SUPREME COURT OF YUKON

Citation: *Knapp v O'Neill*, 2015 YKSC 22

Date: 20150604
S.C. No. 04-A0118
Registry: Whitehorse

Between:

ANGELIKA KNAPP

Plaintiff

And

JAMES P. O'NEILL, RICHARD J. MALLETT, and
JAMES H. BROWN PROFESSIONAL CORPORATION,
operating as JAMES H. BROWN & ASSOCIATES

Defendants

Before: Mr. Justice R.S. Veale

Appearances:
Richard Buchan — Counsel for the Plaintiff
Bruce Comba — Counsel for the Defendants

REASONS FOR JUDGMENT

INTRODUCTION

[1] Ms. Knapp was injured in a motor vehicle accident on September 28, 1999, on the Top of the World Highway, northwest of Dawson City, Yukon.

[2] She retained James P. O'Neill, of Edmonton, Alberta, on April 6, 2001, to pursue a personal injury action on her behalf.

[3] Ms. Knapp now sues Mr. O'Neill for negligent representation for work, which culminated in a settlement Mr. O'Neill recommended at a mediation held in Edmonton on October 22, 2002. Counsel for Ms. Knapp withdrew the claim against Richard J. Mallett.

[4] The first issue to determine is whether Mr. O'Neill was negligent in his representation of Ms. Knapp.

[5] In the event Mr. O'Neill failed to exercise the requisite skill and care required of a lawyer, the Court must then determine whether Ms. Knapp has established liability in her motor vehicle accident and any appropriate damages. This procedure is often referred to as a trial within a trial.

[6] Counsel filed the Writ of Summons and Statement of Claim against Mr. O'Neill on October 18, 2004. The trial was initially scheduled in 2010 but was adjourned at the request of Ms. Knapp for health reasons. It was again scheduled and adjourned in 2013. The trial took place on October 27 - 31, 2014, December 8, 2014 and January 26, 2015.

GENERAL BACKGROUND

[7] Counsel have agreed on the following facts to give an overview of the circumstances. I have added some detail from the admitted documents.

[8] Mr. O'Neill graduated from the University of Alberta with an LLB in 1993. He was called to the Alberta Bar in 1994.

[9] Mr. O'Neill was on the Law Society of Alberta's inactive list between April 1995 and March 1998 while working as a claims adjuster with Co-operators Insurance.

[10] Mr. O'Neill returned to practice with James H. Brown and Associates in March 1998. He carried 200 active files on average, resolving 75 - 100 per year. He did not conduct any trials in the three years after his return to private practice. Mr. O'Neill described the advertising strategy of the firm as "to open as many files as possible."

[11] Mr. O'Neill was not a member of the Yukon Bar at any time material to this action. Richard Mallett, also of James H. Brown & Associates, was at all material times a member of the Yukon Bar. Mr. Mallett had no active role in the personal injury action commenced in the Supreme Court of Yukon under his name. At all times material to this action, Mr. O'Neill and Mr. Mallett were employees of James H. Brown & Associates. It was Mr. O'Neill's evidence that "Pre active litigation steps [,] I believe I could run this file."

[12] Ms. Knapp was born in Austria on December 19, 1963. She is an Austrian citizen.

[13] Ms. Knapp was educated in Austria and in 1980 - 1981 studied bookkeeping and accounting at a college in Innsbruck, Austria.

[14] In 1983, Ms. Knapp attained permanent residency status in Switzerland.

[15] Ms. Knapp's work history in Europe was generally of short duration as a bookkeeper, tax auditor, bar maid and clerk, to name a few.

[16] Ms. Knapp took additional accounting training in Europe during the 1990's.

[17] From late May 1998 to late March 1999, Ms. Knapp travelled in the Yukon and Alaska.

[18] In June 1999, Ms. Knapp applied to be admitted to Canada as a permanent resident.

[19] Also, in June 1999, Ms. Knapp returned to Canada and specifically the Yukon. Her relationship with Eric Dufresne began in August 1999.

[20] During her stay in Canada, Ms. Knapp was contacted about taking a temporary position with the Swiss income tax authority. She made plans to return to Europe in

October 1999 in order to work for a-four to five-month period commencing November 1, 1999, while waiting for a decision on her application to immigrate to Canada.

[21] On September 28, 1999, Ms. Knapp was injured in a motor vehicle accident while riding in a transport truck driven by Mr. Dufresne. She was lying in the sleeper portion of the truck, unrestrained. The sleeper did not have a seatbelt or restraint apparatus. The truck entered the ditch and rolled over in a single-vehicle accident.

[22] Ms. Knapp was trapped in the damaged truck for about two hours. She was transported by ambulance to the Dawson City Nursing Station.

[23] Dr. Parsons, a general practitioner in Dawson City, diagnosed a possible wedge fracture of the 10th thoracic vertebrae of Ms. Knapp's spine. She was fitted with a back brace and prescribed analgesics. She used the brace for approximately two months.

[24] On October 4, 1999, Ms. Knapp was seen at the Whitehorse General Hospital by Dr. Timmermans, a general surgeon, who confirmed the diagnosis and treatment. X-rays were taken.

[25] The truck driven by Mr. Dufresne was insured by Zurich Insurance. In early October 1999, Ms. Knapp communicated with Zurich Insurance regarding accident benefits and submitted a Proof of Claim form on October 18, 1999.

[26] Ms. Knapp's return to Europe was delayed until November 1, 1999, due to her injuries.

[27] Ms. Knapp's treatment was continued by Dr. Thomas Hockholzer in Innsbruck, Austria. He prescribed physiotherapy. Seven treatments were taken in November 1999. A further eighteen treatments were taken in February through April 2000.

[28] Ms. Knapp's planned employment with the Swiss income tax authority was delayed due to her injuries. She did not commence work until December 1999 and worked only part-time in December 1999 and in January and February 2000. She returned to full-time employment in March 2000.

[29] Ms. Knapp's employment with the Swiss income tax authority was extended beyond its initial term. From March 2000, she worked full-time as a tax auditor, ceasing employment on September 15, 2000. During the December 1999 to September 2000 period of her employment, Ms. Knapp earned in excess of 100,000 Swiss francs.

[30] Ms. Knapp left her employment in September 2000 after receiving approval to come to Canada as a permanent resident. She immigrated to Canada in November 2000.

[31] Ms. Knapp's intention was to reside in the Yukon.

[32] On February 6, 2001, Ms. Knapp's thoracic spine was x-rayed and Dr. Ackerman compared the October 4, 1999 x-rays to the February 6, 2001 x-rays and confirmed:

> IMPRESSION: MILD ANTERIOR WEDGE COMPRESSION FRACTURES OF T10 AND T11. THE DEGREE OF ANTERIOR WEDGING IS MINIMALLY PROGRESSED FROM THE PREVIOUS STUDY AND THERE IS INCREASED DEGENERATIVE CHANGES AT THE T10-11 DISC SPACE. THERE IS A MILD KYPHOSIS AT THE LEVEL OF THE COMPRESSION FRACTURES

[33] On March 22, 2001, Dr. Attalla, Ms. Knapp's treating doctor in Whitehorse, confirmed that Ms. Knapp was unable to return to work until she was examined by an orthopaedic specialist.

[34] Ms. Knapp took 13 chiropractic treatments with Dr. Dawn Armstrong in Whitehorse between April 19, 2001 and June 11, 2001, with some relief of her

symptoms. On June 21, 2001, Ms. Knapp was seen by Dr. Pate, an orthopaedic surgeon and knee specialist, in Whitehorse, who referred her to Dr. Dommisse, a spinal surgeon, in Vancouver.

[35] Ms. Knapp learned of the James H. Brown & Associates law firm in Edmonton from seeing a Yellow Pages advertisement in the Yukon telephone directory. She contacted the firm and spoke by telephone to Mr. O'Neill.

[36] On April 6, 2001, Ms. Knapp travelled to Edmonton and retained Mr. O'Neill for the purpose of advancing a personal injury claim. She signed a Contingency Fee Agreement, which provided for a percentage fee of the total amount recovered from 30 - 40 % depending upon whether it was achieved through a settlement or trial.

[37] In September 14, 2001, Mr. O'Neill issued a Writ of Summons and Statement of Claim in the Supreme Court of Yukon, which claimed damages for a fractured spine and included a claim for "impairment of income earning capacity".

[38] By letter dated October 4, 2001, Mr. O'Neill requested medical legal reports from Dr. Dommisse and Dr. Attalla.

[39] By letter dated November 14, 2001, Mr. O'Neill received a medical report from Dr. Attalla, enclosing an x-ray report and consultation reports from three orthopaedic surgeons including Dr. Dommisse.

[40] On November 26, 2001, Dr. Dommisse provided a medical legal report to Mr. O'Neill responding to specific inquiries:

> In answer to your letter of October 4th, 2001:
>
> 1. A description of this lady's injuries is outlined above.
>
> 2. It is possible that this lady may require an anterior thoracic fusion from T10 to T12, but surgical treatment

should only be considered as a last resort if all non-surgical methods of treatment fail. She agrees to trying all forms of therapy before considering any surgery.

3. My diagnosis is two column anterior compression fractures of T10 and T11 with degenerative changes at T10-11 and T11-12.

4. a. I feel that her present condition will gradually deteriorate.

b. the present treatment recommended for her is that of exercises to maintain flexibility of the thoracolumbar spine, as well as trunk and abdominal muscle strengthening. She may try acupuncture, laser therapy, ultrasound interferential and even TENS treatment. I do not feel that chiropractic adjustments would be of much value for her. She may require ongoing TENS treatment for pain relief on a permanent basis.

c. If surgery were an option, I would anticipate that she would have considerable relief of her thoracolumbar pain. She likely would have some residual stiffness within this area and pain to a lesser extent with increased activity, weather changes, fatigue or stress.

The possible complications of this surgery are many, but some of the local complications include infection, breakage or loosening of the internal fixation device used and possible nerve damage.

General complications would include those related to the anaesthetic itself and anaesthetic agents used. She may also develop deep vein thrombosis following such surgery. Hematoma formation following this surgery is also a possibility and she may require blood transfusion.

d. I anticipate that she will have ongoing pain and suffering with physical activity as outlined above to a greater or lesser extent.

e. I feel that she is affected to a moderate extent in her physical activity.

f. Her future disability will be mild to moderate without surgery and I do feel that this disability will be permanent.

> g. as outlined in item “e” above, I feel there is a moderate effect on this lady’s enjoyment of life and ability to work.
>
> h. Ms. Knapp works as an accountant and while I feel that her disability is mild to moderate, I do not feel that she is totally disabled from working at this time. She could conceivably work in a part-time capacity. I feel that this reduced capacity of working would be permanent if she was treated without surgery.
>
> I feel that the overall prognosis in the long term is probably guarded in view of her injury and symptoms.

[41] No Statement of Defence was required to be filed in the action before the mediation on October 22, 2002. The mediation concluded with a settlement, followed in 2004 by this action against Mr. O’Neill and James H. Brown Professional Corporation.

[42] I will discuss Mr. O’Neill’s file and relationship with Ms. Knapp below.

THE LAWYER’S DUTY OF CARE

[43] The lawyer’s duty of care to their client is well stated in *Tiffin Holdings Ltd. v. Millican* (1964), 49 D.L.R. (2d) 216, at 218-219 (Alta.S.C.), aff’d, [1967] S.C.R. 183. At para. 12 of the trial decision, Riley J. stated:

> The obligations of a lawyer are, I think, the following:
>
> (1) To be skilful and careful.
>
> (2) To advise [the] client on all matters relevant to his retainer, so far as may be reasonably necessary.
>
> (3) To protect the interests of [the] client.
>
> (4) To carry out [the client’s] instructions by all proper means.
>
> (5) To consult with [the] client on all questions of doubt which do not fall within the express or implied discretion left to [counsel].

