CITATION: Meady v. Greyhound Canada Transportation Corp., 2012 ONSC 657
COURT FILE NO.: CV-01-0474
DATE: 2012-01-31

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N:	)	
PAM MEADY, EVELYN SHEPHERD, CARRIE ANN TAPAK, DENNIS CROMARTY, THAYNE GILLIAT, FAYE EVANS, SHELDON CHRISTENSEN, a Minor by his Litigation Guardian, CATHY DUCHARME, ANTHONY CLOWES, TANYA CLOWES and BRIAN ELIZABETH CLOWES and SHAUNA PAULINE CLOWES, minors by their Litigation Guardian, TANYA CLOWES, BRIAN GORDON ADAMS, MICHAEL DAVID FINN, JENNIFER ESTERREICHER, JOHNATHAN THERIAULT, an infant under the age of eighteen years by his Litigation Guardian LYNE THERIAULT and LYNE THERIAULT,	)	*Christopher D.J. Hacio¸ Nicole Crowe* and *Karen Drake*, for the Plaintiffs
Plaintiffs	)	
- and -	)	
GREYHOUND CANADA TRANSPORTATION CORP., CONSTABLE COREY PARRISH, CONSTABLE MARTIN SINGLETON, HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO, ALBERT ARNOLD DOLPH and SHAUN DAVIS,	)	*Owen Smith, Amanda McBride* and *David Contant* for the Defendants Greyhound Canada Transportation Corp. & Albert Arnold Dolph; *Stephen Moore, Teri D. MacDonald, Danielle D. Stone, Bianca Matrundola* and *Rafal Szymanski* for the Defendants Constables Parrish & Singleton and Her Majesty The Queen in Right of Ontario
Defendants	)	
	)	**HEARD:** April 26-30; May 10-13, 17-20, 26 , 27 & 31; June 1-4, 25-30; July 8, 15 & 29; September 14-16, 20-23, 27-29; October 4, 12-15, 18-21; November 2, 8-10, 15-18, 22-24, 29 & 30; December 1 & 6, 2010; January 20 and April 27, 2011, at Thunder Bay, Ontario

Mr. Justice T.A. Platana

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General Introduction/Overview

[1] On December 23, 2000, a Greyhound bus was travelling eastbound on Highway No. 1 near Ignace, Ontario. On arrival at Ignace, one of the passengers, later identified as Shaun Davis ("**Davis**"), spoke to the driver, Bill Groves ("**Groves**"). Davis expressed concern with respect to other individuals on the bus who Davis stated were trying to do him harm. He told the driver that they were going through his luggage. Davis and Groves contacted the police. Davis was then given an endorsed ticket to ride on a following bus. The evidence demonstrated, and the police acknowledged, that Davis' behaviour showed symptoms of anxiety and mild paranoia.

[2] After remaining in Ignace for some time, Davis and the police met with the driver of a later bus, Albert Dolph ("**Dolph**"), carrying passengers expecting to be home for Christmas with family and friends. The police spoke to the driver. Davis boarded the bus and was placed in the front seat. Approximately 45 to 50 minutes after leaving Ignace, Davis went up to the front of the bus. He engaged in discussion with Dolph about people on the bus wanting to hurt him. At a point in time, while standing in the wheel well in front of the bus next to the passenger door, Davis jumped up and grabbed the wheel of the bus, forcing it across the highway where it rolled onto its side in a ditch.

[3] Several of the bus passengers, Plaintiffs in this action, suffered injuries. They bring this action against Davis, who did not respond to this action; Dolph as driver of the bus; Greyhound Canada Transportation ("**Greyhound**") as operator; Her Majesty the Queen in the Right of the Province (Ontario Provincial Police ("**O.P.P.**")); and the two named Constables Corey Parrish ("**Parrish**") and Constable (now Sergeant) Martin Singleton ("**Singleton**"). In the course of these reasons, when I use the term "Defendants", I am referring to all named Defendants collectively, unless I otherwise specify a named Defendant. "Police Defendants" references the named officers and the O.P.P. "Greyhound Defendants" references the Defendant Dolph and Greyhound Transportation Corporation. The Plaintiffs claim that the Defendant Constables were negligent by placing Davis onto the bus and the Defendant Dolph was negligent in his operation of the bus. They claim the O.P.P. was negligent in the training of the officers and Greyhound was negligent in the training of Dolph.

Events at Ignace

[4] On December 23, 2000, Groves was driving a bus from Dryden to Thunder Bay. While the bus was stopped at the Tempo, a rest stop in Ignace for Greyhound buses, he was approached by a passenger, subsequently determined to be Davis. Davis indicated that he felt threatened by passengers in the back of the bus. Groves offered to have Davis sit up at the front of the bus. Davis seemed concerned, but forthright. He presented as clean cut, well dressed, and not obnoxious. Nothing stuck out about Davis from any other passenger. He was not aggressive and Groves "saw no red flags". Davis told Groves that someone was going through his luggage. Because this appeared to be a police matter, Groves asked the station attendant to call the police. When the police arrived, they asked if Davis' ticket could be switched to another bus. Groves said he had no problem endorsing his ticket, and that should David so choose, he had no fears or concerns about Davis staying on his bus.

Encounter At Tempo

[5] Sylvia Melanson was working as a cashier and waitress at the Tempo Gas Station/Restaurant in Ignace. Between 2:45 and 3:00 p.m. CST on that afternoon, an individual (whom she subsequently came to know as Davis) got off a Greyhound bus and came into the Tempo behind the bus driver. She testified that Davis seemed agitated, although there was nothing unusual about his appearance. She heard him speaking with the bus driver by the cash register, telling the driver that people on the bus were after him and that they were trying to go through his luggage. She then heard the driver suggesting to him that he call the police and she assisted Davis in doing so. She testified that Davis stated that he wanted to get his bags off the bus and that the bus driver told him that he could do so and take a following bus. In describing Davis' demeanor, she stated that he was nervous, agitated, and seemed paranoid. He appeared to believe what he was saying, however, she did not believe him as it did not appear that anyone was bothering him.

[6] Sylvie Maurice is the owner of the Tempo station/restaurant in Ignace. She came into contact with Davis twice that day; the first time was when she saw him behind the counter some time after 2:15 p.m. in the afternoon. He looked somewhat nervous. Davis indicated to her that people were out to get him. She states that he was asked to come out from behind the counter and he did so when asked.

[7] Constable Corey Parrish was working when he was called to the Tempo Restaurant at 2:20 p.m. in response to a call from his dispatcher that a person needed assistance. On arrival he spoke to Davis and Groves. Parrish testified that Davis presented well. Davis told him that there were some people on the bus who wanted to jump him and take his bags. He asked Davis to check his bags on the bus and Davis noted that everything was there. Davis was polite and communicated well. Constable Parrish spoke to Davis in the cruiser and formed the opinion that his complaints were not substantiated. While speaking to Davis in the cruiser, Davis said that he wanted to go home but wanted to take another bus. Constable Parrish asked him if he had taken any alcohol or drugs and Davis said he was taking prescription medications for Attention Deficit Disorder. Constable Parrish did not ask him what specific medications he was taking.

[8] After arrangements were made for Davis to travel on the following bus, and after retrieving his bags, Davis asked Constable Parrish if he could ride along in the cruiser with Constable Parrish. He was advised that he could not. Davis did not want to stay at the bus stop with the other passengers and Constable Parrish agreed to drive him to the Voyageur, another local restaurant in Ignace. He confirmed that Davis had the financial resources to get a cab back to the Tempo. When Davis exited from the cruiser Constable Parrish noted that Davis was calm, well-mannered, well-spoken and appeared to be suffering from mild paranoia.

[9] Filed as part of Exhibit 72 is a transcript of the tape recording between the Kenora Communication Centre and Constable Parrish, which took place at 3:02 p.m. In that recording, Constable Parrish describes Davis as "… sort of the complainer or whatever it is suffers from mild paranoia…"

[10] Amy Hewlett was working at the Voyageur Restaurant. She had contact with Davis while he was sitting at a counter drinking coffee. He was pacing a lot and looking out the window. He expressed concern to Ms. Hewlett about his belongings being stolen. She testified that she was never afraid of him and that he never made any threats against anyone.

[11] Margaret Glover was also working at the Voyageur Restaurant on the day in question and spoke to Davis. At trial, she stated that she brought him into the back office of the restaurant so that he could use the telephone. He was clean cut and neat. She had a discussion with him after the phone call, during which he said to her that people were after him, going through his luggage. He stated that he was changing buses as there had been some kids on the bus who were bothering him. She described him as looking tired, upset, and tense, and that he looked like someone who was having a bad day. In cross-examination she acknowledged that she was not uncomfortable with him and that he seemed "like a sweet, lost, scared boy."

[12] Karen Ray was driving a taxi in the Town of Ignace. She received a call from the Voyageur Restaurant to pick up a passenger at approximately 3:00 pm in the afternoon. She stated that the passenger was saying that people were after him and that he wanted to see the police. She then drove across the street where a police vehicle was parked. She spoke to Constable Parrish, whom she knew. She testified that she overheard a conversation between Parrish and Davis in which Parrish asked Davis if he wanted to see a doctor to which Davis replied, "no", and said that he "simply wanted to get out of town." She then drove Davis back to the Tempo. Davis again stated that people were trying to rob him. She told him not to worry and to calm down. Her evidence was that she thought he may have been high on something and needed to calm down. He seemed "a little delusional." She acknowledged that in her first contact with the police subsequent to the incident she stated that Davis had looked normal and "like a two year old, quite harmless." She acknowledged that there was never any indication of violence from Davis and that she never felt threatened by him.

[13] Ms. Melanson had contact with Davis for a second time approximately an hour or more after their first encounter. At the time of the second contact, Davis appeared more agitated than he was before. For this reason, she asked Sylvie Maurice not to leave her alone with Davis. He again was repeating that everybody was out to get him. In cross-examination she stated that she spoke to the police approximately five days later about the incident and she agreed that Davis did not appear violent in any way and that he complied with any request that she made of him. She further acknowledged that Davis was neatly groomed, that he did not smell of alcohol, that he was polite and that he was not using any foul language.

[14] Ms. Maurice also came into contact with Davis for a second time shortly before 5:00 p.m. She stated that at that time he was looking around and that he looked very nervous. He again asked her to call the police. During this second contact she stated that he seemed more nervous and agitated than he was during their previous encounter. She acknowledged that she had given a statement to an investigator in June 2001, in which she stated that Davis seemed paranoid but "not to the extent that he would harm anybody." She acknowledged in cross-examination that she was surprised and shocked when she ultimately heard about the accident, since during her contacts with Davis he "just looked like a scared little kid." She also acknowledged that his behaviour was mild compared to other individuals whom she had seen in her restaurant and that

he did not frighten her. Further, she did not have any concern that he would harm anybody. She acknowledged that he was polite, understood everything that she was saying and was not loud.

[15] At the time of this incident, Constable, now Sergeant, Martin Singleton was a Probationary Constable stationed at Ignace. He testified that he was at the detachment in Ignace at approximately 5:15 p.m. when he received a call from Davis stating that people were going to beat him up. He called the Communications Center and was subsequently picked up by Constable Parrish, who was on his way to the Tempo. He learned of Constable Parrish's previous involvement with Davis. His evidence is that upon his arrival at the Tempo Gas Station he was approached by Davis. Davis told the police that the people who were going to beat him up had just gone and that everything was now "okay". He stated that he just wanted to go home for Christmas. Davis was calm when Constable Singleton arrived at the Tempo. He stated that Davis seemed to be suffering from mild paranoia but that it was not the type of paranoia which he had previously seen or was taught about in his training program.

[16] The next scheduled Greyhound bus was operated by Dolph and arrived just after Constables Singleton and Parrish arrived at the Tempo. When the police cruiser stopped, Davis immediately approached the Officers and asked them to stay around until he could get on the Greyhound bus. Constable Parrish put Davis in the back of the police cruiser and went to speak with Dolph, the driver of the bus that Davis would be boarding. Constable Parrish's evidence is that he advised Dolph that Davis had gotten off an earlier bus because he was suffering from mild paranoia but that he was not a threat to anyone and that he displayed no signs of violence or danger. Constable Parrish stated that he advised Dolph that Davis had been concerned about people staring at him but that he was "not a problem."

[17] There is a dispute between the evidence of Constable Parrish and Dolph about whether Dolph had any conversation with Davis while they were all at the Tempo. Constable Parrish testified that Dolph did have a conversation with Davis and that he decided to take Davis on his bus as a result of that conversation. Dolph testified that he had no such conversation with Davis because he did not feel it was necessary to do so. In my view nothing turns on this differing evidence.

[18] Dolph and Constable Parrish then got on the Greyhound bus in question and asked Pam Meady, who was seated in the front left hand passenger side seat, to change seats so that Davis could sit at the front left hand side of the bus. There is some dispute between the evidence of Dolph and Constable Parrish about who wanted to place Davis in Pam Meady's seat. Again, in my view, nothing turns on this evidence. Ms. Meady was advised by Dolph that they really needed her seat because a passenger was getting on the bus who had "issues".

[19] After relocating Pam Meady to her new seat Constable Parrish exited the bus in question and went to speak to Davis. After speaking to him, Parrish returned to the bus. Some of the Plaintiff passengers on the bus testified that Constable Parrish spoke to passengers within hearing range of him. He advised them that no one should look at him or attempt to have any contact with him. Several passengers also testified that they heard Parrish say that Davis was paranoid. Parrish testified that he was speaking only to the young man seated behind Davis. For the purposes of my finding in this trial, it is not necessary for me to determine who Constable

Parrish was specifically speaking to or what specifically was said. It is clear that Constable Parrish did speak to passengers on the bus advising them to avoid contact with Davis.

[20] After this, Dolph and Constable Parrish had another conversation in which Dolph asked Parrish to "keep an eye out for me" in response to which Parrish said that there would be O.P.P. cruisers up and down the highway and that he would be fine. Dolph also asked Parrish to contact the O.P.P. detachment in Upsala, Ontario, and advise that he had Davis on his bus. Constable Parrish then exited the bus and had a short conversation with Davis during which time he advised Davis to speak to Dolph if he had any problems. Parrish then escorted Davis onto the bus and sat him in the front seat previously occupied by Pam Meady.

[21] There was an issue raised by Mr. Hacio with respect to whether Constable Parrish "put" Davis on the bus, implying a forced requirement. Mr. Hacio refers to Exhibit 72 where Parrish says to the Communication Centre "…there is a gentleman who we put on the bus…". Constable Parrish testified that in his communication with Kenora, he had not used the word "put" in the sense of requiring or forcing Davis to board the bus. I note that further along in the same conversation Parrish states "… he just wanted to get on a different bus and avoid the problem so we got him a transfer." I am satisfied from the evidence that Constable Parrish did not use the word "put" in a sense that implies any manner of requirement or coercion. In any event, the evidence of Dolph is clear that it was ultimately his decision to determine who was permitted to be a passenger on the bus.

[22] Constable Singleton had a conversation with Davis in the parking lot while all this was going on in the bus. Davis showed Singleton his medication. Singleton did not make any inquiries when shown this medication. Singleton testified that by the time Davis got on the bus, he appeared to be calm and happy to be going home.

[23] Prior to leaving Ignace, Dolph had a conversation with George Zuber, who would be driving an overflow Greyhound bus that would be following the Dolph bus. Dolph asked Zuber to "keep an eye" on him because he was transporting a passenger who seemed to be troubled.

[24] Constables Parrish and Singleton left the Greyhound bus depot immediately after Davis boarded the bus. The bus then left the Greyhound depot about 30 minutes behind schedule. The roads were partially snow covered and it was very cold out. It was not snowing and the roads had been recently plowed.

Departure from Ignace

[25] Albert Dolph's evidence is that during his conversation with Constable Parrish, Parrish told him that he thought Davis was suffering from mild paranoia. His testimony is that Davis presented as calm, clean cut, polite and responsive to questions. He was not intoxicated, obnoxious, or loud nor was he acting up. He stated that he never felt pressure from the police to put Davis on the bus, and he had no reason to prevent him from boarding the bus. It was Dolph's decision to let Davis board, regardless of what the police would have said or did say. Davis was placed in the front seat, not as a question of concern for other passengers but for his own comfort.

[26] Several witnesses testified that Davis looked "troubled" or disturbed and odd when he got on the bus. Pam Meady boarded the bus in Winnipeg and was on her way home for Christmas. From Winnipeg to Ignace, she was seated in the front row passenger side aisle seat so that she could stretch her leg. She testified that at the Ignace bus stop, she got off the bus for 7 to 10 minutes. When she came back to the bus she saw the driver speaking to a police officer. The driver and the policeman asked her to change seats because there was "a guy having some trouble." She stated that the policeman said that the guy was "not dangerous", but that eye contact with him should be avoided. She agreed to change seats and from that point on she was seated in seat number 11, three rows back from the front of the bus.

[27] Ms. Meady and Brian Adams testified that he plopped himself into the seat and sat slouched in the seat until the bus left Ignace. Ms. Meady and Anthony and Tanya Clowes testified that they were very surprised when the O.P.P. got off the bus because they had the impression that the O.P.P. were going to be travelling on the bus with Davis. While I acknowledge that they had these impressions, the evidence of Davis' physical demeanour presented by the witnesses at Ignace prior to boarding the bus suggests that the passengers' impressions may have been affected by Davis' behavior during and after the incident. I note also the evidence of Michael Finn who testified that when Davis boarded the bus he looked "meek and mild."

[28] Dolph's evidence is that they left Ignace between 6:15 p.m. and 6:20 p.m. EST. Upsala was 63 miles or one hour and five minutes from Ignace. His evidence is that when he was around Graham Road, Davis came forward, not agitated, but expressing concerns in a normal voice. Dolph assured him that all would be okay and that they would be at Upsala in 10 minutes. Davis then went back to his seat. Davis seemed fidgety but made no threatening gestures and did not argue. In his testimony, Dolph acknowledged that he had previously asked Constable Parrish to call ahead to the O.P.P. in Upsala. He did so only because he was aware that Davis had wanted off the previous bus. If Davis subsequently determined that he wanted to get off Dolph's bus, Upsala would be the next opportunity to do so, and there would be no place open in Upsala for Davis to go.

[29] Dolph testified that Greyhound did not train him to diagnose mental disorders, but did provide him with some training regarding how to identify signs of mental illness. When looking at a particular passenger's situation, Dolph stated that he used his training, his own experience and common sense. His evidence is that Davis never seemed dangerous to him.

[30] Dolph estimates that when the bus was about 7 minutes from Upsala, Davis came back to the front of the bus and stood in the stairwell. Dolph did not consider him to be a threat in the stairwell and saw no reason to stop the bus. On previous occasions he had allowed passengers to stand there for a short time for their own comfort. There was no evidence that he had had problems with doing so on those occasions. He chose to let Davis remain in the stairwell as he knew that Upsala was a short distance away and that he could stop at Upsala. At one point, Dolph reduced the speed of the bus. In response, Davis said to him "No, no, don't stop." Dolph testified that at this point on the bus route, there was no safe place to stop on the highway. The shoulders were not wide enough and someone could have run into the bus if he stopped on the highway.

[31] Dolph's testimony was that he requested Davis to return to his seat on several occasions. He spoke to him in a calm voice, attempting to keep Davis calm and assured. Suddenly and without warning Davis leapt from the stairwell and threw himself over the steering wheel, attempting to wrestle the wheel from him. Dolph stated that "once he grabbed the wheel, we were gone." The bus flipped onto its side and slid down the embankment on the opposite side of the highway.

[32] Shane Lywak testified that on the day in question he was travelling eastbound from Winnipeg and arrived in Ignace in the late afternoon. He was travelling at a speed of approximately 110kms/hr. His evidence is that when he left Ignace there were two trucks ahead of him. He passed the first one but stayed behind the second one, following it at 110 kms/hr. Less than an hour after leaving Ignace he lost sight of both the truck and the bus as he approached a left hand corner. He then saw the truck's brake lights, and saw the truck pull to the right. He stated that the entire truck was off the highway portion of the roadway when he passed by and saw the bus lying in the ditch. He was certain that he could not be wrong about that. He came into contact with the bus driver and his evidence is that the bus driver said "those damn O.P.P." Dolph's evidence is that he would not have said that, and does not recall saying "[t]hose damn O.P.P." to anyone at any time after the accident. Mr. Lywak said that the bus had been going at a "pretty good clip" and that the driver told him he was behind schedule. Lywak's evidence is that he would not disagree with the evidence of other witnesses, who have indicated that the bus left Ignace at approximately 5:40 p.m. and that the accident happened at approximately 8:00 p.m. Further, he could neither agree nor disagree with the evidence of a tow truck driver who came onto the scene and who stated that it was not safe for a vehicle to be on the shoulder of the highway.

[33] Dennis Simcock was driving a long distance truck for Arnold Bros. Transport. His evidence is that he followed the Greyhound bus from Ignace at a distance of approximately 1,000 to 2,000 feet and at a speed of 90 to 94 kms/hr. He indicated that the roads were wet but not slippery. The shoulders were snow covered and he could not see where the shoulder ended and the ditch started. He testified that he saw the accident occur in front of him, at which time he stopped his truck on the highway because it was not safe to stop on the shoulder. He disagrees with Lywak's evidence that he stopped his truck off the travelled portion.

[34] Jack Fraser was a passenger riding with Mr. Simcock in the Arnold Bros. Transport. He testified that after leaving Upsala they were driving the posted speed limit although it felt like around 100. He indicated that the truck was governed at 105 kms/hr. He testified that when they arrived at the scene of the accident he climbed over the guardrail at the side of the highway and that the snow there was knee high.

[35] Mr. Hacio urged me to find that Simcock's evidence as to his speed and where he stopped his truck on the highway should not be considered credible. Mr. Simcock did not recall stopping in Upsala after leaving the scene of the accident in order to leave a bag for a person who had been in his truck while he attended the accident. Mr. Fraser testified that following the accident he and Mr. Simcock placed an individual inside their truck in order to warm the person up and that the individual left a bag behind. Mr. Fraser testified that upon discovering the bag, they contacted the Ontario Provincial Police Communication Center to have the bag returned.

Mr. Fraser testified that after leaving the accident scene, Mr. Simcock stopped in Upsala and they left the bag at the O.P.P. station. Mr. Simcock has no recollection of this event taking place. I do not consider this difference to significantly affect Mr. Simcock's evidence as to the speed when following the bus. Nor do I find that this difference impacts upon Mr. Simcock's evidence concerning the location where he parked his truck.

[36] Rod Miron is the Operations Manager of Arnold Bros. Transportation. His testimony was that in 2000 he was an owner/operator. The Arnold Bros. trucks, at that time, were speed governed to 95 kms/hr in cruise and 102 kms/hr when accelerating.

[37] Vern Humphreys was a transport truck driver in 2000. His evidence is that he was driving at 90 kms. per hour following the bus. The roads were wet but not slippery. The shoulders were snow covered and he could not tell where the shoulder ended and the ditch started. He testified that it was not safe to stop on the shoulder of the highway. He stated that he had driven that highway many times before and that there were, in fact, a number of straight-aways to the west of the scene of the accident.

[38] Pam Meady states that at one time she noticed that Davis got up, stood beside the driver and placed his arm around the driver's seat. She could hear his voice going up and down but could not hear the words which were spoken. At one point in time, the bus slowed down and she heard Davis say "don't slow down." At that time she noted that Davis was noticeably agitated. She heard the driver keep telling him to take his seat and that they would be "in Upsala soon." She states that Davis suddenly jumped the driver and grabbed the wheel of the bus, at which point the bus went across the road. Her evidence is that the driver did not have time to react. In cross-examination, she acknowledged that she had given a statement following the incident **(**Exhibit 40**)**. In her statement, she said that the driver had been trying to keep things calm and that subsequent to the accident she told him he had done a really good job.

[39] Evelyn Shepherd testified that at one point in time Davis got out of his seat. He was standing by the windshield a few feet from the driver, and was saying that somebody was after him. She stated that Davis seemed agitated and was moving about and twitching She could not hear all of the conversation, but she did hear the driver tell Davis to sit down and Davis did so fairly shortly after being told. Her evidence is that after Davis returned to his seat he got up for a second time approximately 5-10 minutes later. She was nervous because of how Davis was acting. He stood at the same place and she again heard him say that people were after him with a baseball bat. She stated that Davis seemed scared, that he was speaking in a fairly loud voice and that his comments seemed to be directed at anyone and not specifically to the driver. She again heard the driver ask Davis to take his seat on more than one occasion. She stated that she saw Davis move into the stairwell and that he stood there for several minutes. She could not see the driver's reaction but overheard the driver trying to get him back to his seat. Her evidence is that at one point in time Davis came up and lunged at the driver. In her opinion, the driver did not have a chance to do anything. She then ducked behind her seat. She thinks she was knocked out. When she next has a recollection, she was lying on the bottom of the bus with the bus lying on its passenger's side. She exited the bus and noted that others were already off.

[40] Anthony Clowes was a passenger travelling to Thunder Bay to visit his wife's family. He was with his two daughters, ages four and seven at the time. He was seated in the middle of the bus. When the officers left the bus he saw Davis in the front seat of the passenger side seated by the window. He noted nothing special about him. He testified that approximately 10 minutes after leaving Ignacem, Davis went up to the side of the driver and was talking to him with his left arm across the back of the seat. He testified that when Davis originally went into the stairwell the bus decelerated a little as though the driver took his foot off the gas. Davis then returned to his seat. The bus then sped up again.

[41] Mr. Clowes says that some 10 to 15 minutes later the man got out of his seat again, stood next to the driver and then stepped down into the stairwell. Mr. Clowes testified that there was nothing unusual about the individual's mannerisms; it appeared as though he was just chatting to the driver. Mr. Clowes heard no specific conversation between Dolph and Davis. He states that at that time, the passenger was about two feet from the driver and that on two occasions he heard the passenger say "[d]on't stop the bus." Mr. Clowes states that after the man had been standing in the stairwell some 5 to 7 minutes he jumped and grabbed the wheel. The driver tried to hold the bus straight but was overpowered by the man. He then described the action of the bus in flipping over and that he remembers the back of his head hitting something. The bus stopped on its side after sliding through branches and Mr. Clowes testified the bus rolled two, maybe three times.

[42] In cross-examination he stated that the accident occurred 30 to 35 minutes after leaving Ignace but agreed that he was hazy on the time and distance. He does acknowledge that when the bus slowed down it could have reduced its speed by between 15 to 20 kms/hr. His best estimate of the speed of the bus was between 90 to 95 kms/hr.

[43] Brian Adams was a passenger on the bus, who was seated in the first row aisle seat, behind the driver on its arrival at Ignace. Mr. Adams states that approximately 45 minutes after leaving Ignace, Davis got out of his seat and leaned over to the side and started talking to the driver. He was telling the driver that someone at the back of the bus had a bat and was coming to get him. He kept repeating the same thing over and over. Davis was speaking in a regular voice and seemed bothered. Mr. Adams does not recall what the driver said to Davis. He states that Davis then got up and approached the driver, standing at the top of the stairwell between the driver and the door. Davis seemed to be getting more and more agitated. Mr. Adams' testimony is that the driver kept trying to calm him down and to reassure Davis, telling him that they were going to be in Upsala very soon and that he would be safe. At one time, the bus dramatically reduced speed at which time Davis pleaded with the driver not to stop. The bus then sped back up. On regaining speed, Davis appeared to calm down. Then all of a sudden, he lunged towards the driver, grabbed the wheel and the bus lurched left.

[44] Michael Finn was travelling from Prince Albert, Saskatchewan. He was sitting in the window seat in the second row from the front on the passenger side of the bus. His evidence is that when Davis got on the bus he looked "meek and mild." At first Davis seemed calm and relaxed and was sitting still while speaking on his cell phone. Mr. Finn said that approximately 10 to 20 minutes after the bus left he saw Davis at the front and assumed he was talking to the driver. He then got back into his seat. The speed of the bus at that time, he states, was between

100 to 110 kms/hr. He then observed Davis get up again. He saw Davis walk to the front of the bus and place one foot in the stairwell. The bus then decelerated and Davis became agitated saying something that Mr. Finn could not hear. He overheard the driver trying to calm Davis down and Davis told the driver not to slow the bus down. Mr. Finn stated that he glanced at the speedometer at that time and that the speed was between 80 to 90 kms/hr. He states that the driver was trying to soothe Davis and told him that the O.P.P. station was 10 minutes ahead. The bus then sped back up to 100 or maybe 110 kms/hr. Mr. Finn said that Davis then seemed to calm down and seemed to be more at ease. He did not overhear any other conversation at that time. He stated that the next thing he noticed was that Davis stood up, lunged at the driver and made contact with the steering wheel. Mr. Finn heard the air brakes go on and felt the bus move across the road, hit a snow bank, whip around and flip over on its side.

[45] With respect to Mr. Finn's evidence about seeing the speedometer, Mr. Dolph testified that the gauge to the right of the driver in the control panel is the air pressure gauge which runs normally in a range between 90 and 120. Brian Houghton is the Area Maintenance Manager for Greyhound. Following evidence given by Michael Finn, where Mr. Finn indicated that he could see the speedometer from where he was seated, Mr. Houghton performed an experiment. Mr. Houghton went to Greyhound's Winnipeg facility and sat in the same seat of a Greyhound bus as that which Mr. Finn was seated in during the day in question. Mr. Houghton testified that he would not be able to see the speedometer from seat number 8 where Mr. Finn was seated. In cross-examination, Mr. Finn agreed that he had provided a statement to Greyhound representatives after the accident. In that statement, he said that the bus had slowed down to 70 to 80 kms/hr and was doing 80 to 90 kms/hr at the time Davis grabbed the wheel. He further stated that he never felt as though he was in any danger from Davis and that he did not think Davis was doing anything other than "running off at the mouth".

[46] Jonathon Theriault was 13 years old at the time of the accident. He stated that he caught the bus in Kenora and was seated in an aisle seat in the second row on the passenger side. He stated that when the bus was stopped in Ignace the police came on board and told him that they were bringing an individual onto the bus. Speaking about the individual, the police said "don't look at him, don't bother him." He stated that at one time he saw Davis get up out of his seat and heard him tell the driver that someone in the back of the bus was out to get him. He overheard the driver tell Davis to go sit down and Davis did. His evidence is that he then heard Davis talking on his cell phone. He subsequently saw Davis get up from his seat again and enter the stairwell. He was talking to the driver, asking to be let off. He was also banging on the door. There was no other evidence of that. Theriault heard the driver tell Davis that they would be there soon and to sit down. Theriault then saw Davis go up the stairs quickly and grab the wheel of the bus.

[47] Thayne Gilliatt testified that he was in seat 20, five rows back from the front of the bus. His evidence is that when Davis got on the bus he seemed subdued. Mr. Gilliat noticed nothing out of the ordinary about Davis. For the first half hour after the bus departed from Ignace, he observed Davis just sitting there and not moving much. He stated that the ride was uneventful until the bus reached the vicinity of Graham Road, which was approximately 45 minutes after leaving Ignace. His estimate of the time was based on the fact that he knew how long it would

take him to travel that distance. At this point, Mr. Gilliat saw Davis get out of his seat and lean over the driver's seat with his arm behind the driver. He overheard no details of the discussion but said that the driver appeared to be trying to calm Davis down. Davis then backed away from the driver and moved down into the stairwell. Mr. Gilliatt testified that when the bus passed Graham Road, it was travelling at the usual speed of between 100 and 110 kms/hr. It was at this point that he saw Davis lunge at the driver out of the stairwell in a single motion as though he were running.

[48] Tanya Clowes stated that when Davis boarded the bus he did not look presentable and that he had skin piercings and spiked hair which was dyed blond. She remembers a police officer saying to the driver "he's not dangerous." She testified that at some point in time Davis got up from his seat. She heard Davis say "don't slow down" when he was standing in the door-well. She saw him standing in the door well for about 5 minutes and then saw him lunge at the driver.

Post-accident

[49] Dan Syncox was a tow truck operator who attended at the scene. He stated that when he arrived, the road had not yet been cleared and the shoulders of the highway had not been "winged". He was not able to determine where the shoulder of the highway ended. He acknowledged that there was a snow plow turning area 12 kms. west of the scene and that there was also a couple of straight-aways west of that scene. His testimony is that his tow truck was 84" wide and he parked with his dual rear wheels on the travel portion of the highway.

[50] Randy Boomhower was a certified primary care paramedic in December of 2000. He received a call at 7:45 pm on December 23 with respect to an accident. He arrived at the scene approximately 10 minutes after receiving the call and assumed the duties of sight co-ordinator. He parked his ambulance on the north shoulder with one wheel on the pavement and one on the shoulder of the road. He stated that at one time he noted a second bus on the highway, but he did not know if that bus was parked on the road or on the shoulder.

[51] He began attending to injured people. He came into contact with one individual in particular, later determined to be Shaun Davis, who was holding his abdomen and saying that he was the cause of the accident. He treated that individual and later saw him in the back of an ambulance. He testified that Davis kept saying he wished there was something he could do to make it right. Boomhower acknowledged in cross-examination that when he saw Davis in the ambulance Davis was aggressive and loud, but that his actions were not inappropriate for the circumstances.

[52] He testified that he had some contact with the bus driver who was subsequently identified as Dolph during the period when the passengers were taken to the Upsala Community Centre. Mr. Boomhower witnessed a number of passengers hailing the bus driver as a hero. He stated that Dolph told him that he had felt pressured into letting Davis on the bus, but that he had transported excited and agitated passengers on previous occasions without issue. In his conversation with Dolph, Dolph said that he was confused about not being able to recognize Davis' condition and that he was concerned about getting into trouble with his employer. In particular, he expressed a concern about letting "people like that" onto his bus.

[53] Christopher Beebe was a volunteer fireman with the Upsala Fire Department. He was called to the scene of the accident. His evidence is that when he arrived at the scene of the accident with his uncle, they parked their vehicle on the highway. He stated that the snow banks were approximately one foot high and that the bus was 10 to 15 feet below the highway.

[54] Graham Warburton was a member of the Atikokan Fire Department. He was westbound on Highway 17 when he came across the accident. He stated that he stopped on the shoulder of the road and had no difficulty in doing so. He identified himself to the police officers who were present and then began helping passengers out of the bus and up the embankment. He later went to the Ignace Community Centre to assist and at one time assisted some paramedics who were putting Davis into an ambulance. At that time, Davis seemed extremely agitated. He complained to Mr. Warburton of pain in his legs and back and started to apologize for causing the accident.

[55] Dr. Saad Amir Nassan was accepted by the Defendants as an expert in accident reconstruction. He was permitted to give an opinion on whether the bus could have pulled over on the side of the road. I did not permit him to give expert evidence with respect to the use of seatbelts. He prepared a report using information contained in the police report (Volume 4, Tab 72) which gave measurements of the roadway taken at the time of the accident. The police report also included a video of the straight-aways and intersections on the highway that were in the vicinity of the accident. In his opinion, based upon the information that he had, there was enough room for the bus driver to have pulled onto the snow covered area of the highway. He stated that he had considered the possibility of shoulder collapse but that he could not testify as to whether on the day of the accident, the shoulder could not have collapsed.

[56] In cross-examination, he acknowledged that he had never driven a large bus or transport truck. He acknowledged that his measurements did not include a determination as to whether the bus could fit on the shoulder with the passenger door opened. He stated that he only measured the shoulder space at the scene and that he had no evidence as to what the condition of the shoulder was west of the accident scene.

