarding the likelihood that cognitive problems were contributing to Aberdeen's inability to return to work, he did feel that pain may be the major reason.

[158] Mr. Carlin did not initially have an appreciation of the nature of Aberdeen's lack of abdominal and intercostal musculature. He did not review the video of Aberdeen getting out of his massage bed into a chair. Mr. Carlin did agree that under his definition of competitive employability, Aberdeen would have to compete for a job with non-disabled persons. He also agreed that it was unlikely that he would meet that test and would have to rely on a sympathetic employer.

[159] Mr. Carlin agreed that the comprehension score at the 3rd percentile meant that Aberdeen was worse than 97 percent of the population he was compared to.

[160] Mr. Carlin agreed that if Aberdeen was not competitively employable it would still be important for his identity and his self image to get back into the community in a volunteer

capacity. This would be the best way to enhance his self worth and maximize his mental and physical well being. He modified his opinion at trial, saying Aberdeen had potential to enter the work force, as opposed to his earlier conclusions that he had "excellent potential".

(i) Dr. Terrance Anderson, Epidemiologist

[161] Dr. Anderson was called by the defence to provide an opinion that Aberdeen's spinal cord injury reduces his life expectancy. But Dr. Anderson agrees that his evidence is based on averages and the best he can do for an individual is make an educated guess. Dr. Anderson wrote an article "The Underestimation of Life Expectancy in Elder Patients, the Example of Paraplegia" because both experts in a case underestimated the life expectancy of an elderly paraplegic with the result that she received half of the future care that she required.

[162] Dr. Anderson utilized the Canada Life Tables but could not provide a satisfactory explanation for not using the BC Life Tables which produce a slightly higher life expectancy. He said he was told by someone years ago to use the Canada tables but could not remember who or exactly why, maybe something to do with medical legal opinions.

[163] Dr. Anderson agreed that the average BC male of Aberdeen's age at the date of trial would live 27.07 years based on the BC life tables.

[164] Dr. Anderson confirms that the whole area of predicting life expectancy of a particular individual is just an "educated guess". For example he agrees that a healthy BC male of 54 years of age would in all probability live longer than the average 27.07 years. Accordingly, Aberdeen, given his healthy life style and absence of any illnesses in his history, would likely have lived longer that than the average BC male.

[165] Dr. Anderson agrees that the fact that Aberdeen's mother died last year at 92 years of age and the fact that his aunt is still alive at 94 years of age is a positive factor in determining how long Aberdeen will survive.

[166] Dr. Anderson agrees that optimizing the care that a spinal cord injured person receives will, on average, extend the life expectancy.

[167] Prior to the Accident the positive factors in Aberdeen's history would suggest that he would be far above the average BC or Canadian male in terms of life expectancy. These positive factors still exist following the Accident and with optimal care to minimize the risks associated with the spinal cord injury, there is no reason to expect that his life expectancy would be any different than before the Accident.

(j) Kathy Norton, Occupational Therapist

[168] Ms. Kathy Norton was qualified as an occupational therapist and as a cost of future care specialist. It should be noted that this was Ms. Norton's first cost of future care report since expanding her traditional occupational therapist training into the area of report writing and providing opinion evidence for court.

[169] It is fair to say that Ms. Norton was reluctantly qualified as an expert. No doubt due to her limited experience in this area her evidence at times was weak and not convincing. She seemed strident in her views and unable to see any weaknesses in her report.

[170] One could not help but be left with the impression that her approach to cost of future care was simply to look at what minimal standards Aberdeen has been existing on since the accident, and to price out those minimal needs for the future. There appears to be no detailed analysis of what medically justified expenses might be.

(k) Family and Friends

[171] A number of Aberdeen's family and friends testified as to Aberdeen's circumstances after the accident.

[172] Gary Baker is a long time friend of Aberdeen. He has observed Aberdeen since the accident to be sad, to be subject to infections, and spasms which he cannot control. He further testified as to Aberdeen feeling better about his situation since he has been able to use a machine which allows him to stand up.

[173] Phyllis DeFord has been a friend of Jim Aberdeen for 30 years. She and her husband visited Aberdeen while he was in the hospital as she described as almost every day. She described the difficulty Aberdeen experiences when he falls off his chair. She described one incident where Aberdeen fell on her and she could not get out from under him when he fell. She described Aberdeen as having a limited ability to read as he cannot concentrate due to pain.