> (6) To keep [the] client informed to such an extent as may be reasonably necessary, according to the same criteria.

[44] This statement of the duty of the lawyer to his or her client has been adopted by Kirkpatrick J. (as she then was) in *Startup v. Blake*, 2001 BCSC 8, and Martin J. in *Adeshina v. Litwiniuk & Co.,* 2010 ABQB 80, and was cited with approval in *Chaster (Guardian ad litem of) v. LeBlanc*, 2009 BCCA 315.

[45] Martin J., at para. 106 of *Adeshina*, added the most important aspect of the lawyer-client relationship: the lawyer advises and the client instructs. The lawyer's advice must be reasonable and competent and the client must be properly informed of all available options.

[46] The lawyer's duty is to exercise the standard of care of a reasonably competent member of the profession similarly situated. See *Central Trust Co. v. Rafuse*, [1986] 2 S.C.R. 147. In *Folland v. Reardon* (2005), 74 O.R. (3d) 688 (C.A.), the Ontario Court of Appeal rejected the suggestion that an egregious error must be committed before a lawyer will be found liable.

[47] In *Chaster*, Prowse J.A., at para. 14, approved the approach the trial judge took to the standard of care for a lawyer:

> The trial judge then went on to state that the standard of care was that of a reasonably competent and diligent counsel in Vancouver from 1995 to 1998, citing the reasons for judgment of Kirkpatrick J. in Startup [*Startup v. Blake*, [2001] B.C.J. No. 16]. He observed that the standard of care was not to be judged with the benefit of hindsight, but was to be judged in the light of what Mr. LeBlanc knew, or reasonably ought to have known, at the time of the acts of negligence alleged against him, and that he would not be found liable for mere errors in judgment.

[48] As to errors in judgment, for example, reasonably prudent lawyers may disagree or have different evaluations of an injury so long as it is based on a skillful and careful knowledge of the law and the client's injury.

THE EXPERT LEGAL OPINION

[49] Two eminent Q.C.'s and expert personal injury lawyers provided opinions in this case.

[50] Mr. Vilvang, who was retained by the plaintiff, has practiced for over 35 years in Vancouver in personal injury claims. He has been the mediator in over 700 cases, the vast majority of which have been personal injury claims. He has written several papers on preparation for mediation. He has been a member of the Yukon Bar since 1994. He has acted as a mediator and as counsel in cases resolved in mediation.

[51] Mr. Everard, the defendants' expert, has practiced for 33 years in Alberta and has a predominantly litigation practice comprised mainly of personal injury cases with a significant portion in insurance defence work. He has served as a mediator in several dozen cases, beginning in the mid-1990s.

[52] Mr. Vilvang provided the first opinion dated December 15, 2009, and Mr. Everard responded on August 9, 2010, making numerous references to Mr. Vilvang's opinion.

[53] The experts have significant areas of agreement or similar approaches:

1. The standard of competence of a reasonably prudent lawyer in personal injury is the same in the Yukon as it is in Alberta or British Columbia.
2. Personal injury claims are triaged based upon assessments of seriousness and value although they have slightly different approaches.

3. Loss of Capacity to Earn Income is often the largest head of damage. Mr. Everard qualifies this as follows:

> Although this statement is true, in a general sense, and given that even through awards for Loss of Capacity to Earn Income are reputed to be higher in British Columbia and in the Yukon than in Alberta, each client's case is fact specific and dependent on the evidence available to establish the claim, regardless of where the claim arose.

4. They both agree that future care costs in this case could be expected to be in the $50,000 range.

5. They both agree that it is useful to prepare Written Mediation Summaries. However, Mr. Vilvang said it is the practice "in virtually every mediation I have attended" whereas Mr. Everard agrees they are "desirable, but not required, … the failure to prepare and provide them cannot be said to be negligence on the part of counsel."

6. Mr. Everard did not take issue with Mr. Vilvang's view that a mediation summary would contain:

   (a) Pre-accident history of the plaintiff including comments on general health, occupation, social and recreational activities, etc.

   (b) A description of the circumstances of the accident, particularly where liability is in issue.

   (c) Details of the claim for non-pecuniary damages, often including a reference to similar cases.

   (d) An outline of the claim for past income loss.

   (e) An outline of the claim for loss of capacity to earn income, providing details as to the plaintiff's pre-accident income earning potential,

the limitations on that potential resulting from the accident, and a description of residual employability.

(f) An itemization of the special damages claimed.

(g) A description of the plaintiff's future care claim.

(h) Sometimes summaries will also include particulars on any "in trust" claim, i.e. a claim by the plaintiff for compensation for friends or family members who provide assistance during the time of disability over and above that which would normally be expected of a family members, and/or the plaintiff's bill of costs.

7. Mr. Vilvang said the following about preparation for mediation, and Mr. Everard did not disagree:

> … In preparing the client, reasonably prudent counsel should normally advise the client as to a potential range of damages for each of the heads of damage claimed and provide some estimate of the overall value of the claim. During the mediation, reasonably prudent counsel should make it clear to the client that all aspects of the claim are being negotiated. Normally, in the early stages of the mediation, separate numbers are advanced by each side for each head of damages. As the negotiation progresses, it is normal for counsel to present lump-sum figures. Even when lump-sum figures are being used, reasonably prudent counsel should make sure that the client is fully aware that all heads of damages are included in the number presented.

[54] Mr. Everard adds that the client should be alerted to those items that might reduce a client's claim. He says that a prudent Plaintiff's counsel should advise the client on the impact of three items: "the seatbelt defence, inevitable accident (no negligence), and failure to mitigate [which] would serve to reduce, or completely defeat, Ms. Knapp's case."

[55] Both experts agree that the object of a mediation is to settle the entire claim.

[56] Mr. Everard concluded his opinion with the following, which Mr. Vilvang did not have the opportunity to see and opine on:

> The lawyer [must] remain cognizant that at all times he or she is instructed and directed by the client, and so must inform and counsel the client about the law, about the evidence and the evidence that might be gathered, about the strengths and weaknesses of the client's case, including issues relating to liability and damages, from time to time as circumstances warrant. Ultimately, however the decisions to conduct any investigation, retain any expert witnesses, enter into settlement negotiations, conclude any settlement, or proceed to trial of the case are decisions of the client. The lawyer is obliged to accept the directions of his or her client, within the bounds of legal ethics. If the client's instructions are to attempt to settle at a particular point in time, the lawyer must attempt to settle the claim on the basis of the available evidence.
>
> Although proceeding with the additional investigations, requisitioning additional reports, and otherwise proceeding with the file, in the manner which Mr.Vilvang, Q.C. describes might have resulted in a larger settlement, resolution would have been postponed, and there was also the possibility that with the appointment of defence counsel, that the Defendants and their insurer became more entrenched, and developed their own reports and positions aimed at limiting or defeating the Plaintiff's claims.

[57] While Mr. Vilvang focussed on a reasonably prudent lawyer's approach to mediation, Mr. Everard opined on the issue of client instructions:

> In this writer's respectful opinion, the real issue for determination is not whether O'Neill should have conducted further investigations, arranged additional assessments or obtained additional expert reports, or even whether he should have entered into settlement negotiations when he did.
>
> The real issue is whether a competent lawyer practicing Plaintiff's injury law was obliged to accept his client's instructions to settle the file, notwithstanding that further file

> development would likely have resulted in an enhanced settlement at a later date.
>
> In my opinion, a competent counsel, in the same position as O'Neill, would be obliged to accept his client's instructions, and to attempt to settle the file on the basis of the material which O'Neill compiled, and in accord with those instructions.

[58] Mr. Everard also placed great weight on the presence of David Stark, counsel for the insurer for the defendants in the Knapp action and concluded that it would be "reasonable for Plaintiff's counsel to conclude that he could obtain a significant settlement with an insurance representative of Stark's pedigree without the necessity of first subjecting his client to either a discovery or an IME." An IME is an independent medical examination, which usually refers to defence medical report.

ISSUES

[59] There are six issues to address:

1. Did Mr. O'Neill advise Ms. Knapp as a reasonably prudent lawyer in a personal injury case, as to the range of damages she should expect and settle for?
2. Did Mr. O'Neill advise Ms. Knapp on the issue of loss of capacity to earn income as a reasonable prudent lawyer in the Yukon should?
3. Did Mr. O'Neill address the issue of the seatbelt defence, as a reasonably prudent lawyer in the Yukon should?
4. Did Mr. O'Neill inform, prepare and represent Ms. Knapp as a reasonably prudent lawyer for mediation?
5. Did Mr. O'Neill act as a reasonably prudent lawyer in accepting Ms. Knapp's instructions to settle her claim, notwithstanding that further

file development would have likely resulted in an enhanced settlement at a later date?

6. Was the settlement recommended by Mr. O'Neill so inordinately low that it was negligent?

MR. O'NEILL'S REPRESENTATION

[60] The following is not exhaustive but a chronological summary of the written and phone contact between Ms. Knapp and Mr. O'Neill as well as of the mediation preparation and the mediation.

[61] The time elapsed between Mr. O'Neill's retainer and the date of this trial is roughly 13 years. Mr. O'Neill acknowledged that he did not have a strong recollection of discussions and communications with Ms. Knapp. As a result, the memos and notations on the file, and the lack thereof, take on a great significance. I find that Mr. O'Neill's memory is not reliable unless it is supported by memos and notations on the file. I do not make this finding to be critical of Mr. O'Neill but simply to recognize that with a practice of 200 active files a year, it is extremely difficult to remember events not confirmed by some written notation on the file. It is fair to conclude that without notes he had no independent recollection of matters.

[62] In fact, Mr. O'Neill candidly acknowledged some deficiency in his note-taking:

> Q All right. Do you recall reading in your transcript that – your confession to not being a very thorough note-taker?
> A I don't know if it was a confession, but I certainly acknowledged that I was not a copious note-writer.
> Q Yes. That was your practice in 2001/2002?
> A Correct.
> Q Okay. But you did say that you do write down the most relevant and salient points in any discussion or whatever that you are taking notes about?

A Yes.
Q So, it would be reasonable to conclude then that if there are no notes in particular – about a particular issue on your file, that it's – you know, and if it's an important issue, it's likely that it didn't – it wasn't discussed? Would you agree with me on that?
A I'm not certain I would agree, but it may be a fair statement.

[63] I should also add that Mr. O'Neill's handwriting was difficult to decipher and I have relied on typed-out written words on a page following the handwritten notes.

[64] Ms. Knapp and Mr. O'Neill met in person on the following dates.

[65] April 6, 2001, Ms. Knapp met with Mr. O'Neill at his office in Edmonton, Alberta, and signed a Contingent Fee Agreement, thereby retaining him. She also completed parts of a document known as the "Personal Injury Questionnaire". Section 8 entitled "Wage Loss" indicated "job in Switzerland to start November 1/99"; "unemployed currently" and "has not applied for work in Canada".

[66] Ms. Knapp had previously met with Mr. O'Neill on March 1, 2001, for a preliminary meeting before signing the retainer agreement. He expressed the view that it would be difficult to calculate her wage loss as she had never worked in Canada and advised her to get a job. She explained that Dr. Attalla, her Whitehorse treating physician, would not give her a physiotherapy referral until she was examined by Dr. Dommisse. Mr. O'Neill advised her to get a letter from Dr. Attalla that she was unable to return to work until she saw the orthopaedic specialist. She obtained Dr. Attalla's letter dated March 22, 2001, confirming this.

