

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Perry v. Ismail*,
2012 BCSC 123

Date: 20120126
Docket: M100003
Registry: Vancouver

Between:

Braden Perry

Plaintiff

And

Joseph Ismail and Carter Dodge Chevrolet Ltd.

Defendants

Before: The Honourable Madam Justice Hyslop

Corrected Judgment: The front page of the judgment and para. 106
were corrected on February 7, 2012.

Reasons for Judgment

Counsel for the Plaintiff:

J.S. Stanley
K. Gourlay

Counsel for the Defendants:

T.H. Pettit

Place and Date of Trial:

Vancouver, B.C.
November 1-4, 2011

Place and Date of Judgment:

Vancouver, B.C.
January 26, 2012

[1] At about mid-afternoon on February 6, 2008, the plaintiff, Braden Perry, age 24, was driving his parents' vehicle west on the Lougheed Highway, in the City of Burnaby, British Columbia. The left rear-end of the vehicle was struck by a vehicle driven by the defendant, Joseph Ismail, and owned by the corporate defendant, Carter Dodge Chevrolet Ltd. At the time of the accident, seated in the passenger seat of Mr. Perry's vehicle, was Mr. Perry's long-time friend, Eric Turner. Both Mr. Perry and Mr. Turner were injured in the accident.

[2] The Lougheed Highway consists of two lanes going west and two lanes going east.

[3] Mr. Perry alleges that Mr. Ismail was responsible for the accident and the injuries that he suffered in the accident. Mr. Ismail and the corporate defendant deny that Mr. Ismail was responsible for the accident and the injuries suffered by Mr. Perry.

[4] Shortly before the accident occurred, Mr. Perry, with his passenger, Mr. Turner, drove from Mr. Perry's residence south on Springer Road which intersects with the Lougheed Highway. Although it is not certain, Mr. Perry and Mr. Turner may have intended on going to the Brentwood Mall.

[5] On February 6, 2008 and just before the accident, Mr. Ismail, age 23, and an employee of the corporate defendant, was driving a Jeep owned by the corporate defendant. Mr. Ismail had driven the Jeep from the corporate defendant's compound and was travelling to the dealership. Mr. Ismail was travelling west on the Lougheed Highway in the left lane, and he had been travelling in the left lane for about a block or two.

[6] On the same day and at about the same time, Steven Kelly, age 49, was driving in his motor vehicle south on Springer Road. His teenaged daughter was a passenger. He stopped at the stop sign before entering the right lane travelling west on Lougheed Highway. Mr. Kelly testified that the Perry vehicle was travelling behind him as he drove on Springer Road. Mr. Kelly recalls drawing to his daughter's attention the existence of the Perry vehicle, inferring that the Perry vehicle was right behind him. Both Mr. Perry and Mr. Turner testified that they did not recall whether there was a vehicle ahead of them when they were driving on Springer Road, approaching Lougheed Highway. Mr. Perry stopped at the stop sign and then entered the right lane travelling west on Lougheed Highway. There was a considerable amount of traffic in the right lane of Lougheed Highway.

[7] Mr. Kelly was not required to cue into the right lane traffic. The Perry vehicle was right behind him. Mr. Kelly testified that he did not observe what the Perry vehicle did at the stop sign.

[8] Mr. Kelly testified that upon entering Lougheed Highway the vehicles in the right lane were travelling approximately 40 kilometres per hour, but 50 metres ahead of his vehicle, the vehicles in the right lane were slowing down.

[9] Mr. Perry testified that he had left the stop sign on Springer Road, and when he found there was a gap in the traffic travelling west in the right hand lane, he entered the right lane of Lougheed Highway. He described the traffic in the right hand lane as “bumper-to-bumper”.

[10] Mr. Perry stated that he remained in the right hand lane of Lougheed Highway for 20 to 30 seconds before he moved into the left lane. He described the traffic in the right lane as going approximately 20 kilometres per hour. Mr. Perry was unaware that the Lougheed Highway in the left hand lane ahead of him was closed, which explained why all the vehicles were travelling in the right hand lane. Mr. Perry testified that before moving into the left lane he signalled with the automatic signals and did a shoulder check. He looked in both mirrors and noticed a car in the distance in the left lane, but it was not close to him. He stated he travelled about four or five car lengths, was accelerating and had reached about 40 kilometres per hour and was still accelerating, when Mr. Ismail hit him from behind. Mr. Turner testified that he recalled hearing the ticking of the turn signal and observed Mr. Perry doing a shoulder check. Both Mr. Perry and Mr. Turner testified that there was no warning that the accident was going to happen, such as squealing of brakes or those kinds of signs.