[174] Alferda Simpkins is the sister of Phyllis DeFord and also a long-time friend of Aberdeen. She described Aberdeen as now being very different from his former self, being withdrawn and in constant pain and as a result reluctant to leave the home. Aberdeen prior to the accident was very social, positive and active. She also describes Aberdeen as being forgetful. She has travelled with Aberdeen in her car. She described the difficulty he has in getting into a vehicle. She described the difficulty of his falling out of his chair. She described Aberdeen as having bowel and bladder accidents and how she had assisted him in cleaning up.

[175] Jenny Aberdeen is the 28-year-old daughter of Aberdeen. She has lived with her father since the accident. She described her father since the accident as being tough to manage. Her father currently resides in a slightly renovated home, the family dining room being redesigned to act as Aberdeen's bedroom. She describes circumstances as getting more difficult for him due to his lack of concentration and describes her having to repeat things to him. She describes circumstances of him falling out of his chair and needing "two men" to get him back into it. In regards to ongoing bowel and bladder problems, she describes how there is often bleeding associated with that. She describes Aberdeen as being rarely by himself and although he attempts outside activities, they are limited because of his constant state of pain.

[176] Ryan Aberdeen is the 27-year-old son of Aberdeen. He describes the pre-accident circumstances with his father as being exceptionally close, with him and his father actively involved in similar activities. He describes his father Aberdeen as a great guy, his best friend. Ryan Aberdeen has resided with his father since the accident and he and his sister Jenny have been the primary persons responsible for Aberdeen's care. Aberdeen has not been left alone overnight in the absence of Ryan, Jenny, or another caregiver.

[177] Gayle Aberdeen is the former wife of Aberdeen. Despite their breakup in 1998, they have remained friends. After the accident she attended GF Strong and visited Aberdeen there and has visited regularly in the home. She has assisted him along with Jenny in doing things that he needs done around the home including laundry, housekeeping, driving him to various appointments, getting groceries, assisting in meal preparation and cleaning up afterwards. Though Aberdeen on his good days is able to wheel around, exercise, and be active, she describes his personality as one putting on a strong front but facing considerable difficulties. She has helped Aberdeen with his skin routine, ensuring that his skin is properly cared for. She has assisted him with eliminations, and has assisted in cleaning up after accidents, and has assisted him through advice on bowel and bladder matters. She described the circumstances of Aberdeen falling when she was present and how she could not get him off the floor and he could not get himself off the floor. Ryan Aberdeen had to be called for assistance. She describes her daughter Jenny as being exhausted from assisting her dad as best she can.

(iii) Conclusions relating to damages

[178] In order to determine the appropriate benchmark for an analysis of the damages, particularly cost for future care, a determination must be made as to the life expectancy of Aberdeen.

[179] A first issue in life expectancy is, when considering life tables, whether or not it is appropriate to use BC Life Tables or Canada Life Tables. Generally speaking, BC Life Tables are slightly higher in terms of life expectancy. I can see no logical reason not to follow BC Life Tables for a plaintiff from British Columbia.

[180] BC Life Table based on the years 2000-2002, the most recent table, would indicate from the valuation date, being the 10th of October 2006, that someone of Aberdeen's age would have a life expectancy of 26.5 years. The previous BC Life Table, based on data collected from 1995 to 1997 would have produced a life expectancy of 25.2 years. Dr. T.W. Anderson provided evidence on behalf of the defendants. His report's final conclusion was that Aberdeen's life expectancy should be calculated at 20.5 years. Dr. Anderson's report was based on the use of the Canada Tables, not the BC Tables. Additionally, the report of Dr. Anderson underemphasized, and in fact did not consider, a number of the personal traits of Aberdeen. Aberdeen is a stoic individual who both before the injury and after has been driven to maintain as high a standard of personal health as is possible. His daily routine involves considerable exercise, despite his considerable disability. Additionally, the report did not consider the family history of Aberdeen and the evidence before me suggests a number of relatives surviving into their 80s and 90s.

[181] Considering all of the evidence, I have concluded that the realistic life expectancy for Aberdeen is 25.2 years. This is a slight reduction from the most current BC Life Expectancy Table and reflects the negative contingencies of Aberdeen's injuries and the effect that it may have on his health.