[67] On April 6, Ms. Knapp also indicated her pre-accident occupations of accountant, truck driver, payroll and waitress.

[68] On April 25, 2001, Mr. O'Neill wrote Ms. Knapp a letter confirming his retainer and advising that in addition to damages for pain and suffering, she may be entitled to receive expenses for medical treatments. At this point, Mr. O'Neill did not have any medical legal reports. Ms. Knapp was advised to keep a diary of how these injuries affected her.

[69] Mr. O'Neill also provided Ms. Knapp with a document entitled "Personal Injury Instructions to Client" which included:

> 3. Wages and Earnings Lost:
> A major aspect of your case may be loss of income or potential income. Please keep an accurate record of all days lost from work because of your injuries. If this injury has prevented you from being advanced in your current employment, please give us the names, addresses, and telephone number of witnesses who can substantiate this. Please provide the following:
>
> (a) Union Contract, if any, showing wage rates;
> (b) Income tax returns for the past five years;
> (c) Payroll slips for the last pay period before your accident and the first pay period after returning to work.

[70] In later telephone conversations, Mr. O'Neill's notes indicate that Ms. Knapp advised him that the fractures had healed and she was going to see Dr. Dommisse (mistakenly referred to as Dr. Tunis). Ms. Knapp does not recall that she advised Mr. O'Neill that the fractures had healed. There is no suggestion that Mr. O'Neill's notes could mean that Ms. Knapp's injuries were healed or resolved, and I find that Dr. Dommisse's letter of November 26, 2001, is the basis on which Ms. Knapp's injuries must be evaluated.

[71] Mr. O'Neill's notes indicate that, on September 6, 2001, Ms. Knapp advised, after consultation with Dr. Dommisse in Vancouver, that she intended to have surgery.

Mr. O'Neill recommended the file not be settled until after surgery and recovery. Dr. Dommisse recommended that the insurance claim be settled before considering any surgery. Ms. Knapp testified that she asked Mr. O'Neill for a valuation of her claim before or after surgery but Mr. O'Neill never answered her inquiry.

[72] Mr. O'Neill signed the Writ of Summons and Statement of Claim under Richard Mallett's name on September 14, 2001, just prior to the expiration of the limitation period on September 28, 2001. The Statement of Claim described the injury as a "fractured spine" as the medical reports had not been received by Mr. O'Neill at that point. The Statement of Claim asserted that Ms. Knapp had been unable to work and claimed "loss of income and impairment of earning capacity".

[73] Mr. O'Neill forwarded the Writ of Summons and Statement of Claim to Ms. Knapp on September 28, 2001, advising that it would be served on her common law partner, Eric Dufresne.

[74] Mr. O'Neill forwarded the medical reports of Dr. Attalla and Dr. Dommise to Ms. Knapp on November 21, 2001 and November 26, 2001, respectively, asking for advice on "errors or omissions".

[75] On January 17, 2002, Mr. O'Neill wrote a letter to Zurich Insurance stating:

> … [W]e are prepared to recommend settlement to our client
>
> as set out below:

General Damages	$ 80,000.00
Special Damages	$ 1,000.00
Past Loss of Income/Loss of Opportunity	$ 50,000.00
Surgical/relocation expense (Vancouver)	$ 20,000.00
Cost of Future Care	$ 10,000.00
Loss of Housekeeping Capacity, past and future	$ 10,000.00

Interest on general damages @4% from September 28th, 1999 to January 31st, 2002	$ 7,504.66
Costs (as per attached)	$ 3,741.59
Total:	$ 182,246.25

[76] Mr. O'Neill did not have any instruction from Ms. Knapp to send this letter and he did not provide her with a copy. Mr. O'Neill had not received an internal opinion on damages or the seatbelt issue as of January 17, 2002. Mr. O'Neill did not, at any time in his retainer, send a letter or memorandum to Ms. Knapp setting out heads of damages, ranges of the dollar values, or overall value of the claim. He did not advise her in writing of items that might reduce her claim such as the seatbelt defence, and the amount of the reduction.

[77] The letter of January 17, 2002 enclosed medical reports but did not indicate the nature of Ms. Knapp's injury, the degree of pain and suffering and its impact on her life and ability to work. It did not indicate that her disability was permanent and that her reduced work capacity would be permanent if she was treated without surgery. It did not refer to any case law supporting the value of the heads of damage.

[78] Mr. O'Neill's notes, at this date, do not indicate a decision by Ms. Knapp to have surgery after resolution but he testified:

> A I believe I had had a dialogue with Ms. Knapp that indicated that while she was not going to have the surgery before resolution, that she was going to have the surgery shortly thereafter. And that that surgery would occur in Vancouver, not in Whitehorse, and that she would be required to stay in Vancouver for a period of one to two months post-surgery. And that I needed to build in that future expense.

[79] In cross-examination, Mr. O'Neill was more certain:

> Q All right. So, now you've got her advice to you that she's not going to have the surgery and you've got

> Dr. Dommisse's advice that she's going to suffer a mild to moderate disability and it could be permanent, correct?
>
> A I don't have advice from her that she is not going to have the surgery. I have the direction from her to resolve the claim prior to her having the surgery. The surgery –
>
> Q I thought you –
>
> A The – the surgery throughout this matter was always on the table and was always something Ms. Knapp was going to pursue but after the resolution of this claim. And it wasn't going to be decades later, it was going to be months later.
>
> Q All right. But you have absolutely no note on your file in late December or early January 2002 that she had said to you I want to move this forward, I'm – I'm going to defer the surgery or I'm – you know, I don't know when I'm even going to have the surgery?
>
> A I don't have a note.
>
> Q No. You've got a vague recollection?
>
> A On that point I don't – my – my recollection is not vague.

[80] There is no note or letter on the file advising Ms. Knapp of the risk of settling before surgery.

[81] On February 11, 2002, "Kimberly", presumably a student-at-law, provided Mr. O'Neill with a two-page memo indicating a range of general damages from $39,164 to $83,924. Among other cases, the memo referred to *Reed v. Steele* (1997), 97 B.C.A.C. 163, a British Columbia Court of Appeal decision on future loss of earning capacity, which I will refer to below.

[82] On March 12, 2002, Mr. O'Neill had a telephone conversation with David Stark, the insurer's lawyer, who indicated that the lack of a seatbelt was an issue in the case.

[83] On June 4, 2002, Mr. Stark responded to Mr. O'Neill's January 17, 2002 settlement offer and again raised the seatbelt issue without specifying or being asked what the reduction would be. The offer was the following:

General damages	$40,000
Special damages	$ 1,000
Surgical relocation	$15,000
Cost of future care Housekeeping	$ 3,000

[84] Mr. O'Neill testified at trial, as his notes were unclear, and did not add up, that the offer was for $69,000 + $4,000 interest, or $73,000 plus costs. He also stated, "…for past loss of income, loss of opportunity, it doesn't appear that he [Mr. Stark] addresses that head of damage…".

[85] On June 4, 2002, Mr. O'Neill wrote a letter to Ms. Knapp informing her of the offer to settle her claim for $73,000 plus costs. He did not indicate it was a counter-offer to his January 17, 2002 offer of $182,246.25. He did not indicate the heads of damage involved nor did he alert Ms. Knapp to the seatbelt issue raised by David Stark or the fact that the offer did not include "past loss of income, loss of opportunity."

[86] However, Mr. O'Neill began to research the issue of contributory negligence from the perspective of the lack of availability of a seatbelt in the sleeper of the tractor-trailer unit and the percentage that might be attributed on the seatbelt issue. His student-at-law confirmed that the tractor-trailer in question did not come with a seatbelt in the sleeper and it would be highly unusual to have a seatbelt in the sleeper. The student concluded that it would not be unreasonable to travel in a sleeper without restraining devices. Another student, not finding any law on the point, offered the opinion that it would be unreasonable to expect a long haul driver-partner not to use the sleeper and arguably unreasonable for a passenger as well.

[87] A handwritten memo confirmed that a seatbelt defence requires the defendant to prove that injuries would be lessened or prevented by the seatbelt. At their first meeting, Ms. Knapp provided Mr. O'Neill with photographs of the damages to the tractor cab after the accident, which provided the basis for a submission in this trial that if Ms. Knapp had been sitting in the passenger seat restrained by a seatbelt she would have received more serious injuries. Ms. Knapp states that Mr. O'Neill told her to keep the photographs and did not request them again until she was in mediation preparation with him on October 21, 2002. Mr. O'Neill cannot remember photographs "one way or the other". The nine photographs are an exhibit in this trial.

[88] On June 26, 2002, Mr. O'Neill had a telephone conversation with Ms. Knapp wherein he expressed the opinion that he should make a counter-offer at $120,000 and that pain and suffering was in a range of $40,000 - $50,000. Mr. O'Neill's notes end with the figures $120,000 - $130,000. This telephone conversation confirmed Ms. Knapp's decision to have surgery in the summer of 2003.

[89] I note here that Mr. O'Neill was recommending settlement of $40,000 - $50,000 for pain and suffering, compared to what was ultimately Mr. Stark's opening position of $60,000 for general damages at mediation.

[90] Mr. O'Neill and Mr. Stark had a further telephone conversation on July 5, 2002. Mr. O'Neill's notes do not indicate a discussion of the seatbelt issue or the loss of capacity to earn income. They did discuss a wage loss claim based on $40,000 a year consisting of 1.5 years for work and ½ year for surgery i.e. a claim of $80,000 plus:

Past	$25,000
General	$40,000

Medical $10,000

[91] Mr. O'Neill expressed his position in his notes: "This will result in no further discussion - next step will be discoveries and a 9-12 month timeline." Mr. O'Neill's notes do not mention the seatbelt issue or the loss of capacity to earn income. He explained at trial that Ms. Knapp wanted to make a higher counter-offer than he thought they should but he was concerned that it would result in no further discussion. Ms. Knapp stated that she was upset and wanted to make a counter-offer at $155,000.

[92] The next document on the file is a letter dated August 1, 2002, from Mr. O'Neill to David Stark putting forward a counter-offer of $150,000, requesting a further pre-mediation settlement offer, and proposing the latter half of October 2002 for mediation. The letter has a notation "Draft not sent" in handwriting on it. However, on August 2, 2002, Mr. O'Neill's assistant confirmed October 22, 2002 for mediation and Mr. O'Neill wrote a letter on the same date to Ms. Knapp proposing the mediation. He also requested that she gather up all documentation in support of "your loss of income claim" from Europe and Canada.

[93] At trial, Mr. O'Neill explained the reason he did not send the August 1, 2002 letter:

> I would expect that I thought it would be counter-productive to what we were trying to do at the time, which was resolve the claim as quickly as possible for as much as possible. I thought it would result in Mr. Stark pushing away from the settlement table and immediately moving the matter to active litigation.

[94] I do not accept Mr. O'Neill's inference that in August 2002 he was instructed to "resolve the claim as quickly as possible for as much as possible". It may have been his intention, but his own notes do not indicate any urgency on Ms. Knapp's part until the

meeting of October 21, 2002, in preparation for the mediation on October 22. At this trial, Ms. Knapp denied that she felt any urgency in August 2002.

[95] However, Mr. Stark made notations about receiving an oral counter-offer of $150,000 plus costs. I conclude that both counsel had moved to all-inclusive offers at this point and that although Mr. O'Neill did not send the letter dated August 1, 2002, he did communicate the counter-offer of $150,000 plus costs.

