IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Gallant v. Slootweg,*
2014 BCSC 1579

Date: 20140819
Docket: S25922
Registry: Chilliwack

Between:

Joseph Leon Gallant

Plaintiff

And

Peter Slootweg and Trudy Slootweg

Defendants

Before: The Honourable Mr. Justice Joyce

Reasons for Judgment

Counsel for the Plaintiff:	A.R. Ayliffe
Counsel for the Defendants:	B.Y. Vickers
Place and Date of Trial:	Chilliwack, B.C. April 15, 2014
Place and Date of Judgment:	Chilliwack, B.C. August 19, 2014

Introduction

[1] On January 1, 2012, the plaintiff, who then sixty-one years old, was riding his bicycle on Chilliwack Central Road in Chilliwack, B.C., in front of the defendants' yard, when the defendants' dog, "Rocky", ran from their property, apparently unimpeded by the electronic fence that was intended to keep it within the property, towards the plaintiff and knocked him from his bicycle. The plaintiff suffered injuries as a result of the fall from his bicycle, including a closed comminuted fracture of his left clavicle and fractures of his fifth and sixth ribs.

[2] The plaintiff has brought this action for damages, as a result of the injuries he sustained. He founds his claim on two legal bases: the doctrine of "*scienter*", as well as negligence. The plaintiff claims that the defendants knew, or ought to have known, that their dog had a propensity to cause the kind of harm that it in fact occasioned and that they are strictly liable under the doctrine of *scienter* for the injuries and loss he sustained. The plaintiff also claims that the defendants were negligent in relying on the electronic fence to restrain their dog, and in failing properly to test and maintain the electronic fence.

[3] The defendants say that the doctrine of *scienter* does not apply in the circumstances of this case. They also say that they took reasonable steps to ensure that their dog remained on their property by using the electronic fence, and that they did not fail to take reasonable steps to ensure that the fence was working properly prior to the incident.

[4] The parties are agreed that this case is appropriate for resolution by way of summary trial on the basis of affidavit evidence, evidence taken on examination for discovery and experts' reports. The plaintiff does object to certain portions of the defendants' affidavits, which I will deal with when I review the evidence and the background facts.

Issues

[5] The issues that have to be determined in this action are:

1. Does the doctrine of *scienter* apply?

2. Are the defendants liable in negligence apart from, or in addition to, their liability under the doctrine of *scienter*?

3. What is the quantum of damages suffered by the plaintiff as the result of the injuries that he suffered when he was knocked from his bicycle?

Background and circumstances surrounding the incident

[6] The defendants moved onto their three-acre property on Chilliwack Central Road, in July 2010. Chilliwack Central Road is a two-lane country road, with no shoulder or sidewalks and has a posted speed limit of 60 kmph. The Slootwegs had two driveways running from Chilliwack Central Road onto their property. In her examination for discovery, Mrs. Slootweg described the traffic in front of their property as "high and very fast".

[7] The property had no physical fences separating it from Chilliwack Central Road.

[8] The defendants purchased Rocky, a Doberman, in August 2010, when he was a few months old. In January 2012, Rocky was approximately three feet long, three feet tall and weighed approximately 89 pounds.

[9] Before purchasing Rocky, the defendants purchased and installed an electronic fence around the property. The fence operated by sending a signal from a boundary wire that was buried around the perimeter of the property to a receiver that is attached to a collar around a dog's neck when the dog approached within a certain distance of the boundary wire. When activated, the receiver produced an electric shock though two metal pins that touched the dog's neck.

[10] The transmitter for the system was installed on a barn located on the defendants' property and was powered by batteries. The transmitter had lights to indicate that the power was on. Mr. Slootweg deposed that on the days he was home, he checked to make sure the lights were on in the transmitter. On the days

that he was not home, Mrs. Slootweg check the transmitter to make sure its lights were on.

[11] Mr. Slootweg deposed that after installing the system he tested it by walking towards the boundary line with the collar in his hand. The receiver beeped when he got close to the fence and then vibrated when the receiver came closer to the fence, indicating that it was producing an electric shock.