[182] I have concluded that it is not only a medical justification, it is a medical necessity for Aberdeen to have a substantial amount of personal care assistance. Aberdeen is able to exist on his own for a few hours a day. An acceptable level of safety would see Aberdeen on his own for three hours in the morning and three hours in the afternoon. As such, I have concluded that Aberdeen requires 18 hours a day of personal care assistance to meet his medical and physical needs and to ensure his safety. My reasons for such conclusion will be more thoroughly canvassed under the costs of future care section.

[183] Additionally, I have concluded that Aberdeen continues to suffer from the residual effects of a mild traumatic brain injury. This is clear not only from the evidence before me, which I accept, from Dr. Izabella Schultz and Dr. Raymond Ancill, but also from the observations of Aberdeen himself while he testified. To some degree, not a lot turns on this conclusion, in that the defendants appeared to be arguing that Aberdeen does not suffer from the residual effects of a mild traumatic brain injury but rather his apparent inability to concentrate and his other cognitive difficulties likely relate to the pain he is experiencing. Either way, be it pain from physical injuries or be it the residual effects of a mild traumatic brain injury, these limitations are related to the accident.

4. Losses

(i) Non-pecuniary Loss

[184] Aberdeen sustained catastrophic injuries in the Accident. The effects of those injuries are permanent and impact every aspect of his life. The B.C. Court of Appeal has made it clear that in cases of "severe personal injuries" there is no basis for making fine distinctions between different types of severe injuries. Any case with devastating injuries qualifies for the upper limit

of non-pecuniary damages, notwithstanding that there may be even more severe cases receiving the same damages.

[185] In ***Spehar (Guardian ad litem of) v. Beazley***, 2002 BCSC 1104, aff'd 2004 BCCA 290, leave to appeal to S.C.C. denied, [2004] S.C.C.A. No. 366 (QL), the plaintiff sustained a severe brain injury but did not sustain any significant physical injuries. The trial judge awarded the maximum non-pecuniary damages. In affirming the award, the Court of Appeal said at ¶14-15:

> The trial judge took no time thereafter in adopting the submissions made on behalf of Ms. Spehar that her injuries "should attract the upper limit of non-pecuniary damages" of $280,000. The trial judge referred to ***Lindal v. Lindal***, [1981] 2 S.C.R. 629, 129 D.L.R. (3d) 263, 34 B.C.L.R. 273 wherein the court, in refining the reasoning in the "trilogy" (***Andrews v. Grand and Toy Alberta Ltd.,*** [1978] 2 S.C.R. 229; ***Thornton v. School District 57 (Prince George)***, [1978] 2 S.C.R. 267, and ***Arnold v. Teno***, [1978] 2 S.C.R. 287), noted that the injuries suffered by the plaintiffs in the trilogy were not identical, but each received an award at the upper limit. The trial judge also noted this Court's comments in ***Blackstock v. Patterson*** (1982), 35 B.C.L.R. 231 at 237-38, [1982] 4 W.W.R. 519 (C.A.):
>
> > Once it was determined that the plaintiffs suffered severe personal injuries the court concluded as a matter of policy that the limit for non-pecuniary damages should be fixed at $100,000. This conclusion ... was based on the premise that in the case of all "severely injured plaintiffs", in order to avoid extravagant claims, an upper limit of $100,000 should be imposed. It follows, that even if the respondent's injuries could be said to be different from or not quite as severe as those suffered by the plaintiff in the trilogy cases, her injuries were found by the trial judge to be "devastating", and, therefore, fell within the $100,000 category fixed in ***Lindal*** and the trilogy cases.
>
> In the case at bar the appellants draw a distinction between the injuries suffered by Ms. Spehar and the injuries suffered by the plaintiffs in the trilogy. They also cite cases in this jurisdiction wherein trial judges have awarded less than the judicial cap for extremely serious injuries. On the former, I point to the above quotation from ***Blackstock*** as an answer. On the latter, lesser awards in other cases do not dilute the principle enunciated in ***Blackstock***.

[186] The current inflationary adjusted upper limit for catastrophic claims is $311,000.

[187] Counsel for the plaintiff urged me to consider the language of Dickson J. as he then was in the ***Andrews*** case. In that case, Dickson J. opines that in "most" cases of catastrophic loss $100,000 was the rough upper limit. Counsel for the plaintiff urged me to consider the fact that not only has Aberdeen suffered a catastrophic loss due to his injuries, he suffers even more than the plaintiff did in ***Andrews*** in that he has the ongoing additional difficulty of chronic neuropathic pain. In fact, the suggestion is that in a number of strictly chronic pain cases, absent the significant physical difficulty of a spinal cord injury, an award close to the rough upper limit for pain and suffering has been granted.