The Ontario Provincial Police Training Issue

[57] Constable Parrish is a First Class Constable, having been with the O.P.P. for 16 ½ years. He had been stationed in Ignace since 1997. On December 23, 2000, he was working general patrol duties. He testified that dealing with the mentally ill was covered during his initial Ontario Police College training and during the block training that he had attended prior to the accident. Interacting with the mentally ill was specifically dealt with in a number of training modules, namely, dealing with the mentally ill, tactical communications, use of force and transporting prisoners. Not surprisingly, neither Singleton nor Parrish could recall the details of the specific training they had received. They were both asked how that training was of any use to them when they could not remember the specifics of it. They both indicated that the constant reinforcement achieved through this training together with applying it in the field caused it to become second nature. A significant focus of the Plaintiffs' claim against the O.P.P. and Parrish and Singleton revolves around s. 17 of the *Mental Health Act*, R.S.O. 1990, c. M.7 ("***MHA***").

[58] Constable Parrish stated that, during the time he spent with him, he did not arrest Davis because there were no grounds to do so. Davis had not committed any criminal offence. Constable Parrish testified that he considered apprehending Davis under s. 17 of the *MHA*. On December 23, 2000, that section read:

> "17. Where a police officer has reasonable and probable grounds to believe that a person is acting or has acted in a disorderly manner and has reasonable cause to believe that the person,
>
> a) has threatened or attempted or is threatening or attempting to cause bodily harm to himself or herself;
>
> b) has behaved or is behaving violently towards another person or has caused or is causing another person to fear bodily harm from him or her; or
>
> c) has shown or is showing a lack of competence to care for himself or herself,
>
> and in addition the police officer is of the opinion that the person is apparently suffering from mental disorder of a nature or quality that likely will result in,
>
> d) serious bodily harm to the person;
>
> e) serious physical impairment of the person,
>
> f) and that it would be dangerous to proceed under section 16, the police officer may take the person in custody to an appropriate place for examination by a physician."

[59] The current wording of s. 17 took effect on December 1, 2000, some 23 days before this accident. The earlier wording of the preamble to this section required an officer to personally observe the person acting in a disorderly manner before the officer could act. It also required the physical impairment of the person under clause (e) to be "imminent" as well as serious. Constable Parrish could not remember if he had received training materials regarding the changes before the accident.

[60] Included in Exhibit 69 is the material used to train Constables Parrish and Singleton in dealing with emotionally disturbed individuals. The training focused on how the officers should protect the public. Exhibit 69, Tab 48, contains some of the O.P.P. training materials provided to Constable Parrish. These materials provide response strategies for dealing with emotionally disturbed persons. Under the section "Verbal Response Strategies: Emotionally Disturbed Persons" it states that every effort should be made to obtain all background information about the person in question.

[61] Tab 50 of Exhibit 69 is a police training guide called the "Advanced Patrol Training – Mental Illness – Facilitator Guide." This Guide is used by facilitators to train O.P.P. officers in dealing with mentally ill individuals. This Guide emphasizes the need to obtain as much

information about the individual in question as possible, which includes determining the type and quantity of drug they have consumed. These materials further instruct O.P.P. officers not to move too quickly and not to invade the personal space of, or touch, a person suffering from paranoia. Finally, the training manual teaches officers not to do anything to make the paranoia worse.

[62] Tab 46 of Exhibit 69 is a document entitled "Advanced Patrol Training – Mental Illness Study Guide". This Study Guide is the document given to O.P.P. officers when they receive their advanced patrol training for mental illness. This Study Guide provides instruction and advice which is similar to the teachings set out in the Advanced Patrol Training Mental Illness Facilitators Guide. The Study Guide specifically states that it is of critical importance to realize that a person who exhibits paranoia symptoms does not have control over their symptoms. This Study Guide also says the general rule is that when talking to someone who is delusional, one should never engage in an argument or dispute with the individual regarding the reality of his or her experience. The Study Guide goes on to say that for someone who is suffering from paranoia, the police officer might be included as one of the conspirators out to harm the individual. Extreme caution is recommended. The police officer is told to never invade the person's personal space, to avoid touching the individual and not to make any loud noises. The Study Guide goes on to say that the person should not be put in a situation where they believe that someone is going to hurt them. At page 10 of the Study Guide, it states that the police officer should isolate and contain a person who is suffering from paranoia.

[63] The "Provincial Police Academy Operational Field Briefing 00-43" (Tab 72 of Exhibit 69) makes some recommendations as to when it is appropriate to detain someone under s. 17 of the *MHA*. This Field Briefing, dated December 2000, also explains to a police officer that the test for detaining someone under s. 17 of the *MHA* is to change as of December 2000. The last page of this Field Briefing states that a police officer has other options if they decide not to apprehend under s. 17. A police officer may consider contacting family/friends, a doctor or anyone else in order to complete a thorough investigation.

[64] Exhibits 78 and 79 are videos which are used to train O.P.P. Officers on how to deal with mentally ill individuals. One is dated March 1998 and is entitled "Dealing with the Mentally Ill". This video generally tells officers that interaction with mentally ill persons requires special consideration and training and that they should obtain as much information as possible when dealing with a person who suffers from mental illness. Officers are also told to isolate and contain the situation, to choose the option safest for all concerned and to consider that the person may have medication related symptoms. This video tells officers that "disorderly" under the *MHA* means irrational (described as frightened or paranoid behaviour) but not necessarily unruly. To be apprehended under the *MHA*, a person does not have to be exhibiting violence. The person does not need to be acting with criminal conduct nor does he or she need to be acting out. The video also talks about the seriousness of someone who is hearing voices. It also says that the person must be unable or incompetent to care for themselves, that the threatened imminent bodily harm must be more than "trifling" and that the person must be suffering from a "mental illness" in order to be apprehended under the *MHA*.

[65] The second video that was produced is dated August 1999 and is entitled "Section 17 Mental Health Act". This video is designed as a companion to the 1998 video referred to above. It reviews s. 17 and talks about the upcoming changes to that statute. It emphasizes the changes that were made to the *MHA* (effective December 1, 2000) and in particular focuses on the new provisions of the *MHA*, which state that officers can rely on evidence from third parties to prove "disorderly" conduct and that the word "imminent" has been removed from s. 17.

[66] These materials also train officers as to when they should apprehend someone under s. 17 and includes case studies involving the actions of individuals who act similar to how Davis acted on the evening in question. They tell officers how to identify mental illness and outline the options that are available to them in dealing with such individuals. Pages 64 to 105 of Tab 26(b) of this material states that if an individual is apparently suffering from a mental illness, the officer should try to determine the type of drug or medication the person may be on. It also lists the types of behaviour officers should look for in trying to identify mental illness. The material tells officers not to leave such individuals unattended and to notify or meet with significant others in order to identify the person's mental illness. The material also encourages officers to isolate and contain the individual so as to protect other members of the public.

[67] Constable Parrish acknowledged that being aware of someone suffering from mental illness was critical and that if the illness was serious, he could contact a doctor. He further stated that he was aware that mental illness included delusions and paranoia.

[68] The evidence is that O.P.P. officers do not generally have access to a pharmacist or physician or any other individual who could assist them in determining the side effects of particular prescription or non-prescription medication. If an officer suspects that an individual is on a particular type of drug or medication, they have no way of determining the side effects of such medication. Further, O.P.P. officers have no written material or documentation available to them which can be used to determine the side effects of any particular medication. They do not have a list of telephone numbers of social agencies who would be available to assist mentally ill individuals who are in their custody or care during calls. Through their Communications Operator or detachment, officers do have phone numbers and contacts for social agencies and individuals who can assist mentally ill individuals. At trial, Constable Parrish said that he believed a doctor was available at the local health clinic during the time he was in contact with Davis. Constable Parrish also acknowledged that a pharmacist works out of the Mary Berglund Community Health Centre in Ignace, Ontario, and he acknowledged that he did not ask Davis about any history of mental illness prior to December 23, 2000.

[69] Constable Parrish spent approximately 45 minutes with Davis on December 23, 2000. He considered apprehending Davis under s. 17 of the *MHA* but decided not to because he did not think that he had the appropriate grounds to do so. He understood that pursuant to that section, "disorderly behavior" included a person hearing voices and having hallucinations. He also understood that someone acting irrationally might classify as someone who was acting "disorderly" in accordance with s. 17 of the *MHA*. He understood that pursuant to s. 17 of the *MHA*, the threat of bodily harm that someone is exhibiting must be more than "trifling". Constable Parrish also testified that he could try to have someone voluntarily admit themselves to hospital if he did not feel that he could use s. 17 of the *MHA* to apprehend the person.

[70] Constable Parrish testified that he understood the importance of separating people who were in conflict. He said he understood it was important to reduce the level of anxiety and stress for someone who has mental health issues. He had a vague recollection of receiving training about the concept of personal space before becoming a police constable. He said he was taught to eliminate the triggers that are escalating a particular situation. He did not recall the specifics of his training. He couldn't recall receiving any training about how to deal with delusional or paranoid individuals. He also did not specifically recall having learned to avoid physical contact with, or invade the personal space of, someone suffering from delusions or paranoid delusions. He agreed that it was important to gather as much information as possible when dealing with someone who is emotionally disturbed. He also understood that it was important to avoid causing excitement in a person suffering from a mental illness and to ensure that no one else caused that person to become more excited.

[71] Constable Parrish said he understood that someone exhibiting psychotic symptoms may be suffering those symptoms due to the side effects of medication. He also understood that it was important to contact third parties in order to acquire information about someone who an officer suspects is suffering from mental illness. He further understood that it was important to get details about the person's medication because such information may assist an officer in understanding the person's mental condition. He understood that someone suffering from paranoia should be treated with extreme caution. He understood that it was important to consult mental health professionals in dealing with someone suffering from a mental illness.

[72] Constable Parrish's evidence in re-examination was that in the situation he was in, the second part of the test in s. 17 of the *MHA* was more important than the first in these circumstances. He stated that the training which he received in mental health issues covered delusion, paranoia, depression, hallucination, and psychotic behaviour. He testified that while he felt that Davis was suffering from mild paranoia, Davis was calm, well spoken, never out of control, well mannered, not disorderly, and had clothes and money with him. He determined that Davis was not using alcohol or non-medically prescribed drugs. He stated that when he asked Davis if he wanted to go see a doctor, Davis' replied "no".

[73] He acknowledged that if he had spoken to Sylvia Melanson and learned that she observed Davis talking to himself, that information may have affected his decision as to his course of action. In cross-examination, he responded that he knew the medical clinic in Ignace was open and that there was a doctor there. However, since Davis said that he did not wish to see a doctor, Parrish saw no further reason to pursue this endeavor. He also acknowledged that he had not spoken to Karen Ray, the taxi driver. He admitted that before deciding what to do with Davis, it would have been nice to know what Davis had said to her.

[74] During the time that he was in Davis' company Constable Parrish testified that Davis had always been cooperative. When he saw him for the last time at approximately 5:30 p.m. at the Tempo, Davis was calm and well mannered. He was aware that Davis had reported to Constable Singleton that people were out to get him, but when the police arrived Davis said to them "It's okay. They're gone."

[75] Throughout his three encounters with Davis, Parrish saw no change in him. Parrish testified that he had no concerns about Davis getting on the bus. He had dealt with people suffering from mild paranoia on previous occasions and had never experienced a subsequent problem with any of them.

[76] Constable Parrish acknowledged that he was aware of the legal doctrine of investigative detention, which was taught to him in 2000. He determined that Davis was not involved in any criminal activity and therefore he felt that he had no basis to detain Davis for the purpose of investigative detention.

[77] Sergeant Singleton received his initial training at the Ontario Police College after a period of time with the Anishnabe Aski Police Services. He began his O.P.P. career as a probationary constable during which time he had a coach officer. He stated that following his initial training he received regular shift briefings, monthly updates and information packages. He had *MHA* training at Police College, which included various scenarios of role-playing. He also stated that he was given a general overview of various types of mental illnesses. In cross-examination he agreed that the O.P.P. training materials, specifically Exhibit 69, Volume 1, Tab 26, were the materials that he had received. As part of his training he was aware that when dealing with someone who was experiencing a type of mental illness, he should not invade the individual's personal space. He was also aware that he should gather as much information about the individual as possible and knew that a person did not have to be exhibiting violent behavior in order to be suffering from a mental illness.

[78] In this case he agreed that it would have been helpful to speak to Sylvia Melanson and Sylvie Maurice, but at the time he saw no need to do so because Davis was acting in a calm and normal fashion. Furthermore, when he spoke to Davis at the Tempo in response to Davis' complaint about people outside wanting to harm him, Davis indicated to Sergeant Singleton that everything was now okay. His evidence is that at the time, he saw no need to ask Davis about any medications. This was based on his observations of Davis during the time he was in contact with him. On December 23, 2000, Constable Parrish was the decision making officer.

[79] At the time of the accident, Constable Colin Dubuque had been with the O.P.P. for 11 ½ years. He attended at the McKellar Hospital after the accident. He subsequently arrested Davis upon Davis' release from the Lakehead Psychiatric Hospital. In cross-examination, he acknowledged that he did receive some training with respect to mental health issues, which included response strategies. In referencing page 42 of Exhibit 69, Tab 26(2), he indicated that there are various options that are available to an officer who is dealing with an emotionally disturbed person, one of which is to contact the person's family and friends in order to acquire further information. He stated that the options to be used depended entirely on the situation.

[80] Sergeant Wayne Minnear was off duty when he was originally called in on December 23 at 8:45 pm. He was a senior officer and attended at the accident scene. His evidence is that the distance from Ignace to Upsala is 106 kms. On December 23, 2000, the road conditions to the west of the accident scene were wet but not slippery. The weather was cold and bitter. He further testified that between Graham Road and the accident scene there were 2 locations where a vehicle could be stopped safely, however, the task was made more difficult in the winter because

of snow plowing. He indicated that there were several long flat stretches of the highway approximately 10 kms west of the accident scene toward Ignace. His testimony is that the snow banks on the highway were knee deep or higher and that the weather was cold and bitter. On his arrival at the scene, he observed the second bus parked on the travelled part of the roadway.

[81] Sergeant John McMaster had been a member of the O.P.P. for 12 years at the time of the accident. At the time of this trial he was a Scene Of Crime Officer. He testified that at 8:05 p.m. EST on December 23 he was dispatched from Thunder Bay to Upsala where he arrived at 9:25 p.m. He took photos of the scene. His evidence is that he had contact with Davis at the community center and at that time Davis did not seem normal. He formed the opinion that Davis was paranoid although he could not say whether it was mild or severe. He transported Davis to McKellar Hospital in Thunder Bay.

The Communications Issue

[82] One of the allegations of negligence against the Defendant police officers is that they did not consult with their superiors, supervisors, and/or appropriate professionals concerning the handling of Davis. Pat Weare was a civilian radio operator working with the O.P.P. at the time of the accident. She described that at the time of the accident there were two different communication systems in effect for the O.P.P. in the region where the accident occurred. She testified that she originally took a telephone call from an officer in Ignace asking for a CPIC check. Her evidence is that if she received a call from an officer and the officer wanted other background information, he or she would have to obtain that information from the Communications Center. She stated that Constable Parrish did not ask dispatch to call Davis' family or friends. Nor did he ask for a pharmacist, a health care facility, or the Mary Berglund Clinic before deciding to let Davis board the second bus.

[83] Ted Vincent is the Director of Technology & Client Services with the O.P.P. He testified with respect to the operation of the CPIC system. That system, he noted, is a records repository. Individual police departments are responsible for entering information on the system. A "query" would indicate if someone had been charged, was on probation, or whether there was an outstanding warrant in effect. He further stated that the system could indicate on the criminal name index whether someone had been found not guilty by reason of insanity or was unfit to stand trial. His evidence is that in 2000, there was no mobile access available via CPIC. In order to obtain information from CPIC, an officer had to contact the dispatcher who would then have to obtain the information and relay it back to the inquiring officer. He reviewed the documents in Exhibit 72, Tab 3, which deal with previous involvements of Davis prior to the incident and concluded that these documents would not have been on CPIC in 2000. He also testified that the CPIC system does not include any information concerning whether an individual is suffering from mental health problems.

[84] Staff Sergeant Grant Robins, who retired from the O.P.P. in 2005, testified that a bottle of pills was seized when Mr. Davis was arrested on December 27, 2000. The prescription label suggested that the bottle had contained 100-10 mg Dexedrine tablets on December 20, 2000 and that this was a prescription for Mr. Davis. The bottle contained 62 pills when it was seized at the time Davis was released from the hospital, 72 hours after the accident. He offered no evidence

as to what happened to those pills during that time period. There is no evidence before me that the pills were actually Dexedrine. He further testified that on December 30, 2000, he was able to get information with respect to Davis' history of alcohol and drugs. In the course of the trial, Mr. Hacio indicated that the only purpose in presenting evidence respecting the availability of information on the side effects of Dexedrine and Davis' history of alcohol and drugs was to show that such information was available.

[85] Mr. Hacio submits that Mr. Davis had overdosed on the pills, leading to the events of the bus crash. There are a number of problems with this position. There was never any evidence adduced before me that the pills were as stated on the bottle; there was no evidence as to the purpose of Dexedrine, its effect, or the effect in the event of an overdose; there is evidence that the bottle originally contained 100 pills on December 20, but there is no evidence as to what happened to the pills. Specifically, there is no evidence as to whether Davis had consumed any or all of the 38 missing pills.

The Greyhound Training Issue

[86] William Groves had been a driver with Greyhound since May of 1989. He described the training he had received, which included both classroom and hands on training. That training included discussions of dealing with unruly passengers. He also stated that Greyhound holds ongoing presentations with regard to safety issues which are mandatory for drivers to attend.

[87] His evidence is that the Greyhound training did not specifically include training in psychological issues. He knew he had to be aware of someone who was agitated, who spoke rapidly, or who was incoherent. He confirmed that there was nothing in Davis' demeanour which would have caused him to foresee any problems. His evidence is that ejecting a passenger from the bus was a last resort, a "line in the sand". In the event that such action became necessary, it could only be done if there was a safe place to do so, and the conditions were also safe. When asked about the meaning of "defensive driving", he responded that the term is used to alert drivers to the importance of making informed decisions about what to anticipate while driving.

[88] Albert Dolph's evidence is that he started working for Greyhound in 1972. Previous to that, he drove transport trucks. At the time of this trial he was involved in teaching fire truck drivers. He described his initial training with Greyhound as being one day in a classroom and then four to five trips with another driver. He did not receive any specific training on how to recognize the symptoms of mental illness.

[89] Joan Crawford is the Executive Director of the Motor Carrier Passenger Council. She participated in setting the standards that are followed by members of that Council. Her evidence is that there is nothing in the Motor Carrier Passenger Council's standards dealing with mental illness or recognition of a person on drugs. She noted that paragraph 995 of Exhibit 80 does indicate that drivers must be proactive and recognize potential hazards.

[90] The Motor Carrier Passenger Council of Canada has issued a document entitled "National Occupational Standards Professional Bus Operator" (Exhibit 69, Tab 69). A number of specific standards were relied on by counsel. The standards set out how a driver should assess weather

and road conditions on a regular basis. They also tell drivers how to deal with difficult passengers in situations which threaten the comfort or safety of other passengers. According to the standards, such situations must be dealt with swiftly, decisively and with tack and diplomacy. Drivers are also to ensure that they advise passengers of the rules and regulations on a bus and are to ensure that those rules and regulations are enforced. They are to be trained and must be aware of how to deal with emergency situations. They are to know how to deal with difficult passengers and to do their best to defuse a dangerous situation.

[91] Mr. David Leach is the Chief Executive Officer and President of Greyhound Lines in Canada and the United States. His evidence described the selection process for drivers. He was also questioned about several Greyhound documents that were relied on by counsel. Greyhound has, for some time, had an Operator's Rule Book which drivers keep in their possession when driving a Greyhound bus. The version that was in existence in 2000 is at Exhibit 69, Tab 20. The relevant portions are:

(a) Page 3, The Preface, says that drivers must ensure the safety of passengers. It says drivers must be aware of and comply with all of Greyhounds rules, bulletins and directives. It also says that any violation of any laws, rule or bulletin may result in discipline.

(b) Page 6, Section G-1 - says that good judgment should be applied if the rules, directives or bulletins don't cover a particular situation.

(c) Page 9, Section G-12 Unnecessary Conversation or Distraction – states that a bus driver shall not engage in unnecessary conversation with passengers while the bus is in motion.

(d) Page 11, Section G-23 Schedule Performance – states that drivers are to make their best effort to ensure that time schedules are maintained. Delay at terminals and stops or running ahead of scheduled time is not permitted.

(e) Page 12, Section G-30 Passengers, Handling of Disorderly – states that a bus driver is to refuse transportation to persons who are intoxicated or who are conducting themselves in a manner which may cause discomfort to other passengers. The section also states that drivers should arrange to have a police officer meet the bus and have a passenger removed if that passenger appears to be intoxicated, on drugs or disorderly. Further, the section states that a bus driver should not eject a passenger from a bus at an unsafe place or in an unsafe manner. If a passenger is to be ejected from a bus, the bus driver must ensure that he or she has sound facts in making such a decision and that he or she has acted in good faith and in a proper manner. It should only be done where it is in the best interests of the company to do so and/or it is in the best interests of the travelling public (passengers).

(f) Page 13, Section G-32 Passengers, Seating – states that bus drivers are not authorized to allow passengers to select seats, except where they have reserved seating. An operator is specifically not allowed to reserve or assign seats.

[92] Greyhound issues Transportation Bulletins on various issues to assist bus drivers in operating their buses in a safe and competent fashion. The Transportation Bulletins that are relevant to this proceeding are as follows (see Exhibit 69, Tab 14):

(a) No. 52 issued March 7, 1991, entitled "Passengers Standing on Coaches" – tells bus drivers that passengers must not be allowed to stand on a bus for an extended period of time and must not be allowed to stand in front of the white line at the front of the bus because it is against the law to allow them to do so.

(b) No. 74 issue January 14, 1992, entitled "No Standing Ahead of White Line" – tells bus drivers that passengers must not be allowed to cross the white line at the front of the bus while the bus is in motion and that it is against the law to allow them to do so.

(c) October 1995, entitled "Hazardous & Unusual Road Conditions due to Seasonal Weather" – tells bus drivers that they must operate their bus according to weather and road conditions.

(d) December 1999, entitled "Winter Driving" – tells bus drivers that they must operate their bus according to weather and road conditions.

(e) Exhibit 69, Tab 17, is Bulletin #95 - which says that drivers can refuse passage to any person.

[93] Greyhound has a Safety Department which prepared and released a document entitled "Documentation & Training Forms Manual". The relevant portions of that Manual are at Exhibit 69, Tab 56. The relevant portions of the Manual can be summarized as follows:

(a) Applicants must complete an Application Form with Greyhound Canada in order to qualify to become drivers. Once they are qualified, they receive driver training in accordance with s. 3 of the Manual. They also receive some classroom training.

(b) Drivers are also trained on winter driving. This training is described in s. 4 of the Manual. No portion of the winter training section of the Manual describes when it is appropriate to pull a motor coach off the highway onto a ploughed shoulder.

(c) The Manual (page 66) again emphasizes defensive driving.

[94] Exhibit 69, Tab 57 is Greyhound's Driver's Manual. The relevant portions (Sections 2.3, 2.4, 2.13 and pages 34 and 36) of this Manual state that it is the driver's responsibility to ensure that they identify problem situations as quickly as possible and react to them in a reasonable fashion. The Manual encourages defensive action so as to protect passengers. It instructs drivers

to slow down in adverse weather situations and to reduce speed in poor winter conditions. Greyhound stresses in their materials that drivers must always assume the worst case scenario so as to protect their passengers from harm. The same driver requirements are set out in Greyhound's Rules, which can be found at Exhibit 69, Tab 20 pages 17 to 22 and in the Greyhound document which can be found at Tab 58, pages 105 and 106.

[95] Greyhound also offers an Accessibility Coach Training Program (Exhibit 69, Tab 59) to its drivers. There is a specific section entitled "Assisting Passengers with Psychiatric and Mental Health Disorders". This section is found at pages 68 – 71. The section is used to train drivers on how to identify psychiatric disorders and mental health problems. Drivers are instructed to be patient and calm in dealing with such individuals and to take the individual's concerns seriously. They are directed not to restrain such individuals and are told to try and keep them calm.

[96] Motor coaches in the Province of Ontario are governed by the *Public Vehicles Act*, R.S.O. 1990, c. P.54 2000. Section 22 reads in part:

> "(d) 22.(1) No driver or operator shall allow passengers to ride on the fenders or any other part of a public vehicle other than the seats thereof, except that a vehicle may carry as standing passengers in the aisles thereof not more than one-third the number of persons for which seats are provided.
>
> (e) (2) No driver or operator of a public vehicle shall permit or allow on the front seat of the vehicle more passengers than the seat is designed to carry, exclusive of the driver, or permit or allow any passengers to occupy any other portion of the vehicle forward of the back of the driver's seat …"

[97] Mr. Leach testified that Greyhound followed the standards set out in the National Occupation Standards at Volume 2, Tab 13 of Exhibit 80. He acknowledged that paragraph 1193 of the standards referenced mental health issues. He agreed that the paragraph described some of the means used in identifying people with such issues. This included guidance in dealing with someone who talks to themselves, or who has indicated that people are trying to harm him or her.

[98] He testified that there are always circumstances which are not covered by policies and rules and in those circumstances drivers would be expected to use "good judgment" as a prevailing guideline. That would include an example of someone standing ahead of the white line on a passenger bus. He stated that there is no specific policy with respect to parking the bus on the shoulder of a highway because there are a number of factors which must be considered.

[99] In cross-examination Mr. Leach was not aware of what training Dolph had had when he was hired in 1972. Mr. Leach also indicated that in the year 2000 Greyhound bus drivers had no cell phones and there were no communication devices on the buses.

Position of the Plaintiffs against the O.P.P. and Constables Parrish and Singleton

[100] The Plaintiffs submit that the Defendants O.P.P. and Constables Parrish and Singleton owed them a duty of care. In written submissions, both sets of Defendants acknowledged a duty of care on their respective parties.

[101] The Plaintiffs rely on the decision of *K.L.B. v. British Columbia*, 2003 SCC 51, [2003] 2 S.C.R. 403, in submitting that a police officer breaches his or her standard of care where he or she has failed to protect a private individual in the following circumstances: the risk of harm is reasonable, serious, and foreseeable; the potential victim is an identified individual; and the officer is in a legal relationship of control with the perpetrator; the police possess significant legal powers granted for the purpose of reducing those risks, and a duty of care that requires their use.

[102] The Plaintiffs further submit that the onus is on the Defendants to prove that they did not have a reasonable opportunity to prevent the bus crash or the Plaintiffs' injuries. The Plaintiffs suggest that the Defendants' onus is a heavy one, and that police officers are held to a very high standard of care. The position is that the officers ought to have foreseen a potential problem with Davis if he were to be placed on the bus.

[103] With respect to causation, the Plaintiffs submit that the "but for" test is the proper test to apply in the instant case.

[104] The Plaintiffs rely upon a number of specific ways in which the Defendants O.P.P. and Constables Parrish and Singleton were negligent.

Failure to Follow Training

[105] The Plaintiffs submit that Constables Parrish and Singleton breached the standard of care to which a police officer is held in two ways: first, by failing to follow their training regarding individuals suffering from paranoia, and second, by putting Davis in an enclosed space with over forty individuals. The Plaintiffs posit that the Constables were trained not to invade the space of someone who is suffering from paranoia and to isolate and contain that individual. They were also trained to prevent anyone else from invading the space of someone suffering from paranoia and to avoid personal contact with a person suffering from paranoia. They were trained with the knowledge that someone with paranoia can be a danger to themselves and to others. Finally, they were trained to make every possible effort to obtain background information about a person who appears to be suffering from a mental illness. The argument is that the officers should have identified Davis as dangerous and should have prevented him from boarding the bus.

Failure to Apprehend under S. 17 MHA

[106] The Plaintiffs submit that the Constables failed to apprehend Davis pursuant to s. 17 of the *MHA* when there was more than sufficient evidence to indicate that he passed the appropriate mental health test for apprehension. They rely on the "Tactical Communications" training that the Constables had received. These materials train officers as to when they should apprehend

someone under s. 17 of the *MHA*. The Plaintiffs submit that the materials also include case studies involving the actions of individuals who act in a similar manner to Davis on the evening in question. They also make reference to the training the Constables received at Police College concerning apprehension under s. 17 of the *MHA*. Finally, the Plaintiffs refer to a training video entitled "Section 17 Mental Health Act", which reviews s. 17 of the *MHA* and talks about the upcoming changes to the statute. The video emphasizes that as of December 1, 2000, officers could rely on evidence from third parties to prove "disorderly conduct" and that the word "imminent" had been removed from the section.

[107] The Plaintiffs submit that Davis was acting disorderly and irrational and it was obvious that, if not removed from the environment causing his symptoms, he was or would soon become a danger to himself or others. They rely on the evidence of Constable McMaster, who attended the scene immediately after the bus crash, and, after interviewing Davis and hearing him speak of the same concerns he had voiced to Constables Parrish and Singleton, determined that Davis should be detained under s. 17 of the *MHA*.

[108] The Plaintiffs also rely on the evidence of Vernon Humphries, Randy Boomhower, Chris Beebe, and Graham Warburton and submit that the evidence provided by these individuals confirm that Davis was clearly delusional, psychotic, and severely paranoid.

Failure to Obtain Background Information

[109] The Plaintiffs submit that the Constables failed to follow their training on how to deal with mentally ill individuals. They were told to get as much background information about the individual in question as they could and try to determine what kind of medication the person in question was on. According to the Plaintiffs, the Constables made no such enquiries. The Plaintiffs submit that in order to obtain such information, the Constables could have called Davis' family, friends, or health practitioners. Further, they could have obtained information about Davis from the Communication Centre. Sergeant Robbins made these types of enquiries and discovered the following: that Davis had been prescribed Dexedrine, that he had been in trouble with the RCMP; that an RCMP detachment could be contacted for further information about Davis; that he had drug, alcohol, and mental problems; and finally, that he had been physically abusive to himself in the past.

[110] Davis advised the Constables that he was taking medication but neither Constable made any enquiries about the type of medication he was taking or the quantity of medication he had consumed. Further, the Constables made no effort to determine if there were any side effects relating to the over-consumption of Dexedrine. According to the Plaintiffs, had the Constables made such enquiries, they would have discovered that Davis had over-consumed his medication and was experiencing a drug induced psychosis.

Failure to Detain

[111] Relying on *R. v. Simpson*, [1993] O.J. 308 (C.A.) and *R. v. Mann*, 2004 SCC 52, [2004] 3 S.C.R. 59, the Plaintiffs submit that the Defendant police officers breached the duty of care in that they did not detain Davis using the doctrine of investigative detention. The Plaintiffs submit

that the Constables had the opportunity to detain Davis for examination but failed to do so. It is the Plaintiffs' position that the Constables had sufficient and reasonable grounds to detain Davis given his mental state and conduct, as well as his verbal statements prior to the crash. According to the Plaintiffs, the Constables had a number of options available to them for the purposes of detaining Davis. They could have kept him at a local detachment until his medication wore off. They could have had him assessed by a physician.

Failure to provide Information to Dolph

[112] In the Plaintiffs' submissions, the Constables failed to provide adequate and complete information to Dolph so that he could make an informed decision as to whether Davis should be allowed on the bus. The Plaintiffs submit that the Constables used their position of authority to pressure Dolph into putting Davis on the bus.

Failure of O.P.P. to Provide Information

[113] The Plaintiffs submit that the O.P.P. did not have any information, phone numbers, or access to third parties available to Constables Parrish and Singleton. The Plaintiffs submit that this information could have been used to assist the Constables in determining the effects of certain medications and therefore should have been available. According to the Plaintiffs, the O.P.P. training materials require the local Detachment Commander to make these types of contacts available to their subordinates.

Failure to Provide Training

[114] The Plaintiffs submit that the O.P.P. failed to provide sufficient training on how to deal with individuals suffering from mental health issues. Specifically, the Plaintiffs submit that the constables lacked training relating to how paranoid people are likely to act and to how dangerous they might be to themselves or to others. The O.P.P. also failed to ensure Constables Parrish and Singleton were adequately trained on the provisions of the new *MHA* before December 1, 2000.

Position of the Defendants O.P.P. and Constables Parrish and Singleton

[115] The Defendants O.P.P. and Constables Parrish and Singleton concede that they owed the Plaintiffs a duty of care. However, the Defendants submit that the Plaintiffs have failed to demonstrate that the O.P.P. or Constables Parrish and Singleton breached their respective standards of care.

[116] The Defendants submit that the standard of care for a police officer is that of the reasonable officer in like circumstances: *Hill v. Hamilton-Wentworth Regional Police Services Board*, 2007 SCC 41, [2007] 3 S.C.R. 129, at para. 70, where the Court held that "[p]olice meet a standard of reasonableness by... living up to accepted standards of professional conduct to the extent that it is reasonable to expect in given circumstances." These Defendants submit that when determining whether the standard of care is met, I should consider whether the officer acted reasonably and within the statutory powers imposed upon him. I should also take the policy of a police force into account, and if necessary, I should hear evidence from other police officers.

Finally, these Defendants submit that when considering whether an officer breached the standard of care, I must bear in mind that officers are required to exercise judgment quickly and in highly stressful circumstances.

[117] It is the Defendants' position that a police officer making an error in judgment while acting with ordinary care is not negligence: *Hill*, at para. 73. An error in judgment only amounts to negligence when it is one that would not have been made by a reasonably competent professional who has the same standard and type of skill as the officer in question and who acted with ordinary care: see *Hill*, at para. 70; *Whitehouse v. Jordan*, [1981] 1 W.L.R. 246, at 263. The Defendants argue that even if I determine that Constables Parrish and Singleton did not handle the situation properly, their conduct did not amount to negligence but to an error in judgment.

[118] The Defendants submit that the Plaintiffs can only demonstrate a breach of the standard of care if they can prove, on a balance of probabilities, that Constables Parrish and Singleton knew or ought reasonably to have known that Davis posed a danger to the passengers on the bus and failed to detain him when under an obligation to do so. It is the Defendants' position that the officers' actions were entirely appropriate in the circumstances. The Defendants contend that they did not breach their standard of care and are not at fault for the bus accident or for the Plaintiffs' injuries. They submit that the Plaintiffs have failed to adduce evidence demonstrating that the actions of the O.P.P., Constable Parrish or Constable Singleton fell below the standard of care that was expected of the police in the circumstances.

[119] The Defendants submit that there were no legal means by which the O.P.P. could have prevented Davis from boarding the bus. Constables Parrish and Singleton did not have just cause to detain or apprehend Davis. Constable Parrish did not believe that Davis posed any danger to the passengers on the bus, nor could he have reasonably anticipated Davis' actions.

[120] With respect to the issue of causation, the Defendants agree with the Plaintiffs that the proper test is the "but for" test.

[121] In defending their position, the Defendants respond to a number of specific arguments on liability as follows.