[12] During his initial training of Rocky with the system, Mr. Slootweg observed Rocky approach the property line, receive a shock and turn and go back towards the house. Mr. Slootweg deposed that he knew the fence system was working properly because after the initial training he tried to coax Rocky across the fence line with a piece of meat and he would not cross. He also deposed that he knew the system was working because Rocky's mother, who belonged to the defendants' neighbours, was often unrestrained and came over to their property to visit Rocky. When she left, Rocky would attempt to follow, but never went past the property line. Mrs. Slootweg deposed that she knew the system was working because Rocky liked to go to a compost pile that was outside the property before the system was installed, but never tried to go there after he was trained with the collar. The plaintiff objects to the defendants' statement that they "knew" the system was working. However, I take their statements to be simply that they <u>believed</u> the system was working because of their observations and received the evidence on that basis.

[13] After the first month of getting Rocky, the defendants kept Rocky outdoors. Rocky had a doghouse to keep him out of the weather, but had free run of the property, except on occasions when the defendants had picnics in their yard with family and friends. On those occasions, Rocky was chained because he liked to sniff crotches, babies and people's food. When he was chained, Rocky would lie down and go to sleep. Mrs. Slootweg said he never ran to the end of his chain.

[14] The Slootwegs' two children played with Rocky on a daily basis and walked him on the property. Rocky never bit or growled at the children, nor did he growl or snarl at other people or act aggressively towards them.

[15] The defendants deposed that from August 2010 until January 2012, when Rocky escaped beyond the electronic fence, they never observed Rocky cross the property line. During this time they did not receive any complaints from neighbours or from the City of Chilliwack Animal Control.

[16] The plaintiff objects to the defendant's reference to records from the City of Chilliwack Animal Control Office purporting to show that Rocky was not deemed aggressive. Even though I do not believe the records go as far as the defendants suggest, I agree that this evidence constitutes inadmissible hearsay evidence and have disregarded it entirely.

[17] After the incident, Mr. Slootweg checked the receiver on Rocky's collar and saw that it was not working. It did not beep or vibrate. He replaced the battery, but it still did not work. He checked the transmitter and the lights on it were functioning. He does not know why the system was not working. As a result of this incident, they replaced the receiver.

[18] The defendants cannot say for how long the receiver was not functioning. They had not tested it since the summer of 2010, to make sure that it delivered a shock the way it was supposed to, even though the owner's manual advised that the receiver should be tested monthly to ensure it delivered a shock at the boundary fence.

[19] With regard to Rocky's reaction to cyclists using the road before the occasion involving the plaintiff, Mr. Slootweg deposed in his affidavit of April 4, 2014, at paras. 17 and 22, as follows:

> 17. Rocky would often bark if he saw a bicycle and sometimes tried to race it across the width of the Property. I noticed when he raced bicycles that he would never cross the fence line or get too close to the road. He would generally run at the same speed as the bicycle. Sometimes he would get to the end of the Property first and watch the bicycle go by. He would never growl at the bicycle.
>
> ...
>
> 22. Rocky had never crossed the electric fence line before the accident. He never chased bicycles but he would on occasion race them by running alongside of them. Rocky liked to race birds and airplanes as

> well. Sometimes I would play with a little remote control truck on the driveway of our Property. Rocky would run alongside of it barking at it but he never attacked it. He would simply run alongside it. If I stopped, he would stop.

[20] In their examinations for discovery, the defendants agreed that Rocky often would bark at persons walking on the road and that he frequently, or routinely, ran along with a cyclist or jogger to the end of the property, barking as he ran. He tried to get as close to the bikes that were passing as possible without getting shocked by the electric fence.

[21] The plaintiff's version of the incident as deposed in his affidavit of March 15, 2014, at paras. 20 and 22-25, is as follows:

