

SUPREME COURT OF YUKON

Citation: *Fuller v. Schaff et al.*, 2009 YKSC 23

Date: 20090326
S.C. No. 05-A0075
Registry: Whitehorse

Between:

CHRISTOPHER LANCE FULLER

PLAINTIFF

And

**DANIEL RICHARD SCHAFF, THE COMMISSIONER OF YUKON, HAROLD FRASER
and THE ATTORNEY GENERAL OF CANADA**

DEFENDANTS

And

THE COMMISSIONER OF YUKON and HAROLD FRASER

THIRD PARTIES

Before: Mr. Justice L.F. Gower

Appearances:

Debra L. Fendrick

Counsel for the Plaintiff

Richard A. Buchan

Counsel for the Defendants Daniel Richard
Schaff and The Attorney General of Canada

Zeb Brown

Counsel for the Defendants and Third Parties
The Commissioner of Yukon and Harold Fraser

REASONS FOR JUDGMENT

INTRODUCTION

[1] This is an action by Lance Fuller, the plaintiff, arising out of a motor vehicle accident on the portion of the Alaska Highway that runs along Marsh Lake, Yukon, on

February 1, 2005. Mr. Fuller was driving northbound and prior to the accident had been following a Yukon Government snowplow being driven by the defendant, Harold Fraser. Mr. Fraser was rounding, or had just rounded, a blind curve veering to his right, when he met Daniel Schaff, the co-defendant, travelling southbound. A snow cloud was generated by the snowplow while travelling through the curve. Mr. Schaff became disoriented and crossed over the centre line of the highway with his vehicle, colliding with Mr. Fuller's vehicle. Mr. Fuller suffered various injuries as a result of the collision, the most serious of which were a number of broken bones in both feet. As a result, he now has some loss of mobility and continuing pain in his feet. Mr. Fuller claims that this has also affected his ability to support himself as an independent heavy equipment operator and mining contractor.

[2] Mr. Fuller has sued Mr. Schaff and Mr. Fraser for negligence. Because Mr. Schaff was employed by the United States Air Force at the time of the accident, pursuant to a reciprocal legislative arrangement between the governments of Canada and the United States of America, the Attorney General of Canada ("Canada") has been joined as a defendant and is representing Mr. Schaff in these proceedings.¹ In short, if Mr. Schaff is found liable while acting within the scope of his duties as a U.S. serviceman, Canada will be responsible for any damages awarded.

[3] As Mr. Fraser was a Yukon Government employee at the time of the accident and was operating the snowplow in the normal course of his employment, the Commissioner of Yukon has also been named as a defendant (the "Yukon

¹ The *Visiting Forces Act*, R.S.C. 1985, c.V-2.

Government”) and is representing the interests of Mr. Fraser in this action. I will refer to both as the “Government defendants”.

[4] Mr. Schaff has made a third party claim against Yukon Government and Mr. Fraser, seeking contribution and indemnity in the event that Mr. Schaff is found liable for the damages suffered by Mr. Fuller. In addition, Mr. Schaff has counterclaimed against the Yukon Government and Mr. Fraser for damages to Mr. Schaff’s vehicle and other associated losses.

ISSUES

[5] There are several issues arising in this trial:

1. In the action by Mr. Fuller against Mr. Schaff, although the persuasive burden remains on the plaintiff throughout, because Mr. Schaff crossed over the centre line of the highway, the evidentiary burden shifts to him to show that he was not negligent, despite having done so. The resultant question is whether Mr. Schaff discharged his evidentiary burden by explaining that the accident was caused by the snow cloud thrown up by the snowplow, and is that explanation equally consistent with the absence of negligence on Mr. Schaff’s part, as with his negligence?

2. In the action by Mr. Fuller against the Government defendants, and in counterclaim by Mr. Schaff, the following additional issues arise:

- a) Did the Government defendants owe a duty of care to Mr. Fuller and Mr. Schaff?
- b) If so, what is the standard of care?

- c) Was the standard of care breached?
- d) If so, did the breach of the standard of care cause Mr. Fuller's personal injuries and Mr. Schaff's property damage?
- e) Is Mr. Schaff contributorily negligent for his property loss?

3. The final issues common to all the parties are:

- a) If Mr. Schaff and the Government defendants are all liable for Mr. Fuller's damages, to what extent did each set of defendants contribute to Mr. Fuller's losses?
- b) Is Mr. Fuller himself contributorily negligent for his injuries?
- c) What is the extent of Mr. Fuller's damages?
- d) Is the Insurance Corporation of British Columbia ("ICBC") entitled to make a subrogated claim against the defendants for the no-fault benefits it paid to Mr. Fuller?

FINDINGS OF FACT

[6] The evidence on liability came from a number of witnesses and in several respects the evidence conflicted. The evidence was in the form of in-person evidence and various read-ins from the examinations for discovery. In addition, Mr. Schaff's counsel tendered three expert reports through two expert witnesses. Mr. Fuller's counsel also tendered an expert opinion in rebuttal. Lastly, all parties relied on a joint book of exhibits, which was one of 18 exhibits filed in total.

[7] In an attempt to simplify matters, I make the following findings of fact in relation to the question of liability. Where necessary or helpful, I will add further analysis to explain how I made certain findings where the evidence was in conflict:

1. The accident occurred on February 1, 2005, at or about 8:34 a.m. At that time of day, the natural lighting condition was “civil twilight”, where the horizon is clearly visible and terrestrial objects are easily perceived without artificial light.
2. The location of the accident was on the Alaska Highway about 48 kilometres south of Whitehorse, and roughly a kilometre south of the access road to the Marsh Lake garbage dump. More specifically, the site was a blind curve with a relatively perpendicular rock face on the inside of the curve (the easterly side of the highway) and the shoreline of Marsh Lake on the outside (the westerly side).
3. According to the Environment Canada hourly data for the Whitehorse Airport, on February 1, 2005, snow began at approximately 3:00 a.m. for a couple of hours, then cleared briefly, with snow continuing from 6 a.m. for the remainder of the day. The temperature at 8:30 a.m. was approximately -18.5°C, with relative humidity of 71%. The visibility available between 8 and 9 a.m. ranged from 3.2 to 4.8 kilometres. The wind speed between 8 and 9 a.m. was 17 kilometres per hour.
4. At the time of the accident, a light wind was gusting from west to east off Marsh Lake and the snow conditions at the accident location were light and dry.

5. Mr. Fuller was 56 years old at the time of the accident. He has a background as a professional truck driver and heavy equipment operator and has lived in the Atlin area for over 30 years. In particular, he was a superintendent for the British Columbia Department of Highways in that area from 1990 to 1999, and his driving experience included approximately 15 years of operating snowplows.
6. Mr. Fuller and his 34 year old son, Shane Fuller, left Atlin, British Columbia, where they reside, about 6 or 6:30 a.m. in Mr. Fuller's 2003 Dodge three-quarter-ton white pick-up truck. Mr. Fuller drove throughout, and his son was a passenger beside him. Mr. Fuller had an appointment to have the pick-up serviced at a dealer in Whitehorse about 9 or 9:30 a.m.
7. Mr. Fuller has driven the Alaska Highway between Whitehorse and Atlin many times. It normally takes him about two to two and a half hours to travel that distance, one way, at the speed limit.
8. The speed limit at the accident site was 100 kilometres per hour.
9. Mr. Fuller first noticed the snowplow being driven by Mr. Fraser at or about the "Inn on the Lake" turnoff from the Alaska Highway. He followed the plow for a number of kilometres while approaching the accident scene. He gradually adjusted his speed to that of the snowplow, in order to maintain a consistent distance between his pick-up truck and the plow. He was in no particular rush and anticipated an opportunity to pass the

snowplow a few kilometres ahead on the straight stretch of the Alaska Highway by the Army Beach campground.

10. Mr. Fuller estimated that he was between 400 - 500 metres behind the snowplow. He had some experience in estimating such distances through his previous employment with the Department of Highways in British Columbia, where he had to frequently calibrate a distance measuring instrument on one of the department's trucks. He also had experience in judging distance as a hunting guide and outfitter, and as a big game hunter. Shane Fuller similarly estimated that their following distance behind the snowplow was initially about 400 - 500 yards (one yard = 0.91 metre; one metre = 1.09 yards), but that it might have got down to about 300 yards as the vehicles approached the blind curve. Shane Fuller was also familiar with estimating such distances because of his experience as a big game hunter and from sighting in hunting rifles. I find that the Fuller vehicle was at least 300 metres behind the snowplow as it entered the blind curve, and that the Fuller vehicle was maintaining a consistent distance behind the plow at that point.
11. Mr. Fraser had been a professional truck driver for just over 30 years, as of February 1, 2005. He had worked for the Yukon Department of Highways from 1989 to 2007, and drove snowplows every winter over that time period. At the time of the accident, he was based out of the Whitehorse Grader Station and was responsible for plowing the portion of the Alaska Highway between the City of Whitehorse and Jake's Corner,

which included the accident scene. He was very familiar with that stretch of highway.

12. The snowplow being driven by Mr. Fraser was equipped with both a front, one-way, conical plow blade and an under-body plow. At the time of the accident, only the front plow blade was engaged. The truck itself is a tandem axle single body chassis with a large sandbox over the back wheels and a sand spreader at the rear. Although precise measurements were not given in evidence, it appears from a photograph of the front plow blade that it protrudes slightly past the driver's side of the truck by a few inches. The blade is furthest forward on the driver's side and then is angled back towards the passenger side of the truck. It is also semi-conical in shape. The plow appears overall to be wider than the front of the truck by a couple of feet.
13. Mr. Fraser began plowing that stretch of the highway a little after 6:30 a.m. on February 1, 2005. He made an initial pass along the centre line southbound. When he got to Jake's Corner, about 65 kilometres south of Whitehorse, he turned around and made a second centre line pass going north towards the Carcross intersection on the Alaska Highway. There was about three to four inches of fresh snow on the highway, plus compacted snow with some slippery sections.
14. The snowplow was equipped with a "Silent Witness" device which electronically recorded a number of the mechanical and operational functions of the snowplow truck from the moment the ignition key was

turned on. This data was downloaded into a laptop computer shortly after the accident occurred. Printouts of that data show that certain equipment on the snowplow truck was being operated at various times, for example: the turning signal lights, the brake lights, the front and back beacons, the reverse gear, and the “Jake brake”.² In addition, the Silent Witness keeps a running record of the speed of the snowplow truck in both a “second by second” and a “minute by minute” format.³

15. The minute by minute printout shows that between 8:25 a.m. and 8:35 a.m. on February 1, 2005, the snowplow truck was travelling at or about 70 kilometres per hour. At the precise time of 8:34 a.m., it was travelling slightly below 70 kilometres per hour.
16. Mr. Fraser gave evidence that he let his foot off the accelerator pedal very briefly when he first noticed what was later confirmed to be the Schaff vehicle coming towards him in or about the blind curve. He then said that he returned to his previous speed. That evidence is consistent with the Silent Witness data which indicates a slight drop in speed at around 8:34 a.m., but the data also indicates that the Jake brake on the snowplow truck was not engaged at anytime between 8:10 a.m. and 8:55 a.m. on February 1, 2005. Therefore, if Mr. Fraser did let his foot off the accelerator at that time, he did not do so for a sufficient length of time to

² In general terms, I understand the Jake brake to be a device which assists in the deceleration of the engine when the operator’s foot is removed from the accelerator pedal.

³ The chronological times recorded on the Silent Witness printouts are one hour behind the correct local time in the month of February, due to the device not being re-set after daylight savings time. Therefore, 8:30 a.m. on February 1, 2005 is displayed as 9:30 a.m. on the Silent Witness printout. Further, the Silent Witness times are recorded on a 24 hour clock.

engage the Jake brake. Thus, I conclude that Mr. Fraser did not slow down the snowplow to any appreciable degree upon first noticing the Schaff vehicle.

17. Based on all the evidence, I find that Mr. Fraser was driving the snowplow truck at approximately 70 kilometres per hour at the time of the accident. Further, as Mr. Fuller was maintaining a steady distance of at least 300 metres behind the snowplow immediately prior to the accident, then Mr. Fuller would also have been travelling at approximately 70 kilometres per hour.
18. Mr. Fraser did not slow down while *approaching* the blind curve. He did not consider doing so because, as far as he could tell, there was no traffic either ahead of him or behind him. However, he could not see around the rock bluff and nor could he see the headlights of the Fuller vehicle behind him due to the snow cloud trailing the plow. Therefore, he could not see all the traffic ahead of him or behind him.
19. Mr. Fraser was aware of the wind coming off Marsh Lake across the Alaska Highway. He was also aware that occasionally the wind can blow the snow against the rock face on the blind corner which can then bounce back across the highway from east to west. He was also aware that in the area of the rock face, more of a snow cloud would be generated behind the snowplow. In particular, he was aware that snow thrown up by the plow against a rock bluff could be deflected back and cloud the highway.

He acknowledged that would have been a reason for slowing down in the vicinity of rock bluffs.

20. On October 25, 2004, the Director of the Transportation Maintenance Branch of the Yukon Government's Department of Highways and Public Works, Donald Hobbis, signed a document entitled "Policy & Procedures Directive, Snowplowing and Sanding Policy 6.10" ("Snowplow Policy 6.10"). The Policy was originally issued in 1997 and was most recently revised in October 2004. Under the title "Snow Plowing Operations", a number of points are listed, including the following:

- Plowing speed for **Front plows** must **never exceed 60 km/h**. This speed should be reduced, as conditions become worse or visibility decreases. Never drive faster than the conditions of the road will allow.

...

- During light fluffy snow, speed should be reduced to 50 km/h or less to prevent a cloud of snow in the back of your unit, which will reduce your visibility to other motorists. In addition, this snow cloud will settle back on the road behind the unit.

...

- When plowing the center line on a snow covered road always slow down when meeting on coming traffic and make sure there is enough room to safely pass." (emphasis already added)

21. Mr. Schaff had about 15 years of driving experience, including winter driving conditions in his home state of Montana. He had primarily driven passenger cars and pickup trucks. He also had some driving experience

in the state of Alaska, where he was posted with the U.S. Air Force near Fairbanks. However, he had no experience towing his trailer in winter conditions nor any experience driving the Alaska Highway in the winter.

