

Date: 20250717  
Docket: CI 16-01-02764  
(Winnipeg Centre)  
Indexed as: Larocque v. Larocque et al.  
Cited as: 2025 MBKB 94

## **COURT OF KING'S BENCH OF MANITOBA**

### **B E T W E E N:**

MARC LAROCQUE,	)	
	)	<u>Wayne M. Onchulenko</u>
plaintiff,	)	<u>Simone Marcoux</u>
	)	for the plaintiff
- and -	)	
	)	<u>Andre Larocque</u>
ANDRE LAROCQUE, MOTOR COACH	)	on his own behalf
INDUSTRIES LIMITED, INFINITY LEASING	)	
INC., PRAIRIE COACH CHARTER SERVICES	)	<u>Winston Gordon,</u>
LTD., GOODYEAR TIRE AND RUBBER	)	<u>Corporate officer,</u>
COMPANY, JOSEPH THOMPSON, DONNA	)	on behalf of Five Star Bus
FRANCIS THOMPSON, FIVE STAR BUS LINES	)	Lines Ltd.
LTD. AND TOMMY'S WELDING LIMITED, AND	)	
CONTITECH USA, INC., THE SUCCESSOR	)	
COMPANY TO VEYANCE TECHNOLOGIES	)	
INC.,	)	
	)	
defendants,	)	
- and -	)	
	)	
FIVE STAR BUS LINES LTD. AND WINSTON	)	
GORDON,	)	
	)	
third parties,	)	
- and -	)	
	)	
THE PIONEER TOOL AND DIE CO.,	)	<u>Judgment Delivered:</u>
third party.	)	July 17, 2025

## **TOEWS J.**

### **INTRODUCTION**

[1] The defendant, Andre Larocque ("Andre"), by way of an oral agreement leased a portion of the premises located at 1487 Dugald Road, in Winnipeg, Manitoba (the "premises") from Five Star Bus Lines Ltd. ("Five Star"). Five Star in turn had leased a portion of the premises from another one of the defendants, Tommy's Welding Limited ("Tommy's") who in turn had leased the premises from the defendants Joseph Thompson and Donna Francis Thompson (the "Thompsons"). The Thompsons are the registered owners of the property on which the premises are located. The portion leased by Andre from Five Star was space inside a building in which he kept a 44,600-pound passenger bus (the "bus"), which he owned, and which had been manufactured by Motor Coach Industries Limited ("MCI"). From time-to-time Andre would clean, conduct repairs or otherwise perform maintenance work on the bus in the space he had leased from Five Star.

[2] On June 28, 2014, the plaintiff, Marc Larocque ("Marc"), the brother of Andre, was inside the building on the premises while Andre was conducting repairs on the bus. At the same time, Michael White ("Mr. White") was working on the rear brakes of the bus at the request of Andre. In the previous day or two, the bus had undergone a mandatory vehicle safety inspection. Five Star was the agency responsible for the inspection. The bus had been raised and placed on supports for the purposes of the inspection by an employee of Five Star.

[3] While Marc was under the front passenger side of the bus on June 28, 2014, the supports raising the bus gave way, and landed on the front torso area of Marc (the "incident"). Although Marc suffered severe injuries because of the bus falling, a small space remained beneath the bus after it collapsed. Andre and Mr. White were able to extract Marc from beneath the bus by jacking it up and pulling Marc out from under the bus.

[4] The two parties defending this action at the time of trial are the defendant Andre and Five Star, who was named as a third party in the action. The action against all other defendants or third parties, including the principal officer of Five Star, Winston Gordon ("Mr. Gordon"), have had the action discontinued against them or settled by way of a Pierringer Agreement. Andre is self-represented while Five Star is represented by its principal officer, Mr. Gordon. There are crossclaims as between Andre and Five Star.

[5] The issues as between the parties are first, the liability for the injuries to Marc caused during the incident and second, the damages suffered by Marc.

### **THE EVIDENCE**

[6] The plaintiff Marc is a resident of Winnipeg. He is originally from the Ste. Anne's area of Manitoba and has a Grade 11 education. He returned to Winnipeg in 2001 after a brief stay in Thunder Bay, Ontario and remained a resident of Winnipeg until the incident and thereafter. During this time, he worked at physical labour and as a truck driver. This included working for Andre from time-to-time. He admitted in his testimony that prior to the incident his periods of employment were "short term". In

2007, he was involved in a truck accident in which he suffered a leg injury. He stated that the leg injury was not particularly troublesome. In 2008, he was hospitalized with pneumonia for approximately four months. He developed a significant bedsore as a result of this stay.