[188] There is some strong attraction to this argument put forward by the plaintiff. However, I am bound by the reasoning of Madam Justice Rowles in the recent Court of Appeal decision in ***Lee v. Dawson*** (2006), 51 B.C.L.R. (4th) 221, 2006 BCCA 159 (see ¶ 90), leave to appeal to S.C.C. refused, [2006] S.C.C.A. No. 192 (QL). In light of ***Lee v. Dawson***, in British Columbia, it is not possible to consider an award above the rough upper limit. I assess non-pecuniary loss at $311,000.

(ii) Past Wage Loss

[189] At the time of the Accident in 2002, Aberdeen was 50 years old. He was working as a full-time transit operator with Coast Mountain Bus Company.

[190] Mr. Robert Carson of the firm Associated Economic Consultants Ltd. provided a report dated July 17, 2006 detailing Aberdeen's estimated past without accident income from 2002 to 2006. Based on the figures set out in Mr. Carson's report, Aberdeen's past wage loss is $255,415.00 which is reduced to $153,249.00 after a 40% reduction pursuant to ***Hudniuk v. Warkentin***.

[191] In response to the report of Robert Carson, Mr. Marc Szekely provided a report for past wage loss. The report of Mr. Szekely was however, based on a reduced annual salary for Aberdeen. In determining a yearly income, Mr. Szekely included in the average the actual income earned by Aberdeen in 2001, a year in which there was a strike. His calculation was as such based on a principle that there would lost work time every 4½ years due to a strike. Interestingly, if that was the case, in the 4½ years since the accident, that evidence could have been provided to the court and it was not. Based on that calculation difficulty, if not error, I prefer the report of Robert Carson. I would assess Aberdeen's wage loss at $153,249 after taking into account the ***Hudniuk v. Warkentin*** factors ((2003), 9 B.C.L.R. (4th) 324, 2003 BCSC 62).

(iii) Future Wage Loss

[192] I accept that there is considerable difficulty, verging on impossibility, of Aberdeen ever being employed. His daily routines require him to spend a number of hours in the morning for preparation for his day, exercise, and the like, all of which make him ever achieving work dependent on an incredibly flexible employer who is prepared to recognize that at potentially regular intervals, it would be impossible for Aberdeen to attend and do his job.

[193] Additionally, I conclude that Aberdeen continues to suffer from the effects of the mild traumatic brain injury. This would make any training and retention a considerable difficulty. I do not accept on the evidence that Aberdeen can be employed. I accept that he is competitively unemployable.

[194] For the same reasons as noted above, I prefer the evidence of Mr. Robert Carson in regards to the loss of future income over that of Mr. Marc Szekely.

[195] Aberdeen is not competitively employable. While there is hope that he will re-engage into the community with the appropriate assistance as contemplated by Ms. Baptiste, the best that can be hoped for is that he will find some volunteer work that will provide him with some enjoyment and sense of accomplishment.

[196] Mr. Carson estimates the present value of Aberdeen's future without injury loss of income at $502,381.00 inclusive of future loss of pension benefits to age 63 as a bus driver. Based on the evidence before me, I consider it highly probable that Aberdeen would have worked until age 63. I also consider highly probable that after age 63 Aberdeen would have continued part-time work. However, considering other potential negative contingencies, no amount is provided for this future positive contingency.

[197] I determine the loss of future wages including pension benefits to be $502,381.

(iv) Cost of Future Care

[198] As noted earlier in the discussion around damages generally in these Reasons, I have concluded that full compensation as espoused in ***Andrews*** and ***Milina*** requires that there should be medical justification for a cost of future care expense and the expense must be reasonable. As I noted, the inquiry is more directed to the fact-based determination of whether

each individual item claimed for a cost of future care expense is medically justified, rather than approaching the question from a purely functional analysis of whether a particular item will make the plaintiff whole again. I have rejected any suggestion that medical necessity is the test; rather it is one of medical justification.

[199] The Court in this case is faced with two very different approaches to the cost of future care. These two distinct approaches are found in the report of Barbara Baptiste of Rehabilitation Management Inc. and Kathy Norton of Progressive Rehabilitation Orien Health.

