

CITATION: Morris et al. v. Prince et al. 2023 ONSC 3922
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DATE: 2023/07/10

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:)
)
Colin Morris, Ryan Wagner, Belinda)
Armstrong and Jeni Gauthier) M. Dale and C. Sutherland, for the Plaintiffs
)
Plaintiffs)
)
– and –)
)
Michael Prince and The Corporation of the)
City of London) G. Belch, D. Popadic and G. Smith, for the
Defendants) Defendant, The City of London
)
) T. McCarthy and F. Benedetto, for the
) Defendant, Michael Prince
)
– and –)
)
Ian Ochitwa, Kelley Stapylton, Guild)
Electric Ltd. and Langley Utilities) T. Lidakis, for the Third Party, Guild
Contracting Ltd.) Electric Ltd.
)
Third Parties) **HEARD (via video-conference):** January
) 24 – 28, 31, February 1 – 4, 7, 9 – 11, 23 –
) 25, 28, March 2 – 4, June 6, October 27 –
) 28, 2022.

REASONS FOR JUDGMENT

MITCHELL J.

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INTRODUCTION AND OVERVIEW OF THE CLAIM

- [1] In this personal injury action, the plaintiff, Colin Morris (“Colin”), claims damages resulting from injuries suffered when he was struck by a motor vehicle while crossing Fanshawe Park Road West at its intersection with Aldersbrook Gate in the City of London (the “intersection”).
- [1] Colin’s partner and common-law spouse, Ryan Wagner (“Ryan”), sister, Jeni Gauthier (“Jeni”), and mother, Belinda Armstrong (“Belinda”), seek damages for loss of care, companionship and guidance pursuant to the provisions of the *Family Law Act* (the “*FLA*”)¹.
- [2] On December 21, 2015 Colin resided with Ryan in their home near the intersection. Colin was 42 years of age. On that evening, Colin was heading home from work. As he was walking northbound along the pedestrian crosswalk on the west side of the intersection, Colin was struck by a pickup truck driven by the defendant, Michael Prince, as the vehicle was turning left (west) from Aldersbrook Gate onto Fanshawe Park Road.
- [3] At the time of the collision, the sun had set; a light rain was falling; the truck’s driver-side window was tinted; and the pole, supporting a traffic signal and two overhead lights ordinarily present on the centre median of the west pedestrian crosswalk, was missing. This missing joint-use pole had been knocked down (and not replaced) a month prior in an unrelated motor vehicle accident.
- [4] Mr. Prince was charged under s. 142(1) of the *Highway Traffic Act* (the “*HTA*”) with making an unsafe turn, pleaded guilty and was convicted. Mr. Prince was further charged under s. 73(3) of the *HTA* with having unsafe tinting on his truck windows. This latter charge was ultimately withdrawn.
- [5] In the main action, the plaintiffs claim in negligence against Mr. Prince and the Corporation of the City of London (the “City”). Mr. Prince and the City have crossed-claimed against one another seeking contribution and indemnity. In the third party action, the City claims against Ian Ochitwa, Kelley Stapylton, Langley Utilities Contracting Ltd. (“Langley”) and Guild Electric Ltd. (“Guild”) (collectively, the “Third Parties”) alleging breach of contract and negligence. In a separate third party action, Mr. Prince claims against the Third Parties for contribution and indemnity alleging negligence. Before the trial commenced, the third party claims were dismissed against all but Guild.
- [6] Mr. Prince has conceded his negligence and admitted his guilt to breaking the law which required that he, as a driver of a motor vehicle on the Province’s roadways, execute turns safely. He has admitted partial responsibility for the losses suffered by Colin.
- [7] None of the parties advances a claim against Colin for contributory negligence.

¹ R.S.O. 1990, c. F.-3, as amended.

THE ISSUES

[8] The issues to be decided in this case are:

1. By virtue of the two missing luminaires on the median, did the City fail to maintain the intersection in a “state of repair” thereby breaching its duty of care owed to users of its roads?
2. If the answer to Issue 1. is “yes”, was the intersection deemed to be in a “state of repair” by virtue of the minimum maintenance standards provided for in regulations enacted under the *Municipal Act, 2001*² (the “MMS”)?
3. If the answer to Issue 2. is “no”, did the state of non-repair of the intersection cause Colin’s injuries?
4. Is Guild liable for any portion of the damages for which the City is liable?
5. If the City and/or Guild are liable for the losses suffered by Colin, what is the apportionment of liability between and among Mr. Prince, the City and/or Guild, as the case may be?
6. What is the quantum of damages to which the plaintiffs are entitled arising from the injuries suffered by Colin in the collision?

[9] Issues 1-5 relate to the issue of liability. Issue 6 relates to the issue of damages. Each issue will be addressed separately.

POSITIONS OF THE PARTIES

A. Position of the Plaintiffs

[10] With respect to the City’s liability, the thrust of the plaintiffs’ position is: “more light at the intersection would have been better”. More light would have allowed Mr. Prince to detect Colin in the crosswalk earlier. Earlier detection would have provided Mr. Prince with more time to stop. With more time to stop, Mr. Prince would have avoided hitting Colin with his vehicle. In other words, if Mr. Prince had seen Colin, Colin would not have been injured.

[11] The plaintiffs submit that Mr. Prince was an attentive driver although concede that in executing his turn Mr. Prince was not a “perfect” driver. The plaintiffs further submit that Mr. Prince’s admitted “imperfection” (i.e., negligence) was not the only cause of the collision. The plaintiffs contend the City also owed a duty to ensure the road was in a state of repair and breached its duty by failing to repair and replace the missing luminaires on the median in a timely manner.

² R.S.O. 1990, c. 25 (the “*Municipal Act*”).

- [12] With respect Guild's liability, the plaintiffs submit that, having contracted with the City for the timely replacement of light standards, Guild owed a legal duty to comply with its contractual obligations for repair and replacement of the luminaires on the median in a timely manner. Guild breached its legal duty by failing to maintain sufficient inventory of joint-use poles to ensure compliance with its contractual obligations. Specifically, Guild was negligent in sending the inventory of poles earmarked for the City elsewhere. The plaintiffs submit Guild breached its duty of care owed to both Mr. Prince and Colin as users of the City's roadways and crosswalks, respectively.
- [13] The plaintiffs and Mr. Prince both contend the City is responsible for Guild's negligence because ensuring the safety of the City's roadways is a non-delegable duty.
- [14] The plaintiffs ask that their damages be apportioned between Mr. Prince, on the one hand, and the City and Guild, collectively on the other, 55/60% and 40/45%, respectively.

B. Position of Mr. Prince

- [15] The plaintiffs and Mr. Prince are aligned in their position with respect to the City's liability. Additionally, Mr. Prince commenced a separate third party action against Guild claiming Guild owed a duty to Mr. Prince, as a user of the City's roadways, independent of any liability flowing from the breach of its contract with the City.

C. Position of the City

- [16] The City acknowledges its duty to maintain its roadways in a state of repair; however, denies being in breach of its duty. The City contends Mr. Prince is solely responsible for the plaintiffs' damages for the following reasons:
1. The intersection was in a state of repair at common law or deemed to be in a state of repair by virtue of the regulations. The roadway and, in particular, the intersection were not unlit. Six overhead luminaires (streetlights) arrayed around the intersection were functioning and illuminated the intersection, such that an attentive driver would have avoided colliding with Colin.
 2. The MMS deem the luminaires to be in a "state of repair."
 3. If the MMS do not apply, the condition of non-repair did not cause Colin's injuries because even without the source of light provided by the missing median luminaires, the headlights on Mr. Prince's vehicle provided sufficient light in time for Mr. Prince to react and stop his vehicle before the point of impact.
 4. Reasonable drivers in Ontario are required by law to ensure that, *before* making a turn, they can do so safely. By pleading guilty, Mr. Prince admitted he failed to ensure he could turn safely *before* executing his left turn onto Fanshawe Park Road.
- [17] In summary, the City maintains that it is not liable for the collision and Colin's resulting injuries because the intersection was in a state of repair at the time Colin was struck. Even

if the roadway was, at common law, in a “state of disrepair” due to the missing median light standard, by virtue of the MMS, the roadway was deemed to be in a “state of repair”. Furthermore, even if the deeming provision does not apply, the intersection’s state of non-repair did not cause the collision.

D. Position of Guild

[18] Guild adopts the position of the City in defence of the plaintiffs’ claims. In addition, Guild defends the claims of Mr. Prince arguing its liability, if any, cannot exceed and does not exist independent of the City’s liability. Furthermore, Guild denies it is in breach of the terms of its contract with the City for the repair and replacement of the joint-use pole on the median and, therefore, the City cannot rely on the indemnity provision contained therein.

LIABILITY - ANALYSIS

A. The Law Applicable to the Duty of Care of a Municipality

[19] Before addressing the specific liability issues in this case, it is important to set out the general statutory scheme and corresponding analytical framework applicable to assessing a municipality’s liability generally and, specifically, the City’s liability in this case.

[20] Section 44 of the *Municipal Act*, codifies the common law and imposes a duty of care and provides for a remedy as follows:

44. (1) The municipality that has jurisdiction over a highway or bridge shall keep it in a state of repair that is reasonable in the circumstances, including the character and location of the highway or bridge.

(2) A municipality that defaults in complying with subsection (1) is subject to the *Negligence Act*, liable for all damages any person sustains because of the default.

[21] In addition, subsections 44 (3), (4) and (5) are also relevant to the analysis:

(3) Despite subsection (2), a municipality is not liable for failing to keep a highway or bridge in a reasonable state of repair if,

(a) it did not know and could not reasonably have expected to have known about the state of repair of the highway or bridge;

(b) it took reasonable steps to prevent the default from arising; or

(c) at the time the cause of action arose, minimum standards established under subsection (4) applied to the highway or bridge and to the alleged default and those standards have been met.

(4) The Minister of Transportation may make regulations establishing minimum standards of repair for highways and bridges or any class of them.

(5) The minimum standards may be general or specific in their application.

[22] In *Fordham v. Dutton-Dunwich (Municipality)*³ at para. 26, the Court of Appeal laid out the four-step test for analysing a cause of action against a municipality for non-repair:

1. Non-repair: the plaintiff must prove on a balance of probabilities that the municipality failed to keep the road in question in a reasonable state of repair.
2. Causation: the plaintiff must prove the “non-repair” caused the accident.
3. Statutory Defences: Proof of “non-repair” and causation establish a *prima facie* case of liability against a municipality. The municipality then has the onus of establishing that at least one of the three defences in s. 44(3) applies.
4. Contributory negligence: a municipality that cannot establish any of the three defences in s. 44(3) will be found liable. The municipality can, however, show [another defendant]’s driving caused or contributed to the plaintiff’s injuries.

B. State of Repair

[23] To determine whether the intersection was in a reasonable state of repair at the time of the collision depends on the conditions present in the intersection affecting Mr. Prince’s ability to detect Colin in the crosswalk. Relevant to the issue, is the evidence relating to:

1. Colin’s Movements;
2. Colin’s Clothing;
3. Mr. Prince’s Movements;
4. The Weather;
5. Window Tinting;
6. Detection of Colin/Levels of Illumination.

Colin’s Movements

[24] Colin has no memory of the events of December 21, 2015. He cannot recall standing on the southwest corner of the intersection nor can he recall activating the walk signal although he said it was his practice to do so at this particular crosswalk and had done so many times before. He testified that he believes it more likely than not he did so on December 21, 2015.

³ 2014 ONCA 891 (“*Fordham*”).

- [25] All experts assumed for purposes of their assessments, that Colin stepped off the curb and started walking north along the cross-walk immediately after the traffic light turned green and the walk signal was displayed on the north end of the crosswalk.
- [26] The experts assumed that Colin maintained a brisk walking pace as he travelled along the crosswalk.

Colin's Clothing

- [27] On December 21, 2015, Colin was dressed in dark clothing and wearing white running shoes.

Mr. Prince's Movements

- [28] At the time of the collision, Mr. Prince was 45 years of age and lived with his young family in a home located northwest of the intersection. Mr. Prince was familiar with the intersection and had travelled through the intersection many times prior to December 21, 2015. On that evening, Mr. Prince was driving home with his young daughter as a passenger in the rear seat of the vehicle.
- [29] Mr. Prince testified that at approximately 5:30 p.m. he was stopped in his vehicle at the intersection facing north. He was waiting for the traffic signal to turn green before proceeding to make a left turn into the west bound lanes of Fanshawe Park Road. He recalls that no vehicles were stopped in the southbound lanes of Aldersbrook Gate waiting to cross through the intersection.
- [30] Mr. Prince recalls being stopped at the intersection for approximately 1-3 minutes.
- [31] Mr. Prince testified that he specifically recalls looking for pedestrians standing on the southwest corner of the intersection while sitting in his vehicle waiting for the light to change. Mr. Prince says that despite looking towards the southwest corner of the intersection, he did not observe Colin.
- [32] Mr. Prince did not roll down his tinted driver's side window to assist him in surveying the intersection for pedestrians because he believed he had enough visibility through the tinted window to detect pedestrians standing on the corner.
- [33] Mr. Prince says he did not observe the pedestrian signal and could not recall whether it changed from a signal indicating "Don't Walk" to a "Walk" signal.
- [34] Mr. Prince began executing his left turn from Aldersbrook Gate into the westbound lanes of Fanshawe Park Road approximately three (3) seconds after the traffic signal turned green. He recalls accelerating from 0 mph in the stopped position to approximately 15 mph (24 km/hr).
- [35] As his vehicle moved through the arc of the turn, Mr. Prince says he first observed Colin when his vehicle's headlights illuminated Colin as his line of sight moved from the tinted driver's side window to the un-tinted front windshield of his vehicle.