[7] In approximately 2009 or 2010, Dr. Tse Luk, a family doctor, started treating Marc for back for pain. In 2010, he suffered a stroke and as a result suffered various physical problems that affected his left side. He had difficulty walking, speaking, writing and swallowing. He needed to relearn various tasks including basic tasks such as how to conduct his banking. In January 2013, he went to the emergency department of a Winnipeg hospital complaining that sound and light were causing him pain. At the hospital he underwent brain surgery and blood was drained from his brain. After his release from hospital, he wanted to go back to trucking, but it became evident that this was not a realistic goal. He successfully applied for Canada Pension Plan (CPP) disability and remains on CPP disability benefits. Although he was married in 2001, he separated from his wife in 2018. However, he still maintains a cordial relationship with his spouse who provides him with financial support. This allows him to remain living in his own residence in St. Boniface. He is also assisted in carrying out tasks related to maintaining his home, including his laundry, by his nephew Jason Larocque ("Jason"), with whom he stays in close contact and who also resided with him at his home for a period of time.

[8] Marc testified that during the time preceding the incident he would go to the premises to see Andre and "hang around the shop". He said that he and his brother

would talk about various things and that he assisted in cleaning the bus. He said that he would go to the premises a number of times a month and that he met Mr. Gordon there.

[9] On the day of the incident, he said that he was working on the brakes of his car with his friend, Mr. White, a certified mechanic. He said Andre called him to speak to Mr. White in order to get Mr. White to assist with repairs to the bus. It appears that Mr. White and Marc went to the premises separately. He said Andre led him to the front of the bus when he arrived. He testified that the wheel on the driver's side was off and that the bus had been raised. He stated that he believed it was Andre who told him to see why the part that Andre was trying to remove from under the front of the bus would not come out. He testified that he got underneath the bus from the front passenger side of the bus. He stated that while underneath the bus there was an explosion which raised dust so that he could not see. He felt pressure on his torso and realized that something had fallen on him. He heard people screaming and yelling and that finally the pressure came off of him as he was pulled out from under the bus.

[10] As a result of the incident, he was hospitalized and that he was "very medicated" and required multiple blood transfusions. He stated that he is still in pain and continues to have suicidal ideations. He remains mentally and emotionally distraught and suffers from nightmares as a result of the incident. He stated that since being discharged from the hospital in March 2015, he cannot walk much anymore and that he has stopped improving as the pain is getting worse. He suffers from pain in the buttocks, but the most significant amount of the pain is in the sternum and that pain is debilitating. He

does not go on holidays, and his social circle involves his friends from church and attending church. He says he spends his time reading and sometimes goes to a movie. His excursions are limited in that he still has bodily function "accidents". He has a driver's licence, but not one which would allow him to drive commercial vehicles. He has difficulty doing the lawn, shoveling snow and the laundry and his nephew Jason helps him with that along with providing him with emotional support.

[11] On cross-examination he stated that he never saw any sign that restricted entry to authorized persons only. He stated he was not a certified mechanic and that he could not repair or fix a bus. He was aware the bus was going through a safety inspection but was unaware if the bus had been jacked properly. He said that he believed Andre told him it was safe and that he should do a quick visual to locate why the part Andre was trying to remove was struck. He said that Andre told him the bus had been there in that position for seven days. He said he could not say how many jacks were under the bus. Again, on cross-examination he stated "I believe" Andre told him to go under the bus and that Andre told him that it was safe and not to worry.

[12] Marc's spouse, Natalie Larocque ("Natalie") testified as to his medical condition both prior to and after the incident. She testified that prior to the incident in 2008, Marc was on life support having developed septic pneumonia and was in the hospital for approximately four months. He developed a significant bedsore and after he was discharged from the hospital the injury took approximately a year to heal. She stated at this time his condition improved as he went walking, fishing, working around the yard and doing his laundry. She stated that after his stroke in 2010, he lost the use of

his left side and took approximately five or six months to learn to walk again. In 2013, he developed severe headaches and underwent brain surgery, however after a few months he was back to doing the things that he was doing before the surgery. She testified that before the bus injury, he was doing "pretty good". During this time, Marc was in regular contact with Andre.