> 20. As I rode my bicycle next to the shoulder of the eastbound lane of Chilliwack Central Road approaching the Property, I saw a child in front of the residence on the Property.... The Child was approximately 10 - 12 years old. The Child was holding a large dog ... by its collar. I was approximately 150 to 200 feet away from the Dog and the Child at that time.
>
> ...
>
> 22. As I rode past the Property, the dog lunged towards me. The Child did not hold onto it. The Dog was not leashed, muzzled or restrained from attacking me in any other way. The Dog continued towards me, running very quickly and aggressively. Based on the Dog's speed, size and aggression, I believed it intended to attack me. I was extremely frightened as a result.
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> 23. I tried to escape the dog by pedaling away from the Property as quickly as I could east along Chilliwack Central Road away from the Property. I was travelling at approximately 30 kilometers per hour. The Dog quickly caught up with me and attacked me, striking the back tire of my bike so heavily that it knocked the rear wheel off the bike. ...
>
> 24. The impact of the Dog hitting my bike caused me to be thrown forward over the handle bars and fall to the ground. I landed heavily on my left side on the paved roadway. My left shoulder began to hurt severely immediately.
>
> 25. Immediately following the Attack, Peter and Trudy Slootweg came out of the residence on the Property. Peter Slootweg acknowledged that the Dog and the Property were theirs. He also advised me the Dog often ran after bikes that were travelling along the road in front of the Property.

Analysis

Scienter

[22] *Scienter* is a long-standing doctrine of law that places strict liability on the owner of an animal that causes injury provided the plaintiff can prove the necessary conditions for the doctrine to apply. The doctrine was described by Cumming J.A. in *Janota-Bzowska v. Lewis*, [1997] B.C.J. No. 2053 (C.A.) [*Janota-Bzowska*] at para. 12 as follows:

> [12] The doctrine of scienter has a long history in British Columbia. It was first brought forth over 100 years ago in *Nevill v. Laing*, [1892] Vol. II B.C.R. 101, where Chief Justice Begbie stated that, in order to found an action against an owner, the plaintiff was required to prove three things: first, that the defendant was the owner, second, that the dog was accustomed to bite mankind [or cause harm in some other way] and finally, that the defendant knew of the propensity. Quoting from an earlier decision, *May v. Burdett*, 9 Q.B. 101, Chief Justice Begbie concluded:
>
> > Whoever keeps an animal accustomed to attack and bite mankind, with the knowledge that it is so accustomed is liable for any injury it may inflict, without any averment of negligence in the securing of it. Negligence is presumed without any express averment .... But a dog is not such an animal. On the contrary the law presumes that, until the contrary is shown, a dog is not accustomed to bite mankind ... the mere keeping of an animal known to be dangerous is actionable rather implies that the mere keeping of an animal not known to be dangerous is not actionable.

[23] While the *Animals Act*, R.S.B.C. 1979, c. 16, at one time placed the onus on the dog owner to prove that they did not know, or have the means of knowledge, that their dog was of a vicious or mischievous nature or was accustomed to do acts causing injury, with the repeal of that *Act*, the onus shifted back to the common law which places the onus on the plaintiff to show on a balance of probabilities that the owner knew or ought to have known of the dog's propensity for causing harm (*Janota-Bzowska* at para. 17).

[24] It is not necessary, however, for the plaintiff to show that the dog has actually caused the particular harm in the past; what is required is to show that the defendant knew or ought to have known that the dog had a propensity or manifested a trait to do that kind of harm. As Cumming J.A. stated at paras. 18-20 of *Janota-Bzowska:*

[18] In another more recent British Columbia decision, *Woods v. Standish* (1991), 58 B.C.L.R. (2d) 307 (B.C.S.C.), the Court summed up the essence of the doctrine of scienter at p. 306:

> In short the adage that "every dog is entitled to one bite" seems to sum up the law reasonably accurately.

[19] While the adage quoted in the *Woods* decision may be a reasonably accurate statement of the law it should be pointed out that a dog need not have caused the specific type of harm on a prior occasion for the doctrine to apply. It would be enough if the owner knew that the dog had a propensity or manifested a trait to do that kind of harm even if it had not actually caused that particular harm. This point is clearly made in *Sparvier v. MacMillan*, [1990] S.J. No. 124 (Sask. Q.B.) where the Saskatchewan court, in discussing the common law doctrine of scienter, concluded that:

> In proving scienter, it is not necessary that the animal had actually done the particular kind of harm on a previous occasion; it is sufficient if, to the defendant's knowledge, it had manifested a trait to do that type of harm.
>
> See also *Taller (Guardian ad litem of) v. Goldenshtein* (1992) 87 B.C.L.R. (2d) 249.