- [36] Immediately upon detecting Colin, Mr. Prince let off the accelerator and applied his brakes. He estimated that at impact he had decreased his speed to approximately 5 mph (8 km/hr) and that approximately 2 seconds elapsed from the moment he saw Colin to the moment of impact.
- [37] Following his guilty plea, Mr. Prince was convicted of the offence of making an unsafe turn contrary to s. 142(1) of the *HTA*. Section 142(1) provides:

A driver of a vehicle on a highway, before making a turn, including a turn from one lane for traffic to another lane for traffic, “shall first see that the movement can be made in safety.”

The Weather

- [38] Mr. Prince testified that at the time of the collision it was drizzling and foggy and the roads were wet.
- [39] Shortly after the collision, the traffic management unit (“TMU”) with the London Police Service (“LPS”) attended to complete a reconstruction of the collision. The weather conditions at the time of the reconstruction were approximately 7° above zero with a steady rain falling.

Window Tinting

- [40] Blair Jackson (“PC Jackson”) is a trained accident investigator with the LPS. He was assigned to lead the investigation into the collision and prepared a report which was filed as an exhibit at trial. He arrived on site at 20:44 on December 21, 2015 – several hours following the incident.
- [41] PC Jackson inspected Mr. Prince’s vehicle and observed that “the windows to the left and right of the driver were covered in a dark tint that significantly obscured the interior of the vehicle.”
- [42] Mr. Prince testified that he purchased the vehicle with the “after-market” window tint already applied to the driver’s side window. In the weeks following the collision, Mr. Prince removed the tint from the side windows of the truck. Mr. Prince explained that “so to avoid any further situations, [he] just had the tinting removed from the vehicle”. As a result, the experts retained by the parties were unable to conduct testing of the visibility through the tinted driver’s side window.
- [43] Mr. Prince believes that tint was not a factor in the collision. However, he acknowledged that the first time he observed Colin was through the front un-tinted windshield of the vehicle.
- [44] The plaintiff’s expert, Gordon Jenish, included in his report two photographs taken with his cell phone. One photo was taken through a tinted window and the other was taken with the tinted window lowered. He testified that both of the images closely replicated what he was able to see sitting in the driver’s seat of the exemplar vehicle. The photographs

indicate reduced visibility of the intersection through the tinted window as compared to visibility of the intersection with the window lowered.

Detection of Colin/Levels of Illumination

- [45] PC Jackson testified that other artificial lighting was working at the intersection, including on the northwest corner, the southwest corner, the median on the east side of the intersection and lighting along the north side of Fanshawe Road. He noted that the east side median had two functioning high-pressure sodium streetlights illuminating the east side of the intersection.
- [46] PC Jackson further testified that although the east-facing traffic control signal on the west median had been knocked down in an earlier accident, a temporary traffic control signal was in place and functioning properly.
- [47] Each of the parties retained a liability expert to provide an opinion on various issues including, among others, light levels in the intersection, the detectability of Colin and reaction times.
- [48] Mr. Jenish was retained by the plaintiffs. He testified as an expert qualified in the areas of assessment and technical reconstruction of the collision. He conducted an on-site inspection of the intersection. He tested the illuminating properties of headlights similar to those installed in Mr. Prince's vehicle. He also reconstructed the path and time of travel of Colin and Mr. Prince's truck to the point of impact.
- [49] Mr. Jenish testified that, in his opinion:
1. The point of impact was within the crosswalk near the lane divider line between the left and right westbound lanes.
 2. It took Colin 11 seconds to move from the southwest corner of the intersection to the area of impact.
 3. It took Mr. Prince eight seconds from the time that he began accelerating to reach the point of impact.
 4. The tint applied to Mr. Prince's driver's side window contributed to his inability to detect and avoid Colin.
 5. The absence of streetlights on the centre median resulted in lower light levels within the crosswalk at the time of the collision and contributed to Mr. Prince's inability to detect Colin.
 6. The missing luminaires on the median resulted in light levels in the west crosswalk at the point of the centre median being reduced from 11 lux to 2 lux at the time of the collision - an 82% reduction in light levels.

- [50] After reviewing the report of the City's expert, 30 Forensic Engineering ("30 Forensic"), Mr. Jenish concluded their estimation of the illumination effects of Mr. Prince's vehicle headlights had been overstated.
- [51] Hrycay Consulting Engineers Inc. ("Hrycay") was retained by Mr. Prince. James Hrycay was qualified as an expert in the areas of civil engineering, accident reconstruction, and associated human factors and kinetics.
- [52] Hrycay concluded based on their calculations and testing that:
1. The quantity of light in terms of illumination that was reaching the impact area was likely 61% to 78% less than what normally would have been present due to the missing luminaires on the median. The reduced level of light was a contributing factor to the collision.
 2. The point of impact was within the crosswalk at approximately the lane divider line for westbound traffic.
 3. Had Mr. Prince detected Colin: 3 to 4/10 of one second sooner, he likely would have had the necessary reaction time to avoid the collision.
 4. The lack of lighting from the missing luminaires was a contributing factor to the collision as it deprived Mr. Prince of the opportunity to see Colin earlier.
- [53] Hrycay did not opine on the effect of the tint on the driver's side window on Mr. Prince's ability to detect Colin. Furthermore, Hrycay did not assess the levels of light other than at the point of impact.
- [54] Mr. Hrycay was similarly critical of the estimates of headlight illumination and their illuminating effects as reported by 30 Forensic.
- [55] CEP Forensics ("CEP") was retained by Guild. David Porter was qualified as an expert in the areas of collision reconstruction, mechanical engineering and human factors and testified on behalf of CEP. Mr. Porter concluded as follows:
1. While Colin was walking across the eastbound lanes, Mr. Prince had to look through his driver's side window in order to see him. He would have been in this area when the vehicle started moving and for about 5.5 seconds to 7.0 seconds after the vehicle began moving.
 2. The light level in the crosswalk in the eastbound lanes was likely about 5 lux at the time of the incident.
 3. If there was no tint on the window of the vehicle, Colin was sufficiently illuminated to be visible to a left-turning driver.
 4. With the window tint in place, Mr. Prince still could have seen Colin although the presence of the tint would have caused the view to be much darker.

5. Mr. Prince had an opportunity to avoid the collision, had he looked through his driver's window for pedestrians as he proceeded into the intersection. This opportunity existed despite the missing luminaires on the median.

[56] Mr. Porter was critical of Mr. Hrycay's expert evidence. He explained that a simple quantification of the reduction in lighting levels at the point of impact in the absence of the luminaires does not address the critical issue of whether Colin was visible to Mr. Prince. Mr. Porter explained that, while the absence of the luminaires may have resulted in a lower level of lighting in the area of impact, this was not evidence probative of Mr. Prince's inability to detect Mr. Morris in the crosswalk with the reduced level of lighting.

[57] The City retained 30 Forensic to conduct a human factors assessment of Mr. Prince's opportunities to avoid the collision. On behalf of 30 Forensic, Dr. Adam Campbell, qualified as an expert in human factors, and Raffi Engeian, qualified as an expert in collision reconstruction and vehicle dynamics, both testified.

[58] To develop a profile of the illumination required to detect a dark object, Dr. Campbell utilized Interactive Driver Response Research (IDRR) software, developed by Dr. Muttart.

[59] They reached the following conclusions:

1. To avoid the collision, Mr. Prince needed to detect Colin as a collision hazard from approximately 11 metres or 2 seconds prior to impact. At this point in time, Colin was adjacent to the median separating eastbound and westbound traffic on Fanshawe Park Road and the Prince GMC was part-way through its left turn.
2. The point at which Mr. Prince was required to detect Colin in order to avoid the collision, Colin would have been sufficiently illuminated by the headlights of Mr. Prince's vehicle sufficient to be visible and detectable as a collision hazard to attentive drivers in Mr. Prince's position. Thus, Mr. Prince was presented with an opportunity to avoid the collision despite the absence of the luminaires.
3. In addition to the GMC headlights, additional sources of illumination were present including streetlights on the northwest and southwest corners of the intersection and natural light as well as the traffic signal on the median.
4. The point of impact was at the lane divider separating the two westbound lanes of traffic on Fanshawe Park Road. Mr. Prince could have avoided the collision had he executed a left turn into the westbound passing lane instead of crossing into the westbound curb lane as required by law.

[60] Dr. Campbell was critical of the analysis and assessment conducted by Hrycay because it was restricted to an assessment of lighting levels at the point of impact and did not consider the amount of lighting on the southwest corner or any other location along the crosswalk leading to the point of impact. Dr. Campbell is of the view that this type of analysis is critical to assessing what was available to be seen by Mr. Prince *before* the point of impact so as to avoid the collision.

- [61] Both CEP and 30 Forensic conceded that the presence of the missing luminaires would have cast additional illumination in the crosswalk and upon Colin as he moved toward the point of impact. Not surprisingly, these experts agreed with the logical proposition that increased illumination increases one's ability to detect an object.
- [62] The plaintiffs were critical of the opinions of the City's and Guild's experts claiming Dr. Campbell, Mr. Engeian and Mr. Porter did not conduct an on-site investigation nor did they conduct testing or modelling concerning the overall level of lighting within the intersection. The plaintiffs criticized their use of IDRR software, claiming it is theoretical modelling based upon a computer program attempting to estimate the lighting pattern cast by the headlights on Mr. Prince's vehicle rather than the headlights themselves.
- [63] In defence of his use of IDRR software, Dr. Campbell explained that IDRR is not theoretical rather is based on real physical measurements and real human response data. To assess at what point the collision was avoidable, Dr. Campbell assessed the extent of light needed to see Colin. He explained that he was unable to do any real-world direct observation because the type of bulbs in the luminaires had changed (high pressure sodium to LED) and the missing luminaires had been replaced. Instead, Dr. Campbell says he took a highly conservative approach to illumination and considered only headlight illumination.
- [64] Dr. Campbell concluded that, with only headlight illumination, Colin was visible and therefore capable of detection by Mr. Prince 2.7 seconds prior to impact. Two seconds was needed to avoid the collision. Accordingly, Mr. Prince had 0.7 seconds time to detect and respond once Colin was first visible in the crosswalk.
- [65] Mr. Porter and Dr. Campbell distinguished between the concepts of visibility and conspicuity. Mr. Porter explained that visibility refers to an object's ability to be seen. The concept of visibility does not involve gradations. That is, an object is either visible or it is not. Conspicuity refers to how obvious to the eye an object may be and how that object attracts the attention of the observer. An object can be more or less conspicuous but cannot be more or less visible.
- [66] Mr. Porter further explained that an increase in light levels does not increase an object's visibility. However, a reduction in light levels might reduce the ability of the object to be observed or detected. An ability to detect objects will increase with increased lighting or with increased contrast such as light clothing against a black background.

C. Factual Findings

- [67] In order to determine whether the intersection was in a state of repair at the time of the collision, certain factual findings are necessary. After having reviewed and considered the evidence, I make the following findings based on the uncontested evidence at trial:

1. Mr. Prince was stopped at the intersection facing north waiting for the traffic signal to turn green for 1 to 3 minutes.⁴
2. The southwest corner of the intersection is located to the west and slightly north of vehicles stopped at the intersection on Aldersbrook Gate facing north.
3. Colin approached the intersection and pressed the walk button thereby activating the timer for the walk signal.
4. The walk signal was illuminated simultaneous to the traffic signal light changing from red to green.⁵
5. Once activated, the walk signal would have been displayed on the northwest corner at the same time the traffic signal which Mr. Prince was facing, turned green.
6. Mr. Prince commenced his turn three (3) seconds after the light changed to green and Colin stepped off the southwest curb into the crosswalk.
7. Lowering the tinted driver's side window would have enhanced Mr. Prince's ability to detect Colin standing at the southwest corner and as Colin travelled along the crosswalk.
8. The sources of light in the intersection at the time of the collision included:
 - a. a single-use pole with one functioning luminaire on each corner of the intersection;
 - b. the headlights of the two (2) eastbound vehicles stopped at the west facing traffic signal⁶;
 - c. the headlights of Mr. Prince's vehicle;
 - d. a temporary traffic signal erected in the location of the missing joint-use pole on the median;
 - e. a low level of natural (atmospheric) light;

⁴ PC Jackson testified that approximately four seconds elapsed between the amber traffic light changing to red. There was no advanced green signal for any direction.

⁵ PC Jackson testified that once the walk signal is activated by a pedestrian, upon the light turning green, a "walk" symbol will illuminate on the northwest corner of the intersection.

⁶ Mr. Prince recalls that while he was stopped at the intersection waiting for the traffic light to turn green, eastbound traffic came to a stop. He agreed with the suggestion that the headlights of the eastbound traffic added some illumination to the intersection and the crosswalk area that Colin traversed.

- f. a joint-use pole with two functioning luminaires on the east median; and
 - g. the walk signal on the northwest corner and the traffic signal on the west side of the intersection above the north end of the west crosswalk.
9. Mr. Prince turned wide into the curb lane of the two westbound lanes of Fanshawe Park Road West rather than the lane closest to the median as required by law.
10. Mr. Prince did not detect the presence of Colin in the crosswalk until two seconds prior to the time of impact.
11. The time at which Colin was standing at the southwest corner of the intersection waiting for the walk signal to be activated overlapped with the time during which Mr. Prince was stopped in his vehicle waiting for the traffic signal to change from red to green.
12. Mr. Prince pleaded guilty to and admits all essential elements of the offence of failing to make a safe turn contrary to s. 142(1) of the *HTA*.

