IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Furlan v. The Owners, Strata Plan BCS3202,* 2016 BCSC 213

Date: 20160212
Docket: S122634
Registry: Vancouver

2016 BCSC 213 (CanLII)

Between:

Franck Furlan

Plaintiff

And

The Owners, Strata Plan BCS3202, The Owners, Strata Plan BCS3127, Rancho Management Services (B.C.) Ltd., Concord Pacific Developments Inc., Centreville Construction Ltd. and City of Vancouver

Defendants

And

The Owners, Strata Plan BCS3202, The Owners, Strata Plan BCS3127, Rancho Management Services (B.C.) Ltd., Concord Pacific Developments Inc., Centreville Construction Ltd.

Third Parties

Before: The Honourable Madam Justice Loo

Reasons for Judgment

Counsel for the Plaintiff:	M.G. Siren
Counsel for The Owners, Strata Plan BCS3202 and Rancho Management Services (B.C.) Ltd.:	C.N. Mangan
Place and Dates of Trial/Hearing:	Vancouver, B.C. September 28-30, October 1-2, 5-7, 9, 2015
Place and Date of Judgment:	Vancouver, B.C. February 12, 2016

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A. INTRODUCTION

[1] The plaintiff was injured on April 15, 2010, when he was thrown off of his bicycle while riding along a pathway in Vancouver's Yaletown between Smithe Mews and the seawall. The cause of the accident was a rollover curb.

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[2] The plaintiff has discontinued his action against all of the defendants except for the defendants, The Owners, Strata Plan BCS3202 ("BCS3202") and Rancho Management Services (B.C.) Ltd. ("Rancho Management"). The plaintiff claims that they were negligent and in breach of the *Occupiers Liability Act*, R.S.B.C.1996, c. 337 (*OLA*). Both liability and damages are at issue.

[3] The parties agree that:

1. the accident occurred on the pathway, which is the outdoor common property of BCS3202 and subject to a registered statutory right of way agreement in favour of the City of Vancouver;

2. BCS3202 was developed by Concord Pacific Developments Inc. and construction was managed by Centreville Construction Ltd.,

3. occupancy dates for BCS3202 varied for portions of the building but occupancy permits were granted between October 2008 and April 2009;

4. seven pages of photographs represent the incident scene near the date of the accident;

5. on the date of the accident, the curb was approximately 57 mm (2.23 inches) above the gutter, which complied with the applicable municipal standard(City of Vancouver Street Restoration Manual MF137-A-3 dated August 2008);

6. on July 25, 2011, Dr. Pike, an orthopedic surgeon, performed surgery on the plaintiff's shoulder to repair an anterior and posterior labral tear;

7. the Minister of Heath asserts a claim pursuant to the *Health Care Costs Recovery Act*, S.B.C. 2008, c. 27, in the amount of $12,708.39.

[4] The registered statutory right of way agreement, in general terms:

a. grants to the City of Vancouver and the general public, the right to use the Smithe Mews area, including the pathway by foot, bicycles, rollerskates, skateboards and other modes of conveyance, but specifically excluding any motor vehicles (Article 2.1(a));

b. grants to the City of Vancouver, its contractors, and its workmen, the right to use the pathways with or without vehicles, for purposes relating to the maintenance and repair of Smithe Mews and the seawall (Article 2.1(b));

c. requires the Strata Corporation to keep the area "…in good repair and free of defects and in a safe, neat, clean and tidy condition as would a prudent owner…" (Article 3.1(a)).

B. THE PARTIES

Franck Furlan

[5] The plaintiff Franck Furlan was 45 years old at the time of the accident. He is now 50 years old. Since 1989, he has been employed as a deputy sheriff. He has worked as a deputy sheriff at the criminal courthouse at 222 Main Street, in Vancouver's downtown east side, since 2008.

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[6] Mr. Furlan and his wife have been together for more than 32 years. They have a 17 year old daughter. At the material time, the Furlan family lived on West 12th Avenue, near Vancouver City Hall.

[7] Before the accident, Mr. Furlan was physically active, worked out five days a week, bicycled to work, and often “looped around Stanley Park” twice before arriving at 222 Main Street. He was fit and strong, and known at work as Franck The Tank. After the accident, Mr. Furlan is no longer as fit or as strong as he once was. Despite surgery, he continues to experience right shoulder weakness, ongoing lower back pain, and knee pain.

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The Owners, Strata Plan BCS3202

[8] BCS3202 comprises two high rise residential towers, known as Flagship at 8 Smithe Mews, and Mariner at 918 Cooperage Way, with a total of approximately 245 units. Strata Plan BCS3217, known as Coopers Lookout, comprises a residential tower, townhouses and villas, with a total of 221 units at 33, 29, and 9 Smithe Mews. As the addresses suggest, Flagship and Coopers Lookout are across the street from each other.

Rancho Management Services (B.C.) Ltd.

[9] At the material times, Rancho Management provided property management services to both BCS3202 and BCS3217. Rancho Management continues to manage BCS3217, and provided property management services to BCS3202 until February 2014. Christopher Sargent is vice-president and general manager of Rancho Management. Mr. Sargent was also the property manager and strata agent for BCS3202. Francis Yeung is employed by Rancho Management as property manager, and is the property manager and strata agent for BCS3217.

[10] Allbright Services, a company wholly owned by Rancho Management, employs building managers, who are in turn hired by strata corporations. Peter Duchesne and Lucas Weeks are employed by Allbright Services. Mr. Duchesne was

the building manager for Flagship. Lucas Weeks was the building manager for Coopers Lookout.

C. THE ACCIDENT

[11] On April 15, 2010, Mr. Furlan was scheduled to work the afternoon shift. He left his house around 11:15 a.m., and rode his bike along bikeway routes that took him over the Burrard Street bridge and onto Pacific Boulevard. He was riding his Brodie Tesla hybrid, which was about one year old. The bicycle had road bike components, thin tires, 21 speeds, and straight handlebars. Mr. Furlan wore cycling pants, jacket and gloves, and helmet. It was a beautiful sunny day, so he also wore his sun glasses.

[12] The road along Pacific Boulevard at Nelson Street was blocked because of construction. A flag person redirected Mr. Furlan to Cooperage Way. Mr. Furlan followed Cooperage Way to a T-intersection at Smithe Street, turned right onto Smithe Mews and towards the seawall bike path. On “normal days” he measures his speed with his phone app, and knows that he averages about 20 kilometers an hour on flat surfaces.

[13] Mr. Furlan had never been on Smithe Mews before. As he cycled along the roadway it became a *cul de sac* with a “kind of stamped brick pattern”. At the end of the *cul de sac* he slowed down and turned onto a pathway leading directly to the seawall. The angle of the sun on the residential towers and on the trees in the planters, cast shadows in the area, but the pathway looked smooth and he was not going very fast because he had to turn onto the seawall. Suddenly, the “next thing I know, I’m kind of going through the air”. Something stopped his front tire which bounced up and became airborne. When he landed back on the front tire, his back tire rose up to a 45 degree angle. He could not get his feet out of the pedals because he was clipped in and was ”almost upside down” on his bicycle as it rolled forward. He “couldn’t balance anymore”, was flung forward, “whipped over”, and the right side of his body slammed to the ground. Mr. Furlan was in so much pain, he was unable to get up off the ground until another cyclist came to his aid. She asked

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him if he wanted an ambulance, but Mr. Furlan declined because an ambulance would not take his bicycle.