[20] The law with respect to the doctrine of scienter is relatively clear. The owner of a dog which bites another will not be liable simply for being the owner. Liability will only attach under the doctrine if the three conditions set forth in the Neville decision have been satisfied. In other words, the plaintiff (not the defendant) must establish:

i) that the defendant was the owner of the dog;

ii) that the dog had manifested a propensity to cause the type of harm occasioned; and

iii) that the owner knew of that propensity.

[25] The defendants accept the foregoing as an accurate statement of the law in this Province with regard to the doctrine of scienter. They admit that they were the owners of Rocky and that he caused the plaintiff's injuries. However, they submit that, with regard to propensity, the onus is on the plaintiff to prove that Rocky was "of a vicious or dangerous nature" and that the plaintiff has failed to prove this.

[26] The defendants refer to *Kirk v. Trerise*, [1981] B.C.J. No. 445 (C.A.) [*Kirk*], where McFarlane J.A. for the majority held at para. 5:

> [5] The first aspect of the case that requires consideration is whether the trial Judge was right in applying the principle which has been described as the common law doctrine of scienter. That doctrine, as applied in this Province, places on the appellant owners in this case, the onus of showing that they did not know, or have the means of knowledge, that their dog

> "... was or is of a vicious or mischievous nature or was or is accustomed to do acts causing injury".
>
> These words are taken from the *Animals Act*, R.S.B.C. 1960, Ch. 10, Section 21 (now R.S.B.C. 1979, Ch. 16, Section 20): *Vide Nevill v. Laing* (1892) 2 B.C.R. 100 applied in *Bebbington and Bebbington v. Colquhoun* (1960) 32 W.W.R. 467. The evidence negatives clearly any suggestion that this dog "was or is accustomed to do acts causing injury", and shows that the animal did not have a vicious nature. The reasons for judgment of the trial Judge and the arguments presented to this Court were directed, *inter alia*, to the proper meaning to be given to the word "mischievous" in this context and its application to the facts of this case. The words used in the *Animals Act* "vicious or mischievous nature" have their origin in decisions of judges at common law. They are a part of our legacy of judge-made law. My study of the cases discussed by counsel and of others referred to in them from *Cox v. Burbidge*, (1863) 13 C.B.N.S. at 403 and 439; 143 E.R. 171 to *Fitzgerald v. E.D. and A.D. Cooke Bourne (Farms) Ltd. and Another* [1963] 3 All E.R. 36, and *Draper v. Hodder*, [1972] 2 All E.R. 210 leads me to the conclusion that the word "mischievous" in this context is affected by its association with 'vicious' and that it involves and denotes the concept of fierce, ferocious, dangerous, attacking, causing harm or injury. It does not, in my opinion, include such ideas as playful, boisterous, demonstrative or excitable.

[27] The defendants argue that there is no evidence to support the second condition that Rocky was "vicious or mischievous" within the meaning of those words given by *Kirk*, and further that there is no evidence that the defendants knew of any manifested propensity for Rocky to do a particular kind of harm by chasing or running at cyclists past the property line.

[28] The plaintiff argues that while proof of viciousness or mischievousness as described in *Kirk* is sufficient to meet the second condition, it is not necessary that the evidence go that far. The plaintiff argues that the second condition of *scienter* is broader than that given in *Kirk*, which was a case that was decided based on the language of the now repealed *Animals Act*.

[29] The plaintiff relies on the language of Cumming J.A. in *Janota-Bzowska* where he held that the second condition will be satisfied if it is established that "the dog had manifested a propensity to cause the type of harm occasioned".

[30] The plaintiff submits that it is sufficient if he can prove that Rocky had a propensity to chase cyclists as they rode in front of the property, which demonstrates

a propensity to cause harm by knocking a cyclist off the bicycle if Rocky escaped the electronic fence, and that this is what in fact occurred.

[31] The plaintiff submits and I accept that if the owners know of the propensity to cause the type of harm occasioned, they have an absolute duty to confine or control it, so that it cannot cause the harm which it has the propensity to cause (see *McNeill v. Frankenfield*, [1963], B.C.J. No. 188 (C.A.), at para. 1).