[13] Natalie stated that following the incident on June 28, 2014, Marc was discharged from the hospital after 16 days. She stated that after discharge he went from crying to screaming to "puking blood" and would crouch in the fetal position for hours. He needed assistance bathing and had very irregular sleep, often waking up screaming in pain and delusional. She said that every day was different and that his pain increased appreciably. Follow-up surgery in December 2014, had severe complications. At home he required homecare, nursing care and he could not go out for walks. She testified he had no motivation. While the hole created by the bedsore and the ileostomy reversal surgery conducted after the incident healed, he required homecare for a year after the incident and his bowel and pain issues persisted.

[14] Dr. Luk is Marc's family doctor and after considering his credentials and experience, I qualified him to provide expert testimony in family medicine and pain management. He testified that Marc had been referred to him as a patient in January 2010. He testified that prior to the incident Marc's back pain was moderate (6-7 on a scale of 10), but that sometimes it would become severe (9-10 on a scale of 10). He classified his depression prior to the incident as 8-9 on a scale of 10. However, after

changes in medication in 2013 and 2014, the pain decreased from 8-9 on a scale of 10 to 4 on a scale of 10.

[15] Dr. Luk testified that after the incident, Marc's pain went up from 4 to 7 out of 10. One of the main goals of Marc's treatment before and after the incident has been to find the right combination of drugs to lower the pain he has been experiencing. He also testified as to the symptoms of PTSD experienced by Marc as a result of the bus falling on him. His health condition was aggravated in or about 2018 by his separation from his wife and the death of his dog with whom he had a close relationship.

[16] Marc is still dealing with the issue of suicidal thoughts, pain, specifically attributable to the incident, and depression, but his condition seems to have stabilized. However, it is Dr. Luk's opinion that Marc's condition is much better than just after the incident. The medication he is on is not just for depression but is needed to deal specifically with the pain attributable to the incident. Marc's biggest complaint is the pain in the sternum, but he also has issues related to a bowel condition involving both diarrhea and constipation often related to anxiety. PTSD continues to be an issue as well as difficulty with sleep. On cross-examination he stated that even prior to the incident Marc's depression was measured at 8 on a scale of 10.

[17] Jason, Andre and Marc's nephew, also testified. From approximately 2000, he has lived with Marc from time-to-time. Even when he was not living with Marc he stayed in close contact with him. He testified that prior to the incident Marc's health had been affected by a truck accident, a "brain bleed", pneumonia and the bed sore that he had developed while in hospital. He would see Marc a couple of times a week.



At that time, he went on walks with Marc and that there were improvements to his health. Marc expressed a desire to get back to work.

[18] After Marc was discharged from the hospital following the incident, Jason saw him three or four times a week. He noted that Marc was unable to do much of anything. His mental health was not as vibrant and Marc expressed the wish that he had been killed as a result of the incident. Jason stated Marc was suicidal, in pain, depressed and angry. Although there has been some improvement over the years, Jason still helps by doing some of the household chores. He testified Marc still cannot do a lot of the things he used to do.

[19] Mr. White is a certified mechanic who has worked on cars, buses and trucks. He is presently employed by a school division as a mechanic. He testified that he met Andre through Mr. Gordon, and he met Marc through Andre. He stated that on June 28, 2014, he was fixing Marc's vehicle when he received a phone call from Andre asking him to work on the bus. He drove to the premises on his own while Marc came in another vehicle bringing donuts and coffee.

[20] Mr. White testified that he had been hired by Andre to replace the rear brakes of the bus and had taken off the rear wheels of the bus. He stated that he left the premises for a time to speak to another person in a nearby building leaving Andre and Marc speaking with each other. Upon his return he stated he heard a big bang. Both Andre and Marc were under the bus, with Andre on the front driver's side and Marc under the front passenger side. Marc was trapped under the bus. Mr. White pushed a tire underneath the bus to prevent it from falling further and then using a jack he lifted

the bus. He testified that the bus had been jacked up "wrong" with the jacks being located in the wrong places. However, he did not recall where the jacks were located. He said that Marc was trapped under the bus for less than five minutes before they were able to pull him out. Shortly after pulling Marc out from under the bus, the ambulance arrived, and the emergency personnel took over the treatment of Marc.