[11] Mr. Perry was wearing his seatbelt and the car he was driving was equipped with all-season tires.

[12] Mr. Kelly testified that Mr. Perry, after following him for about ten car lengths, changed to the left lane and that the change was “quite abrupt”. Mr. Kelly testified that the Perry vehicle passed him and “boom, it happened.” He testified that he was looking straight ahead, and in his mirrors he did not see the Ismail vehicle until it passed him and struck the Perry vehicle.

[13] Mr. Ismail testified that the vehicles travelling in the right lane were moving slowly, bumper-to-bumper. He stated that he was travelling in the left lane between 56 to 58 kilometres per hour. He testified there were no vehicles at any time in front of him as he travelled west in the left lane on the Lougheed Highway. He testified that when he first saw the Perry vehicle it was in his lane; the left lane. He stated he did not see the Perry vehicle change lanes. Mr. Ismail testified that when he saw the Perry vehicle, he responded by slamming on the brakes. He said that he panicked and that he did nothing else to avoid the collision. He stated that the front right hand side of the Jeep hit the left back side of the Perry vehicle. This is confirmed by the photographs of the vehicles entered as exhibits. Mr. Ismail stated that the Jeep was equipped with ABS brakes.

[14] Mr. Ismail stated that vehicles in the right hand lane were moving slowly. He acknowledged that he could expect vehicles to move from the right lane into the left lane.

[15] Mr. Ismail testified that after the collision and when his vehicle and the Perry vehicle stopped, they were about four feet apart. He stated that the collision sounded like a “big bang” and he agreed that it was a “fairly violent collision”. Mr. Ismail stated that he did not know how fast he was travelling at the time of impact.

[16] Mr. Ismail confirmed that his recollection of the accident is not good because it happened almost four years ago.

[17] Mr. Turner and Mr. Perry testified that when Mr. Ismail first got out of the Jeep he stated that his “boss would kill him” and said something about previous accidents. Mr. Ismail expressed this at his examination for discovery. In fact, his bosses came to the scene of the accident after Mr. Ismail telephoned them from the scene of the accident.

[18] On the day of the accident it was snowing. The road conditions on the Lougheed Highway, according to Mr. Perry, Mr. Turner and Mr. Ismail, were described as “slushy”, although the surface of the road could be seen. Mr. Kelly described the Lougheed Highway as “wet” with “snow on the boulevard”. After the collision, the Perry vehicle was moved to the side of the Lougheed Highway. The photographs of the Perry vehicle, after it was moved, show part of the Lougheed Highway as wet with fresh snow to the right of the highway and fresh snow on the Perry vehicle.

Analysis

[19] The speed limit on the Lougheed Highway is 70 kilometres per hour. The accident occurred in the left lane of the Lougheed Highway. Both the Perry and Ismail vehicles were travelling west. The Ismail vehicle struck the rear left side of the Perry vehicle. Both the Ismail vehicle and the Perry vehicle were moving when the collision occurred. The Perry vehicle was travelling 40 kilometres per hour and accelerating when the collision occurred.

[20] Mr. Perry had completed his lane change and travelled four to five car lengths, or was four to five cars ahead of Mr. Kelly before the collision occurred. Mr. Ismail was travelling between 56 to 58 kilometres per hour, but did not know how fast he was going when he hit the Perry vehicle.

[21] Mr. Kelly testified that the accident happened in less than three seconds after Mr. Perry changed lanes. Mr. Perry and Mr. Turner testified that the Perry vehicle remained in the right lane between 20 to 30 seconds before the lane change by the Perry vehicle. Mr. Kelly states

that the Perry vehicle remained in the right lane before making the lane change for ten car lengths.

[22] The testimony of seconds and car lengths are estimates involving an accident that happened approximately three and a half years ago. This evidence is not exact. Despite this, I conclude that the accident happened quite quickly after Mr. Perry changed lanes.