Section 17 of the MHA

[122] The Defendants submit that the most pivotal issue concerning liability relates to Constable Parrish's application of s. 17 of the *MHA*. It is the Defendants' position that Constable Parrish interpreted his powers under s. 17 correctly, and his decision not to detain Davis was reasonable in the circumstances. Under Part One of the test, neither Constable Parrish nor Constable Singleton concluded that Davis was acting in a disorderly manner.

[123] Under Part Two of the test, the Defendants submit that even if Constables Parrish and Singleton had sought information from the witnesses who observed Davis that day, they would not have been provided with any information indicating that Davis had threatened to cause bodily harm to himself, had behaved violently towards another person or caused another person to fear bodily harm from him, or had shown a lack of competence to care for himself.

[124] Under Part Three of the test, the Defendants submit that at the time he boarded the bus, there is no evidence that Davis suffered from a mental disorder of a nature that rendered him capable of doing serious bodily harm to himself or another person. The Defendants concede that if the court determines that the first three parts of the tests are met, then the fourth part is also satisfied.

[125] The Defendants note that in order to apprehend a person under s. 17 of the *MHA*, all four parts of the test must be satisfied. If any one part of the test cannot be met, the enquiry must stop and the officer does not have grounds to apprehend under this section. It is the Defendants' position that Constables Parrish and Singleton did not have grounds to apprehend Davis under s. 17.

Placing Davis in an Enclosed Space and invading his Personal Space

[126] The Defendants submit that there is no indication Constable Parrish invaded Davis' personal space. Davis appeared to be calm in Constable Parrish's presence. He had been in enclosed spaces when he was in the police car as it drove him to the Tempo, when he was driven in the taxi, and when he was in the police cruiser during the Constables' final visit to the Tempo at 5:28 p.m. Further, Constable Parrish and Dolph actually increased Davis' personal space on the bus by giving him a seat at the front of the bus to himself and by asking the individuals who were seated around Davis not to interact with him.

[127] Finally, the Defendants submit that there is no causal link between Davis' personal space being invaded and his behaviour on the bus. The Defendants submit that I should not speculate as to why Davis did what he did.

Failure to Speak to Lay Witnesses

[128] The Defendants submit that none of the information provided by the lay witnesses would have changed Constable Parrish's ability to apprehend Davis under s. 17 of the *MHA*. The Defendants ask me to put the situation into context: Constable Parrish was called on the pretext that Davis was the victim of a crime; Davis was mild mannered, compliant, polite, and rational. Based on his experience, Constable Parrish had no reason to believe that a mildly paranoid individual posed any danger to anyone. The Defendants submit that when these factors are taken into consideration, Constable Parrish's failure to speak with lay witnesses was reasonable in the circumstances.

Failure to Obtain Additional Information about Davis' Medication

[129] First, the Defendants submit that there is no admissible evidence indicating that Dexedrine played any role in Davis' attack on Dolph. Any failure of Constable Parrish to obtain further information about the medication Davis was taking cannot be causally linked to the accident. Second, the Defendants submit that it was not unreasonable for Constable Parrish to cease from asking additional questions regarding Davis' medications. Constable Parrish knew that Davis' ADD was a chronic condition, and therefore it was only natural that Davis was on a drug to regulate his symptoms. Finally, the Defendants submit that even if Constable Parrish had

attempted to obtain further information about the drug Davis was taking, the Plaintiffs would still need to establish certain facts in order to advance their case: first, that Davis would have answered Constable Parrish's questions about the drug he was taking; second, that Davis would have been forthcoming about taking more medication than prescribed; third, that a police officer should be aware of the potential problems regarding an overdose of Dexedrine; and fourth, that in the circumstances, a police officer should have gone further and sought information about Dexedrine from a pharmacist or doctor. It is the Defendant's position that because the Plaintiffs cannot establish any of these facts, the Constables' failure to obtain additional information on the drugs Davis was taking is not indicative of a breach of the standard of care.

Failure to Contact the RCMP for further Information

[130] These Defendants submit that information from the RCMP was not available on Saturday. Staff Sergeant Robbins testified that there were only two special officers in the O.P.P. who could contact the RCMP for this information and that neither was available on the day in question. The Defendants submit that even if the information was available, it would have taken time to acquire and analyze the information received. Finally, the Defendants submit that even if a request to the RCMP was made, there is no guarantee that a response would have been forthcoming.

Investigative Detention

[131] It is the Defendant's position that the doctrine of investigative detention was not available in the circumstances. The Defendants submit that investigative detention applies to situations where police need to detain someone whom they suspect of being involved in a crime or whom they suspect is about to commit a crime. They argue that no crime was suspected here, nor was there any indication that Davis was about to commit a crime.

Failure to Provide Complete and Accurate Information to Dolph

[132] The Defendants submit that Constables Parrish and Singleton provided complete and accurate information to Dolph. Further, the Defendants submit that the Plaintiffs do not establish what would have changed if additional information had been provided to Dolph.

Constable Parrish Pressured Dolph into taking Davis

[133] The Defendants submit that there is no evidence to support an allegation that Constable Parrish applied any pressure to Dolph when speaking to him about taking Davis as a passenger.

Failure to Obtain Additional Information from Family and Friends

[134] The Defendants submit that, given Davis' harmless appearance, it was unnecessary for Constables Parrish and Singleton to obtain additional information from Davis' family and friends. Further, no expert evidence was adduced to suggest that such enquiries need to be made when dealing with the mildly paranoid.

[135] Alternatively, the Defendants submit that even if the officers had made third party enquiries into Davis' past, the information obtained from such enquires would not have provided Constables Parrish and Singleton with the grounds to apprehend Davis under s. 17 of the *MHA*, nor would it have been sufficient to detain Davis using the doctrine of investigative detention or to lay a charge against him.

Position of the Plaintiffs against Greyhound and Dolph

[136] The Plaintiffs submit that the Defendants Greyhound and Dolph owed them a duty of care. With regard to the standard of care, the Plaintiffs submit that fault must be determined based on the standard of conduct to be expected of a reasonable person in the circumstances.

[137] The Plaintiffs rely on the *Public Vehicles Act*, R.S.O. 1990, c. P.54, s. 22(2), which states that it is prohibited for a person to stand anywhere that is forward of the back of the driver's seat. Failing to require a person to move to the back or away from the front when it interferes with the bus driver's safe operation of the vehicle has been found to be an act of negligence: *Baldwin v. Lyons and Erin District High School Board*, [1961] O.J. No. 523, (H.C.J).

[138] The Plaintiffs further cite *Rances v. Scaplen*, [2008] A.J. No. 1323 (QB), where the Alberta Court of Queen's Bench states "legislative standards are relevant to the common law standard of care, but the two are not necessarily co-extensive. The fact that a statute prescribes or prohibits certain activities may constitute evidence of reasonable conduct in a given situation, but does not extinguish the underlying obligation of reasonableness." The Court also stated at para. 241:

> "While the obligation upon carriers of persons is to use all due, proper and reasonable care and the care required is of a very high degree …" "Decisions applying *Day [SCC]* have generally interpreted this passage to mean that *where the Defendant is a public carrier, in the event of an accident and resulting injury, the Plaintiff enjoys the benefit of a burden that shifts to the Defendant to prove the carrier was being operated in a skilled and prudent manner."*

In relation to the Defendant Greyhound in that case the court stated at para. 243:

> "While Greyhound is not an insured of the safety of its passengers, it bears a very high duty of care should injury to any of its passengers occur. Upon proof of an incident, the carrier is called upon to show that it was operating its vehicle with all due, proper and reasonable care and skill."

[139] It is the Plaintiffs' position that the Defendant Greyhound had an obligation to provide adequate policies, rules, guidelines, and procedures to ensure that its drivers could fulfill their duties and to ensure that its drivers were aware of the laws applicable to operating a bus. The Plaintiffs further submit that once an allegation of negligence is made against a common carrier, the burden of proof shifts to the Defendant to demonstrate that the carrier was being operated in a skilled and prudent manner: *Rances*, at para. 242.

[140] With respect to causation, the Plaintiffs submit that the basic test for determining causation is the "but for" test, where the Plaintiff bears the burden of showing on a balance of probabilities that "but for" the negligent actions of the Defendant, the injury to the Plaintiff would not have occurred: *Resurfice Corp. v. Hanke*, 2007 SCC 7, [2007] 1 S.C.R. 333. The Plaintiffs further submit that causation need not be proven with scientific precision: *Snell v. Farrell* (1990), 72 D.L.R. (4th) 289, at para. 298.

[141] The Plaintiffs rely upon various ways in which the Defendants Greyhound and Dolph breached their respective standard of care.

Failure to make Reasonable Enquiries

[142] The Plaintiffs submit that at the time the Constables were attempting to put Davis onto Dolph's bus, Dolph failed to make reasonable enquiries of the Constables and/or of Davis concerning Davis' mental state and prior conduct. The Plaintiffs rely on Page 12 of the Greyhound's Operator's Handbook, which was the version in existence in 2000. Under section G-30, entitled "Passengers, Handling of Disorderly", the bus driver is to refuse transportation to persons who are intoxicated or who are conducting themselves in a manner which may cause discomfort to other passengers. The Plaintiffs rely on the testimony of Mr. Groves, who testified that a prudent driver would have made those types of enquiries of the police and/or the potential passenger before allowing him/her to board the bus. The Plaintiffs argue that Dolph had the right to refuse Davis' passage on his bus, but failed to do so.

Allowing Davis to Cross the White Line

[143] The Plaintiffs rely on evidence that Dolph allowed Davis to cross the white line at the front of the bus on two or three occasions. This, they argue, was in violation of published guidelines from Greyhound Canada and s. 22 of the *PVA*. Section 22 of the *PVA* reads, in part:

> "Passengers not to be allowed on running board, etc.
>
> 22. (1) No driver or operator shall allow passengers to ride on the fenders or any other part of a public vehicle other than the seats thereof, except that a vehicle may carry as standing passengers in the aisles thereof not more than one-third the number of persons for which seats are provided.
>
> Restrictions as to seating
>
> (2) No driver or operator of a public vehicle shall permit or allow on the front seat of the vehicle more passengers than the seat is designed to carry, exclusive of the driver, or permit or allow any passenger to occupy any other portion of the vehicle forward of the back of the driver's seat."

[144] According to the Plaintiffs, the failure of Dolph to require Davis to move away from the front of the bus when he was interfering with the bus driver's safe operation of the vehicle amounts to an act of negligence: *Baldwin* at para 4. The Plaintiffs submit that Davis would not

have been able to jump Dolph from such close proximity had Dolph ensured that Davis abide by the law and remain behind the white line.

Allowing Davis to Stand in the Stairwell

[145] The Plaintiffs submit that Dolph also breached the standard of care by allowing Davis to stand in the stairwell in violation of published guidelines from Greyhound Canada and s. 22 of the *PVA*. Dolph also failed to pay adequate attention to Davis while he was in the stairwell. Section 22 of the *PVA* is outlined above. The Plaintiffs reference Greyhound transportation bulletin number 52, issued on March 7, 1991, entitled "Passengers Standing on Coaches", which tells bus drivers that passengers must not be allowed to stand on a bus for an extended period of time and must not be allowed to stand in front of the white line at the front of the bus. Bulletin number 74, issued on January 14, 1992, entitled "No Standing Ahead of White Line", states that passengers must not be allowed to cross the white line at the front of the bus while the bus is in motion and that it is against the law to allow passengers to do so. Dolph testified that he didn't hear what Davis was saying while he was in the stairwell. The Plaintiffs submit that had Dolph been paying adequate attention to Davis, he would have appreciated that Davis was dangerous, and would have reacted accordingly. The submission is that Dolph did not give Davis the attention that he required, and in failing to do so the situation was allowed to escalate. The Plaintiffs submit that this led to Davis' eventual attack and if Dolph had reacted in an appropriate manner, the accident would have been avoided.

Failure to Stop the Bus

[146] The Plaintiffs submit that when Davis was standing in the stairwell Dolph should have assumed that Davis would do something to harm the bus or its passengers and therefore should have stopped the bus on the side of the highway. The Plaintiffs submit that in Greyhound's Driving Manual and rules for bus drivers, Greyhound stresses that drivers must always assume the worst case scenario so as to protect their passengers from harm.

[147] The Plaintiffs submit that there was evidence of two straight stretches of highway within 15 km west of where the bus crashed. Further, Dr. Nassar presented evidence which verified that a Greyhound bus could pull over in the area in question. The argument is that Dolph's failure to stop the bus when he had the time and space to do so was in breach of the standard of care.

Failure to provide Adequate Training on Emergency Pullovers

[148] The Plaintiffs submit that Greyhound failed to train Dolph on how to safely pull a bus over in the winter when the width of the highway shoulders was reduced because of snow accumulation. The Plaintiffs rely on a Greyhound transportation bulletin from October 1995 entitled "Hazardous & Unusual Road Conditions due to Seasonal Weather," which instructs drivers that they must operate their bus according to the weather and road conditions that are in effect at the time. The Plaintiffs also rely on a document entitled "Documentation & Training Forms Manual". The Manual emphasizes defensive driving, and states that drivers are trained on winter driving. No portion of the Manual describes when it is appropriate to pull a motor coach off the highway onto a shoulder. According to the Plaintiffs, there is no evidence that Dolph

received any enhanced operational training, despite its availability. Failure to provide such training on the part of Greyhound breached the standard of care expected of an owner of a common carriage service.

Failure to provide Sufficient Training on how to deal with Difficult Passengers

[149] The Plaintiffs submit that Greyhound did not have sufficient training and/or information available to drivers on the subject of how to deal with difficult passengers, including those who may be suffering from mental illness or drug overdose. They submit that Greyhound does in fact offer an "Accessibility Coach Training Program" to its drivers which includes a section on how to identify psychiatric disorders or mental health problems. Drivers are instructed to be patient and calm in dealing with such individuals and to take the individual's concerns seriously. They are also directed not to restrain such individuals and to try and keep them calm. The Plaintiffs argue that it is unclear as to whether Dolph took this training program before the accident. The Plaintiffs further submit that even if he had taken the program, the training involved was not enough to prepare a bus driver for recognizing and dealing with an individual who suffers from mental illness.

Failure to follow available Guidelines regarding Passengers with Mental Illness

[150] The Plaintiffs submit that Dolph did not follow any of the national guidelines regarding difficult passengers and individuals suffering from mental illness that were available to him. In support of their position, the Plaintiffs point to a document entitled "National Occupational Standards Professional Bus Operator". The document describes how drivers may deal with difficult passengers in situations which threaten the comfort or safety of other passengers. Such situations must be dealt with swiftly, decisively, and with tact and diplomacy. The Plaintiffs also make reference Section 2.3 of Greyhound's Driver's Manual which states that it is the driver's responsibility to ensure that he or she identifies problem situations as quickly as possible and reacts to them in a reasonable fashion. The Manual also encourages defensive action so as to protect passengers. According to the Plaintiffs' submissions, Dolph should have continued to slow the bus down as Davis' irrational behaviour escalated, and he should have practiced defensive driving. It is the Plaintiffs' position that Dolph took neither of these actions and by failing to do so breached his standard of care.

Failure to provide Barrier between Driver and Passengers

[151] The Plaintiffs submit that Greyhound did not have a sufficient barrier between the driver and the passengers to prevent passengers from crossing the white line at the front of the bus, and that if such a barrier existed, Davis would not have been able to jump Dolph and the accident would not have occurred.

Driving at an Excessive Speed

[152] The Plaintiffs submit that Dolph was operating his bus at an excessive speed in the circumstances. It is the Plaintiffs' position that Dolph was travelling at least 100 km/hr at the time of the crash. According to the Plaintiffs, there were a number of factors at play which

warranted a substantially reduced speed: first, the road conditions were medium to poor; second, Davis was standing 2-3 feet away from Dolph while in the stairwell; third, Davis was exhibiting signs of mental illness and severe paranoia; and fourth, Dolph had been warned by the Defendant Constables that Davis had exhibited paranoid behavior earlier that day and on the previous Greyhound bus. The Plaintiffs submit that had Dolph been travelling at a reduced speed, he would have had a chance of regaining control of the bus at the time that Davis grabbed the wheel. Further, the Plaintiffs submit that the injuries to the passengers would have been far less severe if Dolph had been going slower when Davis grabbed the wheel.

Position of the Defendants Greyhound and Dolph

[153] The Defendants Greyhound and Dolph concede that they owed the Plaintiffs a duty of care. These Defendants submit that the standard of care for a bus driver is that of the reasonably prudent bus driver in similar circumstances: *Desjardins v. Arcadian Restaurants Ltd.*, 2005 CarswellOnt 7549. These Defendants agree with the Plaintiffs' position regarding the standard of care for a common carrier: a common carrier must use all due, proper, and reasonable care and skill to avoid or prevent injury to the passenger: *Day v. Toronto Transportation Commission*, 1940 S.C.R. 433, at 441. The Defendants submit that they have an absolute defence to the plaintiffs' claims of liability, arguing that Dolph acted reasonably in the circumstances and by doing so met the applicable standard of care. The Defendants further submit that the Plaintiffs have not established foreseeability, since Dolph could not foresee the danger posed by Davis in the circumstances.

[154] These Defendants agree with the Plaintiffs that the relevant test for causation is the "but for" test. However, the Defendants contend that the Plaintiffs must demonstrate a substantial connection between their injuries and the Defendants' conduct: *Resurfice Corp*., at para 23.

[155] The position of these Defendants is that the Plaintiffs have not established causation. They submit that the onus is on the Plaintiffs to establish causation, and in this case, the Plaintiffs have failed to adduce evidence as to why Davis attacked Dolph. Even if it is found that a reverse onus or heightened standard of care exists, the Defendants argue that they have refuted the Plaintiffs' *prima facie* case by providing evidence which demonstrates that Dolph acted reasonably in the circumstances.

[156] These Defendants further submit that the defence of due diligence is available to them: *R. v. Sault Ste. Marie (City)*, [1978] 2 S.C.R. 1299, in that Greyhound took reasonable and proper steps to protect the safety of its passengers. According to the Defendants, such preventative conduct provides them with a complete defence to the Plaintiffs' allegations of negligence.

[157] The Defendants specifically refute each of the Plaintiffs' allegations of negligence. In support of their position, the Defendants rely on the following arguments.

Davis had a Right to Board the Bus Driven by Dolph

[158] It is the Defendants' position that they had no choice but to allow Davis to board the bus. In making this assertion, the Defendants rely on s. 21 of the *PVA*. Section 21 of the *PVA* states:

> [n]o driver shall refuse to carry any person offering himself at any regular stopping place for carriage and who tenders regular fare to any regular stopping place on the route of the vehicle.

The Defendants reference the evidence that Davis asked to continue his trip and the O.P.P. facilitated his transfer to Dolph's bus. Dolph found that there was nothing unusual about Davis.

No Potential Problem Existed that would have Prevented Davis from Boarding the Bus

[159] These Defendants submit that at the time Davis boarded the bus, Dolph did not fail to recognize a problem because there was no problem to be discerned. Davis did not display any unusual behaviour and did not appear dangerous. The lay witnesses who observed Davis on the day in question stated that he did not appear violent. The O.P.P. were of the view that Davis was slightly paranoid, but not dangerous, and was not a problem. The Defendants submit that there was no indication that Davis was capable of creating a problem at the time he boarded the bus.

Dolph was Properly Trained

[160] The Defendants submit that Dolph had 28 years of driving experience for Greyhound before the incident occurred. At trial, Dolph testified that he followed all of Greyhound's protocols. It is the Defendants' position that he had sufficient front end training and experience. Alternatively, the Defendants submit that, even if the court finds Dolph's training to have been inadequate, his lack of training was not causative of the incident.

It was Proper Procedure to allow Davis to be Seated at the Front of the Bus

[161] The Defendants submit that it was reasonable for Davis to be seated at the front of the bus so that Dolph could keep an eye on him. Further, the Defendants submit that the position in which Davis was seated did not cause the accident.

The White Line

[162] It is the Defendants' position that Dolph's decision to leave Davis in the stairwell was a reasonable one. The Defendants submit that Dolph was attempting to keep Davis calm, and it was only a few more minutes until his next scheduled stop in Upsala. Further, Dolph did not allow Davis to stand in the stairwell; Davis simply did it. According to the Defendants, Davis' actions were beyond Dolph's control. These Defendants submit that allowing Davis to stand in the stairwell was not the cause of the incident. The Defendants further submit that the purpose of section 22(2) of the *PVA*, which prohibits persons from standing in the stairwell, is to protect the person in the stairwell from harm. Since Davis has not brought an action against Greyhound, it is the Defendants' position that the Plaintiffs' use of this section is inappropriate.

Boxing in the Driver is not a Solution

[163] The Defendants submit that the Plaintiffs have not adduced any evidence demonstrating that boxing in the driver is a feasible solution or that doing so would have prevented the accident.

Dolph was driving at a Safe Speed

[164] First, the Defendants submit that Dolph was driving at a reasonable speed in the circumstances. The Defendants rely on the evidence of Mr. Simcock, an ex-police officer who was driving a truck that followed the bus. The truck was governed by a top speed of 103 kms/hr. Second, they argue that the evidence of Shane Lywak cannot be relied upon. Third, contrary to the Plaintiffs' submissions, the Defendants submit that at no time did Dolph state the accident took place at 6:30pm. Further, the Plaintiffs failed to provide evidence as to how they determined that the accident took place at 6:30 p.m. Fourth, the Defendants submit that the Plaintiffs' submissions relating to speed are not plausible or reasonable. These Defendants argue that to accept the Plaintiffs' position, I would have to accept that the bus travelled 95 km on a dark winter evening in approximately 40 minutes. To achieve such a distance in that time, the bus would have been travelling at a speed of approximately 154 kms/hr. Furthermore, these Defendants submit that even if this court finds that Dolph was driving at an excessive speed at the time of the incident, there is no evidence before the court indicating that speed was causative of the accident or that excessive speed exacerbated the Plaintiffs' injuries.

Pulling over the Bus would have been Dangerous

[165] The Defendants submit that Dolph's decision to continue driving, instead of attempting to pull the bus over, was reasonable in the circumstances. According to the Defendants, pulling over could have resulted in the bus rolling over or being pulled into the ditch. These were Dolph's primary concerns. The shoulders of the highway were snowy and it was dark. After the accident occurred, other vehicles arriving at the scene parked on the paved portion of the highway, not on the highway's shoulder. In the Defendants' opinion, this indicates that other individuals were wary of the condition of the highway's shoulders. With respect to the testimony of Dr. Nassar, the Defendants submit that he did not attend at the scene of the accident and did not take the calculations he used in arriving at his conclusions himself. Further, he has no experience driving in Northern Ontario. For these reasons, the Defendants argue that his testimony is unreliable.

[166] The Defendants further submit that had Dolph pulled the bus over, it is uncertain what would have been done with Davis. It is against Greyhound regulations to leave a passenger in the cold and the dark in the middle of nowhere. It is the Defendants' position that it would not have been reasonable for Dolph to have abandoned Davis on the side of the highway on a cold winter night. It was reasonable for him to continue driving toward his next scheduled stop in Upsala.

[167] Finally, the Defendants submit that Davis' actions were not foreseeable. According to the Defendants, because there was no indication to Dolph that any trouble was coming, it was reasonable for him to determine that pulling over the bus was unnecessary in the circumstances.

Legal Principles - Negligence

[168] In *The Law of Torts in Canada*, 3d ed. (Toronto, ON: Thomson Reuters Canada, 2010), at 297, G.H.L. Fridman et. al. defines negligence as the "breach of a legal duty to take care which results in damage to the Plaintiff." To prove negligence, the Plaintiff must show:

(a) that the defendant owed him or her a duty of care;

(b) that the defendant breached his or her duty by failing to observe the relevant standard of care;

(c) that the breach of the duty caused damage or loss to the Plaintiff; and

(d) that the damage was not too remote a consequence of the breach (see Fridman et. al., at 297).

Duty of Care

[169] Both of the Defendants have acknowledged that they owed a duty of care to the Plaintiffs. Since the Defendants are willing to concede that a duty was owed by them to the Plaintiffs, it is unnecessary to canvass the law regarding duty of care.

Standard of Care

[170] The conventional standard of care that is applied in an action for negligence is that of the ordinary, reasonable, cautious and prudent person in the position and circumstances of the defendant: *Ryan v. Victoria (City)*, [1991] 1 S.C.R. 201, at 222. The reasonable person is neither exceptional nor extraordinary. He or she is a person of normal intelligence who makes prudence a guide to conduct, doing nothing that a prudent person would not do and not avoiding doing anything that a prudent person would do: see *Canada (Attorney General) v. Dingle Estate*, 2000 NSCA 5, [2000] N.S.J. No 4, at para. 31; *Burbank v. B (R.T.)*, 2007 BCCA 215, [2007] B.C.L. No. 752, at para. 60; Fridman et. al., at 366. What is reasonable will depend on the facts of each case, and includes a consideration of the likelihood (or foreseeability) of the harm, the gravity of the harm, and the costs that would have to be incurred in order to prevent the harm: *Ryan*, at 526. These factors are to be assessed as of the time of the alleged breach and not in light of subsequent developments: see *Desautels v. Katimavik* (2003), 175 O.A.C. 201 (C.A.); *Nattrass v. Weber*, 2010 ABCA 64, [2010] A.J. No. 424, leave to appeal dismissed, 2010 S.C.C.A. No. 159.

(a) Standard of Care for Bus Drivers

[171] I accept the Greyhound Defendants' submission that for a bus driver, the standard of care is that of the reasonable bus driver in like circumstances. To determine whether the standard of care for a bus driver is met, I must ask whether the bus driver used all due, proper and reasonable care and skill in the circumstances: see *Day*, at 441; *Rances*, at para. 349.

(b) Standard of Care for Police Officers

[172] I accept the argument of the O.P.P. Defendants that for a police officer, the standard of care is that of the reasonable officer in like circumstances. In order to meet the standard of "reasonableness", an officer must live up to the accepted standards of professional conduct to the extent that it is reasonable to do so in the circumstances: *Hill*, at para. 70. I must consider the elements involved in a reasonable and prudent investigation, and must determine whether those

elements have been met: Fridman et. al., at 376. Police officers may make minor errors in judgment without breaching the standard of care. An error in judgment only amounts to negligence if the error would not have been made by a reasonably competent professional with the same skill as the officer in question who acted with ordinary care: *Hill*, at para. 73.

Causation

[173] Causation is the third step in a negligence analysis in tort. In order to reach the stage where it is necessary to determine causation, I must first find that a duty of care was owed by the Defendant to the Plaintiff. Next, I must decide what the appropriate standard of care is, and whether the Defendant breached the standard of care. If I find that the Defendant did not breach the standard of care, an inquiry into causation is not necessary.

[174] I accept the Plaintiffs' position that the "but for" test is the standard test for causation, and is the appropriate test in these circumstances. The test requires the Plaintiff to show that "but for" the negligent act or omission of each Defendant, his or her injury would not have occurred: *Resurfice Corp.*, at para. 21. The "but for" test recognizes that compensation for negligent conduct should only be made where a substantial connection exists between the Plaintiff's injury and the Defendant's conduct: see *Resurfice Corp.*, at para 23; *Snell v. Farrell*, [1990] 2 S.C.R. 311, [1990] S.C.J. No. 73, at para 26. A substantial connection ensures that the Defendant will not be held liable for injuries to the Plaintiff which "may very well be due to factors unconnected to the Defendant and not the fault of anyone": *Snell*, at para. 26. It is also important to appreciate that the Defendant's negligence need only be "a" cause of the Plaintiff's injury; it need not be the "only" cause.

[175] The Plaintiff must prove that the Defendant's breach of the standard of care resulted in some injury to the Plaintiff. It is only the Defendant's breach of the standard of care that can establish causation. If I cannot conclude that the Defendants breached the standard of care, I cannot find that the Defendants caused the Plaintiff's injuries.

Remoteness

[176] In addition to proving factual causation, the Plaintiff must establish that the Defendant's carelessness was a "legal" or "proximate" cause of his or her injuries: Fridman et. al., at 417. The remoteness inquiry asks whether the harm to the Plaintiff is sufficiently related to the wrongful conduct of the Defendant: *Mustapha v. Culligan of Canada Ltd*, 2008 SCC 27, [2008] 2 S.C.R. 114, at para 12. If it is found that the Plaintiff's injuries are too remote to have been caused by the Defendant's conduct, then no liability can attach to the Defendant. In other words, the harm to the Plaintiff must have been reasonably foreseeable to the Defendant: *Mustapha*, at paras. 12-13. In order for liability to be imposed on a negligent Defendant, the risk to the Plaintiff must have been a "real risk" as opposed to a far-fetched one: *Mustapha*, at para. 13.

[177] The remoteness test can therefore be summarized as follows: the trier of fact must ask whether a reasonable person, put in the position of the Defendant, would have contemplated the harm that came to the Plaintiff. If the trier of fact finds that a reasonable person would or should have contemplated the Plaintiff's injuries in the circumstances, the Defendant is liable. If the trier

of fact finds that the harm to the Plaintiff was too remote or far-fetched to have been contemplated by a reasonable person in the circumstances, the Defendant is not liable.

Onus of Proof

[178] In *The Law of Torts in Canada*, Andrew Botterell makes the following comments on the onus of proof in a negligence action:

> "The general rule is that the plaintiff must prove all of the elements of the tort of negligence... The plaintiff's obligation is to convince the court on the balance of probabilities that it is more likely than not that his or her loss was caused by negligence on the part of the defendant. If this is done, the defendant then has the task of calling into question the *prima facie* inference of negligence. By establishing a *prima facie* case, the plaintiff succeeds in *shifting* the evidentiary... burden onto the defendant... Should the plaintiff fail to adduce evidence that proves negligence, or fail to produce evidence for which a reasonable inference may be drawn that the defendant acted negligently, the plaintiff will not succeed" (Fridman et. al., at 384-385).

[179] In a negligence action, the onus of proof rests with the Plaintiff. The Plaintiff must prove all elements of the tort of negligence. If the Plaintiff convinces the court on a balance of probabilities that the Defendant's negligence caused his or her injuries, then he or she has established a *prima facie* case against the Defendant. This shifts the evidentiary burden to the Defendant, who can discharge that burden by providing evidence of non-negligence.

[180] The Plaintiffs have raised the question of whether a reverse onus exists for a common carrier in a negligence action. In *Whelan v. Parsons & Sons Transportation Ltd.*, 2005 CarswellNfld 229, [2005] N.J. No. 264 (C.A.), at paras. 21-22, the Newfoundland Court of Appeal considered whether a reverse onus exists for common carriers in a negligence action. The court made the following comments with respect to the onus of proof for common carriers:

> "Once the plaintiff has established a *prima facie* case, which may be based on the drawing of inferences from circumstantial evidence, the carrier will be found liable for negligence unless it presents evidence to negate that conclusion.
>
> What makes the case of a common carrier different relates, in fact, to the high standard of care imposed on the carrier. As a result of this high standard, the court may draw inferences adverse to the carrier, or conclude that a *prima facie* case has been established, based on evidence adduced by the plaintiff that would not, in other circumstances, have been sufficient. In other words, the carrier may be under a heightened need to adduce evidence in response because the threshold the plaintiff must clear is lower."

[181] The onus is *not* on the common carrier to prove that it was not negligent. Instead, the threshold that the Plaintiff must meet to establish a *prima facie* case is lower than it normally would be. This is so because the standard of care imposed on the common carrier is higher than

that which is placed on the average person. This is not a reverse onus situation; the Plaintiff must still adduce some evidence to establish a *prima facie* case before the burden can shift to the Defendant.

Investigative Detention

[182] In *R. v. Simpson*, the Ontario Court of Appeal held that an investigative detention can only be justified if the detaining officer has some "articulable cause" for the detention. In defining “articulable cause”, the court reviewed a number of U.S. decisions and in doing so, came to the conclusion that:

> These cases require a constellation of objectively discernible facts which give the detaining officer reasonable cause to suspect that the detainee is criminally implicated in the activity under investigation. The requirement that the facts must meet an objectively discernible standard is recognized in connection with the arrest power: R. v. Storrey, [1990] 1 S.C.R. 241 at p. 251, 53 C.C.C. (3d) 316 at p. 324, and serves to avoid indiscriminate and discriminatory exercises of the police power. A "hunch" based entirely on intuition gained by experience cannot suffice, no matter how accurate that "hunch" might prove to be: *Simpson*, at para. 61.

[183] In *R. v. Mann*, the Supreme Court of Canada approved of, and expanded upon, the *Simpson* decision. The Court made the following comments about the power of investigative detention at paragraph 34:

> The detention must be viewed as reasonably necessary on an objective view of the totality of the circumstances, informing the officer's suspicion that there is a clear nexus between the individual to be detained and a recent or on-going criminal offence. Reasonable grounds figures at the front-end of such an assessment, underlying the officer's reasonable suspicion that the particular individual is implicated in the criminal activity under investigation. The overall reasonableness of the decision to detain, however, must further be assessed against all of the circumstances, most notably the extent to which the interference with individual liberty is necessary to perform the officer's duty, the liberty interfered with, and the nature and extent of that interference, in order to meet the second prong of the *Waterfield* test.
>
> Police powers and police duties are not necessarily correlative. While the police have a common law duty to investigate crime, they are not empowered to undertake any and all action in the exercise of that duty. Individual liberty interests are fundamental to the Canadian constitutional order. Consequently, any intrusion upon them must not be taken lightly and, as a result, police officers do not have *carte blanche* to detain. The power to detain cannot be exercised on the basis of a hunch, nor can it become a *de facto* arrest: *Mann*, at paras. 34-35.

Discussion/Analysis as to Liability re: O.P.P. & Constables

Introduction

[184] As I have noted previously, in the course of written submissions, counsel for the Defendants both acknowledged a duty of care on the part of their respective parties.

[185] To obtain judgment against a Defendant in a negligence action, the Plaintiff must establish four elements, each on a balance of probabilities: that the Defendant owed a duty of care to the Plaintiff; the standard of care; a breach of that standard; and that the breach caused the Plaintiff's damages. In considering the Plaintiffs' claims against the Defendants Parrish and Singleton and the O.P.P., the claims can be summarized and conceptualized in the following way: that the officers were in breach of the standard of care and failed to prevent Davis from boarding the bus either by using s. 17 of the *MHA,* by using investigative detention, or by using other powers available to them.

Were the O.P.P. and Constables Parrish & Singleton Negligent?

Failure to Apprehend under Section 17 of the MHA

[186] Before I engage in an analysis of s. 17, I note that the evidence shows Constable Singleton was the secondary, or supporting, officer. His involvement into the investigation of Davis was limited. Constable Parrish, on the other hand, was Singleton's coach officer and it was Parrish who spent a significant amount of time with Davis. He observed Davis at some length and spoke with him on a number of occasions. It fell to him to determine whether or not Davis could be apprehended pursuant to s. 17 of the *MHA*. The analysis that follows therefore focuses on whether Constable Parrish's failure to apprehend was reasonable in the circumstances.

[187] I am satisfied that the Defendants O.P.P. and Constables Parrish and Singleton have correctly identified and explained the legal test for the apprehension of an individual under s. 17 of the *MHA*. In order to apprehend a person under s. 17 of the *MHA*, all four parts of the test must be satisfied. If any one part of the test cannot be met, the investigation must stop and the officer does not have grounds to apprehend.

