IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Bye v. Newman,*
2017 BCSC 1718

Date: 20170927
Docket: S131346
Registry: Vancouver

Between:

Levon Bye

Plaintiff

And

Doria Newman and the City of Trail

Defendants

Before: The Honourable Madam Justice Choi

Reasons for Judgment

Counsel for the Plaintiff:	J. Gopaulsingh M. Bryden
Counsel for the Defendant Doria Newman:	R. Sookorukoff T. Thompson
Place and Date of Trial/Hearing:	Vancouver, B.C. September 12-16,19-23, 26-30; November 17-18; and February 27, 2017
Place and Date of Judgment:	Vancouver, B.C. September 27, 2017

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[1] On August 26, 2012, the plaintiff, Levon Bye, took his Honda CRF 450R dirt bike on a trip to Violin Lake, near Trail, B.C., as he had done many times before. The lake, a disused reservoir, is on private property belonging to the City of Trail, and can only be reached by an old dirt access road that winds up through the forest. Mr. Bye stayed at the lake for over half an hour before starting back at around 6:00 p.m.

[2] While Mr. Bye was travelling north along Violin Lake Road to return home, the defendant, Doria Newman, and his friend Tom Whyte, riding All-Terrain Vehicles (ATVs), turned onto the road heading south towards the lake. Mr. Newman, riding a Can Am Renegade ATV, drove ahead of his friend, and Mr. Whyte lost sight of him in the trees.

[3] The parties disagree on much of what happened after that. Not in dispute is that Mr. Bye's dirt bike and Mr. Newman's ATV collided near a curve in the road. Both vehicles were damaged, and Mr. Bye was left with a number of injuries including a fracture to his neck and multiple fractures to his legs. Although Mr. Bye was rushed to the hospital, his injuries required a through-knee amputation of much of his left leg.

[4] While the City of Trail is named as a defendant, the action against it was dismissed following an agreement between the parties. Mr. Bye and Mr. Newman each allege that the other is responsible for the collision.

Credibility

[5] Liability in this case turns on the sequence of events immediately before and after the crash. When Mr. Bye and Mr. Newman collided, there were no other witnesses. Each has given a starkly differing account of how the collision occurred; therefore, the credibility and reliability of their testimony is critical in reconstructing what happened.

[6] Madam Justice Dillon, in *Bradshaw v. Stenner*, 2010 BCSC 1398, outlined the proper approach to the art of assessing credibility at para. 186:

> [186] Credibility involves an assessment of the trustworthiness of a witness' testimony based upon the veracity or sincerity of a witness and the accuracy of the evidence that the witness provides (*Raymond v. Bosanquet (Township)* (1919), 1919 CanLII 11 (SCC), 59 S.C.R. 452, 50 D.L.R. 560 (S.C.C.)). The art of assessment involves examination of various factors such as the ability and opportunity to observe events, the firmness of his memory, the ability to resist the influence of interest to modify his recollection, whether the witness' evidence harmonizes with independent evidence that has been accepted, whether the witness changes his testimony during direct and cross-examination, whether the witness' testimony seems unreasonable, impossible, or unlikely, whether a witness has a motive to lie, and the demeanour of a witness generally (*Wallace v. Davis*, [1926] 31 O.W.N. 202 (Ont.H.C.); *Faryna v. Chorny*, 1951 CanLII 252 (BC CA), [1952] 2 D.L.R. 354 (B.C.C.A.) [*Farnya*]; *R. v. S.(R.D.),* 1997 CanLII 324 (SCC), [1997] 3 S.C.R. 484 at para.128 (S.C.C.)). Ultimately, the validity of the evidence depends on whether the evidence is consistent with the probabilities affecting the case as a whole and shown to be in existence at the time (*Farnya* at para. 356).

[7] Our Court of Appeal set out the overarching concern of a trial judge approaching the credibility of conflicting witnesses in the oft-cited *Faryna v. Chorny*, [1951] B.C.J. No. 152 (C.A.) at para. 11:

> 11 … In short, the real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions. Only thus can a Court satisfactorily appraise the testimony of quick-minded, experienced and confident witnesses, and of those shrewd persons adept in the half-lie and of long and successful experience in combining skilful exaggeration with partial suppression of the truth. …

Mr. Newman's Account

[8] Mr. Newman testified at trial that, before the collision, he approached the corner headed southbound on the right-hand side of the road. His view around the corner was obscured by the foliage. As he rounded the corner, he saw Mr. Bye's dirt bike in the middle of the road, heading towards him at great speed. Mr. Newman did not know how quickly he was travelling, but said that he was going slowly enough to remain in control of the ATV at all times during the accident.

[9] Mr. Newman testified that he applied his brakes, and immediately pulled off the road into the small ditch on the right-hand side. He travelled for about 22 feet in the ditch before coming to a halt.

[10] He says that the dirt bike hit the left side of his ATV, which was stopped or almost stopped at the time of impact. Mr. Bye rolled off the back of the ATV, ending up approximately five feet behind and to the left of Mr. Newman, lying parallel with the road. Mr. Bye's dirt bike was on the left-hand side of the road, near the middle.

[11] Mr. Newman says that he got off the ATV, turned to help Mr. Bye, and lost consciousness. When he regained consciousness, Mr. Whyte had arrived at the accident scene.

Mr. Bye's Account

[12] Mr. Bye testified that, before the collision, he approached the corner headed north, on the right-hand side of the road. He said that he was close to the bushes on the side of the road, so he could not see around the corner.

[13] Mr. Bye says he first saw Mr. Newman's ATV when he was approximately 15 feet away. The ATV was in the corner on the same side of the road as his dirt bike. Mr. Bye says that the ATV was moving quite quickly, going "maybe 70 to 80 kilometers per hour".

[14] Mr. Bye says that, when he saw the ATV, he tried to avoid the collision by turning to the right, with the bike moving at a 45 degree angle to the road. He testified that he and the bike hit the front left corner of the ATV. He was thrown over the ATV, passing behind the driver, and landed with his body perpendicular to the road.

[15] He said that the ATV came to a stop approximately 20 feet from where he lay, on the right-hand side of the road, not in the ditch. He testified that he saw Mr. Newman come towards him, stumble, and collapse near where he was lying.

Other Evidence

[16] Mr. Bye tendered opinion evidence from Darrin Richards, an expert in accident reconstruction. Both parties submitted a number of photographs of the accident scene, although

even the most recent shots were taken six days after the accident.

[17] Three people who were on the scene after the accident also testified: Mr. Whyte, who arrived first, and two firemen, Lee DePellegrin and Captain Glen Gallamore, who responded to the 911 call from Mr. Bye's phone. They testified to the position of the vehicles and the parties when they arrived at the scene. For the reasons I will outline below, I give their evidence little weight.

Mr. Richards' Accident Reconstruction

[18] At the request of Mr. Bye's counsel, Mr. Richards prepared an accident reconstruction report. Mr. Richards is a mechanical engineer who has worked extensively in accident reconstruction. He was qualified to give opinion evidence on accident reconstruction and biomechanics. In both his report and his testimony, I found him to be straightforward, acknowledging the limitations of the information available to him and refusing to speculate on areas of the evidence that were unavailable or incomplete. He emphasised that his findings were "probabilities not absolutes".

[19] Mr. Richards had access to some of the same pictures of the dirt bike and ATV after the accident that are now before the court. He noted that the dirt bike "had transfer marks on the seat and to the panels below the seat" which were "most likely the result of contact with a tire". The marks are apparent on the upper left rear of the dirt bike. Mr. Richards noted that this was the likely point of impact on the dirt bike.

[20] From the damage to the ATV, Mr. Richards identified that the "principal direction of force" of the impact to the ATV was directed "rearward and rightward".

[21] The dirt bike also had damage to the handlebar, clutch lever and handguard, which Mr. Richards opined likely happened when the dirt bike hit the ground after impact.

[22] In the photographs of the ATV, Mr. Richards found damage to the front left of the vehicle: the fender was bent; the facia had been torn off; the hand guard was broken; and a light was hanging down. In testimony, Mr. Richards noted that, for most of this damage, there was no corresponding damage to the dirt bike. He suggested that some of the damage was caused when Mr. Bye's body was thrown from the bike into the ATV.

[23] Mr. Richards compared the height of the ATV's tires to the height of the transfer marks on the dirt bike. He calculated that the bike was heeled over to the left-hand side at approximately a 45 degree angle at the moment of impact. He said that this was indicative of a "high-side" fall, a kind of motorbike accident.

[24] He explained that a high-side occurs when the rider attempts to turn, causing the back tire of the bike to lose traction. As the bike leans into the turn, with the rear wheel slipping in an arc

relative to the front wheel, the rear tire can suddenly regain traction. This sudden stop rolls the bike towards the ‘high side’, launching the rider off the bike. He said that this process would happen very quickly.

[25] In this case, Mr. Richards theorised that Mr. Bye tried to turn right, causing a high-side. The ATV and the dirt bike collided as Mr. Bye was launched from the bike, likely hitting his leg on the upper area of the ATV that was damaged in the crash.

[26] Counsel for Mr. Newman argued that Mr. Richards contradicted the findings in his report on cross-examination. He points to a passage in Mr. Richards’ testimony that he says confirms Mr. Newman’s account:

> Q: Hitting the handlebar. Didn’t go right over the top of Mr. Bye — Mr. Newman.
>
> A: No, I don’t think — I mean if it went right — if he went right through Mr. Newman, I would expect Mr. Newman would have been knocked off the ATV, so I expect he probably went down, in this photograph, the right side. He probably went down — but in the vehicle reference frame, he probably — you know, he probably travelled down the left side of the ATV, contacting this handlebar, and then would have been — would have ended up behind the ATV.

