IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Ackermann v. Pandher,*
2017 BCSC 880

Date: 20170529
Docket: M126906
Registry: Vancouver

Between:

Jakob Ackermann

Plaintiff

And

Harmeet Singh Pandher, 2154781 Canada Ltd., C.D. Transport Corp., Victor Martens and Oksana Martens

Defendants

And

Viktor Martens, Harmeet Singh Pandher, 2154781 Canada Ltd. and C.D. Transport Corp.

Third Parties

Before: The Honourable Mr. Justice Schultes

Reasons for Judgment

Counsel for the Plaintiff:	W.D. Mussio D.J. Kautz
Counsel for the Defendants H.S. Pandher, 2154781 Canada Ltd., and C.D. Transport Corp.:	P.J. Miller
Place and Date of Trial:	Vancouver, B.C. April 4-8,11-12, 2016
Place and Date of Judgment:	Vancouver, B.C. May 29, 2017

1. INTRODUCTION

[1] This trial dealt with the consequences to Jacob Ackermann of an injury to his wrist that he suffered in a motor vehicle accident on Highway 1 near Sorrento on February 6, 2011. The defendants Harmeet Singh Pandher, 2154781 Canada Ltd. and C.D. Transport Corp. have admitted liability for the accident, although there is an argument by those defendants that Mr. Ackermann was contributorily negligent for failing to wear his seatbelt.

2. EVIDENCE

a. Overview of Life before the Accident

[2] Mr. Ackermann was born in Russia in 1959 and moved to Kazakhstan with his family when he was a young child. His first language was Russian but his parents were ethnically German and spoke that language at home.

[3] His father took him out of school when he was in Grade 8 to train him as a bricklayer. He then did building renovation work on his own.

[4] In 1988 he immigrated to Germany, where he did a variety of painting and renovation-related jobs. Upon his arrival he received a year of German language training, through which he learned to read and write in that language.

[5] He immigrated to Canada in 2004 and settled in the Kelowna area. He and his wife have a house on a small acreage. Two of their adult children — a son and a daughter — live with them, along with their daughter's husband and two young children.

[6] Although the exact level of his language proficiency was an issue in the trial that I will discuss in more detail, it is common ground that his ability to speak English is limited. Except for minimal incidental contact when he is engaging in activities like shopping, since being in Canada he has confined his associations to people who

speak German or Russian, and he attends a church that offers services in German. He testified through an interpreter at the trial.

[7] Until his accident he worked as a tile setter, in a business that he operated with his son Andreas called Ackermann Installations. The division of labour was that Andreas, who speaks English fluently, would arrange the jobs and get instructions about the specific work to be performed and Mr. Ackermann, who also learned tile setting from his father, would carry it out. Two witnesses who are involved in the home building and renovation business in Kelowna testified about the very high quality of Ackermann Installations' work and of their desire to hire them whenever possible.

[8] Mr. Ackermann had some ongoing health problems before the accident, but generally considered himself to be "strong and healthy". His problems included high blood pressure, diabetes and a "cold or a draft" (which I took to mean a pain of some kind) in his left shoulder that had bothered him for a few months. A more serious problem was that he was diagnosed with bladder cancer in 2010. He had surgery in December of that year, followed by several weeks of chemotherapy. His urologist said that there was no evidence of a recurrence of the cancer.

[9] According to Mr. Ackermann his pre-accident life was very active. He completely renovated the family home in his spare time and was always working around the home on one task or another. His wife raises a large number of chickens and they grow produce for their own use, and he participated in the extensive amount of labour that each of those activities requires. On Sundays, his day off, he played sports such as soccer and volleyball, with his family and friends from church. He enjoyed spending time with his grandchildren. He also enjoyed going hunting in the fall with his friends and his sons.

b. Circumstances of the Accident

[10] Mr. Ackermann accompanied two friends from his church, Viktor and Oksana Martens, from Kelowna to Salmon Arm on the afternoon of Sunday, February 6,

2011. They rode in Mr. Martens' Ford F150 pickup truck. The Martens are originally from Russia and like Mr. Ackermann they speak Russian and German. The purpose of the trip was for them all to see a massage therapist there, in Mr. Ackermann's case for the shoulder problem that he had recently developed. He said that he joined the Martens at their invitation and was not otherwise planning to go.

[11] They left around 2:00 p.m. and it took about one and a half hours to get to Salmon Arm.

[12] Their massages took about two hours and Mr. Ackermann said that it was "a bit dark" on the way home. It was snowing, the roads were icy and they were travelling slowly.

[13] This trip was the first lengthy one he had taken since his bladder surgery. One effect of the surgery was that he had to urinate frequently. He initially testified that he did not "buckle" his seatbelt while riding in the Martens' truck because of this frequent urination problem, but then added that he did not remember if this was exactly the problem that had caused him not to wear it. He also did not remember either of the Martens telling him to wear it. He agreed in cross-examination that no doctor had told him after his surgery that he did not have to wear it.

[14] He initially testified that he had worn a seatbelt "off and on" when driving his own vehicle between the surgery and the accident, although he also described times where he had to lie down in the back of that vehicle (and have someone else drive, I infer). In re-examination he clarified that he always wore a seatbelt when driving himself during that period, because the trips were short and there was a persistent beeping sound if the seatbelt was not worn.

[15] Similarly, his son Peter said that he was surprised when he found out that his father had not worn his seatbelt at the time of the accident, because he "always remembered" him wearing it. The only times he had not were occasionally when they were still living in Germany. He had gotten used to doing it in Canada, according to Peter.

[16] Mr. Ackermann's urologist, Dr. Carter, provided a report in November 2015 advising that lower abdominal discomfort is common during chemotherapy (which Mr. Ackermann would have concluded a few weeks before the accident) and offering the opinion that "it would be reasonable for Mr. Ackermann to avoid the use of the seatbelt, which may have exacerbated his lower abdominal/pelvic discomfort."

[17] Mr. Ackermann said that he sat in the middle position of the backseat of the Martens' truck during the journey because it was easier to have a conversation with them from that position.

[18] Mr. Martens and Ms. Martens both testified that she had told Mr. Ackermann to put on his seatbelt during the trip to Salmon Arm and that he had complied. Ms. Martens described some disapproval from her husband for giving this direction to Mr. Ackermann, because speaking to older people in that manner is frowned on in her culture. She said that she turned around at various points during the drive and did not notice that he was not wearing it — if she had, she would have told him again to put it on. On the way to Salmon Arm the light was still sufficient to see well inside their truck. Neither of the Martens saw what he did with his seatbelt on the return trip. Their evidence was that Mr. Ackermann did not tell them during the trip that he was unable to wear it because of his cancer surgery.

[19] Mr. Martens identified the seatbelt in Mr. Ackermann's position as the shoulder-harness type, from a photo of the inside of his truck that was taken after the accident.

[20] When Mr. Martens was shown the following portion of a statement that he gave to an adjuster on February 11, 2001:

> Jakob was not wearing his seatbelt as he had a bladder operation and was still recovering for it and didn't put his seatbelt [sic] because of his healing abdomen….

he said that was not accurate and that he had given a false statement on that point. He also clarified that when he said in his statement that Mr. Ackermann had

"crouched to the right" before the impact, he was basing that on what Mr. Ackermann had told him, rather than his own observations of that action.

[21] When Ms. Martens was shown a passage from her statement to an adjuster, also describing Mr. Ackermann's inability to wear his seatbelt stemming from his surgery, she agreed that it was correct at the time she had given it.

[22] In re-examination Ms. Martens revealed that she and her husband had actually learned about Mr. Ackermann's medical inability to wear a seatbelt from him after the accident, but before she gave her statement to the adjuster. Her husband and Mr. Ackermann were both worried about the seatbelt issue, I infer because of the potential liability of each of them.

[23] Mr. Ackermann's memory of the accident itself was that they were coming to a bend in the road, when he saw a truck skidding. He was "so scared" and thought "the end was coming", so he bent down and covered his head. He heard a crash.

[24] He did not recall his movements within the vehicle after the accident or how he and the Martens exited from it. Mr. and Ms. Martens both described him ending up in the front passenger seat afterwards, essentially in Ms. Martens' lap.

[25] He said that when he "came about" (which I took to mean, when he next became aware of his surroundings), he was in shock and a bone was sticking out of his right wrist. Ms. Martens had to tell him not to walk into the road or he would be run over.

[26] Both Mr. and Ms. Martens agreed that the impact with the semi-truck and then a rock wall had been severe and that they had both suffered meaningful injuries themselves despite having been wearing their seatbelts. Ms. Martens also agreed that there is an outstanding lawsuit against Mr. Ackermann arising from injuries caused to her by his movement within the vehicle after the impact.

c. Injuries, Prognosis, Functioning and Ongoing Care

[27] Mr. Ackermann was eventually taken to the hospital in Salmon Arm by ambulance. He experienced a lot of pain in his wrist. It was initially put in a cast and sling by the emergency staff and then a week later it was operated on by Dr. Miller, a plastic surgeon. He put metal plates in the wrist and Mr. Ackermann wore a cast for six weeks. He also experienced a lot of pain after this surgery, especially if he touched his wrist or banged it against something, and he had trouble sleeping until the plates were removed at the end of the six weeks. This procedure was followed by physiotherapy from April 2011 to January of the following year.