[188] In considering the first part of the test, Constable Parrish did not conclude that Davis was acting in a disorderly manner. He based this belief on his discussions with, and observations of, Davis, which lasted for a period of approximately 45 minutes. During the time that he spent with Davis, Constable Parrish's initial assessment of him did not change. The evidence supports his opinion that Davis did not pose a risk to himself or to others. In assessing Davis, Constable Parrish did not rely on third party information. He did not speak with the lay witnesses who had been in contact with Davis at the Tempo and at the Voyageur restaurant. He did not attempt to obtain further information about Davis from the RCMP, or from his family and friends. However, even if Constable Parrish had made contact with some or all of these third parties, had received information about Davis' past and present behaviour, and was satisfied that his conduct was disorderly, Parts Two and Three of the s. 17 test still had to be met. In this case, they were not.

[189] Part Two of the test requires an investigating officer to determine that the person in question satisfies one of the following three criteria: first, the person must have either threatened or attempted to cause himself bodily harm or was threatening or attempting to cause bodily harm to himself; or second, the person must have behaved or was behaving violently towards another person or had caused or was causing another person to fear bodily injury from him; or third, the person must have shown or was showing a lack of competence. In making a determination under part two of the test, the officer can rely on third party evidence.

[190] With respect to the first criterion, there is no evidence before me suggesting that prior to boarding the bus Davis had threatened, attempted to cause himself bodily harm, or was threatening or attempting to cause bodily harm to himself.

[191] With respect to the second criterion, none of the information from the lay witnesses indicated that Davis had behaved or was behaving violently towards another person or that Davis had caused or was causing another person to fear bodily harm from him. Lay witnesses who had observed Davis in the hours before he boarded the bus remarked that he never appeared violent. Davis was described as polite, harmless, "like a two year old", calm, articulate, a "sweet lost scared boy", mild, and relaxed; these are not words that I would use to describe someone who showed signs of harming himself. Upon meeting Davis in the hours before he got on the bus, another witness thought about taking Davis home for the night in order to let him rest. According to the lay witnesses and the Constables, there was no indication that Davis was behaving violently towards anyone. Constable Parrish could not have apprehended Davis under this part of the test.

[192] With respect to the third criterion, there was no evidence from the witnesses to support a finding that Davis had shown a lack of competence to care for himself. More than one witness described Davis as well-dressed and good looking. Constable Parrish described Davis as articulate, well-spoken, calm, and rational. Dolph described Davis as clean-cut, cleanly dressed, and polite. The lay witness testimony indicates that Davis appeared fully capable of taking care of himself at the time he got on the bus. Constable Parrish could not have apprehended Davis under this part of the test.

[193] With respect to the third part of the s. 17 test, in *Rhora v. Ontario*, 2004 CanLII 4046 (Ont. Sup. Ct.) the court noted that the police are not required to make a detailed curb-side diagnosis unless there is obvious, anomalous behavior that suggests that the person could threaten the well-being of themselves or someone else. There is no evidence that any of the witnesses believed that Davis might do serious bodily harm to himself or to another person, or that he might suffer a serious physical impairment. The evidence provided by the lay witnesses reaffirms Constable Parrish's opinion of Davis as a quiet, polite, mildly paranoid but otherwise harmless individual.

[194] The Defendants have submitted that if I find that the first three parts of the test are satisfied, they are willing to concede that the fourth part of the test is also met.

[195] The Plaintiffs rely heavily on the fact that Constable McMaster, who attended the scene immediately after the bus crash and interviewed Davis, determined that Davis should be detained under section 17 of the *MHA*. The Plaintiffs also submit that evidence from other individuals

who had contact with Davis immediately after the bus crash, namely Vernon Humphries, Randy Boomhower, Chris Beebe, and Graham Warburton, confirms that Davis was clearly delusional, psychotic, and severely paranoid. The Plaintiffs use this evidence to suggest that Constable Parrish should have apprehended Davis *before* he got on the bus. However, Constable McMaster and the lay witnesses referred to above only observed Davis *after* the bus had already crashed.

[196] I conclude on the basis of the evidence that there were no grounds to detail Davis under s. 17 of the *MHA.*

Failure to detain Davis using the Doctrine of Investigative Detention

[197] Although *Mann* came four years after the incident in question, the Supreme Court's comments affirm what *Simpson* has already made clear: the power of investigative attention is only available to an officer who needs to detain an individual that he or she suspects of being involved in a crime. A mere hunch about the individual in question is not enough. The officer must be able to point to some evidence demonstrating that he or she had reason to believe the individual was involved in a crime, thereby justifying the person's arrest. According to the court in *Simpson*, "[t]he detaining officers must have a particularized and objective basis for suspecting the particular person stopped of criminal activity": *Simpson*, at para. 60.

[198] The power of investigative detention can also be used to prevent a crime: *Mann*, at para. 26. In order for an officer to detain an individual using the doctrine of investigative detention, he or she must have some evidence indicating that the person in question was involved in a crime or was about to commit a crime. If there is no evidence to support either of these suspicions, then the officer does not have the grounds to detain the individual.

[199] In this case, there is no evidence before the court indicating that Davis was involved in criminal activity, or that he was about to commit a criminal act. I accept the Defendants' position that the doctrine of investigative detention was not available to Constables Parrish and Singleton.

Putting Davis in an Enclosed Space and Invading his Personal Space

[200] According to the Plaintiffs' submissions, Constables Parrish and Singleton "put" Davis on the bus with the same passengers that he was trying to get away from on the Groves' bus. In their testimony, both Constables Parrish and Singleton made it clear that they were very careful *not* to invade Davis' personal space. Davis appeared to be comfortable in the Constables' presence. The Plaintiffs acknowledge this fact in their submissions. For the Plaintiffs to suggest that the Constables invaded Davis' personal space, then later acknowledge that Davis was comfortable in their presence, is contradictory. I accept the Defendants' position that the Constables made an effort to avoid invading Davis' personal space.

[201] There is also evidence indicating that Davis boarded the bus voluntarily. I accept the Defendants' evidence that Davis just wanted to go home for Christmas, was relieved to be boarding the bus, and did so of his own accord. Forcing Davis onto the bus, as opposed to escorting him, are two very different courses of action. There is no evidence demonstrating that the Constables forced Davis onto the bus.

[202] Finally, as the Defendants have pointed out, Davis found himself in enclosed spaces on three separate occasions in the hours before he boarded the bus. Davis did not act out, nor did his symptoms escalate, in any of those three circumstances. In fact, Davis appeared to be quite calm while he was in Constable Parrish's police cruiser (on two separate occasions) and in Ms. Ray's taxi cab. Even if I were to find that the Constables did in fact encroach upon Davis' personal space, and that the Constables did in fact "put" Davis on the bus, the Plaintiffs have not established that the Constables' carelessness was a proximate cause of their injuries. The risk to the Plaintiffs must have been reasonably foreseeable by the Defendants. The risk to the Plaintiffs must have been a real risk as opposed to an unlikely or far-fetched one.

[203] For this reason, I find there is no liability against either of the officers, or the O.P.P.

Failure to obtain Background Information about Davis from Third Parties

[204] I accept the position of the Defendants that in the circumstances, it was unnecessary for Constables Parrish and Singleton to obtain background information about Davis from third parties. Given the presentation of Davis, it was reasonable for the Constables to conclude that third party enquiries were not needed. As the lay witnesses made clear in their testimony, Davis appeared calm, quiet, and harmless.

[205] Finally, as the Defendants suggest, I must consider the context of the investigation; Constable Parrish was called to *assist* Davis, who was the apparent victim of a crime. After spending a meaningful amount of time with Davis, Constable Parrish concluded that he was mildly paranoid, but otherwise harmless. It was reasonable for Constable Parrish to conclude that phone calls to Davis' health practitioner in Calgary, or to his family and friends in Nova Scotia, were unnecessary. Based on his interactions with Davis, which were less involved than those of Constable Parrish, it was reasonable for Constable Singleton to have arrived at the same conclusion.

Failure to obtain additional information about Davis' Medication

[206] Constable Parrish's failure to obtain additional information about Davis' medication was reasonable in the circumstances. When Constable Parrish made enquiries into whether Davis was on any medication, Davis explained that he had ADD/ADHD, and implied that he had been on drugs for sometime in order to treat his symptoms. Davis' explanation, combined with his calm, quiet, and harmless appearance, were sufficient to satisfy Constable Parrish's interest in the medication he was taking. Similarly, based on his observations of Davis, Constable Singleton had no concerns when Davis told him he was taking medication for ADD.

[207] Constable Parrish did not pursue further information about the prescription drugs Davis was taking because during his interactions with Davis, there was no indication that further enquiries were required in the circumstances. As far as Constable Parrish was concerned, Davis was a calm, quiet, non-violent individual who took prescription medication for a chronic illness. There is no evidence before the Court indicating that Davis' paranoia was a product of an overdose. Finally, the Plaintiffs have not adduced any evidence linking Davis' consumption of Dexedrine with his violent behavior on the bus.

Failure to provide Dolph with Complete and Accurate Information

[208] There is no evidence before the court indicating that Constables Parrish and Singleton withheld information about Davis from Dolph. Constable Parrish made Dolph aware of Davis' paranoia, and indicated to him that he believed Davis was not a threat to himself, nor would he be a threat to the people on the bus. This was the pertinent information that was available to Constable Parrish at the time that he spoke with Dolph. The information was also accurate. Constable Parrish did not mislead or misinform Dolph when providing him with information about Davis. Dolph had all of the information that he needed in order to determine whether Davis should be allowed to board the bus. I am of the view that Constable Parrish provided Dolph with sufficient and accurate information, which Dolph was then able to use in making an informed decision respecting Davis' capacity to board the bus.

Pressuring Dolph into allowing Davis onto the Bus

[209] There is no evidence to support this allegation. Dolph's evidence is clear that it was he who made the ultimate decision to allow Davis to board the bus. According to Dolph, Davis had a valid ticket and had asked to continue his trip. In Dolph's opinion, these facts were sufficient to allow Davis aboard the bus.

Failure to provide proper training/information on how to deal with mentally ill individuals

[210] In their submissions, the Plaintiffs allege that the O.P.P. did not provide sufficient training to its officers which specifically related to how paranoid individuals are likely to act, or how dangerous they might be to themselves or to others.

[211] In order to determine whether the Constables obtained sufficient training on how to deal with mentally ill individuals, an overview of the training regimen on this topic is necessary. The O.P.P. provided training materials to Constable Parrish which teach response strategies in dealing with emotionally disturbed persons. The materials also provide guidelines on how to deal with someone who suffers from paranoia. Also, the document entitled "Advanced Patrol Training – Mental Illness – Facilitator Guide" acts as a guide to be used by facilitators to train O.P.P. officers in dealing with mentally ill individuals.

[212] There is another document, entitled "Advanced Patrol Training – Mental Illness Study Guide", which is a Guide that is given to O.P.P. officers once they have received their advanced patrol training for mental illness. There is also a document entitled the "Provincial Police Academy Operational Field Briefing 00-43", which makes recommendations as to when it is appropriate to detain someone under s. 17 of the *MHA*. Finally, the Defendants O.P.P. and Constables Parrish and Singleton produced two videos that are used to train O.P.P. officers on how to deal with mentally ill individuals.

[213] Although the Constables may not have received specific training on how to deal with the exact symptoms that Davis presented, I am satisfied that they received adequate training on how to recognize, approach, and deal with an individual who presented as Davis did. I therefore

accept the Defendants' position that the O.P.P. training regimen being used at the time of the accident was reasonable.

[214] In *Hill*, Justice McLachlin made the following comments regarding the standard of care that is expected of a police officer:

> The standard of care is not breached because a police officer exercises his or her discretion in a manner other than that deemed optimal by the reviewing court. A number of choices may be open to a police officer investigating a crime, all of which may fall within the range of reasonableness. So long as discretion is exercised within this range, the standard of care is not breached. The standard is not perfection, or even the optimum, judged from the vantage of hindsight. It is that of a reasonable officer, judged in the circumstances prevailing at the time the decision was made - circumstances that may include urgency and deficiencies of information: *Hill*, at para. 73.

[215] Upon his arrival at the Tempo, Constable Parrish was under the impression that Davis was a victim, not an offender. Davis was described as non-violent by those who had been in contact with him that day. Constable Parrish thought that Davis was mildly paranoid, but not threatening.

[216] I am not satisfied that the risk of Davis attacking Dolph was reasonably foreseeable to the Constables at the time they escorted Davis onto the bus. According to the Constables and lay witnesses, Davis was quiet, polite, well mannered, and articulate. No one saw him as being a threat or a danger. At the time he boarded, the Constables could not have foreseen Davis as being a real risk to the patrons of the bus. This determination was within the range of reasonable choices available to them. In my opinion, the harm that came to the Plaintiffs was too remote to have been contemplated by a reasonable police officer in the circumstances.

Discussion/Analysis as to Liability re: Greyhound & Dolph

Were Greyhound & Dolph Negligent?

[217] The essence of the Plaintiffs' allegations against the Defendant Dolph focus on his decision to allow Davis to board the bus, and subsequent his actions in not responding reasonably when Davis was standing in the stairwell at the front of the bus. While Greyhound is not an insurer of the safety of its passengers, it bears a very high duty of care should injury to any of its passengers occur. Upon proof of an incident, the carrier is called upon to show that it was operating its vehicle with all due, proper and reasonable care and skill. The Plaintiffs detailed a number of specific factors, which I will address.

Failure to Make Reasonable Enquiries

[218] I accept the Defendants' position that Dolph had no choice but to permit Davis to board the bus. Section 21 of the *PVA* states that "no driver shall refuse to carry any person offering himself at any regular stopping and who tenders regular fare to any regular stopping place on the

route of the vehicle." Davis had a valid Greyhound ticket for the bus, which was validated by Groves. I accept that Dolph could rely on the fact that Groves marked the ticket indicating that Groves had no issue with Davis, that the ticket was legitimate, and there was no reason to deny Davis boarding the bus. At the time Davis was boarding the bus, he was not acting in an obnoxious or hostile manner. He was not intoxicated. He was not violent. At the time he boarded the bus, Davis' appearance, demeanor, and actions affirm Dolph's initial assessment of him as a non-violent and non-dangerous individual. Dolph performed his own cursory observation of Davis. According to Dolph, Davis appeared to be quiet and polite. This characterization of Davis is similar to the impression that Davis made on other witnesses who observed him that day.

[219] Further, the O.P.P. advised Dolph that Davis did not pose a risk and was not a problem. He was told by two police officers that Davis was not dangerous. It was reasonable for him to have taken the Constables at their word. Davis did not provide Dolph with a reason to prevent him from getting on the bus.

[220] There is in my view no basis to find that Dolph should have made any further inquiries.

[221] Dolph's observations, combined with the assurances provided by the police and Davis' valid bus ticket, were sufficient pieces of information for Dolph to rely on in permitting Davis to board the bus. On the evidence, his decision was not unreasonable in the circumstances.

Dolph allowed Davis to Cross the White Line

[222] Dolph was operating the bus while Davis was standing in the stairwell ahead of the white line. The Plaintiffs submit this is a breach of s. 22 of the *Public Vehicles Act.* In *Rances* after reviewing previous jurisprudence the Alberta Court of Queen's Bench, at para. 228, stated:

> "A breach of a statute is not determinative of whether a party has failed to meet the applicable standard of care so as to give rise to civil liability. A court may make a finding that a party did not meet the standard of care even in the absence of a statutory breach. However, the statutory formulation of a duty of care may provide a specific and useful standard of reasonable conduct."

[223] Davis' decision to stand in the stairwell was not something that Dolph could physically prevent without relinquishing his control of the bus. To relinquish control of the bus in order to physically prevent Davis from crossing the white line would have been unreasonable in the circumstances. Aside from pulling over the bus, there was nothing Dolph could do to prevent Davis from crossing the white line and standing in the stairwell. Dolph was operating a bus on a dark highway in the middle of winter. He used his driving experience, his training, and his judgment to determine that the best course of action was to leave Davis in the stairwell until the bus reached Upsala. He believed that this was the safest decision he could make in the circumstances. It may have been an error in judgment for Dolph to leave Davis in the stairwell, but his decision was reasonable in the circumstances.

Failure to Pull Bus Over

[224] The Plaintiffs rely on the testimony of Dr. Nassar to establish that it was safe for Dolph to pull the bus over while Davis was in the stairwell. However, Dr. Nassar's evidence only establishes that Dolph had adequate space to pull the bus over; his evidence does not establish that it was safe for Dolph to do so in the circumstances. Dr. Nassar did not attend at the scene of the accident, take measurements, or perform any calculations firsthand. The conditions for a roadside stop were uncertain at best. Groves, Simcock and Humphries all testified to the effect that they would not want to stop on the shoulder because they could not determine where the shoulder ended and the ditch began. It was only a few minutes to Upsala, where a stop was scheduled.

[225] Further, there is evidence from the Plaintiffs that at one point in time Dolph began to slow the bus down because of how Davis was acting. When he did so, Davis immediately advised Dolph to speed up because he thought that people were following the bus and that those individuals intended to harm him. If I were to accept the Plaintiffs' evidence, then we have a situation where Dolph attempted to slow the bus down but was told by Davis not to do so. It is reasonable to assume that attempting to pull the bus over could have escalated Davis further.

[226] For these reasons, Dolph's decision not to perform a roadside stop was within the range of reasonable responses available to him in the circumstances.

Operating the Bus at an Excessive Speed

[227] There is conflicting evidence on this point. The Plaintiffs submit that Dolph was travelling at a minimum of 100 kms/hr. They base this estimate on the evidence provided by some of the passengers, who placed the speed of the bus at between 105-110 kms/hr, and on the testimony of Mr. Lywack, who stated that the bus was travelling at around 110 kms/hr. Their estimate is based on their belief that the accident took place at approximately 6:30 p.m. I note that Dolph's evidence is that he left Ignace between 6:15 and 6:20 p.m. There is a time zone change which, if the Plaintiffs' evidence is correct, put the accident at 7:30 p.m.

[228] There is no evidence that had Dolph been travelling at a reduced speed, he would have been able to regain control of the vehicle and avoid the crash. Further, there is no evidence before the court indicating that excessive speed aggravated the Plaintiffs' injuries. There is no expert report to suggest that had Dolph been travelling at a reduced speed, the Plaintiffs would have experienced less serious injuries. While I may speculate that it would have been easier for Dolph to respond to Davis' action at a slower speed, and that the injuries may have been less severe at a slower speed, without such evidence, it is difficult to determine whether the injuries to the Plaintiffs would have been significantly reduced had the bus been travelling at 90 kms/hr rather than at 110 kms/hr.

Insufficient Training and Information on Passengers with Mental Illness

[229] The Plaintiffs submit that Greyhound did not have sufficient training and information available to drivers with respect to how to deal with mentally ill passengers. However, the Plaintiffs do not indicate what "reasonable training" would consist of.

[230] I accept the Defendants' position that Dolph was properly trained. He had 28 years of experience as a Greyhound bus driver. He testified that he followed all Greyhound protocols, and read all of Greyhound's bulletins and safety memos. Prior to the accident in question, Dolph had an excellent driving record. Throughout his years of service, he underwent "competency checks". He was always found to be a competent bus driver. Greyhound also performed an "annual review" of Dolph, which was used to determine whether he continued to meet the minimum requirements for safe driving. In every year leading up to and including the year of the accident, Dolph met these minimum requirements. In addition to his training, Dolph had years of experience driving in Northern Ontario.

[231] Although the training provided by Greyhound respecting how to recognize and deal with a passenger with mental illness was not as extensive as the Plaintiffs allege it could have been, I am satisfied that the training and testing the company provided for its drivers was sufficient for ensuring the safety of its passengers.

Insufficient Barrier between the Driver and the Passengers

[232] It is unclear what the Plaintiffs have in mind with respect to what constitutes a "sufficient barrier". The Plaintiffs have not provided evidence demonstrating that a barrier between the bus driver and the passengers would have prevented the accident from occurring. They do not set out what such a barrier would look like, how it would function, or how it would prevent a passenger from accessing the driver. For these reasons, I cannot accept the Plaintiffs' submission regarding Greyhound's failure to provide a barrier between the driver and the passengers.

Conclusion as to Liability

[233] In *Resurfice Corp.*, the Supreme Court of Canada cited *Jordan House Ltd. v. Merow*, [1974] S.C.R. 239, for the principle that "Liability for negligence requires breach of a duty of care arising from a reasonably foreseeable risk of harm to one person, created by the act or omission of another." In my opinion, the Plaintiffs have failed to establish that, on a balance of probabilities, an officer exercising the care, skill, and expertise of a police officer, being in the same position as Constables Singleton and Parrish and knowing what they knew or ought reasonably to have known, would have prevented Davis from boarding the bus. They have also failed to establish that, on a balance of probabilities, the O.P.P. did not provide reasonable training to Constables Singleton and Parrish.

[234] They have failed to establish, on a balance of probabilities, that a bus driver exercising the care, skill, and expertise of a public carrier, being in the same position as Dolph and knowing

what he knew or ought reasonably to have known, would have prevented Davis from boarding the bus. Further, they have failed to demonstrate that, on a balance of probabilities, Dolph did not use all due, proper, and reasonable care and skill in the circumstances with respect to his operation of the vehicle. Finally, they have failed to establish that, on a balance of probabilities, Greyhound did not provide reasonable training to Dolph.

[235] Because the Plaintiffs have failed to demonstrate that the Defendants breached their respective standards of care, it is unnecessary to determine whether the Plaintiffs have established causation.

[236] The Plaintiffs' claims of liability are therefore dismissed.

Legal Principles – Damages

[237] If I had determined there to be liability, I would have considered the damages on the following basis. The calculation of damages is not an exact science. In *Wood v. Grand Valley Railway Company*, (1914) 51 S.C.R. 283, at 289, Davies J. summarized the difficult task the court must undertake when estimating damages. In his review of the trial judge's findings with respect to damages, Davies J. made the following observation:

> It was clearly impossible under the facts of that case to estimate with anything approaching to mathematical accuracy the damages sustained by the plaintiffs, but it seems to me to be clearly laid down and there by the learned judges that such an impossibility cannot "relieve the wrongdoer of the necessity of paying damages for his breach of contract" and that on the other hand the tribunal to estimate them whether jury or judge must under such circumstances do "the best it can" and its conclusion will not be set aside even if the amount of the verdict is a matter of guesswork.

[238] The principle articulated by Davies J. has been followed in subsequent cases: see *Smith Bros. Excavating Windsor Ltd. v. Camion Equipment & Leasing Inc. (Trustee of)*, [1994] O.J. No. 1380, 21 C.C.L.T. (2d) 113 (C. J. (Gen. Div.)), at para. 247; *Penvidic Contracting Co. v. International Nickel Co. of Canada*, [1976] 1 S.C.R. 267; *Martin v. Goldfarb*, [1998] O.J. No. 3403, 41 O.R. (3d) 161 (C.A.), at paras. 70-71; *Farm Boy Inc. v. Mobius Corp.*: 2011 ONSC 2877, [2011] O.J. No. 2671, at paras. 151-154.

[239] In *Athey v. Leonati*, [1996] 3 S.C.R. 458, 140 D.L.R. (4th) 235, at 27-28:

> "Hypothetical events (such as how the plaintiff's life would have proceeded without the tortious injury) or future events need not be proven on a balance of probabilities. Instead, they are simply given weight according to their relative likelihood. For example, if there is a 30 per cent change that the plaintiff's injuries will worsen, then the damage award may be increased to 30 per cent of the anticipated extra damages to reflect that risk. A future or hypothetical possibility will be taken into consideration as long as it is a real and substantial possibility and not mere speculation."

[240] Although there will always be some element of guesswork when calculating a damages award, there are certain factors that the courts have recognized as instructive in assessing damages. These factors are specific to the type of damages being claimed. The Plaintiffs in this case seek compensation under four different categories of damages: general damages, damages for loss of housekeeping capacity, damages for past and future loss of income earning capacity, and special damages.

[241] In assessing the seriousness of any injuries and impairments claimed, the whole of the evidence must be looked at objectively. This includes the nature of the injuries, the length of the recovery period, and the possibility of any ongoing medical problems related to the injuries, for example, arthritis. Other objective factors to be considered are how much of an impact there has been on a Plaintiff's family function, work function, social enjoyment and capacity for household chores. Additionally, the extent of medical and rehabilitation treatment must be considered.

[242] I considered the Plaintiff's efforts to mitigate and recover from his injuries. In *Lahay v. Henderson*, [2005] O.J. No. d1705, [2005] O.T.C. 313, Wood J., referencing *Janiak v. Ippolito*, [1985] 1 S.C.R. 146, stated at para. 130:

> "A plaintiff cannot recover damages which he could have avoided by taking reasonable steps. In taking these steps he is only required to act like a reasonable and prudent person. However, the test is an objective one based on the court's assessment of what a reasonable person would do in the circumstances. The onus is on a Defendant who asserts that a plaintiff has failed to mitigate his damages".

[243] I considered whether the Plaintiffs had followed a treatment program prescribed by a health care professional. However, I was conscious of the fact that certain Plaintiffs could not mitigate their injuries to the same degree as others due to their personal circumstances.

[244] I considered the importance of the injury to the individual Plaintiff. For example, as then Chief Justice Dickson once remarked, a broken finger is a greater loss to a pianist than it is to someone who does not play the piano at all. I was conscious of each Plaintiff's injuries relative to their pre-accident employment and activities. I am aware that the impact the injury has had on the Plaintiff's life is directly connected to the Plaintiff's ability to pursue the work, play, and general lifestyle that he or she engaged in prior to the accident. I looked at how each Plaintiff's injuries have impacted upon their enjoyment and quality of life. Here, I considered the physical, social and mental impact that the Plaintiffs' injuries have had upon their lives.

[245] I attempted to achieve a level of consistency when I looked at the upper and lower range for damage awards in the same class of case. Similar cases have provided me with the parameters within which the award for general damages ought to fall.

Loss of Housekeeping Capacity

[246] I agree with the Plaintiffs' position that damages for loss of housekeeping capacity are compensable if, as a result of their injuries, a person loses the ability to carry out certain household functions and/or takes longer to perform those functions. When assessing damages for loss of housekeeping capacity, the Plaintiffs must prove that there is a real and substantial risk that he/she has lost the ability to carry out the household functions that he or she performed prior to the accident, or whether the Plaintiff took longer to complete the household functions that he or she performed prior to the accident. I looked to see if there was any objective evidence that there will be a cost to that beyond the Plaintiffs' subjective testimony. As noted in *Menhinick v. Lobesz*, 2008 CarswellBC 2012, 2008 BCSC 1285, para. 55, there must be an evidentiary base to found such an award:

> "The decisions in *McTavish v. MacGillivray*, 2000 BCCA 164, [2000] 5 W.W.R. 554, 74 B.C.L.R. (3d) 281 (B.C.C.A.) and *Deglow v. Uffleman*, 2001 BCCA 652, 96 B.C.L.R. (3d) 130 (B.C.C.A.) are authority for awards for loss of past and future housekeeping capacity assuming that there is an evidentiary base to found such an award. The plaintiff must establish a real and substantial possibility that she will continue in the future to be unable to perform all of her usual and necessary household work, and that the work she will not be able to do will require her to pay someone else to do it, or will require others to do it for her gratuitously."

[247] As R. MacKinnon J., noted in *Watts v. Donovan* 2009 CarswellOnt 3051:

> "It cannot, however, be assessed with absolute certainty and mathematical precision. Rather, it requires a court to predict the future to some extent – and to use its best ability to do so."

Past and Future Loss of Income Earning Capacity

[248] The proof of future economic loss is not on the balance of probabilities, but rather the standard of proof under this heading of damages is substantial possibility. In *Schrump v. Koot* (1977), 18 O.R. (2d) 337 (C.A.), the Ontario Court of Appeal stated:

> "substantial possibilities based on such expert or cogent evidence must be considered in the assessment of damages for personal injuries and civil litigation. This principle applies regardless of the percentage of possibility as long as it is a substantial one, and regardless of whether the possibility is favourable or unfavourable. Thus, future contingencies which are less than probable are regarded as factors to be considered, provided they are shown to be substantial and not speculative."

[249] In *Lazare v. Harver*, 2008 ONCA 171 (CanLII), the Court re-stated the principle with particular clarity:

> "In her charge regarding loss of future income, the trial judge explained correctly and repeatedly that the appellant need only establish that her loss was a real and substantial

> possibility. She emphasized that the appellant was not required to establish this loss on as balance of probabilities, which is of course a different and higher standard. In particular, the trial judge gave the following instruction:
>
> The onus is not on the plaintiff to prove on the balance of probabilities that her future earning capacity will be lost or diminished. The onus is a lower one. [The appellant] need only satisfy you on the evidence that there is a reasonable and substantial risk of loss of income in the future to be entitled to damages under this heading."

[250] In assessing damages arising from past and future loss of income earning capacity, the whole of the evidence must be considered. I considered the career ambitions of the Plaintiff, the reasonableness of those ambitions, and the effect that the bus crash related injuries has had upon the Plaintiff's ability to achieve his or her career goals. I considered what the Plaintiff had demonstrated to attain his or her desired occupation prior to the accident, and assessed whether or not it was likely that the Plaintiff would have achieved his or her career objectives had the accident not occurred. I also looked at whether there were opportunities for career advancement prior to the accident that the Plaintiff did not take advantage of.

[251] Awards for loss of earning capacity must be ultimately assessed in terms of their fairness and reasonableness. The task of the court is to assess damages, not to calculate them according to some mathematical formula. Once an impairment of a Plaintiff's earning capacity as a capital asset has been established, that impairment must be valued. A Plaintiff is entitled to compensation for loss of earning capacity to recognize the likelihood that there may indeed be positions in the future which the Plaintiffs might otherwise have had an opportunity to obtain but which will not be feasible for him/her in light of the continuing symptoms from their injuries. As with any type of damages, claims must be proven as more than speculative.

[252] For students, where there are no actual pre-accident earnings, the court must examine the potential occupational choices of the injured individual and their earning levels for each of those choices to determine pre-accident income potential. Delay caused by the injury in obtaining qualifications or employment income are compensable.

Special Damages

[253] With respect to my assessment of special damages, I considered the out of pocket expenses of the Plaintiff, and whether or not those damages were reasonably related to the injuries he or she sustained in the accident.

The MPIC Claims

[254] With respect to the subrogated claims for Manitoba Public Insurance, I accept the Defendants' argument that based on s. 267.8(17) and the decisions in *Wawanesa Mutual Insurance Co. v. Ontario Provincial Police Force Commissioner* (2000), 54 O.R. (3d) 112 (Div. Ct.); *Matt (Litigation Guardian of) v. Barber* (2002), 221 O.A.C. 34 (C.A.) and *Landry v. Roy* (2001), 55 O.R. (3d) 605 (Sup. Ct. J.), subrogation and this aspect of any of the claims is disallowed.

The Family Law Claims

[255] With respect to *Family Law Act* damages, a plaintiff is entitled to fair compensation for any demonstrated diminution in quantity and quality of the guidance, care, and companionship of his/her spouse.

Discussion / Analysis – Damages

Evelyn Shepherd - Damages

[256] Evelyn Shepherd was 70 years old on the date of the accident in 2000, and living in Dryden, Ontario. She had been retired since 1989 and her source of income was Canada Pension Plan and Old Age Security. Mrs. Shepherd stated that some 5 years prior to the accident she had experienced a back problem which had cleared up and she had had no problem since that time. Prior to the accident, she states that nothing prevented her from doing her normal day-to-day activities. She lived in her own home and did all her own housework and regular daily cleaning. She also did her own Fall and Spring cleanup. She gardened and cut her own lawn. She tried to walk every morning and indicated that she bowled every week. She was involved socially in a local women's institute and volunteered extensively doing church lunches.

[257] In anticipation of the accident, she ducked behind her seat and thinks she was knocked out. She noted that her head was bleeding above the left eye and that she had a sore ankle. She was helped up the hill at the side of the road over the snow bank and got into a vehicle which she understood belonged to a nurse. She stated that she "hurt everywhere." She then moved to another van and was taken to the Upsala Community Centre Clinic. At the clinic her forehead was bandaged by a nurse. Her face was bruised and bleeding and her ankle and head were sore.

[258] She was subsequently taken to Thunder Bay McKellar General Hospital by air ambulance. She was admitted to the hospital and had x-rays taken of her head and ankle. She received six stitches to her head and forehead, three stitches to her left thigh and had a cast placed on her ankle the next morning for a small avulsion fracture. She spent one night in the hospital and subsequently was released to her daughter's home in Thunder Bay. She stated that she was originally on crutches.

[259] Several days following the accident she returned to Dryden by car. For the first few weeks following the accident she required help with her grocery shopping as she was in a cast and could not do any activities. One week after she arrived back in Dryden the stitches were taken out and the cast was removed five to six weeks later. She stated that after the cast was off she did not require crutches, had no pain and she was able to walk around again carefully for a period of some three to four months. Her knee originally started hurting but that resolved over a period of approximately one year. At the time of trial she stated that her ankle aches when tired but that "it is pretty good now." Her condition has been unchanged since 2004. She had headaches after the accident for several months, but has had no headaches of that type since.

[260] Following the accident she attended physiotherapy for a period of six weeks which relieved the pain in both her ankle and her knee. She testified that in the first six months after the

accident her activities were restricted somewhat. She now takes regular walks, although she walks a shorter distance than she was able to previous to the accident. She returned to acquafit four months following the accident and six months after the accident she was able to engage in acquafit in the same fashion as previously. She was able to engage in her summer yard work that summer, planted her own garden and cut her own grass. She describes that for two or three months following the accident she had poor sleeping patterns. She acknowledged that as of March 14, 2001, she had returned to all normal activities.

[261] Dr. Karen Mazurski testified by video from Dryden. Evelyn Shepherd has been her patient since 1984. Her evidence was that in the three years prior to December of 2000 she had seen Mrs. Shepherd mainly for her annual physicals and some general problems. Mrs. Shepherd had no muscular skeletal problems, no physical limitations and was generally in good health prior to December 23, 2000.

[262] Dr. Mazurski's evidence is that she saw Ms. Shepherd on January 2, 2001, to remove the sutures. Ms. Shepherd told her at that time that she was "coping well". On January 19, 2001, she reviewed Mrs. Shepherd's injuries with her. At that time Ms. Shepherd stated that her ankle was pain free and that she was in a walking cast. She still had some soreness in her sacral area and bruising with a small laceration over her left eye, which had healed.

[263] On January 24, 2001, the cast was removed. The ankle seemed stiff but not swollen and Dr. Mazurski referred her to physiotherapy for mobilization. Her prognosis at that time was good and she stated that there did not seem to be any serious injury.

[264] Dr. Mazurski saw her on March 6, 2001, at which time the cast had been off for six weeks. Ms. Shepherd was doing well with her physiotherapy, her left knee was somewhat sore since the cast had been removed, and she had some tenderness along a joint line in her leg with a 5% loss of extension. The ligaments seemed stable. She was pain free in her ankle. Dr. Mazurski queried whether the knee pain was possibly accident related as Mrs. Shepherd had had no previous complaint with respect to her knee. She queried whether there had been a meniscus tear and subsequently referred her to Dr. Remus.