[23] Although it was snowing and the highway was wet, and parts of it were slushy and visibility was not an issue, the conditions that I have described are not a factor in this accident.

[24] Mr. Perry has the onus of establishing that Mr. Ismail caused or contributed to the accident: *Singleton v. Morris*, 2010 BCCA 48. Negligence is not presumed because an accident occurred. I conclude that Mr. Perry has discharged that burden.

[25] Before making his lane change, Mr. Perry shoulder checked and put on his signal light indicating his intention to change lanes. He concluded and I accept he could make the lane change safely. I do not accept Mr. Perry's evidence that he actually recalls independently at the time of trial doing all of those checks before making the lane change. I do accept that he signalled, looked in his mirrors, did a shoulder check and decided that it was safe to change lanes.

[26] Mr. Perry had completed his lane change and was travelling at least 40 kilometres per hour, accelerating, and had not reached his intended speed when the rear end collision occurred.

[27] Mr. Ismail occupied the left lane and was he aware that vehicles might change lanes given the traffic conditions in the right lane.

[28] As Mr. Ismail drove in the left lane there was nothing to obscure his vision. He did not see the Perry vehicle until the very last moment when he slammed on his brakes, colliding with the rear of the Perry vehicle. He did not see the Perry vehicle's signal, nor the change of lanes. I find that Mr. Ismail came upon Mr. Perry who was about four to five car lengths ahead of the Kelly vehicle and accelerating. Mr. Ismail should have seen the Perry vehicle signal and should have seen the lane change and should have seen the Perry vehicle ahead of him. He did not see any of these events.

[29] I conclude that Mr. Ismail was negligent in that he was not paying attention and failed to keep a proper lookout for other vehicles as he drove in the left lane on Lougheed Highway. When the Perry vehicle was finally seen by him it was too late. He slammed on his brakes and struck the Perry vehicle.

[30] I find all the witnesses to the accident to be truthful and they did their best to recall the events. Mr. Ismail did not attempt to explain away the accident. He was transparent, despite the fact there may be consequences to him from his employer.

Mr. Perry's Injuries

[31] Mr. Perry seeks compensation for the injuries he suffered. He alleges that the injuries he suffered are to his neck, lower back, right shoulder and right knee, which caused headaches and depression.

[32] Mr. Perry seeks compensation for loss of enjoyment of life and its amenities, special costs in the amount of \$116.03 (this amount is not disputed by the defendants), future care costs, and the costs of this action.

[33] Mr. Perry has made no claim for a past income loss despite his evidence he lost time from work. Mr. Perry's counsel states in his submissions:

While the Plaintiff missed work and lost wages following the accident, his past wage loss claim would be vitiated by the Part VII benefits that are payable to him by ICBC.

[34] The defendants acknowledge that the plaintiff suffered soft tissue injuries to the neck, shoulder, low back and knee associated with headaches. The defendants argue that the plaintiff has not suffered a permanent injury which they allege the medical evidence supports.

[35] The defendants argue that the future care claim is not only excessive, is not justified, but masquerades itself as an income loss claim.

Mr. Perry's Background and Work History

[36] At the time of trial Mr. Perry was 27 years of age.

[37] Mr. Perry left high school without graduating. His first job was that of a lot boy for a car dealership. He continued to live in his parents' home until December 20, 2007.

[38] As Mr. Perry was growing up and prior to the accident he had no health problems.

[39] As a young person and up to the age of 18, he participated in a number of team sports; basketball and lacrosse, and he played a year of Midget hockey.

[40] In elementary school Mr. Perry discovered snowboarding, an activity that he continued to participate in up to the date of the accident. Up to the date of the accident, he and his friends would shoot baskets and play tennis at BCIT, but not in an organized way. He also held a gym membership to maintain muscle strength, some fitness, and a place for social activity.

[41] Mr. Perry, at the time of the accident, worked as a truck driver for TranSource Industries (“TranSource”), a trucking firm who had a delivery contract with a furniture company. Mr. Perry drove truck, made deliveries and was paid in accordance the number of deliveries. His job required long hours of work.

[42] Mr. Perry did not continue his employment with TranSource after the accident. He remained off work for a period of time, then returned to TranSource for three or four days and he found that he could not continue this employment due to his injuries. Mr. Perry remained off work until July of 2008, when he obtained employment as a forklift operator with a tire company in a warehouse.

