IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: ***Izony v. Weidlich,*** 2006 BCSC 1315

Date: 20060828
Docket: 16894
Registry: Prince George

Between:

Roy Raymond Izony

Plaintiff

And:

Michael John Weidlich (Deceased)

Defendant

Before: The Honourable Mr. Justice Masuhara

Reasons for Judgment

Counsel for the Plaintiff:	D. Byl R.S. Tindale
Counsel for the Defendant:	S.D. Dley Q.C.
Date and Place of Trial/Hearing:	February 20-24, 27-28, and March 1-2, 2006 Prince George, B.C.

Introduction:

[1] On April 3, 2002 at around 2:30 a.m., Mr. Izony started an 11-hour drive from Prince George to Tsay Keh Village to pick up his mother to take her shopping in Prince George. At about 3:00 a.m. on Highway 97 about 1 kilometre north of Sponaugle Road, a 1991 Ford Crown Victoria driven southbound by Mr. Weidlich crossed the centre line and collided head on with Mr. Izony's 2000 Dodge Ram pickup. Both vehicles were travelling at approximately 100 km/h. The speed change experienced by the Dodge was approximately 80 km/h. Mr. Weidlich was killed in the crash. Mr. Izony's vehicle rolled down an embankment and Mr. Izony was ejected from the vehicle in the process. Passers-by found him a few minutes later with his left leg trapped under the left rear wheel of the Dodge, which had come to a stop

upright. He was conscious. The passers-by called for emergency aid. The ambulance attendants arrived within a short time, attended to his injuries, noted that Mr. Izony was alert, rated him 14 out of 15 on the Glascow Coma Scale, and transported him to Prince George Regional Hospital. Mr. Izony has little recall of the accident, but was alert and oriented at the time of admission. After assessment, he was sedated, underwent surgery for his injuries, and was placed in the intensive care unit. He was gradually brought back to full consciousness some six weeks later. He was released from the hospital on July 12, 2002. However, he developed further complications. He now seeks damages for his injuries.

[2] The injuries he claims he suffered as a result of the accident are:

(a) L4 burst fracture;

(b) Grade 3B open proximal left tibia fracture associated with distal segmental fibula fracture;

(c) Posterior fracture dislocation of the right acetabulum;

(d) Fracture of the left distal radius;

(e) Fracture of the right radius;

(f) Comminuted mid-shaft fracture of the right humerus;

(g) Fracture of the sternum;

(h) Multiple rib fractures;

(i) Pulmonary contusion;

(j) Cardiac contusion;

(k) Abdominal wall laceration;

(l) Multi-system organ failure;

(m) Systemic MRSA (methicillin resistant staphylococcus aureus) infection resulting in infection of his left tibia;

(n) Hyperbilirubinemia;

(o) Hyperkalemia;

(p) Renal failure;

(q) Liver failure;

(r) Pneumonia;

(s) Traumatic brain injury;

(t) Hearing loss;

(u) Depression;

(v) Hernia at abdominal incision; and

(w) Sexual dysfunction.

[3] As a result of the injuries, Mr. Izony underwent numerous surgeries and was left with extensive scarring. The chronology of the medical management of his injuries is as follows:

[4] Upon arrival at Prince George Regional Hospital, Mr. Izony was assessed as having severe injuries related to the trauma from the collision. He was intubated, placed on a respirator and readied for surgery. He underwent debridement of the open fractures of his left tibia and patella; stabilization of the left tibial fracture with intramedullary nailing; open reduction and internal fixation of his left wrist and splinting of his right wrist; and stabilization of his right humerus via intramedullary nailing. On April 4, 2002, he underwent further surgery, including open reduction and internal fixation of his right

acetabulum together with a closed reduction and casting of his right wrist and further cleaning of the open wound on his left lower leg. He was extremely ill. On April 30, 2002 he had a tracheotomy, a jejunostomy to insert a feeding tube, and a liver biopsy.

[5] Following these surgeries, he developed multiple system organ failure, which included pneumonia, liver failure, and renal failure. The prognosis was extremely guarded as his chances of survival were very limited. Though he slowly improved, he developed multiple sites of infection, including his left lower leg, with a very resistant strain of bacteria called methicillin resistant staphylococcus aureus ("MRSA"). He underwent surgery on May 27, 2002 for further debridement and cleaning of the infected area of his left lower leg. This surgery involved the removal of infected bone and a fixation device previously installed. Antibiotic beads were inserted into the area. Amputation of the left leg above the knee if the infection persisted was discussed with Mr. Izony. On June 3, 2002, he underwent further surgery, which involved muscle flap coverage and skin grafting, to cover the soft tissue defect left by the debridement.

[6] He was discharged from the hospital in July 2002. He remained on intravenous antibiotics. However, his medical problems did not subside. In October 2002, he developed increasing pain in his right hip area and by December it was obvious there was infection at this site. On December 11, 2002, he underwent surgery to debride and remove plates and screws inserted during earlier surgery. The cause of this infection was again MRSA. The medical opinion was that this infection arose from Mr. Izony's original admission to Prince George Regional Hospital. He was placed on a course of antibiotics and remained in hospital until December 24, 2002. However, his pain became much more severe as the infection had re-emerged. It was determined that the infection was deeply seated within the hipbone. During surgery on February 21, 2003, it became evident that the infection involved the femoral head, and the femoral head was removed. Mr. Izony was discharged from hospital in March 2003. Mr. Izony's condition then seemed to improve. In late 2005, however, Mr. Izony developed another infection in his left leg and was placed on IV therapy which resolved the problem.

[7] The plaintiff argues his injuries are catastrophic. Although Mr. Izony has some leg mobility, he can only stand and walk with crutches for very short distances and is largely confined to a wheel chair. While it is possible that replacement could restore mobility, the medical opinion is that Mr. Izony is at very high risk for recurrence of infection, which could lead to further complications including removal of his right leg at the hip or even death. The same risk exists with respect to joint replacement at his left knee, which is stiff and shows degenerative changes that will likely develop into osteoarthritis. Drs. McKenzie and Boyle, both orthopaedic surgeons, agreed that MRSA could never be said to be completely resolved once bone is infected. He has lost 40 to 50% of range of motion in his left knee. He has also suffered a loss of range of motion in his left ankle. He has some weakness and some loss of mobility in his right shoulder. He has some loss of mobility and stiffness in his wrists. The loss of mobility in these areas is likely permanent. He is at increased risk to develop post-traumatic symptomatic degenerative changes in his wrists. The latest report of Dr. McKenzie notes evidence of early arthritis in the wrists.

[8] The plaintiff alleges that he suffers from significant chronic pain, has suffered from severe fractures, a head injury, and the effects of an MRSA infection.

[9] Mr. Izony claims for non-pecuniary damages, special damages, past wage loss, future wage loss, future care costs, and a substantial "in trust" claim on behalf of his wife, Sherry Izony, with respect to her lost wages and services provided by her.

[10] While the defendant disputes liability, the key focus of the trial related to the assessment of damages and the question of contributory negligence based upon the admission that the plaintiff was not wearing a seatbelt at the time of the accident.

Background:

[11] Mr. Izony was born in August 1946 in a small settlement on Lake Williston, near Fort Graham. The village now sits under Lake Williston due to the flooding caused by the Bennett dam. He is a

member of the Tsay Keh Dene Band. He is married to Sherry Izony who is now 39 years old. They married in 1999, although they had been in a relationship since Sherry was 24. They have two daughters aged 12 and 14 years. The family resides in Prince George. Mr. Izony also has three adult children from a previous marriage that ended in 1986.

[12] Mr. Izony testified that he was forced to attend a native residential school. His experience there was similar to many who attended such schools. He related that he was victimized and suffered physical and emotional abuse. He left the school at age 15 having attained a grade 6 education. He has filed a claim for compensation for the abuse and has participated in a settlement process. For several years after his return from the residential school, he lived an undisciplined life and abused drugs and alcohol. However, he recovered to the point of taking on a leadership role with his people and he was the elected chief of the Tsay Keh Dene Band from 1976 to 1986. He was instrumental in building a school and band office. However, his past caught up to him and in 1994, he pleaded guilty to sexual assaults he had committed in his late teens and early twenties. He was incarcerated and was released in 1996.

[13] From an early age Mr. Izony hunted, trapped, camped, and fished for both sustenance and recreation alongside his father and grandfather. He testified that he would often be in the bush. As one witness put it, "he was born and raised in the bush". He would also spend time with his children in the outdoors to share these experiences with them. The evidence shows that prior to the accident, Mr. Izony was a very active person who spent a good deal of time in the woods and mountains.

[14] Mr. Izony started a logging company called Naska Logging in 1989; it went bankrupt in 1993. Prior to this, he largely hunted, trapped, fished, and took on some seasonal work slashing wood on highway projects and as a firefighter for the Ministry of Forests. In 1996, he started up a silviculture enterprise called Gattah Contracting, a sole proprietorship. He operated this company for 5 years doing brushing and spacing for forestry companies on both reserve and non-reserve lands. This work was seasonal and usually operated from June to October, but it would occasionally go into November or December. A feature that distinguished Mr. Izony's operation from others in the area was that he was open to hiring women, the handicapped, and the elderly. He would provide meals, fuel, and other sundry items without charge.