[28] In addition to this wrist injury, which was the main focus of the trial, Mr. Ackermann suffered some less serious injuries — bruising on the right of his body, bruises and cuts to his face and a stiff neck. These injuries all healed within a month.

[29] The medical evidence about Mr. Ackermann's wrist injury and its effects was not disputed. It indicates that he suffered what is known as a "perilunate dislocation injury[1]" in the accident. This results in "significant soft tissue/ligamentous disruption within the wrist.[2]" Some degree of stiffness is usually seen in patients with this type of injury and his ongoing symptoms are considered to be "reasonable given the nature and extent of his injury.[3]" When he was examined in May of 2015 he had flexion (moving the hand downward from a horizontal position) of only 20%, although his abilities to pinch and grasp were good[4]. His prognosis is for increasing arthritis in the joint as a result of the injury, "with gradually worsening pain and limitation.[5]" A consulting orthopedic surgeon described his condition in 2015 as "chronic and static with a very high likelihood of deteriorating over time.[6]"

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[1] Report of Dr. Steinruck, family doctor, April 27, 2012
[2] Report of Dr. Miller, plastic surgeon, May 7,2012
[3] Ibid
[4] Report of Dr. Steinruck, May 4, 2015
[5] Ibid
[6] Report of Dr. Perey, orthopedic surgeon, August 25, 2015

[30] If his pain worsens he may require a partial or total wrist fusion, which "typically improve[s] pain however at the cost of significant range of motion." A total fusion would mean that he could no longer flex or extend the wrist.[7] For now his symptoms can be "slightly improved" by the intermittent use of a brace and by anti-inflammatory medication.[8]

[31] With respect to work prospects, the orthopedic surgeon offered the opinion that "[b]etween the associated pain and the limited range of motion to his wrist, [he does] not believe that there is any chance of Mr. Ackermann returning to a physical job involving extensive use of his right wrist." Nor did he believe that there were any "interventions" that would allow Mr. Ackermann to do so[9].

[32] During his evidence, Mr. Ackermann demonstrated the restrictions in his range of motion of his right wrist and how moving the wrist forward and backward or from side to side causes him pain.

[33] When he attempted to return to work after the accident he quickly found that the pain in his wrist made it impossible to perform the essential tasks of tile setting.

[34] This injury has also undermined his ability to engage in the extensive range of physical activities that made up his life outside of work. These have included gardening, shovelling manure for his wife's chickens, performing home maintenance tasks and minor renovations, playing sports as part of his Sunday social activities and playing with his grandchildren. He also cannot go hunting because of the effect on his wrist of firing a gun.

[35] Using his wrist to do work of any kind causes a burning pain which is severe enough that it can also wake him up at night. He always feels pain to some extent but if he "takes it easy" it is lessened.

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[7] Report of Dr. Miler
[8] Report of Dr. Perey
[9] Ibid

[36] It had previously been “more or less [his] life” to work with his hands. He now becomes angry with himself for his reduced ability and does not like having to ask his sons for assistance with tasks that require using his wrist, such a changing a tire.

[37] While he agreed in cross-examination that he has a van with a standard transmission that he is able to drive, he pointed out that the reason that he purchased it was that it cost only $600 and gives him something to drive himself when his wife needs to use their car. He had previously testified that using the gear shift in the van caused him pain to his wrist.

[38] He also agreed that he still does some yard work and gardening, but said that it is now more difficult, as is trying to use his left hand to carry out tasks even though he is right-hand dominant. Using a wrist brace helps with some activities, such as pushing a lawnmower. It is hard to work with the brace though, because it makes the hand immobile He has looked into the possibility of buying one that would not cause that problem, which he understands would cost $700.

[39] In their evidence both Andreas and Peter confirmed the difficulties that their father now experiences with tasks that were formerly within his capabilities and the significant impact that this has had on his sense of self-worth and his overall happiness.

[40] Mr. Ackermann underwent functional capacity evaluations by two occupational therapists: Dana Hornibrook on his behalf in 2012 and 2015 and Alisha Morris on behalf of the defendants in 2015.

[41] As Ms. Morris pointed out, there is general agreement in their opinions. The only meaningful differences are that she suggests some additional adaptations and modifications that could be made to increase his tolerance for lifting and carrying,

the use of a pre-fabricated[10] brace to stabilize his right wrist, and using his left hand and arm for carrying.

[42] It is common ground between them that Mr. Ackermann is not able to perform some of the essential functions of a tile setter because of his injury. He is suitable for employment only in the "sedentary" and "light strength" categories, which will avoid placing strain on his wrist that will increase his pain. As Ms. Morris pointed out, although he can lift items in the light to medium range using his right arm, this is on a rare basis and he should usually remain in the sedentary level with respect to that arm.

[43] At one point during the functional capacity testing Mr. Ackermann experienced an elevated heart rate and felt unwell. The defendants' counsel referred to this as a potential indication that his health apart from the injury was not as robust as he maintained.

d. Pre-accident Earnings

[44] Andreas Ackermann handled the financial affairs of Ackermann Installations. The thrust of his evidence was that he and his father, who divided the profits equally, received substantially more income from the business than their declared income for tax purposes. Andreas also prepared his father's personal tax returns. He said that he never discussed with his father how he completed the returns; they only discussed the final amounts

[45] In addition to the usual deductions available to businesses, a key additional means of reducing their income for tax purposes was based on the wages that they notionally paid to Andreas' brothers Peter and Matthias for their part-time help whenever they were not in school. Andreas was able to legitimately include payments to them under the cost of "subcontractors" even though those amounts did

[10] Mr. Ackermann told her that he finds it difficult to do tasks that require any dexterity with his current brace, so she suggested obtaining one that supports his wrist while allowing free movement of his fingers. This may be the $700 brace that he described having investigated on his own.

not actually get paid to them, because they lived at home and the money generated by the business was all received and shared as a family.

[46] Besides his usual work during school breaks, Peter said that in either 2009-10 or 2010-11 (he could not recall which) he took the entire year off of university to assist when the business got a large contract for strata homes. In terms of his role in the business he described himself as being "right beside my dad and Andreas laying tiles." In his view Matthias did "very minimal work[11]."

[47] Andreas agreed in cross-examination that Peter did "almost everything we did". He thought that over the whole time that Peter was with them he did 10% of the work. By the end he guessed it was "maybe 20%". He had some difficulty estimating what a replacement wage for Peter's work would have been, ultimately arriving at a range of $22-$25 per hour. He said that Matthias, who worked only on school breaks, did various ancillary tasks but not the actual tile installation. He would have had to pay someone about $10 an hour to replace that work.

[48] Andreas confirmed in cross-examination that "write-offs" (that is, tax deductions) were taken on the business' vehicles each year, with new vehicles being purchased when that amount reached zero. Other equipment had to be purchased and intermittently replaced to carry on the business as well. An example given was their wet saws, which cost $3,000 each. Three of them had to be purchased during the six years between the start of the business and the accident. He agreed that he had also submitted his various receipts for usual business expenses such as gas, oil, repairs, insurance and maintenance to their accountant, for the purposes of calculating their taxes.

[11] Matthias was living in Germany at the time of the trial and was not called as a witness.

[49] Based on his review of the business' and his father's tax returns, Andreas testified about his father's actual income vs. the amounts he declared for the years between the start of the company and the accident[12]:

Date	Income of Ackermann Installations after deduction of expenses	Jakob Ackermann's Share of Business income	Amount allocated to Peter and Matthias Ackermann as subcontractors	Jakob Ackermann's declared personal income	Income actually received by Jakob Ackermann, i.e. "take home" pay
2005	$85,000	$42,930	$16,000	$32,629	$50,000
2006	$80,000	$40,000	$16,000	$27,980	$48,000
2007	$86,226	$43,113	$16,894	$29,228	$51,560
2008	$75,298	$37,649	$18,000	$26,603	$43,649
2009	$63,747	$31,873	$28,000	$23,615	$45,873
2010[13]	$70,563	$30,000	$30,000	$18,635	$45,000

[50] Mr. Ackermann's income in his tax returns from 2011 onward conforms to his description of being unable to work following the accident. He had a taxable income of $1,449 in 2011, zero in 2012 and, once he became eligible for a CPP disability pension, $11,501 in 2013 and $6,681 in 2014, the last year for which returns were provided.

[51] In the year following the accident Andreas hired a subcontractor to do the work that his father was now unable to do. He paid that subcontractor about $45,000 for the year. When that person had to leave the country his replacement proved, after a short period, to be unsuitable. Andreas was not able to do as much work and had to give up some jobs. (Peter described his father as being three times as fast a worker as a subcontractor whom they had hired previously to cope with a large influx

[12] The actual income that he testified to for each year was not always the precise sum of his father's declared income and half of the amount allocated to Peter and Matthias, but was still quite close to it.
[13] There was some guesswork in Andreas' evidence about this year. He believed that the gross business profit of $70,563 would have been reduced by other expenses, so that his and his father's shares would have been $30,000 each. He also described the $15,000 for Peter's work (in addition to the same amount for Matthias') would have been the minimum amount that they had allocated and that it could have been higher.

of work.) Eventually Andreas realized that his father was not going to be able to return and so he carried on the tile-setting business on his own, doing the actual work himself.