[43] In September of 2008, Mr. Perry bought a five-ton truck and started his own delivery business. His mother borrowed the money to pay for the truck, and as each payment became due by his mother and paid by her, Mr. Perry paid his mother.

[44] In the spring of 2010, Mr. Perry, together with a business partner, incorporated a company for the purposes of a trucking delivery service.

[45] The business has two trucks, one of which was Mr. Perry’s, and the other, his business partner’s. Both Mr. Perry and the business partner drive truck. This business confines its services to the Greater Vancouver area. Mr. Perry is required, with mechanical assistance, to lift between 70 and 100 pounds when making deliveries. At times, he and his partner were assisted with their deliveries by swampers. Mr. Perry and his business partner intend to eventually increase the number of their trucks. As this occurs, Mr. Perry anticipates that his activities will be mainly office work.

[46] In April of 2010, Mr. Perry broke up with his girlfriend with whom he had been living and returned to live with his parents in their home. At the time of trial, Mr. Perry was residing with his parents.

[47] Some day Mr. Perry hopes to marry, have children, and own his own home.

[48] At the time of trial, Mr. Perry’s time and financial resources were focussed on his business.

[49] The injury to Mr. Perry’s knee resolved itself within a period of two weeks from the date of the accident. There are no ongoing complaints about his knee. In time the headaches resolved themselves in 2009. His neck pain diminished over time and it was particularly prevalent when he turned his head from side to side while driving his truck. At the time of trial, he described his neck pain as “annoying”. His major difficulty is back pain which emanates

from his mid-back down to his buttocks.

[50] Mr. Perry pled that he suffered depression as a result of the accident. This was not supported by the medical evidence. There was no mention of depression in the medical evidence. I conclude that Mr. Perry did not suffer from depression as a result of the accident, but rather the accident negatively affected his mood over a short period of time.

[51] Since September 2008 and up to the time of trial, Mr. Perry works four to six days per week, and anywhere from eight to thirteen hours per day. The time he works is in response to seasonal demands in his trucking business.

Medical Treatment

[52] On February 10, 2008, Mr. Perry attended a walk-in clinic for treatment of his injuries. He was prescribed anti-inflammatory and muscle relaxant drugs.

[53] On February 11, 2008, Mr. Perry was seen by his family doctor, Dr. Thomson. At that time, Mr. Perry was complaining of pain in the neck and in his upper and lower back.

[54] Dr. Thomson, in his report of May 5, 2009, described his findings on examining Mr. Perry on February 11, 2008:

There was tenderness and spasm involving the muscles in his neck, C5-7 and upper back, T1-6 along the medial scapular border, right greater than left. There was discomfort during left side bending and rotation of her cervical spine. There was also spasm and tenderness with palpation over L4-S1 in his lower back, greater on the right. He had discomfort with forward flexion as well as left and right side bending of his lumbar spine.

[55] Mr. Perry's next visit to Dr. Thomson was on February 25, 2008. Dr. Thomson found:

There was tenderness and spasm on the right C5-7, sternomastoid and scalenus anterior muscles in his neck as well as at the level of T1-6 in his upper back along the medial scapular border and posterior shoulder. He had reduced side bending and rotation of his cervical spine to the left. There was also still mild tenderness and spasm in his lower back on the right at L2-5 with discomfort during flexion and left side bending.

[56] On April 24, 2008, Mr. Perry saw Dr. Thomson. Dr. Thomson wrote:

... He also complained of having neck stiffness in the morning and intermittent headaches. The dizziness was no longer a problem. ... On examination there was still tenderness and spasm in his neck, upper and lower back with a reduced range of motion.

[57] On May 6, 2008, Mr. Perry saw Dr. Thomson, who wrote:

There was still tenderness and spasm with palpation over C5-7 in his neck and trapezius muscle in his upper back on the right with reduced left and right side bending of his

cervical spine. He had a reduction in flexion and side bending of his lumbar spine with spasm at L5-S1 greater on the right.

[58] Mr. Perry saw Dr. Thomson on September 13, 2008, at which time Mr. Perry reported to Dr. Thomson as to his working conditions. At that time, Dr. Thomson examined Mr. Perry and found:

There was tenderness and spasm on the right L3-5 in his lower back with reduced flexion and side bending of his lumbar spine.

