

COPY

**IN THE SUPREME COURT OF BRITISH COLUMBIA**

Date: 20050504  
Docket: 04-0043  
Registry: Victoria

Between:

**Susan Forbes**

Plaintiff

And:

**Olive Ruth Wilkinson**

Defendant

Before: The Honourable Mr. Justice Kelleher

**Oral Reasons for Judgment**

May 4, 2005

Counsel for the Plaintiff:

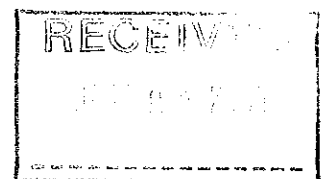
James A.S. Legh  
Chris Cobb, Articled Student

Counsel for the Defendant:

Harold F. Turnham

Place of Trial:

Victoria, B.C.



[1] **THE COURT:** This is an action for damages. On October 26th, 2003, the plaintiff was crossing Hillside Avenue in the City of Victoria, seated in her motorized wheelchair. She was crossing in a marked crosswalk. The defendant was approaching in her vehicle from the plaintiff's left. The defendant's vehicle came into contact with the plaintiff's wheelchair and with the plaintiff. The plaintiff suffered serious injury. There is a dispute about both liability and damages.

**The Accident**

[2] The accident took place on a Sunday morning at approximately 9:15 a.m. The weather was bright. Ms. Forbes' wheelchair displayed a small orange flag above it.

[3] Hillside Avenue is a busy east-west thoroughfare. There are two lanes in each direction. The defendant's vehicle was proceeding east. The plaintiff was attempting to proceed north across Hillside. The plaintiff is confined to a wheelchair because of congenital cerebral palsy with spastic quadriplegia.

[4] There are several versions of what occurred. In addition to the parties to the litigation, I had the benefit of the testimony of three witnesses who, while not seeing the impact, were quite close by.

[5] Ms. Forbes' evidence is that she came out of her house, proceeded to the sidewalk and stopped at a depression in the sidewalk which provides a ramp for wheelchairs and which is at the crosswalk. She testified she stopped back from the curb, waiting for a safe time to cross. She recalls waiting for two vehicles, then

looking west and seeing there were no vehicles coming. She then proceeded to cross the street. She edged the wheelchair off the sidewalk slowly and once all four tires were in the crosswalk, she proceeded forward. When she looked left again, she observed a red car coming toward her. Ms. Forbes did not want to back up because the chair might tip. She therefore went forward and was struck by the vehicle. The vehicle struck her left leg and the left footrest of the wheelchair. She experienced excruciating pain. The impact spun the wheelchair 180 degrees so it was facing south. She, and it, remained in the curb lane.

[6] Ms. Wilkinson testified she was proceeding east in the right (or curb or south) lane. She was driving at approximately 50 kph and then slowed to 30 kph as she approached the crosswalk. She assessed whether anyone was on the crosswalk. There was no one there. She next heard a noise on the right side at her front fender. She braked and swerved to her left to avoid any further collision. Ms. Wilkinson observed a person in what she described as a "scooter" in her rear view mirror. She pulled over and parked then went back to determine what had occurred.

[7] Alana Holt was walking east on Hillside, toward the crosswalk. She was on the south side of Hillside, the same as Ms. Forbes. She observed that Ms. Forbes was entering the crosswalk at the same time as the red vehicle passed her. She looked away, then heard a "bang". She looked up and saw a shoe flying in the air and heard Ms. Forbes scream "my leg". She said that when she heard the noise and looked up the car seemed to be trying to change lanes. She recalled that the car was straddling the two lanes. Ms. Holt testified she was west of the yellow sign

indicating the crosswalk. There is no dispute that the yellow sign is 60 metres west of the crosswalk.

[8] Ms. Holt was pushing her son in a stroller. She was accompanied by Joshua Craig. Mr. Craig also gave evidence. His recollection was more vague. He testified that the wheelchair was knocked over. He is mistaken in that regard. I do not find his evidence helpful in determining what occurred here.