22. Mr. Schaff was travelling south, operating a red 1999 Ford F350 pick-up truck, which was pulling a 25-foot double axle travel trailer. He had tested the brakes on his travel trailer by driving on the Air Force base where he was posted. He had never towed his travel trailer in winter conditions.
23. Mr. Schaff's posting with the Air Force had been transferred to North Dakota. He planned to visit with his children and some friends in Montana before driving on to North Dakota. He was authorized to leave the state of Alaska on February 1, 2005. He planned to drive through Canada to the United States over a period of about one week. Mr. Schaff had no set date by which he wanted to arrive in Montana, but did have a desire to be there "just as soon as [he] could." Accordingly, he planned to make minimal stops for fuel, supplies and sleep, and was primarily eating en route.
24. The night before his departure he had slept about seven or eight hours. He left the Air Force base at about 3 or 4 p.m. on January 31, 2005, and arrived at the Canadian border at 10 p.m. His orders did not allow him to cross the border until midnight on February 1, 2005. He slept a couple of hours while waiting to cross the border.
25. After crossing the Canadian border into the Yukon, Mr. Schaff subsequently stopped for fuel and a couple of hours sleep. He stopped

again in Whitehorse briefly to fuel up and let his dog out, but did not sleep. He continued towards the accident scene with no further stops.

Therefore, he had been driving a total of 12.5 - 13.5 hours between Fairbanks and the accident scene, with about four hours of sleep en route.

26. Between Fairbanks and the accident scene, Mr. Schaff had passed two semi-trailers travelling in the opposite direction, which threw up snow clouds. That was his first experience with snow clouds and he was surprised by them, as they engulfed the entire width of the highway and made it difficult for him to see. On the first occasion he let off the gas and steered through the snow cloud. On the second occasion he slowed down almost to a stop.
27. As Mr. Schaff approached the accident scene, the surface of the highway was largely snow covered and snow packed, with no visible line markings. He was in the right hand portion of the highway just plowed by Mr. Fraser on his centre southbound pass. He was driving at an average speed of 45 miles per hour, or 72 kilometres per hour.
28. As he got closer to the snowplow, Mr. Schaff was steering around the blind curve to his left. He let his foot off the gas pedal. As he was engulfed by the snow cloud, he felt his trailer sway and tapped his brakes gently. He did not apply his brakes harder, because he felt that he might go into a slide. He continued to steer in the direction of the curve to his left. The next thing he saw were headlights right in front of him. He then slammed on his brakes and collided with the Fuller vehicle.

29. Mr. Schaff said that the snow cloud created by the snowplow lasted a lot longer than the two earlier snow clouds he had encountered passing on the oncoming semi-trailers. He said it was like snow was being blown right at him and he had no reference points, as he was unable to see anything in front of him. I accept that evidence.
30. The Schaff vehicle came to rest on the left, easterly shoulder of the highway, on the inside of the blind curve. The Fuller vehicle came to rest in the ditch on the inside of the curve. The two vehicles collided on their front drivers' sides.
31. Mr. Schaff did not recall any movement of the travel trailer at the point of impact, although the trailer hitch was broken in the collision and the hitch and stabilizer bar were pushed under the rear bumper of Mr. Schaff's truck. The trailer was positioned at a very slight angle towards the driver's side of the truck, but was still relatively aligned to the direction of Mr. Schaff's travel.
32. The accident scene was examined by Grant Aune, who was qualified as an expert witness in the areas of accident reconstruction, vehicle safety policy analysis, operation of heavy equipment such as snowplows, and the standard of care in such operation. Mr. Aune examined the scene of the accident and made a number of measurements, which I accept as findings of fact. For the sake of simplicity, I have rounded some of the measurements down to the nearest whole number:
 - the total length of the curve is 366 metres.

- the distance from the start of the curve, at the north end, to the point where the Schaff and Fuller vehicles came to final rest is 216 metres.⁴
- the sight line for a southbound vehicle as it first starts into the curve is 151 metres (which is 165 yards, or 496 feet).

33. Given my findings that Mr. Fraser and Mr. Fuller were both travelling at approximately 70 kilometres per hour (19.5 metres per second), that Mr. Schaff was travelling at approximately 72 kilometres per hour (20 metres per second) and that Mr. Fuller's following distance behind Mr. Fraser's snowplow was at least 300 metres, certain other findings can be made:

- (a) Mr. Fuller was at least 15.4 seconds behind Mr. Fraser ($300 \text{ m.} \div 19.5 \text{ m/sec}$). Therefore, 15.4 seconds prior to the collision Mr. Fraser's snowplow would have passed by the point of impact, with Mr. Fuller at least 300 metres behind, and Mr. Schaff would have been 308 metres north of the point of impact ($15.4 \text{ sec.} \times 20 \text{ m/sec}$);
- (b) Mr. Fraser and Mr. Schaff would have been closing in on each other at the combined rate of 39.5 metres per second ($19.5 \text{ m/sec} + 20 \text{ m/sec}$). Therefore, after Mr. Fraser passed the point of impact, it would have taken an additional 7.6 seconds for he and Mr. Schaff

⁴ The point of impact was measured by Mr. Aune at 216 metres south of the north end of the curve. This was actually the point of *final rest* of the Fuller and Schaff vehicles. As Mr. Schaff's truck and trailer had a greater combined weight than Mr. Fuller's truck, there would have been some movement of the colliding vehicles in a southerly direction. Mr. Aune was opined that the area of impact would have been within 10 – 15 metres north of the final point of rest, which he did not view as significant. For the sake of simplicity, he used the point of rest as the point of impact. I have done the same.

to pass by each other ($300 \text{ m.} \div 39.5 \text{ m/sec}$). Further, the point at which they passed would have been 148 metres north of the point of impact ($7.6 \text{ sec.} \times 19.5 \text{ m/sec}$), or 68 metres south of the north end of the curve ($216 \text{ m.} - 148 \text{ m.}$), i.e. within the curve.

- (c) One second before Mr. Schaff and Mr. Fraser passed by each other, Mr. Fraser would have been 87.5 metres south of the north end of the curve ($68 \text{ m.} + 19.5 \text{ m.}$) and Mr. Schaff would have been 48 metres south of the north end of the curve ($68 \text{ m.} - 20 \text{ m.}$);
- (d) Two seconds before Mr. Schaff and Mr. Fraser passed by each other Mr. Fraser would have been 107 metres south of the north end of the curve ($68 \text{ m.} + 39 \text{ m.}$) and Mr. Schaff would have been 28 meters south of the north end of the curve ($68 \text{ m.} - 40 \text{ m.}$);
- (e) Three seconds prior to passing by each other, Mr. Fraser would have been 126 metres south of the north end of the curve ($68 \text{ m.} + 58.5 \text{ m.}$) and Mr. Schaff would have been 8 metres south of the north end of the curve ($68 \text{ m.} - 60 \text{ m.}$);
- (f) Four seconds prior to passing each other, Mr. Fraser would have been 146 metres south of the north end of the curve ($68 \text{ m.} + 78 \text{ m.}$) and Mr. Schaff would have been 12 metres north of the north end of the curve ($68 \text{ m.} - 80 \text{ m.}$);
- (g) Five seconds prior to passing each other, Mr. Fraser would have been 165.5 metres south of the north end of the curve ($68 \text{ m.} +$

97.5 m.) and Mr. Schaff would have been 20 metres north of the north end of the curve (68 m. - 100 m.);

- (h) The sight line southbound is 151 metres. Therefore, Mr. Schaff would have been able to see the snowplow coming towards him for at least four seconds before passing it.
- (i) From the point of passing by the snowplow, Mr. Schaff and Mr. Fuller would also have been closing in on each other at the combined rate of 39.5 metres per second, subject to allowing for some deceleration of the Schaff vehicle, as testified to by Mr. Schaff. In rough terms, it would have taken Mr. Schaff and Mr. Fuller about 7.6 seconds to cover the 300 metres between them to the point of collision ($300 \text{ m.} \div 39.5 \text{ m/sec}$). Any significant deceleration would only have increased that time.

ANALYSIS

Issue #1 *Has Mr. Schaff discharged his evidentiary burden by explaining that the accident was caused by the snow cloud thrown up by the snowplow, and is that explanation equally consistent with the absence of negligence on Mr. Schaff's part, as with his negligence?*

[8] There is no question that Mr. Schaff owed Mr. Fuller a duty of care in these circumstances. In *Doucet v. Parente*, [1988] B.C.J. No. 675, Gow J., at p. 3, addressed the duty of care in a motor vehicle collision context:

"The driver of a motor car on the highway is under a duty so to conduct himself as not, by his fault in the management of himself

or his car, to expose other users of the highway to unnecessary risk of harm.”

[9] Mr. Schaff also had a statutory duty of care not to cross over the centre line of the highway, pursuant to s. 144(1) of the *Motor Vehicles Act*, R.S.Y. 2002, c. 153.

[10] In *Gauthier & Co. v. The King*, [1945] 2 D.L.R. 49 (S.C.C.), Kellock J., said, at p. 53:

“The driver of a vehicle meeting another vehicle upon a highway is entitled to rely on the performance by the approaching vehicle of the duty cast upon by the statute referred to, and is in its turn bound by a similar duty. A breach of this duty occasioning damage will establish a *prima facie* case of negligence on the part of the driver [of the] offending vehicle casting upon the latter the onus of explanation.”

[11] The standard of care in this context was also addressed in *Doucet*, cited above, at p. 3:

“[The driver] is at fault, whether in emergencies or in ordinary circumstances, when he fails to exercise that reasonable care or reasonable skill or reasonable self-possession which the attendant circumstances require, cf. *Sinclair v. Nyehold* (1973) 29 DLR (3d) 614 per Tysoe, J.A. at p. 618. Thus a driver is presumptively at fault when, being unable to foresee the surface of the road that lies ahead, he proceeds at a speed which disables him from stopping in time should on that surface he come upon an object which blocks his path of travel ... [or] when, knowing that he must take steps to avoid a collision, and, having the opportunity to do so by timely effective braking, he delays effective braking until it is too late and fails to avoid the collision.”

[12] If Mr. Schaff produces an explanation for the collision equally consistent with negligence as with no negligence, then the burden of proving negligence remains with the plaintiff on the balance of probabilities. On the other hand, if his explanation fails in that regard, then the fact that he crossed the centre line is conclusive proof of his negligence. In the words of *Doucet* above, he would be “presumptively at fault”.

[13] A number of cases were referred to by counsel where a driver crossing over the centre line was found to be wholly at fault:

Denesik v. Kleyson Transport Ltd. (1996), 143 Sask. R. 48 (Q.B.);

Moore v. Zapalski, 2003 BCSC 494;

Beskowiney v. Stringer (1996), 143 Sask. R. 157 (Q.B.); and

Hopkins (Committee of) v. Wellington, 2000 BCSC 1072.

Denesik was the only case which involved a snowplow, but all of the above involved snow clouds.

[14] Mr. Schaff's counsel relied on *Hearn v. Rowland* 1988), 33 B.C.L.R. (2d) 67. In that case, the defendant observed a vehicle in the ditch ahead of him, applied his brakes in order to slow down, hit a patch of black ice, and lost control. He crossed the centre line of the road and collided with the plaintiffs' vehicle. The Court of Appeal agreed with the trial judge that the collision occurred without negligence on the part of the defendant, who had no reason to expect that he would encounter the black ice and go into a skid.

[15] Mr. Schaff's counsel similarly relied on *Sharma v. Smook* (1996), 191 A.R. 152 (Q.B), which was also a case where the defendant hit some unseen ice on the roadway, lost control of his vehicle, crossed the median and hit the plaintiff's vehicle. The court concluded that the ice on the road surface was unanticipated by the defendant and that his explanation of skidding on the unseen ice and thereafter being unable to regain control of his vehicle was reasonable.

[16] I agree with the plaintiff's counsel that both of these cases are distinguishable from the situation that Mr. Schaff found himself in. Mr. Schaff was fully aware that the

highway was largely snow-covered and snow-packed as he approached the accident scene. He had also experienced icy patches on the highway en route. More importantly, he had encountered two separate snow clouds before the accident, while passing oncoming semi-trailers. He was surprised by the fact that the snow clouds impaired his visibility to such an extent that, on the second occasion, he had to slow his vehicle almost to a stop. He was therefore familiar with what to expect in a snow cloud prior to encountering the snowplow.

[17] Based upon my findings of fact, I accept Mr. Schaff's evidence that he was already into the blind curve when he passed by the oncoming snowplow. I have calculated that the point of passing by each other would have been about 68 metres south of the north end of the curve.

[18] However, the more important question is whether Mr. Schaff had sufficient time and opportunity to take evasive action upon seeing and passing the snowplow. Clearly, the tenor of Mr. Schaff's evidence was that he had no time to react and no opportunity to stop because it was all too sudden. He said there was nothing he could do to avoid the collision because the Fuller vehicle was "right there". I cannot accept that characterization of the accident for the following reasons:

1. Mr. Schaff himself concedes that he saw the snow cloud created by the snowplow as the plow was coming towards him and that the cloud was in his lane. He said it was like the snow was being blown right at him. Further, based on my findings of fact, Mr. Schaff would have been able to see the snowplow for at least four seconds before passing it.

2. Not only did Mr. Schaff have some difficulty in estimating the time that he had to react to the oncoming snowplow, he also had difficulty in estimating how far the snowplow was away from him when he first saw it. At one point in his evidence, he said that when he first noticed the snowplow it was about 100 feet away from him. According to my findings of fact, the snowplow would have become visible to Mr. Schaff a full four seconds before they passed by each other. At that point, I calculated that Mr. Fraser would have been 146 metres south of the north end of the curve and Mr. Schaff would have been 158 metres north of Mr. Fraser (146 m. + 12 m.). That equates to a separation distance of approximately 172 yards or 516 feet, over five times the distance estimated by Mr. Schaff.⁵
3. Further, at his examination for discovery, Mr. Schaff was asked whether he felt his vehicle sliding. He said that he applied the brakes when he saw the headlights, but did not recall feeling his wheels locking or his vehicle sliding over the centre line. He repeated that he was trying to steer around the blind corner, which was veering to his left. He only slammed on the brakes within feet of seeing the oncoming headlights and then felt himself sliding for maybe a second just prior to the collision. This evidence is inconsistent with the statement Mr. Schaff gave to the authorities immediately after the accident on February 1, 2005, in which he said: "... when the plow passed it also made my camper sway so I applied the brake and went into a slide on the icy road and it pulled me

⁵ Because Mr. Schaff was north of the north end of the curve at this point, he would not have been subject to the 151 metre sight line.

into the other lane causing the accident...” (my emphasis). In my view, this is a significant inconsistency and one which seriously detracts from Mr. Schaff’s credibility.