[21] Mr. Chris Ferrone was called by the plaintiff to give expert evidence. Mr. Ferrone is a mechanical engineer, a mechanic and has worked in the family bus business for decades and in that capacity has worked on large motor coaches manufactured by Prevost and Motor Coach Industries. After reviewing his qualifications and hearing his testimony in respect of those qualifications, I was satisfied that he could give evidence as an expert mechanic and as a mechanical engineer. I would also note that Mr. Ferrone personally inspected the accident site within a short period of time after the incident and advised the scene was still unchanged since the removal of Marc.

[22] It was Mr. Ferrone's testimony that when jacking up the bus and putting it on stands, the bus can only be properly supported at four "hard points", two in the front and two at the back of the bus. He said that had the bus been supported at the four hard points the incident could not have happened. If the bus had been jacked up and stands placed under the four hard points it would not matter if the air bag under the bus was not functioning properly. The bus could not have dropped below the distance of the stands supporting the bus at the four hard points. He noted that in this case the two front hard points were the only relevant concern as the bus could not have dropped on Marc if the stands had been placed beneath the two front hard points.

[23] Mr. Ferrone testified that it was the chassis that came down on Marc and that even if the chassis had been hit with a hammer it could not have dropped had the stands been properly in place. He also inspected the air bag and found no defects in the bag or that anything went wrong with the airbag. He did not see any indication of tampering with the air bag. He stated that even if the air bag had exploded, if the bus had been properly supported by stands at the hard points, it would not have dropped on Marc.

[24] During cross-examination by Andre, Mr. Ferrone testified that it is not the proper practice for a driver or owner of a bus to jack up the bus for the purposes of a safety inspection. This is done by the inspector carrying out the safety inspection. It was Mr. Ferrone's opinion that upon examining the bus, he was of the opinion that the bus had been properly de-energized for the purpose of the safety inspection. Furthermore, Mr. Ferrone and a Red Seal mechanic, Simon Humphries, also called by the plaintiff, stated that even if the proper steps to de-energize the bus for the purposes of a safety inspection had not been taken, if the bus had been properly jacked and placed on stands, it would not have come down on Andre. Mr. Humphries testified that the inspector conducting the safety check would confirm that the bus has been properly jacked up and if a tire needed to come off for the safety inspection, a technician or the inspector would take it off.

[25] Andre testified that the bus required an inspection every six months and that an employee of Five Star who was carrying out the inspection, would have jacked up the bus for that purpose. Andre stated that he went to the premises on the day of the

incident with a list of things that needed to be addressed in order to be certified. Mr. Gordon was not at the premises on June 28, 2014.

[26] Andre testified that he called Mr. White to help, and he came in to work on the rear bus brakes. He stated when he attended at the premises on the day of the incident, the bus had already been jacked up. When Mr. White arrived, Marc came with him. He stated that there was no reason for Marc to come with Mr. White to the premises and did not ask him to come. He stated that from time-to-time Marc would assist with cleaning the bus or other similar minor tasks. He was not carrying out any tasks for Andre on the day of the incident. He also stated that he did not ask Marc to look at the part that he was working on at the front of the bus that day. Marc was at the shop but was not working on the bus nor did Marc go to the rear of the bus to help Mr. White with those repairs. Marc was not a certified mechanic and there was no need for him to assist with the bus.

[27] Andre testified that Marc had worked for him in the past and while it often involved short term physical work, he also stated that Marc drove large commercial trucks for him. However, for one reason or another those periods of employment did not last very long, often because Marc's conduct was less than satisfactory to Andre or to those for whom Andre carried out contracted services.

[28] At the time of the incident itself, Andre said he was having a cigarette in the wheel well of the front driver's wheel well when all of a sudden, the bus "was doing funny things" and there was an explosion. He could hear someone screaming and then saw that Marc was under the bus. Shortly after the bus dropped, and together with

Mr. White and a person from a neighbouring business, they were able to extract Marc from underneath the bus with the assistance of a jack.

[29] Andre takes issue with Marc stating that he believed that Andre told him to go under the bus. The following statements from the examination for discovery of Marc on September 1, 2022, were introduced as evidence by Andre.