[96] On August 15, 2002, Mr. O'Neill spoke to Ms. Knapp, confirmed the mediation on October 22, 2002, and arranged a meeting the day before. She was told to bring current employment information and she said that the "historical stuff" was on file. By letter dated September 24, 2002, Mr. O'Neill confirmed the mediation, requested all pre-and-post accident income documentation and confirmed the meeting on Monday, October 21, 2002, to prepare for mediation. Mr. O'Neill wrote to Revenue Canada for income information and reviewed Tax Return information for 2000 reporting no income and 2001 reporting income of $1,300. Ms. Knapp provided an invoice to Eric Dufresne for pilot car services in the amount of $2,416.76 for 2002.

[97] On August 29, 2002, the mediator sent a letter to Mr. O'Neill and Mr. Stark requesting a two-or three-page summary of the issues, as "helpful but not necessary", prior to the mediation. Mr. O'Neill did not prepare a summary. The letter also enclosed a mediation agreement for signature by Mr. O'Neill, Mr. Stark, Ms. Knapp and the mediator. The Agreement contains the following clauses:

> 1.2 The parties understand that the goal of mediation will be to reach a final agreement on some or all of the issues. No agreement will be binding until it is reduced to writing and signed.

[98] The mediation agreement was not mailed to Ms. Knapp. She saw it for the first time at the mediation meeting on October 22, 2002. The mediator asked Mr. O'Neill if he had the signed mediation agreement. He said he did not and the mediator gave him a copy, which he explained to Ms. Knapp at the mediation table while the mediator and Mr. Stark talked. She signed it but says she did not understand the word "settlement" or the finality of the mediation process.

[99] On October 15, 2002, Ms. Knapp left a voicemail which was reduced to a memo stating in part:

> Angelika called on October 15, 2002 in response to our letter about her loss of income. She says that she sent us by fax everything she has with regard to her income in Canada and in Switzerland. She says that before this accident she was travelling in Canada for 3 months and before that she had an income that resulted from an accident which required knee surgery and her insurance company reimbursed her. Before that she was a student and only worked part-time in the summers.

[100] The mediation preparation took place as agreed. Mr. O'Neill had five pages of notes, documenting in detail for the first time Ms. Knapp's income history pre-and-post accident. The first page covered her background in Europe, the second and third pages detail her job in Switzerland after the accident and confirm her income of 104,000 Swiss francs (based on 69.00 francs/hour) as equal to Canadian dollars, and an income loss of $29,800 post-accident from November 1999 to February 28, 2000, when she resumed full time work in Switzerland.

[101] The fourth page of notes indicated that Ms. Knapp wanted to work in Canada as an accountant/bookkeeper until she got her accreditation in Canada for accounting. The notes set out the following:

Plan: Post-MVA
-Get back fixed
-Delayed by ortho visits
& lack of tment
-could not sit for long periods
Until Sept 2001.

Domisse (Ortho)
-said can work if you like
but just in pain

*wants case settled before surgery for closure & help in healing

[102] I note that the reference to Dr. Dommisse does not reflect what Dr. Dommisse stated in his letter of November 26, 2001.

[103] The fifth page of notes discussed Ms. Knapp's new career and indicated that she had purchased a cabin for tourism and guiding. She stated again that she could not sit for long periods.

[104] The sixth page ended with the notation "Financially cannot wait!!".

[105] The O'Neill notes do not indicate a discussion of any of the heads of damage, including loss of capacity to earn income, a discussion of the seatbelt issue or the total claim to be advanced at mediation. There are no notes indicating a discussion about the risks of settling early or quickly without the required expert reports and an estimate of what she would be sacrificing. Mr. O'Neill testified that "Financially cannot wait!" meant: "she wanted this claim settled and financially she couldn't wait for the claim not (*sic*) to be settled".

[106] Ms. Knapp testified that she was not desperate to settle and that she had savings from Europe. She also stated that at that time she had difficulty describing the accident in English, which was the reason she requested Eric Dufresne to be present at her initial

meeting with Mr. O'Neill. She also said her understanding of written English was better than her verbal understanding. I have no doubt that Ms. Knapp would be financially stressed at the time of mediation. However, the notation "financially cannot wait" is denied by Ms. Knapp and not supported by her expressed ambivalence about the settlement. I find that there was no instruction to settle her case at any cost or "as quickly as possible for as much as possible" although she was clearly seeking a fair settlement.

[107] Ms. Knapp recalled that Mr. O'Neill asked her for the photographs of the damaged tractor cab at the mediation preparation. She did not have them with her and she was very upset that she was not advised to bring them. She stated that Mr. O'Neill said it was an issue but she did not need to worry about it.

[108] The mediation proceeded on October 22, 2002, and took approximately three hours. Both Mr. O'Neill and Mr. Stark had few, if any, independent memories of the mediation hearing except for those refreshed by their notes.

[109] Mr. O'Neill had two pages of notes from the mediation indicating that four issues were addressed:

1. Loss of income/loss of opp – documentation
2. Contrib/Risk assessment
3. Generals
4. Potential Surgery – Mitigation

[110] He described the respective positions as $75,000 - $150,000. He set out the heads of damages of Mr. Stark's first position:

Generals	60,000 (including interest)
Specials	1,000

Wage Loss	
- Europe LOI	30,000
- Canada LOI	10,000
Surgical Re. CFC	10,000
HSKP	$110,000 + costs
Net $75,000	
Final Settlement	New offer $125,000 + costs
	Net $85,000
$128,250 all in	Client instruction to accept

[111] When asked if he had any specific recollection of issues of particular or significant importance to Ms. Knapp, Mr. O'Neill replied:

> Ms. Knapp wanted the claim resolved. That was the issue that was important to her. She wanted me, through the process of mediation, to get the best offer on the table and then to resolve the claim.

[112] Mr. O'Neill's file contains the Memorandum of Agreement confirming the settlement and a Final Release both signed by Ms. Knapp. Mr. O'Neill's mediation notes and his correspondence to Ms. Knapp do not indicate any reluctance on Ms. Knapp's part.

[113] Mr. O'Neill acknowledged at trial that he never advised Ms. Knapp about the potential value of her future earning capacity. On the seatbelt issue, he understood that courts in Alberta were prepared to impose a 25% discount but he has no recollection of whether that was the reduction applied. He stated that if the numbers fell in the range he wished to see them, the percentage was not that important.

[114] Mr. Stark represented the insurer at the mediation. He recalled that Ms. Knapp came to Canada as a tourist and returned to live in the Yukon and set up accounting work and a resort in Faro.

[115] He testified that at the mediation there was no discussion of liability except for the seatbelt defence which he notionally assessed at 50%. He had not seen any photos of the accident. He proceeded with the mediation on the basis that Ms. Knapp was an unrestrained passenger in a vehicle rollover and that a seatbelt had not been used in the sleeper. He stated that he had authority to settle between $150,000 to $300,000 but he had no threshold in mind. His claim report indicated the wage loss component in his $111,000 plus costs offer was a total of $40,000 made up of $30,000 for past wage loss and $10,000 for loss of opportunity to earn income. He assessed pain and suffering at $60,000, specials at $1,000 and $10,000 for surgery expenses, cost of future care and loss of housekeeping capacity i.e. an offer of $10,000 for a $40,000 claim by Mr. O'Neill. Mr. O'Neill counter-offered $140,000 plus costs. Mr. Stark made a final offer of $125,000 plus costs which was accepted.

[116] Mr. Stark had telephone discussions with Ms. Knapp's present counsel and emailed on February 10, 2003 his view of the mediation, including:

> At the mediation I can tell you that the issue of potential future claims were discussed, in fact in previous counsel's mediation brief, the issue of future losses were raised. Frankly I thought this was the softest part of your client's claim, and I suspect the reason previous counsel did not have an expert report, was because of this.

[117] On his review of the file for this trial, Mr. Stark confirmed there were no mediation briefs. He recalled that Ms. Knapp mentioned twice in the mediation that there was a

three-year window to go back and review claims. Both counsel advised this was not the case in Canada.

[118] Ms. Knapp's recollection is quite different. After instructing Mr. O'Neill to make a settlement offer of $155,000, Ms. Knapp received a voicemail advising her of the proposed mediation in Edmonton. She was not familiar with the term "mediation" and was advised that it was a relaxed atmosphere with defence counsel to discuss her claim before discoveries took place. Mr. O'Neill's letter of August 2, 2002, indicated that mediation "…is a positive method of resolving this matter without going into further active litigation." Ms. Knapp testified that it made sense to her to discuss her claim but she was not familiar with the idea that the result would be a final settlement until after the mediation was concluded.

[119] Ms. Knapp described the mediation preparation meeting with Mr. O'Neill as focussing on her work history. There was no discussion of financial numbers or a settlement. She was concerned about her English speaking ability but was reassured by Mr. O'Neill. She recalled a discussion about needing money if in the future she had surgery.

[120] Ms. Knapp testified there was no discussion about the nature of her injury at the mediation, which started with discussion about the seatbelt defence. Mr. Stark said the deduction would be between 0 - 75%. Mr. O'Neill said no deduction and Mr. Stark suggested 25% would be deducted at trial. She confirmed that there was no seatbelt and Mr. O'Neill said there was no case law supporting a deduction in the specific circumstances, but he agreed there would be some deduction although he did not say how much.

[121] The loss of income discussion focussed on Ms. Knapp's earnings following the accident and the fact that she was earning 100% by March 1, 2000. There was no discussion of the distinction between past and future loss and no resolution on the subject. Mr. O'Neill and Ms. Knapp left the room and returned to receive Mr. Stark's $111,000 plus costs counter-offer.

[122] Ms. Knapp acknowledges the all-inclusive numbers exchanged but said she expressed her unhappiness with the lump sum of $125,000. It was not broken down. Mr. O'Neill advised that if she did not accept the offer she risked a seatbelt reduction of 0 - 75%, no income recovery because she was working at 100% in March 2000 and that she could be ordered to pay court costs. Mr. O'Neill finally said that he would not take her case to court and she would have to get a new lawyer if she did not accept the settlement. Ms. Knapp finally said she would accept. She signed the Memorandum of Agreement produced by the mediator. She returned to the office with Mr. O'Neill and signed the Final Release.

[123] Ms. Knapp sent a letter to Mr. O'Neill dated November 15, 2002, advising that she was in the process of making a decision to proceed or back out of the Agreement reached. By a letter dated November 20, 2002, which appears to have been faxed on November 21, 2002, she advised that she did not accept the "Agreement of Settlement" and instructed Mr. O'Neill to send the funds back and send the Final Release documents to her.

[124] Mr. O'Neill, in a memo dated November 21, 2002, advised Ms. Knapp by telephone that he would withdraw as counsel, serve his statement of account and attempt to collect the same via taxation and registration of the judgment against her. He

recommended she seek a second opinion. Ms. Knapp advised that she had received independent legal advice, which confirmed her decision.

[125] By letter dated November 22, 2002, via fax, Mr. O'Neill enclosed an email from Mr. Stark indicating his view that the Agreement was a binding settlement, which would be enforced by way of a summary trial with costs.

[126] There is no pleading to set aside the Settlement Agreement and I conclude that it is binding upon Ms. Knapp as she was represented by counsel and could not mistake the meaning of Final Release. I acknowledge that she would have had difficulty understanding all the legal language, but by the end of the mediation, I find that she appreciated the finality of the Settlement Agreement. However, it is clear that she did so under great pressure from her lawyer and the real issue, among others, is whether it was an improvident or uninformed settlement.