[14] After the accident, Mr. Furlan saw that his bicycle had hit a curb. He never saw the curb before the accident. When he was riding along, the curb "looked like it was flush" with the surrounding area. Hitting the curb was like hitting a rock wall.

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D. LIABILITY

Area of the accident

[15] The T-intersection at Cooperage Way leads onto Smithe Street or onto Smithe Mews, which nominally runs north-south. Smithe Mews ends in a *cul de sac* or what some have referred to as a driveway roundabout. The *cul de sac* is covered with reddish coloured stamped concrete bricks and wide grey concrete strips. Flagship is on the west side of Smithe Mews, and Coopers Lookout on the east side. At the end of the *cul de sac* are two pathways leading to the seawall. The pathway to the west is owned by BCS3202 and the pathway to the east is owned by BCS3217. There are also sidewalks on either side of Smithe Mews. A series of three rows of raised planters with trees and shrubs are in between and on either side of the pathways, so that middle of the three sets of planters runs between the two pathways. The pathways are grey concrete pavers.

[16] The pathways and the *cul de sac* are separated by a cast-in-place concrete rollover curb and gutter pan that runs continuously east-west between the *cul de sac* and the pathways, and abuts the north edge of the raised planter between the two pathways. The curbs have a vertical rise of 6.3 centimeters or 2.5 inches over a horizontal distance of 12 centimeters or 4.72 inches. There are benches at the end of the first set of planters. The distance between the curb and the bench is 7.2 meters or 23.6 feet. The distance between the bench and the seawall appear from the photographs to be roughly the same.

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[17] Until at least May 7, 2010, the rollover curb was unpainted concrete. At some point after that, Mr. Duchesne painted the portion of the curb owned by BCS3202 - yellow. A few months after that, Mr. Weeks also painted the portion of the curb owned by BCS3217 yellow.

[18] Several witnesses testified at trial. Their evidence conflicted on many things, including the reporting system for accidents, the reports of any bicycle accidents, the extent to which cyclists use the pathways, and why the curb was painted yellow.

(a) Lay witnesses

Susan Ferguson (concierge)

[19] Susan Ferguson is a concierge employed by Genetec, a security company. She was a concierge at Flagship from 2009 to July 2012. She currently works as a concierge for Coopers Lookout at 33 Smithe Mews. At Flagship, the concierge's desk is just inside the front entrance, and has a view of the *cul de sac*. During her time at Flagship, she became aware of three bicycle accidents on the pathways near the curb.

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[20] The first accident was in the autumn of 2009, around dusk. Ms. Ferguson had stepped outside to patrol the building perimeter when she saw a male cyclist in his late 20s or early 30s who had just wiped out on his bicycle. He sat on the ground about 10 feet from the curb. His bicycle was lying on the ground. It looked like the curb was the cause of his fall. Before she had a chance to speak to the cyclist, he got back on his bike and rode away.

[21] Ms. Ferguson does not recall whether she made a written incident report but testified that she expressed her concern about the curb to Pete Duchesne, the building manager. She was worried that people riding bicycles would injure themselves because of the curb.

[22] The second bicycle accident occurred in the spring of 2010. Ms. Ferguson was sitting at the concierge desk when she saw a man riding along Smithe Mews, towards the curb on his way to the seawall. The rollover curb had not been painted yellow. She did not see the accident, but heard the bicycle crash. She went outside and saw the cyclist and his bicycle on the ground. The cyclist, in his early to mid-20's, appeared stunned by the accident. She asked him if he needed assistance, but he wanted no help.

[23] The third incident occurred in front of 9 Smithe Mews before the concrete rollover curb was painted yellow. A man came to the front entrance of Flagship and asked her to call an ambulance because a woman had been in a bicycle accident. Ms. Ferguson could see the woman and her bicycle on the ground. She went outside and saw a man near the woman. She could tell from the conversation the man was having on his cell phone that he was calling an ambulance.

[24] Ms. Ferguson is not aware of further accidents involving the curb and bicycles along the pathways after the curb was painted yellow.

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Kan Lee (concierge)

[25] Kan Lee is the head concierge at Flagship. Part of his duties as concierge include to "act as security", patrol areas, including the pathway in front of 8 Smithe Mews, and to see that "no mischief or anything" occurs there.

[26] Mr. Lee testified that about two to three times a day, he sees cyclists using the pathway. No bicycle accident has ever been reported to him. He learned of Mr. Furlan's accident as a result of his "boss talking to one of the lawyers" who wanted to see if there was a report of the incident. He went to "check the file in our cabinet", and found no report of the incident. Other than Mr. Furlan's accident, he is not aware of any other bicycle incident relating to the curb. If there was any accident, he would have typed a report in his computer. He said that he has no personal knowledge of any bicycle accidents on the pathway in 2010 because he did not work there until 2011.

[27] Mr. Lee is mistaken about when he started working at Flagship. He is the author of an incident report relating to a bicycle accident that occurred along the pathway in front of 8 Smithe Mews on May 7, 2010. However, for reasons that will be later explained, the document was not produced or disclosed until after Mr. Lee testified. I do not in any way fault Mr. Lee for not recalling the accident, because it happened some time ago. A concierge sees and talks to many people, and Mr. Lee did not have the benefit of the incident report to refresh his memory.

Peter Duchesne (building manager)

[28] Peter Duchesne has been employed by Allbright Services for over 26 years. He was "start up manager" for Flagship. A start up manager works at "brand new buildings", deals with deficiencies, sets up contracts and staff, and ensures that the "transformation from developer to strata goes smooth". He was Flagship's building manager before and after the 2010 winter Olympics, for approximately three years between 2009 and 2011.

[29] Mr. Duchesne testified that Ms. Ferguson may have said something to him about cyclists and accidents but he does not recall what she told him. However, if she was aware of an incident, she had to fill out a report, and he never saw a report from her about any bicycle incident. It is not “proper reporting” for her to just verbally report an incident to him.

[30] The only conversations he recalls having with Ms. Ferguson about the pathway related to vehicles driving up and down the pathway when they were not allowed to. When the 2010 winter Olympics began, people started driving down the pathway in an effort to get to the casino on the other side of the building. He saw it happen at least half a dozen times, and knew it happened other times. People drove their vehicles down the pathway, ended up at the seawall, and were forced to back out. To deal with the problem a chain was installed across the pathway. However, within a couple of days someone drove through and broke the chain which was never replaced. They also put up signs on either side of the pathway indicating that there was no vehicle access, but that too did not always work.

[31] Every day Mr. Duchesne saw “lots and lots” of cyclists travelling to and from the seawall over the pathways. In direct examination, he testified that the only bicycle accident he ever heard about was based on what he was told by Lucas Weeks. Mr. Weeks mentioned something about some kind of bicycle accident along the pathway, but he recalls nothing more. During cross-examination, Mr. Duchesne also recalled parts of a conversation about another bike accident. He heard that somebody had wiped out, but recalls nothing more.

[32] Mr. Duchesne said that he was “instructed by the strata” to paint the curb yellow because they were concerned about pedestrians being hit by vehicles, and they wanted to make the curb visible.

Christopher Sargent (property manager and strata agent for BCS3202)

[33] Christopher Sargent was examined for discovery on behalf of Rancho Management. He was not called as a witness, but portions of his examination for discovery were read in at trial.