[9] Jake Hurst was visiting Ms. Forbes. He testified that he accompanied her from her home to the crosswalk. He saw her stop at the crosswalk and then go forward. He turned to return to the home and heard a crash. He turned back and saw that Ms. Forbes' wheelchair had been struck. Ms. Forbes was still in the wheelchair but facing the other direction. He observed dents to the right fender and the right bumper of the defendant's vehicle.

[10] Counsel have starkly different theories of what occurred. The plaintiff argues that Ms. Forbes was entering the crosswalk as the vehicle was more than 60 metres away. She was visible, yet Ms. Wilkinson did not notice her. The plaintiff's theory is that Ms. Wilkinson saw her at the last moment and took evasive action by swerving left. I am invited to conclude that the defendant is honestly mistaken when she testified that she did not see anything before the collision and that she took evasive action at the last moment. Ms. Forbes, according to this theory, was perhaps half-way across the first lane when she was struck.

[11] On that basis, the defendant would be entirely to blame. A pedestrian who has entered a crosswalk when it is safe to do so is entitled to the right-of-way. If the

defendant had been exercising reasonable care, she would have noticed the plaintiff and would have stopped to permit the plaintiff to cross the street safely.

[12] Counsel for the defendant argues the defendant was at all times in the center of the curb lane. She did not notice the plaintiff and so clearly took no evasive action until after the collision. Given the width of the lane, the plaintiff must have entered the crosswalk through a lapse of judgment. She did not see the vehicle approaching the crosswalk and drove her wheelchair into the front part of the side of the car. In this regard, I am invited to disregard the plaintiff's evidence that she stopped and looked and saw nothing coming.

[13] The defendant argues that she had the right-of-way unless and until a pedestrian entered the crosswalk while the defendant was so far away that it was "practicable" to yield the right-of-way.

[14] A driver is not liable when a pedestrian leaves the sidewalk and crosses the street where it is unsafe to do so. Where a crosswalk is not occupied by a pedestrian and the driver approaches at a prudent speed, taking precautions to determine whether it is occupied, there is no liability. A driver is entitled to assume that a pedestrian will not enter a crosswalk unless it is safe to do so: *Enright v. Marwick*, (2004), 28 B.C.L.R. (4th) 276 (C.A.), at para. 30.

[15] I have concluded that the accident, and the resulting damage, are the responsibility of the defendant. There are serious, although perhaps innocent, differences among the recollections of the witnesses. Ms. Forbes testified no car was in view. She said in cross-examination that she could see all the way to Cook

Street. Clearly when she entered the crosswalk, the defendant's vehicle was closer than Cook Street. But I do not conclude from this error that Ms. Forbes entered the crosswalk when it was unsafe to do so. An error in recalling that no car was within sight is not the same as an error in judgment of entering into the crosswalk without looking to see whether it is safe to do so.

[16] Ms. Wilkinson maintains that she did not observe the plaintiff until she heard the sound of the collision. But if Ms. Forbes had not been within view, it would mean that the plaintiff left the sidewalk without looking for vehicles and took no steps at all to ensure her safety.

[17] That conclusion is entirely inconsistent with the evidence of Alana Holt. Ms. Holt was an observant and disinterested witness. The effect of her evidence is that she was more than 60 meters from the crosswalk when the car passed her and when the plaintiff entered the crosswalk. I accept this testimony.

[18] I conclude the plaintiff slowly entered the crosswalk by easing the wheels of her motorized wheelchair off the curb and then proceeded to cross the street. The defendant failed to notice her and failed to yield the right-of-way.

### **The Plaintiff's Condition Before the Accident**

[19] Ms. Forbes was 55 years of age at the date of trial. She has had congenital cerebral palsy with spastic quadriplegia since birth. She moved to Victoria from eastern Canada in 1964. Her father died in 1957 and her mother passed away in 1969. She has been on her own since her mother's death.

[20] The plaintiff's primary weakness is in her right side. She has some use of her left limbs. She experiences spasticity when she is over-exerted or is under stress.

[21] Ms. Forbes has been able to live on her own for a substantial period of time. She had various living arrangements while growing up including a group home when she was in her twenties. Twenty years ago she found a place to share with a roommate. She has lived alone since her roommate passed away.

[22] Ms. Forbes pays \$250 per month for subsidized housing from the Capital Regional Housing Authority.