[265] The evidence of Dr. Remus, orthopaedic surgeon who initially treated her on December 27, 2000, noted that the accident caused an avulsion fracture to her left ankle and a cruciate ligament tear in her left knee. He anticipated that she would make a satisfactory recovery and would achieve full range of motion.

[266] Dr. Remus saw her again in September at which time he noted her recovery to have been satisfactory with respect to the knee and the ankle. She had a full range of motion and ligaments were intact and had no obvious restrictions and no surgery was indicated. In February 14, 2002, he noted that there was perhaps a degenerative tear and ordered an MRI which ultimately suggested a degeneration in the meniscus. She had a full range of motion and no surgery was needed. On October 22, 2002, he saw her and noted that she had a full range of motion with no instability. In April of 2003, he noted that she had knee complaints and stated that that could be attributed to normal wear and tear. In September 2003, he noted no significant abnormalities and that she didn't feel she needed injections. In October 2004 he noted that she was doing well. An

x-ray in May 2005 gave an indication that she may develop early arthritic changes. However an x-ray in April 2007 noted no arthritic changes and Dr. Remus acknowledged in cross-examination that he made no diagnosis of post-traumatic arthritis. Dr. Remus stated that she is left with no obvious restrictions, is not a candidate for surgery, and that there is no evidence of any arthritic changes attributable to the accident.

[267] At the time of trial she stated that she had some ongoing aching of her ankle when tired but otherwise the ankle was "pretty good".

[268] With respect to the injury to her knee, her evidence is that approximately one year following the accident her knee got worse and she experienced a very sharp pain when getting out of a car. She stated that she "thought something tore". She stated that the pain she originally experienced in her knee from the accident resolved over a period of one year. There is no evidence that relates this "tear" to the accident.

[269] In assessing general damages for Mrs. Shepherd I have taken into consideration that she was 70 years of age, spent one night in hospital, had stitches to her head and leg, and also had headaches for a period of several months. She took no prescription medications but did take Tylenol. Mrs. Shepherd was active both doing interior and exterior work in her own home and stated that in the summer following the accident she did her own summer yard work.

[270] With respect to any claim for damages for loss of housekeeping, the evidence would indicate that she could do all of her indoor and outdoor activities within a period of six months. Prior to that there is no indication that she could not carry out her housekeeping functions but that it may have taken more time. She was, however, in a cast for four weeks and on crutches for six. I accept that made housekeeping more difficult until mid-March when she acknowledged she had returned to all normal activities.

[271] I award damages for loss of housekeeping capacity, in the amount of $3,000.00. I award $45,000.00 for general damages.

[272] With respect to special damages counsel have agreed that special damages for Mrs. Shepherd are in the amount of $250.00.

Anthony Clowes – Damages

[273] Anthony Clowes was age 37 at the time of the accident. He had been in a relationship with Tanya Clowes since 1992 and they married in 1999. He described theirs as a "beautiful relationship" and that they had no separations prior to 2000. He acknowledged in cross-examination that there had been a previous three month separation. They were living in a rented house. Mr. Clowes testified that he did all the work in relation to the lawn, the garage, eaves troughs, snow shoveling, and some interior cleaning; that the parties shared the cooking 50/50 and that his pre-accident health was excellent. He stated that he had had no previous shoulder problems, no elbow problems and no hip problems. Prior to the accident he played a little hockey, basketball, family baseball, exercised and biked. In cross-examination with respect to his pre-accident health, he acknowledged that in November of 1998 he was at the doctor for soreness

in his middle back; in March of 1999 for a strained lower back and again in October 1999 for a strained lower back. Furthermore, nursing records of his employer reveal a history from 1997 on of frequent chronic headaches, right shoulder pain, and long standing and very frequent attendances regarding back pain, back strains and back injuries.

[274] He was travelling with his wife and daughters. Mr. Clowes testified that when he saw Davis grab the wheel of the bus, he grabbed the daughter who was seated with him. He remembers the back of his head hitting something and his daughter's head hitting the side of his head. He testified that his wife Tanya was shaken up and that his daughters were crying with Shawna's face bleeding. They were transported by the other bus to the Upsala Community Centre and ultimately to the Thunder Bay Port Arthur General Hospital by another Greyhound bus which was travelling a distance behind. With respect to his injuries, he described the initial injuries as a cut on the back of his head, a strained neck as well as bruising of the right shoulder and left upper back. He also described lower left back pain, a sore elbow, pain and bruising in his hips and his left leg which was cut and suffered bruising. X-rays were taken of his left elbow and both hips. His wife Tanya and both daughters were treated. They stayed at the hospital a few hours and ultimately went to his in-laws. He acknowledged in cross-examination that after the accident he left the hospital against medical advice and agrees that there is no record of him ever having returned to the hospital. The family returned to Winnipeg four days after the accident

[275] He returned to work January 15, 2001, to light duty. Prior to the accident he was a welder/fitter working in the chassis department of New Flyer Industries. He was moved to a different location for a period of eight months but remained at the same pay. In the first six months post-accident he described having intermittent pain on a scale of between 2 to 10. His social activities were limited as he states he "wasn't up to it." He testified that he was then unable to work any overtime as he could not work any more than eight hours a day as a result of pain in his back. Muscle relaxants were prescribed and he states that he received no relief in the first six months. He stopped taking medications which had been prescribed because he was not obtaining any relief.

[276] For three years prior to the accident he did shift work at Flyer Industries working two weeks of days followed by two weeks of evenings. His work, he states, was physically demanding prior to 2000. It involved lifting parts, grinding, and lifting parts of up to 40 lbs. The documentation filed indicates that in 1997 he earned $15.05 per hour and in 2000 $18.26. He has been in the union at Flyer Industries since he began work there. He testified that previous to the accident he worked as much overtime as he wanted and that he never declined an opportunity to work overtime. The evidence filed notes that his 1997 tax year income was $32,393.00; in 1998 $43,830.00; and in 1999 $37,417.00. He described that he had not taken any time off for illness or injury prior to the accident although he had one 10-day layoff in the three years preceding the accident of December 2000.

[277] Eight months after the accident Mr. Clowes went to a different position in Flyer when it became available. He again states that he had no overtime in the latter part of 2001 although he did not miss any work.

[278] Prior to the accident his plans were to retire at age 65. His evidence is that as of December 2000 he would have applied for a lead hand position. He had not applied as a lead hand before the accident as he did not want the responsibility. He believes that a lead hand then made $1.00 more per hour. He states that he has not applied for a position as a lead hand since the accident as it would place too much responsibility on him. He agrees that the lead hand position is not as physically demanding as the position he is currently occupying. A number of job postings were reviewed with him and he states that he would have applied for some but did not believe that he could do so as a result of his injuries in the accident. Lead hands currently make $2.00 per hour more including a shift premium.

[279] Mr. Russell Rudkevich is a shop steward for Flyer Industries in Winnipeg. He has known Anthony Clowes for a period of 13 years and has worked closely with him for the last five to six years. He testified that overtime is always available which ebbs and flows depending upon the orders. His evidence is that one could normally expect 1 ½ to 4 hours of overtime per week at double time. He testified that Mr. Clowes has not worked much overtime. He stated that if Mr. Clowes were to become a lead hand, the job would be less physical. He stated that Mr. Clowes went on light duty in approximately 2006 and that he is now back to regular duty. In cross-examination he agreed that in order to be appointed a lead hand one had to apply. He further indicated that a regular work week was 40 hours. Between 40 to 48 hours work was paid at the rate of time and a half and after 48 hours, at double time.

[280] Mr. Clowes stated that by November of 2001 he was experiencing back aches but went through periods of time of up to a month with no discomfort. He describes the pain as being mid-back. He also testified that he was experiencing depression. He testified that this accident has had a significant detrimental effect on his marriage, and the family suffered financially because he was not able to work overtime. As a result of not working overtime his wife began to call him lazy and difficulties ensued. The parties eventually separated in November 2001 which he attributes to them fighting and having money issues. On separation the girls went to live with his wife and he states that the relationship between the two of them continued to deteriorate. He began to see Dr. Bergen for depression and received medication for same in January of 2002. In cross-examination Mr. Clowes admitted that there was no mention in any of the doctors' reports of stress, depression or anxiety until November 2001.

[281] In June 2006 he suffered a work injury. Flyer Industries had been on strike for 20 days and he was told by the supervisor to do a job which he said he couldn't do as it involved lifting over 100 lbs. He states that when he attempted to do so he felt pain in the middle of his back, that he received an injection and ultimately went to physiotherapy for a period of six months. He was treated by a chiropractor and took Tylenol 3 which had been prescribed. He was placed on light duty work for over one year. Mr. Clowes acknowledged that this was a new injury and that the previous pain which he had experienced in his right leg by now was an annoyance more than anything else. When questioned about seeing Dr. Kesselman of Manitoba Workers Compensation Board about that injury, Mr. Clowes acknowledged that the doctor's report stated that Clowes had not missed work as a result of the bus accident. Mr. Clowes stated that was not true and that he had forgotten to tell the doctor that. Exhibit B Tab 25 references a letter from Dr. Loris Cristante dated may 15, 2007 addressed to Workers Compensation. The letter notes "The

past medical history of the patient is unremarkable." Mr. Clowes states that he did not recall being asked about any previous back injury by Dr. Cristante.

[282] Flyer Industries had a 1 ½ year layoff from January 2002 to June 2003. He states that when the company returned to work there were opportunities to work overtime every day. He states he was unable to do so. He agreed in cross-examination that he had never been told by a doctor not to work overtime. He agreed that it bothered his wife Tanya that he was not working overtime and that she suggested physiotherapy to him but that he did not go. He did not pursue any specialist or physiotherapist.

[283] He described the overall effect of the accident on his life as him now suffering pain, alienation, and that he "can't do what he used to do." He acknowledged that he is currently working a 7 ½ hour day and that his job includes lifting 30 lb. parts. He has to pick up smaller parts and weld them to larger pieces. For most of the day he uses either a welding machine or a grinding machine and either sits or stands. He does the same type of work as other employees.

[284] Dr. Jerry Bergen is a family practitioner. The clinical notes he produced at Exhibit B Tab 4 indicated that Mr. Clowes presented on September 29, 1999 for an injury to his mid-back. On January 8, 2001, Dr. Bergen's notes show Mr. Clowes presenting with "L lower back pain; some strain and injury to lower back; tenderness over left SI and left lumbar muscles." His diagnosis was contusion to the right upper back and left lower back with associated muscle spasm. He prescribed Tylenol and told Mr. Clowes to take a week and a half off work.

[285] On January 17, 2001, Dr. Bergen noted "lower back pain; lower back contusion; ROM back normal." Mr. Clowes reported that "he felt generally O.K. able to move around and do his work, but on light duties." Dr. Bergen noted that the right shoulder area almost had entirely resolved. Dr. Bergen's evidence from reviewing his clinical notes indicates that on January 17, 2001 Mr. Clowes had normal range of motion. On February 19, 2001, Dr. Bergen noted, "doing generally well at work, was now able to do full duties".

[286] On November 26, 2001, Dr. Bergen noted recurrent pain over lower left back and noted that Mr. Clowes complained of depression. Dr. Bergen testified that concern was expressed by Mr. Clowes about his wife's infidelity, and the issue of HIV testing for both was discussed. Mr. Clowes further reported that Ms. Clowes had assaulted him. Mr. Clowes stated that he could go a whole month without discomfort. By November he was experiencing back aches, but went months with no discomfort. He had not pursued seeing a specialist or a physiotherapist. Mr. Clowes acknowledged that he did not mention anything about feeling depressed to Dr. Bergen before November 21st because it was "..not big enough a deal to complain about.." prior to then.

[287] On January 15, 2002, Mr. Clowes reported intermittent panic attacks. Dr. Bergen noted "no identifiable trigger." In March and May of 2002, Dr. Bergen rated Mr. Clowes as showing classic depressive symptoms, and noted the cause was a separation from his wife. In March of 2005, Mr. Clowes reported still having mid back pain in the same area as before. In December 2005 and January 2006, Dr. Bergen again noted stress from depression from separation and financial issues. In March 2006, Mr. Clowes reported continued back pain. A CT scan shows

disc protrusion which was not there at the time of accident. By October 2006, his lower back was still sore and chiropractic and physiotherapy had been of no help

[288] In cross-examination Dr. Bergen indicated that he had never been advised by Mr. Clowes of his work injury in June 2006. He acknowledged that following that date Mr. Clowes' complaints were more aggressive then they had been prior.

[289] Counsel agree that Gail Archer-Heesce was entitled to testify as an expert in occupational therapy. She conducted two days of testing on Mr. Clowes. Ms. Archer-Heesce determined that Mr. Clowes functioned overall at a medium level of work. In cross-examination she acknowledged that he was able to return to work to the level of his previous work demands. She also indicated that if treatment had been offered and not taken that would have been a factor in Mr. Clowes' recovery. She acknowledged that she had never visited his worksite and did not know what his actual work requirements were.

[290] Dr. Michael Stambrook is a clinical psychologist whom counsel agreed was entitled to offer an opinion on Post Traumatic Stress Disorder ("PTSD"). He saw Mr. Clowes twice, the first time four and a half years post-accident. He obtained a history from Mr. Clowes and based his opinion on the information given that Mr. Clowes was travelling with his children when the bus accident occurred; that he witnessed a woman suffering after the accident; and that he had experienced changes in his relationship with his wife and children. He was satisfied that Mr. Clowes had experienced an event that could lead to PTSD. He thought that Mr. Clowes was not clinically depressed but rather his symptoms were more anxiety related. Dr. Stambrook conducted various tests which he testified confirmed his initial clinical diagnosis. His opinion was that Mr. Clowes had PTSD following the accident which continued to the time of the assessment. Mr. Clowes had a permanent change in functioning. Dr. Stambrook acknowledged that in his first report he recommended that Mr. Clowes would benefit from a cognitive behavioral program. Mr. Clowes did not do so.

[291] Dr. Stambrook did a second assessment in April of 2010. At that time he determined that Mr. Clowes had serious PTSD symptoms, aggravated by having to prepare for trial and go through the experience of recalling the accident again. He performed the same three tests as he had previously and came to the same conclusion that Mr. Clowes was suffering from PTSD and that it was permanent. The symptoms he is suffering from will reduce after the trial but he has suffered a life change.

[292] Dr. Stambrook was asked to review a report prepared by Dr. Ross, retained by the Defendants. He disagreed with the opinion of Dr. Ross in that Dr. Ross determined that Mr. Clowes had post-traumatic symptoms - an Adjustment Disorder, marked by anxiety and depressive symptoms - but they did not reach the level of PTSD. Dr. Stambrook had no collateral information other than that obtained from Tanya Clowes, to provide any support for his diagnosis. In cross-examination, Dr. Stambrook acknowledged that Mr. Clowes had refused to provide "collateral information," prior to his evaluation. He confirmed that but for the retrospective information given by Mr. Clowes, he would have agreed with the opinion given by Dr. Ross.

[293] Dr. Stambrook agreed that the first mention of any psychological complaints in Dr. Bergen's began in November 2001 following Mr. Clowes separation from his wife, and after references in Dr. Bergen's notes about Mr. Clowes expressing some concern about marital infidelity on the part of his wife. He agreed that if he had Dr. Bergen's notes in 2005 he would have canvassed further issues about his diagnosis of PTSD. He acknowledged that it was possible his diagnosis would have changed if he had had seen Dr. Bergen's notes prior to his testing in 2005. The difference between his opinion and that of Dr. Ross is the information as to what Mr. Clowes told him he was experiencing in the first three to six months.

[294] In cross-examination on his second report, Dr. Stambrook agreed that Mr. Clowes going into bankruptcy as a result of separation from his wife would have been a psychological stressor. He further acknowledged that Mr. Clowes did not mention his back injury in June 2006 and, if that back pain had caused additional physical problems, that also would have added to his psychological stress. Further he was not aware at the time of preparing his second report that this trial was about to start and that Mr. Clowes would be testifying within two weeks. He agreed that Mr. Clowes would have been dealing with "very significant situational increases."

[295] He further acknowledged that he was aware that Mr. Clowes was assessed by an Occupational Therapist in 2005 and that the therapist had administered a Beck Depression Inventory, which Dr. Stambrook acknowledged was a widely used screening tool for depression. That test suggested that Mr. Clowes was functioning at a normal level of mood in 2005, and that he had depressive symptoms but not a depressive disorder. Dr. Stambrook testified that in coming to his ultimate opinion he used his clinical judgement and the results of the tests he administered. If he had used only the test results, he would have diagnosed Mr. Clowes as having an Adjustment Disorder as Dr. Ross had. He would not say that he has PTSD by just looking at the test results.

[296] In cross-examination Mr. Clowes acknowledged that most of his emotional problems were a result of the marriage breakup.

[297] Dr. Doug Kayler testified on behalf of this Plaintiff. He was acknowledged by defence counsel to be an expert in orthopaedics entitled to provide an opinion with respect to injuries suffered by Mr. Clowes. Dr. Kayler saw Mr. Clowes on March 1, 2005. He did an evaluation and subsequently prepared a report dated March 4, 2005. At that time, Mr. Clowes' major complaints were in relation to the left posterior chest wall and his lower back. Dr. Kayler acknowledged that these were the same complaints as shown in the medical notes of Dr. Bergen which he had reviewed. At that time it was considered that there was nothing significant from a medical prospective and that Mr. Clowes' injuries had plateaued two years post-accident. Mr. Clowes at that time was using Extra Strength Tylenol, muscle relaxants and anti-inflamatories.

[298] Dr. Kayler prepared a second report dated March 9, 2010. He testified that he notes similar complaints as in the 2005 report and says that no improvement is shown in Mr. Clowes' symptomatology. At that time he indicated that Mr. Clowes had chronic pain because the same symptoms had lasted for a period of longer than six months. The long term prognosis is that Mr. Clowes would continue indefinitely to have pain and limited function. He was able to work although in lighter duties than pre-accident.

[299] He acknowledged in cross-examination that when he examined Mr. Clowes in 2005 there were no orthopaedic abnormalities. When asked to comment on Dr. Bergen's report of 2002 which says that Mr. Clowes "should have complete recovery within two years", Dr. Kayler stated that this would depend on a number of factors, including exercise, physiotherapy and overall fitness. He noted that by his March 2010 report there had not been a lot of active treatment since 2005. The 2010 report references sciatic nerve irritation which Dr. Kayler concludes would be associated with a 2006 work injury suffered by Clowes and was not accident related. Dr. Kayler agreed that in his report he noted "… the bus accident remains a turning point in his life, although the degree of ongoing pain and limitation and the presentation with the marked local tenderness and sensitivity is not accompanied by documented objective abnormalities. He does have some criteria of a chronic pain syndrome."

[300] Dr. Gordon Hunter, called by the defence as an expert, saw Mr. Clowes on September 21, 2005. He ultimately did an orthopaedic examination coupled with a functional ability evaluation and generated a report on September 30, 2005, filed in these proceedings. On examination Dr. Hunter noted that Clowes had full range of motion. He was surprised that Mr. Clowes was still having pain five years post-accident and considered this not to be reasonable in the absence of any fractures. Mr. Clowes also told Dr. Hunter that he had been prescribed anti-depressants in 2002 but that those were related to his separation and not necessarily to the accident. In general conclusion Dr. Hunter indicates that as of September 21, 2005, Mr. Clowes had had no physiotherapy, no chiropractic, and no massage therapy treatment. He noted that Mr. Clowes said that the pain in the region of his left sacroiliac, and lower level of his back, was worsening. Mr. Clowes told Dr. Hunter that he attributed this pain to stress at work.

[301] Dr. Kayler was permitted to comment on Dr. Hunter's report. He agreed with Dr. Hunter's conclusion that Mr. Clowes could not work at his pre-accident job which required heavy lifting but should be able to continue at modified duties.

[302] In assessing damages for Anthony Clowes I begin by noting that he was physically active and that his pre-accident health was excellent. He did confirm that in 1998 he had been at the doctor for soreness in his middle back, and in March and October of 1999 again was treated for a strained lower back. With respect to his injuries he suffered a cut on the back of his head, strained neck, and bruising of the right shoulder and left upper back. He also described left back pain, a sore elbow and pain and bruising in his hips and left leg. X-rays were taken which revealed no fractures.

[303] He returned to work approximately two weeks after the accident but was limited to light duty. He was moved to a different location but at the same rate of pay. His evidence is that he was then unable to work any overtime as a result of the pain in his back. Notes in the clinical records of Dr. Bergen indicate that by January 17, 2001, he had full normal range of motion and that by February he could function at work. By November he was experiencing some back aches but would go months with no discomfort.

[304] By March 2002 Dr. Bergen describes him as having episodic but left lower back discomfort and that he continued to work at regular full duties. By May of 2002 Dr. Bergen noted that he "feels generally well, no specific worries/concerns; has occasional back aches …

range of motion normal." In the years from 2002 to 2005 records do not indicate that he was on any prescription medication and had intermittent but recurrent back pain.

[305] The Plaintiff relies upon his position that the bus accident so affected his personal life that it caused a separation between he and his wife. He states that he suffered a period of depression and anxiety as a result of financial stress because he could not work overtime. Dr. Bergen's notes indicate that Mr. Clowes first raised any issue of depression in November of 2001. This occurred after a bankruptcy, and after there was evidence of family issues between Mr. & Mrs. Clowes. I am satisfied on the evidence that there was concern expressed to Dr. Bergen about infidelity on the part of one or the other. I draw that inference from Dr. Bergen's notes that Mr. Clowes requested an HIV test. I do not accept Mr. Clowes' evidence that this suspected infidelity was not part of the breakup, particularly in view of the fact that the evidence also indicates an assault by Mrs. Clowes on Mr. Clowes.

[306] The only evidence before me with respect to Mr. Clowes' inability to work overtime is his subjective evidence. I balance that against his indication that during the period of time where he says he was unable to work overtime, Mrs. Clowes was regularly urging him to do so. I find it somewhat incongruous for her to be urging him to return to work, calling him lazy when he stated then he could not.

[307] The evidence of Dr. Kayler and Dr. Hunter both indicate that Mr. Clowes suffered a chest wall and thoroculumbar spine contusion and that the long term prognosis is that he would continue to have symptoms without progression. A Functional Capacity Evaluation concluded that while Mr. Clowes would have difficulty with forward flexion when he was required to lift weight, and from pushing, he did meet the criteria for medium level work.

[308] A significant aspect of Mr. Clowes' claim is that he suffered psychological injuries in the crash. Dr. Stambrook notes symptoms of PTSD in the first three to six months after the crash. He did, however, agree with Dr. Ross that if he had had collateral information available to him that he may have determined that Mr. Clowes had an anxiety disorder but not PTSD. Dr. Stambrook agreed that his diagnosis was based solely on what Mr. Clowes told him he had been experiencing in the first three to six months after the crash. It was not indicated to Dr. Stambrook that Mr. Clowes had gone through a bankruptcy or that he had been experiencing stress within his marriage. I find that the evidence does not support on a balance of probabilities that Mr. Clowes suffered anything beyond an anxiety disorder.

[309] Dawne Marie Macleod was called as an expert to express an opinion on Anthony's past wage loss and loss of earning capacity. She was asked to quantify the amount of damages for the above based on assumptions of Mr. Clowes' loss of overtime pay and loss of the Lead Hand position. She ultimately concluded that Anthony's past wage loss is $32,491.00 for the loss of his ability to work overtime prior to trial, and his pre-trial loss as a result of not being able to obtain a Lead Hand position to be $39,908.00. She calculated Anthony's future losses to be $147,413.00, with a retirement age of 65 and $132,017.00 with a retirement age of 62. Out of the aforementioned past losses $87,309.00 can be attributed to Anthony's inability to work overtime to age 62 and $97,492.00 can be attributed to Anthony's inability to work overtime to age 65.

[310] With respect to a lost wage claim, Ms. MacLeod was asked to quantify the amount of damages based on Mr. Clowes' loss of overtime pay and loss of a lead hand position. With respect to any loss of wages, I considered Dr. Bergen's notes that by February 2001 Mr. Clowes could function at work and by May 2002 his pain was episodic but minimal and that he continued to work at regular, full time duties. Although Mr. Clowes was working at lighter duties, there is no evidence before me to suggest that he incurred any loss of wages as a result of this accident.

[311] The evidence given by Mr. Clowes is that he would have applied, and could have obtained, a lead hand position. I am not satisfied that the evidence supports such an assumption. It is clear that he had considered applying for same earlier and had determined not to as he did not want the responsibility of that position. Tanya Clowes testified to the same effect. The evidence of Mr. Rudkevich, while it demonstrates that lead hand positions may have been available, does not assist in determining that Mr. Clowes would have obtained same if he in fact had applied. He did not apply.

[312] I find that there is insufficient evidence to establish a real and substantial risk of loss of income.

[313] As noted previously I do not allow the subrogated claim on behalf of Manitoba Public Insurance.

[314] There is insufficient evidence to support a claim for loss of housekeeping.

[315] I accept the fact that the accident caused some additional difficulties between Mr. & Mrs. Clowes but was not causative of the separation although it may have contributed to it. I award *Family Law Act* damages in the amount of $10,000.00.

[316] I would assess general damages for Mr. Clowes in the amount of $55,000.00.

Tanya Clowes - Damages

[317] Tanya Clowes was age 30 at the time of the accident. She had a Grade 11 high school education and at the time of the crash worked at Phillips & Tembro Industries as a cord assembler. She says the job was physically demanding but there was room for her to advance in the company.

[318] Prior to the crash she testified that she enjoyed ice skating, bowling and roller skating with her children. The family attended church together and enjoyed taking family vacations, often taking the Greyhound bus from Winnipeg to Thunder Bay. She was responsible for home maintenance activities inside the home and maintained a garden outside. In the five years prior to the crash she did not have any significant health issues. She testified that they had a good family relationship prior to the crash and enjoyed recreational activities together as a family. She further indicated that she and Anthony had had discussions prior to the crash about him becoming a lead hand at his place of employment, however, he decided not to pursue that avenue because of family commitments.

[319] She testified how following the accident she saw both of her daughters lying on the floor of the bus, one with blood on her. She herself was bleeding from close to her left eye, her face was painful and her back was hurting. She was transported to the Upsala Community Center on the second bus. She stated that at that time her girls seemed to be in shock. She was taken to McKellar Hospital where she was treated by Dr. Affleck. She complained of a sore face, back and leg. X-rays of her face and back were taken with no abnormalities detected. She was prescribed Tylenol 3 and when released from the hospital went to her parents' home in Thunder Bay.

[320] On return to Winnipeg she saw Dr. Bergen on January 8 for soreness in her face, back and leg. Dr. Bergen recommended no therapy either for her or her daughters and indicated to her that time would be the healer. She attended again on Dr. Bergen on February 14, 2001, with the same complaints as previously. He prescribed Tylenol 3. On April 25, 2001, she attended again indicating that she was still in pain and was frustrated because the Tylenol was not working.

[321] She stated that during this period of time following the crash she developed sleeping difficulties as a result of having to move during the night to ease her lower back pain, which she states was caused by the accident. She also claimed to suffer from depression and anxiety related to the crash. She has been left with scars around her left eye and on her face that continue to bother her.

[322] After the accident she states that she took between four to six weeks off work, however, a letter from her employer filed as an exhibit states that she returned to work on January 15. She was ultimately laid off in 2002 as part of a factory wide lay off. She was later called back to work but decided she could not meet the physical demands of the job. She currently works as a salesperson where her tasks include calling potential customers for the circulation of a newspaper. She says that since the crash she has a reduced stamina and level of energy and is reluctant to do any physical activity because she may suffer painful side effects.

[323] At the time of trial she stated that she continued to have pain in her right leg which was primarily triggered by stair climbing. She also states she has ongoing back pain and in 2007 she saw Dr. Holder for that pain. He prescribed a stronger prescription of Tylenol 3. At trial she testified that on a good day her back pain is 6 on a scale of 10 and on a bad day is 10 out of 10.

[324] Dr. Bergen's notes of October 3, 2001, indicate that there was not a great deal of improvement in her condition. She was still complaining of pain near her left eye and in the back. Dr. Bergen's note on that date states "back pain has largely decreased". She stated that she did not see Dr. Bergen after that for these injuries as they had improved and plateaued.

[325] As noted in the evidence of Mr. Clowes, the couple separated in November of 2001. Mrs. Clowes blames the bus crash for the breakup in her marriage. She states that within two to three months post-accident the couple was feeling a financial strain. She was pressuring Mr. Clowes to work overtime. She ultimately stated that by November of 2001 Mr. Clowes was "not the same person" as he was before the accident and the tension between the parties resulted in separation.

[326] She acknowledged that she began living with Mr. Clowes in 1992 and that the parties then separated for a time in 1996. She states that the reason for separation post-accident had nothing to do with the financial strain the parties were experiencing. She did acknowledge that there was an incident approximately one month before separation where she physically assaulted Mr. Clowes.

[327] Mrs. Clowes does not claim any loss of income as a result of the accident but does claim a loss of employment enjoyment because the jobs she has had to take subsequent to the accident in order to accommodate her physical limitations are less interesting and challenging.

[328] Dr. Gordon Hunter testified that he did an examination of Miss Clowes on November 23, 2005. From the information she gave him, she stated she was able to do all household chores, inside and outside. She described that a lump on her eye bothered her, however, Dr. Hunter did not see that. He stated that in this examination Ms. Clowes seemed to be concerned only about the cosmetic appearance of her eye. She described having periodic back pain but that it was no more severe than most other people. He determined that she had not sustained a serious permanent disfigurement, and had no serious musculo-skelatal issues.

[329] He stated in cross-examination that a contusion to the lower back usually clears up in a few weeks, but agreed it could take months. He agreed that in review of the medical reports, they contained references to her complaints of some back discomfort in February 2001; right lower back in April 2001, and was complaining of periodic back pain in 2005. He referred also to an October 31, 2001 note that her back pain had largely decreased, but did occasionally cause discomfort.

[330] In assessing damages for Tanya Clowes I have considered that she had no health issues in the five years previous to the accident. She was an active individual who did home maintenance both inside and outside of the home.

[331] She was treated at the hospital with a sore face, back and leg. X-rays noted that there were no abnormalities and she was prescribed Tylenol 3 and released. Her evidence is that she is now left with a scar around her left eye and back pain, which on a good day is 6 on a scale of 10 and on a bad day 10 on a scale of 10. I have difficulty with that description of 10 out of 10, a scale which other witnesses in this trial testified that scale of pain would mean that a person would be bedridden.

[332] I note that throughout the course of her evidence although she had seen Dr. Bergen on a regular basis post-accident, there were several references to his notes regarding her treatment and condition that she either stated were wrong or that she “doesn’t remember” saying that to the doctor. Specifically, she denied telling him that 15 months post-accident she had no physical symptoms. I note that in Dr. Bergen’s note of April 25, 2001, he states that she indicated to him that she was “feeling generally well”. Notes of October 23, 2001, the last of his notes referencing any back pain, state that her back pain had largely decreased but that she was still having some problems. I found many of her answers to be very evasive when cross-examined on parts of Dr. Bergen’s notes which seemed to indicate that her condition was not as severe as she testified to.

Her subjective evidence is difficult to reconcile with the information she was providing to Dr. Bergen.

[333] The most significant aspect of the bus crash relied upon by Ms. Clowes for damages is the breakup of her marriage with her husband Anthony. In considering that issue, I am mindful of the fact that the evidence is that she had a good marriage before the marriage. However, there was a period of separation previously. Her evidence is inconsistent with that of Mr. Clowes, even denying a separation testified to by Mr. Clowes. Ms. Clowes also relies upon significant financial stress, which she says was caused by Mr. Clowes inability to work overtime, and that contributed significantly to the breakup of the marriage. Her evidence, in addition, is that she was laid off from her own employment on January 26, 2001, and not recalled until April 2001. That layoff was not accident related. There is no evidence that any attempts were made for marriage counselling. There is evidence that in the fall of 2001, according to Dr. Bergen's notes, Ms. Clowes struck her husband. Dr. Bergen's evidence also is that Mr. Clowes requested an HIV test which suggests, at minimum, a suspicion of infidelity.

[334] In looking at the evidence I agree with the position of the Defendants that there were a number of factors in play when this marriage broke up. While there may have been some loss of income from Mr. Clowes being unable to work overtime it is also clear that Ms. Clowes had been laid off for a period of some four months post-accident.

[335] The medical evidence would suggest that Ms. Clowes suffered a soft tissue type injury which, based upon the medical evidence of Dr. Bergen, led to her having no physical symptoms 15 months post-accident. I have difficulty in understanding how with that information given to Dr. Bergen she could have been experiencing pain which she describes as being on a good day is 6 on a scale of 10 and on a bad day 10 on a scale of 10. Dr. Hunter testified that in November of 2005 she was able to do all household chores, inside and outside, and described having periodic back pain but this pain was no more severe than most other people.

[336] I further reference Dr. Hunter's evidence that his review of the medical reports suggests that by October 31, 2001, her back pain had largely decreased but did occasionally cause discomfort.

[337] Based on the evidence, I do not accept that the accident was causative of the marital breakup. It may have been factor but cannot be described as the most significant factor leading to the breakup.

[338] I would assess general damages for Ms. Clowes in the amount of $30,000.00. I award a $10,000.00 for *Family Law Act* damages attributable to the accident. I awarded the same amount Anthony Clowes.

Dennis Cromarty - Damages

[339] Dennis Cromarty was 28 years of age at the time of the accident. He had a diploma in electronic engineering and had been working at the Golden Eagle Casino in Kenora since May of 2000 as a systems technician. His job description included cleaning gaming machines, installing

equipment and cameras, and doing some overhead wiring. As he was a First Nations person working on a reserve he was being paid $11.00 per hour for a forty hour week and paid no income tax.

[340] He lived in his own apartment and did all of his home upkeep. Physically he worked out six to seven days a week, played hockey in the winter, softball in the summer, worked outdoors at his camp and played guitar. He also indicated that at the same time he was trying to start his own business repairing electronics. That required him to carry some heavy items and he had no physical limitations prior to the crash. He stated that his long term goals were to work in the electronics field. He stated that he planned to stay with the casino where he had a chance for a management position and, if not, then move onto the electronics field.

[341] He had, however, had a previous back injury at age 18 and had continued problems with his back and with sleep interference.

[342] He testified that just before the crash he braced himself to the seat in front of him, crossed his arms and then felt his body crashing against the luggage rack. He felt intense pain in his right shoulder. He was subsequently transported to Upsala where he was experiencing pain in his shoulder and neck area.

[343] He was taken to Thunder Bay regional hospital where x-rays were done of his shoulder and back. He also had cuts on his legs. His arm was placed in a sling and he was discharged. He refused Tylenol 3. He was treated by Dr. Remus on December 27. Dr. Remus recommended that he continue wearing the sling and to begin physiotherapy in approximately 2 weeks.

[344] Mr. Cromarty stated that a week after the accident his neck was feeling a lot better but that his shoulder was still sore. He continued to wear a shoulder brace until January 24. By January 29 his neck and back pain had diminished and the right shoulder problem remained although not as bad as the pain had been prior. He states that he remained very inactive and used Tylenol 3 sparingly.

[345] He returned to work in Kenora part-time at the end of March, working 2 hours a day every 2 days on light duty. His evidence is that he received 80% of his lost wages and makes a wage loss claim in this matter of $100 every two weeks for a total of $1200. This claim is not disputed by the Defendants. He returned to work full time at the end of April.