[127] I find the following facts:

1. The letter of Dr. Dommisse dated November 26, 2001, provides an accurate description of Ms. Knapp's injuries from the accident on September 28, 1999, as well as her condition in August 2001 and the long-term effect of the accident on her life and work.
2. Ms. Knapp wore a back brace for approximately two months.
3. On March 22, 2001, Dr. Attalla gave the opinion that Ms. Knapp should not work until she was examined by an orthopaedic surgeon.
4. On November 26, 2001, Dr. Dommisse advised that Ms. Knapp was not totally disabled but could conceivably work in a part-time capacity, which would remain the case if she was treated without surgery.

5. Mr. O'Neill did not advise Ms. Knapp or at any time send a letter or memorandum setting out the heads of damage, ranges of dollar values or overall value of her claim.
6. Mr. O'Neill did not have instructions to send the "prepared to recommend settlement" letter dated January 17, 2002, nor did he provide Ms. Knapp with a copy.
7. The letter of January 17, 2002, enclosed the medical reports of Drs. Attalla and Dommisse but did not set out the nature of Ms. Knapp's injury, the degree of pain and suffering and its impact on her life and ability to work.
8. The letter of January 17, 2002, did not provide case law in support of any position or indicate that Ms. Knapp's disability was permanent and her reduced work capacity was permanent if treated without surgery.
9. Mr. O'Neill did not advise Ms. Knapp of the loss of capacity to earn income claim or seek instructions to establish the claim.
10. Mr. O'Neill did not advise Ms. Knapp on the law of the seatbelt defence or advise on an appropriate reduction.
11. Mr. O'Neill was not instructed to "resolve the claim as quickly as possible for as much as possible", although he was instructed to pursue settlement at mediation.
12. Mr. O'Neill's mediation preparation did not include a discussion with Ms. Knapp about the heads of damage, the range of damages and an estimate of the overall value of the claim.
13. Mr. O'Neill did not file a mediation summary or brief.

14. Mr. O’Neill pressured Ms. Knapp into agreeing to the settlement.

[128] I will make further findings of fact as I set out the respective issues.

ANALYSIS

[129] Mr. O’Neill is not a member of the Law Society of Yukon, nor does he have a Certificate of Permission to Act in a particular case. One or the other is required to lawfully practice law in the Yukon. The three northern territories do not participate in the Interjurisdictional Agreement which permits lawyers in the provinces to practice in other jurisdictions without the requirement of membership or a certificate of permission to act. While this lack of Law Society membership or a certificate of permission to act standing alone, would not amount to actionable negligence, it is part of a lack of attention to detail which is aptly demonstrated by the following discovery evidence given by Mr. O’Neill:

(a) Up to 2001, he “suspected” he had handled other cases coming out of the Yukon;

(b) Other than creating “some difficulty” in conducting the file to trial, he had no real concern about the fact that it was a Yukon matter;

(c) Insofar as there are differences in the law between Yukon and Alberta, he did not need to learn more about the law of the Yukon up to the point that he had conducted the file;

(d) In requesting students or young lawyer to prepare research on the Knapp claim, he did not consider it necessary to give instructions that it was a claim arising in Yukon. As to whether that was “a bit inappropriate” he answered “perhaps”;

(e) He acknowledged that he would look to Court of Appeal decisions for precedents but he had no specific knowledge of the Yukon Court of Appeal or its decisions; and

(f) He “may have known” that the British Columbia Court of Appeal also served as Yukon’s Court of Appeal, but he had no specific recollection in that regard.

[130] I will now discuss the issues I have set out. I will not address all aspects of the seatbelt defence and loss of capacity to earn income involved in Ms. Knapp’s case at this stage but will do so when I address the damage and liability issues.

Issue 1: Did Mr. O’Neill advise Ms. Knapp as a reasonably prudent lawyer in a personal injury case, as to the range of damages she should expect and settle for?

[131] In my view, the most important features of this claim from a pain and suffering perspective are found in Dr. Dommisse’s letter dated November 26, 2001:

(a) That the injury is a two-column anterior compression fractures of T-10 and T-11 with degenerative changes at T-11 and T-12;

(b) That it is possible that Ms. Knapp may require an anterior thoracic fusion from T-10 to T-12, but it is a last resort if all non-surgical methods of treatment fail;

(c) That her present condition will gradually deteriorate;

(d) That she will have ongoing pain and suffering with physical activity to a moderate extent;

(e) That her future disability will be mild to moderate without surgery and permanent;

(f) That she was not totally disabled from working and could conceivably work in a part-time capacity but her reduced capacity of working would be permanent if she was treated without surgery.

[132] There is no doubt that Ms. Knapp was very uncertain about whether to have surgery in light of Dr. Dommisse's advice to settle her claim before surgery and Mr. O'Neill's advice to Ms. Knapp to do the surgery before settling her claim. However, Mr. O'Neill failed to do the following:

(a) To research and prepare an opinion to inform Ms. Knapp of the range of damages she might anticipate on all heads of damage;

(b) To advise Ms. Knapp on the risk of settling before surgery;

(c) To obtain her instructions to send the recommended settlement offer of $182,246 on January 17, 2002;

(d) To provide Ms. Knapp with a copy of the $182,246 recommended settlement offer; and

(e) To conduct his research on damages and liability <u>before</u> the first offer of settlement.

[133] There is nothing inherently wrong with the wording "I am prepared to recommend settlement" in the letter, as long as the recommendation is based on research and evaluation of damages, and most importantly the client's instruction. Although being "prepared to recommend" does not result in a binding settlement, if accepted, it clearly sets out the high end of Ms. Knapp's claim for settlement purposes. As Mr. O'Neill

states, the letter was sent (and I would add received) with the understanding that the amount was “at the very high end of the range of the claim”.

[134] Mr. O’Neill was asked in examination-in-chief if there was any relationship between the research on quantum of general damages and his January 17, 2002 “prepared to recommend settlement” letter. He replied:

> A I suppose not specifically. Obviously if the research memoranda came after the letter to Ms. McQuistan, I didn’t have the benefit of seeing that first, so there’s no direct relation. I had assessed general damages, in my opinion, in the January 17th letter on the high side, and then, you know, wanted some research thereafter just to confirm that I was on the high side, in the range, and that’s what that memoranda of Feb. 11 tells me.
> Q Those numbers that are reflected in the – the letter at page 123 and 124 –
> A Yes
> Q -- had you discussed those with Ms. Knapp?
> A I may have. I can’t be certain that I had.

[135] Whatever the case with the memoranda, in my view, it was negligent to write the January 17, 2002 settlement offer without having researched the British Columbia and Yukon case law to reach an informed opinion and obtain informed instructions from Ms. Knapp.

[136] When asked in chief why he sent the “prepared to recommend” settlement offer of January 17, 2002, Mr. O’Neill declared:

> Q -- something that you – you do often on your files? Is this sort of a standard thing with you?
> A Yes. When I make a proposal to an insurer or to defence counsel for that matter, an initial proposal is always one that I am prepared to recommend. It isn’t one that the client is necessarily instructing me to say they will accept.

Q Okay. And what are you attempting to accomplish with letters like that and specifically this January 17th letter?
A I'm looking to elicit an initial offer from the insurance company by going in with numbers that I would believe at the time were at the very high end of the range of the claim.
Q Okay. Can you recall what information that you considered on the file in coming up with the component in the letter of – at page 123 for past loss of income, loss of opportunity, $50,000?
A It would have been the material that I had on the file that would have substantiated that head of damage along with my understanding of the law of income recovery of loss of opportunity recovery and my experience in that regard.

[137] In examination for discovery, Mr. O'Neill was asked if he had instructions to make the January 17, 2002 settlement offer:

Q Did you discuss these numbers with Ms Knapp before presenting them to Zurich?
A I may have, but I can't be certain of that.
Q The letter doesn't indicate a copy going to Ms Knapp.
A There wouldn't have been a copy provided. My practise, typically, isn't to copy my client with that document.
Q This is a fairly routine document?
A To me, it's a fairly routine document, yes.
Q And why would you not inform your client of this kind of proposal, when it really – you know, it's focusing on settlement?
A Right. Two reasons, primarily. As you can see, the language that I use in the proposal, if you want to call it that, is a recommendation.
Q Yes.
A It's not a proposal coming from my client, or the client; it's coming from myself and it's numbers that I'm prepared to recommend. Those numbers, typically, are inflated numbers, and I do not wish to create any expectational difficulties with my client.

[138] I recognize that keeping a client's expectations in check is a relevant and important aspect of a personal injury law practice. It cannot, however, override the duty to inform the client and obtain the client's instructions for an opening settlement offer.

[139] The January 17, 2002 recommended settlement offer did not include any case law to buttress the opening offer. In my view, a reasonably prudent lawyer, particularly when working in another jurisdiction, would review the case law on each head of damage before sending a settlement offer to ensure that the offer comprehensively addresses the claim, and here, also the impact of the seatbelt defence before the defence lawyer raises it.

[140] Mr. O'Neill refers to "inflated numbers" but those were not based upon any research or reasoned basis. A client requires reliable information about the high range and the bottom line to provide informed instructions. Arguably, Mr. O'Neill's general damages offer of $80,000 may not have been inordinately low but instructions from his client were clearly required, particularly with Dr. Dommisse's guarded opinion and the possibility of future surgery.

Issue 2: Did Mr. O'Neill advise Ms. Knapp on the issue of loss of capacity to earn income as a reasonable prudent lawyer in the Yukon should?

[141] There is no evidence from his file that Mr. O'Neill addressed the issue of loss of income earning capacity, much less advised his client of the claim or the expert opinion required to evaluate that claim that would be paid for by the law firm.

[142] Mr. O'Neill stated the following on examination for discovery:

> A I don't believe, sir, that I researched the issue of loss of opportunity or loss of earning capacity on this claim, quite frankly, so I don't want you to think that I specifically researched Alberta and overlooked British

> Columbia and the Yukon. Quite frankly, in my assessment of loss of opportunities/loss of earning capacity in this case, without historical data, without very much in the way of historical information, notwithstanding the injury, that portion of the claim, for many reasons, was somewhat tenuous, in my opinion.

[143] Mr. O'Neill was aware of the requirement to build a case in a structured fashion, which would include functional capacity evaluation, vocational assessment and an economic report. But he apparently abandoned that idea based upon Ms. Knapp's decision not to have surgery before settlement. He put it this way:

> … when it was made clear to me that she did not want to wait until after surgery to settle, it kind of knocked the feet out of building the case in a very structured fashion.

[144] In cross-examination, this exchange took place:

> Q All right. So in – in resolving the – the claim, are you going to sacrifice an area of damages that could be quite sizeable for Ms. Knapp? And I'm speaking for a future earning capacity claim.
> A I was going to follow my client's instruction and attempt to resolve the claim. I wasn't sacrificing anything.
> Q Did you advise her about the potential value of her future earning capacity claim?
> A There may well have been discussion on that point.
> Q You never quantified it, however?
> A Not as the file reflects, no.

[145] In my view, the decision to have surgery or not should not have had any impact on the preparation of expert reports to prepare a claim for loss of income earning capacity for either a settlement or trial. The real fact that Mr. O'Neill did not appreciate is the fact that this injury resulted in a mild to moderate permanent disability that, without surgery, would impair Ms. Knapp's future capacity to earn income.