[19] I acknowledge that there is evidence from Mr. Fraser, who was doing his northbound centre line pass with the snowplow upon encountering Mr. Schaff, that Mr. Schaff pulled over to the right slightly, which allowed Mr. Fraser to maintain his plow’s position on the centre line. Curiously however, there was no such evidence from Mr. Schaff himself. Rather, when Mr. Schaff was asked about his reaction upon seeing the snow cloud in front of him, he replied that he said to himself “Great, here we go”, and let his foot off the accelerator. As he got closer to the snow cloud, he said that he continued to steer around the blind curve to the left. In my view, that response was not reasonable and clearly created a risk that he might veer too far to the left, cross over the centre line and become a hazard to oncoming vehicles, which of course is exactly what happened.

[20] Further, Mr. Fraser’s evidence about his other observations at that point was less than satisfactory. Mr. Fraser testified that when he first noticed the Schaff vehicle, he was just coming out of the blind corner and the Schaff vehicle was about 200 - 300 “feet” away. Mr. Fraser said that he observed the Schaff vehicle move over toward the right hand side of the roadway, into the area of the unplowed snow. He said that in about “two seconds”, he and the Schaff vehicle passed by each other, although he acknowledged that was just a “rough guess”. Mr. Fraser then contradicted himself by saying that he passed by the Schaff vehicle about 200 - 300 feet north of the blind curve. I do not infer from this that he only “noticed” the Schaff vehicle when he “passed

by” it. Rather, that the former preceded the latter, in which case Mr. Fuller must be in error in his estimates of distance. At yet another point he said that he was 200 - 300 “yards” from the top of the curve when he first noticed the Schaff vehicle. He also said that he was “past the bluff” when he met the Schaff vehicle. Still further, his examination for discovery he acknowledged having told his employer that he was “about 200 feet north of the corner on the straight” when the Schaff vehicle passed by him. Not only is all this evidence internally inconsistent, it also conflicts with my findings of fact that Mr. Fraser would have been well south of the north end of the curve (about 146 metres) when he first became visible to Mr. Schaff and that the two of them passed by each other within the curve. In my view, these inconsistencies go to Mr. Fraser’s credibility, which I will expand upon later in these reasons.

[21] Mr. Fraser said that when he returned to the scene of the accident, in the course of doing his second southbound pass with the snowplow, he observed tire tracks about 18-24 inches into the loose snow about “200-300 feet north of the corner”, which I interpret to mean north of the north end of the curve. He said he saw where they went in to the loose snow and where they came back out onto the traveled portion of the highway. He said the tracks were in the loose snow for a total of about 75-100 feet. He assumed these were Mr. Schaff’s tracks, because no other trucks were there at that point. However, Mr. Fraser earlier testified that he noticed an ambulance going by in a southbound direction when he was finishing his north bound centre line pass near the Carcross corner intersection on the Alaska Highway. He further testified that when he arrived at the accident scene, he walked up to an RCMP vehicle to see if he could be of assistance. Therefore, there had been at least some traffic in the area of the accident

scene before Mr. Fraser's return and there is no way of knowing whether the tracks he observed at that time were caused by Mr. Schaff or some other vehicle.

[22] Therefore, I conclude that if Mr. Schaff pulled over to the right, as Mr. Fraser testified, he did so only briefly in order to allow the snowplow to continue its centre line pass, and then returned to his former position on the highway, steering to his left around the blind curve.

[23] I also question the reasonableness of Mr. Schaff's reactions after entering the snow cloud. I do so in light of his admission that, after he became engulfed in the snow cloud, he continued to steer around the curve to his left, notwithstanding that he had no reference points whatsoever nor any idea of the angle or length of the curve.

[24] Once again, the tenor of Mr. Schaff's evidence was that almost immediately after entering the snow cloud, he collided with the Fuller vehicle. However, this is internally inconsistent with his evidence that, as he was engulfed by the cloud, he felt his trailer sway and tapped his brakes gently. He then said that he saw the headlights emerging from the snow cloud and reacted to that by slamming on his brakes. I say that there is an inconsistency here, in part, because of the evidence of Kurt Ising, a professional engineer who was also qualified as an expert in accident reconstruction. He spoke about the "typical" 1.1 second perception response time referred to in the literature and explained that it was based on an experiment where drivers crested a hill in clear daytime conditions and reacted to a foam block on the highway. Mr. Ising said that experiment is to be contrasted with the conditions in this motor vehicle accident, where Mr. Fuller's headlights would have appeared to Mr. Schaff to be emerging gradually out of the snow cloud. Accordingly, there would not have been a clear time to start the

“reaction clock”. Mr. Ising also referred to Mr. Schaff’s evidence that, after passing the snowplow, he perceived his trailer to be swaying and initially reacted by tapping his brakes. Then, upon perceiving the approaching headlights in the snow cloud, Mr. Schaff further reacted by heavily applying his brakes. Mr. Ising opined that some time should be allowed in which to develop a perceptible trailer sway prior to beginning Mr. Schaff’s first reaction. In addition, his detection of the headlights may also been delayed by their gradual emergence from the snow cloud. Therefore, the minimum perception and response time of 1.1 seconds for each of the two reactions by Mr. Schaff is likely not accurate. Further, to those times must be added the length of time the Schaff vehicle was sliding after the brakes were heavily applied immediately before the collision (Mr. Schaff estimated about one second). Thus, Mr. Ising’s evidence suggests that something in excess of 3.2 seconds ($1.1 + 1.1 + 1.0$) elapsed between the time Mr. Schaff passed the oncoming snowplow and the collision.

[25] Mr. Schaff’s description of the timing of the collision is also inconsistent with my finding of fact that, after passing the snowplow, and assuming a constant rate of speed, about 7.6 seconds would have elapsed prior to the collision.

[26] I also find that Mr. Schaff’s actions in attempting to decelerate his vehicle were insufficient and untimely. He said that, upon noticing the plow, he let his foot of the gas, but did not tap his brakes until he was in the snow cloud, because he felt his trailer sway. Even then, he said that he only tapped his brakes “gently”. In my view, a prudent driver would have braked sooner and harder to achieve a slower speed prior to entering the snow cloud. More aggressive braking might also have reduced the collision impact and the resulting damages. Mr. Schaff’s evidence that he was worried about going into

a skid does not square with the amount of time and distance he had in which to respond safely, and is inconsistent with his earlier ability to slow down almost to a stop upon encountering the second of the two snow clouds caused by the oncoming semi-trailers. See also: *Gossen v. Fowler*, 2000 ABQB 994, at para. 84; and *Doucet*, cited above, at p. 4 of 8..

[27] I have concluded that Mr. Schaff had about 4 seconds to slow and stop even prior to passing by the snowplow. Further, I have found that he had an additional 7.6 seconds, approximately, between passing the plow and meeting Mr. Fuller. Therefore, Mr. Schaff had a total of about 11.6 seconds from the time he first had the ability to see the oncoming snowplow until the collision point.

[28] Mr. Tim Leggett is a professional engineer who was qualified to give expert opinion evidence in the areas of mechanical engineering (i.e. fluid dynamics, with snow in motion being viewed as a fluid), accident reconstruction, and winter road maintenance analysis. He also gave evidence with respect to the typical perception response time and stated that a driver at 70 kilometres per hour under snowy conditions would require approximately 6.5 seconds and 64 metres to come to a stop using maximum brake pedal effort on a snowy surface. Mr. Leggett did not give an opinion on the stopping time and distance for a driver at 72 kilometres per hour, such as Mr. Schaff, but I infer the time and distance required would only be marginally greater than at 70 kilometres per hour.

[29] All this evidence leads me to conclude that Mr. Schaff had adequate time to take evasive action and avoid the collision, by slowing down, pulling over to the right shoulder and stopping if necessary.

[30] Finally, the fact that Mr. Schaff continued to steer around the blind curve to his left, even after becoming engulfed and disoriented by the snow cloud, was not a reasonable reaction. As I stated above, in doing this he risked going too far to the left, crossing over the centre line, and becoming a hazard to oncoming traffic. He also had the alternative of slowing his vehicle and pulling over to the right hand shoulder, which for some unstated reason he did not do. Mr. Schaff's counsel suggested that the reason for not doing so was because the road dropped off sharply towards the Marsh Lake shoreline, but there was little or no evidence to support that suggestion. In any event, even if Mr. Schaff had pulled over too far to the right and gone off the roadway, at the very least, he would have avoided making himself a hazard to oncoming traffic.

[31] Therefore, in answer to the first issue, I am not satisfied that Mr. Schaff has discharged his evidentiary burden by explaining that he was disoriented by the snow cloud, because his actions before and after becoming engulfed in the cloud were negligent. Thus, the fact that he crossed the centre line of the highway is conclusive proof of his negligence.

Issue #2 a) Did the Government defendants owe a duty of care to Mr. Fuller and Mr. Schaff?

[32] The Government defendants owed a duty of care to Mr. Fuller and Mr. Schaff arising from the Government's duty to maintain highways in a reasonable state of repair, pursuant to ss. 18(1), (3) and (4) of the *Highways Act*, and the Government is liable for damages incurred by any person because of its default in that regard. This is a public and statutory duty of care and therefore the policy defence raised by counsel for the Government defendants in his closing submissions is inapplicable. My reasons for this conclusion are set out in my ruling cited as *Fuller v. Schaff, et al.*, 2009 YKSC 22.

Issue #2 b) What is the standard of care applicable to the Government defendants?

[33] The standard of care required of Mr. Fraser as a snowplow operator was to discharge his duty to perform highway maintenance work as a reasonable snowplow operator, taking reasonable care for the safety of others using the highway: See *Bradshaw v. Rankel*, [1999] B.C.J. No. 3026 (S.C.), at para. 39. The Yukon Government admits it is vicariously liable, as Mr. Fraser's employer, and is therefore subject to the same standard of care.

[34] As for what is "reasonable" in these circumstances, I have the evidence of Donald Hobbis and Stuart Purser, representing Mr. Fraser's employer, and the Snowplow Policy 6.10. In addition, I have the expert evidence of Mr. Tim Leggett on factors affecting snow cloud generation by snowplows, as well as that of Mr. Grant Aune on the standards applicable to professional drivers of heavy commercial vehicles. Finally, I can take some guidance from the relevant case law.

[35] Donald Hobbis gave evidence that he has 27 years of experience with the Department of Highways, starting as a labourer and then moving up through the ranks as a Heavy Equipment Operator, a Road Foreman, an Area Superintendent, and now Director of Transportation Maintenance. In that time he has had about eight years of experience with snowplows as an Operator and also as a Road Foreman. He said that the Department has a culture of on-the-job training, where the more senior operators teach the juniors how to operate on specific roads, in specific areas, and in specific conditions.

[36] Mr. Hobbis testified that the Yukon has a total of 22 Grader Stations and each one is responsible for the maintenance of about 200 kilometres of highway. In total, his Department maintains about 4,000 kilometres of highway in the winter months.

[37] Mr. Hobbis said that there are extreme differences in highway designs and road surfaces, resulting in differences in how snowplows are operated. In addition, wind direction, wind speed and the amount of snow can also have an impact on snowplow operation. When asked if there was a normal way to plow, he responded that “it changes as the environment changes.” He said that it was normal to start with a centre line pass, followed by a second or even a third pass on the shoulder, if time is available. He said that his Department has received no complaints regarding snow clouds created by his operators.

[38] When asked about the management’s decisions on what roads to plow and when, Mr. Hobbis said that it was “priority driven.” He was reminded that in the three or four days before the accident, it had been snowing fairly regularly. He said that this would have put a lot of pressure on his operators to get the main roads cleared, such as the Alaska Highway, so that some of the operators could then move on to secondary roads, and especially those used by school buses. He said that this would have put a great demand on the operators to try to get caught up and that the Department also had to deal with equipment breakdowns and limited personnel.

[39] Mr. Hobbis also gave some evidence about the total operation and maintenance budget for the Department of Highways and how that was spent in various areas, including snow removal.

[40] When asked specifically about Mr. Fraser, Mr. Hobbis said that his job performance had always been satisfactory and that there were no safety issues. He described Mr. Fraser as “very skilled” operator. He was not alarmed by the fact that, on the day of the accident, Mr. Fraser was plowing snow at the speed of 70 kilometres per hour, saying that this was “not unusual.”

[41] Mr. Hobbis was then asked about Snowplow Policy 6.10 and said that the 60-kilometre per hour speed limit therein is “treated as a guideline and not as a policy that has to be followed.” He explained that in the late 1990’s the Department had a number of incidents where members of the public collided into the rear ends of snowplows. Thus, the Department looked at what they could do to reduce snow clouds. At the same time they had experienced problems with plows digging into the road at high speeds. Consequently, the Department was looking for ways to try to manage plow speeds to reduce the damage and the risk to operators. He also referred to a problem with snow returning onto the road behind the plow trucks. He said “the thinking of the day” (around 1997) was that if plow speeds were reduced it would mitigate the problem. However, said Mr. Hobbis, the Department was unsuccessful in that regard. He said that the 50-kilometre per hour speed limit for light fluffy snow is “unachievable” and was designed for under-body plows, although I note that this term of the Policy does not make that distinction. Mr. Hobbis also said that there was no discussion of hazards to oncoming vehicles when the Policy was revised. Once again, I note that this is inconsistent with the term of the Policy respecting oncoming traffic when plowing on the centre line.

[42] When specifically asked about the centre line term in Snowplow Policy 6.10, Mr. Hobbis said that it was not intended to be applicable to wide roads with 100-kilometre per hour speed limits. I find this evidence troubling. First of all, that term of the Policy makes no such distinction, and secondly, it would only seem to be prudent safety practice to slow down and make sure there is enough room for oncoming traffic to pass a snowplow, when the left front corner of the plow is actually encroaching on the centre line, regardless of the speed limit or the width of the road.

[43] On cross-examination, Mr. Hobbis confirmed that he was involved in the 2004 revision to the Snowplow Policy 6.10, but was not involved in the drafting of the terms of the Policy relating to speed limits. He said that if the 60 kilometre per hour speed limit was adhered to, his Department would never get the roads cleared, because there is not enough equipment or budget to accommodate that requirement.