[52] There was also some evidence directed towards the capacity of the business before the accident and its potential for future growth.

[53] Mr. Ackermann said that they usually worked Monday to Friday, eight hours per day, more if the specific job required it, and occasionally on Saturdays. He confirmed in cross-examination that they were busy from 2007 to 2011, except for a predictable slowdown in the larger jobs during January and February each year. He took a trip to Germany during this period in 2010. At times they were busy enough to require them to hire outside help. Andreas agreed that they used subcontractors for the bigger jobs.

[54] Peter said that while some seasons were busier than others, there was no lack of work and that they could have worked “day and night” if they wanted to.

[55] In Andreas’ view if the accident had not occurred nothing would have prevented the business from growing, using a larger crew. He said that his father was always “driving him to hire more guys”. He believed that they would have had to “find out how to market” their business, I infer to reach a greater number of potential customers. Mr. Ackermann’s own evidence is that he did not “know” about that aspect of the business, which was entirely handled by Andreas, and that he himself was only the worker.

[56] As a means of illustrating the lost potential earnings as a result of the accident, Andreas explained that in contrast to the rate of $3 per square foot that he and his father originally charged for the tiles, he is now able to charge $7 generally and $9 for walls. The rate that he and his father charged for labour was in the range of $50 per hour and he is now able to charge $65, although he charges less if he does a large number of hours on a job. In general he is getting better jobs, involving

high-end houses, and is able to earn more money than previously. He could take on more work if he wanted to.

[57] Jason Breares, a builder of high-end homes in Kelowna, described the Ackermanns' work as "phenomenal." He began using them in 2009 and said that he would have had a lot of work for them since 2011 if the accident had not occurred. Andreas now works almost exclusively for him and he is also very pleased with Andreas' work. It is rare that Andreas has anyone else to assist him in those jobs.

[58] Harold Wellwood, the owner of a local flooring business, also praised the quality of the Ackermanns' work before the accident and said that he gave them higher-end, complicated jobs that required their particular skill set and ability to work as a team.

[59] Darren Benning, an economist who provided an expert report for Mr. Ackermann, calculated his past wage loss, based the yearly earnings of an average tile setter in British Columbia, as $215,731. At an average annual income of $48,000 in 2013 dollars, it would be $197,559[14].

[60] Douglas Hildebrand, an economist who provided an expert report for the defendants, used Mr. Ackermann's declared income, which averages $26,175 per year from 2006 to 2010. Using that figure results in a past income loss of $122,785.

[61] Both economists deducted from their projections the taxes that would have been payable on such earnings, as required by s. 95 of the *Insurance (Vehicle) Act*, R.S.B.C. 1996, c. 231.

e. Future Work Plans

[62] Mr. Ackermann testified that he had no plans or savings for retirement and that he intended to keep working "as long as I live." His father had worked until he

[14] For both past wage loss and impairment of future earning capacity Mr. Benning also made projections based on an income of $80,000 per year. However, that figure was not relied on in submissions.

was 73, when he fell off of scaffolding and became disabled. Mr. Ackermann envisioned a similar or greater degree of longevity for himself. His evidence and that of his sons maintained the consistent theme that working was central to his self-image and that being in the workplace brought him a significant degree of happiness.

[63] In an effort to counterbalance this optimistic projection, the defendants' counsel brought out on cross-examination the physical rigours of tile setting, which include carrying heavy items and spending a considerable portion of the work day on one's knees and bending over.

[64] As in the case of past income loss, Mr. Benning provided projections for future earnings if the accident had not occurred, based on both the average wage of a tile setter and the $48,000 per year that can be deduced as Mr. Ackermann's actual pre-accident earnings in 2013 dollars. He then provided two options: full-time work until 75 (average: $569,723; actual: $559,388) or full-time work until 65 followed by part-time work until 75 (average: $411,491; actual: $404,550).

[65] Mr. Hildebrand's projections were once again based on the much lower figure of Mr. Ackermann's declared income. He provided the options of full-time work until retirement at 65 ($130,041), full-time work until retirement at 70 ($230,897) and full-time until 65 and then part-time until 70 ($180,469).

[66] He had several critical comments about Mr. Benning's projections. First, Mr. Benning did not include any contingency for Mr. Ackermann having to work part-time involuntarily before age 65 due to unforeseen factors. In addition, Mr. Benning did not include the decline in average earnings for tile setters between 60 and 65 (to only $24,000 per year) and did not take into account the fact that there are actually no statistics showing any tile setters working at all after the age of 65.

f. Language Ability

[67] As I mentioned in the overview of Mr. Ackermann's pre-accident life, since coming to Canada he has confined his social contacts to German and Russian-speaking people in Kelowna. He attends a service in German at his church. He stays for the English service that follows and is able to understand about 30% of it. The text is displayed on a screen and he can get the gist of it, looking it up in his German bible.

[68] As I also mentioned, his use of English in the workplace was extremely basic — confined to things like "How are you?", "Good morning" and similar kinds of small talk. His lack of understanding has led to misunderstandings with other workers at the site.

[69] He started to learn English in 2013. After the accident he hoped to eventually be able to go back to tile setting. When he realized that was not going to happen he was in despair, and a friend suggested that he take English training.

[70] As of the trial dates he was attending English classes at the Ki-Low-Na Friendship Society. He attends Monday to Friday from 9:00 a.m. to 12:30 p.m. At first he found this training very difficult because he had never really learned to study, other than in his German classes when he immigrated to Germany from Russia. However, he believes that the classes are helping and he is finding it much easier to understand his teacher. However, he feels "very inexperienced" when he is speaking English to others, because he is not used to how they speak.

[71] In cross-examination he explained that now that he has had some English training, he can ask simple questions in stores. When it was put to him that he had told his current employment counsellor that he can understand 50% of what he reads in newspapers, he explained that he can understand 50% of the advertisements in the local newspaper, which have photographs attached. They read newspaper articles and other texts at school and sometimes he can understand up to 80% of them. This includes the process of underlining and looking up words

that he does not immediately understand. He clarified that the 80% applies to what he described as “Level 1” (I infer, the most basic) material.

[72] As other examples of his level of proficiency he said that the dialogue in English movies is too fast for him, and when he talks to his neighbour he is confined to commenting on the weather.

[73] Peter confirmed his father’s “virtually non-existent” English ability at the time of the accident and characterized him as living within “a German bubble” in the Kelowna area, including the German-speaking subcontractors they hired for tile setting. He said that even in German and Russian his father is a quiet person who would rather listen than speak — language “was never his forte”.

[74] According to Peter, his father’s progress in English has been slow. When the conversations deal with things he is used to (such as taking an order on the phone to buy eggs from the family chickens) he can understand and express himself in “limited ways”. If strangers deviate from subjects that he is accustomed to he understands “maybe 20-30%”. If they talk too fast he just “blanks out”.

[75] Similarly, Andreas described his father’s pre-accident English as “very bad” and said that he was unable to talk to the neighbours. He did not comment on his father’s progress since he began taking language classes.

[76] Alana Turigan is the co-ordinator of Language Services for Newcomers to Canada (LINC) at the Ki-Low-Na Friendship Society, where Mr. Ackermann takes his English classes. She has more than 20 years’ experience teaching English as a second language and is a certified assessor of the Canadian Language Benchmarks (CLB), an accepted measure of determining proficiency in English. The areas of proficiency that it measures are listening, speaking, reading and writing.

[77] The LINC classes teach the same proficiencies as are captured by the CLB system, but they use a slightly different numbering system for the various levels. The highest level that a student can achieve is CLB 8.

[78] Ms. Turigan testified that since beginning his classes in February 2013, Mr. Ackermann had progressed, according to a test that was administered just before trial, to be eligible for classes LINC Level 5/CLB Level 4. This level was full when she testified but she said that he can be put on a waiting list for it. She hoped to get him in before June of 2016, but if not then in September. She agreed that to that extent his progress had "stagnated" due to the space restrictions.

[79] To progress to each new level, the student has to be able to meet 60% of the criteria for it. The student spends the rest of their time at that level mastering the remaining 40%. The average student takes about a year to do that.

[80] Given that he started in 2013, Ms. Turigan initially described Mr. Ackermann as "about average" in his progress. His attendance has been excellent and she agreed with the suggestion that he works hard and wants to learn English. She also agreed that older students do not fare as well in this language training and that students with higher levels of education will progress more quickly through it.

[81] In his cross-examination Mr. Ackermann's counsel drew Ms. Turigan's attention to an apparent slowing of Mr. Ackermann's progress through the levels, in particular the one and a half years that he spent at LINC Level 4 before his recent progress. She agreed that it appeared that he had "plateaued" during that period.

[82] Ms. Turigan said that to be "comfortable" in a customer service job a person would have to be at a Level 6. It would be "a struggle" to do such a job at Mr. Ackermann's current level. People at that level tend to do manual labour, kitchen work and other jobs that require very little public contact and no detailed instructions.

g. Prospects and Efforts to Obtain New Employment

[83] Since the accident Mr. Ackermann has had assistance in finding new types of work that he would be capable of doing.