[15] As the sole proprietor of Gattah, Mr. Izony was responsible for all aspects of the business. This included communicating with the forestry companies; reviewing bid documents; examining maps, particularly the topography; visiting and viewing the various tracts of land identified in bid documents; and costing the various activities in a bid such as wages, fuel, and food supplies. Upon being awarded a contract, Mr. Izony would attend to all of the logistical requirements to perform the contract. This would include: hiring personnel, up to 15 workers; training the workers; setting up work camps; procuring equipment, supplies, and food; preparing meals; scheduling work; assigning work zones; transporting workers; providing first aid, safety, and fire protection training; and paying wages. All of the witnesses who were involved in Mr. Izony's business described it as well organized and well managed.

Liability:

[16] As mentioned above, the defendant did not contest liability to any great degree. The evidence supports the plaintiff's version of the accident; that is, that the defendant's vehicle emerged from close behind a southbound semi-trailer and crossed the centre line into the oncoming lane in which Mr. Izony was travelling. The R.C.M.P. collision reconstructionist concluded that the impact took place in the centre portion of the northbound lane. There was no evidence to suggest otherwise. The evidence supports the view that the movement of the defendant into the path of the plaintiff was sudden and gave the plaintiff little or no time to react. On the evidence, I find that the defendant was entirely at fault for the collision.

Injuries:

[17] Mr. Izony testified that the most serious of his injuries are his physical ones. However, he says that the accident also negatively affected his mental capabilities. He complains that because of the accident, he has difficulty remembering, concentrating, planning, and organizing. He says that he is unable to multi-task, which was a requirement of running his silviculture business. He says he can no longer run his business because of both his mental and physical limitations. Further, he claims he has suffered depression and sexual dysfunction.

[18] The defendant does not dispute that the plaintiff sustained serious injuries. However, the defendant states that the traumatic brain injury falls in the category of "mild"; that the depression required no medical attention; and that any sexual difficulties arise from the pain of Mr. Izony's injuries rather than from actual dysfunction. Though Mr. Izony reported a loss of interest in sex, the defendant notes that he stated in his examination for discovery that his difficulties have not negatively affected his relationship with his wife. Finally, the defendant submits that though the plaintiff sustained serious injuries and remains confined to wheelchair, he is for the most part pain-free.

Cognitive problems

[19] The plaintiff complains of difficulties with attention, concentration, and memory. He says he can no longer multi-task.

[20] The plaintiff called Dr. Joy, a registered psychologist, who conducted a psychological assessment of Mr. Izony. He reviewed the available medical reports, rehabilitation reports, clinical records, hospital charts, photographs of the accident, and physiotherapy reports. He also administered various tests and found no psychological condition as defined by the DSM-IV-TR. He found no signs of significant anxiety or depression, nor evidence of a mood or pain disorder. However, he found "some problems with cognitive function" and deferred to neuropsychology. Dr. Van Rijn, a physiatrist consulted by the plaintiff, also deferred to neuropsychology.

[21] The plaintiff called Dr. Spellacy, a psychologist, who administered neuropsychological testing to assess the plaintiff's neuropsychological status and identify any changes in his mental abilities and/or emotional adjustment that may have been caused by the injuries sustained in the accident. Dr. Spellacy's testing shows evidence of impaired executive function, weak learning and memory, slowed information processing, and impaired attention greater than would be anticipated from the plaintiff's education, work history, and measured intelligence which was found to be average. Dr. Spellacy also found weakness in the plaintiff's visual memory and in his construction and perception of fragmented visual figures. Cultural and language effects were not found to explain the cognitive weaknesses. Dr. Spellacy opined that the cognitive impairment was the result of a traumatic brain injury. At trial, he referred to the injury as "mild". Given the time elapsed since the accident, Dr. Spellacy opined that it was unlikely that there would be further improvement in the plaintiff's mental abilities. In Dr. Spellacy's opinion, Mr. Izony's loss of cerebral reserve capacity makes him more vulnerable to deterioration of function in times of illness, fatigue, or stress. There will be a greater decline in his abilities as he ages than would otherwise have been the case.

[22] In addition to the medical evidence, lay witnesses testified to a marked change in Mr. Izony. They described Mr. Izony as being spontaneous, fun, engaging, outgoing, cheerful, and self-sufficient prior to the accident. Now, he is a person who gets flustered easily, requires things to be explained to him in small increments, has a poor memory, and is withdrawn. Mrs. Izony testified that Mr. Izony's decision-making has been impaired. For example, when the family van needed repairs, Mr. Izony purchased a van that was in even greater disrepair than the existing van instead of having the van repaired. In terms of deficient memory, she points to Mr. Izony's inability to recall key dates such as their wedding date or the children's birthdays. She testified that Mr. Izony is unable to grasp how to open e-mail messages despite repeated instructions on how to do so. She also testified that Mr. Izony is more moody and irritable since the accident. She has observed that he is less affectionate towards their children and seems to have become detached from those close to him.

[23] My own observations of the plaintiff, who attended each day of the trial, were of a man quite devoid of energy and life. It was also clear that Mr. Izony's memory had been affected. There were

several instances where his testimony at trial conflicted with his evidence from his examination for discovery. While his testimony at trial tended to enhance his position, the differences overall in my view were of a nature that supported a memory deficiency and his own current perceptions, as opposed to a credibility issue.

[24] I find on balance that Mr. Izony suffered a mild traumatic brain injury resulting in cognitive impairment because of the collision. This cognitive impairment, along with the physical impairments caused by the accident, limits his ability to manage and operate his silviculture business.

[25] Mr. Izony also claims damages for depression. I find that the accident caused the emotional changes noted by the lay witnesses, but the medical evidence does not support a finding of depression. Certainly, no medical treatment was recommended. Alternatively, to the extent Mr. Izony has suffered from depression, I find that it was not significant.

[26] Similarly, there is little evidence of sexual dysfunction. Mr. Izony told Dr. Joy that he was capable of having sex but that it was painful. Dr. Joy, a psychologist, did not find it sufficiently significant to recommend therapy in this area. Dr. Spellacy testified that Mr. Izony indicated that there was a reduction in sexual activity due to pain. Ms. Quastel, an occupational therapist, testified that Mr. Izony reported he did not have erectile problems but had difficulty assuming certain positions because of pain. Further, Mr. Izony stated in his examination for discovery that his condition did not pose problems for the marriage. Finally, there is no medical diagnosis of sexual dysfunction. While I find that sexual dysfunction is not established, I conclude that his injuries cause him pain that in turn causes some difficulty and decrease in sexual activity.

Physical Problems

[27] As mentioned earlier, Mr. Izony testified that his most serious limitations are physical ones, and the greatest is his inability to walk. This inability relates to the multiple surgeries that he underwent after the accident. Subsequent to these surgeries, he developed MRSA with multiple sites of infection. He had further surgeries in May and December 2002, and in February 2003. Dr. Purnell, his attending orthopaedic surgeon from the date of his initial admission, opined that the infection had likely been brewing since his initial admission and that it had initially been suppressed by the antibiotics he had been administered. During the final surgery, the head of the femur was removed, leaving his right hip joint unstable. As a result, he is unable to walk any significant distance.

[28] The remedy for this situation would normally be hip and knee replacement surgery. However, the medical opinion at trial was that both procedures, particularly the hip surgery, were very high risk because of the plaintiff's previous MRSA infections. Dr. McKenzie reports that "if [Mr. Izony] did undergo joint replacement surgery and ended up with an uncontrolled MRSA hip infection, then he would be at risk for needing a hip disarticulation to control that infection". This means Mr. Izony would undergo a leg amputation up to his hip. In direct evidence, Dr. McKenzie testified that the "worst case scenario" would be death.

[29] The plaintiff called Dr. Van Rijn, a physiatrist. He found Mr. Izony to have: (a) limitation of movement and strength around his right shoulder; (b) restriction of range of movement in both wrists; (c) pain and restricted movement in his right hip; (d) flexion deformity of his left knee and limited range of motion with tenderness behind the kneecap and along the knee margins. Dr. Van Rijn opined in his last report:

> The injuries sustained in these areas [wrists, right hip, left knee and ankle] will continue to affect him in the future and will result in further decreased ability to weight bear as he ages. As previously noted, he is at increased risk for developing more problems in the upper limbs, specifically around the wrists, perhaps further aggravation of his right shoulder, especially for weight bearing (as he might encounter with using forearm crutches), transfers and propelling his wheelchair.
>
> [. . .]

> I previously opined that it was unlikely that Mr. Izony would be competitively employable in the future and I still believe this will be the case. Dr. Wallace has concurred with this opinion in his report of May 2004. This alteration in his work capabilities is a consequence of his accident.

[30] Dr. Van Rijn also agreed with the recommendations of Lila Quastel who provided a report dated August 17, 2004, "with perhaps the exception of the need for cognitive therapy, as necessary, to 'restore' Mr. Izony to his previous level of home and community functioning".