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[34] Mr. Sargent visited the property of BCS3202 weekly prior to Mr. Furlan's bicycle accident, but said that he had never seen a cyclist use the pathway. They had lots of problems during the Olympics with vehicles driving along the pathway, and tried a number of things to deter the vehicles. Despite the terms of the statutory right of way in favour of the City of Vancouver, Mr. Sargent complained that "we also had problems with city vehicles going down that same area to get to the seawall. And that's why the signage was installed."

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[35] With respect to painting the curb yellow, Mr. Sargent testified:

> Q With respect to the changes after the fact, we know it's been painted and maybe a few other things have been done. Is that something that Rancho did or is it something the strata did themselves without Rancho's involvement?
>
> A It was done by -- the building supervisors, I believe, did it. Lucas and Pete. And I think they did mention it to me that it would be a good idea to do it when they heard somebody had wiped out.

[36] Mr. Sargent said that he was not aware of any cyclists falling at the rollover curb since Mr. Furlan's accident in April 2010:

> Q … With respect to incidents or falls at the roll-over curb involving pedestrians or cyclists have there been any since this alleged accident in April 2010 to your knowledge?
>
> A Not that I'm aware of.

[37] Mr. Sargent mentioned nothing about a bicycle accident in May 2010 at the same location where Mr. Furlan had his accident. When he testified the May 2010 incident report had not yet been produced by the defendants, so Mr. Sargent did not have the document to refresh his memory.

Lucas Weeks (building manager)

[38] Lucas Weeks was the building manager for Coopers Lookout from December 2008 until March 2015. Francis Yeung, the property manager and strata agent, was his "boss".

[39] Mr. Weeks saw "hundreds" of bicycles using the pathways every day. He witnessed only one bicycle accident. It was around 11:00 a.m. on a sunny spring day

in 2010. He was outside speaking to the electrician when he had a loud bang behind him. He turned around to see a cyclist on the ground near the bench closest to the rollover curb in front of 8 Smithe Mews. The cyclist appeared to have a scrape on his elbow and leg. Mr. Weeks asked him if he was okay, but he replied that he was fine, picked up his bicycle, and walked away. Mr. Duchesne was away that day, but it was "protocol" for him to bring it to his attention in case anything became of it, and so he verbally informed Mr. Duchesne of the incident. He never filled out an incident report because no ambulance or emergency personnel was required.

[40] Mr. Weeks testified that in 2010, Rancho Management was using an online reporting program for building managers, property managers, and concierges to input incident reports and common area damage reports. The sender could specify whether the report was being sent to the building manager or the property manager, but everyone had access to the report regardless of the intended recipient.

[41] Mr. Weeks said that he was verbally instructed by the property manager, Mr. Yeung, to paint the Coopers Lookout's side of the rollover curb yellow because there was a complaint from Flagship that their curbs did not match. He painted their side of the curb yellow about three months after the Flagship's side of the curb had been painted yellow.

Jack Wong (strata council member BCS3202)

[42] Jack Wong owned a condominium unit at 8 Smithe Mews from early summer 2009 to December 2013. He was elected to strata council at the first annual general meeting after he purchased his unit and became co-chair. He remained on council for approximately three years.

[43] Mr. Wong said that he learned about the April 2010 bicycle incident when Mr. Sargent mentioned to council that there was an accident involving a cyclist falling off a bicycle in front of the building. He said nothing about the cause of the accident and did not make any recommendations. The council members discussed the matter briefly but assumed there was not much they could do about someone falling off a bicycle.

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[44] Mr. Wong said that a concierge was required to comply with the guidelines set out in the company's concierge policy manual. He had seen the guidelines, but cannot recall what incidents must be reported by a concierge. However, if there were "verbal complaints" from the concierge to Mr. Duchesne, that was not the proper reporting system. There was no guideline for the building manager, on what he was required to report to the strata agent, or on what the strata agent was required to report to council.

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[45] Mr. Wong said that he only learned about the curbs being painted yellow about a week before he testified. With the exception one meeting, he attended all of the strata council meetings when he was a member and co-chair. Council would receive an agenda, a summary of letters or correspondence, the financial statements, a log of the incidents reported, and resolutions to any outstanding issues from the property management company. Other than two stolen bicycles, strata council received nothing relating to problems with the curbs or cyclists.

[46] In cross-examination, when he was shown the photographs of the incident scene, Mr. Wong said that he could see the rollover curb "because of its colouration". When asked if he could distinguish between the gutter pan and the curb, Mr. Wong testified that he could distinguish that something is there, but could not distinguish between the gutter pan and the rollover curb.

Luke Cheng (strata council member BCS3127)

[47] Luke Cheng is the owner of a townhouse at 27 Smithe Mews and has lived there since January 2009. He has been a member of the strata council since March 2009. He sees cyclists using both pathways "all the time, especially in the summer time". He is not aware of any bicycle accidents on the pathways, except for the subject accident. He became aware of this proceeding when Mr. Yeung "just quickly mentioned that someone fell and there was litigation against the strata as a council meeting was finishing." Mr. Cheng said that after the meeting he was returning to his townhouse and Mr. Yeung was returning to his vehicle when Mr. Yeung "just quickly

pointed out where the incident occurred", by pointing to the pathway in front of Flagship.

[48] Mr. Cheng does not know when or why the curb was painted yellow.

Francis Yeung (property manager and strata agent BCS3127)

[49] Francis Yeung is a property manager who has been employed by Rancho Management for approximately 11 years.

[50] Ms. Mangan, counsel for the defendants, explained to the Court before Mr. Yeung testified that when she met Mr. Yeung on October 6, 2015, during the mid-morning break, he informed her that there was an online record relating to a subsequent bicycle accident. She asked him to e-mail it to her, and she informed Mr. Siren, counsel for the plaintiff, that there was a document being sent to her. When Ms. Mangan received the May 7, 2010, incident report on her BlackBerry, she forwarded the document to Mr. Siren's e-mail, so that he could review the document. The trial was stood down, and Mr. Yeung did not begin his testimony until Mr. Siren had an opportunity to review the document. The document disclosed that a Steve Flach had been injured in a bicycle accident on May 7, 2010, near the bench on the pathway in front of Flagship.

[51] Mr. Siren informed the court that after reviewing the incident report, he used LinkedIn to locate Mr. Flach and arranged for him to attend court on October 7, 2010.

[52] Mr. Yeung became the property manager and strata agent for BCS3127 in October 2008. He said that the building manager is responsible for inspecting and maintaining outdoor common property. The concierge is responsible for security patrol during his or her shift. In 2010, there were always three concierges assigned to BCS3202, and they operated 16 hours a day.

[53] Rancho Management, as the property manager, was required to maintain the pathways (the common property) to ensure that the bricks were safe and level, and

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there was no organic growth, like grass, growing through the bricks. The actual work was carried out by the building managers as part of their daily maintenance duties. Their job is to see that the pathways are safe, and if they are not, to report the matter to the property manager, who would then report to the strata council and seek directions.

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[54] On his weekly visit to BCS3217, Mr. Yeung walked alongside Mr. Weeks inspecting the pathways. He said that he was not involved in the decision to paint the curb yellow. He learned that the curbs had been painted yellow during one of his weekly visits to Coopers Lookout after both curbs were painted. He understood from his discussion with Mr. Weeks that the curbs were painted yellow to visually deter vehicles from using the pathways.