[84] He saw Bruce Waldie, an employment counsellor, starting in November of 2012. Mr. Waldie met with him six to eight times, with the goal of preparing him to seek work. The preparation consisted of things like help with preparing a resume and tips for presenting himself in job interviews. He observed that Mr. Ackermann's English was poor and initially he made some inquiries with potential employers in the Russian and German communities on his behalf, without success. Potential jobs that his research suggested might be suitable for Mr. Ackermann were delivery driver, lot attendant, car jockey and ticket taker. When it was suggested in cross-examination that this type of work earns in the $30,000 per year range he said "that sounds about right". He ultimately concluded that language proficiency was Mr. Ackermann's main barrier to employment and that overall he "benefitted little" from their contact because of that barrier.

[85] Stevie Wright, a job search specialist at a different agency, began meeting with Mr. Ackermann in January of 2016. She reviewed the results of his work with Bruce Waldie and decided to take a non-traditional approach — trying to secure a volunteer work placement for him first, to assist him in eventually returning to paid employment. She made inquiries of 23 employers, without success. Those businesses that had tasks that he could perform did not have sufficient work available.

[86] Having no success with volunteer positions in workplaces, she decided to try to obtain Mr. Ackermann a volunteer position in the community. As of the time she testified she had put forward applications at the Kelowna Hospital. By that point she had used up almost all of the hours of assistance that she had been authorized to provide him and had requested funding for an additional 40 hours. She agreed with the suggestion in cross-examination that this is not a situation in which he has no chance of becoming employed.

[87] Like Mr. Waldie, Ms. Wright identified Mr. Ackermann's limited English skills as a barrier to employment, along with the level of his education and computer skills and the fact that he has done only labour-based jobs in his career. In cross-

examination she declined to offer an opinion on whether his English skills were sufficient for him to work as a delivery driver or security guard, citing her lack of expertise in language assessment. She did agree that only one of the 23 employers whom she contacted had referred to communication as a barrier to taking him on and that she was able to communicate with him sufficiently to carry out her role.

[88] She described the labour market in Kelowna as being quite competitive. Even candidates with no functional difficulties have problems finding work.

[89] Niall Trainor, a vocational rehabilitation consultant, prepared an expert report on Mr. Ackermann's employment prospects in November 2012, which was based in part on an interview with Mr. Ackermann. There was a follow-up report in January 2016 that was based only on the material submitted to him.

[90] In view of Mr. Ackermann's wrist injury Mr. Trainor felt that "his vocational rehabilitation will likely be a function of his capacity to learn the English language." The limited progress with English that he had made since arriving in Canada, meant that Mr. Trainor was not optimistic that he could make the substantial gains needed to access employment. While acquiring sufficient English would allow him to do jobs such as security guard or driver, he would likely still require a sympathetic employer, who would be willing to hire him in spite of his age, functional limitations, lack of experience in the position and lack of recent employment of any kind. While a return to the labour force was possible with "extensive rehabilitation", the more likely outcome in a case of this kind is "ongoing unemployment or under-employment."

[91] Mr. Trainor recommended English as second language training (ESL) (which Mr. Ackermann had not yet started at that point) including informal discussion groups for ESL students that were offered by a local intercultural society, as well as a vocational case manager for assistance with Mr. Ackermann's job search.

[92] By the time of his follow-up report, Mr. Ackermann had seen Mr. Waldie (but apparently had not yet begun seeing Ms. Wright). Mr. Trainor expressed the opinion that it was premature to have sent him for that kind of assistance before he had

completed literacy training to a functional level, or at least to his maximum level of improvement.

[93] At this point, except for his unsuccessful attempt to return to tile setting, Mr. Ackermann had not worked for almost five years. Such a hiatus, in combination with his other barriers "usually prefigures a poor vocational prognosis." This reflected his previous reliance on his physical abilities, the limited progress of his language training and the preference of employers "for able-bodied workers with recent, relevant work experience." While it was possible that Mr. Ackermann could find "non-competitive" work with a sympathetic employer in one of the roles that Mr. Trainor had previously identified, "the more probable outcome is ongoing unemployment." He said that such sympathetic employers "are out there, we just have to find them."

[94] Dr. Dean Powers, the expert vocational consultant who provided reports on behalf of the defendants, arrived at a more optimistic view of Mr. Ackermann's prospects. His reports, prepared in October 2015 and February 2016, were both based only on his review of the material that had been submitted to him.

[95] Taking into account Mr. Ackermann's background, both the barriers to employment that he faces and his pre-accident work experience, his opinion was that Mr. Ackermann could consider applying for jobs as a locksmith and key copier, a courier/delivery driver or a flooring advisor. Vocational counselling assistance should be provided to him in this process.

[96] Dr. Powers conducted a job search in Mr. Ackermann's immediate labour market area and found "numerous" companies to which an application would likely be successful, especially with vocational support. Such positions would have starting wages in the $13-$15/hour range, and could last until age 67 "and potentially beyond".

[97] In making these recommendations, Dr. Powers assumed that Mr. Ackermann "must obviously have a reasonable command of English after 11 years of residency".

[98] In his follow up report Mr. Trainor had taken issue with several of these points. He described Dr. Powers' assumption about Mr. Ackermann's language proficiency as "purely speculative", and emphasized that his existing English would not equip him to function independently in customer service roles, although he could likely carry out some routine delivery tasks. He said that Mr. Ackermann cannot cope with the customer service requirements of being a key cutter because of his English level. The same is true of being a flooring advisor, to which Mr. Trainor added the further deficiency of having no previous work experience. And being a locksmith would require use of his wrist at a level that is too intensive for his injury.

[99] In his second report, Dr. Powers sought to justify his initial positions. On the language issue, he pointed to Mr. Ackermann's recent attainment of Level 4 of LINC and reiterated his opinion that proficiency at that level is "sufficient" for the jobs that he has identified. He pointed out that Mr. Ackermann has previous work experience as a locksmith and "would be using his hands interchangeably". With respect to the flooring advisor position, he suggested that Mr. Ackermann's skills as a tile setter and painter would be "valued" at the time of hire by companies such as Home Depot, although some accommodation with respect to language "may be expected". With respect to the broader issue of "non-competitive" employment and the need for accommodation raised by Mr. Trainor, he agreed that such accommodation would be "advantageous" and said that it could be arranged in the private sector as part of the vocational assistance that is provided.

[100] In cross-examination Dr. Powers agreed that in addition to not having had a chance to interview Mr. Ackermann, he also did not have the opportunity to speak to Mr. Waldie, Ms. Wright or anyone involved in his English training. Although he has province-wide expertise, he is not based in the Okanagan, as Mr. Trainor is.

[101] He agreed that additional relevant factors on the question of employability are Mr. Ackermann's age, disability, level of previous education and the time that he has now spent out of the workforce.

[102] If it ends up taking Mr. Ackermann seven to nine years to get his English skills to a level that he can gain employment, Dr. Powers said that he would need "good, skilled" vocational rehabilitation to assist him to get a job. On the question of vocational assistance, he thought that Mr. Ackermann would have benefitted from a lot more support than he received from Mr. Waldie, but he was not familiar with Ms. Wright or her involvement.

[103] He believed that 25-30 hours of further vocational support would be needed to get Mr. Ackermann to a first job placement.

[104] In re-examination he clarified that he has previously placed clients with language or educational shortcomings or physical disabilities successfully in jobs.

3. DISCUSSION

a. Contributory Negligence

[105] The defendants' counsel submits that Mr. Ackermann should be assigned at least 25% fault because of his failure to wear a seatbelt.

[106] First of all, he says that Mr. Ackermann's claim not to have been able to wear it for medical reasons should be rejected. None of his treating physicians told him after his surgery that he did not need to do so; he wore it when driving his own vehicle before the accident and he wore it on the way out to Salmon Arm, at Ms. Martens' insistence. Not wearing it was also contrary to his son Peter's observations of his usual behaviour, to the extent that Peter expressed surprise at what had happened in this instance.

[107] The defendants' counsel further argues that whatever his excuse might have been, if Mr. Ackermann could not wear a seatbelt without adverse effects he should not have gone on the trip at all. It required travelling a long distance in poor weather and road conditions, for the non-essential purpose of receiving a massage for a minor shoulder problem. Compounding the risks of this situation, he chose to sit in

the middle of the rear seat, which I gather I am being asked to find would have rendered him more susceptible to moving around within the vehicle in the event of an accident.

[108] On the question of what role wearing his seatbelt could have played in preventing Mr. Ackermann's injuries, the defendants' counsel submits that, despite the subjective impressions of the occupants, this was not such an extreme collision that wearing it would have been rendered useless. It was a side-swipe rather than head on collision; there was no major intrusion into the cabin area, and none where Mr. Ackermann was sitting; the occupants were able to leave the truck themselves; and Mr. Ackermann's other injuries were minor and healed soon after.