[59] On November 10, 2008, Mr. Perry's injuries were reassessed for the purposes of completing the CL-19 for ICBC. At that examination, Dr. Thomson found:

There was tenderness and spasm at the L2-5 on the right in his lower back with discomfort during flexion and side bending of his lumbar spine. Flexion and side bending of his cervical spine caused a pulling sensation in his upper back, T1-5 along the medial scapular border.

[60] At that visit, Dr. Thomson prescribed a new medication to replace those that Mr. Perry had been taking up to this date.

[61] Dr. Thomson saw Mr. Perry on January 26 and February 24 of 2009. Dr. Thomson found:

There was tenderness and spasm in his upper and lower back with a reduction in flexion and side bending. The discomfort in his neck and range of motion with his cervical spine had improved.

[62] Dr. Thomson saw Mr. Perry on April 15, 2009. This was shortly after another motor vehicle accident Mr. Perry had which occurred in the underground parkade of his apartment building on April 9, 2009. Dr. Thomson examined Mr. Perry and found:

On examination there was tenderness in his upper back, T1-8, greater on the right with discomfort during left and right side bending of his cervical spine. There was tenderness with palpation over L4-S1 on the left and right in his lower back. Lumbar spine flexion and side bending was also reduced.

[63] In his report dated May 5, 2009, Dr. Thomson concluded:

As a result of his initial accident on February 6, 2008 Braden continues to suffer with discomfort in his neck and back. While his injuries were aggravated by his recent MVA, there has been a considerable improvement in his overall condition. I would expect that this improvement will continue over the next six months and do not anticipate that Braden will be left with any long term or permanent disability. His injuries did however cause him to be off from work for several blocks of time. Eventually he was unable to continue working as a courier. He has managed to find work driving a delivery truck, which requires less lifting. Still I do not think that his MVA related injuries will have a significant impact on his future employment or income.

Although Braden's injuries have not really limited his activities of daily living, he did not

go snowboarding this winter and has been forced to reduce his workouts at the gym. At this point I doubt that passive forms of therapy such as massage or physiotherapy will be of much benefit. Instead more active rehabilitation should be encouraged. Braden may benefit from having several sessions with a trainer or kinesiologist who could provide him with an exercise program. A four to six month pass for a gym or community centre would also be helpful. Braden may still require the ongoing intermittent use of analgesic medication and muscle relaxants over the next few months.

[64] Mr. Perry does not agree with Dr. Thomson's prognosis and some of his findings. Mr. Perry claims that some of his injuries are permanent, and in particular his back. He believes that his symptoms are more severe than described by Dr. Thomson.

[65] Dr. Thomson provided another report to Dr. Perry's lawyers at their request. Dr. Thomson, in his report dated March 6, 2011, stated:

On June 29, 2009 Braden stated that he continued to have low back pain especially when driving. The discomfort in his neck had improved. He found that swimming helped and was rarely taking any Tramacet. He had not missed any further work.

On examination there was tenderness with palpation over L4-S1 in his low back, right greater than left. Lumbar spine flexion was limited to approximately 70-80 degrees. During right side bending Braden had pain radiating into his buttock. There was also still tenderness on the right in his neck and upper back, C5-7 and T1-4 with mild discomfort during side bending of his cervical spine.

[66] Dr. Thomson saw Mr. Perry on October 6, 2009. On examination he found:

There was tenderness and spasm in his neck, C5-7 as well as sternomastoid muscle with discomfort during left side bending of his cervical spine. Lumbar spine side bending and flexion was reduced with tenderness at L4-5 right greater than left in his lower back.

[67] Dr. Thomson saw Mr. Perry on March 6, 2011 to be reassessed and to provide an updated report to Mr. Perry's lawyers:

On examination Braden has tenderness with palpation over L4-S1 on the right in his lower back. There was mild tenderness on the right as well at C5-7 in his neck. He had reduced right side bending of his lumbar spine and discomfort with flexion greater than 60 degrees. He had a full range of motion with his cervical spine.

[68] On that occasion, Mr. Perry told Dr. Thomson that he continued to have neck and back pain, and described its intensity and described the lifting he performed at his job, as well as the nature and the amount of work he performed.