[44] Despite all the above evidence, Mr. Hobbis conceded that Snowplow Policy 6.10 is “still used to some degree as a guide” to check on operators who don’t operate their equipment properly.

[45] Mr. Hobbis acknowledged that light, dry snow would stay airborne in a snow cloud longer, but maintained that there was no direct relationship between the speed of the snowplow and the size of a snow cloud. I note that this contradicts Mr. Fraser’s evidence that the “simplest and easiest way to reduce snow clouds is to slow down.” It also conflicts with the evidence of Stuart Purser, Acting Safety Officer with the Department of Highways and Public Works, at his examination for discovery.⁶ In any event, Mr. Hobbis maintained that with light, dry snow, the size of the snow cloud would

⁶ Page 47, lines 1-4.

not vary to any “measurable degree” with a change in speed by the operator from 60 to 70 kilometres per hour.

[46] Mr. Hobbis’ evidence was contradicted in other respects by Mr. Purser’s evidence, which was introduced through read-ins of his examination for discovery. When examined by Mr. Fuller’s counsel, Mr. Purser conceded that “proper snowplowing” was to follow the Snowplow Policy 6.10.⁷ When examined by Mr. Schaff’s counsel, Mr. Purser said Snowplow Policy 6.10 “were the guidelines that we would go by” and that compliance with the Policy “is important to minimize risk to the public”.⁸

[47] Snowplow Policy 6.10 assists in determining the standard of care for the Government defendants, but it is not determinative: *Roy v. British Columbia (Attorney General)*, 2005 BCCA 88, at para. 36. In other words, although the Policy does not, in itself, constitute the standard of care, compliance with the Policy is an important factor to consider in determining whether the standard of care has been met. Thus, even if the Snowplow Policy 6.10 is considered as a “guideline” and not a “true policy” of the Department of Highways and Public Works, as urged by counsel for the Government defendants, it is nevertheless a very helpful instrument by which Mr. Fraser’s, and hence the Yukon Government’s, conduct can be measured.

[48] Mr. Tim Leggett gave expert opinion evidence on factors affecting snow cloud generation by snowplows. He said that in colder, dryer conditions, snow is typically less dense and therefore lighter. Accordingly, it is more affected by wind and air currents. He opined that the low relative humidity and cold conditions on the day of the accident would have resulted in snowfall which was dry and very light (in reference to the relative

⁷ Page 135, lines 3 – 9.

⁸ Page 10, lines 18 – 19; Page 20, lines 13 – 17.

weight of any given volume and not the quantity falling on the ground). He pointed to research on snow clouds formed by the wake of passing vehicles dramatically reducing the visibility for involved motorists. Wakes formed by larger vehicles, such as semi-trailers, have been noted to cause poor visibility for approximately 10 seconds. In addition, road structures can also negatively influence snow clouds. One experiment Mr. Leggett noted demonstrated reduced visibility for longer than 60 seconds in the wake of a large truck at a location along a riverbank with an adjacent five-metre snow fence.

[49] Mr. Leggett also corroborated the evidence of Mr. Fraser that wind blowing snow across the highway from west to east coming into contact with the rock bluff would typically cause “bounce back”, as the wind reverses direction and blows from east to west. Alternatively, it could cause the turbulent air containing snow to bounce upwards before displacing westwards. According to Mr. Leggett, combined with a plow-induced snow cloud, both phenomena would result in diminished visibility in the southbound lane. Thus, the rock face would be expected to cause the airborne snow to swirl and result in decreased visibility, for a longer duration, in comparison with other areas along the highway.

[50] With respect to the snow being removed on the day of the accident, Mr. Leggett acknowledged that it was impossible to estimate precisely the duration and intensity of the snow cloud, however he said that it was clear from the literature that a substantial visibility reduction of at least five seconds, and more likely tens of seconds, would have existed. I understood him to be referring to the area of the road bluff here.

[51] Mr. Leggett also reviewed Snowplow Policy 6.10 and opined that the drafters of the speeds limits in that policy likely did so because of an awareness that increased travel speeds result in decreased visibility during plowing operations, which is “well recognized by maintenance managers globally.”

[52] Mr. Leggett continued that it has been long recognized that snow clearing efforts can be hazardous to the traveling public. With front plows in particular, blowing snow in low humidity conditions can create visibility problems. To meet that concern, he said that “the standard practice for operators in most jurisdictions, amongst other things, is to slow down when approaching oncoming traffic [and] move to the right (to increasing passing margins)...”

[53] Mr. Leggett acknowledged that he could not give an opinion on the precise size or shape of the snow cloud in this instance. However, in more general terms, he talked about the area of negative air pressure directly behind the plow truck as it is being operated. He referred to this area as the “wake”. He opined that the drop in air pressure is proportional to the square of the plow’s speed. Thus, the pressure drop at 70 km/hr would be four times as great as that at 35 km/hr. Further, the light, dry, fluffy snow in the presence of this area of reduced air pressure would be sucked up from the under-side of the plow, aided by the motion of the tires, which would act as pumps. Mr. Leggett continued that the snow being removed from the roadway by the funnel shaped front plow would be thrown into the air along the right-hand side of the plow. He said that for any given plow, the faster it is operated, the faster the snow will be dispersed from the end of the plow blade and, as the exit speed of the snow from the plow increases, the

snow being removed from the roadway extends further into the wake created by the truck and gets caught up in the associated turbulence.

[54] Mr. Leggett opined that even a 10-kilometre reduction in speed would reduce the magnitude of the turbulent wake. For example, at 60 km/hr, the air pressure drop would be 73% of what it is at 70 km/hr. At 50 km/hr, he said that the drop would be 51% (almost half) of that at 70 km/hr. Since the turbulent flow is directly related to the air pressure drop in the wake of the plow, Mr. Leggett opined that any speed reduction would necessarily decrease the intensity and length of time the snow is suspended in the wake.

[55] Interestingly, Mr. Leggett referred to studies of snow cloud creation effects modelled at speeds around 56 km/hr, which the authors indicate to be “typical plowing speed”.

[56] Mr. Grant Aune also gave expert opinion evidence about the industrial standard care expected of professional drivers in the operation of heavy commercial vehicles. He was careful to distinguish that from the legal definition of standard of care. He noted that defensive driving is a key component of the driving skills of professional drivers. In particular, he noted that those who operate snow removal equipment often do so in very poor environmental conditions and therefore must exercise additional cautions with their own driving, and more importantly to be mindful of other vehicles around them. He said that plowing snow can create visibility issues for both the operator and other vehicles around the plowing operation. In general, Mr. Aune stated that professional drivers operating heavy vehicles must exercise a greater standard of care than typical non-commercial drivers because, in addition to their commonly larger vehicles, they are

continually experiencing a changing “work environment” and are often facing unexpected motor vehicle situations.

[57] Turning to the case law, *Bradshaw v. Rankel*, cited above, a decision of Beames J. of the British Columbia Supreme Court, is very similar on its facts to the case at bar. There, the plaintiff alleged the negligence of the snowplow operator caused him to lose visibility, which in turn led him to lose control of his vehicle and collide with another oncoming vehicle following the snowplow. The snowplow was travelling between 40 and 50 kilometres per hour, pushing light, dry snow off the highway. Some of that snow became airborne and a moderate cross wind blew the snow into the oncoming lane of traffic. As the plaintiff encountered the snow cloud, he attempted to slow his vehicle unsuccessfully and lost control. The court held that the plaintiff should have anticipated a momentary loss of visibility as he passed the oncoming plow and that the accident was the result of his loss of control of his vehicle and not the operation of the snowplow.

[58] The snowplow in *Bradshaw* sounds similar to the one in the case at bar. It was described, at para. 11, as a “large Class A highway truck”, with a front-mounted conical plow attached to the truck on an angle of 30 to 40 degrees. As here, the left-hand side of the plow blade was narrow and sealed closed by way of a steel plate welded onto it. The larger right-hand side of the blade was open and funnel shaped. Similar to the evidence of Mr. Leggett in this case, Beames J., at para. 13, referred to numerous factors which can affect the way in which the snow is thrown by the plow:

“... The faster the plow is operating, the faster and further the snow will be discharged from the open end of the plow. The wetter the snow is, the further it will be thrown, and conversely, the drier the snow is, the slower its trajectory. If there is a wind, there is an increased chance that the drier and lighter snow, which has more of a tendency to become

airborne, will be caught by the wind. The direction in which airborne snow will blow is dependent upon the direction and speed of the wind and the direction and speed of the plow. ...”

[59] At para. 46, Beames J. concluded:

“The evidence of the experts, and indeed, common sense, satisfy me that the only snow which could have obstructed the visibility of the plaintiff was light airborne snow, which was billowing around the snowplow and into the oncoming lane of traffic. I cannot find that the existence of this billowy cloud of snow is proof of negligence on the part of the snowplow operator. To the contrary, I find that such a cloud of snow is a common product of reasonable snowplowing operations. ...” (my emphasis)

The court determined that there was no unusual amount of snow propelled into the oncoming lane as result of the way in which the snowplow operator was operating the plow, which as I said, was at 40 to 50 kilometres per hour.

Issue #2 c): Was the standard of care breached by the Government defendants?

[60] As noted, at the time of the accident, Mr. Fraser had been a professional truck driver for just over 30 years and had worked for the Department of Highways from 1989 to 2007, driving snowplows every winter season over that time period. He had been with the Whitehorse Grader Station for about four years, with responsibility for the portion of the Alaska Highway that included the accident scene. Earlier in his career, he completed a grader and Caterpillar operation course at a technical college in Alberta, which lasted about three months. He then became a permanent Yukon Government employee and eventually moved on to operating snowplows. He said that he received no formal training in that regard, but rather that it was on the job training. He has had no accidents with snowplows, other than one occasion where he “ran over [his] own plow” due to an obstruction on the roadway, which he claimed was not his fault. He

said that he was aware of the 60-kilometre per hour policy, which I interpret to mean the Snowplow Policy 6.10. He also acknowledged that he was “bound” by such policies. When asked about the 60-kilometre per hour speed limit, he responded “This is what you’re supposed to follow, yes”. However, he also said that he normally plowed in the range of 55-70 kilometres per hour.

[61] Mr. Fraser testified that he had never been reprimanded by his employer, but also said that he never had a supervisor monitor his snowplowing activities.

[62] On the day of the accident, Mr. Fraser admitted doing “better than 60 kilometres per hour”, but said that he was guessing at his speed by the sound of the truck. He also admitted he had previously decided to do three passes in each lane of traffic, and therefore presumably was not constrained by time. It is noteworthy that on his first southbound pass, Mr. Fraser was plowing at an average speed of 57 kilometres per hour.

[63] When cross-examined by Mr. Schaff’s counsel, Mr. Fraser gave some puzzling answers. He disagreed with the suggestion that a professional driver has to bring more skill to their job than an ordinary driver. When it was suggested that it took more skill to drive a snowplow truck than a passenger car, he responded “a little more”. He acknowledged that “safety was always first with the Government.” When asked about making a choice between two alternatives, with the first being cutting back on his “production”, regarding the amount of snow removal from the highway, or putting other motorists at risk, he agreed that he would cut back on production. He acknowledged that the centre line pass with the front plow involves the greatest risk to oncoming traffic. Then, despite his earlier evidence of his awareness of Snowplow Policy 6.10, he said

that it wasn't in his mind on the day of the accident. He later contradicted himself by saying that on that day he was aware of the "centre line" provision in Snowplow Policy 6.10 directing operators to slow down when meeting oncoming traffic. As for the 50-kilometre per hour provision in Snowplow Policy 6.10 in "light fluffy snow" conditions, he responded "To tell the truth, I'd forgotten about it". He also said "You don't change speed no matter what snow you are plowing". He said that on the day of the accident, he had been plowing the way he had done for the past 17 years, and that there was nothing different about that day compared with any other day. In that context he made this comment "You get so used to doing it [i.e. the job], you don't really think about it".

[64] Mr. Fraser was aware of the upcoming rock bluff on the blind curve and described it as having "quite a flat face", which is consistent with the photographs of the accident scene. He was also aware that it was windy that morning and that "blow back" could happen in the area of the bluff. He also said that the wind could make a bigger snow cloud behind him, particularly if the snow is light and fluffy. He acknowledged that the slower he went, the less turbulence there would be and the less snow in the air would result. He also acknowledged that near a rock bluff, snow can be deflected up and blown back, such that the snow cloud can encroach into the oncoming lane of traffic. Then, and again surprisingly, he said that it was not particularly important to adjust his speed while going by a rock bluff. Perhaps the most candid evidence given by Mr. Fraser was an acknowledgement that the "simplest and easiest way to reduce snow clouds is to slow down."

[65] Mr. Fraser also gave somewhat conflicting evidence about his rationale for not slowing down upon approaching the blind curve. At one point, he testified that going into

the curve he was having a problem with some snow coming across his windshield and therefore he said "I kept my speed up". In particular, he said that because of the way the wind was blowing, snow was "blowing back across the windshield." At another point, he said that "if you pick up your speed", it helps with blow back across the windshield. On the other hand, while he acknowledged that he thought he was doing "better than 60 kilometres per hour", he was not looking at his speedometer, because he was gauging his speed by the sound of the truck. Indeed, he added that he had to "guess" his speed. Still later, he testified that "You don't change your speed no matter what snow you are plowing" and that he really was not thinking about his speed at all going into the corner.

[66] The objective Silent Witness data indicates that his speed was more or less consistently around 70 kilometres per hour throughout the period of time that he would have travelled through the blind curve. Therefore, he did not accelerate, as he suggested, in order to help with the blow back across his windshield. More importantly, if the snow was blowing back across his windshield as he was going around the blind curve, I infer that this is precisely because of the problem Mr. Fraser anticipated in that area, which was snow bouncing back off the rock face across the highway in a westerly direction. In other words, the problem with the snow across the windshield was a problem of his own making because of his failure to slow down prior to entering the curve. Thus, not only do I have concerns about his inconsistent evidence on the point, the explanation is simply not reasonable.