[27] With respect, I do not accept counsel’s suggestion that this confirms Mr. Newman’s testimony, or contradicts the expert report. Mr. Richards’ response describes Mr. Bye’s travel in relation to Mr. Newman, and with reference to a head-on photograph of the ATV. There is no dispute that Mr. Bye approached the ATV from its left, struck the left-hand handlebar of the ATV, and continued over the vehicle to land, in the picture’s reference frame, behind the ATV. His testimony is entirely consistent with his report in this regard.

[28] This does not affect my assessment of Mr. Richards as a reliable and impartial witness.

Mr. Whyte’s Evidence

[29] On direct, Mr. Whyte testified that he had lost sight of Mr. Newman in the moments before the crash, but was following close behind. He says that, when he came around the corner, he saw the accident scene and came to a stop. At that time, he says that Mr. Bye was lying on the ground, with the ATV and the dirt bike each two to three feet from his body.

[30] He said that, when he arrived at the accident scene, he saw Mr. Newman get off his ATV and stumbled, before he and Mr. Newman approached Mr. Bye, tended to his injuries, and tried to contact emergency services. Mr. Whyte denied that Mr. Newman was unconscious, which is contrary to the evidence of both Mr. Bye and Mr. Newman.

[31] While I believe Mr. Whyte did his best to be a credible witness, I cannot accept that he is a reliable one. On cross-examination, he acknowledged that he did not have the best memory of the

accident, and had talked with Mr. Newman several times over the four years since the accident about what had happened, including once when he and Mr. Newman returned to the accident scene to take pictures.

[32] Underlying these concerns are a number of inconsistencies between Mr. Whyte's testimony at trial, and both the testimony of other witnesses and previous accounts he gave of the accident scene.

[33] Firstly, Mr. Whyte's account of arriving on the scene differs from that of both Mr. Newman and Mr. Bye. They both testified that Mr. Newman lost consciousness shortly after he left his ATV, with Mr. Newman testifying that he awoke to see Mr. Whyte arriving at the scene. This ambiguity arises over a critical issue in the litigation, and colours other important elements of Mr. Whyte's testimony. The longer Mr. Newman was unconscious, the greater his lead ahead of Mr. Whyte and, likely, the faster he approached the corner.

[34] Secondly, Mr. Whyte appears to have changed his description of the accident scene over time. In cross-examination, counsel for Mr. Bye presented Mr. White with two diagrams of the accident scene. Mr. Whyte acknowledged that he had made both drawings. A number of features of these drawings are different from each other, and from Mr. Whyte's testimony at trial, including the location of Mr. Newman's ATV, the location of different skid marks, and the distances that Mr. Whyte gives between different features on the drawings. Tellingly, Mr. Whyte's recollection seems to become *more* specific as the time since the accident grows, adding distances and skid marks, and changes to be more consistent with Mr. Newman's account. In testimony, he argued that his own diagrams did not accurately show the position of Mr. Bye's body.

[35] This is not unexpected. Mr. Whyte acknowledged in cross-examination that, after his discussions with Mr. Newman, he realised that parts of his account were "wrong", and changed his account accordingly.

[36] I find it likely that Mr. Whyte's attention, when he arrived at the accident scene, was focused on helping Mr. Bye and contacting emergency services. Since then, he has inadvertently filled in the gaps in his memory through supposition and conversations with Mr. Newman. I am, therefore, hesitant to place much, if any, weight on his testimony, except where it accords with other reliable evidence.

Evidence from the First Responders

[37] Mr. Newman called evidence from two firefighters, Capt. Gallamore and Mr. DePellegrin, who were the first responders at the accident scene. They both described responding to the collision, and roughly confirmed Mr. Newman's evidence on the position of the dirt bike, the ATV,

and the orientation of Mr. Bye's body.

[38] Additionally, before trial, both were interviewed by Mr. Newman's counsel, who prepared statements about what they had seen and done at the accident site. Capt. Gallamore and Mr. DePellegrin each signed a statement, and these were tendered in evidence at the trial.

[39] I have significant concerns about the reliability of the first responders' evidence, and cannot rely on their testimony. Their recollections became more detailed over time, they both know the defendant, and they both worked closely with each other. Mr. Newman, Mr. DePellegrin, and Capt. Gallamore all used similar language in their testimony when referring to key details, and Mr. DePellegrin directly acknowledged that he had spoken with Mr. Newman outside his official capacity since the accident. This leaves me with serious concerns that their evidence has been influenced by conversations with each other. I will deal with Capt. Gallamore and Mr. Pellegrin's evidence in turn.

[40] Capt. Gallamore's recollection of the accident scene in direct was much improved since the months after the collision. In direct, he testified to the location of Mr. Bye's body, the dirt bike, and the ATV, marking their locations on photographs of the accident scene. Capt. Gallamore's signed statement, from the months following the collision, was not so specific:

> If one was driving towards Violin Lake, Doria Newman's ATV was on the right shoulder, facing uphill, in the direction of travel. Levon Bye's dirtbike was laying on the ground approximately to the left of the ATV. I do not recall precisely where the ATV was stopped or what portion of it was on or off the road.

In cross-examination, he acknowledged the statement and agreed that the Court should prefer his statement to the evidence he gave in direct. Nevertheless, Capt. Gallamore felt confident to testify at trial about how much of the ATV was off the road in the bushes, and to mark the relative locations of the vehicles and Mr. Bye. This gives me pause when considering other areas about which Capt. Gallamore claimed to be sure.

[41] Mr. DePellegrin also gave a different account of the accident scene at trial than the one in his earlier statement. In his statement, he described "a large blood stain <u>beneath</u> [Mr. Bye's] leg. I did not see the blood stain anywhere else" (emphasis added). I understood this to mean that the leg-shaped blood stain ran parallel to, and underneath, Mr. Bye's leg. At trial, however, he placed the blood stain elsewhere; he testified that Mr. Bye's body lay with his feet facing south, near the blood stain, and his head facing north. This is consistent with Capt. Gallamore and Mr. Newman's evidence that Mr. Bye's body was perpendicular to the bloodstain.

[42] There were also procedural difficulties with Mr. DePellegrin's account of the crash scene. Counsel for Mr. Newman asked Mr. DePellegrin to mark the locations of Mr. Bye, the dirt bike, and

the ATV on a photograph of the road. In doing so, he directed Mr. DePellegrin to the exhibit that had already been marked by Capt. Gallamore before him. Counsel for Mr. Bye rightly objected to this; however, Mr. DePellegrin had already seen Capt. Gallamore's markings. I cannot rely on his subsequent confirmation of Capt. Gallamore's evidence on this point.

[43] Generally, I am reluctant to give the evidence of Capt. Gallamore or Mr. DePellegrin much weight, except where it accords with other reliable evidence.

Photographic Evidence

[44] No one at the scene of the accident recalled taking photographs that day, and there were none presented as evidence. The parties did submit a number of photographs of the scene taken later, as well as photographs of the ATV and dirt bike which showed damage and repairs.

[45] Melanie Jenner, an acquaintance of Mr. Bye, took the first set of seven photographs of the accident scene on September 1, 2012, six days after the accident. Ms. Jenner knew Mr. Bye through her daughter who dated him from about 2002 until 2009. Ms. Jenner visited Mr. Bye after she heard about the accident and then went to Violin Lake to take pictures. She noticed a stain mark on the road, which looked like a pool of blood, and some possible debris from the first responders or ambulance crew. Since these photographs were the first to be taken after the accident, they became important evidence at trial.

[46] While there is little reliable physical evidence available in this case due to the passage of time between the accident and Ms. Jenner's photographs, the parties point to three features in the photographs to support their accounts of the accident:

1. the bushes and plants at the side of the road, visible in the photographs;

2. the blood stain visible in the photographs; and

3. the damage to the ATV and dirt bike.

[47] Much was made of the bushes visible in Ms. Jenner's photographs. The pictures show that the salmonberry bushes and other greenery are bent or trampled in some places, and relatively undisturbed in others. The plaintiff claims that the undisturbed portions show that Mr. Newman could not have travelled through the ditch, braking for 22 feet, as he claims. The defendant argues that the disturbed foliage supports the defence witnesses' testimony that the ATV came to rest in the ditch. He further argues that his ATV was equipped with a "skid plate" that would allow it to pass over many of the bushes, leaving them relatively undisturbed.

[48] I am unwilling to draw either of these inferences from the pictures. There is no dispute

between the parties that Violin Lake Road is commonly travelled by people who live in the area, and is a popular spot for recreation. There was ample opportunity for the bushes to be disturbed, and the scene altered as traffic moved past. Additionally, at the time of the accident, Mr. Newman, Mr. Whyte, both first responders, and two paramedics all moved around Mr. Bye's body in what must have been a busy, if not hectic, time. While Mr. DePellegrin and Capt. Gallamore each testified that they had not trampled down any of the bushes, I find it highly unlikely that they had the opportunity to focus on this detail in the face of stabilizing Mr. Bye's traumatic leg injury.

[49] In short, there is no reliable indication that the condition of the bushes in the photographs shows them as they were at the time of the accident. I would agree that, to the extent the bushes are not damaged along the ditch, that tends to make Mr. Newman's account of driving through the ditch less likely; however, I am unwilling to put much, if any, weight on this factor given the speculative nature of that conclusion, and the lack of evidence about how a skid plate might affect the plants, or the time it would take the plants to recover.