[32] I am satisfied that Rocky had a propensity to chase cyclists while barking and get as close to them as he could within the electronic restrain to which he was ordinarily subject, and to follow them as they traversed in front of the defendants' yard. I am satisfied that Rocky's actions constituted a propensity to cause harm to cyclists by knocking them from their bicycles if he was not restrained within the yard. I am further satisfied that the defendants knew, or ought to have known, that if not restrained, Rocky would run right up to a cyclist, barking at the cyclist and creating a very real risk that he would impede the travel of the bicycle. The defendants had watched Rocky run the length of the front yard getting as close to cyclists as he could within the boundaries of the electronic fence, which was the only method that they employed to restrain Rocky from going right up to the cyclists. The harm the Rocky caused on this occasion was the very kind of harm that, in my view, Rocky had demonstrated a propensity to inflict.

[33] I conclude, therefore, that the defendants are liable on the basis of *scienter*.

Negligence

[34] I am also satisfied that the defendants are liable on the basis of negligence. In my opinion, they knew that the only thing that was keeping Rocky from running up to cyclists using the road in front of their property, and likely knocking them from their bicycles, was the electronic fence. It is my view, that a reasonable person would not place reliance solely on such a device to secure their dog and prevent it from causing harm to users of the road, when they were aware of the risk of harm if Rocky got free from the confines of the electronic fence. Unlike a physical fence or a

large pen, it is not possible to readily observe that the electronic fence is in good repair.

[35] Further, the operating manual that the defendants received when they purchased the fence warned them that the fence was a deterrent, not a barrier and advised that there was no guarantee that a pet could be trained to avoid crossing the boundary.

[36] In order to meet a reasonable standard of care to ensure Rocky was kept within the property would not have required the defendants to incur the expense of fencing the whole of the property. They could have built a large "dog run" that would have provided Rocky with ample exercise room when not on leash, in the company of someone able to restrain him. Alternatively, they could have used a chain for Rocky that would not physically permit him to go beyond the property and onto the roadway.

[37] Further, I find that having adopted the electronic fence as the only means of preventing their dog from escaping onto the road and charging passers-by, they were negligent in not ensuring that it was working properly by testing it on a frequent basis. While it is not known precisely when the receiver failed to operate, they had not tested it for months. They only checked the transmitter on a daily basis. Even when the defendants replaced the batteries and tested the receiver after the incident they found that did not operate consistently. If they had tested it regularly, it is likely that they would have discovered that it was not safe to rely on the electronic fence system to retrain Rocky.

Damages

Injuries suffered and pre-injury status

[38] The plaintiff went to the hospital immediately after the incident where he was assessed in the emergency room. X-rays revealed that the plaintiff had suffered a fracture of his clavicle. His arm was placed in a sling.

[39] The plaintiff deposed that the night after the incident he was unable to sleep, was in constant pain from his shoulder, neck and ribs, and had difficulty breathing. The plaintiff followed up with his medical care with his family doctor. Additional x-rays taken on January 13, 2012 showed that the plaintiff had also suffered fractures of his fifth and sixth ribs on the left side.

[40] During the month following the incident, the plaintiff developed tingling, numbness and pins and needles in the middle, ring and little fingers of both hands when driving a large vehicle. The plaintiff was training to obtain his Class1 Driver's license. The plaintiff was diagnosed with Raynaud's Phenomena in the early 1970's, but deposed that the symptoms in his fingers following the accident were unlike those he suffered as a result of Raynaud's syndrome.

[41] The plaintiff deposed that it took approximately eight weeks for his fractures to heal, and three months before he was able to function normally again and for the pain on his left side to subside. He continued to experience pain in his neck until May 2012. The tingling in his fingers finally stopped in November 2012.

[42] The plaintiff deposed that his injuries hampered his ability to perform normal household chores, including any heavy lifting. For the first month, he was unable to do his own cooking, was unable to sleep normally, and was unable to go for long walks. The plaintiff was unable to ride his bicycle for about three months.

[43] Prior to the incident the plaintiff exercised at the gym five days per week, but following the injuries he was unable to return to a regular exercise routine for three months and unable to return to his pre-injury exercise level until about one year after the incident.