[67] In summary, Mr. Fraser was aware of Snowplow Policy 6. 10 prior to the date of the accident. I also infer, based on over 17 years of experience as a snowplow operator, that he was aware of the cold temperatures that morning and that the snow quality

would have been light and dry. He was also aware of an easterly wind blowing off Marsh Lake towards the near vertical face of the rock bluff on the blind curve. He described the snow cloud being created by the plow as “very dense and hard for anybody to see”, referring to anybody behind him or ahead of him. He was aware that the wind blowing the snow toward the rock bluff created “bounce back”. He was aware wind could create a larger snow cloud behind him. He understood that he was “bound” by Yukon Government policies and he was “supposed to follow” the 60 -kilometre per hour speed limit. He was aware that “the slower you go, the less turbulence and less snow there is in the air”. He was aware that the snow cloud he was creating could encroach onto the oncoming lane because of the bounce back effect. He was aware that the simplest and easiest way to reduce snow cloud was to slow down.

[68] Despite being aware of all of these factors, he maintained a speed of about 70 kilometres per hour going into the blind corner. He did not consider slowing down because he believed there was no traffic ahead of him or behind him. However, he had no way of knowing that. He could not see Mr. Fuller behind him because of the snow cloud and he could not see Mr. Schaff ahead of him because of the blind corner. Therefore, his rationale for failing to slow down was unreasonable. I conclude that he did not give the matter any thought at all. To use his words “You just get so used to doing [the job], you don’t really think about it.” That does not meet the standard of a reasonable snowplow operator, taking reasonable care for the safety of others using the highway.

[69] In addition, Mr. Fraser’s speed was significantly above that specified in Snowplow Policy 6.10. He was driving approximately 10 kilometres per hour above the

maximum specified speed for front plows and about 20 kilometres per hour above the maximum specified speed for the light, fluffy snow conditions which existed on the day of the accident. He also failed to slow down to any appreciable degree when meeting Mr. Schaff. In my view, Mr. Fraser's non-compliance with Snowplow Policy 6.10, even if it is only considered to be a guideline and not a true policy, is evidence supporting my conclusion that he breached the standard of care required of him.

Issue #2 d): Did the breach of the standard of care cause Mr. Fuller's personal injuries and Mr. Schaff's property damage?

[70] The basic test for deciding causation is the "but for" test, under which a plaintiff must show on a balance of probabilities that the injury or loss would not have occurred but for the defendant's negligent acts. The Supreme Court of Canada confirmed this in *Resurface Corp v. Hanke*, 2007 SCC 7:

"[21] First, the basic test for determining causation remains the "but for" test. This applies to multi-cause injuries. The plaintiff bears the burden of showing that "but for" the negligent act or omission of each defendant, the injury would not have occurred. Having done this, contributory negligence may be apportioned, as permitted by statute.

[22] This fundamental rule has never been displaced and remains the primary test for causation in negligence actions.

...

[23] The "but for" test recognizes that compensation for negligent conduct should only be made "where a substantial connection between the injury and defendant's conduct" is present. It ensures that a defendant will not be held liable for the plaintiff's injuries where they "may very well be due to factors unconnected to the defendant and not the fault of anyone": *Snell v. Farrell*, at p. 327, *per Sopinka J.*"

[71] In *Athey v. Leonati*, [1996] 3. S.C.R. 458, Major J. at para. 16, referred to Lord Salmon's caution in *Alphacell Ltd. v. Woodward*, [1972] 2 All E.R. 475, that causation is

“essentially a practical question of fact which can best be answered by ordinary common sense”.

[72] I acknowledge that snow clouds are a common product of reasonable snow plowing operations. I also acknowledge, as did the British Columbia Supreme Court in *Bradshaw v. Rankel*, cited above, that it is a commonplace experience for there to be a momentary loss of visibility when one passes an oncoming snowplow which is creating such a snow cloud.

[73] I previously recognized that Mr. Leggett could not provide an expert opinion on the precise size, shape, duration or intensity of the snow cloud created by Mr. Fraser. However, he was able to opine that it would have resulted in a substantial reduction of visibility for at least five seconds, or more likely tens of seconds. This is consistent with Mr. Schaff’s evidence that the snow cloud appeared to last “a lot longer” than the previous two clouds he experienced when passing the oncoming semi-trailers. In addition, I have Mr. Leggett’s evidence that the negative air pressure in the wake behind the snow plow increases (i.e. the air pressure drops) proportional to the square of the plow’s speed. Therefore, a doubling of the plow’s speed from 35 to 70 kilometres per hour would drop the air pressure behind the plow by four times.

[74] I have also concluded that, given the light, dry snow conditions, the fact that Mr. Fraser was plowing at a speed greater than 50 kilometres per hour is evidence that he was operating unreasonably. Rather, he was plowing at a speed of about 70 kilometres per hour. According to Mr. Leggett, whose evidence I have accepted, the difference between the negative air pressure behind the plow at 70 kilometres per hour in comparison with the negative air pressure at 50 kilometres per hour would be 51%. In

other words, there would be 51% less negative air pressure at the lower speed. From that I conclude that there would also have been proportionally less turbulent flow attributable to that negative air pressure, and a decrease in the intensity of the snow cloud and the length of time the snow was entrained in the plow's wake.

[75] At the end of the day, it is not so much the shape or size of the snow cloud which is at issue, but the extent to which it reduced visibility and for how long. There is no question that Mr. Schaff's visibility was reduced to virtually zero after entering the snow cloud. I am satisfied that if Mr. Fraser had been plowing at 50 kilometres per hour, as specified in Snowplow Policy 6.10, while there may nevertheless have been an accompanying snow cloud, the loss of visibility experienced by a reasonable oncoming motorist, slowing down, pulling over to the right, and stopping if necessary, would have been no more than momentary. Therefore, I hold that there is a substantial connection between Mr. Fuller's injuries and Mr. Schaff's property loss, and Mr. Fraser's negligent conduct in driving through the curve at 70 kilometres per hour. Even though Mr. Fraser's conduct was not the exclusive cause of these losses, the Government defendants are not excused from liability merely because another causal factor, that is Mr. Schaff's negligence, for which they are not responsible, also helped produce the harm: see *Cartner v. Burlington (City)*, [2008] O.J. No. 2986 (S.C.), at para. 19.

Issue #2 e): Is Mr. Schaff contributorily negligent for his property loss?

[76] It is apparent from my comments immediately above that Mr. Schaff was contributorily negligent for his property losses. I will address the extent of his contributory negligence in my consideration of the next issue below

Issue #3 a): If Mr. Schaff and the Government defendants are all liable for Mr. Fuller's damages, to what extent did each set of defendants contribute to Mr. Fuller's losses?

[77] Both Mr. Schaff and the Government defendants have pled their reliance upon the provisions of the *Contributory Negligence Act*, R.S.Y. 2002, c. 42. Section 2 of the *Act* is applicable here:

“Degree of fault

2. If damage or loss has been caused by the fault of two or more persons, a judge or a jury, as the case may be, shall determine the degree in which each was at fault, and if two or more persons are found at fault, they are jointly and severally liable to the person suffering damage or loss, but as between themselves, in the absence of any contract express or implied, they are liable to make contribution to and to indemnify each other in the degree to which they are respectively found to have been at fault.”

[78] I am also guided on this point by the authorities referred to above that found drivers crossing the centre line to be fully responsible for the damages in the resulting motor vehicle accidents. Of these, only *Bradshaw* involved an allegation of negligence against the snowplow operator.⁹

[79] I am as well influenced here by the fact that Mr. Schaff was predominately steering his vehicle to the left both before and after entering the snow cloud. As I stated above, that was without any knowledge of the angle or length of the curve. Of course, it is precisely for that reason that Mr. Schaff eventually crossed the centre line and collided with Mr. Fuller, well over to the right-hand side of northbound lane. For that reason, I conclude that Mr. Schaff must take the lion's share of the responsibility for this accident.

⁹ In *Denesik*, the plaintiff was following a snowplow which caused a whiteout seconds before the accident. Although it was originally alleged that the actions of the snowplow driver had contributed to the accident, by the time the matter went to trial that was not longer at issue.

[80] On the other hand, if Mr. Fraser had been operating the snowplow at a speed of 50 kilometres per hour, as prescribed by Snowplow Policy 6.10, while there may still have been a snow cloud, any loss of visibility by Mr. Schaff would only have been momentary.

[81] In the result, I find that Mr. Schaff is 80% responsible for Mr. Fuller's damage and the Government defendants are 20% responsible. Accordingly, in the counterclaim by Mr. Schaff against the Government defendants, I find Mr. Schaff to be 80% contributorily negligent.

Issue #3 b): Is Mr. Fuller himself contributorily negligent for his injuries?

[82] Mr. Leggett referred to the Yukon Government Driver's Basic Handbook, which states that "under ideal driving conditions [one] should maintain at least a three-second following distance." The webpage for the Yukon Government Highways and Public Works stresses a safe following distance at all times of four seconds behind other motorists. Mr. Leggett opined that neither of those following distances would be appropriate for a driver following a snowplow creating a snow cloud in circumstances where visibility is reduced for five or ten seconds. As I noted above, Mr. Leggett referred to the typical perception response time for most motorists of 1.1 seconds and stated that a driver at 70 kilometres per hour on a snowy surface, would require approximately 6.5 seconds and 64 metres to come to a stop using maximum brake pedal effort. Based on those calculations, it was Mr. Leggett's expert opinion that a safe following distance, that is enough distance to adequately allow for identification of and response to a hazard, in the circumstances of this case would have been at least four seconds, plus

five to ten seconds for the visibility reduction caused by the wake of the snowplow. That would result in total time of nine to 14 seconds, or 175 to 272 metres.

[83] According to my findings of fact, Mr. Fuller was at least 300 metres behind the snowplow immediately prior to the accident, which would have given him a following distance of at least 15.4 seconds. I conclude that this was a safe following distance. Further, his reactions upon noticing Mr. Schaff's headlights emerging from the snow cloud were to brake and pull over to the right as far as possible. Indeed, his vehicle came to rest well into the right-hand ditch on the inside of the blind curve, up against the rock bluff. He could not have done more to avoid the collision. I find there is nothing in the evidence to suggest that Mr. Fuller was in any way contributorily negligent.

Issue #3 c): What is the extent of Mr. Fuller's damages?

General Damages

[84] Mr. Fuller has enjoyed hunting and fishing since he was a child growing up in central British Columbia. Following his move to Atlin, he and his then wife (he is now divorced) lived in a cabin on a trapline for about two years. In addition to trapping, Mr. Fuller started guiding for a big game outfitter. Even after he began working for the Department of Highways, he continued to pursue his love of the bush by guiding and trapping. He has a number of big game trophies to his credit. He also fished in the Atlin area.

[85] His current business, Northwest Contracting Ltd., started as a proprietorship in 1996 and was incorporated in January 2008. Mr. Fuller initially did some part-time earth moving and gravel hauling while still employed with the Department of Highways. In 1990, he left the Department and pursued his private business interests full time.

[86] He was described by his son Shane, his current girlfriend, Linda Dandy, and his former co-worker and friend, Rick Cowan, as an extremely hard worker with a good business reputation in the Atlin area.

[87] In his spare time Mr. Fuller pursued his outdoor interests which included such things as sheep hunting, hunting wolves in the winter, skidooing, driving ATVs, and tenting in the bush.

[88] One particular incident described by Mr. Fuller is a good example of his rugged, determined, and stoic nature. He was skidooing around Atlin Island in 2003 when he came upon some rotten ice and fell through to his waist. The temperature was -28° centigrade. His skidoo was under water and he was afraid that his son, Shane, would come looking for him and also fall through the bad ice. Therefore, he decided to walk back to Atlin, which he did over a distance of about 17 miles. He managed to stop his son from heading out, but by then his feet were badly frozen. He medicated himself with a bottle of rum that night and did not travel to Whitehorse until the next day for medical care. Notwithstanding that his feet were badly frostbitten, he refused any suggestion of surgery or amputation. Fortunately, his feet fully healed and he had no problems after that, until the accident.

[89] Because of the severe nature of the collision, Mr. Fuller was pinned in the driver's seat for about three and one-half hours. The foot pedal of the emergency brake had penetrated his left thigh. Both his feet were crushed. Emergency personal had to use the "Jaws of Life" to remove him from the vehicle.

[90] Mr. Fuller sustained severe splinter fractures of his left and right heel bones. His left inner ankle bone was also fractured. His medical care was complicated by the

development of severe pain swelling in his calves. This was treated by incisions in both calves, approximately six to eight inches in length, left open to relieve the pressure. The left inner ankle fracture was repaired with two screws. The heel fractures were treated conservatively (i.e. without a cast) and healed, but with marked deformity.

[91] Mr. Fuller was hospitalized for 15 days. He was discharged in a wheelchair and was not allowed to weight-bear for several months. He built a make shift elevator to access the second floor of his log home outside of Atlin, where he continues to reside.

[92] The soft tissue injuries in both feet have left scaring and soft tissue fullness around the ankles, hind-foot and mid-foot, more pronounced on the left side. He now suffers from deformity and diminished mobility of his left toe. He also experiences weakness of the right and left calves and the left toe muscles.

[93] The heel bone fractures healed in malalignment. He underwent a second surgery to his left foot in 2006, and a third surgery in January 2007.

[94] Since the accident, Mr. Fuller has had on-going physio-therapy and massage treatment. As of June 2006, he was seeing a physiotherapist in Whitehorse once a week and another physiotherapist in Atlin twice weekly. He was then also receiving "Rolfing" massage treatment once or twice weekly. He regularly received acupuncture for about one year following the accident. He has been fitted with custom made orthotics and footwear.

[95] Dr. G.H. Hirsch, a specialist in rehabilitation medicine, examined Mr. Fuller on two occasions in 2006 and 2007, and provided two reports on his assessments. He described Mr. Fuller as having done "remarkably well" in his recovery, given the severity of his injuries. While he has persistent pain in his ankles, heels and feet, which is

aggravated by weight bearing activities, he chooses not to resort to pain killing medications. Dr. Hirsch noted that Mr. Fuller became more mobile by the end of the summer of 2005 and started increasing his activities, including attending job sites, where his son, Shane, was carrying out Mr. Fuller's business commitments. In June 2006, Mr. Fuller estimated his work productivity at 40% of his pre-accident level of function. At that time, Dr. Hirsch described his impairments as permanent. Those included: diminished standing and walking tolerance; an inability to walk at a fast pace or on uneven terrain; an inability to squat or crouch; difficulty with ascending stairs, hills or ladders; and an inability to run, jog or jump. Dr. Hirsch also suspected the onset of post-traumatic arthritis in the heel joints, which he said would progress with time and would probably result in a further decline in function. He also opined that within the next five to ten years there was a reasonable probability that the pain in Mr. Fuller's ankle and feet would intensify. Although Mr. Fuller eventually demonstrated the ability to return to his former occupation full-time, given the nature of his on-going disabilities, Dr. Hirsch felt that there was a reasonable probability that he would have to discontinue that line of work in due course.