[31] Dr. Van Rijn also stated:

> Mr. Izony is now close to 60 years of age and I anticipate that in the future his care needs will increase because of general diminished physical capabilities associated with the aging process. This has even more implications if Mr. Izony should become ill for some reason and/or suffer other musculoskeletal complaints that further restrict his function. In such instances his care needs could increase substantially and he would require more 'hands on' care and/or adaptive equipment to allow him to continue to function.

[32] Dr. McKenzie, an orthopaedic surgeon, opined:

> Ray has reached maximum medical improvement. . . . He remains severely disabled from his musculoskeletal problem. The only possibility for improvement that I could see would be if he had some relief of his shoulder discomfort with removal of his intramedullary nail.
>
> He is going to have permanent problems with significantly reduced mobility and a minimal ability to weight bear or mobilize without a wheelchair. This will have an obvious effect on his ability to work at any job that he is capable of doing or any recreation he might want to do unless it can be accomplished in his wheelchair.

[33] Dr. McKenzie expressly qualified his opinion as not opining on cognitive functioning and depression, etc. as it was not within his expertise.

[34] Both Mr. Izony and his wife described the difficulties that Mr. Izony has in terms of his mobility and his ability to care for himself. Mr. Izony tires quickly; he cannot stand on crutches much beyond five minutes; he can walk with crutches for only a few yards before tiring; and he can manually wheel himself in his wheelchair for only about one block before tiring. However, the evidence of both Mr. and Mrs. Izony indicates that Mr. Izony has a level of self-sufficiency that takes him beyond needing constant care. This evidence includes the fact that until Mr. Izony advised the Motor Vehicle Branch of his injuries, he had a valid driver's licence. He drove himself to his exercise classes at the YMCA twice a week, picked up the children after school, attended medical appointments, and visited friends in town as well as his wife's place of work.

[35] He is able to prepare simple meals for himself such as toast, sandwiches, and bacon and eggs. He is able to care for himself as he spends a good portion of his day alone while his wife goes to work at the local band office and their children attend school. He is able to dress himself, can shower and attend to his own grooming, though obviously taking greater time and with less ease. He was at one point able to walk for some distance with the aid of crutches to attend his educational classes. At the time, he was attending an exercise programme.

[36] Further, to his credit, Mr. Izony took courses in English 12, Math 12, and Science following the accident. He passed English 12 and was able to write essays for which he received high marks. He testified that he did not complete Math 12 and Science because he had difficulty accessing the class due to his physical limitations and not because of mental difficulties.

[37] Mr. Izony says that he has some hearing loss in his right ear resulting from the accident. Dr. Van Rijn found some bilateral decrease in hearing but could not establish any connection between the decrease and the accident. There was little evidence on this point. There is little mention of this in

the reports and nothing to suggest how the hearing deficiency could have arisen from the accident. On balance, I am not persuaded that the accident caused the hearing decrease that has been detected.

Non-Pecuniary Damages:

[38] The plaintiff argues that this is an upper limit case as defined in ***Andrews v. Grand & Toy Alberta Ltd.***, [1978] 2 S.C.R. 229. The parties agree the current level is $307,000. The plaintiff acknowledges that while he has the use of his legs (though limited), has bladder and bowel control, and is able to have sex, he has many of the problems of a paraplegic. He is largely confined to a wheelchair, has difficulties with memory, attention, executive function, and information processing, and suffers from fatigue. Mr. Byl for the plaintiff submitted several cases that he says support the proposition that plaintiffs suffering catastrophic injury short of paraplegia or quadriplegia can receive upper limit awards: ***Grewal v. Brar***, 2004 BCSC 1157; ***Coulter v. Ball*** (2005), 39 B.C.L.R. (4th) 182, 2005 BCCA 199, leave to appeal to S.C.C. refused, [2005] S.C.C.A. No. 289 (QL); ***Bob v. Bellerose*** (2003), 16 B.C.L.R. (4th) 56, 2003 BCCA 371, leave to appeal to S.C.C. refused, [2003] S.C.C.A. No. 408 (QL); ***Chattu v. Pankratz***, [1991] B.C.J. No. 481 (C.A.) (QL); and ***Sangha v. Dhaliwal***, [1998] B.C.J. No. 323 (S.C.) (QL).

[39] Mr. Dley for the defence argues that Mr. Izony is not as disabled as he claims. Mr. Dley argues that Mr. Izony has been convinced through his course of treatment that his condition is disabling and that the continual reinforcement of this notion has caused it to become a self-fulfilling prophecy. However, the defence tendered no evidence to support this argument. Rather, Mr. Dley relies upon a general answer that he obtained from Dr. Joy in cross-examination who agreed that if a person is consistently told that he is disabled, then that can become a self-perception. He argues that the plaintiff has been taken through a course of treatment that has been litigation-oriented. Though he does not allege Mr. Izony is being deliberately untruthful about his condition, Mr. Dley submits that because of the litigation-oriented approach taken, Mr. Izony's perception of his disabilities is exaggerated.

[40] Mr. Dley pointed to discrepancies between Mr. Izony's testimony about his abilities and other evidence. For example, at one point Mr. Izony testified he could not use the kitchen in his trailer, but the evidence indicated he was able to make simple meals for himself such as toast, eggs and bacon, and sandwiches. He testified that he weighed 300 pounds, which could not be established on the evidence. Further, it was not evident from my observations. He testified he did not think he could work, but on examination for discovery, he stated that he thought he could find work as a silviculture consultant. He testified he could not complete his educational course because of his inability to concentrate, but his discovery evidence indicated that he did not finish certain courses because of the difficulty he had in getting to the classes in the winter and the lack of wheelchair accessibility. He also reported that as a result of the lack of financial support, his children had to go to school without lunches. On this question, Mrs. Izony, who I assume prepares the lunches for the children, took exception to the comment that her children were sent to school without lunch.

[41] Mr. Dley also asks that I draw an adverse inference from the plaintiff's failure to call his primary caregivers, Dr. Purnell, Dr. Haley, Dr. Plouffe, and Rhonda Nelson, an occupational therapist.

[42] Further, the defence argued for a 5% reduction of the award for general damages because Mr. Izony did not take reasonable steps to rehabilitate himself. The defence argues that Mr. Izony's stated reason for stopping his exercise regime at the YMCA—that he was no longer provided a taxi allowance and was not interested in taking the cheaper HandyDART service—is not reasonable.

[43] The defence position is that the appropriate range of non-pecuniary damages is $175,000 to $200,000.

[44] In ***Lindal v. Lindal***, [1981] 2 S.C.R. 629, the Court expanded on the functional approach to the assessment of non-pecuniary damages set out in ***Andrews***. The Court emphasized that the fundamental damages principle of *restitutio in integrum* is of limited application in assessing non-pecuniary damages for personal injury, particularly when the injuries are devastating. Money cannot replace physical or cognitive deficits, or obliterate pain and suffering. I am mindful of the Court's

observation in ***Andrews*** at 261-62:

> There is no medium of exchange for happiness. There is no market for expectation of life. The monetary evaluation of non-pecuniary losses is a philosophical and policy exercise more than a legal or logical one. . . . Money is awarded because it will serve a useful function in making up for what has been lost in the only way possible, accepting that what has been lost is incapable of being replaced in any direct way.

[45] In ***Lindal***, the Court expressly confirmed that the upper limit derives primarily from policy considerations and does not bear a direct relationship to the nature or severity of the injuries, once they reach the "catastrophic" threshold. The upper limit thus applies equally to a plaintiff with a serious brain injury but little physical impairment, and to a plaintiff rendered quadriplegic with no cognitive impairment. The Court also emphasized that non-pecuniary damages are to be assessed on the understanding that any ascertained or ascertainable pecuniary loss will be compensated under the appropriate heads of pecuniary damages.

[46] It is obvious that Mr. Izony has suffered significant physical injuries from the accident; he is fortunate to have survived. He has lost a significant level of mobility and can no longer operate his business and enjoy many other activities such as hiking, fishing, and hunting. However, Mr. Izony is not completely helpless. As I have discussed above at ¶ 35, he is quite self-sufficient and has some mobility. Since the accident, he has been taken hunting by a friend; they shot a moose from the vehicle, which provided meat for his family for some time. The medical reports indicate that he does not experience a significant level of pain and is not regularly on any medication for it. It appears from the medical reports that he seems to feel pain with weather changes and when he is required to move more strenuously. The reports appear to describe a man who has a fairly high pain threshold. When medication is required, it is Tylenol #3. The medical evidence does not support a finding of depression, nor does it support the claim of hearing loss or sexual dysfunction.

[47] Mr. Izony has also suffered a mild traumatic brain injury from the accident and his cognitive abilities have been impaired. He has a clear appreciation of the loss he has suffered and will continue to suffer into the future. To his credit, he has undertaken some educational upgrading to obtain grade 12 equivalency and attended the classes on his own. He also started but did not complete a computer course. He continues to have an interest in researching the history of aboriginal peoples and in pursuing a unique theory he has developed that suggests that the native people of North America originated not via the Bering Strait but descended from the Inca people. He has also re-engaged his pre-accident hobbies of wood carving, making arrowheads, and sketching.