[146] It is quite remarkable that Mr. O'Neill was notified by his student on February 11, 2002 of *Reed v. Steele* with an asterisk followed by "BCCA appeal increased award for future loss of earning capacity, while the general damages remained the same". At paras. 30 – 36 of that case, Rowles J.A. stated that where the plaintiff had "some residual symptoms" arising from the accident, the focus should be on loss in earning capacity rather than a loss of future income. There is a line of British Columbia decisions from *Brown v. Golaiy* (1985), 26 B.C.L.R. (3d) 353 (S.C.) to *Palmer v. Goodall* (1991), 53 B.C.L.R. (2d) 44 (C.A.) that support this. In *Palmer,* Southin J.A. said:

> Because it is impairment that is being redressed, even a plaintiff who is apparently going to be able to earn as much as he could have earned if not injured… is entitled to some compensation for the impairment. He is entitled to it because for the rest of his life some occupations will be closed to him and it is impossible to say that over his working life the impairment will not harm his income earning ability.

[147] The loss of earning capacity was assessed at $50,000 in that case.

[148] To be fair, Mr. O'Neill addressed the difficulty of a future loss of income claim because of Ms. Knapp's irregular actual income from September 1999 to October 2002, while she was in transition from Switzerland to Canada. However, he failed to address the loss of income earning capacity, which even at a modest amount on an annual basis could be significant over Ms. Knapp's lifetime.

[149] In my view, Mr. O'Neill was negligent in the manner and extent to which he considered Ms. Knapp's claim for loss of income earning capacity. Despite his inclusion of the claim in the Statement of Claim, he failed to address the claim or obtain informed instructions from his client before settlement.

[150] Furthermore, his defence that he was merely following instructions lacks merit because his “instructions” were not based on proper informed advice on the claim for loss of capacity to earn income. I reject the notion that it was Ms. Knapp’s decision to consider settlement before surgery that “knocked the feet out of building the case.” On the contrary, it made the requirement to build the claim for loss of earning capacity more compelling.

[151] Mr. O’Neill’s counsel submitted that because of Ms. Knapp’s decision not to have surgery until after the settlement, it was premature to do the functional capacity assessment. I do not accept this view, as Mr. O’Neill’s notes made no reference to prematurity. The fact that the case could be settled prior to surgery, the latter not being a certainty in any event, does not diminish what was a permanent disability and deteriorating condition in Dr. Dommisse’s opinion, nor the requirement to address it.

[152] I conclude that Mr. O’Neill was negligent in his lack of advice and handling of this head of damage.

Issue 3: Did Mr. O’Neill advise Ms. Knapp on the issue of the seatbelt defence, as a reasonably prudent lawyer in the Yukon should?

[153] Mr. O’Neill requested research by a student or young lawyer on the seatbelt issue. He stated:

> Q And do you recall whether or not you gave them any instructions vis-à-vis this being a claim arising in Yukon?
> A I don’t believe so. Again, looking at this material, my concern, first and foremost, was the seatbelt issue, and how it would affect Ms Knapp’s claim.
> Q Now, I see in the file that there’s excerpts from the *Alberta Highway Traffic Act*?
> A Yes.

> Q Now, did you go through that sub-file in the course of your handling of the claim?
> A Undoubtedly, yes.
> Q For the matter of being a Yukon claim, did you not find it a bit inappropriate that the students, or whoever was pulling that information together, was looking to Alberta law?
> A Perhaps.
> Q You don't have any independent recollection of that?
> A I do not, no.

[154] Mr. O'Neill held the view that a seatbelt defence would result in a reduction of 25 - 33 % based on the case law of Alberta. He held the view that in Alberta, it was a given that if a seatbelt was not worn there would be a discount, typically without any obligation on the defendant to produce expert evidence on the issue. He recalled in settlement discussions with Mr. Stark that the 25% range was discussed.

[155] In specific answer to the viability of this seatbelt defence, Mr. O'Neill stated:

> A Well, it was certainly something that we were going to have to be prepared to concede something on it. My approach, typically, would be to try and have its effect minimized by getting our numbers a little higher, so that, when you did get a reduction off, you're not feeling it in the way that you truly would if it was coming off the actual numbers. To me, it's always about what the client nets. To maximize the settlement, you can calculate all your numbers a bunch of ways. You can say your settlement was higher, and you gave up more points on the seatbelt; or your settlement was lower and you gave up fewer points on the seatbelt. it was something that we would have to address our mind to at any time we discussed settlement.

[156] In stating at discovery that the reduction was pretty much a given of a flat 25%, he elaborated:

> You know, was it that in October of '02 … I think we still worked to that number. Counsel may have wanted 35 or 40

> in some cases, probably as low as 33, and we'd start at 10 or 15 or whatever.

[157] Mr. O'Neill's approach to the seatbelt defence in Ms. Knapp's case depended upon the stage of the case, i.e., was it preparation for mediation or preparation for trial.

The following exchange took place in cross-examination:

> Q Okay. Would you not agree with me that over the course of a personal injury lawsuit where there is a question about a possible seatbelt defence, that it's incumbent on plaintiff's counsel to thoroughly examine that issue and determine whether or not the defence is viable? Would you agree with me on that?
> A I think that's a fair statement.
> Q Okay. Can you explain why in 18 months that you had conduct of this file you didn't pursue that with Ms. Knapp?
> A I can't other than to – to think about the time period when I was retained, which was 18 to 19 months post-loss, and the time period or stage at which the matter was resolved, which was pre-litigation. So, certainly it was an issue. Perhaps some of the information that you would like to see there is not there and I can't recall it otherwise today, but October 22, 2002 wasn't the commencement of the personal injury trial.
> Q No.
> A So, the –
> Q No, it was – it was the commencement of a mediation session where a seatbelt issue was on the table.
> A Correct.
> Q Right. And from what I can see, you dropped the ball on that issue; is that correct?
> A I disagree with that statement.
> Q Well, what – what's—what's wrong with that statement? How do you disagree with that statement? After – after 18 months with that file, knowing from day one there was a seatbelt issue, how can you possibly not agree with the – the suggestion that you dropped the ball on the issue?
> A Because based on the fact that we knew Ms. Knapp hadn't been wearing a seatbelt and on the case law that we had researched and on my experience with matters regarding failure to wear a seatbelt, a

reduction was not going to be out of question. So, we negotiated the issue away as best we could with numbers.

Q Okay. So, you're saying that you did the best you could around that issue given that – that you weren't into trial mode or – or litigation mode yet?

A I think – I think that's a fair statement.

[158] In my view, whether a lawyer is preparing for mediation or trial, the defendant has the onus to prove the following as set out in *Gagnon v. Beaulieu*, *Fraser Valley Frosted Foods Ltd. and Jones*, [1976] B.C.J. No. 1313 (S.C.), at para. 16:

> (a) Failure, while travelling in a motor vehicle on a street or highway, to wear a seat belt or any part thereof as provided in a vehicle in accordance with the safety standards from time to time applicable is failure to take a step which a person knows or ought to know to be reasonably necessary for his own safety.
>
> (b) If in such circumstances he suffers injury as the result of the vehicle being involved in an accident, and if it appears from the evidence that if the seat belt had been worn the injuries would have been prevented or the severity thereof lessened, then the failure to wear a seat belt is negligence which has contributed to the nature and extent of those injuries.
>
> (c) In the case of this particular form of contributory negligence, the onus is on the defendant to satisfy the court, in accordance with the usual standard of proof, not only that the seat belt was not worn but also that the injuries would have been prevented or lessened if the seat belt had been worn. The court should not find the second of these facts merely by inference from the first, even if that has been established.

[159] Mr. O'Neill was prepared to concede a 25% reduction without requiring the defence to establish that it was negligent to not wear a seatbelt while in a sleeper where no seatbelt or restraint was provided, or that Ms. Knapp's wearing the seatbelt in the passenger seat would have prevented or lessened her injuries.

[160] Mr. O'Neill failed to either examine the photographs that Ms. Knapp had of the interior of the tractor cab or provide them to an expert to determine whether the seatbelt defence could have been established. He considered this a matter for trial not for settlement.

[161] I conclude that Mr. O'Neill was negligent in advising Ms. Knapp on the seatbelt defence and in negotiating a settlement at the mediation based on a 25% reduction.

Issue 4: Did Mr. O'Neill inform, prepare and represent Ms. Knapp as a reasonably prudent lawyer for mediation?

[162] The use of mediation has been well-established in the practice of personal injury law for the past 20 - 30 years. With proper preparation, mediation has a high settlement outcome that can reduce trial costs and provide certainty to the litigants. To be successful, mediation must include the litigants and it provides a certain ownership and control, particularly for the injured party in personal injury claims.

[163] I am in agreement with the approach to mediation set out above by Mr. Vilvang. It is based upon 35 years of practice and, in my view, is the standard for a reasonably prudent practitioner. Mr. Vilvang provided a paper at a BC Continuing Legal Education Seminar in 2003 entitled *Role of Counsel at Mediation: Pre-Mediation Preparation and Positioning.* In my view, reasonably prudent counsel prepare for mediation in the same way as they would for trial, unless they have express and informed instruction not to do so. This includes securing any expert reports and thoroughly canvassing the law.

[164] I find that adequate preparation did not occur in this case. Trial preparation is undeniably more intense and focussed on witness preparation and cross-examination, but preparation for mediation is similar in terms of preparing the client and making

submissions on expert reports both in writing and orally. Briefs or Mediation Summaries and case law, while optional, are nonetheless absolutely essential where counsel wish to convince the other side or the mediator of their views on the law or practice.

[165] To the extent that Mr. O'Neill infers that mediation is simply a numbers game without the need for legal or expert opinion, he is simply wrong. Mediation is useful when reasonable settlements are achieved. But mediation should never be a process that seeks settlement for settlement's sake.

[166] Ms. Knapp's case is no different. There were four aspects that had to be addressed through expert evidence and case law. Firstly, Mr. O'Neill had the expert reports to put forward on a pain and suffering claim based upon a permanent lifetime disability, albeit mild to moderate. However, he neglected to present any British Columbia or Yukon case law.

[167] Secondly, Mr. O'Neill had the factual basis and expert medical opinions to support an award for loss of capacity to earn income, but he had neither case law nor expert reports to substantiate what both legal experts in this case agree could be the largest head of damage.

[168] Thirdly, on the seatbelt issue, Mr. O'Neill did not address the facts of the case, nor did he appear to understand the law. Rather, he accepted, without reviewing the photographs, that a a 25% reduction would be the likely outcome.

[169] Fourthly, Mr. O'Neill did not provide his client with the mediation agreement she was required to sign in advance of the mediation itself. There is no evidence that he prepared Ms. Knapp for her presentation or the role she and Mr. O'Neill would play at

mediation. I adopt the “Preparation of the Client” section of Mr. Vilvang’s 2003 presentation:

(1) Explain why you believe mediation may be beneficial in this case.

(2) Explain the mediation process in detail.

(3) Advise the client of his or her role in the mediation.

(4) Advise the client what your opening position will be and why.

(5) Advise the client where you realistically expect that a settlement can be reached.

(6) Thoroughly review evidence and arguments you intend to present.

(7) Thoroughly review the evidence and arguments you expect the other side to present. Make sure your client totally understands the strengths and weaknesses of both sides’ positions.

(8) Make sure your client is completely comfortable with plans to proceed to a mediation and that the client has complete confidence in the battle plan you have prepared and your ability to carry it through.

[170] I want to be clear that I do not say that the failure to follow each and every recommendation of Mr. Vilvang should result in a finding of negligence against counsel. In *Chaster*, cited above, at paras. 53 and 54, Prowse J.A. approved the trial judge’s view, on the unique facts of that case, the plaintiff’s lawyer did not have to prepare the case to the same extent as at trial in order to proceed to mediation. That case was unique because Chaster was an accomplished litigation lawyer and, after an unsuccessful mediation, settled the case on his own without advising his lawyer, LeBlanc.