D. Issue Analysis

Issue #1: By virtue of the two missing luminaires on the median, did the City fail to maintain the intersection in a state of repair thereby breaching its duty of care owed to users of its roads?

[68] A municipality is not an insurer of the safety of the users of its roads and cannot be held to a standard of perfection. A municipality must keep its roads in a reasonable state so that users of the road may travel upon them safely. What constitutes a reasonable state of repair is fact-driven and varies from case to case.⁷

[69] The Ontario Court of Appeal in *Fordham*⁸, summarized the standard of care a municipality must meet in fulfilling its duty of reasonable repair as follows:

[28] In brief, a municipality has a duty to prevent or remedy conditions on its roads that create an unreasonable risk of harm for ordinary drivers exercising reasonable care. In other words, a municipality standard of care is measured by the ‘ordinary reasonable driver’. Ordinary reasonable drivers are not perfect drivers, they make mistakes. As Howden J. wrote in *Deering*, at para. 154:

In conclusion, I accept what have become the submissions of all counsel that road authorities have a duty to ordinary motorists to keep their roads in reasonable repair, including the type and location of the road. The standard of care uses as the measure of reasonable conduct the ordinary reasonable driver and the duty to repair arises wherever an unreasonable risk of harm

⁷ *Ferguson v. The Corporation of the County of Brant*, 2013 ONSC 435 (“*Ferguson*”) at para. 13.

⁸ *Supra*, at paras. 28-30.

exists on the roadway for which obvious cues on or near the road are not present and no warning is provided, subject to the defences of no knowledge and reasonable steps to prevent and minimum standards compliance. The ordinary motorist includes those of average range of driving ability – not simply the perfect, the prescient, or the especially perceptive driver, or one with exceptionally fast reflexes, but the ordinary driver who is of average intelligence, pays attention, uses caution when conditions warrant, but is human and sometimes makes mistakes.

[29] But -- and this is the important point for this appeal -- a municipality's duty of reasonable repair does not extend to making its roads safer for negligent drivers. In *Deering*, Howden J. made this point succinctly, at para. 142: "The standard of care for road authorities rests on the notion of the ordinary motorist driving without negligence".

[30] And again, at para. 155:

It is not the law in Canada that the duty of road authorities goes beyond the duty to keep their roads in reasonable repair for the ordinary driver exercising reasonable care, to include drivers who, for instance, do not pay attention, drive at excessive speeds, drive too close to the vehicle in front and who are otherwise negligent.

[70] A municipality has a duty to keep a roadway in a reasonable state of repair so that the users of the roadway, exercising ordinary care, may travel upon it safely. The municipality owes a duty of care to the ordinary driver, not the negligent driver.⁹ An ordinary driver is expected to adjust his or her behaviour according to the nature of the roadway and the driving conditions. If a driver does not, they cannot sustain an action for negligence against the municipality even where the conditions of a road present a hazard.¹⁰

[71] *Fordham* makes it clear that the City owed a duty to Mr. Prince to replace the missing luminaires within a reasonable time provided Mr. Prince was, at all material times, an ordinary driver exercising reasonable care.

[72] Mr. Dale's submissions focussed on the City's duty of care relative to Mr. Prince being an imperfect driver. Mr. Dale argued that Mr. Prince was not obligated to meet a standard of perfection. I agree. However, this submission does not address the issue to be resolved. I must decide whether Mr. Prince paid attention to his surroundings and otherwise exercised reasonable care in the circumstances. Attentiveness is not synonymous with perfection. While Mr. Prince need not be a perfect driver, he is required by law to be an attentive driver.

⁹ *Ferguson, supra*, at para. 16 citing *Housen v. Nikolaisen*, [2002] 2 S.C.R. 235.

¹⁰ *Ferguson, ibid.*, at para. 17.

- [73] To determine whether Mr. Prince was an ordinary driver exercising reasonable care in the execution of the turn, I must assess his evidence relevant to this material issue and determine what portion if any, I accept.
- [74] Mr. Prince testified that during the 1 to 3 minutes he was stopped waiting for the light to turn green: “he looked to [his] left, [he] looked to [his] right, in front of [him] so no one would – was crossing in front of [him]. [He] looked to [his] far corner where [he] was making the turn”. He said that despite actively scanning the intersection for pedestrians, he did not see Colin.
- [75] Both Mr. Prince’s counsel and plaintiffs’ counsel submit that Mr. Prince’s evidence is uncontroverted; was provided spontaneously to police immediately following the collision; and has remained consistent throughout these proceedings and, thus, bears the hallmarks of truthfulness. I am urged to find that Mr. Prince did, in fact, look toward the southwest corner while stopped at the intersection and am asked to further find that he actively scanned the intersection for pedestrians during execution of the turn. The plaintiffs and Mr. Prince argue that if I accept this evidence, I must conclude that Mr. Prince was an attentive driver and took all steps reasonably necessary to ensure the safety of his turn.
- [76] Mr. Prince’s evidence as to his attentiveness prior to and during execution of the turn is contradicted by certain of the undisputed findings of fact listed above, his own evidence and the expert evidence as follows:
1. Mr. Prince admitted his guilt (and negligence) to making an unsafe turn. The law requires that *before* commencing a left turn, a driver must “first see” that he can do so safely. The duty arises *before* the turn is commenced. In other words, the obligation on Mr. Prince to proceed safely arose before he began executing the turn when he was stopped at the intersection and long before he detected Colin. By his guilty plea, Mr. Prince admits he was negligent before commencing the turn, and that his negligence caused Colin’s losses.
 2. I found that during the time Mr. Prince was stopped at the intersection waiting for the traffic signal to change to green, Colin was standing on the southwest corner also waiting for the traffic signal to change to green. Mr. Porter concluded based on his assessment of the illumination levels at the southwest corner that Colin was visible and was “there to be seen”. He was of the opinion that if Mr. Prince had been looking in the direction of Colin when he was stopped at the intersection, Colin would have been visible and therefore detectible. Mr. Porter’s opinion was the same whether Mr. Prince was looking through a tinted window or had rolled the window down.
 3. Mr. Porter’s evidence is consistent with Mr. Prince’s own evidence. Mr. Prince testified that the lighting at the southwest corner was sufficient to observe any pedestrian at the corner thereby making it unnecessary for him to lower the tinted window.

4. During his three (3) second head start (while Mr. Prince remained stopped), Colin was a dark object moving along the south section of the crosswalk and travelling through the light produced by the headlights of the stopped eastbound traffic. He was wearing white running shoes which would have contrasted with his dark surroundings making him more conspicuous.
5. The walk signal was activated and was directly visible to Mr. Prince and in his line of sight through the un-tinted front windshield of the vehicle for a minimum of three seconds during which time Colin was moving north along the crosswalk. The walk signal provided a cue to Mr. Prince that a pedestrian was in the crosswalk.

[77] I do not accept Mr. Prince’s evidence that he looked towards the southwest corner of the intersection prior to commencing his turn and/or scanned the crosswalk for pedestrians before executing the turn. The light standard at the southwest corner was functioning and the level of illumination was sufficient to illuminate Colin making him visible to drivers stopped at the traffic light and looking in the direction of the southwest corner. Simply stated – Colin was there to be seen if Mr. Prince had looked in the direction of the southwest corner and/or scanned the crosswalk before starting his turn. Regrettably, I find he did neither.

[78] The plaintiffs relied on the decision in *Deering v. Scugog (Township)*¹¹ as support for the position that the absence of median lighting created a state of unrepair thereby imposing a duty of care on the City to repair the median lighting within a reasonable amount of time notwithstanding Mr. Prince’s negligence.

[79] The facts of *Deering* are distinguishable from the facts of this case. In *Deering* the trial judge found that the roadway under consideration had a unique feature namely “accident hill” which created a state of non-repair not visible to drivers unfamiliar with the roadway. This state of non-repair imposed a duty on the municipality to erect reduced speed markers and provide additional illumination to warn drivers of the pending, obscured hazard. Notwithstanding the defendant driver’s excessive speed which constituted negligence, the municipality was found liable for creating a condition of non-repair.

[80] In this case it would have been obvious to an attentive driver as they surveyed their surroundings while stopped at the intersection, that the lights on the median were missing thereby creating a potential hazard for pedestrians using the crosswalk. It should have been apparent to Mr. Prince, who was familiar with the intersection, that there was progressively less light in the section of the crosswalk north of the median over which he intended to cross during his left turn.

[81] I concur with the submission of the City that “an unlit road does not excuse poor driving”. Mr. Prince had a duty to Colin to be attentive and to exercise reasonable care before executing the left turn. He had an obligation to ensure the crosswalk was free of pedestrians in the area where he anticipated his vehicle would be crossing over during the arc of his turn. Unlike a situation involving an unmarked curve on a rural road (*Ferguson*) or an

¹¹ 2010 ONSC 5502 (“*Deering*”).

obscured hill (*Deering*), the low level of light in the crosswalk was an obvious potential hazard or should have been obvious to Mr. Prince had he been paying attention to his surroundings.

- [82] I find Mr. Prince had a duty to adjust the manner in which he executed the turn to account for the reduced visibility of objects in the north section of the crosswalk. Mr. Prince ought to have reduced his speed to allow for greater time to survey the crosswalk before proceeding and ought to have rolled down the driver's side tinted window to improve his ability to detect any pedestrians standing on the southwest corner and/or travelling along the crosswalk.
- [83] Having found that Mr. Prince did not check for pedestrians standing on the southwest corner and did not scan the crosswalk prior to commencing his turn, I conclude that Mr. Prince was not an attentive driver – he was a negligent driver. I arrive at this conclusion having regard to the standard of an attentive, careful and prudent driver. Such a driver would have adjusted the manner in which they executed their left turn taking into account their surroundings including the reduced level of lighting over the north section of the crosswalk.
- [84] I agree with the plaintiffs' simple proposition that "more light is better". However, acceptance of this simple proposition does not equate with a corresponding imposition of liability on the City as the party responsible for providing "more light" in the intersection. Unless the absence of lighting on the median equates with a "state of non-repair", the City is not responsible for Colin's losses.
- [85] The crosswalk was lit by multiple sources of illumination: two overhead luminaires positioned one at each end of the crosswalk, the headlights of the stopped eastbound traffic, natural atmospheric light, the illumination from the temporary traffic signal on the median and illumination from the headlights of Mr. Prince's vehicle.
- [86] Notwithstanding there was less light in the north section of the crosswalk because of the missing luminaires on the median, I find there was sufficient illumination from all other sources of light to have enabled an ordinary driver exercising reasonable care to detect Colin both while he was standing at the southwest corner of the intersection and while he traversed the crosswalk. Consequently, I find the intersection was in a reasonable state of repair.

Issue #2: If the intersection was in a state of disrepair because of the missing luminaires on the median, was the intersection deemed to be in a state of repair by virtue of the minimum maintenance standards provided for in regulations enacted under the Municipal Act, 2001?

- [87] In the event I have wrongly decided Issue #1, I will now review the available defences and in particular the City's ability to rely on the MMS as a complete defence.
- [88] Generally speaking, liability will result where the condition of the roadway gives rise to an unreasonable risk of harm to users of the roadway and the municipality fails to take

reasonable steps to eliminate or reduce the risk of harm within a reasonable time after it became aware or ought to have become aware of its existence.¹²

[89] Section 44 of the *Municipal Act* provides for a set of minimum maintenance standards. The MMS for municipal highways were enacted as a regulation under the *Municipal Act*, effective November 1, 2002.

[90] In *Giuliani v. Halton (Municipality)*¹³ the purpose of the MMS was described as:

[22] ...to provide a municipality with a defence even if it would be otherwise liable under the provisions of s. 44. Thus, if a municipality complies with the minimum standards, it is not liable even though it did not maintain a highway in a state of repair that is reasonable in the circumstances, knew or ought to reasonably have known of the faulty state of repair, and did not take steps to prevent the default. To use the common law language, a municipality is not liable for negligently failing to maintain a highway if it complied with the minimum standards that applied to its failure.

[91] The court must be mindful not to conflate the absence of median lighting with a positive statutory duty to provide median lighting. I was not made aware of any legislated duty owed by the City to users of its roadways/highways to provide median lighting at crosswalks. The MMS create a defence where it is established the City breached its duty to repair the median lighting in a reasonable time. The MMS do not establish a standard of care.

[92] Section 10 of the MMS deals with the minimum standard for luminaires (i.e., streetlights). On December 21, 2015, s. 10(1) read as follows:

For conventional illumination, if three or more consecutive luminaires on a highway are not functioning, the minimum standard is to repair the luminaires within the time set out in the Table to this section after becoming aware of the fact.

[93] Pursuant to clause 10(5)(a) of the MMS (as it read in 2015), luminaires are deemed to be in a state of repair for the purpose of subsection (1), if the number of non-functioning consecutive luminaires does not exceed two.

[94] Accordingly, it is a complete defence to the plaintiffs' claims and by extension the crossclaim of Mr. Prince for contribution and indemnity, if it is found that the number of non-functioning consecutive luminaires at the intersection at the time of the collision was less than three.