[346] When he returned to Kenora after the accident he began physiotherapy on February 12 and continued to the end of April. He stated that, while he suffered discomfort, after physiotherapy sessions, his range of motion improved. His evidence is that he now tries to limit what he does with his right side but has learned to work with his left. Following the accident he indicated that he was generally able to do what he had done before the accident with the exception of any heavy lifting.

[347] In August of 2001 he had a follow up with Dr. Remus and discussed possible surgery on the shoulder, which has not taken place.

[348] In 2003 Mr. Cromarty re-injured his shoulder in a bicycle accident. He stated that by spring of 2003 the shoulder problem occasioned by the accident left him with occasional stiffness, but did not prevent him from working. He stated that but for the bike accident he had the abilities to do his job at the casino. He indicates that he subsequently left that position as a result of band politics, and not as a result of any injuries suffered in the bus crash. He had been doing light work at the casino from the time he returned to work after the bus accident until the bike accident.

[349] He came to Thunder Bay in the summer of 2003 and began physiotherapy on August 15, 2003. To support himself financially he began driving taxi. He then began studies at Lakehead University in September 2005 in the field of computer science. He attends on a part time basis and expects to graduate in 2013.

[350] Following the bus accident he indicates that he is not able to engage in as much physical work in the gym and has difficulty with engaging in the same sports as he did pre-accident. He is also limited in the housework which he could do prior to the accident. After the accident he was left with upper back and right shoulder injuries. He stated that he generally could do all work except some heavy overhead lifting. By spring 2003 he testified that his shoulder problem was occasional stiffness but that it did not prevent him from working.

[351] Exhibits 59 and 60 are reports of Dr. Henry Hamilton dated March 24, 2005 and June 10, 2009. These reports confirm that Mr. Cromarty's situation is unlikely to improve but that he may get some relief if indeed he undergoes surgery at some time in the future. It is possible that he may develop arthritic changes in the joint. In the June 10, 2009 report, Dr. Hamilton states that he also sustained injuries in the scapular region and upper back and that these injuries are a result of the bus crash.

[352] Rob Pasqualino, from Thunder Bay Physiotherapy, did a Functional Capacity Assessment on Mr. Cromarty and found that, at the time of trial, he is functioning at a "medium" level. He was functioning below that level on tasks that required heavy use of his right arm and shoulder. He concluded that Mr. Cromarty could no longer perform the duties and functions of an electrical technician because that job at times required operation at a "heavy" level. He could work in computer engineering, and could also be a surveillance operator.

[353] Dawne-Marie MacLeod, a chartered accountant, testified with respect to his past wage loss and loss of earning capacity. She applied a number of assumptions including the following:

1. had the bus crash not occurred, Mr. Cromarty would have continued to work at the Golden Eagle Casino. She noted that any income that he earned at the casino was tax free because of his First Nation status;

2. assumptions about the value of his benefit package;

3. an assumption that he was unable to perform all of his duties and functions at the casino as a result of the bus crash related injuries;

4. that Golden Eagle Casino lost its license in 2004 and that he would have had to seek alternative employment similar to that which he was performing at the casino;

5. he had been driving off and on as a taxi driver since 2003 and that he had been in school off and on since 2005; and

6. the Defendants were given credit for his income replacement benefits.

[354] Schedules 1 and 2 of her report are at Exhibit 74. Ms. MacLeod calculated his past wage loss to be $93,663.00 and his loss of earning capacity to be $40,510.00. These amounts are based on the expectation that he would return to his pre-accident earning ability by April of 2014.

[355] Ms. MacLeod assumed that if the bus crash had not occurred Mr. Cromarty would have continued to work at the Golden Eagle Casino. In fact, he did so until such time as he decided to leave as a result of what he described as band politics. There is nothing in the evidence that indicates that he left that position as a result of his physical injuries. Her calculations are further based upon an assumption that he was unable to perform all of his duties and functions at the casino as a result of the bus crash related injuries. That assumption is untenable. In fact he did continue to perform all of his duties and functions, although he may have been somewhat restricted. Further, the assumptions are based upon the fact that Mr. Cromarty could have obtained employment as a surveillance operator at a casino in Thunder Bay. However, the evidence also indicated that there was no such position available.

[356] With respect to the future loss of income claim, I have also taken into account that Mr. Cromarty suffers from high blood pressure and from ankylosing spondylitis.

[357] I am not satisfied that the assumptions upon which the loss of income claims were made have been established. I am not satisfied that the evidence discloses on the balance or probabilities that there is a real and substantial possibility that he will suffer any wage loss and I therefore make no award for future loss of income.

[358] Mr. Cromarty lived on his own prior to the accident and subsequent to the accident he was limited in the housework which he could do. I recognize the opinion of Mr. Pasqualino that he can now only work at a medium level and would have difficulty on tasks that require heavy use of his right arm and shoulder. That evidence is confirmed by the evidence of Dr. Hamilton. Recognizing that Mr. Cromarty will have some difficulty in the future carrying out household tasks I award damages in the amount of $10,000.00 for that part of the claim.

[359] With respect to general damages, I award the amount of $60,000.00. Wage loss in the amount of $1,200.00 was not disputed by the Defendants and I award $1,200.00 for that claim.

Michael Finn - Damages

[360] Mr. Finn was 33 years old at the time of the accident and was divorced. He had spent some time in jail before the bus crash as a result of having committed various criminal offences

mainly related to property crimes. He dropped out of school in Grade 10. Prior to the crash he had obtained his welding certificate. He had previously worked as a mechanic, dump truck driver, concrete mixer truck operator, labourer, heavy equipment operator, welder, and oil rig worker. He was an avid stockcar racer and bought his own cars and did his own body and mechanical work on such. He also was engaged in doing ornamental welding. Prior to the crash when he lived on his own he did all of his own maintaining and repairing of the home and the exterior. He did all of his own plumbing, electrical and painting work.

[361] Prior to the accident Mr. Finn had a number of medical conditions, including a heart condition, occasional pain at his knees and back, and infrequent headaches. He had various pains throughout his body for which he was taking over the counter medications.

[362] At the time of the crash he was on his way to Thunder Bay where he says that arrangements had been made for him to obtain a job doing welding and operating heavy equipment. Mr. Finn sustained the following injuries in the collision: a contusion to his head; an injury to his neck and upper back; a cut to his right hand; an injury to his sternum and chest; and a left shoulder abrasion and contusion. He was initially taken to the Thunder Bay Regional Hospital where he was given a chest x-ray and an x-ray to his cervical spine. He returned to the hospital for further medical treatment on December 29 at which time he was still complaining about pain and discomfort in his chest and sternum. His chest pain took about three months to improve and about a year to resolve itself totally. There is no evidence of any medical treatment immediately following the accident and after being examined at the hospital.

[363] In April 2001, he left Thunder Bay for Saskatchewan where he went to work as a Heavy Equipment operator. He stated that he lived on a farm, so he did everything, but that he couldn't do welding because he had to take off his welding hood often because of pain.

[364] His evidence is that by December 2001, his chest pain was gone and his back and neck were improving.

[365] Subsequent to the crash he spent time in jail between 2000 and 2003, he was arrested in December 2001. In jail he complained on numerous occasions about sternum pain, cervical strain and neck pain. He agreed that it was at times to get out of work. An MRI in March of 2003 confirmed that he had herniated discs at the C4-5, C5-6 and C6-7 disc levels.

[366] In December of 2003 he was referred to Dr. Barakett because of ongoing complaints. In the fall of 2004 he was referred to Dr. Adams, an orthopaedic surgeon. Dr. Adams' evidence indicates that Mr. Finn has herniated discs at level C4-5, C5-6 and C6-7, related to the accident. The letter opined that the accident could also cause some muscle and joint strain causing acceleration of degenerative changes and that it was most likely the accident that accentuated these degenerative changes.

[367] Mr. Finn moved to Fort McMurray in 2005, and has not had treatment for his neck since.

[368] At the time of trial his injuries to his back and neck had not resolved. They had improved over the first few years after the bus crash but plateaued, he says, about five or six years later. He

does not take pain medication because he has shown an addiction to same having previously been addicted and he wishes to avoid a reoccurrence of that addiction. He continues to take over the counter medications as needed. He continues to have sleep problems which arose only after the bus accident.

[369] He states that, although he has worked in various laboring type positions when out of jail since the crash, he has a difficult time doing any welding as it is difficult to wear a welding helmet because of the neck pain it causes. At his present job he requires assistance from others to help him clean out his dump truck.

[370] In the accident he suffered an undisplaced fracture in the mid part of the sternum, cuts and bruises, and experienced neck and back pain. The evidence is that the chest pain took three months to improve and a year to resolve. X-rays were taken which were negative.

[371] Post-accident he finds it difficult to do any welding because of the neck pain caused by wearing a welding helmet. He can no longer involve himself in stock car driving which was one of his leisure activities pre-accident. He also states that he is no longer able to maintain either the interior or exterior of his home to the same degree as he could pre-accident.

[372] Mr. Finn did not seek medical treatment subsequent to the accident. He states it was because he was “on the run”. I note, however, that upon his return to Saskatchewan for work in April of 2001 he went to work as a heavy equipment operator. He further testified that he was then living on a farm and did everything except welding. It is difficult for me to consider the degree of his immediate post-accident condition when there are few medical reports. Further, he acknowledges that while in custody his complaints were often in order to benefit him from not having to do work within the institution. He stated that by December 2001, his chest pain was gone, and his back and neck were improving.

[373] Beyond his subjective evidence there is no evidence before me which suggests that there should be an award for any loss of housekeeping capacity.

[374] I would assess Mr. Finn’s general damages at $20,000.00.

Thayne Gilliatt - Damages

[375] Mr. Gilliatt was 30 years old at the time of the bus crash, single and living in his own home. He had a diploma in electrical engineering and was a certified engineer technologist. He was employed with Trans Canada Pipelines as a technician level 3, a physically demanding job that required him to be on his feet 90 % of the time lifting, repairing, moving and replacing various pieces of equipment.

[376] Prior to the accident he participated in skating, hockey, softball, golf, running and biking. He maintained the interior and exterior of his home and did all of his own repairs in addition to maintaining a garden. He carried out all of the exterior work necessary including lawn care and snow removal. He considered himself to be a handyman.

[377] He had a case of longstanding colitis prior to the accident but had no muscular skeletal problems and was otherwise healthy.

[378] Following the accident he was taken to the Thunder Bay Regional Hospital where the records note that he sustained the following injuries in the collision: a contusion to his mid and low back; a cut to his head; a cut to his left hand; and abrasions to his neck and mid-back. In the emergency department at Thunder Bay Regional Hospital he received stitches for a laceration in the back of his head and was diagnosed as having a contusion to his back. An x-ray of his thoracic spine showed mild scoliosis of the upper dorsal spine. The x-ray also revealed scoliosis to the lower dorsal spine. He was discharged from the hospital early in the morning of December 24, 2000. He returned to the hospital several days later because of continuing pain and discomfort in his mid-back. He was advised by the emergency physician to stay off work for some time because of his back injury.

[379] He subsequently returned to Winnipeg in January of 2001 where he was then residing. He attended at his family physician, Dr. Monteiro, in early January of 2001. Dr. Montiero's notes, filed as part of the exhibits, noted that he had sustained an injury to his T5-T8 facet joints and T5-T6 lumbar vertebrae. Mr. Gilliatt was referred to physiotherapy and told to stay off work. The laceration he had received to his head had become infected and he was required to take antibiotics for a period of time.

[380] The notes of Vista Place Physiotherapy note that he began physiotherapy sessions on January 26, 2001. He testified at trial that he went a few times a week for a number of months. However, physiotherapy invoices indicate that he attended only four treatments. He eventually stopped going because he was not getting any relief. He continued to do home exercises for an extended period of time. He returned to see his family doctor on March 30, again complaining about back pan. No recommendations were made in terms of additional medical treatments.

[381] In terms of his medical recovery, his evidence is that his back problem plateaued approximately four months after the bus crash and that he has had constant pain in his mid and low back. The level and discomfort fluctuates according to his level of activity. He returned to work on modified duties on February 5, 2001, and by February 19 he was back to regular duties, however, had problems lifting equipment because of back pain. He made changes to the way he did certain activities and at times was given assistance in lifting and other physical activities that would aggravate his back problem.

[382] He acknowledged in cross-examination, that on November 6, 2001 he completed a Canada Life Mortgages Loan back/neck questionnaire (Exhibit 55) (Tab 3). That questionnaire indicated that he had pain or discomfort in his back/neck several times between December 23, 2000 and February 20, 2001. The longest duration of discomfort was 2 minutes. He stated that he had been free of back and neck pain symptoms since March 1, 2001. He admitted at trial that he has had only one medical appointment for a physical in 2002 since the accident.

[383] He does not claim any damages for loss of wages.

[384] His evidence is that he has not done any running since the crash and has reduced his golf playing. He did not play baseball for nine years after the crash but now can only play positions that don't require running. His injuries have affected his stamina, conditioning and physique and that he now has to take breaks more often when doing physical activities than he did before the crash. He states that the accident has also had an effect on his relationships with family and friends.

[385] He currently owns his own home in Calgary, but has problems performing his indoor and outdoor housekeeping activities and struggles with cutting the lawn as it takes him longer to do so. He says he is unable to keep his house as clean as it was prior to the bus crash and now gets help from neighbours for snow shovelling. He has not returned to his pre-crash level of gardening.

[386] The only evidence that he has suffered significantly in terms of any loss of housekeeping capacity either past or future is subjective. He says that he now struggles to cut the lawn, gets help shovelling snow and cannot keep his house as clean as he kept it pre-accident. Considering that he was back at work in a fairly strenuous job by February 19, 2001, I do not award damages for loss of housekeeping capacity.

[387] He acknowledged at trial that, career wise, he is exactly where he planned to be prior to the accident. In calculating Mr. Gilliatt's general damages I have considered the following: soft issue injuries to his mid and low back; he acknowledges that his physical injuries cleared up relatively quickly and are not what I would categorize as permanent or serious in nature; Exhibit 55 says "no neck/back pain after March 1, 2001"; the back problem plateaued approximately four months after the crash; he was not hospitalized; he was off work 6 weeks; he attended only four physiotherapy sessions; he has continued to work on a full time basis. I find that his recreational activities have been impacted. He no longer plays hockey, and golf to the same extent as before.

[388] I award general damages of $25,000.00.

Jennifer Esterreicher – Damages

[389] Ms. Esterreicher claims general damages for pain and suffering; past lose of income; loss of earning capacity; loss of housekeeping capacity; and special damages.

[390] She was a 27 year old Justice and Law Enforcement student at the University of Winnipeg at the time of the accident. She states that it was her intention upon completion of her degree in 2002 to then apply to become a military police officer or a member of the RCMP. Her evidence is that she had spent some time on the internet researching the process and requirements to become a police officer, however, she had never specifically spoken to a recruiter, and had never specifically filed any application in order to become a police officer. She had never pursued any aptitude testing or any physical testing in order to determine whether she would meet the requirements to become a member of the RCMP. She required corrective surgery to meet the vision standards. The evidence also indicates that she understood that there were some 10,000 applicants to the RCMP each year and she understood that the chances of being

selected were low. She further acknowledged that she had been using marijuana and would have had to so indicate.

[391] Her evidence is that prior to the accident she was physically active with no limitations. She went to a gym on a regular basis and her regular activities included snowboarding, cross-country skiing, swimming, hiking and fishing. She testified that she also was engaged in assisting her father with home maintenance and in constructing a summer camp. She resided on her own and did all of her own interior housecleaning and repairs. Personality wise, she considered herself to be an easygoing, positive, motivated person prior to the crash. She testified that she had not had any pre-existing medical or physiological problems, however, throughout the course of evidence in this trial it is clear from the evidence that she gave to this court concerning previous abuse issues that she was suffering from some psycho-emotional problems.

[392] She testified that during the crash she bounced around the interior of the bus and came into contact with seats, arm rests and various articles before being thrown out of the bus. She stated that she immediately felt pain and discomfort to her face, above her left eye, along her right side, her right elbow, lower back and over various other parts of her body. She sustained an open wound injury to her right knee and some bruising. She was ultimately transported to Thunder Bay Regional Hospital by a second Greyhound bus. Her complaints at the hospital were with regard to her left elbow and lower back. She was prescribed Motrin and was discharged to her parent's home.

[393] She later returned to Winnipeg, and in January of 2001 she began seeing a chiropractor. Dr. Ashique, in his notes, indicates that he treated her 38 times between January 31, 2001, and April 23, 2001. She had never seen a chiropractor before. I note that in subsequent evidence from Dr. Lloyd, a defence expert, he testified that chiropractic manipulation for a back injury would be potentially harmful. She engaged in home exercises, working out at a gym, and a pool in order to deal with her discomfort. She continued to complain about low back pain and continued discomfort in her left elbow. Throughout the course of her initial chiropractic treatment she continued to attend university and to work part time at a group home in Winnipeg.

[394] While she was a student Ms. Esterreicher held summer positions working at a restaurant in Sioux Lookout, and also worked part time at a group home in the City of Winnipeg. Both of these positions, she states, were physically demanding, at the restaurant having to lift and carry heavy things, and at Marymount dealing with individuals who could on occasion become physically aggressive. She testified that it was her intention to keep working at the restaurant until she obtained her university degree in Justice and Law Enforcement.

[395] She subsequently returned to Sioux Lookout in May of 2001 where she began receiving treatment from Dr. Jolene Advent, a chiropractor. The medical notes filed confirm numerous attendances on Dr. Advent. Dr. Advent's evidence confirms that Ms. Esterreicher initially complained about neck pain, lower back pain and left elbow discomfort. She was regularly treated for the area of her thoracic, lumbar and cervical spine. When she returned to Sioux Lookout in the summer of 2001 she returned to a previous summer job at a restaurant.

[396] In the fall of 2002 Ms. Esterreicher obtained employment, full time, as a probation officer, and has worked continuously in that position. This involved a significant amount of travel in small aircraft to remote northern communities. Her evidence is that she had by then determined that she would not be able to physically perform the duties and functions associated with becoming a police officer. She stated that during the course of her travel as a probation officer she experienced pain and discomfort in her knees, elbow and back as a result of the physical demands of that position. She testified that she often has to take a day off after she travels to the northern communities because of pain and discomfort in her lower back.

[397] She then accepted a job in Toronto as a probation officer in 2003. She again sought treatment from a chiropractor about lower back and spinal cord pain and discomfort. During the time she lived in Toronto she also saw Dr. Mawani who, in a letter to counsel, filed, confirmed her complaints of low back, knee and elbow pain. Dr. Mawani referred her to Dr. Panjwani, a psychiatrist, because of complaints she made with respect to anxiety and depression. His brief notes, filed, show that he prescribed medication to her after diagnosing her with major depressive order, post-traumatic stress disorder, post-concussive syndrome, and chronic pain disorder. She stated that the medication that he originally prescribed for her had side effects and as a result of that she was self-medicating with cannabis and liquor for a period of time in order to deal with her depression and anxiety.

[398] The consultation report of Dr. Panjwani makes reference to her being diagnosed as having a major depressive order, PTSD, chronic pain syndrome. She acknowledges that she was self-medicating with cannabis and liquor. There is no further evidence to substantiate that degree of disorder. I do not place emphasis on that report as the only follow-up recommended is for chronic pain and medication for stress management. The medical records indicate that she first began to complain about anxiety and depression in 2004. She began counselling in 2005.

[399] In March of 2003 she was involved in a motor vehicle accident. She testified at trial that she sustained no injuries; however, chiropractic records of March 12, 2003, indicated that the following day she was complaining of pain to her right thoracic/lumbar spine. The x-ray taken on July 26, 2004, was the first mention of a compression fracture. No x-rays were taken and none were produced between the time of the bus accident and the March 2003 accident.

[400] Ms. Esterreicher relocated to Sioux Lookout in 2005 and began seeing a chiropractor and her family doctor again. She also began seeing Monica Hansen, a massage therapist, who testified at the trial. Ms. Hansen testified that she provided various treatment modalities to Ms. Esterreicher in order to treat her lower back pain, knee pain, elbow pain and other issues. Ms. Esterreicher related all of her injuries to the bus crash. Ms. Hansen encouraged Ms. Esterreicher to see a councillor because of her psychological condition.

[401] In June of 2005 she started seeing Elaine Pace for counselling. Ms. Pace's notes and records confirm Ms. Esterreicher's complaints as being consistent with all of her earlier complaints. Ms. Esterreicher reported that she had experienced a complete disruption of her life because of the Greyhound bus accident. Notes from the clinical records prepared by Ms. Pace show that when Ms. Esterreicher initially attended she was suffering "emotional distress due to the lengthy wait …" in the litigation process. In January 2007, Ms. Pace states that Ms.

Esterricher's anxiety "is not tied to any one thing in particular." She was again focusing on stress at work. Stress from the bus accident was a secondary factor.

[402] Her first post-accident attendance with a physician was in Sioux Lookout when she saw Dr. Johanne Fry on May 17, 2001. Dr. Fry's notes and testimony at trial say that there was nothing in the clinical notes and records prior to the bus crash suggesting that Ms. Esterreicher had any problems similar to the injuries sustained in the bus crash. Her complaints with respect to her back and left elbow were constant and consistent. As of June 20, 2002, the note indicates that her elbow examination was essentially normal. By December 2004 with reference to the motor vehicle accident the doctor's notes indicate that her chief complaint today is her left elbow. In February 2006 medical notes are "She is able to perform her job duties secondary to her elbow and knee pain." At trial, Dr. Fry agreed with the diagnosis of Dr. Hamilton that Ms. Esterreicher suffered a Grade 1 whiplash. By 2005, Dr. Fry says that Ms. Esterreicher reported that her elbow examination was normal, and that she was experiencing intermittent pain.

[403] Dr. Fry testified that she knew that Ms. Esterreicher was undergoing various forms of treatment to alleviate her pain and discomfort. Based on the nature and type of complaints she had during the period of time she saw her, Dr. Fry ultimately diagnosed her with having Chronic Pain Syndrome. The doctor presumed that in 2005, Ms. Esterreicher was as good as she was going to get. The Defendant notes that during this course of treatment, chiropractic records note that she was playing tennis.

[404] In cross-examination the evidence would indicate that much of the anxiety, tension and stress that she was experiencing post-accident was as a result of what she described as a lengthy wait for determination of this litigation.

[405] Ms. Esterreicher was examined by Dr. Hamilton, an orthopaedic specialist, in March of 2005, who reported that at that time she stated she could walk five kilometers. Dr. Hamilton confirmed she had suffered a fracture of T11, and that she had suffered damages to her left elbow. He diagnosed that she had sustained a whiplash injury to the cervical spine, as well as an injury to her left knee. He confirmed that the nature of her injuries would likely prevent her from becoming an RCMP or Military Police Officer.

[406] Rob Pasqualino did a Functional Capacity Assessment in April 2005. Referring to National Occupational Classification, he confirmed that a police officer is classified as a "heavy" level position and that Ms. Esterreicher tested to a light and medium level of functional ability. She could not complete the physical requirements of a RCMP or Military Police Officer. Johanna Stewart testified as a vocational Assessment expert. Her opinion, based on test results and information given to her, is that Ms. Esterreicher could successfully complete the academic testing required to be a police officer.

[407] One of the significant difficulties I have in determining the extent of her injuries caused by the bus accident is the extensive list of her various ailments, filed as Exhibit 61. It appears that Ms. Esterreicher suggests that virtually every ailment she has suffered post-December 23, 2000, is relatable to the bus accident. I do not accept that position.

[408] I permitted surveillance evidence to be introduced on cross-examination. I did not find this to be helpful, other than showing he capable of carrying out normal activities which I found did not necessarily contradict her evidence of her physical condition.

[409] The hospital records indicate that her main complaints were to her left elbow and lower back. X-rays subsequently indicated that she had sustained a T-11 compression fracture. She received a series of chiropractic treatments. The evidence of Dr. Lloyd indicates that chiropractic treatments may in fact have been potentially harmful to her. I also note that despite her back complaints the evidence indicates that during the time of receiving chiropractic treatments she was also playing tennis. Further, she continued with her university studies and her part time work at a group home.

[410] In May 2009 she was diagnosed with guillain barre syndrome which effects the immune system.

[411] Dawn-Marie McLeod testified on Jennifer's behalf on November 10, 2010. She was asked to calculate Jennifer's past wage loss claim and future loss of earning capacity claim as well as her loss of housekeeping capacity claim. Exhibit 75 includes the four Schedules she relied upon when presenting her testimony. The essential assumptions relied upon by Dawn-Marie McLeod include the following:

1. That had the accident not occurred, Jennifer would have applied for a position with the RCMP sometime after June 2, 2002;

2. On the appropriate wage rates for RCMP officers;

3. Because of the accident Jennifer could no longer become a Police Officer;

4. Jennifer accepted a job with the Ministry of Correctional Services on October 21, 2002. She relied on Jennifer's past and likely future income in performing her calculations;

5. That the fringe benefits that Jennifer was receiving in her present position are similar to those that she would receive as an RCMP Officer;

6. That after ten years of service with the RCMP Jennifer would have received a promotion to a position of Sergeant and continued in that position until her proposed date of retirement which was assumed to be either age 60 or age 62.

[412] Based on these assumptions, Ms. MacLeod valued Jennifer's past loss of income to be $6,962.00. In terms of the value of Jennifer's future loss of earning capacity claim, she valued that at $97,000.00 to retirement at the age of 60 and $103,000.00 using a retirement age of 62 years.

[413] In terms of putting a value on Jennifer's loss of housekeeping capacity claim, in Schedule 4 of Exhibit 75 Ms. MacLeod calculates this loss on the basis of Jennifer losing 10%, 15% and 20% of her pre-crash housekeeping capacity. At 10% she calculated Jennifer's loss at $68,856.00. At a 15%

loss it was calculated at $103,283.00. At a 20% loss it amounts to $137,711.00. These amounts include both Jennifer's past loss of housekeeping capacity damages and future loss of housekeeping capacity damages. The specific calculations that add up to the aforementioned amounts are set out in Schedule 4 of Exhibit 75. These calculations take into account Jennifer having to perform child care functions until her son turns 18 years of age.

[414] With respect to those future plans, she relies extensively on the fact that she was enrolled in a justice and law enforcement program and would have been in a position to join the RCMP some 12 to 18 months following university graduation in 2002. While she has stated subjectively those were her plans, I specifically note in evidence that the only other indication given is that her brother said that she could have passed the physical testing. From an evidentiary perspective, there is no evidence that she had ever taken any active steps in terms of gathering information other than very general information from the internet. She never spoke to a recruiting officer. In addition to that, I am satisfied that the evidence falls short of establishing a real and substantial possibility that she could in fact have become an RCMP officer. She had physical problems with her eyes, she had previous emotional problems, she acknowledged using illegal drugs, and certainly there is no suggestion that even if she had applied, she would have been accepted. The evidence does establish that she had the educational capability and aptitude but I am not satisfied that she has established anything beyond that.

[415] In assessing general damages, I note that she was not hospitalized; there was no interruption in her employment and studies; the evidence notes that she only saw one medical doctor in the year following the accident. She had pre-accident emotional problems primarily focused around her father. There is no indication of any significant physical therapy or treatment other than chiropractic and massage, which Dr. Lloyd indicated would be more harmful than helpful. Dr. Fry presumed that in 2005, Ms. Esterreicher was as good as she was going to get.

[416] I assess Ms. Esterreicher's general damages in the amount of $65,000.00.

[417] The evidence with respect to a loss of future housekeeping services is entirely subjective. Ms. MacLeod has prepared loss figures based on a percentage of loss of housekeeping capacity. The evidence of Rob Pasqualino does indicate that by 2005 her FCA tested to a light and medium level of functional ability. I award an amount of $5,000.00 from the time of the accident to April 2005. However, there is no evidence which discloses that she will suffer a real and substantial risk that she will suffer future housekeeping expenses as a result of her accident-related loss of capacity to perform those duties in the future.

[418] Ms. Esterreicher has claimed past loss of wages in the amount of $320.00 from time lost at her job at the group home post-accident. There was no evidence to dispute that, and I accept this aspect of her claim.

[419] Ms. Esterreicher has submitted a number of items claimed as special damages. The Defendants did not address this aspect of the damage claims in their submissions. In reviewing the numerous items listed, they relate almost entirely to expenses which she claims for treatment for chiropractic, massage therapy, gym membership, or travel to and from medical appointments. There is also an amount claimed for the purchase of medical services and supplies in the future.

The problem I am faced with in determining whether these damages are appropriate is that they were all in essence self-prescribed. She did not see a physician until May 17, 2001 and nowhere in the evidence is there any medical requirements that she receive chiropractic or massage therapy treatments. The only evidence placed before me to substantiate any claims for special damages is a summary which is contained at Tab 55 of Exhibit N. There are no details with respect to timing and, as I noted previously, there is no substantiation that any of these treatments were medically required. In the absence of any indication that these were medically required treatments, I have no basis upon which to substantiate the special damages.

Bryan Adams – Damages

[420] Brian Adams was 19 years of age and attending first year university at the time of the bus incident. Mr. Adams states that he does not know what the movement of the bus was but knows that he was being thrown around. When the bus stopped he was face down and felt pain in his back. He boarded the second bus to the Upsala Recreation Centre where he was seen by paramedics, placed in a neck brace as a precaution and then was put on a back board. He testified that he was experiencing pain in his middle lower back and that he had never felt that kind of pain before. He was taken by ambulance to McKellar Hospital, where he had glass fragments removed from his skull, a cut on his right hand and cuts near his thumb on his left hand. He also had a cut on his chin and he is left with a partial scar. In the hospital he was subjected to x-rays and his main complaints were of a sore knee and sore mid-lower back. He was told to take ibuprofen, and it was recommended to him that he come back to the hospital and see a specialist later.

[421] He was released from the hospital prior to his initial treatment. Mr. Adams states that in the first week following the accident he was taking ibuprofen. He returned to the hospital on January 2. The hospital records noted by Dr. Puskas recommended that he be off work six weeks; and then engage in light duty with no lifting. Dr. Puskas diagnosed the injury as minor, that Mr. Adams was neurologically intact and that he could resume normal activities except jogging.

[422] At the time of the accident he was working part-time at two curling rinks. He took six weeks off work after the accident and states that during that time period he lost approximately $100.00 per week. In cross-examination by Mr. Smith he acknowledged that in the six weeks following the accident he curled for two of those weeks. He states that he could have worked but did not do so because he was “told not to.”

[423] In December of 2000 he had been attending Lakehead University studying to become a teacher. He stated that after the accident he missed some classes as a result of being uncomfortable. He had been in a 5-year honours BA/BEd program but stated that after the accident he did not think that he could do anything which was labour intensive. With respect to his educational progress, he acknowledged that in 2000/2001 school year he was working at two local curling clubs, and would curl some two or three evenings per week with some bonspieling on weekends. He agrees that he fought back from his injuries so that he could play in curling championships and qualified immediately following the accident to play in the Canadian championships.

[424] He obtained summer employment and then returned to Lakehead University in September of 2001. In the Fall of 2001 he could not take the same program that he had previously been enrolled in. He states that he had fallen behind as a result of missing classes, that the courses were difficult and that he was not happy with his progress. He last attended Lakehead University in October 2002. After leaving university in 2002 he began work at Pizza Hut. He acknowledged in cross-examination that he did not leave Lakehead University because of the accident but did so mainly for personal reasons. Working with Pizza Hut permitted him to take time off from work for competitions and cash bonspiels and that Pizza Hut accommodated his wish to be able to control his time which was a benefit for him in following his curling pattern.

[425] In September 2006 he attended Confederation College in a business/human resources program. He states that he had no problem attending that and subsequently returned to Pizza Hut upon completion. He indicated at the time of trial that he is still looking for a human resources job but had not yet been successful in obtaining same.

[426] His evidence is that beginning in early 2001 his activities were limited. He was a highly competitive curler and in mid-January 2001 played in the Provincial Junior Curling Championships. He states that although curling was difficult, his team went to the Canadian Championships in February of 2001. He testified that he took medication before every game after having received permission from officials to do so. The evidence is that he has continued his involvement in curling at a high level although he indicates that he finds playing in bonspiels very tiring.

[427] Dr. Tom Jessiman first began seeing Mr. Adams in May 1995 following an athletic injury. He saw him again in November in 1995 for his upper and lower back. In June 1997 he began treating him for problems with a cervical spine, neck, and upper and lower back. In 1998 visited him four times and in 1999 seven. Mr. Adam's primary complaint at that time was his cervical spine and his upper and lower back.

[428] Mr. Adams was again seen in June through August of 2000 when he was experiencing severe irritation with his upper and lower back. Dr. Jessiman stated that by November 2000 Mr. Adams back problem had rectified.

[429] In May of 2001 Mr. Adams was again treated for an aggravated back after he experienced an incident at work. He spoke to Dr. Jessiman about the accident but said that he had healed. Dr. Jessiman determined that the cause of the problem was structural dysfunction. After May of 2001 Mr. Adams reported to Dr. Jessiman that his upper and lower back injuries were aggravated by golfing. In cross examination Dr. Jessiman agreed that Mr. Adams' problems with his upper back and neck were present pre-accident. Further, Mr. Adams did not come in to receive treatment from Dr. Jessiman in January or February of 2001. He agreed that from May 30, 1995 to the end of 2000, he adjusted Mr. Adams on seventeen or eighteen different joints. Dr. Jessiman noted that his records indicated that Mr. Adams had seen him six times in 1997; four in 1998; seven in 1999; 12 in 2000, 6 in 2001, eight in 2002, twelve in 2003, and twenty in 2004.

[430] The evidence of Dr. Hak is that as of May 29, 2001, Mr. Adams "… has had a period of no pain, however, since starting a new job at LPH that requires repetitive lifting and lots of walking he has begun to develop some back pain."

[431] After seeing Dr. Hak he saw Dr. Jessiman in May of 2001. He was cross-examined extensively on his treatment by Dr. Jessiman. He first saw Dr. Jessiman in May 1995 and from 1997 through 2000 he had seen Dr. Jessiman a total of 29 times for problems with his neck. In the year 2001 he saw Dr. Jessiman half as many times as in 2000. He continued to see Dr. Jessiman regularly from 2002 through 2005. He agreed that during this period of time he was having pain between his shoulders which was not accident related. In cross-examination Mr. Adams acknowledged that the only treatment he has received has been from a chiropractor and from taking ibuprofen. He acknowledges that he has some period of months where he has no need to take any ibuprofen. He acknowledged that he has never sought a referral to an orthopaedic surgeon. He has been content with treatment by Dr. Jessiman. He is able to curl, to golf, and to work.

[432] As I had previously noted, Mr. Adams is a highly competitive curler. After competing in the Canadian Junior Championships he subsequently formed a men's competitive team. He found that being on a team which required him to sweep a lot caused him significant problems although his team did reach the provincial finals five years in a row. As at the date of the trial he continues curling competitively.

[433] When asked to sum up how the accident has affected his life he describes that he has trouble sleeping, that his back is sore, and that it is painful standing for long periods of time. With respect to his sporting activities, particularly his curling and golf, he indicates that fatigue and pain has affected his focus and that he finds playing in bonspiels very tiring. Subsequent to the accident, he acknowledges that his endurance has improved but not to previous levels. He still has some sleep difficulties and is still unable to do any heavy lifting. He describes that at worst his back pain would be at a level of 3 to 4.