[48] I decline to take an adverse inference from the plaintiff's failure to call his primary caregivers. Plaintiff's counsel points out that there were numerous discussions with defence counsel regarding which witnesses would be called, with the result that the clinical records and reports of the primary caregivers were filed as exhibits by consent in this trial.

[49] I have also considered the conflicting evidence of Mr. Izony as pointed out by Mr. Dley.

[50] Based on these considerations, and keeping in mind that the purpose of non-pecuniary damages is to provide the injured party with reasonable solace for their misfortune, my assessment of damages under this head is $275,000. I do not make any deduction for Mr. Izony's alleged failure to rehabilitate himself. The defence led next to no evidence on this point, and I am not satisfied that Mr. Izony is unreasonably refusing to seek appropriate medical treatment or follow medical advice. Nor has the defence provided any evidence that any programme Mr. Izony could take would restore his physical or mental condition.

Past Care and Special Damages:

[51] The amount claimed under this head is $90,840. These costs were incurred primarily for renovations to make the plaintiff's trailer and rented house more wheelchair accessible. The past care costs also include the cost of medications, physiotherapy, and other medical and rehabilitation

expenses. The parties do not dispute entitlement to these costs nor the quantum. Accordingly, I award the amount claimed.

Past Wage Loss:

[52] As discussed earlier, the plaintiff was engaged in the silviculture business through Gattah Contracting prior to the accident. He has been unable to return to work since the accident. The plaintiff's business records for the five years prior to the accident indicate the following revenues for Gattah Contracting:

Year	Gross	Net
1997	$169,784	$44,932
1998	$173,143	$51,690
1999	$173,143	$49,431
2000	$102,981	$20,461
2001	$181,483	$36,618

In essence, the net figures represent Mr. Izony's income after deduction of business expenses such as wages to his workers, equipment leases, groceries, chain saw parts, gasoline, oil etc., from the gross business income. Mr. Izony did not pay himself a regular salary and agreed that what he earned was the balance left after all expenses were paid.

[53] Ms. Wondio, Mr. Izony's bookkeeper, prepared his income tax returns. She testified that as Mr. Izony is a status Indian residing or working on reserve lands, his income was tax-exempt.

[54] The position of the plaintiff is that Mr. Izony's income for 2002 would have been higher as there would have been even more work for him. Further, plaintiff's counsel argues that because Mrs. Izony would visit his camps from time to time to help with the cooking and picking up of groceries and hardware, at no cost to him, his income ought to be higher due to avoided costs related to her assistance. The plaintiff submits that a conservative estimate of past wage loss is $50,000 per annum.

[55] The position of the defence is that the past income should be calculated on past annual income of $30,000 based on the following factors:

- It is questionable that all income reported by Mr. Izony was exempt; it is clear that Ms. Wondio only assumed it was exempt and did not look very deeply into the nature of the income. The CCRA is currently reassessing Mr. Izony's past tax returns.
- Actual income as reflected by the year-end balance after payment of all business expenses is in the range of $30,000.
- The silviculture business had become much more competitive since the accident and profits would not be as healthy as in the past.
- Mr. Izony was not as profit-oriented as his competitors. He employed women, elders, and at least one significantly disabled person afflicted with fetal alcohol syndrome. These employees were not as productive as the younger, fitter men who worked at competing firms. Mr. Izony paid wages equivalent to his competitors, but did not charge his contracting partners for expenses such as gas, oil, hardware, and meals. In this regard, Mr. Izony was clearly the exception.

[56] Mr. Izony's average annual net income was $40,600 for the five years prior to the accident. I find the most relevant factor of those enumerated by the defence is that the silviculture business has become more competitive since the accident. This change had already begun to show in the two years immediately preceding the accident, when Mr. Izony's net income had begun to diminish. Mr. Izony agreed during cross-examination that competition in the industry had increased. It is clear that the

majority of Mr. Izony's earnings were not from operations within reserve lands and were therefore not tax-exempt. While I find that there would have been work on reserve lands for Mr. Izony, I did not find the evidence from the Band regarding his income related to band work persuasive. As for the benefits provided by Mrs. Izony's unpaid assistance, I do not see how these can be said to work in favour of imputing higher net income to Mr. Izony. If anything, Mr. Izony's net income would have been lower if he had employed someone to carry out the tasks performed at no cost by Mrs. Izony.

[57] Given the foregoing, I find that the appropriate annual level of past wage loss is $35,000 for a total of $140,000 over the four years since the accident.

Future Wage Loss:

[58] In ***Brown v. Golaiy*** (1985), 26 B.C.L.R. (3d) 353 (S.C.), a number of considerations for making an assessment as to the value of the lost or impaired asset of earning capacity are set out. They are whether:

1. the plaintiff has been rendered less capable overall from earning income from all types of employment;
2. the plaintiff is less marketable or attractive as an employee to potential employers;
3. the plaintiff has lost the ability to take advantage of all job opportunities which might otherwise have been open to him, had he not been injured; and
4. the plaintiff is less valuable to himself as a person capable of earning income in a competitive labour market.

Mr. Izony says that because of the mental and physical limitations caused by the accident he is not able to find employment.

[59] Dr. Wallace, a vocational rehabilitation specialist, opined that given the plaintiff's physical limitations he is precluded from returning to his pre-injury employment within the logging, sawmill, and silviculture industry. Given the totality of his physical limitations, neuropsychological concerns, work history, education, aptitudes, vocational interests, as well as his age, these multiple challenges provide a significant barrier to any return to work. Dr. Wallace concludes that it is unlikely Mr. Izony will be able to return to the competitive work force. Dr. Van Rijn opined that it was unlikely that Mr. Izony would be competitively employable given his cognitive problems as well as his limited physical abilities.

[60] Mr. Izony views himself as less capable of earning income in a competitive marketplace. Mr. Izony stated that he is now unable to do much, and this perception was supported by others who have observed him. It is obvious that Mr. Izony has been rendered less capable overall from earning income from all types of employment. I think it is also fair to say that, given Mr. Izony's age and his disabilities, he is less marketable or attractive as an employee to potential employers. He has also lost the ability to take advantage of all job opportunities that might otherwise have been open to him had he not been injured. Finally, it is clear that the plaintiff is less valuable to himself as a person capable of earning in a competitive market.

[61] The plaintiff submits that in the circumstances of this case, the natural assumption that retirement should occur at age 65 does not apply. Rather, given the excellent health of the plaintiff prior to the accident, his family circumstances, and the enjoyment he derived from his work, his retirement would have occurred later than age 65. It is likely that Mr. Izony would have worked past the usual retirement age to provide for his young family. His children are now 12 and 14 years of age; his wife Sherry is twenty years younger than he is, and his niece Sidney, who lives with the family, is 6 years old.

[62] Based upon all of these considerations, the plaintiff submits that his future wage loss is approximately $450,000, based upon an annual income range from $40,000 to $50,000 and retirement at 70 years. The plaintiff tendered economic evidence in support of this figure.

[63] The position of the defence is that future wage loss is $163,140. Further, the defence submits that while Mr. Izony is impaired, there is a real possibility that he will earn income from a job in the future. Mr. Dley submits that therefore this figure should be reduced by 20% to recognize this contingency, resulting in an award of $130,500.

[64] Mr. Dley points to Mr. Izony's evidence from his examination for discovery that he could work as a consultant in the silviculture industry. As well, Mr. Izony agrees that he has a unique knowledge of the written language of the Tsay Keh Dene people. He has conducted historical research about his people, and has developed a unique theory regarding their origins. Mr. Izony also agreed at his examination for discovery that he was confident he could find some employment. He has never approached the Band to enquire if they could employ someone with his skills.

[65] Mr. Dley submits that the plaintiff's family history does not support his claim that he would likely have worked past the age of 65. He notes that Mr. Izony's father, a forestry worker, retired at the age of 50 and is now 90 years old. He further notes that the medical reports refer to retirement at 65 years.

[66] I find that Mr. Izony has suffered a significant impairment of his future income earning capacity. He clearly does not have the capacity to carry on with his silviculture business. I am persuaded that there is a substantial likelihood he would have continued to work past the age of 65, possibly to the age of 70, in the silviculture industry. However, I find that his level of activity or involvement would likely have declined with age; and, as noted above, I find it likely that his earnings would have continued to fall as the industry has become increasingly competitive. Consequently, his earnings would likely have fallen as his age increased.

[67] I also find that the suggestion that Mr. Izony could find work with the Band is speculative, rather than a reasonable or likely contingency. If he were to teach about the history of his people he would be required to move back to Tsay Keh Village, which is remote, hard to access, and has only gravel or dirt roads. It is not wheelchair accessible for the most part and has very limited medical facilities. As to the suggestion that he could be a consultant for treaty negotiations, I find this remote as well. Chief Jonny Pierre acknowledged Mr. Izony's considerable knowledge of the history and culture of the Band, but did not see Mr. Izony as an active contributor to their treaty negotiations. Rather, he thought it possible that Mr. Izony might make some unspecified form of contribution once treaty negotiations advanced further. I find the possibility of him finding work as a consultant in the silviculture industry is also remote. The medical reports regarding Mr. Izony's capabilities, both mental and physical, do not support this.