[55] Mr. Yeung saw cyclists use the pathways, but was unaware of any bicycle incidents along the pathways until BCS3127 was served with the notice of civil claim in this proceeding. He only because aware of another accident on October 2, 2015, when he conducted a review of the incident reports.

[56] On Friday, October 2, 2015, Mr. Yeung reviewed the incident reports in the CARE system. He found no incident report relating to Mr. Furlan's accident, but he found an incident report issue no. 327 (each incident is given an issue number), relating to a bicycle accident that occurred on May 7, 2010. This accident occurred at or near the location of Mr. Furlan's accident on April 10, 2010. The incident report was prepared by "Concierge Kan", submitted on May 7, 2010, at 3:56 p.m., addressed to Chris Sargent, property manager, and reads:

> Details:
>
> 05/07/2010: On May 7, 2010 @ 14:25 hour, ambulance came to Flagship building, but the paramedics did not come inside. Concierge Kan went outside to check. Kan found that there was a biker lying on the ground on Smithe Mews between the Lookout and the Flagship buildings, near TH101 Flagship's balcony next to the outside bench. The biker, Steve Flach, had a broken arm and had wound on his right side of the head. A bystander, Denise Leung, 307 loft of 29 Smithe Mews called for the ambulance. She also kept Steve's bike for him. At 15:00 hour, the ambulance took Steve to Saint Paul hospital.

Action taken by Concierge:

05/07/2010: Reported to property manager, Chris Sargent.

Action taken by On-Site Supervisor:

05/13/2010: Acknowledged

Action taken by Senior Property Manager:

05/25/2010: Noted - cs

05/25/2010: Noted - cs

Approval by Senior Property Manager: Yes

Date Approved: 05/25/2010

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[57] The CARE system does not allow incident reports to be sent electronically. They are stored in the CARE data base, and Mr. Sargent had to log into the system in order to view the report. The notes on the report indicate that Mr. Sargent read the incident report on May 25, 2010, decided that no further action was required, and closed the file on May 25, 2010.

[58] Mr. Yeung testified that there are no written guidelines or instructions for a building manager or concierge to report any personal injury accidents on the property, but “that was the expectation”.

Stephen Flach (cyclist injured on pathway May 7, 2010)

[59] Stephen Flach is 43 years old. He has a bachelor of communications degree, and is employed as an administrative assistant in the department of physics at Simon Fraser University.

[60] On May 7, 2010, Mr. Flach was working at the Vancouver Public Library on Georgia Street in downtown Vancouver. It was a sunny spring day. After having lunch, he began riding his bicycle to a scheduled meeting he had near Kingsway and Main Street. He left early for the meeting, and the route he took was influenced by the fact that he was early. He decided to take a slow, leisurely but longer route to get to the meeting because it was such a nice day.

[61] Mr. Flach was riding a 1980 Bianchi road bike that he modified for stability. The rear wheel is a hybrid wheel, and the handlebars are straight, rather than curved

racing handlebars. He was dressed in business casual clothing, and wearing shoes that were not dress shoes or runners, but "something in between". The bike has toe clips but Mr. Flach had removed the straps so they were "a very loose kind of clip that weren't really holding me in."

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[62] From the library, Mr. Flach cycled to Pacific Boulevard, along Pacific Boulevard, and onto Smithe Mews. He had never been there before.

[63] Mr. Flach turned onto Smithe Mews because he was looking for a route to the seawall, and saw a clear pathway to the seawall. As he rode along Smithe Mews he noticed that instead of asphalt pavement, the roadway was brick with cement or concrete inlays. It was brand new and "quite smooth". When he came to where the *cul de sac* meets the pathway, he saw what appeared to be another flat strip of cement or concrete inlay between the brick. What happened next "came out of nowhere", and "was completely unexpected". The back wheel of his bike came up and he flipped over the handlebars and landed on the ground. The last thing he remembers is seeing his hands reach toward the ground through the handlebars. He landed on his right elbow, struck his head, and broke his glasses. He knew he had been badly injured and lay still. A male voice came up and asked him if he was okay. He heard a female voice say, "He's not okay. Look at his arm!"

[64] Mr. Flach believed the male voice belonged to a concierge for one of the buildings because he asked him "some questions for an incident report".

[65] An ambulance took Mr. Flach to the hospital. He underwent surgery that day for compound fractures of his right elbow joint and upper arm. He is left with two plates and 21 screws in his arm.

[66] A few weeks after the accident, Mr. Flach returned to the scene of the accident to see if he could determine what happened because "it happened so quickly". He saw the rollover curb, which was still unpainted concrete. Mr. Flach never saw the rollover curb before the accident because it was "invisible".

(b) Expert witnesses

Granville W. Airton (forensic engineer)

[67] Mr. Airton was called as an expert by the plaintiff, although much of his evidence was not expert evidence. Mr. Airton inspected all of the curbs in Yaletown and found only four small areas where there were rollover curbs, but none of them were like the one at the end of Smithe Mews where the rollover curb is installed across a pathway. The rollover curb is about an inch or about 25 millimeters higher above the gutter than the standard curb crossing.

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Bradley Heinrichs (professional engineer)

[68] Bradley Heinrichs is a professional engineer and expert in vehicle accident or collision reconstruction. Mr. Heinrichs used Searle's formula to calculate Mr. Furlan's minimum and maximum possible speeds when he hit the curb. He based his calculations on Mr. Furlan's starting height and the distance he travelled between contacting the curb and coming to a stop. He calculated Mr. Furlan's speed when he contacted the curb at 27 to 38 km/h. He agreed that if Mr. Furlan's front tire continued to roll after it came down and hit the ground, his estimated speeds would be too high.

Craig Luker (professional engineer)

[69] Craig Luker is an expert in accident reconstructions. He is also considers himself an "expert" cyclist. Mr. Luker reviewed the accident scene and Mr. Heinrichs's report. He opined that Searle's formula was inapplicable because after Mr. Furlan's bicycle became airborne, the bicycle supported him again before he landed. In other words, his bicycle went up into the air, and *before* he came to a stop, he landed on his front wheels and continued to roll.

[70] Mr. Luker tried many times with a similar bicycle but was unable to achieve the speeds that Mr. Heinrichs opined Mr. Furlan was travelling at the time of impact. He cited studies reporting average riding speed of adults at between 16./8km/h to

20.9 km/h, and that amateur men in the Ironman competition race their bicycles at average speeds of 29 to 34 km/h.

[71] Mr. Luker also found that the curb rose more abruptly than what appeared in the photographs. He measured a vertical rise of 6.3 cm over a horizontal distance of 12 centimeters. The curb is made of pre-formed concrete section complete with a gutter pan at its base. The road surface adjoins the edge of the gutter pan which then transitions into the rise of the curb face. The gutter pan slopes downhill towards the base of the curb face forming a shallow pocket between the edge of the road and the base of the curb.

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[72] At one point in his evidence about the curb, Mr. Luker stated: “I was aware it was a hazard because it was painted yellow”.

Analysis

[73] The defendants argue that they are not liable for the accident for a number of reasons, including:

a. BCS3202 complied with its maintenance obligations under the registered statutory right of way;

b. the rollover curb was visible and ought to have been seen by the plaintiff;

c. the rollover curb was not in a state of disrepair;

d. the plaintiff ought to have anticipated a “transition” between the roadway and the pathway; and

e. the plaintiff’s speed was a contributing factor to the accident.