[434] With respect to curling it is clear that he was extensively involved in highly competitive curling, including at the provincial level, from 2006 through 2010. In 2005/2006 he stated that he played between 75 and 100 games and that he would also have played in cash bonspiels. In the provincial playdowns, he stated that he would throw 20 rocks weighing 44 lbs. per game and that there would generally be 8 games in a round-robin bonspiel. He stated that from December 2003 to November 2006 he did not miss any games and that he did not lose any games because of back pain.

[435] Video surveillance was introduced with respect to the activities of Mr. Adams. I did not consider that the video tape added to the evidence in this trial as it essentially simply verified the evidence which Mr. Adams himself had stated.

[436] Rob Pasqualino is a kinesiologist who did a Functional Capacity Assessment on Mr. Adams. His recommended job classification following testing would be that Mr. Adams could work at a medium level with no prolonged overhead work. He stated that even someone with no injury could be classified similarly.

[437] At the request of his counsel, in 2005, Adams saw Dr. Hamilton, whom the Defendants accepted as an expert in orthopaedic surgery. His notes indicated that Mr. Adams had a compression fracture to the lower back. The notes indicated that Dr. Puskas, the orthopaedic surgeon who saw him at the hospital at the time of the accident, had said that the injury was minor, neurologically intact and that Mr. Adams could resume normal activities except for jogging. Dr. Hamilton agreed that if Mr. Adams had received physiotherapy treatment for five to six months that might have helped and that physiotherapy should have been started within a few days. On physical examination, he noted that Mr. Adams had good range of movement, no sensory loss, and no motor loss. In cross-examination he acknowledged that he has not seen any X-rays showing any degenerative changes resulting from the accident. In his opinion, Mr. Adams suffered from minor fractures, had good prognosis, but may have some long term pain, more so when curling. At the time of trial he believed that his back injury pain had plateaued and that he reached maximum recovery approximately one year after the accident. He returned to golfing regularly in 2003.

[438] It is difficult to assess the overall aspect of Mr. Adams general damages in light of his post-accident activities. He continued to curl extensively, and although he testified as to experiencing back pain it is questionable whether any back pain after May 1 was accident related or related to pre-existing difficulties in other areas of his back. I further recognize that Mr. Adams received no medical treatment from January 2, 2001 to May 29, 2001.

[439] Although there is a claim for loss of housekeeping, there is no evidence before me that would substantiate that claim particularly in light of the evidence of his extensive curling activities post-accident.

[440] The Plaintiff has suggested that he should be compensated as he has not had as much success at curling because of low back pain. That submission is highly speculative. In my view there is no evidence to substantiate such a claim.

[441] With respect to general damages, the essence of this claim would appear to be that Mr. Adams suffered from minor fractures, had a good prognosis but may have some long term pain, which is exacerbated when curling. The injury, commencing with the notes of Dr. Puskas, had been classified as minor with no neurological injury.

[442] I assess Mr. Adams general damages in the amount of $20,000.00 and make no award for loss of housekeeping.

Faye Evans – Damages

[443] Ms. Evans was 38 years old at the time of this accident. She stated that pre-accident, she had no physical or emotional issues. She exercised regularly, did body-building, and participated in a variety of sporting activities. In cross-examination, she acknowledged that she had seen Dr. Schneider, a chiropractor, from January 1997 to October 1998. Information provided by her in the initial consultation notes her chief complaint as being “neck, recently upper and mid back, always.” She also noted experiencing dizziness, forgetfulness, and confusion. It was further noted that she reported stress from having gone through a marriage breakup. In cross-

examination she acknowledged that she had stress and anxiety issues pre-accident. The clinical records of Dr. Sean Bourassa, chiropractor, similarly note neck and upper back pain prior to the accident.

[444] She described how the bus hit guardrail and then felt her back hitting different parts of the bus. She described how she saw an older lady who had been sitting in front of her and that the lady's forehead was badly cut. She was taken to the hospital in Thunder Bay. The medical reports indicate that she had bruises on her back, but no cuts and she was prescribed pain killers. She was released and then took a bus to Sault Saint Marie. She described the first few days after the accident as still having a sore back. While in Sault Saint Marie she attended at the hospital and saw a doctor who she described as having had her do a few movements, said she was okay, did no x-ray and in her terms "blew me off." She states that she then experienced pain for the next month but did go back to work immediately.

[445] When she returned to Alberta she saw a doctor who then did x-rays. The x-ray report stated that the doctor thought that she may have a very mild, non-displaced, compression fracture of her lower back, but he was not convinced of that. He prescribed pain killers for her and suggested that she stay off work for a period of one week. She states that she saw a chiropractor and that she was feeling much better at the end of three months and that her back pain gradually improved over a four month period.

[446] She acknowledged in cross-examination that shortly after the accident she began jogging and working out again. There was never a point where she couldn't walk or was bedridden. She took no narcotic medications, and did not have any attendances on a doctor for psychological issues, except in preparation for this litigation.

[447] In April 2001 she moved to Ontario and described that at that point in time her pain had diminished by half, was "a lot better" and that when she did experience pain she was able to "put it out of my mind".

[448] Ms. Evans worked at varied short term employment prior to the crash. Her history notes that she worked at several positions related to personal fitness. She had employment working at a gym as a receptionist, worked at an automobile dealership, and worked at the front desk of a health establishment selling products and taking care of tanning beds. In February 2002 she moved back to Alberta where she obtained employment with an insurance agency doing data entry and policy updating. From August 2002 to August 2004 she worked with Great West Life Insurance Company as a marketing assistant. During that period of employment she was placed on probation on two different occasions with notations that her work needed improvement or she risked being terminated. From August 2004 to April 2005 she worked for another insurance company as a receptionist. Her evidence indicates that during the time she was employed in some of those positions she had personal conflict situations with her employers. The medical evidence presented notes that during those times she was also experiencing medical issues attempting to balance her thyroid levels. While she was employed at Great West Life, concerns were expressed about her time management skills. She indicated that the volume of work was overwhelming to her.

[449] At the time of the accident she was employed as a data entry person at an insurance company. She missed no time from work post-accident.

[450] In March 2005 she was assessed by Dr. Gregor Jason. His testimony indicates that while he considered that at that time she did not meet the criteria for PTSD she was suffering from an Anxiety Disorder-Not Otherwise Specified ("AD-NOS") and that her emotional well being had been compromised as a result of the accident. She acknowledged in cross-examination that in 2005 she was happy in her job, her marriage, and was happy with her children.

[451] Dr. Jason assessed her again in December 2009 at which point in time he suggested that she had crossed the line from AD-NOS to suffering from mild PTSD. In cross-examination he acknowledged that on one test score in the MMPI-2 the validity was such that he questioned the issue of exaggeration but discounted it. Dr. Rubenstein who subsequently testified also considered the issue of exaggeration and did not discount it. His testimony was that other tests demonstrated a real risk that she was exaggerating. Dr. Jason agreed that if it was found that she was exaggerating then his PTSD diagnosis would be called into question. He indicated that even if his diagnosis differed between his assessment in 2005 and 2009 that either diagnosis would have had some impact on her ability to work.

[452] During the period of 2005 to 2009 the evidence indicates that Ms. Evans lost a good job, was divorced, and was in what could only be described as a strained relationship.

[453] Martin Berger is a rehabilitation counselor who assessed Ms. Evans on March 22 and 23 of 2005. His evidence is that her general aptitude levels exceeded the requirements for most of the positions that she had previously held working in the insurance industry. She functioned well in jobs where routine and repetition were required but struggled where the employment involved problem solving or working with other people. His opinion and his assessment of her aptitude did not match her actual workplace performance. He testified that what affected her was her inability to deal with basic work place stressors. He indicated that she was at the low end of moderately disabled based on her own perception. While he agreed that he could not diagnose psychological issues as that was not part of his expertise, he did state that psychological issues definitely could affect someone's functional capacity. In cross-examination, he acknowledged that there is no suggestion that her low scores were in any way tied to the accident. He was not aware of her pre-accident history when he did the assessments.

[454] Steve McGregor did a Functional Capacity Evaluation of Ms. Evans in 2005. He determined that she could function at a medium work level and could participate in physical work tasks with limitations. Medical evidence also indicates that on a global assessment of a functioning scale she scored between 71 and 80 which was a relatively good score.

[455] Dr. Miron Stelmaschuk saw Ms. Evans on June 16, 2005 and January 11, 2010. He concluded that her injuries were accident related and resulted in sprain to the cervical, lumbar and thoracic regions. There was in his view no evidence of a compression fracture. He indicated that 4 ½ years post accident she appeared to have reached a level of recovery which he described as maximum medical recovery (MMR). In the assessment done in 2010 he opined that she was

suffering from permanent chronic pain and had a level of 2-3 which he indicated as mild to moderate. There is no evidence of any disability according to her job description.

[456] Dr. Rubenstein assessed Ms. Evans and agreed that she had adjustment disorder with anxiety and depressed moods after the accident but stated that she could not be categorized in any DSM-IV category. He testified that the basic difference between his opinion and that of Dr. Jason is the weight given to the validity testing. Dr. Rubenstein found evidence in some tests that she may have exaggerated her symptoms, denied good health status, and admitted to a variety of symptoms she did not have. By Ms. Evans own evidence, she indicated that in 2005 she told Dr. Rubenstein that "life was very good." She further agree that she told Dr. Ross that her low and mid back pain were unpleasant but did not interfere with her functioning in any way.

[457] The evidence of Dr. Rubinstein and Dr. Jason in 2005 was essentially in agreement that she did not meet the criteria for PTSD but did suffer from an anxiety disorder. Both agreed that that did not prevent her from working. In 2009 Dr. Jason then said that she did meet the criteria for PTSD although he acknowledged that, if she was exaggerating as Dr. Rubinstein had suggested, that diagnosis would be called into question. Dr. Jason stated that whether the diagnosis of PTSD could be made or whether it was more appropriately an anxiety disorder, either way her ability to work would be called into play. I find this position difficult to accept in view of the fact that her income increased post-accident and the history also would demonstrate that she stayed at jobs longer.

[458] The evidence of Dr. Hunter is that any persistent pain which she is currently experiencing is more likely to be due to her pre-existing scoliosis with possible degenerative changes rather than being a direct result of the accident in December 2000. Ms. Evans has suffered no loss of physical function.

[459] Tax returns filed as exhibits show that in 1999 she earned $12,044.01; in 2000, $17,800.00; in 2001, $11,771.00; in 2002, $25,300.00; in 2003, $29,816.00. Her income rose from 2004, with some exceptions, to her 2009 income of $47,068.00. Her average income in the 3 years prior to the accident was $12,600.00. From 2001 – 2006, she earned an average income of $26,000.00. From 2001 – 2009 her average income was $29,380.00.

[460] Dawne-Marie MacLeod testified with respect to Ms. Evans damages for past loss and future loss of earnings. She based her assumptions on the fact that Ms. Evans told her she intended to become an insurance broker and would have earned her license four years post accident. Further, Ms. Evans had told her that she had worked at four insurance companies in the previous five years. Ms. MacLeod also based her evidence on the following assumptions: that Ms. Evans was working as a data processor in an insurance related field; that the accident resulted in anxiety disorder not otherwise specified; that she had certain psychological affects which affected her employability; that at Great West Life she demonstrated an inability to cope, had difficulties with concentration and that she could not focus, all of which she stated were symptoms post accident; and at the time of the accident she believed that she would excel in the insurance agency either in administration or as a broker.

[461] Ms. MacLeod estimated the pre-trial past loss of earnings at $20,652. Ms. MacLeod has calculated her future loss of income if she retired at age 62 to be $136,989 and if she retired at age 65 the loss would be $155, 582.01.

[462] The Defendants argue that the types of employment in the insurance agencies prior to the accident do not reflect a specific intention, or an ability to become an insurance broker. Her tasks were essentially data entry and other clerical tasks. The Defendants further note the personal difficulties that Ms. Evans experienced in working with other people and state that there is no evidence before the court to suggest that those problems are accident related. The Defendants also note that she was terminated from Gunderson Insurance, and also left Great West Life, having received two performance issue warnings.

[463] The Defendants also point to Ms. Evans employment history from 1998 to 2009. In the three years prior to the accident her average income was $12,600. In 2001, the year she moved from Alberta to Ontario, she earned $11,771. Her post accident average income from 2001 to 2009 was $29,380.

[464] With respect to the loss of wages and future loss of income claim, the evidence of Ms. MacLeod is based on the assumption that Ms. Evans would have become an insurance broker and would have earned her licence four years post-accident. That assumption was based on the fact that Ms. Evans told her of an intention to become a broker and told Ms. MacLeod that she had worked at four insurance companies in the previous five years. I accept the position of the Defendants that the types of employment prior to the accident do not reflect a specific intention to become an insurance broker. Her tasks were essentially data entry and clerical tasks. In addition, there is no evidence that any personal difficulties that Ms. Evans was experiencing in working with other people is accident related.

[465] I am not satisfied that the facts have established a real and substantial possibility that Ms. Evans could have become an insurance broker and the claim for past loss of wages and future loss of income is not allowed.

[466] There is a difference of opinion in the evidence as to whether Ms. Evans suffers from Post Traumatic Stress Syndrome. I am not satisfied that that has been established. Both Dr. Jason and Dr. Rubinstein, in 2005, did not classify her circumstances as PTSD. Although Dr. Jason did so in 2009, the evidence would indicate that there were a number of contributing factors including divorce and loss of a job in addition to thyroid issues. Both doctors did agree that the accident caused her to suffer an anxiety disorder that lasted for some years.

[467] I would assess Ms. Evans general damages at $55,000.00.

Jonathan Theriault - Damages

[468] Jonathan Theriault was 14 years of age on the date of the accident. He was a grade 9 student who was returning from Kenora after visiting his father. His history to that point in time indicates that he was a young boy who had problems learning in school, suffered from ADHD and had behavioral problems.

[469] Prior to the accident he had experienced no particular health problems. He had seen a doctor previously as a result of headaches caused from taking Ritalin and at one point in time had experienced low back pain which was determined to be as a result of kidney stones. He enjoyed playing basketball, volleyball, fishing, trick biking and street hockey. He suffered no physical limitations. He played guitar and on a home level he cut grass and shovelled snow.

[470] After the crash he was bleeding from a cut on his arm and one on the head. He was transported to the hospital where the emergency note indicates that he suffered a right shoulder contusion. No X-ray was done and he refused a scan. He was released from hospital with no specific treatment. In the first week after the accident he suffered pain in his lower back and right shoulder. The cuts were healing and he had no stitches. His evidence is that the cuts healed after a few weeks.

[471] On March 22, 2001, three months post accident he saw his family physician Dr. Woods, who diagnosed him with muscle strain and rotator cuff tendinitis. He was referred to physiotherapy. His evidence is that his level of energy in the first 3 months post accident was such that he played hockey a few times. He stated he did not attend school as he was focused on pain.

[472] By September 27, 2001, a medical report describes him as “an active boy” and, further, that “patient feels good.” Through 2001 and 2002 he would appear to have resumed some of his recreational activities but with some back and shoulder pain.

[473] He testified that throughout 2001 and 2002 he tried skateboarding 10 times and experienced pain. He also played ball hockey and noted that his back and shoulder were sore. He rode his BMX trick bike and did a lot of jumping but stated that he couldn’t ride his ski-do because of pain. He also stated that he played ice hockey several times but experienced back and shoulder pain.

[474] In 2001 he began to experience difficulties with the law. He was convicted of mischief in 2001 and in 2002 spent his first period in jail for break and enter for a period of 4 months. He spent several periods incarcerated for various offences between 2001 and 2005. During time spent in custody at a youth centre, a case management report notes that he was successful in a staff outing for fishing and hiking, highway programs and community work. Notwithstanding the notation in the report, his evidence is that he did not do either of those activities and that the report is wrong in so stating. In other case notes filed as exhibits, it is noted that on January 7, 2003 he states that he went sliding on his GT Sled.

[475] In 2002 he began going to addiction counselling, although it is clear that he did not attend all of his appointments and was skipping appointments on a somewhat regular basis. He acknowledged that he was smoking marijuana approximately 3 times a day in order to relieve the pain. He states that he started at age 16; however, in information given to the South Cochrane Addiction Services, he acknowledged that his marijuana use began at age 12 and that he was a regular user by age 14.

[476] During this time period he acknowledged that he had poor attendance at school, that he had behavioral problems and that he was stealing in order to obtain money to purchase drugs. He also acknowledged skipping appointments at the addiction centre. In a pre-sentence report prepared for one of his offences the report noted that he was "…capable of completing community service…" and there is no mention of any back problems.

[477] Although he began physiotherapy some four months post-accident, he did not complete the prescribed program.

[478] Dr. Nancy Woods testifies as Mr. Theriault's treating physician. She had first treated him in 1987 for a period of 13 months and determined him to be suffering from ADHD. She remained his family physician until 2008. Her pre-accident summary describes Mr. Theriault as being a young boy with ADHD and no muscular/skeletal issues. In March 2001 she noted him as having a sore lower back and shoulder with a diagnosis of muscle strain and rotator cuff tendinitis. In 2008, Dr. Woods diagnosed Mr. Theriault with mild scoliosis. While that was not specifically commented on by counsel, it is a factor which I have taken into account in attempting to ascertain the extent of any back injuries caused by the accident.

[479] Dr. Woods referred him to physiotherapy, and in May 2001 he began seeing Louis Favretto, a physiotherapist. He was initially treated with stretching exercises, which were intended to address pain in his right shoulder and his back. Mr. Favretto determined that Mr. Theriault had soft tissue injury in terms of rotator cuff tendinitis and low back strain. He was prescribed home exercises and stretching. He attended at physiotherapy for two and half months and then stopped coming in for treatment. In Mr. Favretto's notes, he indicates that by June 5, 2001, Mr. Theriault had improved somewhat since assessed on May 2. The right shoulder had improved and low back was his chief complaint. A note of July 13, 2001 states that Mr. Theriault was improved with better movement in the low back and less reports of pain. It is noted, however, that he did some manual labour just before the reassessment and had poorer than expected results.

[480] Mr. Favretto performed a Functional Capacity Assessment on Mr. Theriault in March 2005. At that time he stated that his neck seemed to be better than it had been at previous testing and that he determined that Mr. Theriault was giving an honest effort on the tests. Mr. Favretto summarized the results on those test dates, indicating that Mr. Theriault was capable of working in a light range of work and had limitations that prevented him from doing labour intensive work.

[481] A second test conducted in February 2010 resulted in Mr. Favretto's findings that the pain was worsening in that there was now a larger area of pain which lasted longer. His view is that by this time, the pain was not going to get any better. In cross-examination, he stated that all of his tests - including his initial treatment in May of 2001 - were based on Mr. Theriault's reports of subjective pain. He agreed that, for any recovery, a patient has to want to help himself and noted that in Mr. Theriault's mind, he seemed to perceive himself as more disabled than what the tests objectively showed. In April 2004, following an x-ray, Dr. Woods opined that Mr. Theriault had a good chance for resolution of his pain with physiotherapy.

[482] Dr. Mary Ann Mountain was acknowledged to be an expert and testified as to her findings on a neuropsychological report which she prepared in August 2005. She relied on medical documents provided by the Plaintiff's counsel and determined that he could not do anything too physical. Her test results indicated that he was suffering from chronic pain, and possible PTSD from the accident. He was experiencing a moderate level of depression and had feelings of hopelessness were mild. She testified that the permanent chronic pain was related to the bus crash but she was less positive about relating the PTSD to the accident.

[483] She states that in her initial interview she asked Mr. Theriault what he thought the future held for him. At that time, his answer was that he did not have any thoughts on the kind of work he might do. He also told her in their initial interview that about 2 months after the accident his back started to clench up.

[484] Dr. Mountain testified that, during testing, the psychometrist determined that Mr. Theriault was not particularly engaged. He was not making a good effort on the tests but still did well on the symptom validity test. Test results indicated that, intellectually, he could be described as border-line impaired … range at the 7th percentile. His verbal tests also determined he was border-line impaired. In the academic achievement test he was functioning at a grade 5 to 6 level. Dr. Mountain acknowledged that some of the symptoms being suffered by Mr. Theriault were consistent with PTSD; however, she was not prepared to express any opinion on the balance of probabilities that Mr. Theriault has Post Traumatic Stress Syndrome.

[485] She acknowledged in cross-examination that when she did her report she had no information with respect to Mr. Theriault's school records, no jail or custodial records, and no family physiotherapy records. She acknowledged that an individual's history is critical and that all of those would have been helpful. She stated Mr. Theriault was not good at showing up for appointments and that he did not engage her very much in therapy. She acknowledged that she had based her assessment on the fact that he had told her that in school his marks had been in the 70's or 80's and that he had no failures. Other evidence filed clearly acknowledged that information to be wrong.

[486] Dr. Mountain agreed with a suggestion put to her in cross-examination that since she last saw him in 2005, any number of things could have happened after 2000.

[487] Kevin Reed testified as an Occupational Therapist. He did an in-home assessment to determine Mr. Theriault's capabilities in the areas of housekeeping and handyman work. His conclusion is that Mr. Theriault demonstrated impairments in his lower back and demonstrated objective pain. He was able to perform household tasks; however, higher physical tasks such as cleaning floors, vacuuming, washing windows or carrying heavy groceries were restricted. He also noted some difficulty in child care up to five years of age.

[488] Mr. Reed acknowledged in cross-examination that Mr. Theriault did not complete his physiotherapy treatment in 2001 and that he had no idea how Mr. Theriault could have done if that had been completed. He did state that Mr. Theriault evidenced that he spent much of his day just lying around and that minimal activity can aggravate the symptoms being suffered as muscles will atrophy. Mr. Reed suggested certain electric devices which would assist Jonathan

for a total cost of $760.00. He recommended 2 hours weekly of housekeeping assistance at a cost of $26.00 a month or $312.00 annually. In addition, he recommended 16 hours annually for housekeeping assistance for heavier seasonal cleaning at an annual cost of $208.00.

[489] Dr. Kerry Lawson did a neuropsychological assessment of Mr. Theriault as part of a Functional Capacity Evaluation in January 2006. In general terms, he noted that Mr. Theriault over-reported his psychological symptoms. Dr. Lawson testified that there was no neuropsychological contraindication to Mr. Theriault working. He stated that while Mr. Theriault was experiencing a mild degree of depression and mild to moderate degree of anxiety, it was not a depression that would prevent him from returning to work. In describing a snapshot of Mr. Theriault's personality, Dr. Lawson described him as avoidant, dependant and negativistic, all characteristics which likely predated the accident.

[490] Dr. Lawson agreed with Dr. Mountain that Mr. Theriault exhibited chronic pain syndrome, although Dr. Lawson preferred to use the term somatoform disorder. He testified that would be a mixed presentation of chronic pain and persistent post-concussive syndromes. His evidence is that Mr. Theriault showed mild impairment and that his borderline scores of intelligence testing are not related to the accident.

[491] As part of a Functional Capacity Evaluation, Dr. Hunter, orthopaedic expert, noted that Mr. Theriault's MRIs revealed no abnormalities in the spine. He stated that the medical evidence suggested soft tissue injuries in the back and that the injuries were not serious enough to render him disabled.

[492] Caroline Woodward, physiotherapist, noted that Mr. Theriault was previously cleared to participate in the FCE and he showed no physical restrictions.

[493] Dr. Gordon Hunter also prepared a report that is part of the Functional Capacity Evaluation. His evidence is that Mr. Theriault told him that in January 2006 he was not looking for a job but he thinks he may be interested in carpentry although he had not pursued that idea any further. Dr. Hunter testified that Mr. Theriault had almost dislocated his shoulder in the bus accident but that it had not been completely dislocated. He had a full range of motion of his back with some pain at the extreme of the flexion. Dr. Hunter's conclusion is that Mr. Theriault suffered from soft tissue injuries of his thorocolumbar area. He had a subluxation of the right shoulder and that the symptoms were mild but probably permanent in the absence of treatment. Dr. Hunter's evidence is that surgery tends to be avoided with injuries such as this in that results aren't satisfactory. He agreed that the soft tissue injury was caused by the accident.

[494] Mr. Hacio submits that Mr. Theriault is unlikely to return to work on a full time basis arising from his chronic pain diagnosis and the psychological sequelae**.** He submits that the best Mr. Theriault can expect in terms of employment would be to work part time for 20 hours per week at a minimum wage job. The claim is for past wage loss in the amount of $100,000 and future loss of earning capacity damages in the amount of $600,000 which is based on the difference between his probable employment working at a part time job paying $10.00 an hour and his expected employment but for the bus crash, working at full time job paying $20.00 an hour.

[495] Dawne-Marie MacLeod testified with respect to a loss of earning assessment report dated July 22, 2005 and supplemental schedules for loss of earning assessments dated September 27, 2010. The career assumption used by Ms. MacLeod is that Jonathan's career goal was to be in a labour position, particularly working as a tradesperson in construction, paper mills or sawmills, and that because of the bus crash he could no longer do the duties associated with that level of heavy labour. He could only carry on light duty types of employment on a part time basis. Her loss of income calculations were based on a comparison between what he would have been paid in a full time labour intensive job, paying $20.00 an hour for 40 hours a week plus 18.5% benefits per week versus a light duty part time job paying $10.00 an hour for 20 hours a week. Her evidence is that total past loss of earnings was $134,000.

[496] With respect to future loss of earnings her evidence is that Mr. Theriault would make approximately $38,000 less annually in a light duty part time job as compared with a full time labour intensive job. If he worked until age 65 taking into account the appropriate factors his lifetime future loss of earnings would be $836,000 at present value. If he had a full time labour intensive job paying $15.00 an hour for 40 hours per week his lifetime future loss of earnings would be $600,000. If he had worked until age 65 taking the same factors into account his lifetime future loss of earnings would be $836,000 and if a full time labour intensive job $630,000. The future loss of earnings covered a 46 year working life and the figures were reduced by $172,000 and $180,000 respectively to account for negative contingencies.

[497] A further claim is made for loss of housekeeping capacity damages. Based on Mr. Reed's evidence with respect to his functional capacity the submission is that Jonathan has lost 30% of his housekeeping and handyman capacity and that this loss should be based on a probable life expectancy of 75 years of age, resulting in a claim for damages of $60,000.

[498] Professor Norman Bonsor provided expert evidence on the probable loss of housekeeping services sustained as a result of the bus crash and quantified the value of Jonathan's loss based on a percentage reduction in his capacity. The probable loss figures were based on the assumption of a 2010 statutory discount rate. Professor Bonsor opined that if Jonathan had lost 10% of capacity his lifetime loss to the age of 75 would be $24,300 and to the age of 80 would be $25,200. A table was provided which suggested that at a 30% loss, his lifetime loss at age 65 would be $72,900 and at age 60 $75,600. A 50% loss at age 75 is $121,500 and at age 80 $126,000.

[499] Overall, the evidence suggests that physically Mr. Theriault's injuries cannot be considered to be as significant as he would have me accept. In coming to that conclusion I also rely upon the evidence of Mr. Kevin Reed, the occupational therapist, who, during his home assessment, indicated that Mr. Theriault was able to perform all household tasks but some of the higher physical tasks such as vacuuming and snow shoveling were restricted.

[500] A significant aspect of this claim is that Mr. Theriault relies upon the fact that he is suffering from psychological impairments arising from injuries sustained in the accident. In reviewing the evidence of Dr. Mary Ann Mountain, her 2005 report indicates that he is suffering from chronic pain and possible post-traumatic stress disorder. She also notes a moderate level of depression and feelings of hopelessness. I am unable to place a great deal of weight on her

opinion based upon her 2005 report. That is not reflective of the fact that I discount her diagnosis, but on the fact that she acknowledged that she did not have certain information with respect to Mr. Theriault's background which she acknowledges would not only have been helpful, but at times critical in coming to her diagnosis. I also note that with respect to some of the information given to her by Mr. Theriault to his previous marks in school was clearly inaccurate. Testing performed by Dr. Mountain indicated that Mr. Theriault could be described as borderline impaired and that in the academic achievement test he was functioning at a Grade 5 to 6 level.

[501] With respect to the neuropsychological evidence, I accept that Mr. Theriault appears to be suffering from a chronic pain syndrome, or somatoform disorder.

[502] In assessing the general damages in this case, I have focused on the fact that the physical injuries and pain as described by Mr. Theriault must be discounted, based upon the evidence that he perceives his pain to be greater than it actually is. I further have taken into account that there was no surgery involved, and that he did not follow the treatment of physiotherapy as recommended by Mr. Favretto in 2001. I note that other evidence indicates that by September of 2001 a notation in the medical report describes him as an "active boy" and that "patient feels good." I have also focused on the fact that evidence from Mr. Favretto and Mr. Reed certainly would indicate that inactivity, and spending much of his day lying around could aggravate his symptoms. All of the physical evidence would suggest that Mr. Theriault continues to suffer in some way but that the injuries are not what could be classified as of a severe nature.

[503] With respect to the claim for loss of wages, I am not satisfied that the evidence is sufficient to establish the loss of wages. There is simply insufficient evidence before me that Mr. Theriault has ever attempted to obtain any employment, what the nature of that employment might be, and the fact that on his own evidence as noted in an application for Ontario disability support in 2009, that he "spends most of the day lying down". The evidence simply is not sufficient to establish to me that Mr. Theriault has suffered any loss of wages as a result of the accident. His current employment status must take into account all of his personal factors.

[504] Furthermore, although the assumption in Ms. MacLeod's analysis of lost wages assumes a difference between Mr. Theriault working part time in a light duty job or full time in a labour intensive job, there is no evidence that he could not obtain full time light duty employment earning pay at a full time rate. The only evidence that I have in the case before me is that he is capable only of light duty work. There is no evidence for me to assume that with light duty work he could not earn the same income as though he were employed full time doing heavy work.

[505] With respect to the claim for loss of future housekeeping capacity, the only evidence with respect to that is that of the Plaintiff himself, together with the evidence of the occupational therapist, Mr. Reed. Mr. Reed in essence indicated that Mr. Theriault was able to perform all household tasks although with some limitation in some of the heavier tasks. I award $5,000.00 for this head of damages.

[506] Taking into account the evidence that Mr. Theriault did not make significant efforts by way of physiotherapy or other aspects of treatment I would overall assess his general damages in the amount of $65,000.00.

Pam Meady – Damages

[507] Pam Meady was 39 years of age at the time of the accident. She held a position as a server-supervisor at two different restaurants. Previous to that she had worked as a general manager and programming director at a student centre at Lakehead University in Thunder Bay. She had also worked as a coordinator for food at the Pan-American games and as a coordinator at a kite festival held in Winnipeg. At both of those positions she was responsible for training staff or training volunteers.

[508] At the time of the crash she was enrolled in an information training and development program at Red River Community College in Winnipeg and hoped to have a specialist diploma by the end of December 2001. She testified that in the future she hoped to become the general manager or the director of a non-profit organization and anticipated retirement at age 65.

[509] Prior to the accident she testified that she was in good health although she had injured her left leg in a motor vehicle accident in October of 2000. She had no residual injuries either physical or psychological. She resided on her own and did all of her own interior and exterior work. She was physically active.

[510] At the hospital she was treated in the emergency room with bruising to her lower left leg, upper left arm, tailbone, and one finger. The emergency room note indicates a diagnosis of Whiplash Associated Disorder.

[511] Shortly after the accident she returned to work in Winnipeg with no time away from her employment. She then saw Dr. Kimelman on January the 9, 2001. She checked out well physically and Dr. Kimelman was more concerned about her emotional state. Her evidence is that she "didn't do anything in the first month." Emotionally she testified that she blamed herself and questioned what she could have done to prevent the accident. She travelled back and forth from work by way of city buses in Winnipeg.

[512] Her evidence then is that for the first six months post accident she was experiencing anxiety and in particular a phobia about travelling on buses. She stated that she received no medical treatment and she "just tried to avoid things that reminded her of the accident." During this course of time she continued to study and completed her diploma course. Between June and December of 2001 she was seeing Dr. Kimelman. In March 2001, Dr. Kimelman referred her to Dr. Moser for the anxiety she was experiencing from the motor vehicle accident and the bus crash. He indicated to her that she should get help and she continued to say no. She stated that she was physically okay and that she didn't want to talk about it. In her own evidence she "chose to not go that route."

[513] By the end of 2001 she was working the same hours that she had worked pre-accident and was taking classes at Red River Community College. She states that she was not driving a

vehicle because of a phobia of doing so and as a result was not involved in any non-profit volunteer work which she had previously involved herself in. She engaged in no sporting activities in that first year.

[514] Since the accident she has continued to work full time and has completed her university studies to the extent where she has received certification as a payroll specialist. Prior to the bus crash she had been studying to obtain a diploma in IT programming and development; however, she decided to change her future employment plans because post-accident she no longer felt she had the appropriate personality characteristics or psychological makeup to be a director or manager of a non-profit organization.

[515] Between November 2002 and November 2003 she saw Dr. Kimelman periodically. In November 2003 she acted on the previous referral by Dr. Kimelman and saw Dr. Cathy Moser. Dr. Moser indicated in a note of November 18, 2003 that Ms. Meady showed symptoms of PTSD. Dr. Moser's evidence is that when she saw Ms. Meady in November of 2003 she did no review of any materials prior to that. Dr. Moser performed no tests and relied entirely on information given to her by Ms. Meady's verbal interview. Dr. Moser indicated that Ms. Meady had all seventeen indicators of PTSD and diagnosed her on the more severe scale. She prescribed relaxation tapes. She stated that in the first meeting on November 18 Ms. Meady also had symptoms of depression.

[516] Ms. Meady again saw Dr. Moser on November 24, 2003. Ms. Meady had not used the relaxation tapes. Dr. Moser testified that Ms. Meady experienced trigger points for her PTSD when she saw a young man who looked like Shaun Davis wearing a hoodie or travelling on a bus in traffic. Ms. Meady testified that by December 2003 she felt that some of her symptoms were diminishing and at times felt worse after seeing Dr. Moser.

[517] In January 2004 Dr. Moser indicated that Ms. Meady was experiencing increased anxiety because of the fact that she had experienced a bankruptcy and also showed anxiety as a result of upcoming discoveries in this action. Dr. Moser last saw Ms. Meady in March 2004. She stated that the bankruptcy was a huge source of Ms. Meady's emotional upset but that she had continued working throughout that time. Ms. Meady was also experiencing much stress from feelings of being an under achiever and not able to meet her own expectations in terms of her work career.

[518] Dr. Moser testified that for someone who suffers extreme cases of PTSD, his or her life can change completely and that even small stressors which may occur in daily life can have a large impact. Dr. Moser summarized that in the time spent with Ms. Meady, Ms. Meady made slow but steady progress. Medications had been prescribed although Ms. Meady did not take them. Dr. Moser testified that she would have liked to have had more sessions with Ms. Meady. She also indicated that PTSD alone may not prevent someone from working.

[519] Ms. Meady states that she last saw Dr. Kimelman in February of 2004 prior to moving to Calgary. Before moving she had not attempted to ask either Dr. Kimelman or Dr. Moser for any references with respect to follow up treatment. While living in Calgary with her friend Jim, she

states that they went on trips, including cruises from time to time. She states that by 2004 she was not as anxious as she had been previously.