[68] While actuarial tables and calculations can provide a helpful range of awards, an award under this head is an assessment of the lost asset, not a calculation of projected earnings with deductions for every possible contingency: see ***Rowe v. Bobell Express Ltd.*** (2005), 39 B.C.L.R. (4th) 185, 2005 BCCA 141.

[69] I assess damages under this category at $240,000.

Cost of Future Care:

[70] At the outset, I note that the cost of future care award is "by its nature notional and not a precise accounting exercise to determine the strict minimum" required by the plaintiff: ***Strachan (Guardian ad Litem of) v. Reynolds***, 2006 BCSC 362. In ***Courdin v. Meyers*** (2005), 37 B.C.L.R. (4th) 222, 2005 BCCA 91 at ¶ 34, our Court of Appeal endorsed the following approach to dealing with the many imponderable factors and contingencies in assessing damages in this category:

> Damages for cost of future care are a matter of prediction. No one knows the future. Yet the rule that damages must be assessed once and for all at the time of trial (subject to modification on appeal) requires courts to peer into the future and fix the damages for future care as best they can. In doing so, courts rely on the evidence as to what care is likely to be in the injured person's best interest. Then they calculate the present cost of providing that care and may make an adjustment for the contingency that the future may differ from what the evidence at trial indicates.

(***Krangle (Guardian ad litem of) v. Brisco***, [2002] 1 S.C.R. 205, 2002 SCC 9 at ¶ 21.)

[71] The plaintiff has provided separate lists of estimated one-time and annual costs that relate to his future care. The listing was compiled from the reports of Ms. Lila Quastel, a registered occupational therapist. Ms. Quastel also testified at trial. Plaintiff's counsel provided a revised list of annual costs based upon the evidence at trial as part of their final submissions. In these submissions, plaintiff's counsel indicated that they were not seeking costs related to a new residence. The annual costs sought by the plaintiff total $47,023 ($621,597 present value) and the one-time costs total $59,008. The defendant argues that the cost of future care that is fair and reasonable is $260,000.

[72] The plaintiff listed his initial and annual items and costs as follows:

Initial or One-Time Costs

Description	Amount
Van with Lift	10,000
Desensitization Therapy	1,160
Psychological Counselling for Family Members	6,960
Ride-on Lawn Mower	2,500
Driver Refresher Education	350
Travel Prince George/Vancouver	3,640
Motorized Wheelchair	13,500
Roho Cushion for Motorized Wheelchair	550
Wheelchair Backpack	152
Shower Wheelchair	3,500
Custom-made Shoes	400
Stationary Bicycle	750
Exercise Mat	96
Height Adjustable Parallel Bars	2,000
Universal Gym	3,000
All-Terrain Vehicle	10,000
Computer/Internet Access Lessons	450
Total Initial or One-Time Costs	**59,008**

Annual Costs

Description	Amount
Van Replacement	2,000
Medication	500
Physiotherapy	1,080
Massage	4,800
Case Manager – Year 1	2,640
Case Manager	1,200
Counselling	870
Homemaker	19,500
Heavy Cleaning	700
Home Maintenance	1,200
Vehicle Maintenance	500
Lifeline	456
Podiatry	456
Fitness Membership	360
Kinesiologist	720
Weight Control	750
Manual Wheelchair Maintenance	150
Manual Wheelchair Replacement	583

Manual Wheelchair Cushion Replacement	90
Motorized Wheelchair Battery Replacement	275
Motorized Wheelchair Maintenance	1,350
Motorized Wheelchair Cushion Replacement	110
Motorized Wheelchair Replacement	1,928
Backpack	50
Wheelchair Gloves	76
Shower Wheelchair Replacement	583
Custom-made Shoes	133
Elastic Shoelaces	19
Sigvarus Stockings	375
Bathmat	7
Memory Aids	100
Stationary Bike Replacement	75
Exercise Mat Replacement	19
ATV Maintenance	1,000
ATV Replacement	1,428
Hobby Supplies	300
Computer Replacement	400
Internet Access	240
Total Annual Costs	47,023
Multiplier	*13.219*
Total Future Care Costs (Annual Items)	621,597

[73] The defence does not take issue with the approach taken by the plaintiff, but argues that a number of the items are unreasonable and extravagant. The defendant cites ***Milina v. Bartsch*** (1985), 49 B.C.L.R. (2d) 33 (S.C.) for the proposition that future care costs must be objectively based on medical justification and reasonableness.

[74] I agree that future care costs must be justified as reasonable both in the sense of being medically required and in the sense of being expenses that the plaintiff will, on the evidence, be likely to incur (see generally ***Krangle***). I therefore do not think it appropriate to make provision for items or services that the plaintiff has not used in the past (see ***Courdin*** at ¶ 35), or for items or services that it is unlikely he will use in the future. The evidence at trial and the clinical records clearly indicated Mr. Izony has expressed resistance to using items or availing himself of services that were medically recommended.

[75] The defendant argues that medical justification of the future care costs as recommended by Ms. Quastel consists solely of a short comment of agreement in the report of Dr. Van Rijn. Mr. Dley submits this was a "shallow" endorsement insofar as there was little provided in the report to support it. He further notes that Ms. Quastel recommends items such as Sigvarus stockings, custom-made shoes, and elastic shoelaces that Mr. Izony has stated he would not use; that Mr. Izony has in the past resisted psychological counselling, except from one individual who is now his pastor; and that Mr. Izony already owns some of the items claimed, such as a backpack. Mr. Dley also submits that the evidence does not establish the need for counselling for Mrs. Izony and the children. In any event, the children have been receiving weekly counselling since January 2006.

[76] In my assessment, the following future care costs have not been adequately justified as reasonably necessary:

One-Time Costs

Psychological counselling for the family and Mr. Izony: These costs are not allowed. The evidence establishes that the children already receive weekly counselling at a church. There is no evidence that this counselling is not sufficient. Mr. Dley has cited authorities that suggest that compensation for the services required in the circumstances of this case is not available, and the plaintiff has not provided any contrary cases.

Mr. Izony adamantly resisted counselling in the past, but says he is open to it now. There is a serious doubt as to whether Mr. Izony will avail himself of counselling. To the extent that he is prepared to seek counselling, he testified that he preferred Mr. Jamieson, a counsellor who formerly provided services to the Band rehabilitation programme. Mr. Jamieson is now a pastor who ministers to those in prison. Mr. Izony reposes a high degree of respect and trust in Mr. Jamieson built on the strength of a past relationship, and agreed that there would be no cost for obtaining counselling from him. The records indicate that Mr. Jamieson is willing to meet with Mr. Izony.

Ride-on Lawn Mower: Mr. Izony has limited strength to carry out gardening activities. At the time of trial, the family was about to return to their trailer park home which has a much smaller lawn area than the home they have resided in. Justification for this item is that it would provide Mr. Izony with a sense of usefulness. I do not find the justification relative to the nature of this item reasonable.

Travel from Prince George to Vancouver: I have reduced this cost by 50% as it reflected costs of attending medical appointments in Vancouver for litigation purposes.

Motorized wheelchair: Mr. Izony has been provided with an electric scooter that provides a similar level of mobility. The justification for having both a scooter and a motorized wheelchair has not been made out. The medical evidence supports one or the other, not both. It follows that the Roho cushion for the motorized wheelchair will not be required. Instead, I have made an award later in these reasons for the possibility that Mr. Izony may need a motorized wheelchair in the future, as discussed in Ms. Quastel's initial report and reflected in the economic report.

Wheelchair Backpack: Mr. Izony testified that he has a backpack and that it is satisfactory.

Shower Wheelchair: Mr. Izony is returning to live in his trailer home that has been renovated to meet his needs. The tub has a hand-held shower attachment and bath seat. There is no evidence that he currently has a wheel-in shower or intends to renovate the bathroom to allow one. I note also that the request for the annual expense of homemaker assistance, which I have allowed in part below, was specifically intended to provide Mr. Izony with assistance getting into and out of the tub.

Custom-made Shoes: Mr. Izony testified that he was satisfied with the shoes that he already has. There is also evidence in the clinical records that Mr. Izony resisted having custom-made shoes. I am not satisfied this item is justified.

Parallel Bars and Universal Gym: Mr. Izony has limited strength to lift weights and any programme would entail only light weights; thus, a full universal gym and set of parallel bars would not be appropriate. I find that the evidence suggests that a membership in a fitness centre and the assistance of a kinesiologist (requested and permitted as an annual cost) would be more appropriate. I have allowed the claim for a stationary bicycle and exercise mat that will allow Mr. Izony to pursue an exercise programme, developed under the supervision of a professional, at home.

All-Terrain Vehicle: The evidence is that Mr. Izony is unable to ride this vehicle properly. His evidence was that he would have to ride it sidesaddle. This is clearly an unsafe manner of use. Given the known, risk that ATV's tip over, and the medical evidence that the protection of Mr. Izony from further injury (particularly to his upper limbs to preserve his remaining independence) is critical, an ATV is clearly unreasonable. The evidence of Ms. Quastel on this item was quite unsatisfactory.