[69] Dr. Thomson opines:

Over time these strains have improved significantly. His neck pain has more or less resolved, however, he continues to suffer with low back discomfort which limits his activity.

[70] Dr. Thomson concluded that the motor vehicle accident was the cause of the low back pain, and though it has been over three years since the accident, he states:

I would anticipate that with ongoing active rehabilitation, stretching and core exercises his back pain will continue to improve and he will be able to return to his pre-accident level of functioning. Still I would suggest that Braden try to limit heavy lifting with any future employment.

[71] Dr. Thomson's initial treatment of Mr. Perry was to continue the medication as prescribed at the walk-in clinic, use of alternate heat and ice treatments, and to start a program of stretching and a range of motion exercises. Massage therapy and physiotherapy was also suggested by Dr. Thomson. As stated earlier, a new medication was also prescribed in place of the previous medication; some of which was over-the-counter medication.

[72] Dr. Thomson recommended that Mr. Perry seek more active rehabilitation as stated in his report of March 6, 2011.

[73] Dr. Thomson writes that he feels that massage or physiotherapy would not provide any ongoing benefit. He recommends that Mr. Perry have several sessions with a personal trainer or kinesiologist "who could provide him with a specific exercise program." He acknowledges that at times Mr. Perry would require the use of analgesic medications or muscle relaxants.

[74] The plaintiff is seeking the following damages:

General damages (non-pecuniary):	\$50,000.00
Special damages:	\$116.00
Past housekeeping:	\$9,000.00
Future care:	\$56,544.00
Total:	\$115,660.00

Adverse Interest

[75] This trial was initially scheduled to be tried in June of 2011; it was adjourned. Mr. Perry obtained another report from Dr. Thomson. This report was served on the defendants as expert evidence. The report was not tendered as evidence during this trial, nor did Mr. Perry produce his counsel's letter in seeking this report. The parties agreed to place before me this statement made by Dr. Thomson in that report:

Even though it has been three and a half years since this accident, I do not feel that Braden's recovery has plateaued. I expect that his residual low back discomfort will continue to improve with ongoing active rehabilitation.

[76] The defence argues that I should find an adverse interest against Mr. Perry. They cited

a number of cases to aid in this finding.

[77] I have concluded that I do not have to find an adverse interest against Mr. Perry. The evidence before me at the end of the plaintiff's case is contained in both Dr. Thomson's reports. Those reports state that Mr. Perry will not be left with any long term or permanent injuries, and that he would return to his pre-accident level of functioning.

[78] Should I be wrong, I would draw an adverse interest against Mr. Perry. The statement taken from the new report states the same as in the previous reports, but in a different way.

[79] The conclusions that Dr. Thomson came to in his first two reports are based on the assumption that Mr. Perry take his advice and seek active rehabilitation.

Non-Pecuniary Damages

[80] To support his claim for non-pecuniary damages, Mr. Perry relies on the following cases:

Case Name:	Pain and Suffering
<i>Lai v. Wang</i> , 2009 BCSC 133	\$40,000.00
<i>Lee v. Jarvie</i> , 2010 BCSC 1852	\$40,000.00
<i>Sandher v. Hogg</i> , 2010 BCSC 1152	\$40,000.00
<i>Mendoza-Flores v. Haigh</i> , 2010 BCSC 740 (2 accidents)	\$40,000.00
<i>Sharpe v. Tidey</i> , 2009 BCSC 948	\$40,000.00
<i>Rattenbury v. Samra</i> , 2009 BCSC 207	\$30,000.00
<i>Snow v. Toth</i> , (1994)	\$25,000.00

[81] The defendants rely on the following cases in assessing general damages:

Case Name:	Pain and Suffering
<i>Co v. Watson</i> , 2010 BCSC 950	\$27,500.00
<i>Manson v. Kalar</i> , 2011 BCSC 373	\$25,000.00
<i>Golam v. Fortier</i> , 2005 BCSC 598	\$25,000.00
<i>Bray v. Gaete</i> , 2004 BCSC 335	\$20,000.00
<i>Chamberlin v. Profeit</i> , 2010 BCSC 1598	\$27,500.00

[82] The cases cited by Mr. Perry are cases where the plaintiffs are similar in age, the nature of the collision is similar, and the injuries can be described as soft tissue injuries to the shoulder, neck and back. In these cases, the medical predictions range from expectations of

complete recovery or some continuing disability ending at a predictable time, or a disability that continues indefinitely.