[50] Ms. Jenner's photographs also show a large, dark, oval mark on the west side of the road, with its length running in an east-west direction. The spot is approximately half way through the corner. While they disagree on the orientation of Mr. Bye's body, and his position relative to the road, all of the witnesses at the scene agreed that the dark spot was a blood stain, and that it marked where Mr. Bye ended up following the collision. I accept that it accurately shows Mr. Bye's position. Much was also made of Mr. Bye's orientation relative to the blood stain. In light of the unreliable and conflicting nature of the oral testimony on that point, which I will address below, I find it probable that the blood stain formed beneath Mr. Bye's leg, with him lying perpendicular to the road.

[51] Lastly, the parties submitted a number of photographs of the ATV and the dirt bike after the accident. Mr. Richards considered many of these when preparing his expert report, and I have discussed their contents above. I accept that the images accurately show the damage to both vehicles.

Credibility and Reliability of Mr. Bye and Mr. Newman

[52] I turn now to assessing the credibility and reliability of Mr. Newman and Mr. Bye's accounts of the accident. In doing so, I am mindful of the factors in *Bradshaw*, and the overall consistency of the evidence with the probabilities affecting the case. For the reasons that follow, I prefer Mr. Bye's evidence where it conflicts with Mr. Newman's.

Mr. Newman's Testimony

[53] Mr. Newman was inconsistent with key details in his account. One troubling example concerned his evidence on when he had applied his brakes during the accident. He testified that

his ATV has three braking devices: two hand brakes and a foot brake. In cross-examination, counsel for Mr. Bye asked if Mr. Newman had had his brakes on as he travelled in the ditch:

> Q: Okay. And I understood your evidence to be that you, when you were on the roadway, you turned and then you applied your hand brakes and your foot brake?
>
> A: All three. Correct.
>
> Q: Okay. And that was after you turned on the road, but before you went into the ditch?
>
> A: Yes.
>
> Q: Okay. And I understood you to say that after you were in the ditch you let your foot off your foot brake?
>
> A: Correct.

Mr. Newman explained that he took his foot off the foot brake because, otherwise, the wheels of his ATV would lock, and he would not have control over the vehicle. On discovery, however, Mr. Newman had a different account:

> 622 Q: Okay. Going to [picture] 71, what is being measured here?
>
> A: That's the distance I travelled in the ditch.
>
> 623 Q: Oh. I see. Oh, okay. Was your foot on the brakes during that time?
>
> A: Yes.

Mr. Newman acknowledged and adopted these answers at trial.

[54] In my view, Mr. Newman modified his account because the pictures of the accident scene do not show skid marks in the ditch. Mr. Newman acknowledged that, when 'locked-up" by the foot brake, the wheels of his ATV caused skid marks. He then changed his account to explain the discrepancy.

[55] I am also hesitant to rely on portions of Mr. Newman's account because of how his evidence was given at trial. Counsel for Mr. Newman clearly had a picture of what had happened during the critical moments before the accident; he extensively used leading questions to draw out Mr. Newman's evidence on critical issues of liability. Counsel for Mr. Bye objected to this.

[56] In *R. v. Benji*, 2012 BCCA 55, our Court of Appeal considered the weight that can be given to critical testimony adduced through leading questions in direct examination:

> [133] In *R. v. Rose* (2001), 153 C.C.C. (3d) 225 at para. 9, 53 O.R. (3d) 417 (Ont. C.A.), Charron J.A. (as she then was) made the following observations about leading questions being asked by the party who has called the witness:
>
> > [9] A leading question is one that suggests the answer. It is trite law that the party who calls a witness is generally not permitted to ask the witness leading questions. The reason for the rule arises from a concern that the witness, who in many instances favours the party who calls him or her, will readily agree to the suggestions put in the form of a question rather than give

> his or her own answers to the questions. Of course, the degree of concern that may arise from the use of leading questions will depend on the particular circumstances, and the rule is applied with some flexibility. For example, leading questions are routinely asked to elicit a witness's evidence on preliminary and non-contentious matters. This practice is adopted for the sake of expediency and generally gives rise to no concern. Leading questions are also permitted to the extent that they are necessary to direct the witness to a particular matter or field of inquiry. Apart from these specific examples, the trial judge has a general discretion to allow leading questions whenever it is considered necessary in the interests of justice: *Reference Re R. v. Coffin* (1956), 1956 CanLII 94 (SCC), 114 C.C.C. 1 (S.C.C.) at 22.

[57] Here, Mr. Newman was not led through uncontentious facts or general background information, but asked to agree with his counsel on areas that are central to liability in this case and vigorously disputed between the parties.

[58] The following exchange is from Mr. Newman's direct examination:

> Q: And you agree with me that the Violin Lake Road, although it's private property, is still a recreational area widely used by people?
>
> A: I do.
>
> Q: And you've seen — you've encountered all kinds of all-terrain vehicles and motorcycles on that road?
>
> A: Correct.
>
> Q: You've also encountered people walking on that road?
>
> A: Yes.
>
> Q: You'd often pass, what, three to four people every time you were driving on that road? Sometimes you wouldn't see any people.
>
> A: Yeah. I don't know. On average I guess. There was always three or four people it seemed but sometimes, you're right, it would be an excess of people.
>
> Q: Okay.
>
> A: It would just depend on the weather I guess.
>
> Q: So when you're riding on that road, and I specifically refer to the road between the mill pond and Violin Lake Road, <u>you were always on guard watching for people?</u> Is that what you're telling us?
>
> A: Correct.
>
> Q: <u>And you ride your ATV accordingly?</u>
>
> A: Yes.
>
> [Emphasis added.]

[59] I would add that much of Mr. Newman's evidence, whether prompted by counsel or not, was similarly conclusory on what are properly legal questions, not evidentiary ones. When he was testifying on his speed of travel, he gave conclusory statements that he drove "according to the

conditions" or at a speed that "suits the environment". Mr. Newman's task as a witness is to give evidence, not to make or prompt legal conclusions; I put no weight on these statements.

[60] Turning to the details of Mr. Newman's story, they are neither probable on their own, nor do they accord with the location of Mr. Bye's body following the crash or the expert evidence on the damage to the vehicles and their relative speed.

[61] Firstly, in my view, Mr. Newman's account is not probable on its own. He testified that, when he saw Mr. Bye approaching down the middle of the road, he pulled into the ditch, and came to a stop, or a near-stop. While there, he was struck by Mr. Bye, and possibly the dirt bike. This would require Mr. Bye's dirt bike to have travelled in a generally northwesterly direction (into the "oncoming" side of the road) to strike the ATV in the ditch on the west side. Mr. Newman did not offer any explanation for why Mr. Bye would drive into him, either through accident or design.

[62] Mr. Newman gave no reasonable explanation of how or why this would have happened. I find this to be an improbable and unlikely account.

[63] Additionally, while Mr. Newman testified that he was stopped at the time of the collision, there is evidence that he has not always taken this position. The statements that Mr. DePellegrin and Capt. Gallamore adopted at trial relate the parties' immediate impressions of their speed at the time of the accident. Mr. DePellegrin described conversations he had with Mr. Newman and Mr. Bye at the scene, writing that both had said they "were going" at the time of the crash. Capt. Gallamore reported on a conversation he had with Mr. Newman as they left the scene in Capt. Gallamore's truck:

> He said he was heading up Violin Lake Road with Tom Whyte, he saw Levon Bye coming at him as he came around the corner, and he turned to the right to get off the road, but Levon Bye struck the front left side of his ATV. He said he was travelling about 20 to 30 kilometers at the time.

In this regard, both statements and Mr. Bye's testimony agree that the ATV was not stopped when the vehicles collided, calling Mr. Newman's credibility into question on this point.

[64] The second major difficulty with Mr. Newman's account is that it does not accord with the location of the blood stain on the road. Mr. Richards' opinion was that, following the high-side accident, Mr. Bye's body would have continued travelling over the ATV, roughly in the direction the dirt bike had been travelling. This accords with common sense; upon colliding with the ATV, Mr. Bye's body would have significant momentum still carrying it forward. Mr. Richards testified that, because the impact to Mr. Bye's leg was low on his body, he would have retained most of his momentum. Had the collision occurred in the ditch, as Mr. Newman recounted, Mr. Bye's body should have continued over the ATV in the general direction he had been travelling and should

have landed off the road, or in the ditch.

[65] Mr. Richards addressed this situation on cross-examination. Mr. Newman's counsel asked him what he would expect to happen if the ATV was not moving at the time of impact:

> A: … What I'm saying is there's a relative speed between the vehicles, whether the ATV's moving or not. Even if the ATV is at a complete stop, you know, Mr. Bye — there — there is relative speed between the vehicles, so if the ATV's stopped, Mr. Bye's still coming in at a speed.
>
> Q: Yes.
>
> A: When he hits the ATV, yes, some energy is going to be dissipated, he's got bad fractures, but I would expect him to continue … beyond the ATV.
>
> …
>
> Q: I am suggesting … to you that the ATV here is stopped or almost stopped.
>
> A: Right, but in this case, Mr. Bye is not stopped, so even in that hypothetical where the ATV is stopped, he is not stopped so he is going to still go over the ATV.

His report states that it is difficult to predict the motion of a body after impact, and that this is not an exact science:

> It is likely that Mr. Bye collided with the left front corner of the ATV. While it is apparent that there was significant interaction between his left leg and the ATV, any impact forces to his upper body were apparently much less significant. In my experience it is likely that Mr. Bye traveled over, or partially over the ATV, although he would have experienced a change in velocity, and likely some change in direction as a result of the impact … However, tumbling of a person can be chaotic in nature and his final rest position may not be in line with the point of impact.