All other one-time costs are allowed, with an additional amount for a one-time weight control clinic or programme (listed by the plaintiff in the annual costs). The total award for these items is $15,376.

Annual Costs

Medication: The evidence at trial was that a programme administered by the Band pays

medication and Mr. Izony has never been required to pay for medications. Ms. Quastel made no inquiries as to any costs incurred by the plaintiff and conceded at trial her cost was simply a "guess".

Massage: This treatment is medically recommended for pain relief, but Mr. Izony has not sought nor received any massage treatments. In addition, the amount claimed at trial was $4,800, while Ms. Quastel's reports indicated either no amount or $3,120 for massage therapy, which represents weekly massage treatments. I allow $720 for this item.

Case manager: The plaintiff appears to have erred by listing the first-year amount for this item as an annual expense in addition to the ongoing amount. I have allowed the ongoing amount as an annual expense. There was no justification provided for the first year expense.

Counselling: This item is not allowed for the reasons discussed above.

Homemaker: This service is to provide Mr. Izony standby assistance in areas such as getting into and out of the tub or shower; or to speed up the process of getting dressed if he has an appointment; or to help putting on his shoes. Mr. Izony to date has been left at home alone by Mrs. Izony while she goes to work. Mr. Izony is largely able to care for himself in the home. It is possible that in the future, he may need greater assistance at home, and I have made an award for this contingency later in these reasons; however, the three hours per day claimed is high given the degree of self-sufficiency he has now and I set the amount at $13,000 per year.

Podiatry: Mr. Izony has difficulties with foot and nail care and suffered from ingrown nails at one point. Mrs. Izony now provides this care for Mr. Izony. An "in-trust" award has been provided and I would expect that it would cover foot and nail care if that is considered something that is beyond what she would ordinarily do as a supportive spouse. Alternatively, an allowance for personal care assistance has also been recognized in this award and would be a logical way to deal with foot and nail care. I would expect that more serious foot problems would be covered by regular medical care, and find that an annual allowance for this expense is not justified.

Weight Control: I have permitted $750 for the initial year of treatment. Ms. Quastel's reports only included and costed this item over two years and accordingly it is not justified as an annual expense.

Shower Wheelchair Replacement: As I have disallowed the shower wheelchair as a one-time expense, it follows that the replacement cost is disallowed.

Motorized Wheelchair Maintenance & Replacement: I have replaced these costs with the annual maintenance costs for the electric scooter.

Custom-made Shoes: Mr. Izony is satisfied with the shoes he normally purchases.

Elastic Shoelaces: Mr. Izony indicated that he does not require this item.

Sigvarus Stockings: Mr. Izony indicated that he does not require this item.

ATV Maintenance and Replacement: The elimination of this cost follows the elimination of the ATV.

Hobby Supplies: This item is for the provision of materials for wood carving, sketching, painting and arrow-making, Mr. Izony's pre-accident hobbies. The clinical records indicate that funding was provided for Mr. Izony to buy a Dremel tool for making native arts and crafts. I make no award for these additional items as the award of non-pecuniary damages is sufficient to permit the plaintiff to pursue hobbies if he is so inclined.

Computer Replacement and Internet Access: I make no award for these items as there

is no evidence they are medically required. I note in this regard that while I view some specialized computer training as a reasonable one-time expense in view of Mr. Izony's cognitive impairment, the need for the equipment itself does not arise from the accident. I view computer equipment and internet access as a general family expense that would be acquired in any event. I note as well that the Band administers a programme for providing computers to its members without charge.

Tub & Shower Equipment: Ms. Quastel's reports itemized certain provisional costs that may arise in the future on the theory that if Mr. Izony did not have a wheelchair accessible home, he would need more bathroom safety equipment, as follows:

- $100 for a hand-held shower;
- $20/year as the replacement cost;
- $250 for an extended bath seat;
- $50/year as the replacement cost;
- $7/year for replacement for a second non-slip bathmat.

At trial, the Izony family was preparing to move back to their trailer home. The tub has a hand-held shower and bath seat. I have therefore allowed the annual replacement costs for these two items. While I find it difficult to believe that two bathmats per year would be required, defence counsel took no specific objection to this item and it is allowed as an annual cost as well.

[77] The plaintiff also seeks recognition in the assessment of future care costs a "worst case" scenario in which Sherry Izony is unavailable to help when Mr. Izony is older. Further, if he suffers a significant decrease in physical and/or cognitive functioning, he may need a full time attendant caregiver/homemaker in order to remain living independently (with assistance) in the community. The annual cost would be $91,250. The present value of this amount is $531,805. Alternatively, he may have to reside in a nursing home or intermediate care facility. The annual cost of a private nursing home is in the range of $43,200 to $62,000. The plaintiff argues that a probability factor of 50% be attached with the resultant cost being $265,000.

[78] The defence says that no contingent damages should be awarded, as the potential for greater debilitation requiring greater care for Mr. Izony is speculative.

[79] There is always, of course, the statistical possibility that any of these "worst case" scenarios could arise in the future. Given the length of their relationship and Mrs. Izony's ability to keep working and care for her husband since the accident, I do not see her future unavailability as a substantial possibility. On the other hand, I conclude that there is a substantial possibility beyond the level of mere speculation that in the future, Mr. Izony's various physical conditions may deteriorate. Mrs. Izony may be unable to care for him at home without assistance beyond that allowed for in the annual homemaker allowance of $13,000; or he may indeed have to reside in a care facility. I do not think the probability of either of these eventualities is as high as 50%. I think one must also consider that in such an unfortunate situation, certain annual costs that have been permitted may no longer be required and should be taken into account in the estimation process to avoid double recovery. Doing the best I can with the evidence and calculations provided, I allow an additional $150,000 for contingencies.

[80] Further, with respect to the motorized wheelchair costs, Ms. Quastel's initial report set out a need for this item at year 10. The initial and annual costs that I have extracted from the documentation at year 10 and thereafter leads me to find the present cost is $28,000. I have assessed the probability of needing this item at 75%, and have therefore allowed $21,000 for this contingency.

[81] Summary of award for future care costs:

Initial or One-Time Costs

Description	Allowed

Van with Lift	10,000
Desensitization Therapy	1,160
Driver Refresher Education	350
Travel Prince George/Vancouver	1,820
Stationary Bicycle	750
Exercise Mat	96
Computer/Internet Access Lessons	450
Add Weight Loss Clinic	750
Total Initial or One-Time Costs	**15,376**

Annual Costs

Description	Allowed
Van Replacement	2,000
Physiotherapy	1,080
Massage	720
Case Manager	1,200
Homemaker	13,000
Heavy Cleaning	700
Home Maintenance	1,200
Vehicle Maintenance	500
Lifeline	456
Fitness Membership	360
Kinesiologist (personal trainer)	720
Manual Wheelchair Maintenance	150
Manual Wheelchair Replacement	583
Manual Wheelchair Cushion Replacement	90
Backpack	50
Wheelchair Gloves	76
Bathmat	7
Memory Aids	100
Stationary Bike Replacement	75
Exercise Mat Replacement	19
Add Hand-held Shower Replacement	20
Add Extended Bath Seat Replacement	50
Add Second Bath Mat Replacement	7
Add Scooter Maintenance	95
Add Scooter Replacement	1,000
Sub-total	**24,258**
Multiplier (Ex. 8 Tab 2)	*13.219*
Total Annual Costs	**320,667**
Contingency: motorized wheelchair	21,000
Contingency: deterioration	150,000
Total Future Care Costs	**491,667**

In Trust Claim of Sherry Izony:

[82] The plaintiff claims $100,000 for past and future care and assistance provided by Sherry Izony. The defence argues that Mrs. Izony's past wage loss results from her leaving part-time employment at Pennington's. She lost 26 months of work. Based on the information provided by Pennington's, including an allowance for overtime, the total wage loss amounted to $12,272. During a good part of this time, however, Mr. Izony was in hospital and was under the full care of hospital caregivers Regarding future care, the defence argues that there is no evidence of what Mrs. Izony now provides,

and further argues that Mr. Izony is "quite capable of caring for himself". In July 2004, Mrs. Izony started employment with the Tsay Key Dene Bank. She now works full-time and Mr. Izony is left to care for himself for much of the day.

[83] Mrs. Izony provided much-needed nursing care for Mr. Izony upon his return from the hospital. With training, she gave Mr. Izony his medication intravenously through a pump, cleaned his tracheotomy opening, cleaned his urine catheter, measured and recorded his urine output, and cleaned areas where skin grafts were taken and applied. While this care would otherwise have required a paid home care attendant, I find that Mrs. Izony's activities since she returned to work reflect what would normally be expected from a spouse in an established working marriage. I find, however, that Mrs. Izony is able to provide more skilled care than an average spouse because of the training she received after the accident, and that she may have to reduce her full-time hours somewhat to provide such care in the future. On the other hand, I have already provided for some ongoing homemaker assistance, and have also made an allowance for the possibility that Mr. Izony may require more personal care assistance in the future. Accordingly, I award $25,000 for Mrs. Izony's in-trust claim.