[83] This is not surprising as each individual is different. The Court in these cases often makes findings as to the credibility of the plaintiff on many material facts of each case. Mr. Justice Truscott in *Rattenbury* subscribed to the words of Mr. Justice Halfyard at para. 92:

I subscribe to the view of Mr. Justice Halfyard as he expressed it in *Turner v. Coblenz*, 2008 BCSC 1801, where he said at [paragraph] 94:

It is well accepted that previously-decided cases have limited value which usually consists in establishing a general range of damages within which the award in a particular case may fall. No two plaintiffs will ever be the same in age, previous state of strength and health, occupation and other activities. The injuries sustained by one plaintiff will never be the same as those received by another, in kind or severity. The reaction of any two persons to the pain of a similar injury, or to particular treatments, will be different. The length of time that has passed between the date of the injury and the date of trial will vary from case to case, and can be a significant distinguishing feature.

[84] It is not disputed that Mr. Perry suffered injuries in the accident.

[85] Mr. Perry's injuries were soft tissue injuries to his neck, right side of his shoulder, and back; the latter being the most difficult for him. Mr. Perry was unable to resume his employment after the accident. He remained off work until July of 2008. In September of 2008, he bought a truck and started his own delivery business. He was aware at that time of his injuries and their effect on him. The hours he worked in his own business were similar in the number of days and hours per day that he worked previously. In addition, Mr. Perry had the responsibility of operating his own business.

[86] In March of 2010, Mr. Perry and his business partner formed a company whose business was trucking. The deliveries were in the Lower Mainland. The plan for the trucking business is to expand. Mr. Perry is aware that he could have made other employment choices. Despite this, he chose the trucking business which requires long hours and some lifting.

[87] There is objective evidence of Mr. Perry's injuries and these are contained in the reports of Dr. Thomson. Dr. Thomson's objective findings are over a period of three years and indicate by the close to the end of April of 2008 that Mr. Perry's headaches were intermittent. I conclude that by early 2009 the headaches had all but disappeared. Mr. Perry's evidence at trial was he has no problems with headaches or his shoulder.

[88] Mr. Perry claims that he had for a period of time neck pain all the time, and particularly when driving his truck looking left and right put a strain on his neck Mr. Perry described his

neck injury as “annoying” by the summer of 2010, and it is still “annoying”. Dr. Thomson noted in his examinations conducted on January 26 and February 24, 2009 that there was discomfort in Mr. Perry’s neck and the range of motion with the cervical spine had improved. By April 15, 2009, Dr. Thomson’s objective findings were those related to Mr. Perry’s back. By the end of June 2009, Mr. Perry reported to Dr. Thomson that his neck had improved. At the end of June of 2009, Dr. Thomson did detect tenderness in his neck. On October 6, 2009, Dr. Thomson detected tenderness and spasm in his neck. At this time, Dr. Thomson still found reduced flexion in his back.

[89] The only activity that Mr. Perry can no longer do at the time of trial was snowboarding. The other activities that he is no longer participating in are due to the pressures of business and lacking in time. However, his enthusiasm for snowboarding is such that he stated that if he could go snowboarding he would make time to snowboard.

[90] As I have stated, prior to the accident Mr. Perry went to the gym. He continues to go to the gym and stated that friends of his who are personal trainers help him with exercises designed to help with his back. There was no evidence before me as to what those exercises are or what those exercises should be, so as to return to his pre-accident condition. Mr. Perry is back to pressing weights at the gym, almost to the amount that he pressed prior to the accident.

[91] Mr. Perry’s back, as the medical evidence states, is not completely resolved. Just prior to the trial he had a back spasm which required him to be driven to the hospital by his mother to receive medical treatment and prescribed medication. This had also occurred about seven months earlier in 2011.

[92] Mr. Perry has not followed the advice of Dr. Thomson as to physiotherapy and massage therapy as prescribed early on in his treatment, or a rehabilitation program.