[23] The plaintiff requires assistance with the necessities of daily living: transfers in and out of bed, dressing, bathing and toileting. She plans her meals but requires assistance for cooking.

[24] Ms. Forbes had a care worker attend from 8:00 a.m. until between 12:30 and 1:30 p.m. each day. The care worker would prepare her meals. The major meal was at lunchtime. The care worker also attended to the necessities described above.

[25] Ms. Forbes values her independence. She is strictly limited in her intake of fluids to reduce the need for voiding. A care worker was not needed until 8:00 p.m. to put her to bed. The exception was on Thursdays when she went swimming and when groceries were delivered on Wednesdays and had to be put away.

[26] Ms. Forbes had some use of her left leg. For toileting, for example, Ms. Forbes was able to assist her caregiver and place her weight on her left leg to pivot

to sit on the toilet. This pivoting action was part of the transfer process in and out of bed as well. She could shift in bed using her right arm and left leg. She could use her leg to shift her weight in the chair.

[27] Ms. Forbes has the use of her left hand to control her wheelchair, to write and to use a computer.

[28] In 2000, a new method of funding from the Provincial Government began. An agency had provided care workers. They charge a substantial premium over the actual wage. The difference covers such matters as statutory employer remittances (such as Canada Pension Plan and Employment Insurance), vacation and holiday pay, statutory holiday premiums, overtime and the cost of running the business of hiring and scheduling employees.

[29] The Government funding agency offered to persons in the position of Ms. Forbes the opportunity to receive the same funding at a reduced rate from what the agency charges and to use the funds to hire their own employees. Ms. Forbes has taken advantage of this opportunity. It means she has hired people suited to her. She paid (and continues to pay) \$14 per hour for most care, \$16 per hour to the worker who takes her swimming and \$21 per hour for assistance in bookkeeping.

[30] Ms. Forbes is susceptible to bronchitis. She instructs her staff not to come in if they have a cold or are contagious. She then locates a substitute and pays overtime.

[31] Before the accident, Ms. Forbes went by herself to the local shopping mall on a regular basis. She also used her motorized wheelchair to travel downtown and to a book store. She is an avid reader. Her income consists of \$727 per month: \$200 from a trust and \$527 from the Federal Department of Veteran Affairs based on her father's military service.

[32] Before the accident, Ms. Forbes coped admirably with her cerebral palsy. She is intelligent and independent.

### **Post-Accident Care**

[33] After the accident, Ms. Forbes was hospitalized for some 80 days. Dr. Ralph Lapp, an orthopaedic surgeon, described her injuries as a severe crush injury to the left leg with a completely displaced and very unstable injury to the left tibia and fibula, swelling and soft tissue injury to the lower part of the right leg.

[34] Dr. Lapp's plan was to stabilize her left tibia with an intramedullary nail. But Ms. Forbes' contractures restricted access and her bone structure was so small he elected instead to use a contoured plate. This reduced the tibia. The fibula was left to heal on its own. During hospitalization, there were a large number of complications. A large area of necrosis occurred. Debridement surgery took place on November 17 and 27, 2003, and a skin graft was performed. Ms. Forbes experienced swelling in both legs. She was using a catheter in the hospital and this led to infection. She contracted cedificile infection as well as an eye infection.

[35] The stay in hospital was long and unpleasant. Ms. Forbes suffered from loss of appetite and vomiting as a result of antibiotics. She suffered skin breakdown in addition to the pain and discomfort from her injuries and infection.

**Present Condition**

[36] Ms. Forbes continues to have pain in her left leg from the fracture or the skin graft. Transfers on and off the toilet are more difficult. She can no longer place her entire weight on her left leg for pivoting. Mechanical aids are necessary: a disc for pivoting, a mechanical sling, a bar and a triangle on the bed which are needed for moving on the soft mattress. She becomes fatigued more easily and sometimes requires a sleep in the afternoon.

[37] Ms. Forbes had some swelling before the accident but it has become far more severe. She has therefore been required to take a diuretic. This requires more frequent voiding and, of course, more care.