Contributory Negligence:

[84] It is common ground that the plaintiff was not wearing a seatbelt at the time of the collision. It is also not disputed that the pickup had a three-point harness that was in proper working order. Both the RCMP Collision Reconstruction Investigation Report and Mr. Acteson's report confirm this. I also note that the airbags deployed during the accident.

[85] The defendant does not argue that the use of a seatbelt would have completely prevented the injuries; rather, the defendant submits that had Mr. Izony been wearing his seatbelt his injuries would have been less severe. The position of the defence is that the plaintiff's overall award should be reduced by 20% to 25%.

[86] On the other hand, the plaintiff argues that because of the extreme forces involved in the collision, wearing a seatbelt would not have made a difference.

[87] The onus rests with the defendant to establish upon a balance of probabilities that the use of seatbelt by Mr. Izony would have lessened his injuries.

[88] The defence tendered the reports of three experts in support of its position: Dr. Boyle, an orthopaedic surgeon whose experience includes many years as a trauma surgeon; Mr. William Acteson, a professional engineer who has expertise in accident reconstruction; and Mr. Craig Good, a professional engineer who has expertise in accident reconstruction.

[89] The plaintiff tendered reports from Mr. Jonathan Gough, a professional engineer who has expertise in accident reconstruction.

[90] Mr. Acteson reported the following analysis and conclusions regarding the collision and subsequent rollover:

- Both vehicles were travelling approximately 100 km/h at impact and Mr. Izony's Dodge experienced a speed change (Delta-V) of approximately 80 km/h. The collision force was off-centre and therefore Mr. Izony would have moved forward and slightly to the left inside the Dodge.
- Both vehicles spun counter-clockwise before coming to rest. The Dodge, which was taller, over-rode the Ford, causing the Dodge to roll over to its right as it was spinning. It landed in the ditch, touched down on its right-hand side, rolled over its roof and came to rest back on its wheels.
- The front end of the Dodge was significantly crushed and the left front tire had been shifted to a position under the driver's foot well. The floor panel was forced upward due to the displacement of the left front wheel.
- There was relatively minor damage to the right front fender and right-hand upper

portion of the cab. The damage was consistent with a rollover.

- The cab was intact and the steering column had not been significantly displaced.
- The lower portion of the dashboard was damaged, consistent with an impact from an unrestrained occupant's knees.
- Both front airbags had deployed. The steering wheel rim was bent forward at the bottom. The windshield was struck from the interior of the vehicle, at a position in front of the driver and near the roof. This was likely caused by Mr. Izony moving forward and upward, along with the airbag, into the windshield.
- There was a scuffmark on the driver's door panel, due to an impact by Mr. Izony as he ejected out through the driver's door window during the rollover.

[91] Mr. Acteson further opined that because Mr. Izony was not wearing his seatbelt, the force at impact caused his unrestrained body to move forward relative to the rapidly decelerating Dodge until he slammed into the airbag with his upper body and the dashboard with his knees. He would have then rotated upward, about his knees, toward the upper portion of the windshield and door panel. Without the seatbelt, Izony was free to travel out of the vehicle, coming to rest under it.

[92] Mr. Acteson concluded that there was adequate space for Mr. Izony inside the cab of the truck, which was not significantly compromised by the accident. Further, he would not have been crushed if he had remained inside the cab of the truck. The seatbelt would have prevented his ejection and would also have lowered the injury-producing forces on his upper legs.

[93] Mr. Good's report described the "Mechanism of Injuries" as follows:

> 7.12 Mr. Izony's broken ribs, cardiac and pulmonary contusions, broken sternum and abdominal wall bruising likely resulted from contact with interior components of the vehicle such as the steering wheel during the initial impact with the Weidlich Ford. . . . [T] he steering wheel [was] loaded and deformed by extensive occupant contact. The Izony vehicle would have been significantly slowed by its impact with the Weidlich Ford. Since Mr. Izony was not attached to the vehicle by a restraint system, he would have continued to travel forward at the pre-collision velocity of the vehicle until he forcibly struck the airbag, steering wheel, instrument panel and windshield.
>
> 7.13 The alleged head injury, dislocated acetabulum, fractured vertebra and upper extremity injuries may have resulted from impact with the interior structures of the vehicle or forcible contact with the exterior environment or vehicle exterior when partially or fully ejected. The lower extremity injuries may have been caused by vehicle intrusion into the occupant space, interaction with the vehicle during ejection, interaction with the environment outside the vehicle or as a result of the vehicle landing on the occupant post-collision.

[94] Under the heading "Seatbelt effectiveness during rollover", Mr. Good reported:

> 7.21 It is well known that the usage of seatbelts during a rollover collision reduces the chance of ejection and consequentially reduces the chance of serious or fatal injury to the occupant. Unbelted occupants in light trucks have been found to be six times more likely to be seriously injured or killed in rollover collisions. Ejected occupants have been found to sustain a higher occurrence of multiple injuries than those occupants who remained inside the vehicle. Ejection is associated with 56% of the financial costs to treat injuries sustained in rollover collisions. For unbelted occupants involved in rollover collisions, 35% of the estimated financial costs associated with treating injuries is spent treating injuries that were sustained outside the occupant compartment. Milter and Wiedmann analysed 30 rollover crashes at speeds between 65 km/h and 180 km/h. 52% of the occupants were belted and 48% were not. Twenty-four percent (24%) of the belted occupants suffered fatal injuries where 58% of the unbelted occupants sustained fatal injuries. Five percent (5%) of the belted occupants were ejected and 68% of the

unbelted occupants were ejected. Parenteau and Shah identify that keeping the occupant in the vehicle and increasing belt usage are key factors required to mitigate rollover injuries.

7.22 It is possible for a belted occupant to sustain serious injuries in a rollover. Often, these injuries are associated with partial ejection through a side window. The 2000 Dodge 2500 pickup truck is equipped with a seatbelt restraint system where the shoulder belt originates inside the seatback as opposed to inside the B-pillar. Tests performed by Collision Analysis in other cases have shown this type of restraint system to be effective in preventing partial ejection.

7.23 Malliaris et al suggests that safety belts are 95% effective in preventing ejection. Had Mr. Izony been utilizing the provided three-point restraint system at the time of the collision, he most likely would have not been ejected. Therefore, he would not have sustained the injuries he received a result of ejection due to forceful contacts with the ground or the vehicle. The truck would not have come to rest on top of Mr. Izony.

[95] Under the heading "Seatbelt effectiveness during offset frontal collision", Mr. Good stated:

7.36 Notwithstanding that the amount of available load limiting is unknown, based on the severe deformation to the bottom of the steering wheel and the separation of the steering column from the instrument panel, Collision Analysis suspects that Mr. Izony sustained the majority of his chest injuries when he struck the steering wheel. It is likely that the airbag was not able to fully manage Mr. Izony's kinetic energy and that Mr. Izony bottomed out the airbag in this severe crash. Had Mr. Izony used the available three-point restraint system, it is possible he may have received some chest injury from the restraint system. However, it is the opinion of Collision analysis that the chest injury would likely have been reduced from its current levels.

7.37 The loading mark to the windshield near the headliner on the driver's side is consistent with Mr. Izony's trajectory as an unbelted occupant during the initial offset collision. Mr. Izony may have struck the inside of the windshield with his head, shoulders, or his upper extremities to create this mark. Had Mr. Izony been utilizing the available three-point restraint system, it is unlikely that he would have reached the windshield with his head or shoulders.

[96] Dr. Boyle opined that had Mr. Izony worn the lap and shoulder belt, and in combination with the deployment of the airbag, it is quite likely that he could have avoided or reduced the severity of the sternal and rib fractures; the pulmonary and cardiac contusions; the burst fracture of L4; the posterior fracture dislocation of the right acetabulum; the right and left wrist fractures; the fracture of the right humerus; and the fracture of the left tibia.

[97] In his report, Dr. Boyle stated:

Statistics by the National Highway Traffic Safety Administration indicates a potential reduction of 66 percent of serious injury to the chest with use of seatbelts and airbags. Considering that the driver's space was not seriously compromised, it is quite likely that this patient could have avoided the sternal and rib fractures, pulmonary and cardiac contusions with the use of the seatbelt in combination with the airbags.

Dr. Boyle said the above statement applied to the plaintiff's burst fracture of L4.

[98] Regarding the posterior fracture dislocation of the right acetabulum, Dr. Boyle stated "statistically, he would have a 78 percent likelihood of having suffered much less damage to his right hip had a seatbelt been in place".

[99] Regarding the fractured right and left wrists, he stated:

Although the statistics are not as significant, i.e. 40 percent vs. nearly 80 percent for the upper extremity vs. lower extremity respectively, this patient is likely to have suffered

somewhat less trauma to his wrists.

The patient has gone on to develop difficulties with the right wrist in the form of OA [osteoarthritis], which is limiting his use of ambulatory aides. It is quite likely that the amount of trauma would have been less with a lesser likelihood of OA with restraints in place.

[100] Regarding the fracture to the right humerus, Dr. Boyle stated:

[W]ith the seatbelt in place and with the airbags deployed, the likelihood of trauma to the humerus would have been significantly lessened. He would not have been ejected from the vehicle and therefore, if this was a mechanism of injury, he would not have sustained a fractured humerus. This fracture has gone on to non-union and he is showing evidence of difficulties with his shoulder. Again, this is impeding his mobilization.