[96] As of May 2007, Dr. Hirsch was of the opinion that Mr. Fuller had reached maximum medical recovery. He expected that his condition would remain stable for the next few years, but that there was a distinct probability that he would experience increased discomfort and pain in his feet due to progressive degenerative arthritis, which would further restrict his mobility. He said that Mr. Fuller's left hind-foot is fused and the range of motion of his left mid- and fore-foot as well as toes has been profoundly diminished. Those impairments are compounded by chronic pain. He

continues to experience muscle weakness in both calves. Dr. Hirsch stated that Mr. Fuller was no longer capable of performing many of the tasks in his occupation which he was doing without any difficulty prior to the accident. Furthermore, his working tolerance has been reduced and he is no longer able to work as many hours as he used to. Finally, Dr. Hirsch was of the view that Mr. Fuller's ability to go hunting, fishing, four-wheeling and snowmobiling would be permanently compromised as a result of this accident.

[97] Mr. Fuller still experiences pain in his ankles and feet, with the left side being more affected. The more he is on his feet, the more his ankles and hind-feet swell. His ankle and foot mobility is diminished. He also has pain in the ball of his left foot and as well as in his left toes. He walks with an abnormal gait pattern.

[98] Mr. Fuller himself describes the pain in his feet as "constantly" at a minimum level of three out of ten (from that I infer that the pain is often worse than that, but never goes below that level). Although he can sleep at night, he is never pain free. He says that he can comfortably walk no more than three or four blocks, but by then his feet get really sore. He cannot walk up hills because his feet do not bend. He said that he has had to drop on his hands and knees to crawl up hills, when necessary. He walks sideways on stairways. He says that mornings are the worst time of day for him. He is normally an early riser, getting up at about 5 a.m. He says that it takes him about 1 ½ to 2 hours massaging his feet to get to the point where he is able to walk. He says that he cannot operate heavy machinery for more than a couple of hours at a time and his feet swell up as a result. He acknowledged that he can do some mechanical and welding work, but he requires assistance with heavy lifting. Whereas he used to prefer running

his contracting business as a “one man show”, he has now been forced to hire employees as operators, and he acts in the position of supervisor and manager.

[99] Mr. Fuller has not gone hunting since the accident, although he admits that he might be able to hunt moose with the assistance of his son. Even then, he says that he would be reluctant to do so, because his son would end up doing most of the work. He also said that he would not feel very good sitting on an ATV while others pursued the game.

[100] He explained that the reason he does not take pain killers is because the pain “governs” how much he can do. That is, he uses the pain as feedback to stop what he is doing whenever he is pushing it, in order to avoid damaging his feet.

[101] The plaintiff’s counsel submits that general damages in this case should be in the range of \$225,000 to \$240,000. Mr. Schaff’s counsel suggested that they should be approximately \$120,000. Counsel for the Government defendants adopted the submissions on damages made by Mr. Schaff’s counsel.

[102] Counsel agreed that the upper limit for “catastrophic” claims is \$311,000, subject to any inflationary adjustment: *Aberdeen v. Langley (Township)*, 2007 BCSC 993, at para. 186. The British Columbia Court of Appeal has also made it clear that in cases of “severe personal injuries” there is no basis for making fine distinctions between different types of severe injuries: *Spehar (Guardian ad litem of) v. Beazley*, [2004] B.C.J. No. 1044, paras. 14 – 15.

[103] The plaintiff’s counsel suggested that the case of *MacLean v. Wallace*, [1999] O.J. No. 3220 (S.C.), is similar to that of the plaintiff. Mr. MacLean’s injuries resulted in him being described as “an incomplete paraplegic largely confined to a wheelchair”. He

suffered from declining energy and stamina and chronic pain, which necessitated the implantation of a morphine pump. He had a neurogenic bladder. He was noted to wake several times during the night and had lost his sexual function. He was able to return to his consulting business, but suffered a 50% reduction in earning capacity. While the court recognized that his disability was significant and permanent, and “one bordering on the devastating” it did not fall within the “catastrophic” cases referred to in *Aberdeen*, cited above. His general damages were assessed at \$200,000.

[104] The plaintiff’s counsel also relied on *Daniel-Cuffy v. Pereira*, [2005] O.T.C. 736 (S.C.). That case involved a 44-year old nurse who suffered permanent serious impairment of her right foot. Similar to the plaintiff, she had almost no side-to-side motion, which made it difficult to adjust to walking on uneven terrain. She also complained of heel pain and had developed post-traumatic arthritis. She walked with an unusual gait pattern. There was significant muscle wasting of her right calf. She was going to have a permanent limp. Her pain and disability had significantly disrupted her activities and quality of life. She was unable to return to her profession as a nurse. She was awarded general damages of \$150,000.

[105] Mr. Schaff’s counsel referred to the case of *Park v. Heimbeckner*, 2007 ABQB 386, to contrast the damages suffered by the plaintiff in that case with those of Mr. Fuller. Mr. Park was 29 years old when he was involved in a motor vehicle accident and was thrown some distance from the vehicle in which he was a passenger. His spine was fractured in at least eight places. He suffered a minor closed head injury, a broken right foot, and severe injuries to his left knee and left shoulder. When he landed on the roadway, a portion of his scalp was torn away, requiring four surgeries to perform a skin

graft. He also had multiple abrasions over his body resulting in scarring. He had episodes of depression and sexual dysfunction. It was expected that he would continue to endure daily pain for the rest of his life. His ability to continue his occupation as a roofing subcontractor was uncertain. Mr. Park was awarded general damages for \$160,000.

[106] *Park* cited the case of *Funk v Carter*, 2004 BCSC 866, where the plaintiff was involved in a motor vehicle accident and suffered serious injuries to his legs, neck, shoulders and back. He required three surgeries, was hospitalized and suffered from chronic pain and psychological issues. He was described as being active prior to the accident and becoming a changed person following, due to the continuing pain. He was awarded general damages of \$140,000.

[107] Mr. Schaff's counsel also referred to *Cole v. Smith*, 2002 BCSC 1235. That case involved a 53-year old plaintiff who worked as a secretary in her husband's insurance business at the time of her motor vehicle accident. She was described as having an active life and was a devoted mother. She suffered a compound fracture and dislocation of her left elbow, a fracture and dislocation of adjacent bones in her left arm, a splinter fracture of her left knee cap and several fractures in the bones of her right heel and foot. She required a bone graft from her hip to her fractured left arm. She underwent a total of five surgeries. At trial, her knee, elbow and right foot remained painful. She tried to walk up to two kilometres a day. It was difficult for her to walk on uneven ground or climb stairs and she limped if she was tired or walked too far. She used a cane occasionally and could not comfortably bend her left knee, nor could she carry weight more than ten pounds with her left arm or use it to reach up for things. The pain in her

joints, her shoulder and back, as well as her headaches increased with her activity level. While she wanted to be as active as possible, she was said to “pay a price” if she pushed herself too far. The plaintiff was awarded \$125,000 in general damages. At para. 47, the trial judge stated as follows:

“... Despite her stoicism and her considerable efforts to regain her health, I am satisfied that she is left with permanent pain and loss of mobility that impair her function in a number of respects, and that this will continue to significantly curtail or eliminate many of the activities she previously enjoyed. As well, she faces the possibility of future deterioration and further loss of function.”

These comments could also be said of Mr. Fuller.

[108] In *Wozenik v. Alexander*, 2008 ABQB 430, the 17-year old plaintiff was injured in a boating accident. Her right foot was nearly severed in two. She had a compound fracture of her heel bone, nerve damage and laceration of tendons and other muscle and soft tissue damage. Because she had irreversible damage to the heel bone, she required an ankle fusion to hold the fractures in place. The small bone in the lower leg and outside ankle bone were also fractured. The trial judge described her as a normal healthy active 17-year old prior to the accident, who suffered from a significant disability and permanent impact. She no longer walked normally. She could not walk or stand for long periods of time. She occasionally limped and could not run or participate in any sports. She could not walk on uneven surfaces without considerable difficulty. She could not wear high heels anymore and was bothered by the scarring on her foot. She could no longer participate in ski trips or hiking activities. She found stairs difficult and ladders impossible. She found it difficult to crouch on her toes. She continued to suffer from pain and had a higher risk of developing arthritis. Notwithstanding those impacts, the trial

judge described her as having made “a pretty good recovery under the circumstances”. He assessed general damages of \$120,000.

[109] *Easton v. Chrunka*, 2006 BCSC 1396, was also submitted by Mr. Schaff’s counsel for comparative purposes. There, the 47-year old plaintiff’s injuries included: a spine fracture; internal injuries to her kidney, spleen, lungs, and heart; 11 fractured ribs; a fractured left arm; soft tissue injuries; scarring; and several fractures of her left foot. She was 55 years old at the time of trial. The injuries to her spine and left arm required surgeries. She had some chest deformities on her right side as a result of the rib fractures. She had scarring on her chest and left arm. She had developed a “frozen” left shoulder and weakness in her left arm. She required a second surgery to her spine and extensive surgical repairs to resolve the injuries to her left foot. She was described as being considerably limited in what she could do in terms of standing and walking and was “extremely disadvantaged with respect to the workforce”. She was awarded \$160,000 in general damages. The trial judge stated:

“[20] There is no doubt that Ms. Easton's life has been radically altered by the collision and its consequences. I was impressed by Ms. Easton's fortitude in dealing with the many problems she has faced and her efforts to overcome her injuries and their impact upon her and her life.

[21] Ms. Easton is neither a complainer nor a malingerer and, in my opinion, tended to downplay rather than exaggerate the suffering that she has endured and continues to endure.”

Once again, the same could be said of Mr. Fuller.

[110] As many of the case authorities indicate, the purpose of general damages is to compensate an injured plaintiff for the pain, suffering, and loss of enjoyment of the

amenities of life which they have suffered and will likely continue to suffer. It is not a perfect science, because money can never replace what the plaintiff has lost.

[111] I acknowledge that Mr. Fuller's injuries have been devastating for him and have had a profound impact on his quality of life. Having said that, they do not approach the severity of the injuries suffered by the plaintiff in *MacLean v. Wallace*, as Mr. Fuller's counsel urged. In my view, the cases of *Daniel-Cuffy*, *Wozniak*, *Cole* and *Funk*, all cited above, are the most helpful and instructive. I must also keep in mind that Mr. Fuller is now 60 years of age and, as was noted in *MacLean*, his pain will be suffered over a fewer number of years than some of the younger plaintiffs in the cases I have reviewed, assuming normal life expectancy. On the other hand, that principle must be tempered with the acknowledgment by McEachern C.J. in *Bolster v. Wendel et al.*, unreported, No. B832706, May 2, 1985, that Mr. Fuller is being deprived of the enjoyment of some of his "golden years", as he looks forward to his retirement.

[112] Having considered all of the evidence as best I can, as well as the case authorities submitted, I conclude that Mr. Fuller will be suitably compensated for his pain, suffering and loss of enjoyment of life by an award of general damages of \$135,000.

Loss of Past Income

[113] Mr. Fuller's net business income in 2004 was \$39,535. That was the year he took on the "Canamera" mining company as his major client. Canamera later became "Prize Mining", for which Mr. Fuller's company remains the primary contractor. In 2005, Mr. Fuller's net income fell to \$25,993, and in 2006 it was \$27,816. In both of those years, Mr. Fuller's son, Shane, assisted him in meeting his business commitments. In 2007,

Mr. Fuller's income jumped remarkably to \$268,207. However, that was the result of Mr. Fuller having substantially expanded his business operations under his contract with Prize Mining. In that year, he hired about ten employees. In virtually all of his previous years as an independent contractor, Mr. Fuller worked by himself. Therefore, I am disregarding the income in 2007 as an anomaly for the purposes of calculating loss of past income. Rather, I simply looked to the reduction in income for each of 2005 and 2006, in comparison with Mr. Fuller's income in 2004 and award a total of \$25,000.

Loss of future income

[114] I begin here by acknowledging the comments of the Ontario Court of Appeal in *Graham v. Rourke* (1990), 75 O.R. (2d) 622, that a trial judge who is called upon to assess future pecuniary loss is, of necessity, engaged in a somewhat speculative exercise. The plaintiff in such a case need not prove the loss on a balance of probabilities. It is sufficient if the plaintiff establishes a "real and substantial risk" of future pecuniary loss. Messrs. Kenneth D. Cooper-Stephenson and Iwan B. Saunders, in *Personal Injury Damages in Canada*, (Toronto: Carswell, 1981) referred to the standard of proof here as "simple probability".

[115] I also acknowledge that the defendants in this case, with the exception of filing the report of Douglas Hildebrand, a professional economist, did not call evidence to rebut the plaintiff's evidence on loss of future earnings or costs of future care: see *Thornton (Next friend of) v. Prince George School District Number 57*, [1978] S.C.J. No. 7, [1978] 2 S.C.R. 267, at p. 9 of 13 (Q.L.).

[116] Mr. Fuller testified that, at one point prior to the motor vehicle accident, he had no particular intention of retiring. However, he acknowledged that he conveyed something

different to the economist he retained to give expert opinion evidence on the loss of his future earnings and his costs of future care, Mr. Kevin Turnbull. Specifically, Mr. Turnbull understood from the plaintiff that before the accident he intended to work full-time to age 65 and part-time to age 70. Apparently, Mr. Fuller also led Mr. Turnbull to believe that, since the accident, he had changed his mind and would now retire at age 60, around the time of his birthday on September 1, 2008. However, there was no evidence that Mr. Fuller did in fact retire at age 60. Rather, Mr. Fuller testified that his company was continuing as the key contractor for Prize Mining in Atlin, and that 2008 was a very good year income wise and his company was expected to generate income similar to what it did in 2007.