[171] The *Chaster* case is quite distinguishable because LeBlanc, before mediation, completed a number of steps including the securing expert reports for a claim for loss of capacity to earn income. Further, Chaster had been discovered, witness statements were taken from two of the three eyewitnesses, two legal opinions had been obtained (one of which presented a dim picture on liability), an oral report on accident reconstruction was received, an economic report on past and future loss had been prepared, and there was an actuarial report as well as current medical reports.

[172] Prowse J.A. stated the following:

> 54 All of this information was considered by Mr. LeBlanc in the preparation of his Mediation Brief, which the trial judge found sufficient for its purpose. It is evident that he and Mr. Chaster approached the mediation as an opportunity to canvass the possibilities of settlement and to move the defence from what had been its intransigent position on both liability and quantum. Mr. LeBlanc stated that, for tactical reasons, he did not usually provide "will say", or similar summaries of the evidence of his collateral witnesses prior to mediation, since the information contained in them could potentially be used to the benefit of the defence in the event that settlement was not effected, despite the confidentiality of the mediation proceedings.
>
> …
>
> 66 In my view, it cannot be said that the trial judge erred in all of the circumstances before him, in finding that Mr. LeBlanc's mediation brief was good, in the sense of representing a reasonable approach to settlement as matters stood at that time, or in failing to find that Mr. LeBlanc should have adjourned the mediation in circumstances where he was not fully geared up for trial. To say that lawyers who are not fully prepared for trial should not engage in mediation is a proposition which would take many lawyers in the personal injury bar by surprise and, in my view, with good cause. There are many reasons for choosing to mediate at a particular point in time and many strategies and approaches which lawyers may take in doing so, depending on variables which do not lend themselves to

> a "one size fits all" strategy. The trial judge was obviously of the view that Mr. LeBlanc was not negligent in proceeding to mediation in the circumstances having regard to all of the evidence and I am not persuaded that his finding in that regard is in error.

[173] However, the research and preparation of Mr. O'Neill failed to address the necessary elements of fact and case law prior to this mediation, and I find that he failed to inform, prepare and represent Ms. Knapp as a reasonably prudent lawyer.

Issue 5: Did Mr. O'Neill act as a reasonably prudent lawyer in accepting Ms. Knapp's instructions to settle her claim, notwithstanding that further file development would have likely resulted in an enhanced settlement at a later date?

[174] As indicated above, Mr. Everard opined that the real issue is whether Mr. O'Neill acted prudently in acting upon his client's instructions to conclude an early settlement. He expressed this opinion as follows:

> However, given that O'Neill was instructed by the client to conclude an early settlement, and given that the client had traded a reasonably clear employment trajectory in Switzerland, for an uncertain future in the Yukon, and given that some of her motivation appears to be non-monetary, it would be improper for O'Neill to refuse to accept, and to act upon, his client's instructions to settle the file on the basis of the information which he had in hand at the time of the Mediation.

[175] At the outset, I should say that the facts I have found provide no support for the proposition that Mr. O'Neill was acting on Ms. Knapp's informed instructions to settle her claim early. Ms. Knapp was completely unaware that further file development would have likely resulted in an enhanced settlement at a later date. On the contrary, I have found that:

1. Mr. O’Neill never provided Ms. Knapp with any evaluation of the heads of damage;
2. he never provided her with advice on the development of a claim for loss of capacity to earn income because he essentially thought her claim under this head was tenuous;
3. he did not provide her with an opinion on the seatbelt defence and the expert opinion that could be obtained;
4. he never provided an opinion on the merits of proceeding to trial versus the settlement on the table at mediation.

[176] In fact, Mr. O’Neill told her that he would not take her case to trial, she risked a seatbelt reduction of 0 – 75% and she could be ordered to pay costs.

[177] I do not find any evidence supporting the assertion that Ms. Knapp gave any informed instruction to Mr. O’Neill about an early settlement and what she would be sacrificing financially.

[178] However, even if the facts supported Mr. O’Neill’s instruction to conclude an early settlement, a reasonably prudent lawyer should have provided Ms. Knapp with an evaluation of her claim, including any financial detriment that could result from settling without all the expert opinion evidence. A reasonably prudent lawyer would be concerned about a client seeking an early settlement and would, at the very least, put the pros and cons in writing and have the client sign acknowledging receipt and confirming the early settlement instruction.

Issue 6: Was the settlement recommended by Mr. O'Neill so inordinately low that it was negligent?

[179] With reference to my assessment of damages below, I conclude that the "prepared to recommend settlement" offer was inordinately low. In addition, the failure of Mr. O'Neill to include a proper claim for loss of opportunity to earn income and address the seatbelt defence necessarily put the offer in the inordinately low category, despite the fact that individual heads of damage that were covered may not be inordinately low.

[180] The mediation, having started at an inordinately low offer, could not produce a fair settlement.

MS. KNAPP'S PERSONAL INJURY CLAIM

[181] As I have found Mr. O'Neill's representation of Ms. Knapp negligent, I now turn to the damages claim of Ms. Knapp. I have found that the settlement agreement is valid and should be paid by the insurer. The question is the additional damage amount, if any, to be paid by Mr. O'Neill and his firm.

[182] I accept that conceptually the assessment of damages must be based upon a trial date of 2004 and the facts as they existed at that time. I do not put this forward as an immutable principle of law, as each case must be considered on its particular facts. It would be tempting to consider subsequent developments in Ms. Knapp's condition but they cannot be part of the assessment of damages which a court would have taken into consideration in 2004. *See Chaster*, cited above.

[183] The onus is on Ms. Knapp to establish that Mr. Dufresne was negligent in the operation of the tractor-trailer. She also has the onus to establish the damages award based upon the value that a court would have assessed in 2004. Thus, the facts that

relate to her injury must be facts that existed in 1999 – 2004 as the basis upon which damages are assessed. As in the *Chaster* case, the facts must be considered in light of what Mr. O'Neill knew, or reasonably ought to have known between April 2001 and a notional trial date in 2004. Expert reports that have been prepared after those years can be considered, but not to the extent that they are based upon new facts that did not exist in the 1999 – 2004 time frame. In other words, it is appropriate to rely on the medical evidence of Drs. Parsons, Ackerman, Pate, Timmermans, Dommisse and Attalla. It would only be appropriate to consider a new expert report where the failure to obtain it at the time of Mr. O'Neill's representation was negligent.

[184] The loss of capacity to earn income, on the other hand, should have been assessed by Mr. O'Neill, so it is appropriate to accept new expert opinions to assist in the determination of a reasonable value for that head of damage. By the same token, expert evidence on the seatbelt defence could have been presented based on the photographs of the tractor cab and Ms. Knapp and Mr. Dufresne's evidence of the dynamics of how she was injured. I note that neither Mr. O'Neill nor James H. Brown Professional Corporation provided any expert reports.

LIABILITY

[185] The pleading of the defendants does not deny the liability of Mr. Dufresne for the accident of September 28, 1999. Nor does it plead the seatbelt defence. Thus, the failure to plead those defences can be deemed to be a waiver of those defences. Rule 20(17) states that subsequent to a statement of claim "a party shall plead specifically" any matter of fact or law that makes a claim not maintainable. See *Fuller v. Schaff et al*, 2009 YKSC 22.

[186] The fact that the defendant insurer never pled a denial of liability or a seatbelt defence relating to the September 28, 1999 single vehicle accident does not relieve Ms. Knapp from the onus to establish liability on the balance of probabilities, and counsel for the defendants have submitted case law on the onus on Ms. Knapp. This onus has been set out in *Fontaine v. British Columbia*, [1998] 1 S.C.R. 424, where Major J., speaking for the court, concluded that the correct approach to negligence is to weigh all the evidence, both direct and circumstantial, to determine whether the plaintiff has established a *prima facie* case and whether the defendant has negated that evidence.

[187] In *Nason v. Nunes*, 2008 BCCA 203, this principle was applied by the trial judge where Nunes explained that he had driven with reasonable care in winter driving conditions and that any presumption of negligence arising from his loss of control was rebutted by his explanation that the truck had fishtailed when it went over a bump between the road surface and the bridge.

[188] In *Savinkoff v. Seggewiss* (1996), 77 B.C.A.C. 98, the court held that evidence of other motorists negotiating a curve without difficulty is evidence that when driven at a safe speed, a slippery road did not present an unforeseeable risk of harm.

[189] The issue of liability for the driving here largely rests on the evidence of Mr. Dufresne, as Ms. Knapp was in the sleeper at the time.

[190] Mr. Dufresne testified that he has lived common-law with Ms. Knapp since she took up permanent Canadian residence in November 2000. He has driven highway tractors with trailers for over 30 years. He generally drives in the winter.

[191] On this occasion, he was hauling a fuel tanker loaded with diesel fuel from Alaska to Dawson City via the Top of the World Highway.

[192] Mr. Dufresne left Tok, Alaska, in the morning of September 28, 1999, with Ms. Knapp. He described the driving conditions as winter conditions with light snow at Tok. When he reached the Canada-US border, the weather was getting worse, and visibility was reduced. It was 0 to – 2^{o} C. The snow was wet and slushy. The weather continued to worsen after he crossed into the Yukon, with more snow and snow accumulation on the highway.

[193] When he began to experience some sliding, Mr. Dufresne stopped to put chains on. He had two sets of chains for eight tires but only put on one set.

[194] He was aware of other truck drivers ahead of him on the highway.

[195] The snowfall increased and there was 3 – 4 inches accumulated on the road. He could no longer see the tracks of the trucks that were ahead of him.

[196] As he was approaching a right hand corner at 30 km/hr on a descent, he lost traction on his trailer wheels. His driving wheels began to spin, and the accident occurred very fast as the tractor and trailer slid off the left side of the highway.

[197] He acknowledged that he should have put the second set of chains on when snow conditions worsened and he could no longer see the previous trucks' tire tracks. There is no evidence that the truck drivers ahead of him had any difficulty negotiating the corner.

[198] There was no challenge to Mr. Dufresne's evidence and I find him negligent for not putting the second set of chains and not reducing his speed further to adjust to the deteriorating conditions.

THE SEATBELT DEFENCE

[199] There was no pleading of the seatbelt defence and the defendant has not presented any evidence that had Ms. Knapp been wearing a seatbelt her injuries would have been lessened or prevented. This is sufficient to dismiss the seatbelt defence.

[200] In addition, there was no restraining device in the sleeper. Ms. Knapp and Mr. Dufresne testified that Ms. Knapp, following the rollover, was located on the truck floor with her legs between the passenger seat and the driver seat, and her body behind the passenger seat. The crush damage to the roof of the cab over the passenger seat could have resulted in a head injury to Ms. Knapp.

[201] I conclude that there should be no contributory negligence resulting from the seatbelt defence as the defendant neither pleaded the seatbelt defence nor met the onus to establish the defence.

GENERAL DAMAGES

[202] General damages or non-pecuniary loss provides compensation for pain and suffering, loss of amenities and enjoyment of life. Dr. Dommisse's letter of November 26, 2001, confirmed the following:

1. He diagnosed a two-column anterior compression fractures of T10 and T11 showing a 30 degree Kyphosis (curvature of the spine), with degenerative changes at T10 – 11 and T11-12.
2. He felt that her present condition would gradually deteriorate.
3. It is possible that she may require an anterior thoracic fusion from T10 to T12, but surgical treatment should only be considered as a last resort if all non-surgical methods fail.