[109] In particular, the defendants resist the suggestion that proof of the ability of the seatbelt to prevent or reduce the injury that he suffered required expert evidence on their part. Their counsel cites decisions in which findings that the plaintiff striking the dashboard, steering wheel or windshield could have been prevented by a seatbelt have been made on the basic of straightforward inferences from the proven facts, informed by common sense, even in the face of expert evidence to the contrary (see: *Lakhani v. Samson,* [1982] B.C.J. No. 397 (S.C.) at para. 3; *Aujla v. Christensen*, [1992] B.C.J. No. 860 (S.C.) at paras. 14-15; *Mosimann v. Guliker*, 2014 BCSC 492 at paras. 28-32). For example, in *Mosimann* the trial judge concluded:

> [28] …According to Craig Lukar, a professional engineer who gave an opinion to the court, however, the plaintiff would have suffered her facial injuries in any event, that is, even she had been wearing seatbelt.
>
> …
>
> [30] …I am not substituting my own interpretation of the evidence for that of Mr. Lukar. I am simply saying that despite his qualifications, Mr. Lukar was not able to satisfy me that what he described displaced the inference the court might have drawn without assistance. His suggestions were simply unconvincing.
>
> …
>
> [32] Sometimes experts state the obvious, in which case they are superfluous. Sometimes they do not. On those occasions, it is up to the trier

> of fact to decide whether the inference the expert invited has the authoritative force of training or experience, or whether it is just not helpful. Having done my best to assess Mr. Lukar's surprising conclusion – that failure to wear a lap belt would have made no difference in this face-hit-the-dashboard collision – I am simply unable to say that I am persuaded that that is the correct inference.

[110] In response, Mr. Ackermann's counsel points out that the urologist's opinion, although it was given after the accident, provides a medical justification for the decision not to wear the seatbelt. An analogy is drawn to the justification of a pregnant woman not wearing her seatbelt to protect the unborn child. In addition, I am urged to find that the Martens' original statements to the adjusters reflected their awareness of Mr. Ackermann's medical justification at the time of the trip[15], despite their efforts to resile from those statements in their testimony. His counsel submits that I should take a dim view of their credibility in light of these efforts, which he says were made in the interests of upholding Ms. Martens' own personal injury claim.

[111] More importantly, Mr. Ackermann's counsel stresses the burden on the defendants to prove on a balance of probabilities that his use of a seatbelt could have prevented his wrist injury or reduced its severity: *Gilbert v. Bottle*, 2011 BCSC 1389 at para. 24.

[112] Although there are obvious situations, as in the cases cited by the defendants, in which inferences and common sense have led to that finding, it is clear that such an approach will be inappropriate when multiple inferences about how the injuries were caused are available, or where the finding would be speculative. As the extensive canvass of previous cases in *Schenker v. Scott*, 2013 BCSC 599, varied on other grounds 2014 BCCA 203 demonstrates, defendants have failed to meet their burden even when there was expert evidence, if it could not address the specific question of the relationship between seatbelt use and the plaintiff's actual injury.

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[15] Although it was not explained in submissions, I took the relevance of this fact, if it is established, to be that Mr. Ackermann was advancing this justification before any accident or litigation gave him a motivation to do so, thus rebutting the implicit defence suggestion that it is a more recent contrivance to avoid contributory negligence.

[113] This requirement of evidence on the specific issue was addressed in *Terracciano (Guardian ad litem of) v. Etheridge* (1997), 33 B.C.L.R. (3d) 328 (S.C.):

> [64] This opinion, the only evidence directly on the issue, is of a general nature and essentially unhelpful in resolving the factual issue in this case. It states no more than what most well-read individuals know, that if one is belted, one will not sustain injury from ejection. It does not assist in showing, in this case, whether the injuries were sustained inside the vehicle or as a result of ejection from the vehicle. In the event the injuries were sustained inside the vehicle by, for example, contact with the roof, it is possible a seat belt would not have prevented or lessened the injuries. If, on the other hand, the injuries were sustained as a result of ejection, then failure to wear a seat belt is likely causative, in part at least, of the injuries.
>
> [65] …The defendants refer to common sense. However, common sense tells one that a wedge compression fracture may occur inside a small vehicle, even with lap belt restraint, or on landing outside the vehicle. So too, a head injury may occur inside or outside the vehicle.
>
> …
>
> [67] Counsel for the defendants relied upon [*Lakhani* and two other decisions in which contributory negligence had been found based on lack of seatbelt use]. However, in all three cases there was evidence before the Court of the likely mechanism of the accident and a connection to the failure to wear a seat belt. Such is not the case here.
>
> [Emphasis added.]

[114] Another illustration of the correct analysis is said to be found in *Naidu (Guardian ad litem of) v. Welter,* [1995] B.C.J. No. 2176 (S.C.):

> 21 …The Court of Appeal has acknowledged: "There may be cases where common sense leads to the conclusion that injuries were more severe because of the failure to wear or use some restraining device ..." (*Koopman v. Fehr* (1993), 81 B.C.L.R. (2d) 145 at 151 per Hollinrake J.A.), but generally evidence must show "... that the particular injuries suffered by the plaintiff would have been prevented or their severity lessened had the seat belt been properly operating." (*Hooiveld v. Van Biert* (1993), 36 B.C.A.C. 19 at 23).
>
> 22 In this case there was no medical evidence that the injuries complained of, which were essentially neck and referred shoulder pain, were caused or made worse by Nancy Naidu head striking the windshield, so the question I must ask myself is whether this is one of those cases where common sense leads to that conclusion. I am unable to say that it does and, accordingly, I find that there was no contribution by Nancy Naidu to the injuries she complains of by reason of her failure to wear a seat belt.
>
> [Emphasis added.]

[115] Or, as the Court of Appeal reasoned in *Schenker*:

> [42] At first sight it may seem obvious that Ms. Schenker was injured as a result of being ejected from the van and that her seatbelt would have prevented her from being thrown from the vehicle. Indeed, Ms. Scott contends this is a matter of common sense.
>
> [43] Ms. Scott's argument cannot succeed. There was no evidence that Ms. Schenker's injuries were the result of being ejected from the van. Ms. Schenker suffered compression fractures in her back from "axial loading", as forces were transmitted along her vertebrae. There is no way to know when, in the course of the accident, those injuries occurred. They may have occurred as the van careened down the embankment or when it hit Main Street below the embankment. Had Ms. Schenker been restrained in the passenger seat, she may still have been subject to the axial loading that caused the injuries. Furthermore, if she was restrained by a seatbelt, she may have been as seriously injured when the van came to rest with its passenger side embedded in the ground. Given the mechanics of this accident and the nature of the injuries suffered, this is not a case where a seatbelt defence could be made out by relying on common sense inferences.
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> [Emphasis added.]

[116] In addition to the absence of evidence from the defendants to meet their burden on this point, Mr. Ackermann's counsel points to the fact that Mr. and Ms. Martens also suffered reasonably serious injuries in the accident, despite having been properly restrained, as a further indication that failure to wear the seatbelt cannot safely be found as a causative factor.

[117] First of all, I cannot find any valid medical justification for Mr. Ackermann failing to wear his seatbelt. He could not clearly recall or articulate that supposed justification in his evidence, whether it was his frequency of urination or some other cause. In particular he could not link his motivations to the subsequent opinion offered by Dr. Carter.

[118] I am also satisfied that he did not communicate this condition to the Martens at the time of the trip. They refused to adopt during cross-examination the portion of their statements to the adjusters that implied that they were aware at that time, and quite straightforwardly admitted that it was not true. Certainly their willingness to provide information that was at best misleading in terms of its chronology (Mr. Martens also added the detail that Mr. Ackermann "crouch[ed] to the right" to his

statement based on what Mr. Ackermann told him, even though he had not seen it), and the existence of Ms. Martens' lawsuit against Mr. Ackermann, dictate caution when assessing their evidence. But Ms. Martens' description of the discussion with Mr. Ackermann that led them to put the seatbelt explanation in their statements seemed to me like an unforced narration of actual events. Significantly, she included her husband being motivated by worry about his own liability as the driver, rather than putting all of the responsibility on Mr. Ackermann. And I think it would have been illogical for her to direct Mr. Ackermann to wear the seatbelt, an aspect of her testimony that was not challenged and for which she endured some criticism from her husband, if the explicit medical excuse that they mentioned in their statements had really been given by him.

[119] I noted an absence of any hostility from either of them towards Mr. Ackermann, and an overall quite guileless approach to the giving of their testimony.

[120] I would not put any weight on the fact that Mr. Ackermann seems to have worn a seatbelt in his own post-surgery driving however. He explained that in a satisfactory way by reference to the beeping of the safety equipment in his car if he did not wear it and the short duration of the trips he took. His son Peter's previous observations and surprise about his failure to wear the seatbelt on this trip in light of those observations are not of much help either, since the questions posed to Peter did not deal specifically with the post-surgery period, and it was not disputed that this was Mr. Ackermann's first lengthy trip since the surgery.

[121] As to the relationship between the lack of seatbelt use and Mr. Ackermann's particular injuries, I think that the arguments of the parties on this issue are really reflecting different aspects of the same governing principle. Where the mechanism of injury and its link to the lack of restraint of the plaintiff within the vehicle is obvious, as in the cases relied on by the defendants, it will be possible to draw the clear factual inference that presents itself, without requiring the assistance of an expert opinion. Where the dynamics of the accident are more complex and the source of

the plaintiff's injuries within the sequence of events is less clear, the causative role of their failure to wear the seatbelt may not be a finding that can be made solely on the basis of common sense. In certain situations, like *Terracciano*, even expert evidence may not be specific enough to meet the defendants' onus.