[93] Mr. Perry claims that he could not afford this treatment. I do not accept this explanation. His mother paid for some of his early massage therapy. Mr. Perry’s total focus since starting his own business has been plowing all his money into his business, as well as all of his time. He has prioritized his business interests over that of following Dr. Thomson’s advice. This, I conclude, has delayed some of his recovery, and I take that into consideration in awarding general damages.

[94] I also take into consideration when awarding Mr. Perry an amount for past housekeeping capacity; a topic I will deal with later in these reasons.

[95] I award Mr. Perry \$42,500.00 for general damages.

Past Household Capacity

[96] Mr. Perry claims that he was unable to carry out ordinary household tasks while living in an apartment with his girlfriend. The apartment was a little over 500 square feet. Mr. Perry's girlfriend provided these services. Mr. Perry claims that when he went back to live at his parents' home he was not able to assist in the household due to his back injuries. His mother's expectations of him were that he could vacuum and mow the lawn. Mr. Perry states that he has not been able to perform these activities due to his back injuries. His mother provided these services. The Court may allow such a claim when the housekeeping services are provided gratuitously: *Kroeker v. Jansen*, (1995) 4 B.C.L.R. (3d) 178.

[97] Mr. Perry is seeking \$9,000.00 for past household capacity for a period of three and a half years. This is based on an annual cost of \$2,600.00 per year. The basis of that figure comes from a cost of future care report dated February 3, 2011, and authored by Mr. Gerald Kerr, an occupational therapist. Mr. Perry's girlfriend provided these services. After leaving that residence, and when he moved in to live with his parents, his mother provided these services.

[98] During this period, for which he makes a claim for past household capacity, Mr. Perry was off work and for a period of time he worked four to six days a week, eight to thirteen hours per day. Mr. Perry's former girlfriend did not give evidence as to what their arrangement was prior to the accident. I have difficulty accepting that Mr. Perry could do nothing in such a small space; an apartment that was a little over 500 square feet.

[99] When Mr. Perry went to reside at his parents' home in December of 2010, he had already been examined for discovery. Without qualification, he claimed that he could perform all household tasks that he could perform before the accident. There may have been a few months after the accident when Mr. Perry had difficulty performing household tasks. I took that into consideration in awarding the non-pecuniary damages.

[100] I dismiss the claim for past household capacity.

Future Care

[101] Mr. Perry is seeking a claim for future care costs in the amount of \$56,544.00. The basis of this amount is contained in the Kerr report. Of the amount of \$56,544.00, there is a \$25,000.00 cost of homemaker services in the future. The evidence before me is that Mr. Perry can perform all these duties. In his examination for discovery held on September 16, 2010, Mr. Perry was asked the following questions and gave the following answers:

569 Q Okay. And were there any activities around the house that you were no longer able to do as a result of your injuries?

A No.

- 570 Q You were still able to do all the stuff that you had done before?
A Yeah.
- 571 Q Okay. Have you had to modify any activities that you did around the house?
A No.

[102] Other than medical claims which have some merit, the balance of the claims relate to potential yard work and potential home maintenance at a projected cost of \$17,000.00. Mr. Perry does not own a home. At present he lives in his parents' home and his whole focus is on his business. There is no evidence before me that he can even do home maintenance, or that he has done home maintenance for his parents on any regular basis. This claim is too speculative.

[103] However, Mr. Perry is in need of an exercise program designed to meet the needs of his back injury. Further, he will have ongoing need for medication, both prescribed and over-the-counter, and he may need some physiotherapy for his back in the event he has spasms in his back as they occurred in 2011.

[104] I will not breakdown each item as set out in the submissions, but I award Mr. Perry the sum of \$6,500.00 to meet those costs. I do not award a gym pass as Mr. Perry has, for a number of years prior to the accident, had a gym pass. There is no reason for me to believe that this would not continue.

Summary

[105] I award the following damages:

General Damages:	\$42,500.00
Special Damages:	\$116.03
Cost of Future Care:	\$6,500.00

Costs

[106] Unless either the plaintiff or the defendants make it known that they wish to address me on the matter of costs within 30 days of the receipt of these reasons, I order the plaintiff will have his costs pursuant to Rule 15-1(15)(c) in the amount of \$11,000.00, plus assessed disbursements pursuant to the *Supreme Court Civil Rules*.

“H.C. Hyslop J.”
HYSLOP J.