[38] Fionnula Killian is a physiatrist who examined the plaintiff in October 2004. She concluded that there has been a significant compromise of Ms. Forbes' level of functionality. Care needs have increased and her needs will continue to increase over the next two to three years. Dr. Killian concluded that the plaintiff will need assistive devices sooner than she would have if she had not been injured. She noted that Ms. Forbes has returned to her recreational activities from before the accident.

[39] Margaret Towler is a cousin of the plaintiff who has visited her in Victoria regularly over the last 10 years. She spent time with Ms. Forbes on three occasions while the plaintiff was in the hospital and on six occasions after she was discharged. Ms. Towler has noticed several changes after the accident. Ms. Forbes can no longer shift weight herself in her chair. She was formerly able to do this and sit comfortably for several hours. She is less inclined to venture outdoors. She remains independent-minded but must accept help from Ms. Towler. She wears a surgical stocking on her left leg. She requires more toileting assistance.

#### **Non-Pecuniary Damages**

[40] An award of non-pecuniary damages must take into account Ms. Forbes' pain and suffering during recovery and the ongoing effects of the injury on her enjoyment of life.

[41] The plaintiff spent 80 days in the hospital. She underwent four surgeries - insertion and fixation of a plate in her left tibia; resection of necrotic skin with grafting, surgery to debride the left leg; and surgery to remove gauze from the wound in the left leg. She suffered skin breakdowns, increased spasticity, clostridium-difficile, other infections, vomiting, and swelling of her legs, arms and feet. She required catheterization. She required isolation due to infection. There was a long period of pain and discomfort.

[42] The plaintiff's recovery from many of these difficulties has been substantial. Mary Wick is a physiotherapist who examined her September 24, 2004. She found

a substantial improvement. Because Ms. Forbes receives skilled care, her health is stable.

[43] But there are ongoing deficits. There is increased spasticity. Ms. Forbes' left leg is permanently weakened. She must take diuretics for swelling. She had acute anxiety about using crosswalks on her own. She has only been able to resume this activity recently.

[44] An award of non-pecuniary damages must also take into account the effect of the accident on the plaintiff's life. Ms. Forbes values her independence. Living alone and doing as much for herself as possible are important to her. She has lost part of this independence. She requires more assistance in toileting; the diuretics increase the frequency of voiding and thus the need for care. She tires more easily. Even when she was physically able to operate her motorized wheelchair once again, anxiety about crossing streets prevented her from venturing out on her own. She has only been able to resume these outings recently.

[45] It is significant as well that Ms. Forbes is less able to make adjustments because of her cerebral palsy. She needs assistance or the use of aids to shift her weight in her wheelchair or to move on her bed.

[46] A person in the plaintiff's position with limited physical abilities values these abilities. They are precious. A loss of or decrease in the ability to carry out these functions has a special significance, and as Mr. Justice Meiklem stated in *Raeber v. Gallagher*, [1998] B.C.J. No. 2747 (S.C.) (QL):

...because of the previous limitations on mobility and activities mandated by [the plaintiff's] cerebral palsy, the conventional awards should be augmented to reflect the fact that further limitations imposed by the accident are more significant than they would be to any non-disabled person. ...  
(at para.26)

[47] This court has recognized that where a person with disabilities is injured and his or her independence is further compromised by injury, that must be recognized by the award. Mr. Justice Oliver made this observation in *Bracey (Public Trustee of) v. Jahnke*, [1995] B.C.J. No. 1850 (S.C.) (QL), varied on other grounds (1997), 34 B.C.L.R. (3d) 191 (C.A.).

She has, by reason of the defendant's negligence, been substantially deprived of many of the limited pleasures and comforts life still holds for her. To rob a disabled person of what little she has left is a monstrous injury, for that little she has, is, for her, the whole of her life.  
(at para.27)

See also *Falconar v. Le*, 2003 BCSC 1434; and *Agar v. Morgan* 2003 BCSC 630.

[48] I was referred to several authorities on non-pecuniary damages. These cases, like the ones I have cited, turn very much on their peculiar circumstances. But following a review of the authorities and considering the substantial period of pain, suffering and hospitalization together with the ongoing deficit and loss of independence, I assess non-pecuniary damages at \$90,000.