In spite of that caution, however, there is nothing in the expert evidence to suggest that, on impact, Mr. Bye could have reversed direction. Mr. Richards' evidence was clear that, although he could not determine precisely where a moving body would come to rest, it would likely travel over, or partially over, the ATV. If the ATV was in the ditch, as Mr. Newman testified, then Mr. Bye's body would likely have traveled over the ATV, into the brush, or partially over the ATV, coming to a rest in the ditch. This does not accord with the blood stain in the road that I have found marks where Mr. Bye lay after the accident. Indeed, one of the few points of consistency between all of the witnesses was that Mr. Bye's body came to rest on the road.

[66] Instead, the blood stain shows that Mr. Bye's lower leg came to rest on the west side of the road, towards the middle. This would involve a significant deviation from the alleged point of impact that is not consistent with either what is probable or the expert evidence available.

[67] This is further supported by the extent of the damage to the ATV. Mr. Bye hit the upper structure with significant force, sufficient to cause multiple fractures to his left leg. This conclusion accords with Mr. Richards' report and the damage to the ATV without corresponding damage to the

dirt bike. Mr. Richards affirmed on cross-examination, and I agree, that the damage indicates that the two vehicles were travelling with “significant relative speed”. If the ATV was stopped, then the dirt bike must have been travelling quickly. It is improbable that Mr. Bye could hit the ATV at speed and simply, as Mr. Newman claims, “roll off”, to land immediately behind it.

[68] Finally, while Mr. Newman’s testimony can explain how the front left of the ATV was damaged, it does not explain the transfer marks to the upper rear left of the dirt bike. Mr. Richards testified, and I accept, that the bike must have been leaning to the left at an approximately 45-degree angle at impact to create the transfer marks. Therefore, the dirt bike would have to have entered a high-side, leaving a skid mark that ended roughly at the point of impact. None of the witnesses described a skid mark ending at or near the ditch, but instead, a skid mark roughly in the middle of the road, deviating towards the west.

[69] I find Mr. Newman’s testimony to be an improbable account of the collision, and I do not accept it.

Mr. Bye’s Testimony

[70] Mr. Bye’s testimony is also not without its faults. Mr. Newman points to a number of possible inconsistencies both between Mr. Bye’s testimony and the testimony of other witnesses, and with his own earlier evidence on discovery.

[71] The majority of these concerns are minor, such as Mr. Bye possibly confusing a cigarette with a cigarillo, not recalling who he handed his phone to when he got through to 911, and changes in his rough estimate of the number of potholes along the Violin Lake Road. With few exceptions, these concerns relate to what happened after the collision; in those cases, I am mindful that Mr. Bye was in overwhelming pain and losing blood. He may not have had a good opportunity to accurately observe and remember the specifics of what happened after he came to rest on the road. I place less reliance on his testimony in these areas, especially since they are not necessary to the determination of liability below.

[72] However, I accept the broad strokes of his testimony, and none of the concerns to which Mr. Newman’s counsel points give me any grave concerns about Mr. Bye’s credibility on the whole.

Liability

[73] To establish negligence, the plaintiff must prove three elements on a balance of probabilities: (1) that the defendant owed him a duty of care, (2) that the defendant’s behaviour breached the standard of care, and (3) that the plaintiff suffered damage caused (in fact and law) by the defendant’s breach: *Mustapha v. Culligan of Canada Ltd.*, 2008 SCC 27 at para. 3.

[74] The first and the third factors are not contentious here.

[75] Both parties agree that the plaintiff and defendant owed a duty of care to not expose others on the road to unnecessary risk of harm: *Sinclair v. Nyehold* (1972), 29 D.L.R. (3d) 614 at 618 (B.C.C.A.).

[76] The parties have also submitted a lengthy agreed statement of facts accepting that the accident caused Mr. Bye's numerous leg injuries, and led to the eventual amputation of his leg.

[77] Therefore, there are two remaining issues:

1. did either Mr. Newman or Mr. Bye breach the applicable standard of care and thereby cause the accident; and

2. in the event that both Mr. Bye and Mr. Newman are at fault, in what proportion should they bear the responsibility?

The Parties' Positions

[78] The plaintiff argues that, by driving too quickly around a blind corner on the wrong side of the road, Mr. Newman created an unreasonable risk of harm to Mr. Bye. Presented with this risk, Mr. Bye tried to avoid the collision, but could not. Mr. Bye argues that Mr. Newman's negligence caused the accident.

[79] The defendant argues Mr. Bye was solely responsible for the collision. He argues that Mr. Bye put Mr. Newman at risk by travelling too quickly, by overreacting to Mr. Newman's appearance, and by failing to keep a proper lookout. In the alternative, Mr. Newman argues that Mr. Bye was contributorily negligent, and should bear most of the fault. Specifically, the defendant argues that: Mr. Bye contributed to the accident by causing a high-side; Mr. Bye did not have adequate experience with his dirt bike; Mr. Bye had greater visibility than Mr. Newman; and that a dirt bike is inherently more dangerous than an ATV.

Issue 1: Did either Mr. Bye or Mr. Newman breach the applicable standard of care and thereby cause the collision?

[80] In *Ryan v. Victoria (City)*, [1999] 1 S.C.R. 201 at para. 28, Major J., writing for the court, outlined the test for the relevant standard of care:

> 28 Conduct is negligent if it creates an objectively unreasonable risk of harm. To avoid liability, a person must exercise the standard of care that would be expected of an ordinary, reasonable and prudent person in the same circumstances. The measure of what is reasonable depends on the facts of each case, including the likelihood of a known or foreseeable harm, the gravity of that harm, and the burden or cost which would be incurred to prevent the injury. In addition, one may look to external indicators of reasonable conduct, such as custom, industry practice, and statutory or regulatory standards.

Therefore, the applicable standard of care here is what an ordinary, reasonable, and prudent person would be expected to do in the same circumstances as the parties here.

[81] Whether Mr. Newman breached the standard of care in this case depends on the sequence of events that unfolded on the Violin Lake Road. Therefore, I make the following findings on the events surrounding the collision:

1. Mr. Newman was travelling at an unsafe speed in the moments before the collision. Although I do not accept Mr. Bye's estimate that he was travelling at 70-80 kilometers per hour, I find that he was travelling too quickly for the road conditions and visibility. Mr. Bye's testimony on this is supported by Mr. Whyte coming on the accident scene to find Mr. Newman conscious; this suggests that Mr. Whyte had been a significant distance behind Mr. Newman's ATV. Mr. Newman testified that his ATV was significantly more powerful than Mr. Whyte's, with an engine more than three times larger, allowing him to quickly outdistance Mr. Whyte.

2. Mr. Newman "cut" the corner, passing on the east side (his left) of the road as he turned. I accept Mr. Bye's evidence on this which is consistent with Mr. Richards' opinion on the meaning of the skid mark and that Mr. Newman was travelling quickly.

3. Mr. Bye approached the corner on the east side of the road (his right), traveling at a speed which, but for the presence of Mr. Newman's ATV, would have allowed him to safely turn the corner. I accept Mr. Bye's testimony on this matter.

4. Mr. Bye attempted to avoid the collision by turning to the right. This caused the rear wheel of his dirt bike to slide, resulting in a high-side. This accords with Mr. Bye's testimony and Mr. Richards' opinion. The skid mark, noted by all of the witnesses, was made by the rear wheel sliding on the road. Its path, running down the middle of the road, deviating towards the west, shows that the rear of Mr. Bye's dirt bike spun outward during the high-side.

5. As the dirt bike was completing the high-side, it was struck by Mr. Newman's ATV, as Mr. Newman attempted to turn to the right. Mr. Richards' evidence on the nature of the damage to the fender, hand guard, and ignition support this conclusion. This impact caused the transfer marks on the seat of the dirt bike.

6. Mr. Bye was thrown from the bike with his left leg striking the upper left area of the ATV, causing the damage to the ATV's handlebar and ignition and the injury to Mr. Bye's leg.

7. The point of impact was at or near the end of the skid mark, in the centre of the road. Mr.

Richards explained, and I accept, that this shows the point where the rear wheel of the dirt bike gained traction and began the high-side. This corresponds with Mr. Bye's testimony that, at the moment of impact, his bike was on the east side of the road, turned 45 degrees to the right; this would leave his rear tire at or near the centre line of the road.

8. The same impact pushed Mr. Newman forward and to the left, injuring his left leg as shown in the photographs.

9. Mr. Bye landed perpendicular to the road. The blood spot visible in the photographs shows where his injured left leg was resting.

10. Although it was a principal point of disagreement, whether Mr. Newman's ATV came to a stop on the west side of the road, or in the ditch on the west side is immaterial to liability. The parties invited me to make inferences of the speed and path of the vehicles based on their final locations; however, the evidence on where the dirt bike and the ATV came to rest is unclear at best. I have serious concerns about relying on the testimony of Mr. Newman, Mr. Whyte, and the first responders, and would also note that Mr. Bye at that point likely had his ability to observe and remember the scene, affected by pain and shock.

[82] I find that Mr. Newman breached the standard of care expected of an ordinary, reasonable, and prudent person by driving his ATV too quickly, and by crossing the centre of the road into the oncoming side around a blind corner. This breach caused the accident.

Issue 2: Was Mr. Bye contributorily negligent, and, if so, how should liability be apportioned?