[200] I have a number of significant concerns with the report of Kathy Norton and the evidence of Kathy Norton. Though seemingly well-meaning, Ms. Norton's approach to the preparation of a cost of future care report appears to be naive and minimalistic. In her testimony, Ms. Norton appeared to be of the view that the plaintiff would, with minimal assistance be in a much more active or advanced position in terms of assisting in his own care, than appears at present. There is a suggestion in her evidence that Aberdeen could learn to get himself off the floor and back into his chair in the event he was to fall.

[201] This is inconsistent with the entire medical evidence and inconsistent with Aberdeen's experience to date as noted by him in his evidence as well as those who testified who had to assist him in getting off the floor as a result of a fall in the past.

[202] Additionally, Ms. Norton appears to be of the view that Aberdeen would be able to learn to get himself into his car and dismantle his own chair, something that he from all other evidence appears incapable of doing.

[203] There is no evidence at all to suggest that Aberdeen is not doing the best he can in his circumstances, and in fact Aberdeen is regularly exercising and appears to be diligent in his efforts to obtain as much physical strength as possible with his considerable disability. It is hopelessly naive, in my view, for one to base the cost of future care report on a patient being able to do physical activities which he clearly cannot do.

[204] Additionally, some of the costing in Ms. Norton's report would, frankly, be comical if it was not for the significant consequences of one's reliance on it would be. For example, it is not disputed by any party that Aberdeen's current home is inadequate for his needs. I will deal with this issue in more detail later on in this section on costs of future care. The plaintiff and the defendants collectively have provided the court with evidence of what they feel is the cost of replacement housing for Aberdeen is. Both agreed that some component of moving costs is necessitated by the need to find alternative accommodations.

[205] Ms. Norton's allocation for moving expenses in her cost of future care report is $500.

[206] It is hard to imagine how even an able-bodied individual could pack, move, and unpack a household for $500. On this point, despite extensive cross examination, Ms. Norton could not bring herself to resile from her report, her assessment of quite frankly, a preposterously low estimated cost.

[207] This was Ms. Norton's first cost of future care report. Under cross examination, she admitted to not having consulted any textbooks on the preparation of a cost of future care report.

[208] I find her report to be based on hopelessly naive assumptions about Aberdeen's abilities and I find her summary of costs woefully inadequate.

[209] In contrast, I find the report of Ms. Baptiste to be well thought out, and much more reflective of the tests in law, which is what costs are medically justified for this plaintiff in light of the injury caused to him by the negligence of the defendants. There are however a number of items from Ms. Baptiste which, in meeting the medical justification test, must be "backed out" of her costing estimate.

[210] I accept the recommendations of her report dated the 29th of June 2006, less the items to be backed out from it.

[211] Having considered the medical evidence and the evidence of the friends and family of Aberdeen who witnessed his circumstances, there are a number of conclusions that can be drawn as it relates to damages. One particularly contentious claim was the plaintiff's request for the provision of a 24-hour personal support care worker.

[212] Despite Aberdeen's almost heroic efforts of maintaining a quality lifestyle and being stoic in the face of considerable adversity, I have concluded that Aberdeen is a person very much in need of personal support care assistance. Aberdeen has relied on this support assistance, provided voluntarily by friends and family since the accident. Aberdeen has attempted through regular physical exercise and considerable discipline to try to improve his circumstances. He is, four-and-a-half years post-accident, still in a circumstance where he is unable to care for himself without considerable support.

[213] Though able to drive, having obtained a license, Aberdeen cannot get in and out of a traditional vehicle on his own. Though able to provide himself with minimal food preparation, he cannot shop for groceries, and he cannot provide himself on his own with complex meals important for balanced nutrition.

[214] Due to his physical limitations, he cannot clean up after himself if he has a bowel or bladder accident. These are unfortunately relatively common occurrences.

[215] In terms of maintaining a home, he cannot maintain a home and the level of cleanliness necessary for someone subject to infections and illnesses as a result of his limited physical ability.

[216] Additionally, and of a great concern, is the injury on one occasion that Aberdeen caused himself in attempting to sterilize catheters. He accidentally burned himself significantly with hot water and was only sensitive to this once sores and scars developed as a result of the burn.

[217] The costing of the claim for future care in the Barbara Baptiste report is found in the report of Robert Carson of Associated Economic Consultants Ltd. dated July 14, 2006. Based on the determination of Aberdeen's life expectancy at 25.2 years from the assessment date in October 2006, I accept the costs set out in the report of Robert Carson.