[101] Regarding the fracture of the left tibia, Dr. Boyle stated:

Two mechanisms of injury are possible, i.e. direct blows to the articulation against the dashboard or steering column, or, more likely, a crush injury by the vehicle following the rollover and the patient's ejection from the vehicle. Had the patient not been ejected from the vehicle, the likelihood is that less trauma would have been sustained by the left lower extremity. This is a significant source of disability for him. The likelihood of such disability would have been lessened by the use of a seatbelt.

[102] All of the experts called by the defence discussed the effectiveness of seatbelt use in reducing injuries. Mr. Dley submits that all of the opinion evidence tendered by the defence is further supported by common sense.

[103] In response to the defence experts, the plaintiff argues that given the severity of the head-on collision where the vehicles were travelling at an estimated 100 km/h and experienced a Delta-V of approximately 80 km/h at impact, the use of a seatbelt would have made no difference in the plaintiff's injuries.

[104] The plaintiff's expert Mr. Gough noted that Mr. Acteson's report refers to statistical data contained in a 1996 National Highway Traffic Safety Administration report to Congress. While concluding that seatbelt use significantly reduces moderate and serious injuries, the report does not compare the effectiveness of restraint mechanisms with respect to specific injuries, nor does it discuss effectiveness at extremely high impact severities such as those involved in the instant case. Mr. Gough states that the impact severity in this case is

well in excess of that used in the staged collision tests performed by NHTSA (approximately a 56 km/h barrier impact) and would represent a small fraction of one percent of all collisions. The fact that the impact severity was so high complicates any assessment of seatbelt effectiveness, as there is little staged test data or even real world statistical data that addresses impacts of this magnitude.

Analysis

[105] While the opinions of Dr. Boyle and Mr. Acteson rely in good measure upon the statistics found in a National Highway Traffic Safety Administration report, Mr. Good's report does not. It relies primarily upon independent research and only footnotes a later NHTSA report. I find Mr. Good's report persuasive, and I note that Mr. Gough's review finds it to be "fairly balanced". I do not find Mr. Gough's criticisms of the reports seriously undermine the conclusions found in all of the reports.

[106] Mr. Gough stated that the defence experts had not considered the specifics of the injuries sustained by Mr. Izony, nor the mechanisms by which the injuries were sustained, and opined that such an assessment would have to be performed before any conclusion could be drawn regarding the effectiveness of seatbelt use. I do not find this criticism to be persuasive. In my view, the defence

reports provide each expert's opinion as to how the injuries were incurred. In addition, Mr. Gough's reviews did not address the expert opinion, which accords entirely with common sense, that use of a seatbelt would in all probability have prevented Mr. Izony's ejection from the vehicle. To discount all the defence expert reports in the way that the plaintiff would have me do, I would have to conclude that Mr. Izony's ejection from his truck did not cause any of his injuries, or that the seatbelt would have done nothing to reduce the severity of any injuries sustained inside the vehicle. As I detail below, I cannot come to either conclusion.

[107] Having considered the evidence, I am led to conclude on a balance of probabilities that Mr. Izony suffered the fracture of his left tibia as a result of his ejection from his pickup. This finding is based upon:

- the report that Mr. Izony was found at the scene with his left leg under the rear tire of the pickup that had rolled and stopped upright;
- the opinion of Dr. Boyle who stated that the nature of the injury was a "crush" injury and more likely to have been caused "by the vehicle following the rollover and the patient's ejection from the vehicle";
- the opinion of Mr. Good who stated that had Mr. Izony not been ejected that "he would not have sustained the injuries associated with his body impacting the environment or the exterior of the vehicle, nor would he have sustained the injuries caused by the vehicle landing on top of him".

[108] I recognize that Mr. Good states that Mr. Izony may have sustained injuries to his lower extremities due to intrusion into the driver's footwell. I also recognize that the safety reports on this Dodge pickup model have a general rating of poor, including leg injuries. However, I find that any injuries to his lower left leg incurred inside the vehicle would have been less severe had he been wearing his seatbelt.

[109] I find on a balance of probabilities that Mr. Izony's head and shoulder injuries arose as a result of his impact against the windshield of his pickup. This finding is based on Mr. Acteson's report regarding Mr. Izony's movement in the pickup at the time of the collision (see ¶ 90-91). In addition, Mr. Good was of the view that had Mr. Izony been utilizing his seatbelt, it is unlikely that his head or shoulders would have reached the windshield.

[110] Further, I am of the view that if these injuries did not arise from impact with the windshield, they likely occurred during Mr. Izony's ejection from the vehicle, either from impact with the environment, with the exterior of the vehicle, or when the vehicle landed on top of him. Again, had Mr. Izony worn his seatbelt, neither his impact with the windshield nor ejection from the vehicle have occurred.

[111] I find on balance that Mr. Izony's chest trauma (the fractured sternum, multiple rib fractures, and pulmonary and cardiac contusion) arose from his contact with the steering wheel. I base this conclusion on the report of Mr. Good, reproduced above at ¶ 93. Given the nature of collision and the high Delta-V, these injuries suffered would not have been completely avoided as chest and rib injuries do arise from seatbelts. However, I accept the evidence of Mr. Good that the "chest injury would likely have been reduced from its current levels" (see ¶ 95 above).

[112] In his report, Dr. Boyle attributed a significant portion of the multi-system failure that Mr. Izony developed to the chest trauma and cardio/respiratory dysfunction. He opined that the use of the seatbelt combined with airbags would have resulted in a significant likelihood of diminished trauma. In cross-examination, he testified that the tissue damage would have been less severe and that Mr. Izony's immune system would not have been as suppressed, thus reducing significantly the likelihood of the MRSA infection.

[113] I find on balance that the L4 burst fracture resulted from Mr. Izony's ejection from the vehicle. Had Mr. Izony been wearing a seatbelt he would not have been ejected from his vehicle. If I am wrong about the mechanism of injury, I accept the expert consensus that this injury would likely have been less severe.

[114] I find on balance that the injuries suffered by Mr. Izony to his left and right wrists and his right humerus occurred when he hit the steering wheel. Again, had he been wearing his seatbelt, and in combination with the airbag deployment, the force of his impact with the steering wheel would likely have been diminished, resulting in less severe injury.

[115] I find on balance that the posterior fracture dislocation of the right acetabulum occurred when Mr. Izony's knees moved forward into the dashboard causing longitudinal stresses in his hip joint. I base this conclusion on the evidence of damage to the lower dashboard. I accept Mr. Acteson's opinion that the lap portion of the seatbelt would have restricted Mr. Izony's lower body movement and would have lowered the injury-causing forces to his upper legs.

Would the use of a seatbelt lessened the severity of Mr. Izony's injuries?

[116] Given the circumstances of this case, I find on balance that if Mr. Izony had worn his seatbelt, most of the physical injuries he suffered would either have been avoided altogether because he would not have been ejected, or would have been less severe. The evidence supports the view that Mr. Izony would likely have avoided a head injury had he been wearing his seatbelt. Mr. Izony claims that as a result of his head injury, he has great difficulty in concentration, focus, memory, and decision making.

[117] However, I find that the defence has failed to establish on balance that that Mr. Izony's injuries would have been sufficiently less severe for Mr. Izony to have avoided the MRSA infection, which was most likely contracted at Prince George Regional Hospital. The only scenario that would have avoided the possibility of MRSA infection is one in which there were no open wounds requiring treatment at a hospital, or injuries requiring open surgery. The MRSA infection required the removal of the head of Mr. Izony's femur, created difficulties with his left knee, and put him at high risk of re-infection should he require hip and/or knee replacement. As described above, these injuries have seriously impaired Mr. Izony's mobility and increased his chances of suffering further degenerative changes such as osteoarthritis.

[118] In coming to this conclusion, I note particularly the evidence that there was considerable intrusion into the footwell forward of the driver's seat. The RCMP Collision Reconstruction Investigation Report notes that "[t]he floorboards had been displaced rearward and were positioned upwards to within 10 cm of the driver's seat cushion". Further, Mr. Good concluded: "Had Mr. Izony been wearing his seatbelt, he may have sustained injuries to his lower extremities due to intrusion of the driver's footwell".

[119] Given all of the foregoing, I find that had Mr. Izony been wearing his seatbelt at the time of the collision, his injuries would have been less severe. I assess contributory negligence on the part of Mr. Izony at 15%.

Summary:

[120] In summary, I find that the plaintiff is entitled to the following damages:

Non-pecuniary damages	$ 275,000
Past loss of income	140,000
Future wage loss or loss of future earning capacity	240,000
In-trust for Sherry Izony	25,000
Cost of future care	491,667
Past care and special damages	90,840
Total Award	**$1,262,507**

[121] The defendant has established contributory negligence on the part of the plaintiff and I assess it at 15%.

[122] The parties advised at the end of trial that they would address matters such as tax implications

and costs following judgment. The parties have leave to apply for any further directions arising out of these reasons.

"D. Masuhara, J."
The Honourable Mr. Justice D. Masuhara