[95] The MMS were amended effective May 3, 2018 to provide as follows:

¹² *Gould v. County of Perth*, (1983) 42 O.R. (2d) 548 (Ont. H.C.) at p. 556; aff'd (1984), 48 O.R. (2d) 120 (Ont. C.A.).

¹³ 2011 ONCA 812 at para 22.

(6) Luminaires are deemed to be in a state of repair,

(a) for the purpose of subsection (2), if the number of non-functioning consecutive luminaires on the same side of a highway does not exceed two...

- [96] The plaintiffs submit that the addition of the language “on the same side of a highway” is a substantive change which cannot be relied upon by the City to support its position that it met the minimum standard for the repair of luminaires in force at the time of the collision.
- [97] I am not persuaded that the addition of this language is a substantive change affecting the rights of the parties. The definition of the word “consecutive” is:¹⁴ “following one after the other without an interruption”. The addition of the language “on the same side of the highway” in 2018 merely expands upon and clarifies the proper interpretation of the word “consecutive” in clause 10(5)(a) as it read in 2015. This additional language is consistent with the ordinary meaning of “consecutive”.
- [98] In this case, the two missing luminaires were located on a median within the intersection of two streets (i.e., “highways”). To support their position that more than two consecutive luminaires were non-functioning at the time of the collision thereby negating the defence, the plaintiffs point to the two non-functioning luminaires on the single-use pole located on the west end of the median approximately 50 m west of the intersection.
- [99] The non-functioning luminaires located on the west end of the median are not the subject of this litigation and were not considered by the expert witnesses for purposes of assessing their contribution towards the level of illumination in the crosswalk at the time of the collision. Moreover, the repair of these non-functioning luminaires was the responsibility of Langley not Guild. The third party claims against Langley were not pursued at trial.
- [100] I find that these non-functioning luminaires are not “consecutive” to the two non-functioning luminaires located on the east end of the median forming the subject matter of this litigation.
- [101] I further find that Aldersbrook Gate (not Fanshawe Park Road) is the “highway” under consideration for purposes of determining compliance with the MMS. Aldersbrook Gate runs north/south. Its direction is consistent with the direction of the crosswalk where the collision occurred. Both the luminaire on the southwest corner and the luminaire on the northwest corner of the intersection (i.e., the luminaire at each end of the crosswalk) were functioning at the time of the collision. These lights are “consecutive” to the two missing luminaires on the east end of the median.
- [102] As no more than two consecutive luminaires on Aldersbrook Gate were non-functioning, the MMS imposed no minimum standard of time within which the City was to repair the two missing luminaires on the median. In fact, the missing luminaires were deemed to be

¹⁴ *Cambridge Dictionary* (2020). Cambridge: Cambridge University Press.

in a “state of repair” on December 21, 2015 thereby providing the City with a complete defence to this action pursuant to s. 44(3)(c) of the *Municipal Act*.

Issue #3: Did the state of non-repair of the intersection cause Colin’s injuries?

[103] In the event I have wrongly decided Issues #1 and #2, I will now consider whether the plaintiffs have established that the state of non-repair (i.e., the City’s negligence) caused the collision.

[104] The test for causation is the “but for” test articulated by the Supreme Court of Canada in *Clements v. Clements*¹⁵ as:

The plaintiff must show on a balance of probabilities that ‘but for’ the defendant’s negligent act, the injury would not have occurred. Inherent in the phrase ‘but for’ is the requirement that the defendant’s negligence was necessary to bring about the injury -- in other words, that the injury would not have occurred without the defendant’s negligence.

[105] The plaintiffs submit that no matter how attentive a driver Mr. Prince may have been the night of December 21, 2015, the lack of median lighting caused him to strike Colin with his pick-up truck. I disagree. The crosswalk was not in complete darkness. As earlier noted in these reasons, there were multiple sources of illumination present in the crosswalk. I have found that Colin was visible and was “there to be seen”. Or stated another way, Colin was capable of detection while standing at the southwest corner; when he stepped off the curb; and while travelling along the crosswalk and immediately.

[106] It was the responsibility of Mr. Prince *prior to commencing the turn* to ensure he could do so safely. He admitted to making an unsafe turn and committing an offence. Had Mr. Prince conducted himself in the manner of a prudent and attentive driver before commencing the turn to ensure he could do so safely as required by law, the collision would not have occurred, notwithstanding that the missing luminaires on the median reduced the light in the crosswalk.

[107] The reverse onus clause found in s. 193(1) of the *HTA* provides:

When loss or damage is sustained by any person by reason of a motor vehicle on a highway, the onus of proof that the loss or damage did not arise through the negligence or improper conduct of the owner, driver, lessee or operator of the motor vehicle is upon the owner, driver, lessee or operator of the motor vehicle,

[108] By virtue of this provision, Mr. Prince’s admitted negligence (failing to make a safe turn) is deemed to have caused the losses sustained by Colin.

[109] Furthermore, Dr. Campbell, taking the most conservative approach to the assessment of light levels, determined that Mr. Prince’s vehicle headlights, on their own, provided

¹⁵ [2012] S.C.J. No. 32 at para. 8.

sufficient light for Mr. Prince to detect Colin and stop his vehicle short of the point of impact. I find Dr. Campbell's use of IDRR software scientifically valid and I accept his evidence. Even by eliminating all other light sources, the headlights on Mr. Prince's vehicle provided enough light for Mr. Prince to detect Colin with sufficient time to avoid striking him.

[110] I am unable to find on the evidence I accept that 'but for' the missing luminaires on the median, the collision would not have occurred. Therefore, I conclude that the City's negligence did not cause the collision.

Issue #4: Is Guild liable for any portion of the damages for which the City is liable?

[111] With respect to Mr. Prince's claim against Guild in negligence, the law does not impose a higher standard of care on Guild than on the City. This is so, notwithstanding that the contract between Guild and the City imposed a higher standard for joint-use pole repair and replacement than the relevant provisions of the *Municipal Act*.¹⁶ Consequently, Guild is not liable to Mr. Prince in negligence by virtue of any breach of its contract with the City. In other words, Guild is not liable in negligence independent of the City's negligence.

[112] In light of my findings with regards to the City's liability, it is unnecessary to assess Guild's liability for contribution and indemnity under its contract with the City. However, a few comments are warranted. At the time of the collision, the City had a contract with Guild to repair or replace damaged light standards containing traffic control signals. The contract is titled "Tender T13-101 Traffic Signal Maintenance". The contract provided that a pole knockdown was a "critical priority maintenance event" that required repair "without delay". The contract provided a timeline for temporary repairs and permanent repairs with the latter to be completed within two weeks or as agreed upon by the parties.

[113] Guild did not repair and replace the joint-use pole within two weeks. However, the City took no steps to enforce the contract and appeared satisfied with the temporary traffic signal in place on the median until such time as inventory was available to permanently replace the missing joint-use pole. The joint-use pole was permanently replaced on December 24, 2015. Arguably, the City agreed to extend the time for repair.

[114] It is noteworthy that the missing light standard on the median was a joint-use pole containing traffic control signals. By its title, the contract was intended to deal with traffic signal maintenance. Shane Maguire, testifying on behalf of the City, did not believe an unsafe condition existed once the temporary traffic signal head was installed on the median. The contract did not provide for the temporary repair and replacement of luminaires.

[115] Langley, the subcontractor responsible for repair and replacement of light standards (not containing traffic signals), was released from this action. Evidence at trial confirmed that under its contract with the City, Langley had up to 28 days to make a permanent repair and replacement of poles having luminaires. Notably, Langley did not take any steps to repair the dual luminaire pole located on the west end of the median until January 6, 2016 – well

¹⁶. *Guiliani v. Region of Halton* 2010 ONSC 4630 ("*Guiliani*") at para. 140.

beyond its 28 day contractual obligation. This evidence suggests that the replacement and repair of missing luminaires was not a critical priority for the City in December 2015.

[116] Based on the evidence at trial, the City had an arguable claim against Guild for breach of contract. Conversely, Guild had an arguable defence to the City's claim for breach of contract. With respect to Guild's liability under the contractual indemnity, such liability was dependent upon the City being unable to avail itself of the statutory defence of deemed state of repair. In that event, there would have been a finding that more than two consecutive luminaires were non-functioning. However, Guild was not responsible for repair and replacement of any of the third or more consecutive luminaires. Responsibility for the failure to repair any consecutive luminaire in addition to the two missing luminaires on the median lay squarely at the feet of the City.

Issue #5: If the City and/or Guild are liable for the losses suffered by Colin, what is the apportionment of liability between and among Mr. Prince, the City and/or Guild, as the case may be?

[117] Having found the City and Guild not liable for Colin's losses, it is unnecessary to apportion liability between Mr. Prince, the City and/or Guild. Mr. Prince is liable for 100% of the plaintiffs' damages.

DAMAGES - ANALYSIS

Issue #6: What is the quantum of damages to which the plaintiffs are entitled arising from the injuries suffered by Colin in the collision?

A. The Law Applicable to Damage Awards

[118] The legal principles relevant to my assessment of Colin's damages were succinctly summarized in *Kwok v. Abecassis*¹⁷ as follows:

1. While the plaintiff must prove past facts on a balance of probabilities, future loss or damage must only be shown to have a reasonable chance of occurring. Once it is shown that there is a reasonable chance of suffering a loss or damage in the future, the court must then assess the value of that chance, and future contingencies are regarded as factors to increase or decrease the award.
2. The degree of possibility of such future loss must be reflected in the award. Compensation for future loss is not an "all or nothing" proposition, but rather depends on the degree of risk established.
3. An award must be moderate, fair to both parties, and not determined on the basis of sympathy or compassion. In determining what is reasonable, it is not cost that

¹⁷ 2017 ONSC 164 at paras. 130 – 134.

rules the day, but what is reasonable for the individual plaintiff whose needs are being assessed by the court.

4. While the award must be fair to both parties, the ability of the defendant to pay is not a relevant consideration. The focus must be on the injuries of the innocent party. Fairness to the defendants is achieved by assuring that the claims raised against them are legitimate and justifiable.
5. The paramount concern of the courts when awarding damages for personal injury should be to ensure that there will be adequate future care. [Citations omitted]

[119] Colin seeks a global damage award in the range of \$4,332,436.71 and \$4,690,234.71. By comparison, the City suggests an appropriate range of damages is \$1,137,264.71 to \$1,435,051.71. The difference in positions lies predominantly in the assessment of Colin's future income losses and future care costs.

[120] I will address the heads of damages separately. The parties reached a consensus on certain heads of damages and aside from providing a summary of the parties' consent position, no further analysis will be conducted.

[121] As a general comment, I recognize that no amount of money will return Colin to the quality of life he enjoyed prior to the collision. Sadly, the tragedy that befell Colin on December 21, 2015 cannot be undone.

B. General Damages

[122] The plaintiffs advise that the current "cap" on non-pecuniary general damages as of February 2022 is \$418,234.¹⁸ The plaintiffs submit that Colin's nonpecuniary general damages ought to be assessed at \$365,000 plus prejudgment interest. The City and Mr. Prince submit a more appropriate award of non-pecuniary damages is in the range of \$300,000 to \$325,000 and suggest as a fair award of damages the amount of \$315,000 which represents 75% of the cap. Guild contends a fair and reasonable amount is \$300,000.

[123] Colin was 42 years of age at the time of the collision. At the time of trial, he was 49 years of age. Colin lives with Ryan, his common-law spouse with whom he has resided for 18 years. They own their own home. They have no children.

[124] The undisputed evidence establishes that Colin sustained a serious head injury in the collision. He suffered multiple skull fractures causing swelling of his brain. To reduce the swelling, he endured lifesaving brain surgery shortly after the collision and was placed in a medical- induced coma. Colin now suffers from a permanent and irreversible injury to his brain which has left him with cognitive problems and tinnitus (ringing in his ears). He also suffers from emotional and behavioural issues and seizures, although the latter are well controlled with medication.

¹⁸ See Mckellar Structured Settlements (<https://www.mckellar.com/statistics>).

[125] Following the collision, Colin spent approximately 10 weeks in hospital and in a residential rehabilitative care setting. Colin was discharged and returned home on March 3, 2016. Colin did not return to work. He receives weekly assistance with home cleaning and personal care. The evidence indicates that Colin has reached his maximum recovery. Colin's brain injury and resulting impairments are permanent.

[126] The undisputed evidence establishes and I find that:

1. Colin took pride in his work at TD Canada Trust ("TD") and derived enjoyment and purpose from his employment.
2. Colin is less independent.
3. Colin is irritable and suffers from tinnitus leaving him unable to enjoy activities in social settings such as movies and dining in restaurants.
4. Colin no longer enjoys video gaming as he cannot play at the level which he had achieved pre-accident and the noise associated with gaming aggravates his tinnitus.
5. Colin suffers from aphasia which results in him being prone to perseveration and fixating on certain topics of conversation. Colin becomes easily distracted. He rambles while speaking and finds himself off-topic and requires redirection.
6. Colin suffers from chronic fatigue and has reduced stamina requiring him to take frequent naps and his fatigue has led to increased irritability and inability to enjoy activities such as travelling.
7. Colin suffers from headaches and jaw pain. He also suffers from pain in his right elbow, right knee and back. He has been diagnosed with chronic pain syndrome.
8. Colin has been diagnosed with depression for which he has been prescribed medication.
9. Colin suffers from seizures and seizure-like events which have been successfully managed with medication.

[127] Notwithstanding his brain injury, Colin has reasonably high functionability as evidenced by his ability to testify at trial over two days. During his testimony, he demonstrated good memory and gave appropriate answers. Moreover, Colin has a high level of mobility, despite his chronic pain, as demonstrated by his ability to walk as a means of exercise, mow the lawn, take the bus, volunteer and travel.