[30] Exhibit 6 in this matter is a portion of the examination for discovery of Marc on September 1, 2022, which states as follows:

**56 Q.** Had you provided him assistance with repairs to his bus in the past?

**A. In the sense of, can you give me a wrench? Can you get that wrench? Like that. Can you get the air hose? Like that. I have done things like that. Not doing any mechanical work myself, no.**

**57 Q.** had you ever been under a bus before?

**A. No.**

**120. Q.** How did you get under the bus in terms of your physical body? Did you go in on your back, on your front, head first, feet first? What did you do?

**A. I got on my back and I just slid myself under.**

**126 Q.** Did you tell Andre you were going to do that, your brother?

**A. I can't remember if I did that or not. I can't remember if I said anything to him about that/**

**127 Q.** Did Andre send you around to take a look? Did he suggest you get under and take a look to see what the problem was?

**A. Once again, I can't be sure if it was Andy or if his helper or anybody said anything of that nature.**

**178 Q.** Let's take it in parts then. Did your brother ask you to go under the bus, sir?

**A. That I cannot be sure. I am not sure if it was Andy or something said earlier, in the -- when I first arrived. But I believe that my knowledge or what I know that day, that somebody had said if we can see the other side. I took that to mean that I should go look.**

**179 Q.** So, you might have been asked to go under the bus by your brother or by the as yet unnamed helper, but it may have been suggested that it would be a good idea? Is that what you are saying?

**A. One thing that I can't be 100 per cent sure if anybody, but I -- I can't be sure.**

[31] The evidence of the defendant Mr. Gordon is that on the day of the incident he was not present at the premises but off driving his own bus. He learned about the bus falling on Marc by telephone. He stated that there was no reason for Marc to be under the bus and that his job insofar as the bus was concerned was to wash and clean the bus.

[32] Mr. Gordon stated that Five Star did not jack the bus up and that he did not know who did. There was no employee of Five Star at the premises on the day of the incident and that the bus had been jacked up a few days earlier for the purposes of the safety inspection. The former Five Star employee who conducted the safety certification was not called by Five Star or any other party to provide evidence.

### **THE ARGUMENTS OF THE PARTIES IN RESPECT OF LIABILITY**

#### **I. THE PLAINTIFF'S ARGUMENT AS TO LIABILITY**

[33] Marc stated that the evidence establishes that on the day of the incident he attended at the premises at the invitation of his brother Andre, where Andre was carrying out repairs on the bus. While he was under the bus it fell on his front torso area causing him significant injuries, pain and suffering.

[34] Marc argued the evidence establishes that both Five Star and Andre are occupiers of the property and they both had control over the premises. Accordingly, his position is that they both had a responsibility to those who had access to the premises. He stated that both Five Star and Andre owed him a duty of care by virtue of their status as occupiers of the premises pursuant to ***The Occupiers' Liability Act***, R.S.M. 1987, c. O8 (the "***OLA***"). The ***OLA*** defines "occupier" and "premises" as follows:

**"occupier"** means an occupier at common law and may include

- (a) a person who is in physical possession of premises, or
- (b) a person who has responsibility for, and control over, the condition of premises, the activities conducted on those premises or the persons allowed to enter the premises; ("occupant")

**"premises"** includes

- (a) land and structures or either of them, except portable structures and equipment other than those described in clause (d),
- (b) water,
- (c) ships and vessels,
- (d) trailers and portable structures designed or used for a residence, business or shelter, and
- (e) railway locomotives, railway cars, vehicles and aircraft while not in operation; ("lieux")

[35] Furthermore, sections 3(1) and (2) of the **OLA** set out the occupiers' duty and the application of the occupiers' duty as follows:

**Occupiers' duty.**

3(1) An occupier of premises owes a duty to persons entering on the premises and to any person, whether on or off the premises, whose property is on the premises, to take such care as, in all circumstances of the case, is reasonable to see that the person or property, as the case may be, will be reasonably safe while on the premises.

**Application of duty.**

3(2) The duty referred to in subsection (1) applies in respect of

- (a) the condition of the premises;
- (b) activities on the premises; and
- (c) the conduct of third parties on the premises.