[44] The report of Dr. D. Grover, an orthopaedic surgeon, dated May 18, 2012, included the following information and opinions:

- Mr. Gallant told him that he is now single and lives in a rented room and is able to do all the chores that are required in and around his room without any problems.

- Mr. Gallant also told him that as far as his independent activities of daily living are concerned, he had significant impairment for the first six to eight weeks. Now he has no functional impairment, except for the use of vibrating tools which is of course a long standing pre-existing problem.

- Dr. Glover opined that Mr. Gallant suffered a closed comminute fracture of the left clavicle and fractures of the fifth and sixth ribs, as well as a possible aggravation of a pre-existing degenerative disc disease of the cervical spine leading to possible irritation of the C6/7 nerve roots bilaterally (this diagnosis not yet proven).

- Dr. Glover opined that Mr. Gallant has evidence of pre-existing cervical disc disease, which has likely been aggravated by the accident. He noted that Mr. Gallant suffered with Raynaud's Phenomena of long-standing duration but he never had neurological manifestations. He thought that the current neurological symptoms could be a new manifestation of an old, pre-existing problem, i.e. the Raynaud's Phenomena.

- Dr. Glover's opinion is that Mr. Gallant's injuries rendered him unable to do any kind of physical work for a period of up to three months.

- Dr. Glover further opined that by the date of the examination, Mr. Gallant had recovered fully from his musculoskeletal injuries so that they would not cause him any disability from working. He continued to have neurological symptoms in his hands which would likely be present for the foreseeable future. Dr. Glover was not able to ascertain the exact nature of this problem, but it is possible that it arose from the pre-existing, previously asymptomatic degenerative disc disease in the neck.

Non-pecuniary damages

[45] The assessment of non-pecuniary damages is an individual exercise taking into account a variety of factors including: age, nature of the injury, severity and

duration of pain, disability, emotional suffering, impairment of family and social relationships, and loss of lifestyle (*Stapley v. Hejslet*, 2006 BCCA 34).

[46] While the determination of damages in each case will be unique, reference to other cases involving similar injuries with similar degrees of pain, suffering and impairment can be helpful.

[47] The plaintiff submits that an award of $30,000 to $35,000 for non-pecuniary loss would be appropriate. The plaintiff refers to the following cases:

- *Siderius v. Rieger*, [1994] B.C.J. 196 (S.C.) [*Siderius*]

  The plaintiff, a cyclist, was thrown from her bicycle while trying to avoid a motor vehicle. She sustained a fracture of her clavicle that took six months to heal; a central spinal cord injury that caused headaches, tingling in her arm and fingers; pain in the scapular area; nausea; and fainting. Her symptoms had almost fully resolved after 18 months. She was awarded $25,000 in general damages ($35,743 in 2014 dollars).

- *Madsen v. Mission School District No. 75*, [1999] B.C.J. No. 1716 (S.C.) [*Madsen*]

  The plaintiff suffered a fracture of his left clavicle near the shoulder joint. He was left with laxity in the shoulder joint and some restriction in his ability to use his shoulder, but otherwise the shoulder healed within a few months. He was awarded $25,000 in general damages ($33,633 in 2014 dollars).

- *Erikson v. Hall*, [1995] B.C.J. No. 2475 (S.C.)

  The plaintiff suffered two broken ribs, cuts to his right eye and bruising on his face, abdomen and neck, as the result of an assault. He also complained of some blurred vision and facial numbness. He was off work for four months. He was awarded non-pecuniary damages of

> $15,000 ($21,396 in 2014 dollars) before deduction of $5,000 for having provoked the assault.

[48] The defendants submit that the appropriate range of non-pecuniary damages in this case is between $8,000 and $15,000. The defendants refer to the following cases:

- *Manson v. Kalar*, [2011] B.C.J. No.517 (S.C.)

  > The 53-year-old plaintiff suffered soft tissue injuries to his neck and back that affected his ability to golf, ski and fish. His symptoms had persisted for three years and were not completely resolved by the date of trial. He was awarded $25,000 in non-pecuniary damages.

- *Morrison v. Peng*, [2010] B.C.J. No. 731 (S.C.)