[128] However, Colin's impairments negatively impact on virtually every aspect of Colin's life – his work, his hobbies, his relationships with friends and family, and his ability to care for himself. Overall, I find that Colin's enjoyment and quality of life have been significantly compromised by the injuries suffered in the collision.

- [129] An award of general damages is designed to compensate the plaintiff for their loss of enjoyment of life, pain and suffering. Of course, while it is impossible to completely compensate Colin, the court must attempt to award him an amount which is fair and reasonable having regard to the specific losses and injuries suffered by Colin.
- [130] I am reminded that the upper limit for non-pecuniary damage awards and catastrophic injury cases is not to be used as a scale against which non-pecuniary claims for all other injuries are to be measured. Rather, the court must determine the appropriate award having regard to the factors specific to the case.¹⁹
- [131] Each party pointed me to authority in support of their position. The plaintiffs relied on the decision in *Foniciello v. Bendall*²⁰ claiming it is factually similar to Colin’s case and therefore persuasive. In that case, the plaintiff suffered a severe head injury in a motorcycle accident and was awarded approximately 76% of the then-cap. Comparatively, in the case of *McMillan v. Ontario*²¹ the 41-year-old plaintiff suffered a fractured skull and closed head injury resulting in cognitive behavioural and physical impairments and was awarded the equivalent of \$330,000 in nonpecuniary damages.
- [132] The defendants and Guild argue that awards at the top end of the range should be reserved for the most serious cases in which a plaintiff has suffered an all-pervading series of impairments, physical or mental or combination of both. I was referred to the decision in *Butler v. Royal Victoria Hospital*²² at para. 178 where the court stated:
- To elevate every case of serious and permanent impairment to the level where it would qualify for maximum general damages recovery once it crossed a certain bar of “catastrophic” would have the dual effect of overcompensating some individual claimants while diminishing the significance of the pain and suffering experienced by those who, on any sliding scale of compensation, would have undoubtedly recovered more for pain and suffering but for the cap imposed on the general damages by the Supreme Court in the *Andrews* trilogy.
- [133] I pause to note that the plaintiffs in *McMillan* and *Foniciello* endured lengthier post recovery and rehabilitation periods. In the case of Mr. McMillan, he spent more than four years living in rehabilitation facilities following the accident, lost his sense of taste and smell and suffers from vision and balance issues. Mr. Foniciello remained in a semiconscious state in hospital for approximately five months following his accident.
- [134] In addition to the impact of his impairments on his quality of life, I must also consider the positive aspects of Colin’s life. Colin is not wheelchair bound. He is capable of performing and assisting with most of his activities of daily life. He is able to exercise including attending at the gym and going for walks. He does volunteer work. Although suffering

¹⁹ *Sandhu (Litigation Guardian of) v. Wellington Place Apartments*, 2008 ONCA 215, at para. 25.

²⁰ 2016 ONSC 1119 (“*Foniciello*”).

²¹ 1998 CarswellOnt 2908 (Gen. Div.).

²² 2017 ONSC 2792.

from chronic pain, his physical impairments do not appear to limit his ability to exercise, travel and engage in social activities. His relationship with Ryan has endured.

- [135] Taking into account the cap on non-pecuniary damages and the impact of Colin's specific impairments on his quality of life, I assess his nonpecuniary damages for pain, suffering, and loss of enjoyment of life at \$330,000.

C. Special Damages

- [136] In accordance with the agreement of the parties, I assess special damages in the amount of \$58,134.71

D. Pre-trial Income Loss

- [137] In accordance with the agreement of the parties, I assess Colin's pretrial income loss to be \$16,800.

E. Future Income Loss

- [138] Plaintiffs' counsel reminded me that this is Colin's only opportunity to be properly compensated for his future losses. He cannot come back to court down the road if I "get it wrong". However, an award of damages for anticipated future income loss must be fair and reasonable after taking into account relevant future contingencies.

- [139] Colin obtained a computer science degree from Acadia University in the early 2000's.

- [140] At the time of the accident, Colin had worked for TD for approximately 2 ½ years. Initially, Colin had been hired on a full-time contract basis through a temp agency. Colin had been working in a full-time permanent position with the bank since July 2015.

- [141] Until hired by TD into a full-time position in summer of 2015, Colin's work history was varied, transient and arguably "spotty".

Entitlement to Damages for Future Income Loss

- [142] Dr. Keith Sequeira, Psychiatrist; Jennifer Fogarty, Neuropsychologist; Tony Iezzi, psychologist; and Heather Spencer-Grim, vocational expert, testified in support of the plaintiffs' position with respect to Colin's ability to earn income in the future.

- [143] The plaintiffs' experts were unanimous and unequivocal in their conclusion that Colin cannot work and is incapable of working in the future. They arrived at this conclusion bearing in mind that Colin suffered a severe brain injury and had not returned to work in any capacity and at any level, post-collision. Both Colin and Ryan testified that they believe Colin is incapable of working in the future.

- [144] The City's and Guild's experts agreed with these conclusions with respect to Colin's future employability. Their point of disagreement rests with the assumptions upon which the plaintiffs' expert relied in arriving at their range of future income loss, regarding Colin's

anticipated age of retirement and his future employment prospects had the collision not occurred.

- [145] Mr. Prince retained Dr. Lawrence Freedman, a clinical neuropsychologist to provide an opinion with respect to Colin’s vocational prospects. During his clinical examination of Colin, Dr. Freedman found evidence of neurocognitive and neuro-behavioural dysfunction in the form of residual dysphagia, verbal memory and auditory verbal attentional impairment and behavioural risk inhibition. He concluded “[t]he combination and mix of the residual neurocognitive and neuro-behavioural abnormalities, in my opinion, represents serious and permanent impairments that will prevent Mr. Morris from returning to work over the long-term...”.
- [146] Curiously and for reasons best known to him, Dr. Freedman attempted to qualify his initial opinion in a second report served mid-trial on February 9, 2022. In this report, Dr. Freedman qualified his initial opinion by stating Colin was unable to work in *competitive* employment... *for which he is suited by education, training and experience*. (emphasis added) This qualifying language suggests Dr. Freedman was of the view that Colin is capable of working part time in a low level position outside his areas of education and training.
- [147] Dr. Freedman’s revised opinion prepared a mere five months following his initial opinion, defies explanation. All experts, including Dr. Freedman, agree that brain injuries do not repair themselves or heal over time. Dr. Freedman readily acknowledged that Colin had reached his maximum level of recovery. Why, then, did Dr. Freedman appear to suggest Colin’s vocational prospects improved over the five months’ time between his initial assessment in September 2021 and his further report prepared in February 2022? No satisfactory explanation was provided by Dr. Freedman for this contradiction in his evidence. Ultimately, Dr. Freedman accepted that his initial unqualified opinion (to the effect that Colin’s brain injury will prevent him from returning to work over the long-term) was, in fact, his opinion.
- [148] Consequently, I find that Colin is incapable of returning to any type of work - whether the employment is competitive or non-competitive.

Quantum of Damages for Future Income Loss

- [149] Having found Colin is entitled to damages for future income loss, I must now consider what his career trajectory may have been had he not been injured. Again, I am reminded that the test is not what his career path most likely would have been. The plaintiffs need only establish that Colin had a reasonable chance of proceeding down a particular career path.
- [150] On this issue, employees of TD, Sarah Lightfoot and Mathew Leung, testified. Ms. Lightfoot was hired by TD in 1999 into the same position in which Colin was working at the time of the collision. Similar to Colin, Ms. Lightfoot was hired as a contract worker before being hired on a full-time basis in 2001. At the time of trial, Ms. Lightfoot was the associate VP of Enterprise Text Solutions at TD. The plaintiffs point to Ms. Lightfoot’s

ascension through the ranks at TD as indicative of the opportunities for advancement which Colin would have enjoyed but for his injuries.

- [151] Ms. Lightfoot was Colin's direct manager from 2013 to 2015. She described Colin as "very dependable, very polite, very calm and very organized". She described Colin as someone they could depend on and who had "high customer service skills". By all accounts, Colin was achieving a high level of success in his role with TD with management consistently praising his job performance.
- [152] Ms. Lightfoot explained that 40-45% of workers in Colin's role were contract employees and that each month, management would assess whether any full-time positions needed to be filled. They tracked a pipeline of prospective hires from the pool of contract employees of which Colin was part. She explained that persons in contract positions were hired on a full-time basis based upon performance and not seniority. Ms. Lightfoot recommended and was responsible for Colin being hired as a full-time employee. She testified that hiring was done specifically with a view to potential future growth. She expected Colin would have continued to progress beyond the position he held at the time of the accident.
- [153] During cross-examination, Ms. Lightfoot reiterated that advancement within the bank was a function only of job performance. She testified that a candidate's age and prior work history were not considered when assessing the candidate's suitability for advancement and promotion within the bank.
- [154] Similar to Ms. Lightfoot and Colin, Mr. Leung was initially hired to work on the TD helpdesk as a contract worker in 2010. He was hired full-time after two years and by 2015 he had been promoted to manager. At the time of trial, Mr. Leung was IT Manager, Operations. He, too, was extremely complimentary of Colin's work ethic, work performance and overall skill level. He testified that people in Colin's position were highly sought after and often "cherry picked" by the other groups within the bank given their knowledge about all areas of TD, including their divisions in the United States. Like Ms. Lightfoot, Mr. Leung described Colin's position on the service desk as a "stepping-stone". Mr. Leung testified that he expected Colin would have excelled and progressed beyond his position but for the collision. He described Colin's advancement prospects as "very bright".
- [155] Colin's evidence with respect to his position at TD was uncontradicted. Colin joined the bank in 2013 on a contract basis. He was initially hired to work full-time on a project to roll out new technology throughout the bank but quickly transitioned into his role on the IT service desk. Colin testified that he enjoyed his job at TD and was good at it. He says it was always his intention to remain with and advance within TD.
- [156] In the summer of 2015, Colin was offered a full-time permanent position on the IT service desk. His new position provided him with benefits and a pension. Colin regularly picked up overtime work. Ryan's evidence was consistent with this evidence. He described Colin as "really liking" his position with TD and described the job as "the one" because it would allow him to pursue a career and "move up the ladder of success".

- [157] As indicated above, the court must assess future losses having regard to whether the plaintiff has a “reasonable chance” of suffering the future loss or damage. Unlike past losses, future losses are not to be assessed on a balance of probabilities. The Ontario Court of Appeal has described a reasonable chance as a “real and substantial risk” or a “real and substantial possibility” of the event occurring.²³
- [158] The plaintiffs retained Christopher Gray, a certified professional accountant, to calculate Colin’s potential future income losses under two scenarios. In both scenarios, Mr. Gray assumed: (i) that Colin will never work again; and (ii) that, but for the accident, Colin would have retired at age 65.
- [159] Under the first scenario, Colin’s projected annual income was calculated based on full-time employment as an IT operations analyst at TD (his position at the time of the accident). Under this scenario, it was assumed Colin would have remained in the position he had at the time of the accident receiving the same rate of pay (\$44,300 plus \$3,100 incentive award). Under Scenario 1, Mr. Gray projected that Colin would suffer a future income loss of \$617,300 (net of income replacement benefits).
- [160] Under the second scenario, Colin’s projected annual income was calculated based on full-time employment working as a computer systems analyst in Ontario being in a position commensurate with his academic qualifications at the time of the accident but not consistent with his work history. Under Scenario 2, Mr. Gray provided a range of projected annual incomes and corresponding future income losses of \$739,200 at the low end based on annual income of \$55,000, \$899,700 at the mid range based on annual income of \$65,000, and \$1,060,100 at the high end based on annual income of \$75,000.
- [161] A third scenario was advanced in the plaintiffs’ written submissions which was not considered by Mr. Gray in his original report. Under Scenario 3, the plaintiffs rely on Ryan’s trial evidence to support a career trajectory for Colin which would see him pursue and attain a position as a computer programmer. Ryan holds the same degree from Acadia University as Colin and in his current position as a computer programmer earns \$74,000 per annum.
- [162] Ms. Spencer-Grim, vocational expert retained by the plaintiffs, concluded after a review of the National Occupation Classification Guide (“NOCG”) that Colin’s position with the bank was most closely aligned with a User Support Technician, not a computer programmer. For purposes of Scenario 3, the plaintiffs suggest I use \$88,000 being the high-end of the income range for a user support technician in the local London market as determined by Ms. Spencer-Grim.
- [163] Using Mr. Gray’s present value factor of 16.0443, under Scenario 3 Colin’s projected annual income assuming full-time employment as a computer programmer in London Ontario produces a range of \$1,060,100 (which reflects an annual income of \$75,000) at

²³ See *West v. Knowles*, 2021 ONCA 0296 at para. 74; and *Walker v. Richie*, (2005) 197 OAC 81 (ONCA) at para. 30.

the low-end, and \$1,411,898 at the high end (based on annual income of \$88,000), for Colin's projected future income loss.

[164] The defendants and Guild reject the suggestion that Colin would have advanced beyond the position he held with TD at the time of the collision, and submit that only the losses calculated under Scenario 1 meet the threshold of "real and substantial possibility".