[218] The total of that report is (CDN) $5,021,538, $259,966 in GST and PST, and (US)$57,085. Noted below in these Reasons as Table 1 are the expenses which I would back out from this costing report.

Table 1: Cost of Future Care Items from Report of Barbara Baptiste, as costed in Report of Robert Carson (July 14, 2006) not allowed

No.	Item		$ Cost	PST/GST
	Medical Needs:			
1.	Urologist	(3 years)	720	
		(Onward)	1,125	
2.	Psychiatry		5,970	
3.	Psychological Counselling – Family	(2 years)	3,169	
		(Onward)	16,959	
4.	Registered Nurse Services[1]		19,866	
5.	Acupuncture	(3 years)	3,163	190
		(Onward)	7,409	445
	Rehabilitation Support Services:			

No.	Item		$ Cost	PST/GST
6.	Cost of care assessed at age 65		3,770	226
7.	Kinesiologist supervision		59,258	3555
	Personnel Care Support:			
8.	Personal Support Worker[2]		725,443	43527
9.	Childcare grandchildren		3,200	192
	Equipment and External Aids/Devices:			
10.	Seating Assessment (Manual Wheelchair)		5,781	
11.	Environmental Control Unit		44,869	5883
12.	Computer/Monitor/Printer		5,865	763
13.	Internet Service		5,228	317
14.	Tens Unit (Combined costs)		2,274	297
15.	Computerized Electrical Standalone device		27,885	1673
16.	Therapy Pool[3]	(USD)	(57,084)	
	Educational and Vocational Support:			
17.	Educational Consultant		15,922	955
	Transportation:			
18.	Taxi Services		107,185	
	Living Arrangements:			
19.	Home Modification Assessment		6,468	388
			1,071,589	58,411
		Total Reduction (Cdn$)	1,130,000	
		Total Reduction (USD$)	57,084	

Notes:

[1] Nursing Services allowed at one-half of claim, reduction from Cost Report of $19,866.

[2] Personal Support Worker allowed at three quarters of claim (18 hours a day), reduction from Cost Report at $725,443 plus $43,527 taxes.

[3] Therapy Pool is US dollars, reduced from Cost Report

[219] The net effect of my eliminating the costs in Table 1 are that the cost of future care total (CDN) $3,949,949 plus $201,605 in GST and PST, no US dollar component, for a total of

$4,151,504. A short explanation for the expenses removed from the costing of the Barbara Baptiste report is as follows:

- Urologist expense. This is covered by BC Medical Plan.
- Psychiatry. If necessary this can also be covered through the BC Medical Plan.
- Psychology counselling family (family/group). The cost of future care for Aberdeen will include personal counselling but not that for his family.
- Registered Nurses services. I would allow only $19,866, one-half of the claim costs for a savings of $19,866, some registered nurse services can be provided by the public health system but it will be necessary in my view for additional support services especially in the latter stages of Aberdeen's life.
- Acupuncture services. Aberdeen indicated that he tried these as a pain control system and it was of no use to him.
- Cost of care assessment at age 65. This is an unnecessary expense.
- Kinesiologist supervision. This is an unnecessary expense. Aberdeen is capable of planning his exercise routine and implementing same.
- Personal Support Worker. I would allow 18 hours a day for a personal support worker. This would require Aberdeen to essentially be on his own for three hours in the morning and potentially three hours in the afternoon each day. It is crucial in my view that Aberdeen have assistance for evening times, particularly in light of his need to regularly adjust himself while sleeping. Although he is currently able to achieve this, it is in my view unlikely with aging that he could continue to do this. I would allow 18 hours a day of care for a personal support worker which would result in a reduction of $725,443 from the cost of the report.
- Child Care Costs for Grandchildren is not appropriate.
- Seating Assessment for Manual Wheelchair. This is available through GF Strong.
- Environmental Control Unit. This is an unnecessary expense with a reconstructed home and regular assistance from a personal support worker. This is unnecessary.
- Computer Monitor, Printer and Internet Services. These are expenses which Aberdeen would have incurred in any event and are not related to his injury and are therefore not compensable to him from the defendants.
- Expenses related to the TENS Unit. This is an unnecessary medical expense although low cost.
- Computerized Electrical Stimulation device. This is an experimental item of no appreciable benefit or justification and should not be included.
- Therapy Pool. This is an unnecessary expense. Aberdeen with the assistance of his personal support worker can attend a public pool for such activities. The benefits of this involve further interaction into the community which will be of the long term benefit to Aberdeen.
- Education Consultant. Although study programs and vocational counselling are of a benefit, further education is not appropriate or required.