[74] With respect to the last point, I do not accept Mr. Heinrichs’s opinion. Searle’s formula is inapplicable. Mr. Furlan was not a projectile from the time he hit the curb until the point he landed. I accept Mr. Furlan’s evidence that he slowed down when

he was cycling along the *cul de sac* and onto the pathway because he had to make a left hand turn onto the seawall.

Applicable law

[75] Section 3 of the *OLA* provides:

> 3 (1) An occupier of premises owes a duty to take that care that in all the circumstances of the case is reasonable to see that a person, and the person's property, on the premises, and property on the premises of a person, whether or not that person personally enters on the premises, will be reasonably safe in using the premises.

[76] "Occupier" is defined in section 1 of the *OLA* as follows:

> **"occupier"** means a person who
>
> (a) is in physical possession of premises, or
>
> (b) has responsibility for, and control over, the condition of premises, the activities conducted on those premises and the persons allowed to enter those premises,
>
> and, for this Act, there may be more than one occupier of the same premises.

[77] The parties agree that the leading case on occupier's liability is *Agar v. Weber*, 2014 BCCA 297 at paras. 27 to 32:

> [27] The definition of "occupier" under the *OLA* includes a person who "is in physical possession of premises"; the definition of "premises" includes "land and structures or either of them".
>
> [28] In short, Mr. Weber's duty of care under the *OLA* was to take care that in all of the circumstances of the case Dr. Agar would be reasonably safe when he used the device.
>
> [29] In negligence, the common law requires a plaintiff to establish:
>
> > 1. a duty of care to conform to a certain standard of care for the protection of others against unreasonable risks. The duty does not extend to the removal of every possible danger, rather the test is one of reasonableness: *Ryan v. Victoria (City)*, [1999] 1 S.C.R. 201 at para. 28;
> >
> > 2. a breach of that duty by some act or omission by the defendant; and
> >
> > 3. the breach of duty is the proximate cause of a plaintiff's injury, meaning there must be a nexus between the injury sustained by the plaintiff and the defendant's negligent act or omission: [citations omitted].

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> [30] The standard of care under the *OLA* and at common law for negligence is the same: it is to protect others from an objectively unreasonable risk of harm. Whether a risk is reasonable or unreasonable is a question of fact.
>
> [31] Under the statutory test for occupiers liability, the Court in *Waldick v. Malcolm,* [1991] 2 S.C.R. 456 described the standard of care at 472:
>
> > …the statutory duty on occupiers is framed quite generally, as indeed it must be. That duty is to take reasonable care in the circumstances to make the premises safe. That duty does not change but the factors which are relevant to an assessment of what constitutes reasonable care will necessarily be very specific to each fact situation -- thus the proviso "such care as in all the circumstances of the case is reasonable".
>
> [32] Similarly, in *Ryan v. Victoria (City)*, the Court described the standard of care for negligence as follows:
>
> > [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 the 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.
>
> [Underline emphasis added in *Agar*.]

[78] The plaintiff also relies on the following case authorities: *Fingerhut v. Longwood*, 2009 BCSC 1839; *Coleman v. Yen Hoy Enterprises Ltd.*, 2000 BCSC 276; and *Stynes v. Victoria (City of)* (1990), 66 D.L.R. (4th) 588 (B.C.C.A.). The defendants rely on the following authorities: *Gervais v. Do*, 2000 BCSC 1271; *Robson v. Trail Bay Developments Ltd.*, 2009 BCSC 806; and *Cahoon v. Wendy's Restaurant of Canada Inc.*, 2000 BCSC 629.

[79] In *Gervais*, the plaintiff tripped and broke a bone in his left foot after he left a Mac's convenience store and was returning to his parked car. He alleged that "he tripped because of an unusual and unmarked hazard in front of the store constituted by the elevation between the edge of a concrete sidewalk and the adjacent asphalt surface of the parking area." In dismissing the plaintiff's claim, Justice Holmes stated:

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> [30] The surfaces on the parking lot and sidewalk were in good condition. There was no lack of repair. The area was in compliance with building, by-law, and safety codes. There were no obstructions to vision apart from the natural effects of shade and sunlight.
>
> [31] The evidence does not indicate the degree that shade obscured an ability to see the de-embarkation line between sidewalk and asphalt. The sidewalk appears a light to medium grey concrete and the asphalt was black.
>
> [32] Counsel for the plaintiff suggests the edge of the sidewalk should have been painted. There is no evidence that was required by any applicable authority, or even an industry or common practice in use at other locations. I also do not find that painting the curb would assist in indicating a height differential.
>
> [33] The areas in front of the store have been used daily by customers for years in all weather and lighting conditions and no problems have been indicated.
>
> [34] One cannot expect complete matching of surfaces when walking in outdoor areas like parking lots, and transition areas from parking surfaces to walkways to building entries.

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[80] In *Robson v. Trail Bay Developments Ltd.*, 2009 BCSC 806, the plaintiff was injured at a mall that was clearly undergoing construction. A ramp was constructed near the entrance of the mall by pouring a concrete slab approximately 30 feet wide and 18 feet long. The ramp sloped from being flush with the adjacent parking lot adjacent to the height of the sidewalk surrounding the mall. The sidewalk was approximately four inches above the adjacent parking lot surface. The concrete ramp was light grey in colour and the asphalt of the parking lot was black.

[81] The plaintiff was returning to her vehicle and looking into her purse for her keys as she was about half way down a concrete ramp when she approached the edge of a ramp and fell. There was a difference of approximately two inches between the ramp and the asphalt of the parking lot. The plaintiff alleged that the ramp was an unusual danger and the sides of the ramp should have been tapered down to the pavement or marked to advise users of the precipice. She also alleged that the sidewalk or ramp ought to have been painted. In dismissing her claim, Justice Burnyeat concluded:

> [22] I find that Ms. Robson has failed to demonstrate on a balance of probabilities that the ramp was unsafe or that it constituted an unusual danger. The edge of the ramp was there to be seen. It was not seen because Ms. Robson was paying attention to extracting her keys from her purse,

> rather than watching where she was stepping. While perfection might have seen the Defendants placing some sort of barricade at that side of the ramp, the steps taken by the Defendants to assure patrons that the premises were reasonably safe were more than sufficient in the circumstances. There was no unusual danger. At the same time, Ms. Robson has not proven on a balance of probabilities that the Defendants were negligent. The dismissal of the Action of Ms. Robson is ordered.

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[82] In *Cahoon v. Wendy's Restaurant of Canada Inc.*, 2000 BCSC 629, the plaintiff was leaving a restaurant leading back to the parking lot, when "he stepped off the sidewalk onto what he says appeared to be the wheelchair ramp leading up to the sidewalk, but instead, stepped onto the part of the surface of the parking lot which was adjacent to but lower than the wheelchair ramp". His claim was dismissed. The defendants rely on the following statements of Burnyeat J.:

> [21] Any "remedial" steps taken by the defendants are not to be considered as proof that such steps were required to make the premises "reasonably safe." The defendants only have to make the premises "reasonably safe." The defendants do not have to provide an environment which guarantees against all possible accidents. Steps taken after an accident may well only change an already reasonably safe area to an area which is more than reasonably safe. On the other hand, steps taken after an accident may well convert an unsafe area to an area which is then reasonably safe. What is done after the fact is merely a factor to be considered in answering the question of whether the area at the time of the accident was reasonably safe for occupants of the premises.
>
> …
>
> [28] The curb, the ramp and the actual edge of the ramp should have been seen by Mr. Cahoon when he exited the premises. I find that the premises were reasonably safe even for occupants who were exiting quickly as might be expected of some customers who are not using the "drive-thru" feature available at the restaurant but who nevertheless wished not to eat any food purchased at the restaurant. This activity was reasonably foreseeable and the premises were reasonably safe for that type of customer as well.
>
> [29] There is nothing which would allow me to conclude that the premises were not reasonably safe for occupants and, accordingly, I conclude that the accident was caused solely by the negligence of the plaintiff.