[520] Ms. Meady testified that when she moved to Calgary in February 2004 she first got a job with a temporary agency. She took courses at university and received her certification as a payroll specialist. She experienced problems in some positions in that she had a difficult time working with people and was disciplined as a result of her lack of people skills. She then changed employment and in January of 2007 was hired as a payroll clerk with Tri-Can Well Service. That position did not require significant interaction with other employees or co-workers. Eventually she obtained the position of payroll supervisor, a position she continues to hold.

[521] She has had some of the same problems she had when she worked at previous employers in terms of dealing with people. Her evidence is that that is directly related to the accident. She testified that she did not apply for a promotion to the position of HR manager and HR supervisor because of her driving phobia and because those jobs required more interaction with employees and their family members. She would also be responsible for terminations and discipline which she has found very difficult to do since the bus crash.

[522] She started working for the Calgary Flames in late 2005 as a training supervisor. She testified that she would have taken on this job even if the bus crash had not occurred and she was working as director or a general manager of a nonprofit organization. That is a casual part-time position where she is responsible for training and supervising staff who perform various functions at the Saddle Dome.

[523] In April of 2005 Ms. Meady saw Dr. Irena Esche. Dr. Esche found her incredibly anxious and agitated and noted Ms. Meady was one of the most agitated patients she had ever seen without having an acute psychotic illness. Ms. Meady described to her that she had suffered a car accident in October of 2000. Dr. Esche determined that had been a fairly dramatic event and that Ms. Meady responded with anxiety. She had some problems with fear around vehicles but that these symptoms got better to the point where she ultimately could travel on the Greyhound bus in December. Dr. Esche noted that Ms. Meady described herself as being very anxious when she saw Shaun Davis get on the bus. She stated that he was acting erratic, appeared intoxicated and that she was anxious about him attacking the driver or someone else. (I specifically note that none of the other witnesses who were passengers on the bus testified to this effect.) Dr. Esche determined that Ms. Meady demonstrated symptoms of anxiety prior to the accident. She specifically asked Ms. Meady if there had been anything pre-existing and stated that Ms. Meady "…didn't give me any information that would make me feel that she was predisposed to an anxiety disorder."

[524] Dr. Esche testified that when she saw Ms. Meady she diagnosed her with moderate to severe PTSD and that it was chronic. When questioned as to the fact that Ms. Meady had not followed up in treatment with Dr. Moser until some two years after it was initially recommended, Dr. Esche testified that avoidance of going to see a doctor is typical in patients with PTSD. In her view that was a critical factor in her diagnosis of Ms. Meady. Patients often will not act upon their symptoms until they get into a crisis situation in their lives. Ms. Meady

described to Dr. Esche that at one point she just felt so overwhelmed that she had to do something and it was at that point in time that she went to see Dr. Moser. Dr. Esche noted that although she had been prescribed medications, the medications appeared in Ms. Meady's case to contribute to nightmares which she had been having. Following her interview in April 2005 Dr. Esche recommended to Ms. Meady that she get a family doctor, take sleeping medication and anti-anxiety medication and recommended that she find a counselor experienced in dealing with chronic PTSD in order to decrease her anxiety.

[525] Dr. Esche saw Ms. Meady again in 2010. Dr. Esche was able to determine that Ms. Meady had not undertaken the recommendations made in 2005. She indicated that if Ms. Meady had acted on some of the recommendations made in 2005 it was Dr. Esche's opinion that Ms. Meady would have had improvement in her symptoms and functioning. She did note that her impression was that Ms. Meady's condition had deteriorated initially in the first couple of years after the accident and by the time Dr. Esche saw her in 2005 Ms. Meady was at a plateau. In 2010 Dr. Esche stated that the PTSD was now moderate and chronic but no longer severe as Ms. Meady had improved.

[526] Dr. Esche described that people with PTSD have symptoms which fluctuate over time and that Ms. Meady described as being able to cope. In Dr. Esche's view she had not recovered 100% but she was coping. She was still having difficulty at work as a result of what she described as not having a lot of social skills which was a marked change in her personality from before the accident.

[527] In cross-examination Dr. Esche was questioned with respect to what she described in her report as diagnosing Ms. Meady with Axis V. She explained that Axis V is a rating scale from 1-100 that is really a global assessment of functioning. As a psychiatrist she would look at the overall functioning of an individual and then rate it. 100-80 is fairly normal with 90 being usually around the level of someone functioning at a professional level and 80 as someone who is perhaps having some anxiety in response to life circumstances. She testified that between 80-60 there would be an increase in symptomatology and under 60 is considered moderate impairment of global functioning. She acknowledged that in the first interview Ms. Meady scored between 55 and 60 and on the second interview between 75 and 80. She agreed from 71-80 a person could be expected to have symptom problems but they are temporary, expectable reactions to stresses and there is no more than slight impairment in any area of psychological functioning.

[528] In cross-examination, Ms. Meady indicated that she probably would not take treatment if she has to talk about the accident. She agreed that every doctor she has spoken to has told her that she needs counselling but that she wanted to finish with the legal matters before she proceeded.

[529] Ms. Meady's evidence is that prior to the accident her future plans included a desire to become a general manager or a director of a non-profit organization. Dr. Kerry Lawson, who performed part of her Functional Capacity Evaluation, testified on behalf of the Defendants. He agreed that she had the ability to do so. He agreed that Ms. Meady met the necessary criteria for a diagnosis of Major Depressive Disorder - single episode, non psychotic, moderate as well as

for PTSD. He agreed that these types of psychiatric disorders can have a major impact on someone's level of functioning. He also noted that people with PTSD often delay getting treatment because they don't want to relive the situation that is causing them trauma.

[530] Dawne-Marie MacLeod testified on Ms. Meady's behalf to calculate her past wage past wage loss and future loss of earning capacity. Exhibits 43 and 44 are schedules which were attached to her report, not filed, entitled "Updated Loss of Earnings Assessment". In terms of the assumptions relied on by Ms. MacLeod, she testified that she relied on the following basic assumptions in expressing her opinion: a) Ms. Meady's intention was to work in a management position with a nonprofit organization and had the necessary background to be successful in that field; b) she would have earned wages between $32 an hour and $48 an hour in such a position; c) because of accident related injuries, Ms. Meady was unable to obtain that position and instead has obtained alternate employment, the income from which the Defendants were entitled to a credit for; d) Ms. Meady received no collateral income replacement benefits; e) Ms. Meady would have worked for the Calgary Flames Hockey Club even if she was in a management position for a nonprofit organization and therefore any income earned from the Calgary Flames Hockey Club should not offset past wage loss and future loss of earning capacity claim.

[531] Ms. MacLeod also testified that she took into account income fluctuations which Ms. Meady had experienced. At one point in time there was a roll back of wages. Her evidence was that she also took into account that Ms. Meady had not applied for a human resources management position because of the impact of the accident.

[532] Ms. MacLeod's detailed calculations for Ms. Meady's past loss of wages are set out in schedule 1 of exhibit 44. That calculation results in a past loss of earnings to April 26, 2010 of $227, 175. Ms. MacLeod also calculated future loss of earnings capacity set out in schedules 2 and 3 of exhibit 44. She sets out a number of different scenarios with the first assuming that Ms. Meady's salary would not be rolled back again as it was in April 2009. She testified that the future loss of earnings to retirement age of 62 under that scenario would be $202,957 and $241,078 to retirement age of 65 years.

[533] Ms. MacLeod prepared a summary of a total of the past and future wage loss claims which although was not marked as an exhibit, was filed with the court. Assuming that there would be no salary rollback in the future, if she retired at age 62, the total loss is calculated at $430,132, and with retirement at age 65, $468,253. Assuming that there would be periodic salary decreases over her working life with retirement at age 62 the total loss is calculated at $493,039 and retirement at age 65, $542,975.

[534] She also acknowledged that since Ms. Meady began her employment with Tri-Can in December 2006 that her income has been rising much higher than the average percentage increases for workers. If that trend continues, Ms. Meady will eventually catch up and may be better off with this career path than the one she testified she was initially ascribing to.

[535] In determining the quantum of damages for Ms. Meady I do so on the basis that she sustained soft tissue injuries. Subsequently I note that she originally attended on her family physician on January 9, 2001 and did not re-attend until October of 2001. I accept the evidence

of Dr. Moser and Dr. Irena Esche that Ms. Meady suffers from PTSD. I do not see evidence before me to suggest that these symptoms were present prior to the bus accident. She may have been experiencing a form of anxiety but the evidence does not suggest the condition went beyond that. I have considered also that she was not hospitalized and that her physical injuries cleared up in short order. I have also noted the evidence that it has not prevented her from working. In fact, the evidence indicates that she did work throughout the entire time she has continued to pursue her education and employment and has advanced in her career earning significant increases in income. Her 2009 net income approximated $80,000.

[536] I have specifically considered the evidence of Dr. Esche who determined, in her testing, that someone who fell within the range of Ms. Meady could be expected to have symptoms and problems but they are temporary, expectable reactions to stress and there is no more than slight impairment in any area of psychological functioning.

[537] I have further considered that although it was recommended to her very early following the accident that she seek professional help to deal with her psychological issues she made a deliberate decision and in her own evidence she "chose to not go that route". She, in fact, did not act upon the recommendation of Dr. Kimelman until approximately two years subsequent to the recommendation. Dr. Esche testified that had Ms. Meady undertaken the recommendations for treatment, it was her opinion that Ms. Meady's symptoms and functioning would have improved. I have placed significant emphasis on the fact that Ms. Meady took very limited steps which have been suggested to her by medical professionals in order to alleviate her PTSD. I also note the evidence of Dr. Esche who states that here emotional problems are not permanent and that she will benefit from ongoing treatment.

[538] By the time of trial in 2010 Dr. Esche stated that the PTSD was now moderate and chronic.

[539] With respect to the loss of wage claim, that claim was based on the assumption made by Ms. MacLeod that Ms. Meady would obtain the position of a senior manager in 2002. There is no evidence that she had applied for any positions which she did not obtain in that capacity. Further, beyond her own general indication as her personality prior, there is no evidence to support that it was the accident that caused the personal difficulties which she was experiencing with other employees or co-workers.

[540] While I acknowledge that the Functional Capacity Assessments show that she may be capable of attaining a position of a manager, the Plaintiff has not met the test of proving that there was a real and substantial possibility of obtaining that position and therefore I make no award for future loss of income. With respect to the claim for past wage loss, her evidence is that she took no time away from her employment. I do not find that there is evidence which supports an award for past wage loss or future loss of income.

[541] Taking all of the above factors into account, including her failure to follow medical advice with respect to early treatment, I would assess Ms. Meady's general damages at $50,000.00.

[542] The Manitoba Public Insurance claim is denied for reasons given previously.

Carrie Anne Tapak - Damages

[543] Carrie Anne Tapak was 29 years of age at the time of the accident. She had a high school education and had taken one course as a child care worker which she intended to complete within two years. She had previously taken a hairdresser course and graduated in 1999 following which she did a six month apprenticeship. Prior to December of 2000 she had previous employment as a waitress, a gas station attendant, a chamber maid and she did volunteer work at senior residences.

[544] She described her pre-accident health as having no physical impairments. She had seen a chiropractor regularly as a result of issues in her back, shoulder and neck relating to her position as a hairdresser. She maintained an active gym membership and jogged regularly.

[545] She described her mental status previous to the accident as being very depressed. He grandmother, to whom she was very close, died when she was 18 years of age. She had been on medication and received outpatient counselling for depression until she started her hairdressing course in 1998. The evidence further would indicate that she had a very difficult family relationship when she was young. At the time of the accident she was also involved in a very stressful and abusive relationship with her partner.

[546] In December of 2000 she was being treated by Dr. deRocquigny for depression. His evidence notes that she was suffering from severe depression when she moved to Winnipeg in 1998. She had suffered the stress of having been raped, and had overdosed on pills in March of 2000. Dr. deRocquigny's impression pre-accident is that she "…suffers from a severe personality disorder due to the severe emotional deprivation as a child plus the physical and emotional abuse." At the time of the accident she states that she was beginning to feel better mentally. She was working at Tim Horton's earning $6.85 per hour for a 40 hour week and was also working at a payroll loans company earning $7.00 working 34-76 hours per week.

[547] At the time of the accident Ms. Tapak was seated on the driver's side of the bus in approximately the middle. She states that she woke up just before the crash when she heard yelling. She described that the bus flipped over 3 times and that she hit the ceiling and side of the bus "…like being in a dryer…" She thinks she lost consciousness for a while and when the bus stopped her legs were wedged under the seat. Her legs felt numb, her ankle was throbbing and her lower back was sore. She ultimately got onto the second bus and was then put on a backboard at the Upsala community centre where she was transported by ambulance to the hospital in Thunder Bay. At the hospital x-rays were taken and she was given pain medication. At that time she also learned that she was pregnant. Tests determined that the baby had not suffered any injuries. She spent one week in hospital. During that time she was scene by Dr. Remus, an orthopaedic surgeon who referred her to physiotherapy. She was also referred to counselling as a result of stress she was undergoing because her partner, having determined she was pregnant, wanted her to have an abortion.

[548] The medical evidence notes that at the time she attended in the emergency department X-rays were taken, all of which were normal. She also had full range of motion. The emergency records of the Thunder Bay Regional hospital note that on arrival she was treated for cervical, thoracic and lumbar spine and abdominal injuries. A July 12 2002 letter to Mr. Hacio from Dr. Jack Remus, the orthopaedic surgeon who saw her on arrival at the hospital, noted, "I expect that she will make a complete recovery from the soft tissue injuries, to her cervical spine and other areas that sustained soft tissue injuries."

[549] She was discharged form hospital December 30 and remained in Thunder Bay until May 1 of 2001. During those months she received physiotherapy on her neck and upper back between January 5 and April 27. During the same period she attended at counselling at the women's shelter for abused women in Thunder Bay.

[550] She returned to Winnipeg in May and moved back in with her abusive partner. She was then attending physiotherapy but states that she spent much time on bed rest. She left both of the jobs she was then working at. She states that if there had been no accident she would have worked until the seventh or eighth month of her pregnancy and, after delivering the baby, would have returned to school in September of 2002.

[551] Between September 2001 and March 2002 she took medications and had no treatment. She returned to Thunder Bay in March 2002 and on return began to see Dr. Rooney, a chiropractor. She initially saw him three times per week and obtained some relief and then saw him regularly through 2002. Her evidence is that in 2002 she was feeling "pretty good" mentally. She had purchased a home, had regular income and had family support. She was then living on maternity benefits and welfare. She states that she did not look for work during this period as she was suffering from accident related issues. She had difficulty lifting her newborn baby into the tub for a bath. During 2002 she states that she returned to attending at a gym 3 to 4 times a week where she did stretches and aqua-fit.

[552] She states that in December of 2002 she returned to her previous employment as a hairdresser and worked at that until November of 2003. During this time she states that she had pain in her lower back which radiated down into her thighs. This would appear to be the similar type of pain and treatment that she had seen a chiropractor for pre-accident. She continued her work as a hairdresser between November 2003 and May 2004. At that time she determined that because of stress she could not continue and was referred to Dr. Eke for depression and counselling. During this same time period from 2003 to 2004 she had a welfare placement working as a volunteer at the Arthritis Society as a receptionist, and orienting volunteers.

[553] In 2005 her evidence is that her neck had improved and that it was not weighing her down anymore. She described herself as having "…more good days than bad…" She was now bike riding again, looking after her own home and doing her own laundry. She stated "as long as I go to the gym and see Dr. Rooney I can do most things." She described that her back had improved more than her neck. She stated that on a good day her back pain was 2 on a scale of 10 and on a bad day 5 on a scale of 10.

[554] In 2005 she looked into being retrained. She met with an employment counselor and after discussion determined that she wished to work in the field of recreation and leisure services. In June 2007, she obtained a Diploma in Recreation and Leisure Services. On completion of her recreational program she started work as a social service support worker with Community Living. In summer of 2006 she worked at Saint Joseph's Care Group at a job which she states was not physically demanding.

[555] Her evidence is that in the two years previous to trial the pain in her neck and back plateaued. She took extra strength Tylenol on bad days. She states that she was then able to do things with her son. Her sleep had improved, her mood was a lot better and her energy and stamina had improved. As she stated "…for the most part, I'm involved in my life."

[556] She is currently earning $44,000 per year between her position at Community Living and with the Victorian Order of Nurses. She states that she gets tired and has a sore neck and back if she works any more than that. She states that she had previous plans of becoming a nurse but now could not do that because she is unable to lift heavy objects. She described her long range plans as wishing to work for the Victorian Order of Nurses as a recreation/leisure counselor. She anticipated earning $22 per hour and would have worked until age 65.

[557] In January of 2008 she was involved in a motor vehicle accident. That resulted in neck pain for a period of 2-3 months and back pain which she states resolved by mid April. She stated that the pain from this motor vehicle accident were in different areas than the bus accident.

[558] In cross-examination she acknowledged that, although she wished to be a nurse. pre-accident she had been on academic probation at the community college. She states her academic problems arose only after her grandmother died. In questioning she acknowledged that prior to her grandmother's death she had course marks of between 50 and 64 with five of the marks being in the low to mid 50's. She agreed that with these marks she would not be able to go to university to become a nurse and would have had to upgrade her marks to do so. She further acknowledged that she had not looked into any prerequisites to enter into nursing and agreed that she had significant hurdles to overcome in the fall of 2002 before she could be admitted to nursing. When she was referenced to a vocational assessment done in 2003, which says nothing of her wanting to be a nurse, she indicated that she verbally told the counselor of her desire but that it had not been put into the report. There is no evidence presented that she took any steps toward any upgrade planning.

[559] She was cross examined with respect to several medical reports. A medical report of Dr. deRocquigny in December of 2002 contains an indication that she said she was drinking heavily and was depressed. She stated that was not true and that much of the information in Dr. deRocquigny's report was inaccurate. She further states that other information given in a report done by Dr. Korn in June of 2000 was incorrect and that in fact was information given to the doctor by her boyfriend, not by her.

[560] Rob Pasqualino performed a Functional Capacity Assessment on Ms. Tapak in April 2005 to determine whether she could work part time or full time as a nurse. He noted that this occurred at a time where she had just learned that her previous partner had died and that that

affected his assessment. In order to do his assessment he made use of the National Occupational Classification System. His evidence is that in April 2005 she was self limiting in the number of tests that she could perform and that she seemed distracted. In the tests which she did complete her physical performance was unremarkable. Major limiting factors appeared to be pain in her neck and low back. Mr. Pasqualino agreed that he assumed that nursing was a "heavy" job. He agreed that the National Occupational Classification showed a nurse in the medium category and that if indeed Ms. Tapak reached this category she could do the job of a nurse. He states that if he had not been asked to assess her on the basis of a "heavy" occupation, he would have done tests, compared her to the profile, and determined that she should be classified as medium.

[561] In a second report done in 2009 he concluded that she was functioning at a light to medium level. Her physical conditioning and performance had improved significantly and her endurance was better. She demonstrated no self-limiting behaviour during this second assessment. He determined that she was functionally limited in overhead work, work requiring squatting, and work that required the involvement of her cervical and lumbar spine.

[562] Dr. Paul Rooney is a chiropractor who treated Ms. Tapak between 2002 and 2004. He had originally developed a treatment plan which suggested that she had Whiplash Associated Disorder Stage 2 (WAD II). He had originally hoped for improvement within a period of 17 weeks, however, her recovery was slower than expected. He saw her 20 times in 2005 and 32 times in 2006. He states that between 2002 and 2006 she improved 75% overall but was still limited in what she could do. In 2006 he noted that the pain had improved.

[563] Dr. Brian Schroeder is a chiropractor who had been hired to do an independent review for Manitoba Public Insurance Corporation of Dr. Rooney's treatment plan. He noted that her complaints were consistent with other complaints she had made up to that point in time and that she did not appear to be embellishing her injuries in any way. He ultimately diagnosed her with Whiplash Associated Disorder Stage 3 and concluded that she had been under diagnosed previously. He stated that if appropriate therapy had been undergone he would have expected her recovery to take approximately one year.

[564] Dr. Mary Ann Mountain did a neuropsychological assessment of Ms. Tapak in June of 2005. She first did a clinical assessment and then subjected Ms. Tapak to psychometric testing. She determined that there had been no neurological injury at the time of the accident but that Ms. Tapak had a number of problems in the psychiatric area. She determined that in the psychometric/physical test Ms. Tapak may have been too extreme in her reporting. She determined that her academic ability was good but that she had a significant weakness on her emotional side. Dr. Mountain summarized the findings from her 2005 assessment as being that Ms. Tapak was suffering from PTSD and chronic pain. An indication was given that she had to be "more persistent" in treatment and that she needed to get her psychiatric problems treated. Dr. Mountain further acknowledged that Ms. Tapak had a number of possible triggers of PTSD pre-accident.

[565] In cross-examination Dr. Mountain acknowledged that in her first interview there was no reference by Ms. Tapak to following a nursing career and indeed no discussion of any future plans.

[566] Dr. Mountain prepared a second report in September 2010 based on a telephone interview with Ms. Tapak. She states that at that point in time she had more recent information and also had an opportunity to review a neuropsychological/vocational assessment report prepared by Dr. Keith Travis in October 2005. She acknowledged that Dr. Travis did a much more comprehensive clinical assessment than she had done. Dr. Mountain testified that in 2010 Ms. Tapak's condition had improved, although she would have preferred a personal meeting to carry out a more comprehensive assessment. She agreed that in 2005 she was of the view that Ms. Tapak could not have completed studies in order to become a nurse. She testified that she changed her opinion by 2010.

[567] Johanna Stewart was accepted as an expert in the field of doing a vocational assessment and transfer of skills assessment. She prepared a report based on an assessment done in March 2005. Based on her assessment she concluded that Ms. Tapak had the ability to obtain a post secondary undergraduate degree, including a nursing degree. She testified that she had indicated to Ms. Tapak that based on her education, training and experience, and physical limitations she should consider obtaining a position as a community social services worker. Ms. Stewart acknowledged in cross-examination that Ms. Tapak at the time of trial probably had greater transferable skills than she had in 2005. She further acknowledged that if she had seen the Functional Capacity Evaluation from April of 2005, the evaluation may have made a difference in her ultimate conclusion. She did not evaluate, and expressed no opinion as to whether Ms. Tapak could have been a nurse prior to the accident.

[568] Dr. Keith Travis testified on behalf of the Defendants. He was accepted as an expert in the field of neuropsychological/vocational assessments. He performed an assessment on Ms. Tapak on October 24 and 25 of 2005 and ultimately prepared a report. His test results showed that Ms. Tapak carried out her performance tasks in the average range. There was no evidence of any neurological deficit, a similar finding to that made by Dr. Mountain. He did indicate that comparing her test results with her behavioral observations, showed "an amazing lack of congruity." He concluded that she was over-reporting her symptoms.

[569] Dr. Travis testified that Ms. Tapak had symptoms of PTSD pre-accident. He noted a previous sexual assault and her past history. He accepted that her symptoms were exacerbated by the accident. He stated that he could not comment on by how much, but noted that prior to the accident she also exhibited symptoms of fear, self blame, hopelessness, sleep disturbance, and feelings of panic. He described that there are some traumatic events which may have instant consequences and other circumstances where traumatic situations keep falling over, toppling like dominos and they keep going on. In this particular case there were toppling dominos having to do with that problematic relationship. Dr. Travis then goes on to note several significant factors and circumstances in Ms. Tapak's life prior to the bus accident and that given the number of previous traumatic incidents in her life she may well suffer from a PTSD.

[570] Dr. Travis noted that throughout the reports which he reviewed, there was a medical consensus that Ms. Tapak sustained multiple soft tissue myofacial injuries primarily to the neck and back. In cross-examination he agreed that her pre-existing psychiatric problems made her more vulnerable to an exacerbation of these problems caused by the bus crash. He agreed that based upon the accident and her subsequent testing Ms. Tapak had a somatoform disorder.

While he disagreed with the categorization by Dr. Mountain as PTSD, he acknowledged they were in essence talking about the same thing. He concluded that the somatoform disorder could indeed affect future employment, future personal relationships, physical activity, and general enjoyment of life.

[571] In terms of his vocational assessment, he agreed that she may have expressed an interest in nursing previously but that the evidence did not show that she had any investment in nursing. He indicated that the test data pertaining to her abilities could be taken as reliable indicators of her current functioning. In his opinion, Ms. Tapak had several significant barriers with respect to becoming a nurse. These included her psychiatric history, an excessive use of alcohol, and significant educational barriers. He agreed with Dr. Mountain that while she may be academically capable of pursuing nursing studies, from a psychological basis she could not have done so.

[572] Dr. Gordon Hunter, an orthopaedic specialist called by the Defendants, prepared two reports. At the time of the first report in October 2005 Ms. Tapak's complaints were neck pain which reached down to the low back region and pain in both shoulders. He detected no significant impairments from a musculo-skeletal point of view. She had full range of motion in the neck and there was no serious loss of any physical function as a result of the accident.

[573] Dr. Hunter prepared a second report in November 2010. He then had the opportunity to have reviewed a report of Dr. Henry Hamilton which was filed as an exhibit on this case. His evidence is that although he was not aware of Ms. Tapak having had any neck or back pain pre-accident, the medical information would indicate that she has consistently complained of neck and back pain since. His testimony is that one would normally expect that by the end of three months, 90% of whiplash injuries would be pain free. Dr. Hunter himself did not incorporate the use of the term Whiplash Associated Disorder ("WAD") in any stage. He did however disagree with Dr. Schroeder who described Ms. Tapak as having WAD III. He further disagreed with Dr. Rooney who diagnosed the injuries as WAD II. He did agree that Ms. Tapak had a soft tissue strain with pain in the neck and no neurological involvement. He testified that he would not differ with the opinion of the psychiatrist with respect to someone suffering from chronic pain syndrome.

[574] An MRI in February of 2010 confirmed that Ms. Tapak had a disc herniation at the C6-C7 level with additional disc herniation at C4-5 and C5-6. There is no specific evidence which I can rely upon to determine whether this condition existed pre-accident or was caused at the time of the accident. I agree with the argument put forth by the Defendants that Ms. Tapak has such a varied history, both physically and emotionally, that it is difficult to ascertain the degree to which her accident related injuries and her other problems were contributing to her current situation.

[575] She describes her current pain level in her neck as being 4 out of 10 on a good day and 8 out of 10 on a bad day. The level of pain in her back ranges from 2 out of 10 on a good day and 5 out of 10 on a bad day.

[576] Dawne-Marie MacLeod testified on Carrie Anne's behalf to provide an opinion on Carrie Anne's past loss of wages and future loss of earning capacity. Ms. MacLeod was asked to determine Carrie Anne's past loss of wages and future loss of earning capacity based on the assumption that she would have become a nurse had the bus crash not occurred. Her Supplemental Schedules were marked at Exhibit #53. In her testimony Ms. MacLeod described the documentation and assumptions she relied on, the most important being that Carrie Anne wanted to be a nurse and that but for the bus crash she now was unable physically to do that job. She also assumed that Carrie Anne would complete her schooling to become a nurse by April of 2006 and start in the nursing field in or around that period of time. She also assumed that Carrie Anne would be unable to work on a full time permanent basis in her present position because of her bus crash related injuries. She also assumed Carrie Anne would have retired at the age of 60 or 62 years. She also testified that she took the lower nursing wage rates as between Manitoba and Ontario in performing her calculations.

[577] She prepared Supplemental Schedules for her updated loss of earning assessment calculations taking into account that Carrie Anne had just before trial obtained a position with VON Canada and was earning additional wages. Those wages had to be deducted from her past wage loss and future loss of earning capacity claims. She also took into consideration that Carrie Anne was hoping to be able to work on a full time basis with VON Canada because she was finding it very difficult to perform the physical duties and functions of her present position with Community Living Thunder Bay. Ms. MacLeod therefore calculated two wage loss scenarios. The first wage loss scenario is with her staying with Community Living Thunder Bay and the other is with her getting a job with VON Canada on a full time basis.

[578] She testified that Carrie Anne's past wage loss was approximately $97,000.00. In terms of Carrie Anne's future loss of earning capacity, under the assumption that Carrie Anne would continue to work for Community Living Thunder Bay and continue to work on a part time basis with VON her loss of earning capacity claim set out in Schedule 2 of Exhibit 53 is as follows:

1. With a retirement age of 60 $434,336.00

2. With a retirement age of 62 $452,000.00

[579] Schedule 3 of Exhibit 53 is calculated on the basis that Carrie Anne will begin working for VON Canada on a full time basis. Her calculations for that scenario were as follows:

1. With a retirement age of 60 $246,186.00
2. With a retirement age of 62 $256,000.00.

[580] Ms. MacLeod cautioned by saying that there was certainly no guarantee that this scenario was an appropriate one given that she understood from Ms. Tapak that there were no full time positions available at VON at the time of the trial.

[581] Ms. MacLeod was also asked to quantify Carrie Anne's loss of housekeeping capacity claim. In doing those calculations Ms. MacLeod applied a loss of housekeeping ability of 10%, 15% and 20%. The other assumptions Ms. MacLeod relied upon were that Carrie Anne could

perform all of her pre-accident housekeeping and home maintenance activities without restrictions. She also assumed that her son would no longer require any assistance by the time he reached 18 years of age. She also relied on the assumption that Carrie Anne would be a single mother until her son reached the age of 18. Ms. MacLeod also used a replacement cost wage rate of $12.00 per hour, which she testified was reasonable in the circumstances. She calculated Carrie Anne's loss as follows: at a 10% loss - $73,289.00 ($15,944 was her past loss of housekeeping capacity, $10,695.00 was for loss of childcare capacity); at a 15% loss - $109, 934.00 ($23,916.00 was her past loss of housekeeping capacity, $16,042.00 was for loss of childcare capacity); and at a 20% loss - $146,579.00 ($31,887.00 was her past loss of housekeeping capacity, $21,390.00 was for loss of childcare capacity).

[582] The evidence of her interests in nursing comes solely from Ms. Tapak. The evidence suggests that she did not express any interest in nursing until the spring of 2000. The evidence, however, notes that she would have required some significant educational upgrading in order to be selected into a nursing program. There is no indication that she had ever applied, no indication in the evidence that she had taken any further steps after the spring of 2000 to investigate entering into a nursing program. She did not express, either to Dr. Mountain or to Dr. Travis who carried out neuropsychological assessment, that she had any specific interest in nursing. In 2005 both Dr. Mountain and Dr. Travis concluded that she did not have the ability overall to pursue a nursing career. I recognized that Dr. Mountain changed her view in 2010; however, that was done without any additional testing. While I accept that she had the intelligence to pursue such a career path, intelligence alone is not sufficient to successfully obtain professional accreditation. A myriad of other factors militated against her ever getting into nursing. While she now indicates that she wanted to pursue a career in nursing following high school, there is nothing in her pre-accident choices or academic record which suggests that she would have actually pursued such a course of action or would have been successful.

[583] She has not established a reasonable and substantial risk of loss of income as a result of her accident related injuries.

[584] In assessing general damages for Ms. Tapak the Defendants acknowledge that she has suffered a somatoform disorder caused by the accident and that such disorder will likely continue indefinitely. Prior to the accident she suffered no physical impairments but had seen a chiropractor on a fairly regular basis for back issues resulting from her job as a hairdresser. She engaged in regular gym workouts including weight lifting. She was active in rollerblading and volunteer work. She did all of her own interior and most of her exterior housework.

[585] Ms. Tapak had experienced pre-accident incidents. She was noted to have suffered from a severe personality disorder due to the severe emotional depravation she experienced as a child together with physical and emotional abuse, including a sexual assault.

[586] The medical evidence on file is consistent with the position that Ms. Tapak suffered a whiplash type of injury although it differs with respect to the severity. I am also satisfied that the evidence would indicate that she had Post Traumatic Stress Syndrome pre-accident which may very well have been exacerbated by the accident. I further note that both Doctors Mountain and Travis noted over reporting of symptoms by Ms. Tapak.

[587] The focus of the general damage claim put forth by Ms. Tapak is on her chronic pain syndrome which continues to affect her. She continues to have pain and discomfort at work when she performs heavy physical functions. Although she indicates that she can no longer do many of her pre-crash recreational activities, the evidence indicates that she did engage in extensive exercise post-accident. She has been performing well working at her current position at community living. While I recognize the acknowledgment of a somatoform disorder, I balance that against the aspect that she continued to work, to go to school successfully, and to ultimately obtain employment since the accident.

[588] In assessing the general damages in this case, I have considered that the accident exacerbated existing problems rather than being a specific and only cause. I would assess her general damages at $70,000.00.

[589] With respect to the loss of housekeeping claim, there is no evidence other than Ms. Tapak's subjective evidence as to any difficulties with housekeeping. Absent any basis upon which to assess the future housekeeping claim, but recognizing that she will require some assistance, I award the amount of $25,000.00 for that head of damage.

[590] The Defendants do not dispute the special damages claims advanced by the Plaintiff, with the exception of the Manitoba Public Health Insurance subrogated claim. For reasons given for other Plaintiffs the MPIC claim is disallowed. However, there shall be an award for special damages in the amount of $6,179.08.

Disposition

[591] During the oral part of submissions, Plaintiffs' counsel acknowledged that, if I am unable to conclude that on the facts presented to the police, they should have taken further action, and prevented Mr. Davis from boarding the bus, then the Plaintiffs' case fails. Put in other words, if the Plaintiffs have not established that it was foreseeable that Davis was going to do anything to disrupt the operation of the bus, the case fails. The same issue of foreseeability applies to Mr. Dolph and Greyhound.

[592] For the reasons I have referenced herein, I find that there was no evidence upon which either of the police or Mr. Dolph should have foreseen that the actions on Davis' part would have resulted in the injuries to these Plaintiffs.

[593] The case is, therefore, dismissed, against all the Defendants except Shaun Davis. I would have awarded damages for each Plaintiff as noted herein.

[594] If the parties are unable to agree on costs, the Plaintiffs may make submissions in writing within 30 days, and the Defendants shall reply within 30 days of the Plaintiffs' submissions.

"original signed by"
Mr. Justice T. A. Platana

Released: January 31, 2012

CITATION: Meady v. Greyhound Canada Transportation Corp., 2012 ONSC 657
COURT FILE NO.: CV-01-0474
DATE: 2012-01-31

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N:

PAM MEADY, EVELYN SHEPHERD, CARRIE ANN TAPAK, DENNIS CROMARTY, THAYNE GILLIAT, FAYE EVANS, SHELDON CHRISTENSEN, a Minor by his Litigation Guardian, CATHY DUCHARME, ANTHONY CLOWES, TANYA CLOWES and BRIAN ELIZABETH CLOWES and SHAUNA PAULINE CLOWES, minors by their Litigation Guardian, TANYA CLOWES, BRIAN GORDON ADAMS, MICHAEL DAVID FINN, JENNIFER ESTERREICHEER, JOHNATHAN THERIAULT, an infant under the age of eighteen years by his Litigation Guardian LYNE THERIAULT and LYNE THERIAULT,

Plaintiffs

- and –

GREYHOUND CANADA TRANSPORTATION CORP., CONSTABLE COREY PARRISH, CONSTABLE MARTIN SINGLETON, HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO, ALBERT ARNOLD DOLPH and SHAUN DAVIS,

Defendants

REASONS FOR JUDGMENT

Platana J.

Released: January 31, 2012

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