[165] The defendants and Guild point to the following evidence supporting Scenario 1 (as opposed to Scenarios 2 and 3):

1. Both Scenarios 2 and 3 are premised on the belief that Colin would have worked as a computer programmer or computer analyst like Ryan because both hold a computer science degree from the University of Acadia. However, that is the only commonality and the point at which their career trajectories dramatically diverge.
2. Colin completed his degree and graduated in 2003. During his university studies he worked in the meal hall as well as for a brief period with the Nova Scotia commission. After graduating, Colin was hired as an assistant manager in the meal hall.
3. Colin testified that he was unable to find work in his field in Nova Scotia after graduating.
4. As a result of employment opportunities for Ryan, Colin moved with Ryan to London in September 2004. After arriving in London, Colin was unemployed for a period of time and eventually found work at TeleTech, a call centre where he provided IT support to various companies.
5. Colin was employed with TeleTech for approximately five years from 2005 to 2010. After being laid off by TeleTech, Colin was unemployed for approximately one year.
6. Colin found similar work with Stream where he provided technical assistance for Dell customers for approximately six months and then was assigned to provide billing assistance to Rogers' customers. After approximately 9 to 10 months, Colin left his employment with Stream earning approximately \$10 per hour.
7. Through a temp agency Colin was hired by TD for a one-year contract position in 2013. He assisted on a project providing technical assistance for the installation of new software to TD branches across Canada. He earned \$17.50 per hour.
8. In June 2015, Colin was offered a full-time permanent position with TD. The position involved him assisting employees with various computer software and hardware issues. The position did not involve computer programming or require the skill set of a computer analyst. By comparison, Mr. Leung, Colin's immediate supervisor had a fine arts degree and no training or experience in computer science.

- [166] Notwithstanding having graduated from the same program as Colin, Ryan’s career had a very different trajectory. While at University, Ryan worked part-time as a computer programmer with an organization called Progeny Software. Following graduation he was hired by Progeny on a full-time basis. After being laid off in 2003, Ryan was hired by IConnect, a software development company for the legal market located in London. He worked with IConnect until 2011 and then was hired at Nexus Solutions Inc where he remains employed today as a computer programmer.
- [167] Since graduating from University, Ryan has only ever worked as a computer programmer. Since graduating from University, Colin has never worked as a computer programmer. Furthermore, Ryan has continuously been employed since graduating whereas Colin has had intermittent periods of unemployment post-graduation before joining TD in 2013. Before joining TD, Colin was earning wages at or about the minimum rate. Before accepting employment with TD on a permanent basis in the summer of 2015, Colin described his employment as “transient and unfulfilling”.
- [168] Based on the evidence, I am unable to conclude there is a real and substantial possibility Colin would have left TD to pursue a career as a computer analyst or programmer as contemplated by Scenario 3. I find Colin had no intention of leaving the bank. Furthermore, no evidence was led establishing that TD paid employees with Colin’s skills, \$88,000 per annum as contemplated under Scenario 3.
- [169] Turning to a consideration of Scenario 2. Both Ms. Lightfoot and Mr. Leung provided uncontroverted evidence that the position Colin held at the time of the accident was a “stepping-stone” to better-paying, more senior positions within the bank. It is clear that Colin excelled in his duties at TD. He was well-liked and respected by his co-workers and had excellent performance reviews. I am persuaded on the evidence that Colin would have advanced within the bank to a more senior position commensurate with greater remuneration. However, Colin was not particularly youthful at the time of his accident and so had less time to rise up the ranks. He also had no work experience in computer programming or working as a computer analyst in the 12 years since graduating from university. These facts limit his career trajectory within TD to positions within the mid-range of income levels as contemplated under Scenario 2. What is the appropriate income level assuming a moderate pace of ascension up the ranks at the bank?
- [170] For purposes of performing his calculations, Mr. Gray was asked to assume certain income levels under Scenario 2. These assumptions must be supported by the evidence to support an award of damages within the range provided by Mr. Gray under Scenario 2. Mr. Gray relied on an annual income of \$65,000 to arrive at his mid-range future loss figure of \$899,700. Neither Ms. Lightfoot nor Mr. Leung provided evidence of the likely ages of attainment and incomes for positions at TD which Colin may have reached during his career with the bank.
- [171] Without evidence of income levels within TD, I must rely on the evidence of Ms. Spencer-Grim. Having found that Colin would have risen up the ranks at a moderate pace and promoted into positions having duties similar to those of a user support technician, I find the appropriate annual income level is the median wage rate for a user support technician

of \$27.53/hr set out in the NOCG. Accordingly, I calculate Colin's annual income based on a median wage rate of \$27.53/hr assuming Colin works 40 hours per week for 52 weeks per year, to be \$57,262.

[172] By my math, I find that the present value of Colin's future income losses to age 65 based on annual income of \$57,262, after applying the present value factor of 16.0443 and net of the AB settlement relating to income replacement benefits for the post-trial period (\$143,208), to be \$775,520.

Set-offs for LTD and CPP

[173] I have found that Colin will not work in the future. This finding is amply supported by the evidence reviewed above and by the fact Colin is currently receiving long term disability (LTD) benefits and Canada Pension Plan (CPP) benefits. LTD benefits were approved by Manulife Financial on December 20, 2016 and are currently paid on a non-taxable basis at the rate of \$802.60 monthly (\$9,631 annually). Similarly, Colin receives CPP benefits in the amount of \$802.58 monthly or \$9,354 annually²⁴

[174] Mr. Gray did not deduct from his future income loss calculations any amount potentially payable to Colin in the future on account of LTD and CPP benefits. The plaintiffs support this approach arguing the payment of these benefits to Colin to age 65 is not guaranteed and it would, therefore, be incorrect to deduct these "uncertain" payments from any award for future income losses. I was referred to s. 267.8(9) of the *Insurance Act*, the relevant provisions of which provide as follows:

Future collateral benefits

s. 267.8(9) A plaintiff who recovers damages for income loss, loss of earning capacity, expenses that have been or will be incurred for health care, or other pecuniary loss in an action for loss or damage from bodily injury or death arising directly or indirectly from the use or operation of an automobile shall hold the following amounts in trust:

...

2. All payments in respect of the incident that the plaintiff receives after the trial of the action for income loss or loss of earning capacity under the laws of any jurisdiction or under an income continuation benefit plan.

3. All payments in respect of the incident that the plaintiff receives after the trial of the action under a sick leave plan arising by reason of the plaintiff's occupation or employment.

...

²⁴ 2021 CPP benefits.

Payments from trust

267.8(10) A plaintiff who holds money in trust under subsection (9) shall pay the money to the persons from whom damages were recovered in the action in the proportions that those persons paid the damages.

[175] Due to the uncertainty of payment of these benefits in the future, I find that it would be inappropriate to reduce the damage award for future income loss by the present value of any future CPP and LTD benefits payable to Colin. The *Insurance Act* creates a statutory trust in favour of Mr. Prince to avoid the possibility of double-recovery.

F. Future Care Costs

[176] The plaintiffs seek an award of damages for Colin's future care costs in the aggregate amount of \$3,672,402. From this amount, the plaintiffs concede that \$840,000 representing Colin's accident benefits settlement on account of future care costs, be deducted to avoid double recovery. The net amount requested by the plaintiffs is \$2,832,402.

[177] The City takes the position that many of the care costs claimed by the plaintiffs are not supported by the evidence and suggests that a range of \$145,030-\$417,817 (net of \$840,000 on account of the accident benefits ("AB") settlement) is appropriate. Guild takes a similar position although opposes certain additional items accepted by the City.

[178] Mr. Prince concurs with the City's position; however, argues that any overall award for future care costs must be reduced by \$1,540,000 representing the proportionate share of the AB settlement reached in April 2020²⁵ related to future care costs (\$840,000) *plus* \$700,000 representing the amount available to Colin for future attendant care "left on the table". Mr. Prince submits that Colin made a choice to settle his AB case earlier at a reduced amount despite his clear entitlement to the full amount of available benefits under his policy during his lifetime. Furthermore, Mr. Prince submits Colin's settlement of his claim at an amount far below his entitlement should be regarded as evidence indicating his reduced need for such attendant care.

[179] The plaintiffs retained Shelley Cosma, a registered nurse, to assess Colin and provide her opinion with regards to Colin's future care needs. No corresponding expert evidence was proffered by either of the defendants or Guild.

[180] I am mindful that the burden of proof resting on the plaintiffs entitling Colin to an award of damages on account of future care costs is whether there is a reasonable chance that Colin will require a particular recommended item of care. As noted earlier in these reasons, reasonable chance equates to a "real and substantial possibility" of the need arising in the future. A mere possibility that Colin might require a certain item of care in the future, including its duration and frequency, does not meet the evidentiary burden on the plaintiffs.

²⁵ \$1,000,000.

- [181] Ms. Cosma broke down Colin's future care needs into five categories which I will address separately below. They are: Medication and Assistive Devices; Professional Services; Personal Care Services; Avocational Services; and Housekeeping and Home Maintenance Services. Ms. Cosma also provided for two contingency options: a caregiving option; and an increased PSW support option.
- [182] Ms. Cosma calculated Colin's future care needs to age 82, being his projected lifespan.
- [183] To the extent any particular care item and corresponding cost is not objected to by the defendants and Guild, it will not be discussed below and is deemed to meet the evidentiary threshold for entitlement.

Medical and Assistive Devices

- [184] The plaintiffs claim \$160,711 on account of medication and assistive devices. Of this amount, \$29,725 relates to prescription medication consisting of Levetiracetam (anti-convulsant medication for seizures) and Escitalopram (medication for depression and anxiety). The defendants do not dispute Colin's need for the majority of these items and their related cost. The defendants and Guild object to the plaintiffs' claim for vitamin supplements. In addition to supplements, Guild objects to an award of costs for prescription medication beyond age 65 arguing prescription medications are available at no cost to persons over the age of 65 in Ontario.
- [185] On the evidence, Colin has clearly established his need for these medications as a means of treating his chronic conditions. I disagree with Guild's position with respect to Colin's entitlement beyond age 65. It is purely speculative whether Colin will receive government benefits and prescription coverage when he reaches the age of 65. Accordingly, I find that Colin's future care costs for medications total \$29,725 as claimed.
- [186] Turning now to Colin's claim for supplements. Ms. Cosma budgeted \$3600 per year for supplements with a present value of the cost of supplements over his lifetime of \$95,205. The defendants and Guild object to Colin's claim for supplements in its entirety. The plaintiffs rely on the evidence of Dr. Sequeira who noted that "literature" supports the use of vitamins for headaches and migraines as a first line of defence with medication a second. He noted that Colin was taking magnesium, vitamin B2, coenzyme q10.
- [187] Ms. Cosma recommended supplements because Colin had nutritional deficits in his diet. She explained that because of his brain injury Colin did not have the cues to be hungry and, therefore, was not eating properly. In addition, she testified that persons with brain injuries require additional nutritional support to help with brain function, fatigue and stamina. Ms. Cosma admitted during cross-examination that it was not her scope of practice to comment on the nutritional supplements needed by Colin and that a nutritionist would be better suited to advise of those needs.
- [188] Colin's nutritionist did not testify with respect to his future need for supplements including which supplements he needs and why such supplements are needed. Dr. Sequeira's evidence supports Colin's need for vitamin supplements to assist in managing his migraine

headaches. I note this cost is not duplicated by a claim for headache, pain and sleep medication. Moreover, post-collision and at the time of trial Colin was taking supplements. However, Ms. Cosma's costing of supplements at a level of \$3600 per year is not supported by the evidence and is excessive.

[189] I find Colin has established a future need for supplements over his lifetime however have reduced the amount to one-half of the amount claimed. All other medication and assistive devices as claimed are not opposed. Consequently, the plaintiffs are entitled to an award of \$113,108.50 for future medications and assistive devices.

Professional Services

[190] The plaintiffs have conceded that dental treatments, travel for dental treatments, neuro-optometry, travel for neural optometry and the vision training contingency should not be awarded. The plaintiffs claim \$142,500 for professional services excluding the amount claimed for the services of a rehabilitation support worker (RSW) and a personal support worker (PSW).

[191] Of this amount, the defendants and Guild do not object to the following professional items/services and their related travel costs totaling \$73,103:

- auditory equipment replacement
- auditory follow-up visits
- gym membership
- chiropractor/massage intervention
- psychology/social work intervention

[192] The defendants and Guild object to Colin's need for future occupational therapy, physiotherapy, speech pathology, case management and nutritional services based on the absence or insufficiency of the evidence to support these claims.

[193] Drs. Sequeira and Fogarty generally agreed that physiotherapy, occupational therapy and speech language therapy would be beneficial for Colin. Their evidence is hardly surprising; however, it is insufficient to establish Colin's future need for these services. No evidence was adduced at trial with respect to the extent such services will be needed and for how long these services will be needed. At the time of trial, Colin was not receiving these services and had not been receiving these services for some time.

[194] Ms. Cosma explained that she recommended the timing and frequency for different services based on recommendations provided by Colin's treatment providers. Ms. Cosma did not recommend these services based on her own views as to the future treatment most beneficial to Colin. Evidence as to the nature and frequency of treatments in the future is

required before a court may award damages for a particular service.²⁶ In this case, there is no such evidence.

[195] I pause to note that the evidence establishes that Colin suffers from chronic pain syndrome and a permanent and irreversible brain injury. The evidence further establishes that Colin has reached his maximum physical and cognitive potential. Such that, it does not appear any future speech therapy, occupational therapy, physiotherapy, case management and/or nutritional services will result in improved physical and cognitive capacity. Furthermore, this finding is consistent with Colin's need for PSW and RSW services which are addressed below.