  > The plaintiff, Mr. Morrison, suffered mild soft tissue injures to his neck and back that resolved within a year. He was awarded $9,000 in non-pecuniary damages. The plaintiff, Ms. Jabs, suffered mild to moderate soft tissue injuries to her neck, upper and lower back that lasted for more than a year. She was awarded $18,000 in non-pecuniary damages.

- *Hmic v. Fast*, [2004] B.C.J. No. 2255 (S.C.)

  > The plaintiff suffered soft tissue injuries to her neck, shoulder, arm and back. The symptoms in her neck shoulder and arm resolved within six months. The symptoms in her back did not resolve until approximately 16 months following the accident. She was awarded $12,000 in non-pecuniary damages.

[49] In my view, the cases cited by the plaintiff, particularly *Siderius* and *Madsen*, are more representative of the loss suffered by Mr. Gallant, although somewhat more severe in nature and duration than those in the present case.

[50] The injuries that Mr. Gallant suffered in this incident rendered him disabled from doing any kind of physical work for three months. For the first month after the incident, the plaintiff was hampered in his activities of daily living and for three months or more the injuries affected his ability to engage in his exercise regime and recreational pursuits of walking, biking and working out at the gym.

[51] By May 2012, the plaintiff was essential able to resume all his pre-injury activities.

[52] I am of the opinion that an amount of $25,000 will constitute an award of non-pecuniary damages that is just and fair in all the circumstances.

Loss of earning capacity

[53] The plaintiff seeks to recover $25,000 as past loss of earning capacity due to what he claims is a three month delay in his entry into the work force.

[54] At the time of this incident, the plaintiff had just begun retraining through a WorkSafeBC program to obtain is Class 1 Driver's Licence. He was due to complete his training by the end of March, 2012. The plaintiff deposed that because of his injuries he had to postpone his training and was not able to resume the course until April 2, 2012. His evidence in that regard is supported by the medical report of Dr. Glover.

[55] The plaintiff deposed that he completed the course in May 2012. He took and passed his test for the Class 1 licence in June 2012. He found a job in July 2012 driving a bus for Diversified Transportation Ltd. in Fort McMurray, Alberta.

[56] The plaintiff asserts that if he had not been injured he would have completed his course in March 2012 and passed his driver's test in April 2012 (April to June). On that basis, it appears to me that the plaintiff was delayed in obtaining his qualification for his new career by two months, rather than the three months claimed, and delayed in earning income from employment by two months, assuming he could have found the same job two months earlier. The plaintiff deposed that there is an

extremely high turnover rate for drivers at Diversified so that is, I think, a fair assumption.

[57] As to the quantum of the loss for delayed entry in working for Diversified, the plaintiff deposed that his annual gross income is $106,000 per year. However, he did not provide any verification of income from his employer. The plaintiff also deposed that he drives 21 days in a row, and then has seven days off. He typically makes two trips per day, and is paid $127 per trip, plus a living allowance of $1,200 per month. According to my calculations, based on that evidence, the plaintiff's annual income would be $78,408 per year, as set out below:

((21 days/mo. x 2 trips/day x $127/trip)) +$1,200/mo.) x 12 mo./yr. = $78,408.

[58] I, therefore, find that the plaintiff is entitled to damages for past loss of earning capacity in the amount of $13,068.

Special Damages

[59] The plaintiff claims the cost of physiotherapy treatments in the amount of $190, which claim is supported by the medical evidence and verified by receipts.

[60] The plaintiff also claims $1,349 for the damage to his bicycle. That is the amount that he paid for it on October 6, 2011. After the incident, the plaintiff was told that it was not worth repairing the bicycle and that he could purchase a new one for only a few hundred dollars more. He bought a different make and model for $2,099.

[61] The plaintiff is only entitled to the value of the bicycle at the date of the loss. Even though it was quite new, I believe that the defendants are entitled to some reduction on account of depreciation. I will allow $1,050 under this head of damages.

Order

[62] The plaintiff is therefore entitled to judgment against the defendants, jointly and severally, in the following amounts:

Non-pecuniary damages	$25,000
Past loss of earning capacity	$13,068
Special damages	$1,050
Total	$39,118

[63] Subject to any matters of which I am not aware, the plaintiff is entitled to costs of this proceeding at Scale B.

"B.M. Joyce J."

4,563.31