[122] I feel comfortable finding on the basis of the current evidence that Mr. Ackermann would not have ended up in the front passenger seat with Ms. Martens if he had been wearing his seatbelt. Where I conclude that the defendants fall short is my ability to be satisfied on a balance of probabilities that his wrist injury would not have occurred, or not been as severe. We do not know, because Mr. Ackermann could not describe it, where in the course of the accident his wrist was injured. We know, because it was Ms. Martens' evidence and the basis of her injury claim, that some part of his body struck her shoulder, but no specific probable mechanism of injury to him emerges. And balanced against the theory that it occurred due to his ejection from his position is his evidence that he bent down and covered his head before impact, which adds a reasonable possibility that his wrist was injured when he was still in a position to which a seatbelt would have confined him. I think a resolution of this question to the required standard would have required some evidence of the post-accident dynamics of a person in Mr. Ackermann's location and bodily position, with and without the seatbelt, and an attempt to link his wrist injury with his likely route of travel to his resting position.

[123] On the current evidence I conclude that the defendants have not met their burden and I am therefore unable to attribute fault to Mr. Ackermann for his injuries to any degree.

b. Non-pecuniary Damages

[124] The principles that should guide an award under this heading are not controversial.

[125] The purpose of non-pecuniary damages is to compensate a plaintiff for "pain, suffering, loss of enjoyment of life and loss of amenities": *Jackson v. Lai*, 2007 BCSC 1023 at para. 134.

[126] Among the factors that can influence the amount of the award are the age of the plaintiff, the nature of the injury, the severity and duration of the pain, and the degree of disability, emotional suffering and impairment of life experienced by the plaintiff, including impairment of their important relationships and lifestyle pursuits: *Stapley v. Hejslet*, 2006 BCCA 34, at para. 46.

[127] The amount of the award is driven by what is required to ameliorate the condition of plaintiff in their particular situation, and their need for solace may not necessarily correlate with the seriousness of their injury. Because of this need to recognize the specific circumstances, there can be no general “tariff” of awards: *Lindal v. Lindal*, [1981] 2 S.C.R. 629 at 637. Nevertheless, other decisions dealing with similar circumstances can serve as a guide in arriving at an award that is just and fair to both parties: *Kuskis v. Hon Tin*, 2008 BCSC 862 at paras. 135-136.

[128] Mr. Ackermann’s counsel characterizes him as having “a lifelong severe injury with resulting disability”. This has led to the loss of his sense of self-worth, as a result of his inability to do a job in which he took pride or to engage in many of the home-related tasks and family activities that used to give him pleasure. As a result, his counsel seeks an award of $150,000 under this heading, relying on the following recent decisions to justify that figure:

Case	**Relevant Circumstances**	**Non-pecuniary Damages**
Ishii v. Wong, 2015 BCSC 922	In the first of two accidents being dealt with in the trial, the plaintiff suffered fractures of a bone in his left wrist, two bones in his right forearm, and his right femur when a car turned left in front of his motorcycle. This required surgical repair and the insertion of hardware in all the facture areas. The judge found that he had permanent partial disability	$150,000 for the first accident

	to his dominant right wrist and pain and discomfort to his right leg with prolonged use.	
Zawadzki v. Calimoso, 2011 BCSC 45	The plaintiff was struck from behind by the defendant's truck as he was walking along the roadway. He suffered a serious injury to his elbow joint, requiring three surgeries and resulting in significant ongoing pain and permanent loss of function. In addition he suffered from sleep difficulties, anxiety and depression, and excessive alcohol use as a result of the accident. The judge found that the accident had "fundamentally changed" the plaintiff's life and had precluded him from engaging in the activities that had been the basis of his social life.	$180,000 (before deduction for the plaintiff's failure to mitigate)
Han v. Chahal, 2013 BCSC 1575	The plaintiff was struck in a crosswalk by a vehicle turning left at the intersection. She suffered a significant fracture of her left femur, in which the parts of the bone were completely separated from each other, and a fracture of her right wrist. She developed chronic pain in several areas of her body, in particular her left hip. She also had anxiety and depression.	$140,000
Gulati v. Chan, 2015 BCSC 431	This case involved another pedestrian being struck by a vehicle while in a crosswalk. She suffered a fracture of her upper arm, as well as soft tissue injuries, dizziness and mild hearing loss in one ear.	$150,000 (before deduction for the likelihood that the plaintiff would have developed arthritis due to previous accidents in any event)
Hanson v. Yun, 2013 BCSC 2313	The plaintiff suffered injuries to his dominant right shoulder, resulting in permanent pain, progressive deterioration and restricted function in the shoulder. He had become addicted to the narcotic medication required to manage his pain.	$120,000

[129] The defendants' submission is that while Mr. Ackermann's injury has certainly affected his life, it has not done so to a degree that justifies a "significant" award of general damages. As their counsel put it, Mr. Ackermann "still has significant use of his wrist, and while there are limitations, he is still able to work around the house, spend time with family and visit friends." Therefore he submits that an appropriate award should not exceed $50,000.

[130] The decisions offered by the defendants' counsel in support of this position are:

Case	**Relevant Circumstances**	**Non-pecuniary damages**
Miller v. 2085337 Ontario Ltd.(c.o.b. Hampton Inn by Hilton), [2014] O.J. No. 2622 (Sup. Ct. (Sm. Cl. Div.))	This was an occupiers liability case involving the plaintiff slipping on a mat at the entrance to a hotel. Her most serious injury was a broken wrist of her non-dominant hand. At the time of trial two years later she had "occasional" pain and some limitation of movement in the injured wrist, for which she had not sought medical attention.	$22,000
Abbott v. Glaim, 2013 BCSC 1723	Following an assault in which she was pushed down some stairs, the plaintiff suffered a fracture of her non-dominant left wrist and an injury to her jaw causing frequent headaches. Seven years later she experienced "occasional" difficulties with her wrist and was managing the jaw issue to reduce her headaches.	$35,000
Patoma v. Clarke, 2009 BCSC 1069	The plaintiff broke his left wrist when the bus in which he was riding braked suddenly. After two years the only remaining symptom was occasional cramping in the muscles of that had but during his recovery he had been prevented from engaging in a recreational activity that had great importance to him.	$38,000

Foley v. Imperial Oil Ltd., 2010 BCSC 797	This was another occupiers liability case, involving the plaintiff slipping on ice outside of the defendant's car wash. The most significant injury that the plaintiff received in the fall was a serious dislocation of his knee. Four years after the accident he continued to suffer low-level pain, instability of the kneecap and reduced tolerance for activities such as walking. It deprived him of the ability to engage in several activities that he had previously enjoyed.	$40,000
Thorp v. Gerow, 2008 BCSC 622	The plaintiff suffered a dislocation of his right elbow when the car he was a passenger in drove off the road. This led to a permanent partial disability. The trial judge found that because of the plaintiff's active lifestyle previously, the injuries had affected him more than they would have many others.	$50,000

[131] As can be seen, these two ranges of cases are quite polarized. In general the cases offered on Mr. Ackermann's behalf involve more numerous or serious injuries, or more serious after-effects and impact on the plaintiffs' functioning. Conversely, most of the defendants' cases do not feature as significant a duration or extent of impairment as he has suffered, although the circumstances in *Foley* and *Thorp* do reflect fairly substantial interference with those plaintiffs' previous lifestyles.

[132] I think that in this case Mr. Ackermann's circumstances demonstrate a meaningful requirement for solace, one that is greater than his physical injury might otherwise suggest. It was not contested that he was previously a person for whom the ability to interact physically with the world, and his identity as a "worker" in both his actual employment and his home life, were extremely important. The pain that is brought on by the use of his wrist is serious enough, but in my view a critical aggravating factor has been the comprehensive undermining of his sense of capability in the parts of his life that he otherwise found the most fulfilling. Even though he was rather stoic when giving his evidence, the overall sense he projected

of someone who has been cut adrift from the previous fundamentals of his life was still palpable.

[133] Taking care to distinguish these effects from the harm that has been caused to his earning capacity, which is of course to be dealt with separately, I conclude that an award of $90,000 under this heading is appropriate.

c. Past Wage Loss

[134] Mr. Ackermann's counsel submits that an appropriate award for past wage loss should be calculated based on a figure that falls between his actual annual earnings before the accident (once one adds back some of the deductions that he was able to claim through the business) and the somewhat higher average wage for a tile setter identified by Mr. Benning. It is argued that his earnings in the absence of the accident would likely have been higher than they were before it occurred, as the business grew and he was no longer spending time on his home renovation. This calculation would lead to an award of $205,000.

[135] The defendants' counsel challenges the income analysis that produced Mr. Ackermann's supposed actual income. First of all he says that the higher actual income that Andreas described during the pre-accident years failed to deduct their expenses for vehicles, capital cost allowance and home business expenses, which according to Andreas' evidence were actually incurred by the business during those years. Second, the departure of Peter and Matthias from part-time work to pursue their studies, which occurred before the accident, would have to have been replaced, at hourly wages of $20-$25 per hour for Peter and $10 per hour for Matthias. Thus, the level of subcontractor deductions shown in the pre-accident years would have continued, but would now actually have to have been paid to workers outside the family, thereby reducing the business' income. And to the extent that the average wage of a tile setter is a relevant consideration in identifying the amount of lost income, there is a conflict in the expert evidence called by

Mr. Ackermann. Mr. Trainor gave an average annual income of $34,668 and Mr. Benning said that it exceeded $50,000.

[136] In addition, the defendants' counsel questions whether there was actually any additional income-producing capacity in the business that would have been utilized if the accident had not occurred. The Ackermanns described themselves as being very busy before the accident and had already established their reputation for excellent work.