- Taxi Services. This would be an unnecessary expense in light of the assistance to be provided through a modified van and the assistance of a personal support worker.
- Home Modification Assessment. This is an unnecessary expense in light of the new construction of a home called for in these reasons.

(v) Cost of Care – Home Replacement

[220] Aberdeen's current home is a two-storey home which has the bedrooms on the upper floor. These are clearly inaccessible for Aberdeen. Although there was no direct concession on this point, the defendants do not appear to dispute that Aberdeen's home will have to be replaced—the cost of modification being impractical or prohibitive.

[221] As noted earlier, Aberdeen's friends have modified his home to create a bedroom for Aberdeen in what was previously the dining room of the home on the main floor. Additionally, the bathroom has been modified and a number of ramps have been included.

[222] Two experts provided evidence in regards to a replacement home for Aberdeen. The plaintiff called Richard E. Galan. His report costed out the billing costs of a 3739 square foot modified rancher style home with a 600 square foot garage, 150 square foot deck and 150 square foot patio. The floor area of the home was designed in such a way to provide the additional space required for the operations of a wheelchair. The home had a master bedroom and four other bedrooms as well as caregiver's living space.

[223] The second expert called on behalf of the defendants was Edward deGrey. Mr. deGrey's report takes the approach of the purchase of 2300 square foot bungalow or one level home and modification of it with the addition of approximately 450 square feet.

[224] The two reports represent two different approaches. Both approaches have their limitations.

[225] Beginning with the Galan approach, although the approach is rational, the home proposed by Galan is far beyond what is required for Aberdeen. Realistically, Aberdeen needs a home with a master bedroom, one guestroom, and space for a caregiver. The evidence before me suggests that both of his children, Ryan and Jenny Aberdeen, are in the process of getting on with their lives and will shortly be moving out of the home, provided there are adequate caregivers in place for their father.

[226] The positive side of the Galan report is the thorough way in which Galan has calculated the costs of miscellaneous architectural considerations necessary for a home for someone with a disability at the level of Aberdeen. This includes kitchen modifications, wall protectors, high traffic non-skid flooring, automatic door openers, and numerous bathroom, hallway, and landscape modifications.

[227] The limitations of the deGrey report appeared to be that it is really based on the assumption of a suitable 2300 square foot being available with the possibility of modification for the addition of a further 450 square feet. deGrey conceded in cross examination that no such home was available in Aberdeen's neighbourhood to suit that purpose.

[228] In addition, deGrey appeared to take a somewhat unique approach to the needs of Aberdeen, and the costing of such. Frankly, in cross examination, deGrey appeared belligerent and hostile to suggestions posed to him. He simply dismissed a number of the modifications in the Galan proposal as being too expensive and seemed to focus on costs and cost savings rather than what was reasonable for the needs of someone with Aberdeen's level of disability and his medical needs and needs for care. At one point, deGrey went so far as to question why certain house plans were not provided to him, commenting that it was curious that plaintiff's counsel had not provided such. These remarks by deGrey were inappropriate and unfortunately leads one to conclude that he was acting more as an advocate for his position than as a true expert.

[229] I preferred the Galan approach to the replacement of Aberdeen's home with the following limitations. I would reduce the proposed living room size to 220 square feet for a reduction of 40 square feet. I would eliminate the 3rd and 4th bedroom as well as the guest bedroom for a saving of 552 square feet, and as such revise the proposed designed residence to 2364 square feet, which, when one adds the ten percent addition for design, construction (236 square feet) and the fifteen percent increase for hall circulation (355 square feet) gives a total floor area of 2955 square feet.

[230] Additionally, I would reduce the architectural and design fee component to twenty percent or $67,500, based on a total construction cost of $335,500. As such, the total cost for construction prior to special construction equipment and fixture costs would be $405,000.

[231] In regards to the special construction equipment and fixture costs, I would again reduce the architectural fees to twenty percent and reduce the various costs claimed to reflect the reduced square footage of the home, reduced as such from 3739 square feet to 2955 square feet. This would mean that the additional costs that he sets out as Table C expenses in his report would be $82,231 plus $16,446 for the twenty percent architectural and other fees which, when added to the $405,000 equals a total construction costs for the new residence of $503,667.