Analysis and conclusion on liability

[83] Both BCS3202 and Rancho Management Services meet the definition of "occupier" set out in s. 1 of the *OLA*. The definition provides that there can be more than one occupier of the same premises. In this case, the strata corporation was in

physical possession of the premises, while Rancho Management had care and control of the premises. Therefore, the defendants owed Mr. Furlan a duty of care under s. 3 of the OLA. They owed Mr. Furlan the duty to take reasonable care to ensure that he would be reasonably safe when using the pathway. They owed Mr. Furlan a duty of care to ensure the pathway was reasonably safe.

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[84] The important issue in this case is whether the defendants breached the standard of care because the rollover curb posed an objectively unreasonable risk of harm to the plaintiff.

[85] During the course of Mr. Furlan's cross-examination, there was a suggestion by the defendants that he ought to have been aware from the signs that the pathway was only for pedestrians. However, the statutory right of way agreement expressly provides that the strata corporation permitted the Smithe Mews *cul de sac* and pathway to be used by cyclists to and from the seawall.

[86] The defendants argue that the rollover curb was not unsafe, and that variations in surface height are something the law expects a person to anticipate in outdoor areas. There was no legal requirement that the curb had to be painted. Mr. Airton's photographs of other rollover curbs in the area demonstrate that none of them are painted yellow.

[87] However, other than the subject rollover curb, there were no rollover curbs between a roadway and a pathway. Further, from Mr. Airton's photographs, the other rollover curbs are clearly visible. Some of the photographs of the rollover curb where Mr. Furlan fell show that the rollover curb and gutter pan are not clearly visible. This is because parts of the curb are totally shaded by the trees and shrubbery in the planters. The photographs where the curb is clearly visible were taken from a vantage point that is obviously much lower than what Mr. Furlan's vantage point would have been on a bicycle. They were taken from a vantage point where the camera was pointed towards the level of the no vehicle access sign, which appears to be about two feet or less above the pathway. What can be seen from the photographs is that the rollover curb and gutter pan appears to be the same colour

and composition and about the same width of the flat concrete strips on the *cul de sac* and the pathway. From the photographs, the curb is clearly visible after it was painted yellow and looks like a small speed bump.

[88] The defendants argue that the plaintiff ought to have expected a transition between the end of the *cul de sac* and the pathway. He may have expected a transition, but he reasonably cannot have expected a curb that was not clearly visible.

[89] I find that there were bicycle accidents on account of the rollover curb, prior to Mr. Furlan's accident. The evidence relating to the system of reporting the accidents was totally inconsistent. However, I accept Mr. Yeung's evidence that there were no written guidelines or instructions for a concierge or building manager to report about bicycle accidents.

[90] However, whether or not there were earlier bicycle accidents, or whether the accidents were reported to strata council, is not decisive of the issue. The important factors in this case are that the rollover curb was in a place where a curb is not reasonably anticipated. The curb was also the same colour and about the same width as the concrete strips. It was not clearly visible. The defendants knew that the rollover curb is along a bicycle route to and from the seawall, and they knew or ought to have known the curb needed to be visible to cyclists. I accept Mr. Duchesne's evidence that he painted the curb yellow so that it would be visible. Before he painted the curb yellow it was not clearly visible, and at times shaded by shrubbery, trees, and the residential towers.

[91] I find that the defendants did not take reasonable care to protect people using the pathway from unreasonable risks. Given the location of the rollover curb, to leave it unmarked was unsafe and a breach of the defendants' duty of care. This failure to meet their duty directly resulted in Mr. Furlan's injury. I find that the defendants are wholly liable for the accident.

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E. DAMAGES

1. Non-pecuniary damages

[92] After the accident, Mr. Furlan made his way to work and was taken to the hospital, where he had x-rays and a prescription for painkillers. He remained in bed for the first seven days, and his wife had to bathe and feed him. For the first couple of weeks, he had headaches at the back and through the top of his head. The swelling, bruising and constant throbbing sensation at the top of his head lasted about a week. The stiffness in the upper part of his neck to his shoulders lasted around five weeks. The pain from the scrapes and bruises to his right hip and elbow went away after a few weeks. His right pinky finger was in pain and sensitive for three or four months. The bruising to his right foot lasted about eight months and made it very painful for him to put on a shoe. The pain in his right shoulder, right knee – and now left knee – and lower back remain.

[93] The pain in his right shoulder blade was "really bad" and increased despite various recommended treatments, including cortisone and physiotherapy, which made it worse. Mr. Furlan complains that as his right shoulder pain worsened, he could feel the muscles and ligaments ripping off of his shoulder. On July 25, 2011, Mr. Furlan underwent surgery and Dr. Pike, an orthopaedic surgeon, performed a labral repair of his right shoulder. He remained off work for 10 months because of the surgery.

[94] Between September 2011 and June 2012, Mr. Furlan attended physiotherapy two to three times a week for his right shoulder and right knee. He described the pain in his right shoulder before the surgery as 10 out of 10, but after the surgery, at sometimes 7 out of 10, but usually 3 out of 10. He remains unable to sleep on his right shoulder. He has regained range of motion in his right shoulder but considers his right shoulder strength to be 33 percent of what it was before the accident.

[95] Following the accident, Mr. Furlan developed a ganglion on his right wrist. The ganglion is thought to have been caused by the way he fell on his right arm and

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wrist. Ganglions are generally thought to be caused by trauma. The ganglion was surgically removed.

[96] In November 2011, Mr. Furlan's wife sustained a serious brain injury. Following a hospital procedure, she collapsed outside on the sidewalk and struck her head. She lost her ability to speak for many months and is no longer able to drive or to work. Her memory has also been severely compromised, and she has no memory or only sporadic memory of events before or after her husband's accident. Her recollection of his surgery in July 2011 and after the surgery is non-existent.

[97] For several months, while his right arm was a sling from his surgery, Mr. Furlan had to bathe and dress his wife using only one of his arms.

[98] About a year after the accident, Mr. Furlan began experiencing pain in his left knee because he had been compensating for the difficulties he has with his right knee. Since the accident, his right knee bows inward. When he has knee pain, he also suffers from low back pain. In April 2012, he was seen by a surgeon, Dr. K.F. Hughes, who felt that Mr. Furlan may have a possible tear of both the right and left medial menisci. Dr. Hughes recommended a conservative approach initially, rather than immediate surgery.

[99] Before the accident, Mr. Furlan regularly enjoyed cycling, weight training, running, martial arts (he also taught martial arts), boxing, kick-boxing, basketball, football, volley ball and soccer. He has done everything that has been recommended to him for strengthening and reconditioning, including running and doing arm exercises in the pool. He was unable to return to weight training until 2013 when he started with 1.5 pound weights. He is now using up to 40 pound weights, although before the accident, he could lift 110 pound weights. He returned to cycling in 2013, and in January 2014 returned to cycling to and from work.