[196] I find the plaintiffs are entitled to a damage award for professional services (exclusive of PSW and RSW services which are addressed below) in the amount of \$73,103.

Rehabilitation Support Worker and Personal Support Worker Services

[197] Colin's current RSW, Pam McCurdy, together with occupational therapist, Kelly Ann Farrell, testified in support of Colin's claim for future RSW services and his level of future need for these services. At the time of trial, Ms. McCurdy and another RSW, Heather Raycraft, saw Colin two times per week for three hours each visit for a total of six hours per week of RSW assistance. Ms. McCurdy explained that RSW's assist Colin to build and implement strategies with a view to developing skills to assist in him gaining greater independence. Unlike a PSW, RSW's are able to provide transportation for their clients.

[198] Ms. McCurdy is of the view that, in her experience dealing with catastrophically brain-injured clients, Colin should be receiving more RSW support than he is currently receiving. She explained that due to Colin's distractibility and issues with initiation, she finds it very difficult to accomplish anything meaningful during their three-hour sessions. She analogized the extent of RSW services Colin is currently receiving to a "Band-aid". Optimally, Ms. McCurdy believes Colin would benefit from at least 12 hours per week of RSW services. Ms. Farrell supported Ms. McCurdy's recommendation based on her own assessment of Colin's needs.

[199] With respect to the average hourly rate of an RSW, Ms. McCurdy testified that the market rate is in the range of \$70-90 per hour. She explained that she has a strong rapport with Colin, and so charges Colin far below market rate at \$58.19 per hour. She explained that, by doing so, she is able to provide Colin with as much assistance as possible given his financial means.

[200] Notwithstanding the trial evidence of Ms. McCurdy and Ms. Farrell, Ms. Cosma used an hourly rate of \$73 per hour and a weekly estimate of 7.5 hours (the mid-point of her recommended range of 6 to 9 hours per week) to cost Colin's need for future RSW services. In turn, Mr. Gray relied on Ms. Cosma's costing in arriving at his costing of these services to age 82 in the amount of \$752,910. Ms. Cosma explained that in preparing her report she had spoken with all of Colin's treatment providers involved in his care. Specifically with

²⁶ *McNamee v. Oickle*, 2020 ONSC 1077 at para. 25.

respect to RSW services, she confirmed speaking with Colin in the presence of Ms. McCurdy and she also discussed Colin's needs with Ryan. Of particular note, is that Ms. Cosma discussed with Ms. McCurdy Colin's level of function and confirmed her role in helping Colin perform various activities and improving his overall function.

- [201] During closing submissions, the plaintiffs asked that I accept the recommendations of Ms. McCurdy over the recommendations of Ms. Cosma when deciding Colin's future RSW needs. To that end, the plaintiffs ask that I undertake my own calculation using an average hourly rate of \$85 and 12 hours per week (as opposed to 7.5 hours) multiplied by a PV factor of 26.4457 (as per Mr. Gray's report) to arrive at a total cost of \$1,402,679 for Colin's future RSW needs to age 82. The plaintiffs' revised damage claim for future RSW services represents an 86% increase over Ms. Cosma's recommendation and a 192% increase over the present level of RSW services provided to Colin by Ms. McCurdy and Ms. Raycraft.
- [202] The conflicting evidence of the plaintiffs' experts with respect to frequency requires a deeper look into the nature of the services provided by an RSW and whether Colin would benefit from 12 hours versus the 7 ½ hours recommended by Ms. Cosma. In conjunction with this assessment, it is necessary to consider Colin's future needs for PSW services. There is overlap in the services provided by a RSW as compared to the services of a PSW. A PSW fulfills a supervisory role with an RSW fulfilling a functional or instructional role. For example, a PSW is able to supervise Colin while he mows the lawn and makes himself a meal. A PSW is able to take Colin to the bus stop and remind him to take his medication and provide him with other "cueing" assistance. A PSW provides light housekeeping services. By comparison, an RSW has an enhanced role and assists Colin with improving his functionality and independence by instructing him on how to perform tasks and will also undertake certain activities with Colin. However, there is a supervisory aspect subsumed within the role of an RSW. Consequently, Colin's needs for attendant care (PSW) and RSW services must be considered together to avoid over-compensating Colin.²⁷
- [203] In support of her recommendation for 4-hour sessions three times per week, Ms. McCurdy explained that an additional hour per session would allow Colin to build on various skills and therapies introduced by her during their sessions. However, Colin is easily fatigued. Volunteering for 2-2.5 hours leaves him exhausted. Notwithstanding the anticipated benefit to longer sessions, I find that in Colin's case he would be unable to endure longer cognitively-taxing RSW sessions.
- [204] With respect to PSW services, Ms. Cosma recommended 21 hours per week of PSW support at a rate of \$36.13 per hour for a total cost of \$1,043,390 to age 82. It is noteworthy that no medical expert testified that Colin requires 21 hours per week of PSW services.
- [205] Whether Colin will actually use 12 hours of RSW services and 21 hours of PSW services per week if funds are awarded for this purpose is an important consideration. The evidence suggests he will not. In arriving at this conclusion I have considered that at least since February 2020 and up to the time of trial, Colin was receiving PSW services twice a week

²⁷ *Fonicello et al. v. Bendall et al.*, 2016 ONSC 1119 at para. 130.

for two hours each session for a total of four hours per week. In September 2021, Dr. Sequeira reassessed Colin and recommended that whatever level of PSW support Colin was then receiving should continue. Dr. Fogarty noted in her report that “continued PSW assistance was felt to be appropriate and appeared to be beneficial”. Notably, increased PSW assistance was not specifically recommended.

- [206] Despite this evidence, Ms. McCurdy and Ryan both testified that Colin’s RSW needs are currently not being met at 6 hours per week. The plaintiffs submit that Colin’s current level of RSW services are far below his actual need for these services so as to conservatively manage his existing financial resources pending judgment.
- [207] I would have found this argument persuasive but for the evidence of Dr. Fogarty. She testified that in or around November 2017, Colin was receiving increased attendant care. When he met with Dr. Fogarty he complained of “feeling stuck in the house most days” and expressed concern with his level of supervision. He described feeling “babysat” and expressed frustration with not being allowed to perform tasks independently. Moreover, he stated that he felt like he was “in prison” because he not allowed to leave the house unaccompanied. He expressed a loss of privacy.
- [208] In response to Colin’s expressed concerns, Dr. Fogarty opined that greater independence in his home with the guidance of the treatment team would have a beneficial effect on Colin’s emotional health.
- [209] By the time of Dr. Fogarty’s second interview with Colin in February 2020, and in response to Colin’s request for more independent time without PSW supervision services, his PSW support was reduced. To address safety concerns and reduce the need for constant supervision, Colin was equipped with a Lifeline device. At this time, Colin was home alone for several hours per day. Ms. Farrell testified that Colin reported to her that he was content with the level of RSW support at two times per week and the level of PSW support at two times per week.
- [210] The question to be answered is whether there is a real and substantial risk that Colin will suffer the losses associated with paying for 12 hours per week for RSW services and 21 hours per week for PSW services to age 82. Based on the evidence at trial, I am satisfied that Colin will likely have both a need for an enhanced level of attendant care (PSW) and RSW services and will utilize and pay for such enhanced level of attendant care and RSW services.
- [211] The question is: What does the evidence suggest is the appropriate enhanced level of care? It is trite to say that Colin’s historical and present day needs serve as a useful indicator of his future needs. Furthermore, I find there is merit to, on the one hand, the plaintiffs’ argument with regard to Colin’s conservative spending at this juncture and, on the other hand, the defendants’ and Guild’s argument that Colin values his privacy and independence and fostering same is critical to his overall mental health.
- [212] With respect to RSW services, I find there is a real and substantial risk that Colin will incur costs for RSW services to age 82 based on 3 x 3-hour sessions per week (9 hours per week).

This accords with the high-end of Ms. Cosma's recommended range and increases the number of sessions per week from 2 to 3; however, maintains the existing length of each session to account for Colin's chronic fatigue and his reduced ability to focus on cognitively-taxing activities and instruction. I accept Ms. Cosma's hourly rate of \$73 per hour. This rate falls within the range provided by Ms. McCurdy. Ms. McCurdy's current rate does not reflect market rates for RSW services and is, therefore, not an appropriate gauge of future cost for these services

- [213] Therefore, I find there is a real and substantial risk that Colin will suffer a pecuniary loss relating to his need for RSW services having a present value cost to age 82 of \$903,490.
- [214] Turning now to Colin's claim for damages relating to his future need for attendant care or PSW services.
- [215] As indicated above, it is important to ensure that any award of damages reflects compensation for Colin's anticipated future use of these services relative to his need. In other words, the experts may all agree and recommend that Colin has a need for supervision seven days a week three hours per day. However, bearing in mind Colin's stated desire for greater autonomy and independence, his use of attendant care services may not, or ever, match his need.
- [216] The evidence establishes that Colin is able to make simple meals and perform light housekeeping tasks. His ability to perform tasks related to home maintenance, housekeeping and self-care such as feeding, dressing and personal hygiene will be enhanced with an enhanced level of RSW services. Over time, his proficiency to perform these tasks will increase with a corresponding reduction in his need for attendant care. Presumably over this same time, Colin's need for RSW services will reduce as Colin's ability to perform daily tasks of living increases thereby freeing up a portion of these funds available to fund an increase in the level of attendant care if necessary, recognizing that the hourly rate for PSW services is approximately one-half the hourly rate for RSW services.
- [217] Additionally, out of respect for Colin's need for privacy and autonomy, it is unnecessary to have both RSW services and PSW services provided on the same day of the week. I find the evidence supports an award of damages for Colin's future attendant care/PSW services of four two-hour sessions per week for a total of eight hours per week. Attendant (PSW) care on two days midweek and every Saturday and Sunday, will ensure Colin has the benefit of supervision and assistance with initiation on a daily basis and will also allow Ryan the opportunity for some personal time on weekends to engage in activities he enjoys such as cycling.
- [218] It is important to remember that the plaintiffs' experts recommended attendant care in part to address Colin's need to be reminded to perform certain self-care tasks such as taking medication at a set time, brushing his teeth, showering, and eating, to name a few. Cell phone applications are available for download at little or no cost and are able to provide reminders or "cueing". In addition, the cost of "Lifeline" services have been awarded and such service will enhance Colin's safety when home alone without the significant cost associated with in-home attendant care. I accept the hourly rate of \$36.13 provided by Ms.

Cosma. I note that the defendants and Guild did not retain a future care cost expert to contradict the evidence of Ms. Cosma in this regard.

[219] I find there is a real and substantial risk that Colin will suffer a pecuniary loss relating to his need for PSW services having a present value cost to age 82 of \$397,481.

Avocational Services

[220] Since the collision, Colin has volunteered on a part-time basis with Canadian Blood Services. Not surprisingly, all experts agreed that Colin should continue to volunteer his time and that volunteering is beneficial both as a means of slowing Colin's cognitive decline and to facilitate and encourage Colin's independence, productivity and to give him purpose.

[221] Ms. Spencer-Grim testified that supports are required for Colin to pursue avocational pursuits such as volunteer work. Avocational services to enable Colin to take courses of interest, provide taxi transport and pay for avocational planning sessions were costed. These avocational costs were calculated as having a present value of \$56,229.

[222] I am unable to conclude that the costs associated with further education and avocational planning and associated travel costs are proper future care needs since Colin has been found incapable of working now and in the future, and has been awarded damages for his future income losses.

[223] However, I allow \$41,255 on account of transportation costs related to his future volunteering endeavours.

Housekeeping and Home Maintenance

[224] The plaintiffs seek an award of \$169,508 on account of future housekeeping and home maintenance services required by Colin for homemaking, lawn care, snow removal, and gardening to age 76. The defendants and Guild do not take issue with the various tasks comprising this category of future care. However, they submit the amount claimed is excessive given that the home is jointly owned by Ryan and Colin and, as before the collision, Ryan was, and would be in the future, responsible for one half of the housekeeping and home maintenance associated with their home.

[225] The defendants submit that an appropriate award for future housekeeping and home maintenance is one-half of the amount claimed. Guild submits that a further reduction is necessary to account for the fact that even among the uninjured population, as a person ages they may reasonably require third-party provided services to assist with home maintenance and housekeeping post 65 years of age. Guild did not adduce evidence with respect to the abilities of uninjured 65-year-old persons, generally, to perform these tasks unassisted.

[226] I find that Colin is entitled to an award of future care costs for housekeeping and home maintenance services equal to his one-half of the amounts determined by Ms. Cosma which

totals \$84,754. Ryan, as co-resident and owner of the home, is responsible for providing, directly or indirectly through a third-party service, his share of the future housekeeping and home maintenance costs.