[83] The defendant submits that, if he is found liable, this Court should find that Mr. Bye also contributed to the collision, and apportion liability under the *Negligence Act*, R.S.B.C. 1996, c. 333, s. 1. It reads:

> **Apportionment of liability for damages**
>
> 1 (1) If by the fault of 2 or more persons damage or loss is caused to one or more of them, the liability to make good the damage or loss is in proportion to the degree to which each person was at fault.
>
> (2) Despite subsection (1), if, having regard to all the circumstances of the case, it is not possible to establish different degrees of fault, the liability must be apportioned equally.
>
> (3) Nothing in this section operates to make a person liable for damage or loss to which the person's fault has not contributed.

[84] The burden is on the defendant to prove that Mr. Bye was contributorily negligent: *Shaw v. Storey* (1991), 53 B.C.L.R. (2d) 257 (C.A). To do so, he must show that the plaintiff acted in a way that created an unreasonable risk of harm, breaching the standard of care and putting himself in

harm's way.

[85] The law does not expect perfection from a person put in danger by another's negligence. Where a person must respond immediately to a dangerous situation, the court will not require them to take the safest possible course in order to avoid liability. Instead, as Freedman C.J.M. wrote in *Williamson Estate v. Landr*y, [1974] M.J. No. 68 (C.A.) wrote at para. 4:

> 4 … The conduct of the plaintiff driver must be assessed in the light of the crisis that was looming up before her. If in the "agony of the moment" the evasive action she took may not have been as good as some other course of action she might have taken - a doubtful matter at best - we would not characterize her conduct as amounting to contributory negligence. It was the defendant who created the emergency which led to the accident. It does not lie in his mouth to be minutely critical of the reactive conduct of the plaintiff whose safety he has imperilled by his negligence.

As Savage J.A., writing for our Court of Appeal, noted in *Graham v. Carson*, 2015 BCCA 310 at para. 15, this principle is not restricted to vehicles travelling at highway speeds, but can apply when, on the facts, a person had to respond to another's negligence without the time to properly consider their reaction.

[86] I find that, to the extent that Mr. Bye's decision to turn contributed to his injuries, he acted in the "agony of the moment"; Mr. Bye had little time to address the risk Mr. Newman's negligence had created, and it is not reasonable to use the considered perfection of hindsight as a measure of his response.

[87] Mr. Bye testified that, when he first saw Mr. Newman's ATV, it was on the wrong side of the road coming out of the blind corner, and travelling at great speed. He testified that he had only seconds to respond to the oncoming ATV. He turned to the right, further towards his own side of the road. While it turned out that that turn was too sharp for the road and conditions, this does not raise Mr. Bye's conduct to the level of contributory negligence.

[88] Section 1 of the *Negligence Act* does not arise on these facts, and there will be no apportionment of liability between the plaintiff and defendant.

[89] I find Mr. Newman 100% liable for the collision.

Damages

[90] Mr. Bye claims non-pecuniary damages, past and future loss of earning capacity, cost of future care, loss of housekeeping capacity, and special damages. I will address each of these heads in turn.

Non-pecuniary Damages

[91] Non-pecuniary awards are given to compensate a plaintiff for the pain and suffering caused by the defendant's negligence. Mr. Justice Dickson set out the policy behind these awards in *Andrews v. Grand & Toy Alberta Ltd.,* [1978] 2 S.C.R. 229 at 261:

> … There is no medium of exchange for happiness. There is no market for expectation of life. The monetary evaluation of non-pecuniary losses is a philosophical and policy exercise more than a legal or logical one. The award must be fair and reasonable, fairness being gauged by earlier decisions; but the award must also of necessity be arbitrary or conventional. No money can provide true restitution. …

[92] While each case depends on its own facts, the award should be fair when measured against other, similar cases. In *Stapley v. Hesjlet*, 2006 BCCA 34 at paras. 45-46, the Court of Appeal set out a non-exhaustive list of factors to be considered in making this award:

- the age of the plaintiff;
- the nature of the injury;
- severity and duration of the pain;
- disability;
- impairment of life;
- impairment of family, marital, and social relationships;
- impairment of physical and mental abilities; and
- loss of lifestyle.

The plaintiff's stoicism is also a factor, but should not penalize the plaintiff.

[93] Mr. Bye is a young man. He was 35 years old at trial and 31 at the time of the accident. He was an active man who enjoyed various recreational pursuits. He had been employed by Teck Metals as a carpenter commencing February 2010. It was a job he loved, which paid him handsomely.

[94] The injuries from the accident have changed his life dramatically forever. He now suffers from daily pain and fatigue as a result of the amputation and is permanently disabled from returning to carpentry work and to many of his recreational activities. He testified that, before the accident, he enjoyed dirt biking, boating, hunting, fishing, hiking, and swimming, and that his injuries have either cut off, or severely limited his enjoyment of these.

[95] Additionally, Mr. Bye is now a father, with his son born during the litigation, in 2016. While he

is still able to play with and care for his son, many of these interactions are made more difficult by his injury. He testified to the difficulties of lowering himself to the floor to spend time with his son.

[96] Mr. Bye is seeking $240,000 for non-pecuniary damages. Mr. Newman submits a range of $160,000-$180,000 is more appropriate. There is no dispute that Mr. Bye suffered significant physical injuries, and that these have had a profound effect on how he lives. Counsel for the plaintiff points to five cases that he says involved injuries that are analogous to this case: *Graham v. Grant* (1990), 46 B.C.L.R. (2d) 151 (C.A.); *Gallson v. Butzow*, [1995] B.C.J. No. 1874 (S.C.); *Forsberg v. Naidoo*, 2011 ABQB 252; *Tailleur (Next Friend Of) v. Grande Prairie General and Auxiliary Hospital and Nursing Home District No. 14* (1996), 38 Alta. L.R. (3d) 112 (Q.B.); and *Greenhalgh v. Douro-Dummer (Township)*, [2009] O.J. No. 5438 (S.C.J.), aff'd 2012 ONCA 299. These cases give a range of non-pecuniary damages between $226,760 and $308,500 present value.

[97] The defendant argues that a lower range would be more appropriate for Mr. Bye's injuries. He cites *Chesher v. Monaghan*, [1999] O.J. No. 1278 (C.J. Gen. Div), *Morrison v. Pankratz* (1996), 3 B.C.L.R. (3d) 1 (C.A.), *Appel (Guardian ad litem of) v. Appel*, 1994 CanLII 2171 (B.C.S.C.), and *Savinkoff v. Seggewiss*, 1994 CanLII 3196 (B.C.S.C.), rev'd on other grounds 25 B.C.L.R. (3d) 1 (C.A.). These cases give a range of between $138,755 and $187,427 present value.

[98] Because this type of amputation is rare in the case law, none of the cases submitted were perfectly analogous, and many are quite old. I must discount some cases, which considered injuries that vary too widely from Mr. Bye's. *Greenhalgh,* for example, involved an 18-year-old plaintiff who lost both legs and all but two fingers. A number of the other cases involved much older plaintiffs whose pre-accident activities were not as extensive or active as Mr. Bye's, and whose lives are more difficult to compare to his.

[99] I found the facts in *Tailleur* and *Savinkoff* to be most helpful.

[100] *Tailleur* considered a 14-year-old who, through negligent medical care, required an above-knee amputation instead of one below the knee. The court assessed the non-pecuniary loss of an above-knee amputation, and subtracted that from the loss from a below-knee amputation, finding that $170,000 was appropriate compensation for an amputation like Mr. Bye's. That would have a present value of $246,000. Similar to the facts in this case, the plaintiff was young (though significantly younger than Mr. Bye), had an active lifestyle, and was subjected to ongoing and painful treatment for her condition.

[101] *Savinkoff* gives the low range for an injury similar to Mr. Bye's. There, the plaintiff suffered an above-knee amputation after a car accident. The court considered the difficulty of finding prostheses for above-knee amputations, the plaintiff's age (57 at the time of the accident), and a

pre-existing, life-threatening heart condition, which limited the plaintiff's activities, and life expectancy. The court awarded $125,000 in general damages, with a present value of $187,427.

[102] Mr. Bye has been dealing with his injuries since he was 31. He will continue to face difficulties for the rest of his life. Considering all the evidence, the *Stapley* factors, and case law submitted by the parties, I conclude an award of $220,000 is fair and appropriate in all the circumstances.

Loss of Past Earning Capacity

[103] In many cases, quantifying an award for past loss of earning capacity is a straightforward exercise, as Tysoe J.A. pointed out in *Bradley v. Bath*, 2010 BCCA 10 at para. 33:

> [33] In the usual type of case, as I have described it above, the assessment of the loss of past earning capacity is straightforward. There is no suggestion that the plaintiff would have worked at a job other than the one he or she had at the time of the accident and the one to which he or she has returned. The loss of the past earning capacity is quantified by the amount of the wages or salary the plaintiff would have earned at the job if his or her capacity had not been impaired by the injuries sustained in the accident. The assessment is not so straightforward, however, in other cases; for example, where the plaintiff was not employed at the time of the accident or where, as here, the plaintiff does not return to the job at which he or she was employed at the time of the accident.

[104] At the time of the accident, Mr. Bye was in the relatively early stages of his career, and he has not returned to his previous position. Even in cases where assessing past loss is more speculative, however, the analysis is guided in part by the plaintiff's pre-accident income as a measure of the capacity which he has now lost. Kent J. adopts that approach in *Cook v. Symons,* 2014 BCSC 1781 at para. 201:

> [201] … Where the plaintiff was engaged in steady, long-term, likely permanent employment before the accident, the starting point for the measurement will usually be reference to the actual earnings the plaintiff would have received had his employment continued to the date of trial. From that amount will then be deducted whatever income the plaintiff actually did earn, or should have earned, during that period. Further adjustments may be made to account for hypothetical possibilities that might have affected the earning scenario, so long as they are real and substantial possibilities and not mere speculation.