[232] Based on the appraisal information available, which is the appraisal of Aberdeen's current home, one can estimate that the cost of a lot would be $325,000. As such a new home and lot would cost $828,647.

[233] The value of Aberdeen's current home must be subtracted from the cost of the replacement home. His current home is appraised at $465,000 which, with the reduction for real estate commission (7% on the first $100,000, 3½% on everything thereafter, plus 6% GST equals $20,962) would leave a net receipt to Aberdeen from the sale of his home of $440,038.

[234] As such, the cost to provide Aberdeen with a modestly sized home fit for his needs, on a lot equivalent to his current property and after considering the resale value of his home, would be $388,639. As such I award damages to Aberdeen for home replacement in the amount of $388,639.

(vi) In Trust Claim

[235] In considering the in trust claim, I turn to the analysis of Harvey J. in the ***Brennan*** case (***Brennan v. Singh***, [1999] B.C.J. No. 520 (S.C.) (QL)). In ¶ 95 of that decision, Harvey J. stated as follows:

> 95 In my view, it is useful to review briefly the factors which are considered in the assessment of such claims. They are:
>
> (a) where the services replace services necessary for the care of the plaintiff;
>
> (b) if the services are rendered by a family member, here the spouse, are they over and above what would be expected from the marital relationship?
>
> (c) quantification should reflect the true and reasonable value of the services performed taking into account the time, quality and nature of those services. In this regard, the damages should reflect the wage of a substitute caregiver. There should not be a discounting or undervaluation of such services because of the nature of the relationship;
>
> (d) it is no longer necessary that the person providing the services has foregone other income and there need not be payment for such services.

[236] This case clearly upholds the principle of full compensation in quantifying the value of the contributions of family members. Damages should be awarded based on the market value of services provided. This case is however somewhat unique in that regard. A substantial amount of personal services have been provided to Aberdeen over the course of 48 months, from the time he left GF Strong until the valuation date at trial in October 2006, by family members who reside with him and by doing so, reduce their costs.

[237] His daughter Jenny Aberdeen lives at home with her father and does not pay any rent. Her expenses are provided by him. She has however dedicated much of her time to assist in the care of her father.

[238] The plaintiff's son Ryan Aberdeen resides at home and pays a nominal amount of rent. He assists to some degree in the home and is completely responsible for the outside care of the home. In addition he is a general caregiver for his father as is his sister Jenny.

[239] Additionally, Aberdeen's estranged wife Gail Aberdeen has provided substantial care. She is coincidentally employed as a home care worker, earning approximately $15 an hour. The number of hours that she has spent in providing care to Aberdeen has varied over time. In the beginning it was as much as 10-15 hours a week, and it has gotten less since that time. Much of Aberdeen's success in recovering as best he can from the injuries sustained in the accident is a credit to Jenny, Ryan and Gail Aberdeen as well as the numerous close friends who have assisted Aberdeen in his recovery. The law provides for family members to advocate an in trust claim. I would calculate that claim as follows:

- Jenny Aberdeen - $1,000 per month;
- Ryan Aberdeen - $500 per month; and
- Gail Aberdeen - $500 per month.

The total is $2,000 per month. That calculated over 48 months totals $96,000.

(vii) Special Damages

[240] The parties have agreed on special damages at $45,000.00. The plaintiff is entitled to judgment in that amount for special damages.

5. Conclusions

[241] I conclude that the Zanatta Defendants and Langley have both breached their duty of care to Aberdeen and Aberdeen has suffered a loss as a result. I apportion liability as between the two defendants 25% to the Zanatta Defendants and 75% to Langley.

[242] Damages are assessed as follows:

1. Non-pecuniary loss: $311,000
2. Past wage loss (after applying ***Hudniuk***): $153,249
3. Future wage loss: $502,381
4. Cost of future care: $4,151,504
5. Cost of care - Home replacement: $388,639
6. In trust claim: $96,000
7. Special damages: $45,000

[243] Thus, total damages are assessed at $5,647,773. Aberdeen has been successful and he is entitled to his costs on Scale B. If there are circumstances, of which I am unaware,

counsel are at liberty to return to me on the issue of costs, as can be arranged through Trial Division.

"The Honourable Mr. Justice Groves"