[36] Marc stated that as occupiers of the premises, to satisfy ss. 3(1) and 3(2) of the **OLA** the defendants had the duty to:

- a. Properly maintain the premises in order to ensure that it was safe so as to avoid the risk of injury to the public and the Plaintiff in particular;
- b. Notify and warn individuals entering the premises of the existence of hazards and dangers that could be posed;
- c. Ensure that activities occurring on the premises were conducted in a safe manner;

- d. Have specific safety protocols in place to minimize the risk of injury to the public and the Plaintiff in particular.

[37] Marc notes there may be conflicting evidence regarding whether he was invited to the premises. However, whether Marc was invited or not, the duty of the defendants remains the same here. There is no evidence of a policy in place that forbade the public or people like Marc from entering the premises.

[38] Marc argues that Andre and Five Star failed to exercise a reasonable standard of care which resulted in the injuries suffered by him. The plaintiff's experts have stated that regardless of what caused the bus to fall, the failure to ensure that the jacks and the stands were in the right places, resulted in the plaintiff's injuries.

[39] While there is disagreement between Five Star and Andre as to who jacked up the bus or whether Andre directed him to get under the bus, Marc stated that regardless of who jacked up the bus, both defendants had an obligation to ensure that the premises were safely maintained, including ensuring that the bus was properly jacked up before allowing any work to take place underneath the bus. He argued that whether he was directed to get under the bus by Andre or not, by failing to ensure that the premises were safe, Five Star and Andre failed to exercise a reasonable standard of care and are jointly and severally liable for the plaintiff's injuries.

[40] The plaintiff stated that he was not contributorily negligent. He stated that Andre directed him to get under the bus and both Five Star and Andre allowed him to enter into a dangerous space without any instruction or warning. He stated that he had no reason to believe that getting under the bus was not safe.



## **II. ANDRE'S ARGUMENT AS TO LIABILITY**

[41] Andre stated in his argument that the evidence of Marc regarding the issue of whether Andre directed him to go under the bus is inconsistent. While Marc stated repeatedly at trial that Andre directed him to go under the bus, his statements prior to trial are not clear on that point, including his recollection as to whether anyone told him to go under the bus. Andre stated that he did not instruct Marc to go under the bus, that he did not see Marc under the bus and would never think that Marc would go under the bus for any reason while it was being repaired.

[42] Andre notes that he is not a certified mechanic and is a bus driver by profession. Andre stated that the bus was jacked up by Mike Walchuk, a certified mechanic who was working for Five Star at the time of the incident. He stated that Mr. White, who was also a certified mechanic, was working on the bus at the time of the incident and that it is Mr. Walchuk and Mr. White as certified mechanics who were responsible for the safety and stability of the bus. He stated that he was entitled to rely on the expertise of Five Star and Mr. White to ensure that the bus was properly supported and stable. He denies any breach of duty towards Marc that would render him liable to Marc.

[43] Furthermore, he argued that if there is any liability on his part, that Marc's actions constitute contributory negligence. He stated that Marc went under the bus either by reason of curiosity or otherwise, without being directed by anyone to do so. He went under the bus without regard for the obvious risks, demonstrating a failure to exercise reasonable care for his own safety.

### **III. FIVE STAR'S ARGUMENT AS TO LIABILITY**

[44] Arguing on behalf of Five Star, Mr. Gordon, denies any liability. He stated that the verbal lease agreement between Five Star and Andre permitted Andre to park the bus in a bay in the building on the premises and to perform regular cleaning and maintenance as he deemed necessary. He stated that it was the responsibility of Andre to guide and supervise the repairs being done on the day of the incident.

[45] Mr. Gordon noted that Five Star completed a full safety inspection of the bus on June 27, 2014, the day before the incident as set out on the safety inspection sheet. The safety inspection sheet stated the bus passed the safety inspection on June 27, 2014, the day before the incident. He submitted that the events that led to the injury of Marc had nothing to do with Five Star and therefore the claim against Five Star should be dismissed.

### **DECISION ON LIABILITY**

[46] I have no difficulty in concluding that both Five Star and Andre are occupiers of the property and they both had control over the premises. Both Five Star and Andre owed Marc a duty of care by virtue of their status as occupiers of the premises pursuant to the **OLA**. The issue presented by this case is the nature of that duty, whether owed by either or both Five Star or Andre, and whether either or both Five Star and Andre breached the duty of care owed to Marc.