[137] A claim for what is often described as "past loss of income" is actually a claim for loss of earning capacity; that is, a claim for the loss of the value of the work that the injured plaintiff would have performed but was unable to perform because of the injury: *Rowe v. Bobell Express Ltd.*, 2005 BCCA 141 at para. 30.

[138] When assessing loss under this heading, past hypothetical events (that is, what a plaintiff would have earned but for the accident) are to be treated the same way as future hypothetical events — they are to be given weight in accordance with their relative likelihood. They do not have to be proven on a balance of probabilities: *Gill v. Probert*, 2001 BCCA 331 at para. 9.

[139] The generally accepted approach to assessment of claims for a loss of earning capacity is first to set the parameters of the claim by referring to statistical evidence with respect to the class of individuals to which the plaintiff belongs, and then to adjust the resulting preliminary measure of damages to take into account contingencies that are particular to the plaintiff: *Smith v. Fremlin*, 2014 BCCA 253 at para. 23.

[140] The importance of an accurate understanding of Mr. Ackermann's actual pre-accident earnings is obvious. If they are as low as his reported income, as the defendants contend, then there is a good reason to adjust the average earnings of a person in his position significantly downward in order to avoid over-compensating him.

[141] In resolving this issue it is important to note first that the credibility of Andreas' core assertion — that the business deducted significant amounts as subcontractor expenses for Peter and Matthias that he and his father actually received themselves — was not challenged. Nor were the specific yearly amounts that Andreas said they had attributed to his brothers.

[142] The argument that other expenses, which Andreas agreed they incurred, would have reduced their claimed earnings stumbles on the fact that in the statements of business income for Ackermann Installations, those expenses were all deducted before reaching the figure that Mr. Ackermann claimed as his business income.

[143] As to the effect in future years of the departure of Peter and Matthias from the business, no link was established in the evidence between their participation and the ability of the business to take on a particular number of jobs or earn a particular amount of income. For example, as Mr. Ackermann's counsel pointed out in his reply submissions, there was no increase in income during the year that Peter was working full-time. Andreas was clear that he needed to hire the subcontractor following the accident to replace his father's skill and labour. There was no suggestion that the operation of the business depended on replacing Peter and Matthias' contributions once they completed their schooling. The evidence suggests instead that this was seen by all concerned as a collective family endeavour, which they were expected to contribute to while they were available but which did not depend on their involvement for its ongoing capacity.

[144] As a result, I think it is reasonable to add half of the amounts that Andreas said were deducted for Peter and Matthias each year to Mr. Ackermann's share of the business income to arrive at his actual income.

[145] As to the earnings of the business in the absence of the accident, I am prepared to accept that Mr. Ackermann would also have reaped the benefits of the higher rates per square foot of tile laid and the higher hourly rates for labour that

Andreas now receives. However, it is difficult to assign a very high probability to the business growing in the manner that Andreas envisioned in his evidence, which seems largely to reflect his own ambitions. The fact that he now mainly works alone tends to suggest that the business is actually highly dependent on the skill of the individual tile setter, and not readily expandable through the use of crews. Without knowing what his solo business now earns it is difficult to identify with any confidence what the true additive effect of his father's participation was to the capacity and profitability of their former business, other than the efficiency gained from his ability to go and set up the next job while his father was completing the current one, and his general comments that he could not do as much work without his father and had to give up some jobs. The division of labour in Ackermann Installations made sense, because his father would not have been able to interact with English-speaking customers sufficiently, but there is a realistic possibility that Andreas has now largely combined their two roles and not much additional earning capacity has been lost because of his father's injury.

[146] All in all, I think that the figure proposed by Mr. Ackermann's counsel — the mid-point between average tile setter earnings and the actual earnings as I have found them — fairly reflects the rate increases that the business would certainly have commanded in the years since the accident (and which Andreas now enjoys in his own business) without indulging in speculation about business growth. Accordingly I will award $205,000 under this heading. The deductions required by the *Insurance (Vehicle) Act* were already included in the average and actual earnings that Mr. Benning calculated, so no further deduction from this award needs to be made.

d. Future Earning Capacity

[147] As in the case of past income loss, Mr. Ackermann's counsel submits that an award for impairment of future income capacity should fall between the projections based on his actual income in the pre-accident years and those based on the average income of tile setters, on the basis that he would have worked full-time until

75. This would lead to an award of $560,000. His evidence clearly indicates that he would have worked “well into his 70s” like his father, so in his counsel’s view that projection of earnings into his later years is appropriate.

[148] His counsel also submits that it is doubtful that Mr. Ackermann has any residual capacity to earn income that would reduce the award. His current English skills are insufficient for any jobs involving customer service and it could be two to four more years before he reaches that level, according to Ms. Turigan. In addition to the significant barrier to his employment raised by his language ability, other barriers identified by the vocational witnesses who testified are his time out of the workforce, his age, his lack of education and computer skills, and the injury to his dominant hand.

[149] Even Dr. Powers, whose more optimistic opinion I am urged to treat with caution, conceded that these barriers to employment exists and that in particular Mr. Ackermann’s time off from working by the time his language skills reach an acceptable level will make his return difficult.

[150] The defendants’ counsel takes serious issue with these propositions.

[151] On the length of Mr. Ackermann’s remaining career as a tile setter if he had not been injured, the submission is that it is unrealistic to project that he will work to any extent as a tile setter until age 75, in view of the physically demanding nature of the work and the medical issues that exist independently of the wrist injury, such as his diabetes and high blood pressure. The only evidence in support of such a degree of longevity came from Mr. Ackermann and his sons’ subjective impressions of his continuing health and strength. It is also noteworthy that there are no statistics showing anyone working as a tile setter at that advanced age.

[152] On the question of what other employment Mr. Ackermann is capable of doing, the defendants’ counsel sought first to emphasize the meaningful degree of right wrist function that he retains and the fact that the medical experts and the occupational therapists who evaluated his capacity concluded that he is capable of

returning to positions that are sedentary or require only “light strength”. He can use his left wrist for greater strength and could improve his functioning with his right hand with a wrist brace.

[153] The defendants also stress the prospect of continuing improvement in Mr. Ackermann’s language skills, which will increase the range of his job opportunities. They point to Dr. Powers’ opinion that with employer accommodations and vocational rehabilitation he could earn $13-15 per hour. Such a job would completely replace the lost income from tile setting at Mr. Ackermann’s declared income, and even a minimum wage job would contribute about $11,000 per year. Dr. Powers has previously found work for people with a similar range of challenges.

[154] Their counsel pointed out that even Mr. Trainor, the expert in vocational rehabilitation called by Mr. Ackermann, conceded that if his English improved sufficiently he could, with a sympathetic employer, work as a security guard or driver (bus, truck or delivery).

[155] The governing principles in this area are well known. They were concisely summarized in *Morgan v. Galbraith*, 2013 BCCA 305 (I have omitted the points that do not relate to our circumstances):

> [24] As this Court noted in [*Perren v. Lalari*, 2010 BCCA 140], at para. 32…where a plaintiff …claims a loss of earning capacity, the onus is on the plaintiff to prove that there is a substantial possibility of an event occurring, which will result in a loss of earnings:
>
> > A plaintiff must <u>always</u> prove, as was noted by Donald J.A. in *Steward* [*Steward v. Berezan*, 2007 BCCA 150], by Bauman J. in *Chang* [*Chang v. Feng*, 2008 BCSC 49], and by Tysoe J.A. in *Romanchych* [*Romanchych v. Vallianatos*, 2010 BCCA 20], that there is a real and substantial possibility of a future event leading to an income loss. If the plaintiff discharges that burden of proof, then depending upon the facts of the case, the plaintiff may prove the quantification of that loss of earning capacity, either on an earnings approach, as in *Steenblok* [*Steenblok v. Fung* (1990), 46 B.C.L.R. (2d) 133 (C.A.)], or a capital asset approach, as in *Brown* [*Brown v. Golaiy* (1985), 26 B.C.L.R. (3d) 353 (S.C.)]. The former approach will be more useful when the loss is more easily measurable, as it was in *Steenblok*. The latter approach will be more useful when the loss is not as easily

> measurable, as in *Pallos* [*Pallos v. Insurance Corporation of British Columbia* (1995), 100 B.C.L.R. (2d) 260 (C.A.)] and *Romanchych*…
>
> [Emphasis in original.]

[156] There is no dispute that to the extent that Mr. Ackermann's earning capacity is dependent on his ability to work as a tile setter in the future it has effectively been extinguished by his injury. The evidence is clear that he cannot do that job. The important question is whether he retains the capacity to work in other fields and whether he can earn sufficient amounts that it can either be said that there is not a real and substantial possibility of a future event leading to an income loss, or that any such loss is much less serious than the level at which he seeks to quantify it.

[157] I am satisfied that Mr. Ackermann's age, the pace at which he is mastering English, his level of education, his previous dependence on his physical capabilities and his time out of the workforce all combine to make placing him in any job a daunting task. In this regard I found Dr. Powers' opinions quite unrealistic. When his assumptions about how well Mr. Ackermann could speak English after being in Canada since 2004 proved unwarranted, he sought to shift his ground and maintain that Mr. Ackermann's current language proficiency level would allow him to have productive customer interactions in the jobs that were being proposed for him. I found Ms. Turigan's view that Mr. Ackermann's language skills would not currently permit him to engage in that kind of activity much more persuasive.