[100] Before the accident Mr. Furlan ran long distances with his daughter, who he considers an elite athlete, but he can now only run very short distances because of the pain in his knees and legs. He returned to training in martial arts in early 2014

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but feels like his flexibility and lateral movements have been affected. He has lost his edge.

[101] As deputy sheriff, Mr. Furlan works in the cells at 222 Main Street, where he escorts prisoners. The work is physically demanding. He carries about 23 pounds of equipment, including a bullet proof vest, duty belt, firearm, pepper spray, a heavy seat of keys, and handcuffs. The prisoners include gang members, violent prisoners, and the mentally ill. At times Mr. Furlan is required to engage in a high risk take down and use force. He used to do that "automatically", but now he has to plan his attack, and finds that he is constantly "second guessing" himself. However, he does not complain and has worked despite his constant pain.

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[102] Mr. Furlan's knees are stiff when he starts his work day. The pain will be a 2/10 but increase to 5/10. He has low back pain when he starts his day, but the pain begins at 3/10 and increases to 5/10 as the day progresses. If his knees flare up, the pain in his low back can shoot up to a 9/10. The pain interrupts Mr. Furlan's sleep, and makes him more irritable and short tempered.

[103] Dr. C. Hershler, a specialist in physical medicine and rehabilitation, examined Mr. Furlan on June 17, 2015. In his report dated June 18, 2015, he notes that Mr. Furlan has a significant medical history before the accident, including:

> 1. Peripheral polyneuropathy (intermittent numbness in the distal legs) - This primarily affects his feet and has caused occasional problems with balance and incoordination. He began to notice these symptoms in 1997. He is able to control these symptoms with exercise.
>
> 2. In 2007, he was diagnosed with a mediastinal cavernous hemangioma - He has had surgical removal of this tumor. At that time, he was also diagnosed with restless leg syndrome and sleep apnea, both of which improved after removal of the tumor.

[104] Dr. Hershler opines that as a result of the accident, Mr. Furlan sustained the following injuries:

(a) Injury to his right shoulder – the labral tear was surgically repaired but he is left with constant pain within the glenohumeral joint and right acromioclavicular joint;

(b) Ganglion to his right wrist which was surgically removed;

(c) Muscular pain affecting the right paraspinal mass in his low back;

(d) Medial joint space pain in the right knee and the development of pain in his left knee, due to alterations in his gait;

(e) Soft tissue injury to his right ankle which has healed.

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[105] In his prognosis, Dr. Hershler states:

> Over five years have now elapsed since the accident. Mr. Furlan remains with daily levels of pain, but has a high pain tolerance and an extremely motivated attitude with respect to exercise and work ability.
>
> It is my opinion that it is unlikely that Mr. Furlan's situation will change spontaneously in the foreseeable future. It is more likely than not that he will have to deal with his current symptoms and loss of strength and flexibility on a permanent basis.
>
> In an effort to assist with further pain management and strength, I recommend that he work one-on-one with a physical trainer who has both physiotherapy and physical training expertise. Mr. Furlan should have weekly sessions with such a trainer for six months, and then on a monthly basis for a further six months. At the end of such a program, he should have acquired more insight into his injury patterns and have fine-tuned his exercise regimen. I have no doubt that he will follow those exercises on his own (daily).
>
> At this stage and for the foreseeable future, Mr. Furlan will remain symptomatic in his current fashion.

[106] Mr. Furlan seeks an award of $125,000 for non-pecuniary damages. He relies on *Burtwell v. McCaffrey*, 2013 BCSC 886, and *Chabot v. Chaube*, 2014 BCSC 300, where the plaintiffs were awarded $80,000 for non-pecuniary damages. He also relies on *Power v. White*, 2010 BCSC 1084, where the plaintiff was awarded $135,000 for similar injuries.

[107] The defendants argue that Mr. Furlan's complaints are affected by his previously diagnosed neuropathy. However, I find Mr. Furlan to be a credible witness, and that all of his complaints relating to his shoulder, lower back, and knees

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were caused by the accident and not by any pre-existing conditions. I also find that Mr. Furlan is not a quitter or a malingerer. At one point in his evidence he explained that before his shoulder surgery, he was in excruciating pain, and returned home from work “spent” because of his “inner battle dealing with my emotions…because we’re in the public eye”. Mr. Furlan is stoic. He works despite his pain, does his best not to disclose that he is in pain, and continues working at a job that requires physical stamina.

[108] The defendants refer to handwritten notes in the October 26, 2009, clinical records of Dr. C. Ryan, Mr. Furlan’s family physician. The handwritten notes read:

- angry
- irritable
- short fuse
- worries in mom-in-law
- frustrated (everything)
  - illness
  - home - he downstairs
  - both restless legs
  - his legs vibrate a lot

[109] On the basis of the notes the defendants argue that Mr. Furlan was already angry and irritable before the accident. Dr. Ryan was not called to testify about his notes. However, Mr. Furlan testified that in the fall of 2009 his wife was complaining that his legs vibrated at night and he was worried he might have another tumour. As noted in Dr. Hershler’s report above, Mr. Furlan had a tumor near his heart removed in 2007. Mr. Furlan stated that he “almost died” when he had the tumor removed.

[110] More to the point: it would be the rare person that did not experience irritability and a short fuse from time to time. Mr. Furlan experiences daily pain as a result of the injuries he sustained in the accident. Common sense tells me that constant and chronic pain affects a person’s moods and personality. Mr. Furlan had health issues before the accident, but none of those issues are the cause of his present complaints.

[111] The defendants argue that the award for non-pecuniary damages should be $60,000 and rely on *Filsinger v. ICBC*, 2009 BCSC 232, and *Gregory v. Insurance Corporation of British Columbia*, 2010 BCSC 352. However, the injuries and the consequences of those injuries on the plaintiffs in those cases were not as great as the injuries and the impact of those injuries suffered by Mr. Furlan. In *Filsinger* the plaintiff had a shoulder injury which resolved after surgery, and a pre-existing low back condition. In *Gregory*, the plaintiff sustained a permanent mild impairment to her left shoulder, for which she was awarded $60,000.

[112] Each case turns on its facts. Taking into account the factors to be considered in assessing non-pecuniary damages, as outlined in *Stapley v. Hejslet*, 2006 BCCA 34 at paras. 45 to 47, I consider an award of $80,000 for non-pecuniary damages to be appropriate.

2. Past wage loss

[113] Through Great-West Life, Mr. Furlan received short-term disability or 65 percent of his wages, and then long-term disability or 55 percent of his wages. It is agreed that the total for his lost wages and benefits as a result of the accident is $51,758.76.

3. Past loss of earning capacity

[114] Before the accident Mr. Furlan generally worked approximately 100 hours of overtime annually because of what he referred to as his “specialities”. He was born in France and is fluent in French. He can work as a sheriff for bilingual trials, and is the French deputy sheriff for the Province. He also “specializes in violent offenders”. Because of his pain, lack of energy, and efforts at recovery, he declined opportunities to work overtime from the date of the accident until the end of 2013. There is no evidence whether the overtime he turned down was for more or less than two hours a day. He receives 1.5 times his hourly rate for the first two hours of overtime, and then double time beyond the first two hours. Before the accident he earned from $54,000 to $66,000 annually, depending on the amount of overtime. At the time of the accident he was earning $27 an hour, plus an additional $110 a

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month because he is a "medic" who responds to medical emergencies. He presently earns $32 an hour. It was not until the end of 2014 that he returned to working approximately 100 hours of overtime as he did before the accident. He worked more than 100 hours of overtime in 2014 and 2015. There is no evidence that he has declined any overtime work since 2014.