[47] Based on the expert evidence led by the plaintiff at trial, it is my conclusion that the bus had not been properly jacked up or properly placed on stands before the work was done on the day of the incident. I accept the expert evidence that had the bus

been properly raised and supported by stands at the four hard points underneath the bus designed for that purpose, the bus could not have fallen. I accept the evidence that whether there was a defect with the airbag under the bus or whether the chassis of the bus had been struck with a hammer or otherwise, the bus could not have fallen if it had been properly jacked and placed on stands. But for the improper jacking of the bus and properly placing it on stands to keep it in a raised position, the incident could not have occurred.

[48] The evidence as to what transpired on the day of the incident as well as the status of the safety inspection conducted by Five Star on the bus prior to that date, is not clear. It is my determination that Marc may have some recollection of the events preceding the incident itself, and despite his testimony at trial, in my opinion he has no recollection as to what led him to be under the bus. I repeat the evidence from his discovery read in by Andre at trial which is as follows:

**56 Q.** Had you provided him assistance with repairs to his bus in the past?

**B. In the sense of, can you give me a wrench? Can you get that wrench? Like that. Can you get the air hose? Like that. I have done things like that. Not doing any mechanical work myself, no.**

**57 Q.** had you ever been under a bus before?

**B. No.**

**120. Q.** How did you get under the bus in terms of your physical body? Did you go in on your back, on your front, head first, feet first? What did you do?

**A. I got on my back and I just slid myself under.**

**126 Q.** Did you tell Andre you were going to do that, your brother?

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**127 Q.** Did Andre send you around to take a look? Did he suggest you get under and take a look to see what the problem was?

**B. Once again, I can't be sure if it was Andy or if his helper or anybody said anything of that nature.**

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**179 Q.** So, you might have been asked to go under the bus by your brother or by the as yet unnamed helper, but it may have been suggested that it would be a good idea? Is that what you are saying?

**B. One thing that I can't be 100 per cent sure if anybody, but I -- I can't be sure.**

[49] The evidence is not clear why Marc decided to go to the premises after Andre spoke to Mr. White on the day of the incident asking him to repair the rear brakes of the bus. I do accept the evidence that Marc came in his own vehicle or in a different vehicle from Mr. White and that he brought coffee and donuts. At trial, he testified in chief and in his cross-examination by Mr. Gordon and by Andre that he "believed" Andre told him to go under the bus. Apparently, the reason he "believed" he was asked by Andre to go under the bus was to see what the problem was in respect of a particular part at the front of bus where Andre was working that would not come loose. He said he "believed" Andre told him that "it was safe, don't worry."

[50] Although Marc has familiarity with large vehicles, and more particularly large commercial trucks, he was not a mechanic and is not certified to work on the mechanical aspects of any large vehicles, including buses. He testified he did not know whether the bus had been jacked properly. However, he had attended the premises on more than a few prior occasions, assisting in the cleaning and washing of the bus. Based on his evidence it is apparent that he was familiar with the nature of the

business Andre and Five Star carried on in the premises and generally knew his way around the premises.

[51] Andre testified that while he knew that Marc was at the premises and indeed spoke to him, he did not direct or otherwise request him to go under the bus. He testified that he had no idea that Marc had gone underneath the bus, the location where Marc went under being on the passenger side of the bus and the opposite side from where Andre was working in the front wheel well. He testified that Mr. White, a certified mechanic, who was working on the rear brakes could have provided him with any mechanical opinion or assistance if he had required it.

[52] Based on the evidence, I find that the facts do not establish Andre directed or otherwise requested Marc to go under the bus. Nor do I find that Andre had assured him it was safe for him to go under the bus or that he told him not to worry about going under the bus. I note that Andre argued that if he directed him to go under the bus after assuring him it was safe to do so, it does not make sense that he would personally assist Marc with finding a lawyer to pursue an action in respect of the incident. It is not necessary for me to address that argument. Similarly, it is speculative and not helpful for the purposes of these reasons to try to determine based on the evidence here whether Marc went under the bus simply out of curiosity or went under the bus unsolicited, with a brotherly intention to help. These are conclusions that lack a proper factual foundation. While those may be possibilities, I am not prepared to speculate in that respect and indeed it would be inappropriate for me to do so.