#### Cost of Future Care

[49] The principles to be applied are these:

1. The fundamental governing principle is *restitutio in integrum*. The injured person is to be restored to the position she would have been in had the injury not occurred, insofar as this can be done with money.
2. The primary emphasis in assessing damages for those seriously injured through the fault of others is the provision of adequate care. The award for future care is what is reasonably necessary on the medical evidence to promote the mental and physical health of the plaintiff. See **Milina v. Bartsch** (1985), 49 B.C.L.R. (2d) 33 (S.C.).

[50] In determining the appropriate standard of care for an injured plaintiff, I adopt what was said by Mr. Justice Harvey in **Brennan v. Singh**, [1999] B.C.J. No. 520 (S.C.) (QL) at para. 78:

...the test for standard of care generally is whether a reasonably-minded person of ample means would be ready to incur the expense. When measuring reasonableness, the expense should not be a squandering of money.

[51] The most significant part of the cost of future care is the cost of home-support worker care. Cecile Petra is an occupational therapist retained by the plaintiff. She has calculated a recommended cost based on an additional 4.5 hours of care per day. This is based on the assumption that before the accident Ms. Forbes was receiving 5.5 hours per day. The defendant is liable for the increased hours.

[52] It is plain that on average the plaintiff received more than 5.5 hours of care per day. Ms. Forbes testified that care was provided from 8:00 a.m. to 12:30 p.m. or

1:00 p.m. or sometimes 1:30 p.m. She would then have an hour's assistance at 8:00 p.m. for being assisted to bed. In addition, there was assistance with swimming on Thursdays and unpacking of groceries on Wednesdays.

[53] The evidence does not support the conclusion that Ms. Forbes requires an additional 4.5 hours of care per day beyond what she received before the accident. Ms. Forbes testified she has been receiving eight hours of care on some days and seven hours on other days. This is compared to 5.5 to 6.5 hours before the accident.

[54] I am satisfied the plaintiff's needs have increased. The need for diuretics has led to a greater need for toileting assistance; bathing takes longer; Ms. Forbes has less energy and strength and requires more care; and she requires a nap more frequently. Dr. Killian's opinion supports these findings.

[55] My conclusion is that a further 2.5 hours of care per day is what is reasonably necessary to promote the physical and mental health of Ms. Forbes.

[56] The next issue arises from Ms. Petra's recommendation that there be an additional 4.0 hours per day after two years. This is based on a conclusion in Dr. Killian's report. Dr. Killian states:

Given the level of disability that Susan has, the increase in her care level and her present physical limitations, it is likely that within the next two to three years there will be a realization of increasing needs.

[57] The difficulty I have with Ms. Petra's report is that there is nothing in Dr. Killian's report that points to an additional 4.0 hours per day. It also appears

inconsistent with Ms. Forbes' motivation to maintain her independence. The recommendation of Ms. Petra would place a caregiver with the plaintiff for virtually every waking hour. That is not what Ms. Forbes is likely to require. Moreover, the evidence that her needs will increase in the future is too vague to justify such a large increase in care.

[58] Dr. Killian also expressed the view that reliance on assistive devices will "increase at a more rapid rate than would have been expected if the accident had not occurred". It follows logically that care is in the same category. While I accept Dr. Killian's view that Ms. Forbes will need increased help after two-to-three years, this is an acceleration of what would have occurred in any event.

[59] It must be kept in mind that the defendant is not responsible for care which would have been necessary in the absence of the accident. The award must reflect that. I conclude that the appropriate award for home support is based on an additional 2.5 hours per day based on normal life expectancy. In addition, effective May 1, 2007, a further two hours per day for a ten-year period or until April 30, 2017.

[60] Ms. Petra has based future care costs on the rates charged by a company called We Care. The hourly rate of \$26.95 reflects administration, hiring and scheduling performed by that company. It is not a necessary expense here. Ms. Forbes enjoys the advantage of hiring employees of her choice. She has the energy and capacity to do this and has been doing so for some time. She presently pays \$14 for most care, \$16 for assistance at the pool and \$21 for bookkeeping work. These figures do not include statutory additions, vacation pay, holiday pay, overtime

and the like. There is also some evidence that \$14 is acceptable because the persons working at that rate are friends of Ms. Forbes. However, there is no guarantee such persons will continue to be available.