Factual Background

[105] Mr. Bye is a trained carpenter. Before the accident, he worked as a carpenter in the Maintenance Services division of Teck Metals, a union job with the opportunity to work overtime. A little over a year after he was hired in March 2011, Mr. Bye moved to Teck's Zinc Electrolytic and Melting plant ("E and M plant") which allowed him to work substantially more overtime hours. Mr. Bye was hardworking and motivated, and his income increased greatly.

[106] The parties agree that, as a result of the accident, Mr. Bye can no longer work as a

carpenter in the E and M plant. They further agree that he was off work entirely until September 2013 because of his injuries. On his return to work, he was a Sign Shop Operator, which paid less than his job at the E and M plant. Since January 2015, Mr. Bye has worked as a trades instructor for Teck, which has a base pay slightly higher than what he was making as a carpenter at the E and M plant, though the position offers much less overtime.

[107] Both parties tendered economic reports about the effect of the accident on Mr. Bye's earnings. The main difference in the reports concerns how they treat the significant overtime that Mr. Bye worked after moving to the E and M Plant. Mr. Turnbull, expert for the plaintiff, uses the overtime in his assessment, and arrives at $218,640 in past wage loss, net of taxes. Mr. Carson, expert for the defendant, does not include overtime in his assessment, and gives a before-tax figure of $166,696. I am mindful that only Mr. Bye's net, after-tax losses are recoverable.

[108] Bryan Zelke, a carpenter in the Roaster-Acid Plant at Teck, testified that he worked overtime with Mr. Bye about once a week from the time Mr. Bye started working at the E and M Plant. I accept Mr. Zelke's testimony that significant overtime opportunities continued after August 2012, and would have been available to Mr. Bye. His oral evidence was corroborated with his paystubs from 2011 to 2016.

[109] Mr. Profili, Mr. Bye's supervisor in the E and M Plant at the time of the accident, and Mr. Audia, who supervises the carpenter who took Mr. Bye's position in the E and M Plant after the accident, also testified that significant overtime would have continued to be available to Mr. Bye. I accept their testimony.

[110] I prefer Mr. Audia's evidence to that of Mr. Banga, the carpenter who took over Mr. Bye's job, on the overtime available after 2012. This is, in part, because Mr. Banga is a friend of Mr. Newman, and also because he did not produce his payroll records from 2012 to 2015, but only for 2016. Mr. Audia testified that the opportunity to work overtime was influenced by having a good personal relationship with the carpenter who needed assistance. It seems probable that Mr. Banga, who was a non-union carpenter, could not cultivate as positive a relationship with the other union carpenters, and was not asked to work as much overtime. I do not accept that Mr. Bye, who was in the union, would have faced the same difficulty.

[111] I find that Mr. Bye's carpentry position was steady, long-term and likely permanent. I find that he would have been offered ample overtime in the E and M Plant and elsewhere from 2012 to 2016. Therefore, I prefer Mr. Turnbull's report. Those calculations best reflect the facts I have found, and I accept his figure.

[112] I find that Mr. Bye suffered past wage loss of $218,640.

Loss of Future Earning Capacity

[113] Mr. Bye also claims compensation for his lost future earning capacity.

[114] In *Perren v. Lalari*, 2010 BCCA 140, our Court of Appeal summarised what a plaintiff must show to establish and value a loss of future earning capacity at para. 32:

> [32] A plaintiff must always prove … that there is a real and substantial possibility of a future event leading to an income loss. If the plaintiff discharges that burden of proof, then depending upon the facts of the case, the plaintiff may prove the quantification of that loss of earning capacity, either on an earnings approach, as in *Steenblok,* or a capital asset approach, as in *Brown*. The former approach will be more useful when the loss is more easily measurable, as it was in *Steenblok*. The latter approach will be more useful when the loss is not as easily measurable, as in *Pallos* and *Romanchych*. A plaintiff may indeed be able to prove that there is a substantial possibility of a future loss of income despite having returned to his or her usual employment. That was the case in both *Pallos* and *Parypa.* But, as Donald J.A. said in *Steward*, an inability to perform an occupation that is not a realistic alternative occupation is not proof of a future loss.
>
> [Emphasis in original.]

[115] As Greyell J. noted in *Simmavong v. Haddock,* 2012 BCSC 473 at para. 95, this poses two questions:

1. has the plaintiff shown that their earning capacity has been impaired by their injuries; and, if so,

2. what is the appropriate measure of that loss?

[116] In *Hoy v. Williams*, 2014 BCSC 234 at paras. 156-158, Mr. Justice Kent summarized the two approaches to assessing loss of future earning capacity:

> [156] There are two possible approaches to assessment of loss of future earning capacity: the "earnings approach" from *Pallos*, and the "capital asset approach" in *Brown*. Both approaches are correct. The "earnings approach" will generally be more useful when the loss is easily measurable: *Perren v. Lalari*, 2010 BCCA 140 at para. 32. Where the loss "is not measurable in a pecuniary way", the "capital asset" approach is more appropriate: *Perren* at para. 12.
>
> [157] The earnings approach involves a form of math-oriented methodology such as i) postulating a minimum annual income loss for the plaintiff's remaining years of work, multiplying the annual projected loss by the number of remaining years and calculating a present value or ii) awarding the plaintiff's entire annual income for a year or two: *Pallos v. Insurance Corp. of British Columbia* (1995), 100 B.C.L.R. (2d) 260 (C.A.); *Gilbert v. Bottle*, 2011 BCSC 1389 at para. 233.
>
> [158] The capital asset approach involves considering factors such as i) whether the plaintiff has been rendered less capable overall of earning income from all types of employment; ii) whether the plaintiff is less marketable or attractive as a potential employee; iii) whether the plaintiff has lost the ability to take advantage of all job opportunities that might otherwise have been open; and iv) whether the plaintiff is less valuable to herself as a person capable of earning income in a competitive labour market:

> *Brown v. Golaiy* (1985), 26 B.C.L.R. (3d) 353 (S.C.); *Gilbert v. Bottle*, 2011 BCSC 1389 at para. 233; *Morgan v. Galbraith*, 2013 BCCA 305 at paras. 53 & 56.

[117] Regardless of the means used to assess loss of future earning capacity, through either the income or capital asset approach, this is a global assessment, not a mathematical calculation: *Jurczak v. Mauro*, 2013 BCCA 507 at para 36; *Grewal v. Naumann,* 2017 BCCA 158 at para. 54.

[118] The court's task, in either approach, is to identify the contingencies that bear on the plaintiff's earning ability in the future. These contingencies, both positive and negative, are weighed according to their likelihood and impact, provided that they rise to the level of a "real and substantial possibility" rather than mere speculation. The goal is to craft an award that will reflect the plaintiff's true future loss, and, as best as is practicable, place them in the position they would have been in but for their injury: *Cook* at para. 218.

[119] There is no dispute that Mr. Bye has proven some loss of future earning capacity. The parties differ, however, in the approach the court ought to employ to assess that loss. Mr. Bye seeks to use the earnings approach, while Mr. Newman advocates for the capital asset approach.

[120] In his report, Mr. Turnbull calculated Mr. Bye's future income loss at $1,626,000 to age 65 and at $1,851,669 to age 71. His calculation assumes that Mr. Bye could and would work at his 12-month pre-accident overtime levels indefinitely and does not account for contingencies like the labour market or other factors in Mr. Bye's life. Mr. Carson calculates that, if 10% were applied for labour market contingencies to Mr. Turnbull's numbers, Mr. Bye's lost earnings would actually be $1,212.027.

[121] The defendant submits, however, that an award of $200,000 would better reflect Mr. Bye's actual lost earning capacity. He argues that, because Mr. Bye now has a higher base wage, his loss of future earnings is limited to the lost opportunities to work overtime. In assessing Mr. Bye's loss as a capital asset, the defendant argues that, as in *Pallos v. Insurance Corp. of British Columbia* (1995), 100 B.C.L.R. (2d) 260 (C.A.), the court should assess the lost capacity based on some multiple of the plaintiff's annual wage. He says that $200,000 represents 1.3 times Mr. Bye's annual, pre-accident, peak earnings.

[122] The plaintiff disputes that *Pallos* stands for the general principle that is preferable to assess lost future earning capacity as some multiple of the plaintiff's yearly wage. He relies on *Jurczak* at paras. 36-37, where the court stressed the contextual nature of such an award:

> [36] This process is "an assessment rather than a calculation" and "many different contingencies must be reflected in such an award": *Barnes v. Richardson*, 2010 BCCA 116 at para. 18. "Ultimately, the court must base its decision on what is reasonable in all of the circumstances. Projections, calculations and formulas are only useful to the extent that they help determine what is fair and reasonable": *Parypa v. Wickware*, [1999 BCCA 88], at para.

70.

> [37] With that said, if there are mathematical aids that may be of some assistance, the court should start its analysis by considering them. For example, in *Henry v. Zenith* (1993), 31 B.C.A.C. 223 at paras. 44-48, 82 B.C.L.R. (2d) 186 (C.A.), this Court held that a trial judge's failure to consider an economist's projections of a plaintiff's lost future earning capacity contributed to the judge committing an error in principle, which "resulted in a wholly erroneous estimate of the damages".