[117] In a similar vein, Mr. Fuller gave somewhat confusing evidence as to his intentions regarding his business. He stated that Prize Mining was expected to boost its production about five-fold in the near future and that, although Northwest Contracting Ltd “intended to be involved” in that expansion, Mr. Fuller himself “wanted out”. He said his feet cannot take it and he wants to enjoy the fruits of his labour in his golden years. On the other hand, he said that he would like his sons to take over his business, perhaps in a couple of years, while he guides them through it. I understood him to mean here that he wanted an opportunity to groom them in the management of the business until they commit to the takeover. On the other hand, if his sons are both uninterested in doing so, then Mr. Fuller said he intends to liquidate the company.

[118] Kevin Turnbull was qualified as an expert in the area of labour economics and accounting. He reviewed Mr. Fuller’s net business income over the years from 1997 to 2007, as follows:

1997	(\$8,027)
1998	\$16,682
1999	\$17,379
2000	\$21,073
2001	\$19,022
2002	\$3,625
2003	\$147
2004	\$39,535
2005	\$25,993
2006	\$27,816
2007	\$268,207

10

[119] It should be noted that Mr. Fuller conceded that, in addition to his declared income, he also had a significant amount of cash income which was undeclared over the period from 1997 to 2003. Although he was somewhat vague about the amount of these cash earnings, he did estimate that in 1999 they might have been in the \$15,000 to \$20,000 range, and that in 2003, he might have received about \$20,000 in cash income. I mention this because it was a point of interest raised by Mr. Turnbull, however, as he did not the benefit of Mr. Fuller's trial evidence, he relied exclusively on Mr. Fuller's tax return figures for his calculations. Nevertheless, he conceded that if Mr. Fuller had a significant amount of unreported or under-reported revenue, then the earnings loss figures in his report may be somewhat or greatly understated.

[120] Mr. Turnbull based his estimates of Mr. Fuller's likely future earnings, absent the accident, on the actual results he achieved from 2004 to 2007. However, he also acknowledged that, insofar as 2 of the 3 post-accident years (i.e. after February 1,

¹⁰ In 1997 and 1998, Mr. Fuller's main source of income was his salary from the Department of Highways.

2005) were negatively affected by the accident, he may again have underestimated what Mr. Fuller could have achieved in the absence of the accident. In particular, Mr. Turnbull assumed that Mr. Fuller's business had grown to a new level by 2004 and that it would have stayed at that level in the accident had not occurred. That seems a reasonable assumption, given Mr. Fuller's evidence that he took on the predecessor of Prize Mining as his major client in that year. However, because 2007 was such an extraordinarily high income year, Mr. Turnbull gave it only half weight, which he said is the equivalent of stating that a year like 2007 is only likely to be repeated once every eight years. Further, based on the assumption that Mr. Fuller planned to work to the age of 70 (albeit on a part-time basis in the last five years), his use of 2007 at half weight in the average income calculation implies an assumption that Mr. Fuller would likely have had one more big year before retirement. Mr. Turnbull's average of the 2004 to 2007 net incomes is \$56,862, with 2007 given half weight.

[121] Mr. Schaff's counsel tendered a rebuttal report on Mr. Fuller's projected loss of future earnings and costs of future care. This was prepared by Douglas Hildebrand, a professional economist. Mr. Fuller's counsel did not require Mr. Hildebrand to attend the trial for the purposes of cross-examination and Mr. Schaff's counsel did not call him as a witness. While I appreciate the desire of counsel to save trial costs in that regard, it created a disadvantage for the court, as there was no opportunity for Mr. Hildebrand to elaborate on the concepts and approaches he employed. As a result, I found it challenging to understand certain aspect of Mr. Hildebrand's report.

[122] In any event, Mr. Hildebrand reviewed Mr. Turnbull's report and criticised it for disregarding Mr. Fuller's income in the years 2000 to 2003. He also questioned Mr.

Turnbull's arbitrary assumption that the 2007 year had a one and eight year chance of being repeated. Mr. Hildebrand did not have the benefit of any information explaining why Mr. Fuller's earnings in 2007 were so much higher than in the previous years. Therefore, he was not able to offer any opinions with respect to the probability of achieving similar earnings in subsequent years.

[123] Mr. Hildebrand did his own alternative calculations under three scenarios A, B and C for the years 2000 through 2007. He set these out in the following table:

	Net Income	Weight		
		Scenario A	Scenario B	Scenario C
2000	\$21,072	0%	100%	100%
2001	\$19,023	0%	100%	100%
2002	\$3,626	0%	100%	100%
2003	\$147	0%	100%	100%
2004	\$39,535	100%	100%	100%
2005	\$25,994	100%	100%	100%
2006	\$27,817	100%	100%	100%
2007	\$268,205	50%	100%	50%
Total Earning		\$227,449	\$405,419	\$217,317
Years Considered		<u>4.0</u>	<u>8.0</u>	<u>8.0</u>
Projected Annual Earnings		\$56,862	\$50,677	\$33,915
Annual Chance of "Big Year"		1/8	1/8	1/16

[124] Mr. Hildebrand explained this table as follows:

- "Scenario A" replicates Mr. Turnbull's assumptions. Specifically, the low years (2000 to 2003) are dropped out of the analysis entirely, and the probability of achieving 2007 earnings (\$268,205) is set at one-in-eight.
- "Scenario B" includes all eight available years (2000 to 2007) and assigns an equal probability to each. Similar to

“Scenario A”, the probability of achieving 2007 earnings (\$268,205) is set at one-in-eight.

- “Scenario C” includes all eight available years (2000 to 2007) as well. Unlike “Scenario A” however, the probability of achieving 2007 earnings (\$268,205) is reduced to one-in-sixteen.”

[125] Mr. Turnbull was cross-examined on this table. He agreed that all of Mr.

Hildebrand’s scenarios were reasonable, and that determining which was the most appropriate would depend on the evidence. Mr. Turnbull also conceded that if Mr. Fuller had any significant residual earning capacity, this would reduce his estimate of loss of future earnings. Finally, on re-examination, Mr. Turnbull was asked to assume that Mr. Fuller’s earnings for 2008 would be the same as in 2007. In that event, Mr. Turnbull said that he would probably not have discounted the 2007 income by one half, because two good years in a row could be seen as evidence of the “start of a trend.” In that event, the average for the four years he used would go up.

[126] In my view, Mr. Hildebrand’s scenario B is the most appropriate. Taking the average of Mr. Fuller’s earnings over a period of eight years, as opposed to four, results in a more accurate average income. Further, given Mr. Fuller’s evidence that his 2008 income would likely be similar to that in 2007, and based upon Mr. Turnbull’s concession on the point, it would seem reasonable to give full weight (100%) to the 2007 income.

[127] Finally, Mr. Hildebrand continued to assess the annual chance of another “big year” as one in eight, which would seem to fit well with Mr. Fuller’s likely income in 2008, coupled with his evidence about his intentions to either groom his sons to take over the business over the next two years, or to liquidate the business if they are not

interested in doing so. Shane Fuller testified to the effect that he was not particularly enamoured by the prospect of taking over the Mr. Fuller's company in the long term. He doubted his own qualifications in that regard, noting that he does not have the same drive as his father to immerse himself in the business 24/7. He also said that he did not find it "easy to be the boss". There was no evidence about the possible interest of Mr. Fuller's other adult son, Clay, who was described as a successful business person in his own right, residing in Fort McMurray, Alberta. This evidence suggests that it is unlikely that Mr. Fuller's sons will take over his company as he would prefer. The alternative then is liquidation in the shorter term. Nevertheless, 2008 still looks to be another "big year".

[128] Mr. Turnbull also assumed a retirement age of 70 for Mr. Fuller, with a 50% reduction in earnings between age 65 and 70. That was apparently based on Mr. Fuller's own statement of intention, absent the accident, to Mr. Turnbull, either directly or through his counsel.

[129] Mr. Fuller also conveyed to Mr. Turnbull that, since the accident, he had decided to retire on his 60th birthday on September 1, 2008. At the time of the trial, Mr. Fuller was still working, but was talking in terms of retirement possibly as early as in 2009. From this evidence, from the medical evidence about the likelihood of the deterioration of the condition of his feet due to progressive arthritis, and from the absence of any evidence confirming an interest by either or both of his sons to take over Northwest Contracting Ltd, I infer that Mr. Fuller will likely retire around the end of 2009, at age 61.

[130] Given Mr. Fuller's strong work ethic, the degree of satisfaction that he obtains from his work, and his demonstrated ability, following the accident, to continue to run his

business in the capacity of a supervisor and manager, as opposed to an operator, I assess his future capacity to earn to income after his actual retirement, somewhat arbitrarily, at 25% to the age of 65. However, rather than using that to reduce the loss of future earnings, I will set it off against the probable underestimation by Mr. Turnbull of Mr. Fuller's actual income in years 2000 to 2003, by not accounting for his unreported cash income. That likely contributed to a lower than accurate average income for the eight-year period from 2000 – 2007. Accordingly, I will not discount Mr. Fuller's projected loss of future earnings by this degree of residual earning capacity.

[131] Both Mr. Turnbull and Mr. Hildebrand referred to “multipliers”, which economists use to determine what the value in current dollars will be in the future, coupled with an adjustment for the expected mortality rate. Neither economist criticized the multipliers used by the other for loss of future earnings, as they were substantially similar.

[132] Mr. Hildebrand referred to a Statistics Canada Labour Force Survey for 2000 to 2004 which reported that, amongst self-employed Canadian males, the average retirement age is 66.6 years, and for those self-employed in the construction industry, the average is 65.5 years. Further, at the time of Wade Scoffin's report on costs of future care, which I will come to next, Mr. Fuller had just turned 58. Mr. Scoffin opined that, had the accident not taken place, it would be reasonable to expect that Mr. Fuller would have continued to work as an equipment operator and solo contractor for the next ten years, and then retire. That would place Mr. Fuller's retirement age at 68. Based on this evidence, I accept as reasonable Mr. Hildebrand's forecast that, absent the accident, Mr. Fuller would be fully retired at age 67, which I interpret to be around the end of 2015. Further, I have also accepted Mr. Hildebrand's Scenario B, which resulted

in an average forecasted future income for Mr. Fuller of \$50,677 per year. Therefore, if Mr. Fuller actually retires by or about the end of 2009, at age 61 as I expect, that will result in five years (2010 – 2015) in which he would have earned an average income of \$50,677 per year, had the accident not occurred. However, the calculation is not that simple, as the multipliers must also be introduced into the equation.

[133] In his calculations, Mr. Hildebrand assumed, as did Mr. Turnbull, that any forecasted earnings after the age of 65 would be reduced by 50%. I also accept that as reasonable. The relevant portion of Mr. Hildebrand’s table of calculations, under Scenario B, which incorporates the use of appropriate multipliers, is set out as follows:

	Date of Assumed Retirement		
	Age 65	Age 66	Age 67
Scenario B			
Earnings to Age 65			
- Annual	\$50,677	\$50,677	\$50,677
- Present Value	\$228,604	\$228,604	\$228,604
Earnings from 65 Onward			
- Annual	\$25,339	\$25,339	\$25,339
- Present Value	-	\$20,702	\$40,568
Absent-Accident Income	\$228,604	\$249,306	\$269,172

[134] I note that Mr. Hildebrand’s calculations assumed Mr. Fuller would be retired by the time of trial, when in fact Mr. Fuller was still working at that point and was talking of continuing to work for some unspecified time. Therefore, one should theoretically account for the personal net income he actually earned in 2008 and perhaps 2009. However, it is uncertain what these actual earnings are expected to be. If I assume Mr. Fuller would have earned the average income forecasted under Scenario B (\$50,677),

that would seem to equate to the assumption made by Mr. Hildebrand in his table above, i.e. that Mr. Fuller was expected to earn \$50,677 in the years going forward from 2008 to 2013, (at which time the earnings would reduce by one-half). Thus, the result would be the same and the figure of \$269,172 remains supportable.

[135] Finally, on this issue, Mr. Hildebrand was critical of Mr. Turnbull's report because it did not account for the effects of under-employment, which he defined to include the consequences of unemployment and part-time work, which may reduce earnings below their full-time potential. Given Mr. Fuller's strong work ethic, his good business reputation in the Atlin area and his history of success in his field, I view Mr. Hildebrand's concerns about under-employment as unfounded.

Costs of future care

[136] Mr. Wade Scoffin, an occupational therapist, was qualified to give expert opinion evidence on Mr. Fuller's future care needs. Mr. Scoffin visited with Mr. Fuller at his residence in Atlin on September 15 and 16, 2006, spending between four and five hours in total with him. Earlier, in March 2005, Mr. Scoffin also had a one-hour interview with Mr. Fuller about his home safety and maintenance issues. He presented his evidence both through a written report and in person.

[137] Mr. Scoffin reported that Mr. Fuller lives alone in a two-story log dwelling on a country residential lot about five kilometres outside of Atlin, British Columbia. Atlin has a population of about 400 people and is 180 kilometres from Whitehorse, Yukon, which is the nearest city. The main floor of Mr. Fuller's home includes a garage, laundry room and entry room. The second floor has one bedroom, one bathroom and a large open concept living/kitchen/dining room.

[138] Mr. Scoffin also reviewed certain details of Mr. Fuller’s occupation and leisure activities and described how these have been impacted by his injuries.

[139] Mr. Scoffin addressed the probable future care needs for Mr. Fuller in the following areas: medical; shelter; mobility; education and training; and service needs.

[140] It is important to note that Dr. Hirsch, the rehabilitation medicine specialist also retained by Mr. Fuller, reviewed Mr. Scoffin’s report and concurred with most of the recommendations. One exception raised by Dr. Hirsch was that he did not think Mr. Fuller would require on-going regular physiotherapy treatments, but rather “periodic review” at times of acute symptomatic regression. Mr. Scoffin acknowledged that clarification, but opined that reasonable periodic review, in his view, would be once per month for physiotherapy and twice per month for massage treatments.

[141] Mr. Scoffin was cross-examined at some length by Mr. Schaff’s counsel and conceded some errors and amendments to his report. However, in my assessment, the bulk of his evidence was unchallenged. As I noted above, the only evidence tendered in rebuttal was Mr. Hildebrand’s report.

[142] The summary of Mr. Scoffin’s amended findings is set out below. It is based on an assumption that Mr. Fuller would retire in ten years time. At the time of the report, Mr. Fuller was 58 years old. I accept Mr. Scoffin’s estimates as reasonable.