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[115] Mr. Furlan also contends that as a result of using the sick time he did following the accident, he was disqualified from applying to become a sergeant and earning approximately $4 more an hour. From 2010 to the present there have been four postings for the position of sergeant. Since the end of 2014, Mr. Furlan has been qualified to apply for the positions.

[116] However, I find that Mr. Furlan has failed to meet the burden of proving that there was a real or substantial possibility that he would have been promoted to sergeant but for the accident. There is no doubt that that Mr. Furlan has hopes of a promotion, even to the position of acting superintendent. He has been in the position of deputy sheriff since 1989. Based on all of the evidence, including his annual performance development reviews, I am not satisfied that Mr. Furlan would have been awarded the position of sergeant, had he applied for the position, but for the accident.

[117] I am satisfied, however, that Mr. Furlan lost opportunities to work overtime. The amount of lost overtime is difficult to quantify. It seems that Mr. Furlan began working overtime sometime around the beginning of 2014 and by the end of that year, was up to the 100 or so hours of overtime that he generally performed before the accident. While he claims to have loss 400 hours of overtime from 2010 to 2014, I do not think it is that high. Doing the best I can, I find an award of $15,000 (gross) is appropriate.

4. Future loss of earning capacity

[118] Mr. Furlan seeks an award of $120,000 for future loss of earning capacity. The defendants contend that Mr. Furlan has failed to establish any loss of future earning capacity.

[119] Mr. Furlan testified that he plans to retire between ages 65 and 70.

[120] To prove a loss of future earning capacity, a plaintiff must establish a real and substantial possibility that his or her injuries will lead to a loss of income in the future. If the plaintiff meets that burden, then depending upon the circumstances of the case, the plaintiff may quantify that loss of earnings either on an earnings approach or capital asset approach: *Perren v. Lalari*, 2010 BCCA 140 at paras. 30 and 32.

[121] Mr. Furlan undergoes an annual firearms requalification test. In 2012, he failed because he experienced a painful burning sensation from his elbow to his upper shoulder when he tried to get his gun out of his holster. He retook the test with modifications – his holster was lowered two inches – and passed the test with a high score.

[122] From time to time, when he was working in protective operations and as an instructor at the Justice Institute, Mr. Furlan was required to take SOPAT (sheriff office physical abilities or assessment test). Over the time that he has worked as deputy sheriff he has taken the test about 10 times and never failed. However, in 2014 he failed the obstacle course by 15 seconds. His knees were so inflamed that it affected his back and he had to step over rather than jump over two fences during the quarter mile obstacle course. He has not taken the course since, but intends to. Otherwise, he claims that he won't be able to get any work in "specialty areas". These areas include protective operations, where he is paid a sergeant's rate of pay for protecting certain judges at home and to and from work.

[123] Mr. Furlan says that he has worked in protective operations since he was 16 years old, and has worked as a bodyguard for celebrities, monarchs, and high profile wealthy businessman. He says that when he retires from working as a sheriff, he can continue to work in protective operations.

[124] Mr. Furlan is concerned that he might not be able to pass the tests required in order for him to work in protective custody. He argues that his chronic pain is

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permanent, and there is a real and substantial possibility that over the next 15 to 20 years, his injuries will lead to an income loss if he fails course, or misses opportunities for promotions.

[125] If Mr. Furlan follows Dr. Hershler's recommendation that he work with a physical trainer with expertise in physiotherapy and physical training, he should be able to pass any physical tests required by him in order to work in protective custody. There is no expert evidence to suggest that Mr. Furlan will, at some time in the future, not be able to continue working in his present position because of his injuries.

[126] From 2006 to 2010, Mr. Furlan worked as a first aid instructor at Traumatech. He worked at Traumatech approximately once or twice a month, sometimes three times a month, or sometimes not at all, depending on his schedule at work. He does not recall his rate of pay but believes it was $170 to $190 a day. He claims that he no longer works at Traumatech because of the "issues with his shoulder with doing compressions".

[127] Mr. Furlan produced no documents indicating the hours he worked or his rate of pay at Traumatech. He did however produce a letter from Traumatech dated July 31, 2014, indicating that he fully and successfully participated in the 70-hour week long Work Safe BC Occupational First Aid Level III course in May 2014, and is now certified until May 2017. Mr. Furlan describes himself as the "main medic" or "senior head guy" at 222 Main Street. I assume that the proper designation is first aid attendant.

[128] Mr. Furlan was asked in cross-examination how he was able to complete his first aid course, yet not be able to teach at Traumatech. He explained that during the week long course, the only time he had to do compressions for CPR (cardiopulmonary resuscitation) was when he took the test. He only had to do it once. When he was doing compressions while teaching first aid at Traumatech, he had to demonstrate the compressions over and over again – not just do it once.

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[129] The defendants contend that other than Mr. Furlan's own evidence there is nothing to prove that he ever worked at Traumatech. While it may have been helpful to have other evidence establishing the dates that Mr. Furlan worked at Traumatech and the rate of pay, there is no suggestion that Mr. Furlan is not telling the truth.

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[130] I am not satisfied that Mr. Furlan has proved that there is a real and substantial possibility that he will suffer any loss of earnings from his work as a deputy sheriff as a result of the accident. There was no suggestion of inability by Staff Sergeant Singh, who testified that Mr. Furlan is able to carry out all of his duties.

[131] I find, however, that Mr. Furlan has established a real and substantial possibility that he is unable to return to work at Traumatech because of his injuries and pain. Quantifying the loss is difficult. He worked between once or twice a month, sometimes three times a month, and sometimes not at all during a month, and earned approximately $180 a day. Whether he worked or not also seemed to be dependent on his work schedule as a deputy sheriff. There is no evidence that the job would be available to him until he reaches ages 65 or 70. What is being compensated is not the loss of projected earnings, but the loss or impairment of Mr. Furlan's earning capacity, which is a capital asset. Using the capital asset approach, I find an award of $15,000 for future loss of earning capacity is appropriate.

5. Future care costs

[132] Mr. Furlan is entitled to an award of $3,000 for future care costs as claimed. The amount is for one-on-one training recommended by Dr. Hershler (once a week for six months, and once a month for six months) on the basis that the cost of each session is $100 a session.

6. Special damages

[133] Special damages are agreed at $858.35.

7. Health care costs

[134] It is agreed that the Minister of Health is asserting a claim, pursuant to the *Health Care Costs Recovery Act*, in the amount of $12,708.39. Pursuant to the provisions of that act, the defendants shall pay to the “the government”, or the Province, the amount of its claim.

F. CONCLUSION

[135] Mr. Furlan is entitled to judgment against the defendants in the following amounts:

1.	Non-pecuniary damages	$80,000.00
2.	Past wage loss	$51,758.76
3.	Past loss of earning capacity	$15,000.00
4.	Future loss of earning capacity	$15,000.00
5.	Future care costs	$3,000.00
6.	Special damages	$858.35
7.	Health care costs	$12,708.39
	Total	$178,325.50

[136] Mr. Furlan is also entitled to the costs of this action.

“Loo J.”

The Honourable Madam Justice Loo

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