[123] The plaintiff therefore argues that a $200,000 award would be entirely arbitrary with no factual basis. I agree; the defendant's approach would unmoor the assessment of lost future earning capacity from evidence about the injury and its actual effect on the plaintiff's ability to work. In some cases, where there is limited evidence or fluctuating earnings, such an approach might be necessary; however, that is not the case here. I reject that figure as an appropriate award for this head of damage.

[124] In my view, the earnings approach is appropriate because Mr. Bye had an established, predictable work history and pay which will aid in determining his loss. There is, however, still a predictive element to this assessment, and his work history cannot dictate the result with mathematical precision.

[125] Assuming that Mr. Bye would continue working full time at his pre-accident level of overtime until retirement, Mr. Turnbull's report calculated that Mr. Bye's total loss was $1,626,000, if he retired at 65, and $1,852,000 if he retired at 71. Mr. Turnbull's report accounts for a number of factors, such as increases in pay guaranteed in the collective agreement and the present value of future earnings. While I accept that Mr. Turnbull's calculations are an acceptable starting point for determining Mr. Bye's loss, there are a number of contingencies I must account for in my assessment that are not reflected in Mr. Turnbull's report.

[126] Firstly, I find it likely that Mr. Bye would not have continued to work the long overtime hours that he had in the year before the accident. The 800-900 hours that Mr. Bye worked that year earned him $50,571 in overtime pay. The defendant argues that this is not sustainable. I agree.

[127] The 12-month pre-accident history reflects Mr. Bye's earning potential as a young man. Mr. Zelke testified that some of the work included building scaffolds and crates. As he aged, I find it likely that Mr. Bye would not have the endurance to work his physically demanding job at such a punishing rate. Moreover, as a new father to a son born in 2016, I find it likely that Mr. Bye would have cut back his hours to spend time with his family. Indeed, that concern is also reflected in the loss of home-making capacity award set out below. Mr. Bye's availability for overtime would fluctuate with his family's needs.

[128] Additionally, there were personal factors at play in the amount of overtime that was available

to Mr. Bye. Mr. Zelke testified that he was friends with Mr. Bye, and would ask him, rather than another carpenter, to help with overtime projects when his plant required extra work. That allowed Mr. Bye to work overtime not only in the E and M plant, but also in the Roaster-Acid Plant. I accept that the opportunity for overtime was, at least in part, based on positive relationships with co-workers who needed a carpenter for overtime work. This human factor adds another level of uncertainty to Mr. Bye's overtime pay, and tends to act as a negative contingency.

[129] In his expert report, Mr. Carson pointed out that Mr. Turnbull's lost earnings figure did not apply a general contingency reduction for market trends and employment risk. Mr. Turnbull also noted this, pointing out that his calculations did not take into account any labour market contingencies, such as early retirement or unemployment.

[130] Counsel for the plaintiff argued that Mr. Bye loved his job and planned to stay well into his 60s. Indeed, Mr. Turnbull's calculations were based on this assumption, giving possible retirement ages of 65 or 71. I accept that Mr. Bye loved his job in the E and M Plant. He enjoyed the work and accepted the lucrative overtime he was offered. However, it is speculative that Mr. Bye would have continued to work the same hours, both regular and overtime until age 65 or 71. As I noted above, carpentry is physically demanding. While Mr. Bye and other witnesses testified that two men at the E and M plant — one an electrician and one a millwright — were still employed in their mid to late 60's, I cannot infer that this would be Mr. Bye's experience. Those men did not testify. We do not know their circumstances and how their jobs differ from Mr. Bye's. The parties presented no evidence on the average retirement age for carpenters, either at Teck or in the industry generally. Therefore, I must take into account the possibility of Mr. Bye's early retirement as a negative contingency.

[131] Both reports also identified a small negative contingency for the general possibility of unemployment. I will take this into account, noting, however, that the evidence shows that Mr. Bye's job is more stable and secure than most.

[132] As a positive contingency, I must take into account Mr. Bye's general employability, considering his injury and his skill set. While he currently has a relatively secure union position, as a trades instructor, his injury has made his skills less marketable on the whole. Therefore, it is a positive contingency on the award that Mr. Bye's injury makes him less competitive in the market should he lose his current job.

[133] Additionally, Mr. Bye has pointed out the possibility of down time at work if his prosthetic should need repair. Although he raises this as a cost of future care issue, I find it is more appropriate to account for this as a small positive contingency here.

[134] Lastly, I must consider the effect that Mr. Bye's injury will have on his employment as he

grows older. I accept that the injury will make work more difficult as he ages, raising the possibility of reduced hours, or early retirement. I will account for this as a positive contingency on the award.

[135] Taking all of these considerations into account, I find that a roughly 25% negative contingency overall is appropriate in this case. At large, I have considered the optimistic basis of Mr. Turnbull's original calculations, and the inherently speculative nature of these overtime payments as significant factors.

[136] I assess Mr. Bye's loss of income earning capacity at $1,200,000.

Cost of Future Care

[137] The parties do not dispute the law governing awards for the cost of future care. In *Krangle (Guardian ad litem of) v. Brisco*, 2002 SCC 9 at paras. 21-22, McLachlin C.J.C. set out the general goal of an award for future care:

> 21 Damages for cost of future care are a matter of prediction. No one knows the future. Yet the rule that damages must be assessed once and for all at the time of trial (subject to modification on appeal) requires courts to peer into the future and fix the damages for future care as best they can. In doing so, courts rely on the evidence as to what care is likely to be in the injured person's best interest. Then they calculate the present cost of providing that care and may make an adjustment for the contingency that the future may differ from what the evidence at trial indicates.
>
> 22 The resulting award may be said to reflect the reasonable or normal expectations of what the injured person will require … The measure is objective, based on the evidence. This method produces a result fair to both the claimant and the defendant. The claimant receives damages for future losses, as best they can be ascertained. The defendant is required to compensate for those losses. To award less than what may reasonably be expected to be required is to give the plaintiff too little and unfairly advantage the defendant. To award more is to give the plaintiff a windfall and require the defendant to pay more than is fair.

[138] Future care expenses that flow from the defendant's negligence will be recoverable where there is both a medical justification for the future care cost, and where the claim is reasonable*:* *Milina v. Bartsch* (1985), 49 B.C.L.R. (2d) 33 (S.C.), aff'd 49 B.C.L.R. (2d) 99 (C.A.).

[139] In *Brewster v. Li,* 2013 BCSC 774 at para. 158, the court summarised the principles that govern such awards:

> a) Awards for costs of future care must be reasonable, both in the sense of being medically required and in the sense of being costs that, on the evidence, the plaintiff will be likely to incur;
>
> b) The weight to be given to an opinion on future care will depend on the extent to which recommendations for items like psychological counselling and physiotherapy are supported by the evidence of experts within the relevant field of expertise: see, for example, *Frers v. De Moulin*, 2002 BCSC 408 at para. 191, 1 B.C.L.R. (4th) 131; and *O'Connell v. Yung*, 2010 BCSC 1764 at para. 98, costs of future care award varied on appeal 2012 BCCA 57;

the trial judge erred in concluding that “future care costs are payable whether or not they may be incurred in the future” (para. 68).

c) An award of future care costs should be reasonable and the award must be moderate and fair to both parties;

d) Common sense should inform claims for the costs of future care, however much they may be recommended by experts in the field;

e) In considering any particular item of future care, the test is whether a reasonable person of ample means would incur the expense;

[Citations omitted.]

[140] Mr. Bye seeks $1,595,562.40 for his total cost of future care. He claims the following costs:

1. prosthetics (including his daily prosthetic, a number of recreational prosthetics, and the cost of maintaining these);

2. mobility aids (including a knee brace, forearm crutches, a wheeled task chair, and a mobility scooter);

3. medication;

4. therapy (including chiropractic treatments, a gym pass, and psychological counselling and support); and

5. modifications to his home, which is not wheelchair accessible.

[141] Mr. Newman submits that $653,305 is appropriate for this head of damage, arguing that many of the expenses Mr. Bye claims are not medically justified, or would be incurred because of the accident.

[142] Mr. Bye tendered expert evidence from Mr. Rob Corcoran, an occupational therapist, and Dr. Fadi Tarazi, an orthopaedic surgeon, on the different costs that he will incur because of his injuries. Mr. Turnbull also gave opinion evidence on the present value of these costs in his report.

Prosthetics

[143] Mr. Bye claims for three different prosthetics: the Genium prosthetic knee and leg which he uses daily, a waterproof Aquiline prosthetic for bathing and swimming, and a Procarve prosthetic for snowboarding.

[144] I accept that Mr. Bye requires the Genium leg that he uses daily, the cost of its maintenance and repair and replacement. Mr. Bye also claims a positive contingency to reflect the impact that repairs to the leg will have on his work. As I noted above, however, this is better reflected as a contingency in the lost working capacity analysis.

[145] The defendant argues that, since the Genium knee is a state-of-art design, there should be a negative contingency applied to its cost to reflect its likely reduction in cost. They cite *Houle v. Calgary (City)* (1983), 44 A.R. 271 (Q.B.), varied on other grounds, 60 A.R. 366 (C.A.), as authority for this, and propose a 30% reduction. Neither party, however, has led any evidence on how the cost of these devices is expected to change over time, and I will not draw an inference about this narrow area from the defendant's general assertions. I will not apply a negative contingency on this account.

[146] I also accept that he requires a waterproof prosthetic for bathing and swimming. While the defendant argued that these costs overlap with the purposes of a non-pecuniary award, I disagree. Dr. Tarazi recommended that Mr. Bye remain active to maintain his health, and I agree that that prosthetic would help him do so. Therefore, it is a medically justified expense.