[61] I conclude that \$20 per hour, not \$26.95 per hour, is the appropriate rate for assessing the cost of future care.

[62] The report of Ms. Petra recommends a number of purchases of supplies and equipment. Dr. Young, the economist called by the plaintiff, has calculated the cost at \$10,950. These items are appropriate and consistent with the approach taken in *Milina, supra*.

[63] I do not make an award for psychological counselling. There is no opinion from a qualified professional that such counselling is required. In fact, the plaintiff's psychological health has improved according to Dr. Killian.

[64] I accept and award items under the following headings in the corrected costs provided on April 22 by Dr. Young: The medical supplies and medication; adaptive equipment; bathroom/safety; pain/skin management; program expenses and transportation. Dr. Young's method of computation of present value is accepted.

[65] For physiotherapy, I award \$500 per year for years 1 to 10. For occupational therapy, I award \$297.50 plus \$74.38 for years 2, 4, 6, 8 and 10. For home care, I award the present value of \$18,250 per annum for the life expectancy of a female of Ms. Forbes' age. I award as well the present value of \$14,600 per annum for 10 years for the period May 1, 2001, to April 30, 2017.

[66] Those are the elements of the award of future care. This head of damages will be assessed in accordance with those findings. I do not have the evidence before me to accurately determine the present value of this future care and to make a final award. If counsel cannot agree on the appropriate figure, it may be spoken to.

**Special Damages**

[67] The plaintiff has incurred care costs of \$80,974.98 from October 26, 2003 until March 31, 2005. It is common ground that the costs covered by a pre-existing care regimen in place totalled \$42,959.34, leaving a claim for \$38,015.64.

Payments under Part 7 of the Revised Regulation (1984) under the *Insurance (Motor Vehicle) Act*, B.C. Reg. 447/83 have already been made in the amount of \$23,477.27.

[68] The defendant argues that these additional hours of help have been excessive and are beyond what is medically necessary. I do not agree. The plaintiff has incurred care costs that have been reasonable and appropriate.

[69] The plaintiff claims for three additional amounts: care for the period from April 1 to 17, 2005 which is \$858; an invoice from the Health Authority here on the island for modifications to her wheelchair for \$3,615; and other miscellaneous expenses \$866.36.

[70] The April care costs are awarded. The seating expense is not awarded. The evidence does not establish that Ms. Forbes is required to pay this amount. The

other miscellaneous expenses are allowed, except for the invoice of Ms. Petra. I agree with counsel for the defendant that this is properly a disbursement for plaintiff's counsel.

[71] The award of special damages is therefore:

Care to March 31, 2005:	\$14,537.37
Care in April 2005 to date of Trial:	\$858.00
Other Expenses:	<u>\$349.56</u>
TOTAL:	\$15,744.93

**Other Issues**

[72] The plaintiff claims damages based on the fact that her housing may cease to be subsidized and that payments from the Government for home care may be reduced or eliminated. This issue was left to be determined. If the parties remain in dispute about it, counsel are at liberty to present evidence and argument, so I remain seized of that issue and of course any dispute about the exact amount of the award of the cost of future care.

[73] That concludes my reasons. Is there anything further?

[74] MR. LEGH: We had sought leave, My Lord, as well to bring evidence and argue the issue of tax gross ups and management fees if, depending on the results of this, that they became relevant.

[75] THE COURT: Yes, that is true, and I remain seized of those issues as well if the parties cannot agree.

[76] MR. LEGH: The only other issue would be the issue of costs, My Lord, and I would be seeking increased costs in the circumstances of this matter, but that would be an issue I would submit would be better dealt with later. Either my friend and I can agree, or if we have to come back to court, because some of it will depend potentially on these other issues as well, so I would submit it would be better to leave the issue of costs until we've got everything resolved.

[77] THE COURT: All right. I will not express a view on the application for increased costs and leave it to you to discuss.

[78] Is there anything further?

[79] MR. TURNHAM: No, My Lord.

*Shirley J.*