4. He recommended exercise, trunk and abdominal muscle strengthening and trying acupuncture, laser therapy, ultrasound and TENS treatment, the latter which may be required for pain relief on a permanent basis.
5. If surgery were an option, he anticipated that Ms. Knapp would have considerable relief of her thoracolumbar pain with residual stiffness and pain to a lesser extent with increased activity, weather changes, fatigue or stress.
6. He set out possible complications from surgery, which include nerve damage and deep vein thrombosis.
7. He anticipated that Ms. Knapp will have ongoing pain and suffering with physical activity to a greater or lesser extent.
8. Ms. Knapp is affected to a moderate extent in her physical activity, enjoyment of life and ability to work.
9. Her future disability will be mild to moderate without surgery and this disability will be permanent.
10. In her work as an accountant, he felt her disability is mild to moderate and she was not totally disabled at that time. She could conceivably work in a part-time capacity, but that would be permanent if she was treated without surgery.

[203] Dr. Dommisse concluded that Ms. Knapp's "overall prognosis in the long-term is probably guarded".

[204] A Comprehensive Functional Capacity Evaluation, prepared by physiotherapist Mandy McClung, dated November 9, 2009, summarized Ms. Knapp's functional capacity as follows:

> Ms. Knapp did not demonstrate the ability to complete the job demands of a job in the field of an accounting related profession. This type of work requires constant sitting which is one of the most aggravating postures for Ms. Knapp. Bending, reaching and twisting further aggravate the pain in her mid back.
>
> Ms. Knapp should seek work that allows her to change position frequently from sitting to dynamic standing with not more than 45 minutes in sitting or two hours in standing duration. I would suggest that she sit a maximum for two hours per day, broken up throughout the day. Ms. Knapp demonstrated the ability to lift and carry in the light to medium levels. I would recommend that lifting not be a significant part of any job that Ms. Knapp pursues as her lifestyle already requires her to lift to near her capacity during the day. As she currently does, she should pursue a schedule that allows flexibility for breaks during the day so that she can self manage her pain level. She should avoid repetitive or prolonged bending, twisting, unsupported reaching or overhead work.

[205] Ms. McClung recommended an intensive six-week daily program at a pain clinic.

[206] Ms. Knapp also testified that the injury and pain she suffers from the accident has made her depressed and dependant as well as negative, affecting her sexual relationship with Mr. Dufresne. I have no doubt that this occurred but it does not appear to be a matter brought to Mr. O'Neill's attention. I conclude that it cannot be a significant factor in the assessment of damages in 2004.

[207] Mr. O'Neill's research received after his "prepared to recommend" offer set out a range for general damages of approximately $50,000 to $84,000 (excluding a case involving a failure to mitigate with a pre-existing condition).

[208] Counsel for Mr. O'Neill submits $60,000 is reasonable and counsel for Ms. Knapp submits $90,000 is appropriate under this head.

[209] From my review of cases involving compression fractures, the general damages range from $60,000 to $80,000. See *Forsyth v. Sikorsky Aircraft Corp.*, 2000 BCSC 642; *Bryant v. Griffiths*, [1988] B.C.J. No. 1919 (S.C.); *McDougall v. Skip's Cargo Service Inc*., [1992] B.C.J. No. 2300 (S.C.) and; *Downey v. Brousseau*, 2007 BCSC 149.

[210] In the *Forsyth* case, Mr. Kokoszka suffered spinal injuries in the form of a T12 compression fracture and L4 burst fracture. The impairment to his spine from the burst fracture was long term and permanent. His compression fracture would be painful for months or years. Blair J. awarded $80,000 for his non-pecuniary damages.

[211] In my view, Ms. Knapp should similarly receive $80,000 for her general damages. This is not a case where there is any challenge to Dr. Dommisse's report of November 26, 2001. He describes her injury as a two-column anterior compression fractures of T10 and 11 resulting in ongoing pain and suffering. Her disability will be mild to moderate without surgery, which he considered to be a last resort. He felt she could work in a part-time capacity but that would be permanent if treated without surgery. Her prognosis was guarded.

LOSS OF CAPACITY TO EARN INCOME

[212] I have concluded that Ms. Knapp has suffered a serious injury with permanent and painful consequences that impact on her ability to earn income.

[213] In *Morris v. Rose Estate* (1996), 75 B.C.A.C. 263, Donald J.A., at para. 24 noted the difficulty in assessing loss of earning capacity:

> Assessing damages in this area involves an estimate based on prophecies. Mathematical certainty is impossible in virtually all cases. While a comparative scenario approach will often be useful, the judge must step back and look at all the relevant factors, especially general incapacity, before fixing an amount.

[214] In *Pallos v. Insurance Corp. of British Columbia* (1995), 53 B.C.A.C., the Court of Appeal cited, with approval, the following from *Brown v. Golaiy*, *supra,* which described the considerations when assessing damages for loss of earning capacity:

> The means by which the value of the lost, or impaired, assets is to be assessed varies of course from case to case. Some of the considerations to take into account in making that assessment include whether:
>
> 1. The plaintiff has been rendered less capable overall from earning income from all types of employment;
>
> 2. The plaintiff is less marketable or attractive as an employee to potential employers;
>
> 3. The plaintiff has lost the ability to take advantage of all job opportunities which might otherwise have been open to him, and he not been injured; and
>
> 4. The plaintiff is less valuable to himself as a person capable of earning income in a competitive labour market.

[215] In *Pallos,* Finch J.A. reviewed the various means of assigning dollar value at para. 43:

> The cases to which we were referred suggest various means of assigning a dollar value to the loss of capacity to earn income. One method is to postulate a minimum annual income loss for the plaintiff's remaining years of work, to multiply the annual projected loss times the number of year remaining, and to calculate a present value of this sum. Another is to award the plaintiff's entire annual income for one or more years. Another is to award the present value of

> some nominal percentage loss per annum applied against the plaintiff's expected annual income. In the end, all of these methods seem equally arbitrary. It has, however, often been said that the difficulty of making a fair assessment of damages cannot relieve the court of its duty to do so. In all the circumstances, I would regard a fair award under this head to be the sum of $40,000.00.

[216] In *Pallos*, the injured worker suffered a comminuted fracture of the right tibia and fibula, which left him unable to do the heavy lifting as a manual labourer. He had chronic pain in his right knee but would be able to continue lighter work in the future. He was able to earn $41,000 in 1989, the year after the accident and $49,000 in 1990.

[217] I have also considered *Perren v. Lalari*, 2010 BCCA 140, at para. 32, requiring the plaintiff to prove that there is a real and substantial possibility of a future event leading to an income loss. In my view, Ms. Knapp has discharged the burden of proof and I now turn to the assessment of that loss.

[218] Prior to 1995, Ms. Knapp worked in Austria and Switzerland as a tax consultant, banker, waitress, factory worker, barmaid, tax advisor and bookkeeper. She earned incomes ranging from $30,000 to over $50,000 CAD (except for lower incomes in 1983 – 1985). From March 1995 to March 2000, she attended university full-time and had income in the same range from employment and scholarships.

[219] Her highest earning year was December 1999 to September 2000, when she worked as a tax auditor in Switzerland. She earned the Canadian equivalent of approximately $90,000 - $100,000.

[220] In September of 2000, she learned of her acceptance as a permanent resident of Canada and she emigrated in November 2000.

[221] Ms. Knapp was advised not to work by Dr. Attalla, her Whitehorse doctor, until she had an examination by an orthopaedic surgeon.

[222] Ms. Knapp had planned to work in Europe during each winter but that did not happen, which I find was because she had started a relationship with Mr. Dufresne, she wanted to come to Canada, and because of her injury.

[223] Ms. Knapp did some part-time bookkeeping work with Ms. Fournier, a self-employed bookkeeper in 2003 and 2004 from approximately February – May in each year at tax time. She was unable to work on a full-time basis because of limitations from her injury.

[224] However, in the years 2002 – 2003, Ms. Knapp operated a business called A. Knapp Accounting Services, which earned less than $5,000 each year. She also operated a business called North Star Adventures, which made equipment expenditures for outdoor adventure but earned modest amounts. She also provided pilot car services for Mr. Dufresne.

[225] I conclude that there is no question that Ms. Knapp has been rendered less capable overall of earning income from all types of employment, less marketable as an employee to potential employers, and less valuable as a person capable of earning income in a competitive labour market as a result of the injuries she sustained on September 28, 1999. But taking into account the mild to moderate nature of her disability and the fact that accommodations can be made as established by Ms. McClung, I am not of the view that the mathematical calculations of Mr. Szekely, the consulting economist, is the approach to take.

[226] I agree with the assessment of Finch J.A. that the various methods of assessing this loss of capacity to earn income are “equally arbitrary”. While Ms. Knapp is a very capable bookkeeper/accountant, she does have a disability in sitting for long periods of time and dealing with her back pain. I assess this loss at $70,000.

PAST WAGE LOSS

[227] Ms. Knapp has a past wage loss of $27,450 as a result of the accident when she was unable to work at full capacity on her return to employment in Austria between December 1999 and February 2000.

[228] I also find that she was unable to work when she moved permanently to Canada in November 2000, because Dr. Attalla indicated she should not return to work until she was examined by an orthopaedic specialist, Dr. Dommisse.

[229] Again, this amount is an arbitrary assessment as Ms. Knapp was recently residing in Canada and had not established an employment record. I assess this wage loss at $30,000 resulting in a total past wage loss of $57,450.

COST OF FUTURE CARE

[230] Counsel for Ms. Knapp claims that she should be compensated for twice-weekly sessions at $80 per session for 50 weeks of the year, amounting to a principal cost of $8,000 per year. He calculates the present value to be $150,130.

[231] Counsel for Ms. Knapp also claims for the cost of a 4 – 6 week residential treatment program at a pain clinic, which Ms. Knapp advised, would cost $25,000.

[232] I prefer the evidence of Mandy McClung, the physiotherapist who prepared the Functional Capacity Evaluation. She recommended an intensive six-week daily program at a pain clinic to be followed up by an independent home program so Ms. Knapp can

continue her rehabilitation independently, especially as Ms. Knapp lives far away from a treatment service.

[233] I order $50,000 for costs of future care, which includes the possibility of surgery after 2004 and the costs of after-care.

HOUSEKEEPING CLAIM

[234] I agree that $10,000 is appropriate for this claim.

SPECIAL DAMAGES

[235] I order $1,000 for special damages.

PREJUDGMENT INTEREST

[236] Counsel for Ms. Knapp proposes calculating an interest rate of 5.75%, which corresponds with the Judicature Act methodology as the action was commenced in September 2001. He proposes that this interest rate would run for four years from the date of the accident to September 28, 2003. He then submits that from September 28, 2003, a prejudgment interest rate of 4%, the Bank of Canada prime lending rate, as of September 2004, be applied to the date of this judgment.

[237] I order prejudgment interest as claimed but state that it runs until March 1, 2010, as that was the first trial date set in this matter. There have been many delays in getting this matter to trial but, in fairness, I have not found the delay should be visited upon the defendants entirely.

SUMMARY

[238] I have found the defendants liable for solicitor negligence and order them to pay the following damages plus interest as set out above:

1.	General Damages	$80,000
2.	Special Damages	$1,000
3.	Past Wage Loss	$57,450
4.	Loss of Future Earning Capacity	$70,000
5.	Cost of Future Care	$50,000
6.	Cost of Housekeeping	$10,000
	Total	$268,450

[239] The settlement from Zurich Insurance in the amount of $125,000 should be paid and deducted from this judgment. I will leave the calculation of interest to counsel.

[240] Counsel may speak to costs, or any other matter that arises, in case management, if necessary.

VEALE J.