[147] I do not, however, accept that the snowboarding prosthetic is medically justified. The defendant argued that this is a purely recreational device, which better fits the goal of a functional non-pecuniary award. I agree. The Procarve is only used for snowboarding, and, while snowboarding might be a recreational pursuit that Mr. Bye enjoys and wishes to do, I do not find that that is a medical justification for the device. It is not recoverable as a cost of future care.

Mobility Aids

[148] I accept the costs that Mr. Bye claims for his mobility aids.

Medication

[149] Mr. Bye withdrew much of his claim for medication costs at the close of trial; however, the other costs for medication which he claims are clearly recoverable. According to Mr. Turnbull's report, these medications have a present value cost of slightly over $13,000.

Therapy

[150] Mr. Bye claims that he will need psychological counselling, based on Mr. Corcoran's report. Mr. Corcoran based his recommendation on a diagnosis of post-traumatic stress disorder (which is not in evidence), as well as on his general experience with people who have undergone traumatic catastrophic injuries. While Mr. Corcoran is not qualified to give an opinion on whether Mr. Bye had PTSD from the accident, I accept that he has relevant experience considering when psychological counselling will benefit his client. I am also mindful of the authorities' assertions that common sense should, in part, guide the court's approach. Mr. Bye and Krista-Lee Bye, his wife, both testified to the emotional and psychological difficulties Mr. Bye has had adjusting to his new life. I accept that Mr. Bye will benefit from counselling generally, though I will apply a negative contingency to reflect my uncertainty about the scope of this need.

[151] I accept Mr. Bye's claim for a gym pass and chiropractic treatment.

Home Modifications

[152] Mr. Bye's house is not wheelchair accessible; he claims the cost of modifying his home and yard to suit his needs. Mr. Newman agrees that Mr. Bye's house is totally unsuitable for his needs, but argues that the expense of modifying the home is out of proportion to the cost of moving. He argues that, while the modifications are medically justifiable, the cost is not reasonable. He says that there are single-storey homes available that would better suit Mr. Bye's needs.

[153] Mr. Bye lives in Rossland in a multi-level house with a tiered back yard. He testified that he would like to remain in Rossland and stay in his house, and does not wish to move to nearby Trail. Mr. Corcoran's report sets out a list of extensive modifications that Mr. Bye would need to use his home.

[154] The defendant called Mr. Wilson, a realtor who produced listings of property in the $100,000 to $300,000 range. He found 121 listings in Rossland, Warfield, Trail, Montrose, and Fruitvale. However, much of that evidence was not helpful. Mr. Wilson is not an expert in what facilities Mr. Bye would require because of his injuries, nor had Mr. Wilson actually viewed the properties himself to see if they might be appropriate. Mr. Wilson also lacked some key information about Mr. Bye's circumstances: he had not been to Mr. Bye's house to assess its value or condition, and he had no information about Mr. Bye's family. He simply did a search on MLS. He did not measure the doors or have any idea whether the properties were wheelchair accessible.

[155] At least one of the listings was for a two-story home and another was for a 595-square-foot condominium, which is not like Mr. Bye's current home and is not appropriate for his growing family.

[156] I do not, however, accept Mr. Bye's claim in its entirety. He asks for $250,778.12 to modify the house, including $83,260 for landscaping and backyard ramps, and $48,606 for a home elevator. He seeks some costs on an annual basis, such as elevator and automatic door maintenance at $15,710 each, present value.

[157] Mr. Bye presented no evidence of the value of his house, so I am unable to assess whether it warrants the cost of the extensive renovations he seeks, rather than purchasing and modifying a home elsewhere in the area. I do not accept that Mr. Bye's desire to remain in that home, specifically, is medically justifiable. I accept, however, that no matter where Mr. Bye lives, he will pay some premium or incur some costs to have a home that meets his and his family's needs. Since this assessment is speculative, I will begin with Mr. Bye's claimed costs, but apply a negative contingency against the possibility that he finds a home more easily adapted to his needs.

Conclusion on the Cost of Future Care

[158] Considering the costs and contingencies I have identified above, I make a global award of $1,100,000 to compensate Mr. Bye for his future care costs.

Loss of Housekeeping Capacity

[159] As our Court of Appeal set out in *O'Connell v. Yung*, 2012 BCCA 57 at paras. 65-66, a person's lost ability to care for themselves, their family, and their home is recoverable as a separate head of damages. The goal of this analysis is to assess the value of the unpaid work that, but for the defendant's negligence, the plaintiff would otherwise have done for themselves.

[160] The court must assess what costs the plaintiff can reasonably expect to incur because they can no longer do housework (*O'Connell* at para. 67), taking a cautionary approach to this head of damages: *Westbroek v. Brizuela*, 2014 BCCA 48 at para. 77. Nevertheless, the goal is to ensure that the compensation is commensurate with the loss: *Kroeker v. Jansen* (1995), 4 B.C.L.R. (3d) 178 (C.A.) at para. 29, as cited in *Westbroek* at para. 77.

[161] The parties do not dispute that Mr. Bye's injuries have left him less able to do this kind of work. They differ, however, on the quantum that should be awarded.

[162] Mr. Bye seeks $320,000 for his lost housekeeping capacity. He points to different jobs he has done around the house in the past, including maintaining the family car, chopping firewood, and shovelling snow seeking those costs until age 75. He also cites significant one-time costs for a number of major household projects: building a retaining wall at $20,668, replacing a metal roof at $10,747, widening and reinforcing his driveway at $43,540, and replacing siding at $12,401. He says that his injuries prevent him from doing some of this work himself, as he had planned.

[163] Mr. Newman submits that $50,000 would be more appropriate. He stresses, citing *Westbroek*, that the courts apply a conservative, cautionary approach to these awards. He argues that many of these items, such as the need to gather firewood, would not be necessary if Mr. Bye moves into a more suitable property. Further, he points out that many of these items are tasks required by healthy people in any case before age 75. He relies on *Pololos v. Cinnamon-Lopez,* 2016 BCSC 81 at para. 150, where Voith J. reduced an award for yard work on that basis.

[164] I accept that Mr. Bye would likely have done less of the physically demanding housework that he claims as he aged, regardless of the accident. It is not reasonable for Mr. Newman to bear the full cost into Mr. Bye's age 75.

[165] To the extent that Ms. Bye has taken on some of her husband's share of work caring for the home and family, I do not accept that this is grounds for reducing the award. Although the plaintiff did not articulate it this way, additional work that Ms. Bye must do because of the accident would be recoverable in-trust here. I find that there is no principled reason to reduce the housekeeping award

on this account.

[166] I accept that as a result of this accident, Mr. Bye will now need assistance with tasks he used to do himself such as housekeeping, some yard maintenance, house maintenance and repairs, and all car maintenance. I accept that some firewood supply is needed for his current home, which is wood-heated only. However, I agree with the defendant that many of the costs Mr. Bye identifies could be mitigated over time, for example, through alternative heating. Further, as I have noted, when considering the cost of future care, Mr. Bye may well find a house better suited to his needs, and easier to maintain. This makes a good deal of the ongoing suggested housekeeping costs speculative, and while I would not deny recovery on those grounds, I will reduce the award accordingly.

[167] Lastly, a number of the major projects Mr. Bye has claimed under this head of damages would have required a significant amount of his time. Mr. Corcoran's report explains that these claims are based on a quote from a general contractor, assuming an hourly labour rate of $35. Certainly, Mr. Bye is an experienced carpenter, and it seems unlikely that these tasks would take him longer than professional contractors; however, I cannot agree that these would be projects that Mr. Bye would have been likely to undertake but for the accident, or, if he did undertake them, that that would be a reasonable and compensable use of his time.

[168] When considering Mr. Bye's lost employment capacity, I accepted that Mr. Bye was ready and willing to accept all of the overtime he could at the Teck plants. The evidence from Mr. Zelke and others was that overtime opportunities were in plentiful supply. Additionally, as Mr. Bye's financial records and Mr. Turnbull's report show, his base hourly pay has been greater than $35 since before the accident. With overtime paid at time-and-a-half, or double-time, it would be far greater than the $35 labour rate. Therefore, I consider it unlikely that Mr. Bye would have chosen to save $35 per hour on labour at home when he could have earned far more than that working at his job. For similar reasons, I am also concerned that allowing recovery here would overlap with Mr. Bye's lost earning capacity award.

[169] Accordingly, I fix Mr. Bye's lost housekeeping capacity at $125,000.

Special Damages

[170] The parties agree that Mr. Bye's special damages are $81,557.61.

***Health Care Costs Recovery Act* Subrogated Claims**

[171] The parties have agreed that, because of Mr. Bye's injuries, he incurred $101,058.13 in health care costs as defined in the *Health Care Costs Recovery Act*, S.B.C. 2008, c. 27. I award this amount as a subrogated claim.

Summary

[172] In summary, I find Mr. Newman fully liable for the collision and Mr. Bye's resulting injuries, and make the following awards:

1)	Non-pecuniary damages:	$220,000.00
2)	Past income loss:	$218,640.00
3)	Future income loss:	$1,200,000.00
4)	Cost of future care:	$1,100,000.00
5)	Loss of housekeeping capacity:	$125,000.00
6)	Special damages:	$81,557.61
7)	Health care costs:	$101,058.13

[173] Mr. Bye's total damages are $3,046,255.74.

Costs

[174] Unless there are circumstances of which I am unaware, I order that Mr. Bye have his costs at Scale B. Otherwise, the parties should contact Supreme Court Scheduling within 30 days of these reasons to set down a hearing for costs.

"Choi J."