Description of future care	Next ten years	Eleven years onwards
Medications		
Off the shelf and prescribed medication	\$20.00 per month	\$40.00 per month
Off the shelf medication	\$20.00 per month	\$40.00 per month
Therapy		
Therapy sessions – massage, acupuncture, physiotherapy	\$45.00/week x 3 for 06 \$45.00/biweekly x 3 for	N/A

	07	
Therapy sessions – Physiotherapy	\$45.00/month 2008 onwards	\$45.00/month 2008 onwards
Therapy sessions – massage	\$45.00/twice a month 2008 onwards	\$45.00/twice a month 2008 onwards
Therapy sessions – others	\$45.00/twice a year 2008 onwards	\$45.00/twice a year 2008 onwards
Durable equipment		
Customs Orthotics	\$500.00 every two years, plus travel to Vancouver for 8 days (\$2,000.00/trip)	\$500.00 every two years, plus travel to Vancouver for 8 days (\$2,000.00/trip)
Yearly work footwear adaptation	\$300.00/year	N/A
Day to day shoe upgrading	2 pairs @ \$50.00 each	2 pairs @ \$50.00 each
Mobility devices	\$1,000.00 one time cost	N/A
Manual Wheelchair	\$1,500.00 once	\$1,500.00 every five years
Supplies		
Off the shelf pharmacy supplies	\$20.00 per month	\$20.00 per month
Home Modifications		
Elevator	\$15,000 - \$25,000	N/A
Quad upgrade	\$1,000.00 every six years	\$1,000.00 every six years
Snowmachine upgrade	\$1,000.00 every six years	\$1,000.00 every six years
Work Modifications		
Consult an economist for a comprehensive evaluation	Unknown	Unknown
Extraordinary Transportation Costs		
Automatic transmission upgrade	\$1,000.00/ vehicle	\$1,000.00/ vehicle
Additional travel time	10 minutes break per each hour of driving	10 minutes break per each hour of driving
Home Services		
Home cleaning support		\$80.00 per month
Yard and home maintenance	\$600.00 - \$1,000.00/ year	\$600.00 - \$1,000.00/ year

[143] Mr. Scoffin's report was in turn reviewed by Kevin Turnbull for the purpose of forecasting these costs over Mr. Fuller's probable lifetime. Where Mr. Scoffin used a

range of costs for an item, Mr. Turnbull used the mid-point. He summarized his results in the following table:

Starting year	Frequency required	Items required	Annual cost	Multiplier factor	Total cost	GST & PST	Total Including Tax
(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)
Medications							
2008	For 10 years	Prescribed medications	\$240	7.952	\$1,908	Nil	\$1,908
2018	Annually	Prescribed medications	\$480	6.141	\$2,948	Nil	\$2,948
2008	For 10 years	Off the shelf Medications	\$240	7.952	\$1,908	\$95	\$2,004
2018	Annually	Off the shelf Medications	\$480	6.141	\$2,948	\$147	\$3,095
Therapy							
2008	Annually	Physiotherapy (once per month)	\$540	14.093	\$7,610	Nil	\$7,610
2008	Annually	Massage Therapy (twice per month)	\$1,080	14.093	\$15,220	Nil	\$15,220
2008	Annually	Other therapy sessions (twice per year)	\$90	14.093	\$1,268	Nil	\$1,268
Durable Equipment							
2008	Every 2 years	Custom orthotics (including travel)	\$2,500	7.206	\$18,241	Incl.	\$18,241
2008	Annually to age 70	Work footwear adaptation	\$300	7.952	\$2,385	Incl.	\$2,385
2008	Annually	Day to day shoe upgrading	\$100	14.093	\$1,409	Incl.	\$1,409
2008	Once	Mobility devices	\$1,000	1.000	\$1,000	Nil	\$1,000
2008	Once	Manual wheelchair	\$1,500	1.000	\$1,500	Nil	\$1,500
2018	Every 5 years	Manual wheelchair with additional features	\$2,000	1.477	\$2,954	Nil	\$2,954
Supplies							
2008	Annually	Off the shelf pharmacy supplies	\$240	14.093	\$3,382	\$406	\$3,788
Home Modifications							
2008	Once	Elevator	\$20,000	1.000	\$20,000	Nil	\$20,000
2008	Every 6 years	Quad upgrade	\$1,000	2.778	\$2,778	\$333	\$3,111
2008	Every 6 years	Snowmachine upgrade	\$1,000	2.778	\$2,778	\$333	\$3,111

Work ModificationsDiscussed in loss of income
analysis report**Mobility
needs**

2008	Every 7 years	Automatic transmission upgrade Additional travel time – costs not provided	\$1,000	2.457	\$2,457	\$295	\$2,752
------	------------------	---	---------	-------	---------	-------	---------

**Home
Services**

2008	Annually	Home cleaning support	\$960	14.093	\$13,529	\$676	\$14,206
2008	Annually	Yard and home maintenance	\$800	14.093	\$11,274	\$564	<u>\$11,838</u>

Total \$120,349

[144] Mr. Hildebrand reviewed Mr. Turnbull's report on costs of future care and agreed with the multipliers he used. His only obvious criticism was Mr. Turnbull's treatment of "home cleaning support" and "yard and home maintenance" as being incremental costs for life. Mr. Hildebrand opined that Mr. Turnbull did not allow for the possibility that Mr. Fuller might have lost some degree of his independence during his later years in any event. Therefore, to account for the possibility of increased dependence with age, Mr. Hildebrand would have truncated these expenses at around the age of 80. Such an adjustment would reduce Mr. Turnbull's present value estimates for those expenses by 12.8%. Mr. Turnbull conceded in cross-examination that he agreed in principle with this approach. A 12.8% reduction from the home services estimated by Mr. Turnbull would equate to \$3,334. Further, Mr. Turnbull assumed Mr. Fuller would require immediate "upgrades" for his quad ATV and pick-up truck (automatic transmissions) and his snowmachine (reverse gear) in 2008. However, Mr. Fuller testified that he already had these upgrades. Therefore, I conclude an additional \$3,000 should be deducted from Mr. Turnbull's total. Finally, I note Mr. Turnbull assumed Mr. Fuller would require "work

footwear” to age 70, at a cost of \$300 annually. As I have found Mr. Fuller will probably retire at age 61, I will subtract an additional \$2,700 (\$300 x 9 yrs). These deductions would reduce Mr. Turnbull’s total from \$120,349 to \$111,315, which I accept as reasonable.

Special Damages

[145] Mr. Fuller’s counsel placed in evidence a number of receipts for expenses related to his injuries not covered by his ICBC insurance policy. Those totalled \$7,507.34. The defendants have not challenged this claim and I accept it as reasonable.

Issue #3 d) Is ICBC entitled to make a subrogated claim against the defendants for the no-fault benefits it paid to Mr. Fuller?

[146] Mr. Fuller’s counsel seeks to recover from the defendants a total of \$56,211.66 in no-fault benefits paid to Mr. Fuller by his insurer, ICBC. Mr. Fuller’s counsel submitted that ICBC has a statutory right of subrogation for accidents occurring outside of British Columbia. Mr. Schaff’s counsel disagreed. The issue was addressed very perfunctorily by counsel in their closing submissions. It appeared to be an issue that is very familiar to them, but certainly not to me. I would have appreciated more attention to the question, as I fear that I may have misunderstood the arguments.

[147] Mr. Fuller’s counsel relied on s. 84(1) of the *Insurance (Vehicle) Act*, R.S.B.C. 1996, c. 231. That subsection states:

“Subrogation

84(1) On making a payment of benefits or insurance money or assuming liability for payment of benefits or insurance money, an insurer

(a) is subrogated to and is deemed to be the assignee of all rights of recovery against any other person liable in respect of the loss, damage, bodily injury or death of a person to whom, on whose behalf or in respect of

whom the payment of benefits or insurance money is made or to be made, and

(b) may bring action in the name of the insured or in its own name to enforce the rights referred to in paragraph (a).”

[148] Mr. Schaff’s counsel also referred me to ss. 83(1) and (2) of that Act.

“Liability reduced

83(1) In this section and in section 84, "benefits" means benefits

(a) within the definition of section 1.1, or

(b) that are similar to those within the definition of section 1.1, provided under vehicle insurance wherever issued and in effect,

but does not include a payment made pursuant to third party liability insurance coverage.

(2) A person who has a claim for damages and who receives or is entitled to receive benefits respecting the loss on which the claim is based, is deemed to have released the claim to the extent of the benefits.”

[149] Both counsel seemed to rely on the British Columbia Court of Appeal decision in *Matilda v. MacLeod*, 2000 BCCA 1, which considered the predecessor legislation (*Insurance (Motor Vehicle) Act*) and ss. 25(1), (2) and 26, which are similarly worded to ss. 83(1), (2) and 84 above. The Court of Appeal acknowledged that ICBC had a statutory right of subrogation under s. 26. However, with respect to the deemed release in the context of ss. 25(1) and (2), the court held that these subsections simply provide that accident (i.e. no-fault) benefits cannot be claimed in British Columbia tort actions, irrespective of where the policy paying the benefit was made. The Court said that the provisions did not purport to modify the terms of extra-provincial insurance policies, but merely limit the damages recoverable in tort, whether by the insured plaintiff or the

plaintiff's insurer under a subrogated claim, in British Columbia. I fail to see how this case assists Mr. Fuller or Mr. Schaff in this Yukon action.

[150] Mr. Schaff's counsel also directed me to ss. 163(1) and (2) of the Yukon *Insurance Act*, R.S.Y. 2002, c. 119, as amended by S.Y. 2003, c. 21, s. 16; S.Y. 2004, c. 13, and submitted that they are similar in effect to ss. 83(1) and (2) of the British Columbia *Insurance (Vehicle) Act*, insofar as they release a plaintiff's insurer, or the insurer of any other person who may be liable to the plaintiff, to the extent of any no-fault benefits paid to that plaintiff by the insurer. However, the *Act* deals with insurance contracts made in the Yukon [s. 131(1)], therefore I do not see how it has any bearing on Mr. Fuller's contract with ICBC in British Columbia. Nor have I discovered any provisions in the *Insurance Act* which would prohibit ICBC from making its subrogated claim in the Yukon.

[151] Finally, Mr. Schaff's counsel made a rather vague submission about there being "reciprocity amongst insurance companies" in these situations. Not only did I not understand that submission, there is no evidence to support it.

[152] The apparent purpose of the deemed release in s. 83(2) of the British Columbia *Insurance (Vehicle) Act* is to ensure that, in tort actions in British Columbia, ICBC and not the defendants pays for these benefits, and that the plaintiff should not recover double: *Kibsey v. Wielki*, 2008 BCSC 880, at para. 7. However, once again, I fail to see how that provision has any bearing on the question of ICBC's asserted *extra-provincial* right of subrogation.

[153] Fortunately, Veale J. dealt with this issue in *Minet v. Kossler*, 2007 YKSC 30. In that case, the plaintiff was injured by the defendant's assault and battery, which

occurred in the Yukon. Although the plaintiff resided in the Yukon at the time of the assault, she was a beneficiary under the Alberta health care system and was not covered under the Yukon health care system. Health care services were provided by both the Alberta health authorities and the Yukon health authorities. Alberta then made a claim in the Yukon tort action (in excess of \$40,000) for the health services it had provided. Veale J. noted that, pursuant to s. 62(1) of the Alberta *Hospital Act*, R.S.A. 2000, c. H-12, the province had the right to recover the costs of health services provided as a result of a wrongful act. He also relied on *Cowley v. Brown Estate*, [1997] A.J. No. 442 (C.A.), which permitted a Saskatchewan health claim to be recovered in Alberta. The Saskatchewan resident had claimed the costs of health services incurred by the Saskatchewan health authority for an accident that occurred in Alberta, and for which an Alberta resident was fully liable. The Alberta and Saskatchewan legislation both provided a right of subrogation to the province for health care services rendered to an injured person. The trial judge denied the claim on the ground that the law of Saskatchewan could have no application in Alberta. However, the Alberta Court of Appeal reversed on the basis that it was not a conflict of laws issue, but one of subrogation and permitted the Saskatchewan resident to enforce the right of subrogation under Saskatchewan law. Foisy J.A. at para. 26, stated:

“... In the instant case, the application of Saskatchewan law is not invoked to deny Alberta residents their cause of action, but to entitle the Province of Saskatchewan to pursue its right of subrogation and to recover from the tortfeasor expenses incurred directly as a result of the tortfeasor's negligence. No law in Alberta protects the tortfeasor from payment of all damages which arise from the accident caused by his negligence. The application of Saskatchewan legislation in this case does not compromise any rights of an Alberta resident.” (my emphasis)

Veale J. chose to follow this reasoning, stating at para. 85:

“It would not be good public policy to deny a legitimate Alberta Health claim, which includes the payment of health care services rendered in the Yukon by Yukon Health, on the basis that Alberta law does not apply. This is not a case of conflict of law but one of recognizing a valid statutory right of subrogation between the province of Alberta and Ms. Minet.”

[154] I note that *Minet v. Kossler* was appealed to the Yukon Court of Appeal, which acknowledged Veale J.’s award to the Alberta Government under its subrogated claim but made no further comment on the point, as it was not one of the issues on appeal: 2008 YKCA 12, at para. 12.

[155] I choose to follow Veale J.’s reasoning in *Minet*, and, accordingly, I allow ICBC its subrogated claim, which has implicitly been made in Mr. Fuller’s name, in the amount of \$56,211.66.

CONCLUSION

[156] In summary, Mr. Fuller is entitled to judgment against the defendants in the following amounts:

- a) General damages - \$135,000;
- b) Past Income Loss - \$25,000;
- c) Loss of future earnings - \$269,172;
- d) Cost of future care - \$111,315;
- e) Special damages - \$7,507.34, and
- f) ICBC subrogated claim - \$56,211.66

Total - **\$604,206.**

[157] In addition, Mr. Fuller is entitled to pre-judgment interest under s. 35 of the *Judicature Act*, R.S.Y. 2002, c. 128, calculated from the date the cause of action arose to the date of judgment.

[158] At the request of Mr. Fuller's counsel, I will remain seized of this matter in order to deal with the issue of costs. If the matter cannot be resolved by agreement, counsel may approach the trial coordinator for a hearing date within 45 days of the date of this judgment. In the alternative, counsel may wish to simply make written submissions. If so, I direct that a brief case management conference be held with me to discuss the filing of materials.

Gower J.