G. Childcare Contingency Expense

- [227] The plaintiffs asked Ms. Cosma to consider the potential contingent costs relating to childcare services in the event Colin becomes a parent. Ms. Cosma costed childcare services provided by a nanny for 10 to 15 hours per week. Ms. Cosma extrapolated this annual cost over the first four years of the child's life prior to the child being eligible to enter the public school system, and arrived at a cost of \$38,792.
- [228] The plaintiffs concede that it is unclear whether Colin and Ryan will have a child together. Of course, being a future event, is not possible to ascertain with certainty the existence of any future event. As with all future care cost claims, the plaintiffs must establish that there is a real or substantial possibility that Ryan and Colin will have a child.
- [229] While both Ryan and Colin testified to their intention prior to the collision of having a child, no steps were taken (aside from moving from an apartment into a house), to achieve their dream of becoming parents. Both Ryan and Colin gave evidence that being married would increase their chances of being approved for adoption, yet marriage has not been pursued. Surrogacy and adoption opportunities have not been investigated whether before or after the collision. Both adoption and surrogacy are lengthy and expensive processes. Neither Colin nor Ryan is particularly youthful. Both Ryan and Colin testified that given their ages and the costs associated with surrogacy that they were undecided on the issue and had taken no steps in the years leading up to trial to pursue either surrogacy or adoption.
- [230] I find there is no real or substantial possibility that Ryan and Colin will become parents in the future. Accordingly, no amount is awarded for contingent childcare costs. Any loss of opportunity to reap the benefits of being a parent as a result of the injuries suffered in the collision have been taken into consideration in the amount awarded to Colin for general non-compensatory damages.

H. Increased PSW Support Contingency

- [231] Ms. Cosma was asked to consider the cost of Colin receiving 24/7 PSW support in the event of a deterioration in his cognitive functioning. She costed "round-the-clock" PSW support for Colin to be \$130,477 per annum. The plaintiffs request an award of \$130,477 for a period of five years totaling \$652,385 for this contingency.
- [232] Ms. Cosma acknowledged that she lacked the expertise and qualifications to provide an opinion as to the potential for Colin's cognitive abilities to deteriorate to the point of requiring 24/7 care. Dr. Fogarty testified that Colin is at risk of future decline with the medical literature indicating the risk of dementia being doubled in the case of persons with moderate to severe brain injuries.

- [233] Dr. Sequeira testified that Colin required ongoing support in order for him not to substantially or precipitously deteriorate. However, neither Dr. Sequeira nor any other medical expert called by the plaintiffs testified that ongoing support at the level of 24/7 or round-the-clock care was required to prevent cognitive deterioration.
- [234] Additionally, the plaintiffs submit that Colin will require 24/7 PSW support in the event Ryan leaves the relationship and Colin is left to live on his own and care for himself. The evidence does not support a finding that there is a real and substantial possibility that their relationship will end. In fact, the evidence suggests the opposite. At the time of trial, being approximately six years following the collision, Ryan and Colin remained in a loving, supportive and committed relationship.
- [235] It is not surprising that the plaintiffs' medical experts agree that Colin's cognitive functioning will deteriorate over time. Presumably, deterioration in cognitive functioning occurs in all persons, whether or not injured, as they age. However, the evidence (or lack of evidence) does not support a finding that there is a real and substantial possibility Colin will require 24/7 PSW support in the future as a result of cognitive deterioration.

I. FLA Claims

- [236] Pursuant to subsections 61(1) and 61(2)(e) of the *FLA*, Ryan, Belinda and Jeni are entitled to damages to compensate them for loss of guidance, care and companionship they have each suffered as a result of Colin's injuries suffered in the collision.
- [237] Damages under the *FLA* are subject to a statutory deductible. At the time of trial, this amount was \$20,751.76. The deductible is waived if the damages exceed \$69,171.36.
- [238] The plaintiffs take the position that Ryan's damages exceed the deductible threshold; however, the damages of each of Jeni and Belinda will not. The latter damage awards must, therefore, be reduced by the \$20,751.76 deductible.

Ryan Wagner

- [239] Colin and Ryan met in 1998 while attending university in Nova Scotia both enrolled in computer programming. They began dating in 1999 and moved in together in 2003. In 2004 they moved from Nova Scotia to London Ontario to accommodate an employment opportunity for Ryan. They bought a home together in 2015. They share similar interests. Prior to the collision, Ryan and Colin discussed marriage and becoming parents.
- [240] Ryan testified that post-collision Colin's temperament has changed. He is less tolerant, and more irritable and short-tempered. He frequently gets angry with Ryan. Colin's perseveration and distractibility makes communication difficult. Colin requires supervision and care. Colin tires easily and suffers from chronic fatigue which makes travel difficult and limits them to engaging in sedentary activities. Ryan and Colin no longer share a bedroom which has affected the intimacy in their relationship.

[241] I find that Colin's brain injury has negatively impacted his personality, level of energy, and the manner in which he interacts and engages with Ryan, generally. I have also taken into consideration that, Ryan and Colin are still able to enjoy each other's company on a day-to-day basis and at the time of trial they remained in a loving, caring and committed relationship. I hereby assess Ryan's damages for loss of guidance, care and companionship under the *FLA* in the amount of \$70,000, plus prejudgment interest.

Belinda Armstrong

[242] Belinda is Colin's 69-year-old mother. She lives in Nova Scotia. By all accounts, Belinda is a loving mother who cares deeply for her son and has consistently shown love and support for Colin throughout his lifetime. The last time she and Colin lived together was in 2002/03.

[243] Prior to the collision Belinda and Colin would speak on the telephone a couple of times a month. In 2007/08 Colin twice traveled to Nova Scotia to meet his mother's new partner and walk her down the aisle at her wedding.

[244] After being notified of the collision, Belinda immediately travelled to London to be by Colin's side during his treatment and recovery. She stayed in London until February 2, 2016. She made two further trips to London – in May 2016 and again in December 2016.

[245] Belinda testified that she continues to have a close relationship with her son. As they did before the collision, they continue to speak regularly by telephone. It is noteworthy that since the collision, Colin and Ryan have visited Belinda in Nova Scotia – two weeks at Christmas 2017, and again for three weeks in September 2018.

[246] Belinda testified that Colin is no longer happy-go-lucky and upbeat. He is quiet and subdued. She finds it difficult to communicate with Colin by telephone. He fixates on a topic of conversation and finds it difficult to move on to new topics and tends to dominate the conversation.

[247] At the time of the collision, Colin and Ryan had moved on with their lives in Ontario. Belinda continues to enjoy the same monthly telephone communication with her son as she did before the collision. Furthermore, Colin maintains the ability to travel to Nova Scotia to spend time with Belinda to the same extent as he did pre-collision. I find they continue to share a close bond although the manner in which they communicate has been modestly impacted by Colin's brain injury.

[248] I hereby assess Belinda's damages for loss of guidance, care and companionship under the *FLA* in the gross amount of \$30,751.76 leaving a net amount, after deducting the statutory deductible, of \$10,000 plus prejudgment interest.

Jeni Gauthier

- [249] Jeni is Colin’s older sister. She currently lives in Nova Scotia together with her husband. She has three adult children. Jeni was very close with her brother growing up and described him as her best friend during their childhood.
- [250] Jeni moved out of the home family home when Colin was 19 years of age. She eventually moved to Québec and then returned to Nova Scotia. She testified that in the three years prior to the collision, she communicated with Colin on a monthly basis via text and telephone.
- [251] She described Colin as a “joker”, always cracking jokes to cut the tension. She testified that she and Colin helped their mother through her divorce from their father.
- [252] Following the collision, Jeni travelled to London in March 2016 and stayed a week with Ryan and Colin. She described Colin as easily fatigued.
- [253] Jeni testified that she continues to communicate with Colin approximately once a month by telephone or text. She regularly sends pictures by text. She testified that Colin rambles and it makes her “glaze over”. Jeni still considers her brother to be a loving, caring person though “almost to an extreme”. She now finds Colin quick to anger and easily frustrated.
- [254] Jeni testified that in some ways she and her brother are closer now and keep in touch more often than they did before the collision. I find that Jeni maintains a close bond with her brother and their communication and level of contact have remained regular and consistent post-collision. I hereby assess Jeni’s damages for loss of guidance, care and companionship under the *FLA* in the gross amount of \$25,751.76 leaving a net amount, after deducting the statutory deductible, of \$5,000 plus prejudgment interest.

J. Set-Off for Accident Benefits Settlement

- [255] Colin settled all future claims for accident benefits with his insurer in April 2020 for the total sum of \$1 million. Already deducted from the future income loss award was the sum of \$160,000 which represents the portion of the AB settlement amount attributable to future income replacement benefits. The plaintiffs concede that the amount remaining (\$840,000) is properly deductible from the gross amount awarded to Colin for his future care needs.
- [256] As mentioned earlier in these reasons, Mr. Prince argues that any overall award for future care costs should be reduced by \$1,540,000 representing the proportionate share of the AB settlement related to future care costs (\$840,000) *plus* \$700,000 representing the amount available to Colin for future attendant care “left on the table”. Mr. Prince submits that Colin made a choice to settle his AB claim earlier at a reduced amount despite his clear entitlement to the full amount of available benefits under his policy during his lifetime (based on his “catastrophically impaired” status). The City and Guild adopt this position.

[257] To succeed on this argument requires that the defendants establish Colin acted with malicious intent or bad faith in settling his AB claim for less than what he should have, for the purpose of inflating his claim in this tort action to the prejudice of the defendants.²⁸

[258] The defendants' and Guild's position ignores the harsh realities of "entitlement" to accident benefits over one's lifetime after having been deemed catastrophically impaired as Colin has been. In order to receive payment for treatment, a treatment plan is required to be submitted for approval. In addition, a portion of accident benefits is diverted to administrative costs of the treatment providers. Payment is at the behest and whim of the accident benefits provider.

[259] Greg Di Matteo, a representative of Aviva testified to the numerous advantages gained by claimants like Colin upon settling their accident benefits claims including:

1. financial certainty;
2. the benefit of the time value of the money;
3. the ability to control the manner in which the dollars are spent for rehabilitation;
4. none of the rehabilitation funds are diverted to administrative costs of treatment providers;
5. treatment plans are not required to be prepared; and
6. approval of treatment plans is no longer a precondition to funding of treatment.

[260] Mr. Di Matteo further testified that insurers have a fiduciary obligation to deal in good faith with their insured. That is, Aviva had an obligation to care for Colin within the parameters of the statutory accident benefits schedule. I infer from this evidence that the settlement reached was fair and equitable in all respects.

[261] Furthermore, there is no evidence that Colin acted in bad faith, the accident benefits settlement is improvident and/or that Colin failed to fully mitigate his damages. The defendants' and Guild's request to reduce the future care damage award by an additional \$700,000 is therefore denied.

K. Pre-judgment Interest

[262] Prejudgment interest for the period December 21, 2015 through July 10, 2023 is calculated and payable on the *FLA* damage awards and Colin's awards for general damages, special damages and past income losses, in accordance with s. 128 of the *Courts of Justice Act* (the "*CJA*").

²⁸ *Morrison v. Gravina* (2001), 29 C.C.L.I. (3d) 129 (Ont. S.C.J.).

DISPOSITION

[263] Judgment to issue on the following terms:

1. The defendant, Michael Prince, shall pay damages to the plaintiffs as follows:
 1. to Colin Morris the following amounts:
 1. **\$330,000** on account of general non-pecuniary damages plus prejudgment interest in accordance with s. 128(2) of the *CJA*;
 2. **\$58,134.71** on account of special damages plus prejudgment interest in accordance with s. 128(1) of the *CJA*;
 3. **\$16,800** on account of pretrial income loss plus prejudgment interest in accordance with s. 128(1) of the *CJA*;
 4. **\$775,520** on account of damages for future income loss;
 5. **\$1,613,191.50** on account of damages for future care costs (comprised of \$113,108.50 for medications and assistive devices; \$73,103 for professional services; \$903,490 for RSW services; \$397,481 for PSW services; \$41,255 for avocational costs; and \$84,754 for housekeeping and home maintenance) less \$840,000 set off for the AB settlement, for an aggregate net award of damages for future care costs of **\$773,191.50**.
 2. to Ryan Wagner the amount of **\$70,000** plus prejudgment interest in accordance with section 128(2) of the *CJA*;
 3. to Belinda Armstrong the amount of **\$10,000** (net of the deductible) plus prejudgment interest in accordance with section 128(2) of the *CJA*;
 4. to Jeni Gauthier the amount of **\$5,000** (net of the deductible) plus prejudgment interest in accordance with section 128(2) of the *CJA*.
2. The plaintiffs' claims against the defendant, the City of London, are hereby dismissed.
3. The cross-claim of the defendant, Michael Prince, against the City of London is hereby dismissed.
4. The third-party claims of the defendants, the City of London and Michael Prince, against Guild Electric Ltd. are hereby dismissed.

COSTS

[264] In the event the parties are unable to agree, I will receive written submissions on the issues of entitlement and quantum of costs with respect to the main action and third party claims as follows:

1. With respect to the main action, the plaintiffs and the City shall serve and file their respective written submissions addressed to my attention not exceeding 5 pages in length (exclusive of any case law, Bill of Costs and time dockets) within 30 days; and Mr. Prince shall serve and file his responding submissions within 20 days thereafter. Reply submissions, if any, within 10 days thereafter not to exceed 3 pages in length.
2. With respect to the third-party actions, Guild shall serve and file its written submissions addressed to my attention, not exceeding 5 pages in length (exclusive of any case law, Bill of Costs and time dockets) within 30 days; and the City and Mr. Prince shall serve and file their respective responding submissions within 20 days thereafter. Reply submissions, if any within 10 days thereafter, not to exceed 3 pages in length.

“Justice A.K. Mitchell”
Justice A. K. Mitchell

Released: July 10, 2023

CITATION: Morris et al. v. Prince et al. 2023 ONSC 3922
COURT FILE NOS.: 1791/16
1791/16A1
1791/16A2
DATE: 2023/07/10

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

Colin Morris et al.

-and-

Michael Prince et al.

REASONS FOR JUDGMENT

Justice A.K. Mitchell

Released: July 10, 2023