[158] And even if Dr. Powers found Mr. Waldie's vocational rehabilitation efforts lacking, he was not in a position to address Ms. Wright's actual job searches on Mr. Ackermann's behalf, which failed to secure even a volunteer opportunity in any business setting. That struck me as the best evidence of the enormity of challenge that Mr. Ackermann actually faces. I find it hard to believe that she somehow overlooked the numerous promising local employers that Dr. Powers said he was able to identify.

[159] I accept that Mr. Ackermann's prospects may improve if he is able to progress higher in the language levels. But that improvement in his attractiveness as an

employee will be offset by the resulting increase in his time out of the workforce and his age, which were generally conceded to be detrimental factors.

[160] I conclude that the possibility of Mr. Ackermann obtaining paid employment in the future is so low that his remaining earning capacity must be considered minor at best. If he does become employed I predict that at best he is looking at entry-level service-type jobs, with virtually no possibility of replacing his pre-accident income.

[161] In this case we have reliable enough information about his past earnings to use that as the basis for quantifying his loss of capacity under this heading. Average tile setter wages decline to $24,000 per year for workers between 60 and 65 and as I have said there are no income statistics at all after that, so the average wages are no longer useful for setting a reasonable mid-point for any award, as they were for past income loss.

[162] The question then becomes: how long a working life if that accident had not occurred should the award reflect? The length of Mr. Ackermann's father's working life obviously does not help me determine what his own physical capacity to continue as a tile setter likely would have been, since that is dependent on such a variety of factors, but it does shed light on his attitude towards work and its crucial role in his self-image, which are useful predictors of his intention to keep working. I accept his evidence that he had no retirement plan other than to keep working as a tile setter, and I am satisfied that he would have done so as long as he was physically capable of it. The evidence as a whole describes a person whose pre-accident life was really all about working. But even the strongest work ethic, which I am satisfied he has, cannot overcome the progressive effects of aging, and the defendants' counsel did a good job of establishing the physical demanding nature of tile setting, which I am satisfied that Mr. Ackermann would have had increasing difficulty carrying on at the same pace, even if he had kept at the job. In other words, I think that effective part-time work and earnings would have been forced on him eventually by diminishing capacity rather than by a wish to cut back. That may explain why Mr. Hildebrand's statistics did not include any tile setters in the higher age range. I foresee that this

reduction would have occurred progressively, through a slowing in his productivity and a decline in the number of jobs he could take on, rather than by a conscious decision to work half-time at a fixed point.

[163] I do not think that his current health problems, which are fairly common and appear to be well-managed, require any adjustment of this forecast. The evidence from his urologist was that his cancer was effectively dealt with. His elevated heart rate during functional testing was not linked to any medical evidence, so I cannot give it any weight as an indication of his health prospects. The usual statistical probability of disability or death in each year is already built into the economists' projections.

[164] As is well-known, an award under this heading must be assessed rather than mathematically calculated (see *Uhrovic v. Masjhuri*, 2008 BCCA 462 at paras. 28-32), but it still needs to be realistically anchored in as much information about earnings as is available. To that end, I think it would be helpful to recall the future projections of each of the expert economists, on the earnings that they assumed:

Mr. Benning:

- $48,000 per year in 2013 dollars, working full-time to age 65 and part-time from 65 to 75: $404,550;
- $48,000 per year in 2013 dollars, working full-time to age 65: $559,388.

Mr. Hildebrand:

- $26,175 per year, full-time to 65: $130,041;
- $26,175 per year full-time to 70: $230,897;
- $26,175 per year full-time to 65 and part-time from 65 to 70: $180,469.

[165] I find that Mr. Benning's first scenario (working full-time to age 65 and part-time from 65 to 75) most closely matches the working life for Mr. Ackermann that would likely have occurred in the absence of the accident, except that I think that his earnings would have begun to decline at around age 65, rather than being reduced immediately by half, and then decreased gradually to zero, or close to it, by age 75. I think Mr. Benning's figure remains accurate however, since in the years between 65 and 75 he probably would have spent roughly equal amounts of time earning above and below the half-time figure as those earnings declined.

[166] His minor remaining earning capacity justifies only a correspondingly minor reduction of Mr. Benning's figures. I conclude that a 5% reduction roughly captures what remains.

[167] As a result, the award under this heading will be $385,000.

e. Failure to Mitigate

[168] A plaintiff in a personal injury action has a positive duty to mitigate their loss, but if a defendant's position is that a plaintiff could reasonably have avoided some part of it, the defendant bears the onus of proof on that issue: *Graham v. Rogers*, 2001 BCCA 432 at para. 35.

[169] The defendants' counsel submits that Mr. Ackermann failed to act reasonably to mitigate his loss in several respects. He took two years to start English classes and did not attempt to accelerate his progress once he began them by practising with any of the English-speakers in his family. He has not attempted to upgrade his computer skills, which are close to non-existent, he has not called on his network within the German community of Kelowna for job prospects and he did not follow up on any of the information and support that he received from Mr. Waldie, until he started seeing Ms. Wright just before trial.

[170] The position on behalf of Mr. Ackermann is that he took a reasonable amount of time to try to recover sufficiently to try to return to tile setting. Since it became

apparent that this was no longer a realistic goal he has taken extensive English instruction and worked with two vocational specialists, to no avail.

[171] In my opinion, no failure to mitigate has been shown. In this case the defendants caused injury to a man in late middle age, with little formal education and virtually no English, who was entirely dependent on his physical capacity to earn a living. What would have been reasonable for him to do to improve his situation after receiving the injury must be determined in light of those factors.

[172] I am unable to find that the time between the accident and the beginning of Mr. Ackermann's efforts to prepare himself for other forms of employment was unreasonable. That period contained his failed efforts to return to tile setting, the dates of which were not defined precisely in the evidence, and I am satisfied that it would have taken some additional time following that failure to come to the realization that he was not going to be able to do any physical jobs that involved the repeated use of his right hand — that is, everything he had done in his working life until then — and would need to embark on a completely different career path.

[173] If Mr. Waldie's assistance did not follow the best practices of vocational rehabilitation, as Dr. Powers suggested, I am not sure how Mr. Ackermann could have known that, and it is unrealistic to suggest that he should have sought out alternative advice. He was certainly fully cooperative with both Mr. Waldie and Ms. Wright's suggestions.

[174] I also cannot put much weight on Mr. Ackermann's failure to access job prospects within his language communities. It must be kept in mind that such prospective employers would have had to (1) speak his language, (2) have a suitable vacancy or be willing to employ him despite being surplus to requirements, and (3) be sympathetic to his lack of immediately-applicable skills and experience. Mr. Waldie certainly had no success with that approach. I have already found that Ms. Wright's efforts, which were directed to the very modest goal of helping Mr. Ackermann obtain a community-based volunteer position, are the best measure

of what is actually out there for him, and I am not satisfied that calling on linguistic or ethnic connections would have made any appreciable difference to that situation.

[175] Nor were his computer skills shown to be one of the main barriers to gaining new employment, so I can see no particular significance in his failure to upgrade them.

[176] Finally, the evidence is clear that he has been diligent in pursuing his English training. If speaking English at home would have helped him with his progress, which common sense suggests it might have, it has not been shown to what degree or, more importantly, that he would now be at a different LINC/CLB level or would be better able to perform a customer service job than he currently is.

f. Cost of Future Care

[177] This was a fairly lightly-documented aspect of the case. I think that Dr. Powers' recommendation of further vocational counselling (25-30 hours at $100 per hour) is reasonable, to take maximum possible advantage of Mr. Ackermann's very limited remaining future earning capacity.

[178] The orthopedic surgeon, the plastic surgeon and Ms. Morris, the defendants' occupational therapist, all say that a wrist brace would be beneficial and Ms. Morris has identified a more suitable one than the one that Mr. Ackermann has struggled with. As I have said, this may be the same brace that he said he was contemplating purchasing for $700. The use of such a brace makes perfect sense and the expense should be allowed.

[179] Anti-inflammatory medication was recommended by the orthopedic surgeon in his report. Mr. Ackermann's counsel also submits that an allowance for household tasks at home that he can no longer do himself would also be reasonable. However, in the absence of evidence of the amounts of these supports that will be required over his life expectancy and their costs, I do not feel comfortable speculating about them to the defendants' detriment.

[180] I will therefore award $3,700 under this heading.

g. Special Damages

[181] These were admitted by the defendants, in the modest amount of $109.60.

4. CONCLUSION

a. Summary

[182] In summary, I award the following:

• Non-pecuniary Damages:	$90,000.00
• Past Income Loss:	$205,000.00
• Impairment of Future Earning Capacity:	$385,000.00
• Future Care	$3,700.00
• Special Damages:	$109.60
TOTAL:	**$683,810.00**

b. Costs

[183] In the absence of any other considerations, I would say that Mr. Ackermann has had substantial success in this trial and should receive his costs at the ordinary scale of difficulty. However, if there are matters affecting costs that need to be raised, the parties should arrange a hearing date or a schedule for making written submissions, as they prefer.

The Honourable Mr. Justice T.A. Schultes