[53] It is clear however, that when the bus fell, Marc was under it. On the facts here I find that the bus was improperly jacked or improperly placed on stands which caused it to collapse and pin Marc underneath. There is no other explanation. The expert testimony of Mr. Ferrone is that had the bus been properly jacked and supported by stands at the four hard points, the incident would not have happened. Mr. Ferrone stated that had the bus been supported at only the two hard points at the front of the bus, this would have been sufficient to hold the bus in place. It is not sufficient to rely on the airbag underneath the bus since the air could lose air and create a danger.

[54] The opinions and conclusions of Mr. Ferrone are more fully set out in his report found at document 49 in volume 3 of the agreed book of documents and specifically at pages 1646 and 1647. At the enumerated paragraph 13 on page 1647, Mr. Ferrone concludes as follows:

- 13). This incident would have been prevented if this bus was supported as prescribed by MCI. Mr. A. Laroque's deposition statement (p. 43-46) concerning six jack stands being under the bus is not plausible. It is not possible for this to be true since this bus factually fell onto Marc.

Therefore, the only way for the monocoque body to fall onto Marc is:

- there were no jack stands at all,
- the jack stands were not in the correct location,
- the jack stands failed (no evidence of this found),
- an insufficient number of jack stands were used,
- hydraulic "bottle jacks" were used at an incorrect location,
- other type of hydraulic jacks were used at an incorrect location,
- hydraulic jack(s) used at the dedicated hard point(s), but collapsed (no evidence of this).

[55] There is conflicting evidence in respect of who jacked up the bus. Andre stated that the bus was still jacked up from the safety inspection, which was apparently conducted on or before June 27, the day before the incident. That date is set out on

the safety certificate and signed by the Five Star employee who conducted the inspection and an office person, also a Five Star employee as two signatures of the inspecting agency were required at that time. The evidence of Mr. Gordon is that the bus would not have been left jacked up overnight. However, Mr. Gordon was not at the premises on June 27 or June 28, 2014, to be able to verify that the bus was no longer jacked up. Furthermore, it was the testimony of Mr. Gordon that he did not call Mr. Walchuk, the Five Star employee who conducted the safety inspection, to give evidence because apparently Mr. Walchuk did not wish to be involved in these proceedings. He was not placed under subpoena.

[56] In my opinion, it is not necessary to draw an adverse inference against Five Star for not calling its former employee, Mr. Walchuk, to testify. Indeed, there is no property in a witness and he could have been called by any one of the parties. However, it is my conclusion that without the testimony of Mr. Walchuk in these proceedings, Five Star's argument that the bus was no longer jacked up at the end of business on June 27, 2014, remains without a factual foundation. Since he was the one personally conducting the inspection, Mr. Walchuk might have provided important evidence regarding when exactly the safety certification was completed and if the bus was taken off the jacks and/or stands by the end of June 27, 2014, the day before the incident. It is Andre's evidence that the bus was still jacked up on June 28, 2014, when he came to the premises to work on the V-link assembly at the front end of the bus on that day and there is no substantive evidence to suggest otherwise. The evidence of Mr. White, or Marc for that matter, sheds no light on that issue as the front wheel was

already off the bus and it was raised when Mr. White came to work on the rear brakes of the bus.

[57] I agree with the plaintiff's position that both Five Star and Andre had an obligation to ensure that the bus was properly jacked up before anyone went under the bus to work on it. Neither carried out that obligation properly. However, I am not satisfied that only Five Star and Andre bear the responsibility for injuries suffered by Marc. I am troubled by the fact that although Mr. White stated in his testimony that it was his opinion that the bus had not been properly jacked, he only formed that conclusion after the bus fell on Marc. Despite being a certified mechanic working on the bus just prior to the incident, it appears that he took no steps to ascertain whether the bus had been jacked properly before he began to work on the rear wheels of the bus. His own evidence is that he had to jack up the back of the bus by using a large jack to remove the rear wheels and work on the brakes. As a certified mechanic he too had an obligation to assure himself that the bus had been properly jacked before he used the jack to remove the rear wheels. However, with respect to the causation of the incident itself, the testimony of the expert, Mr. Ferrone here is that the only two relevant hard points in this case were the ones in the front and had they been properly supporting the bus, it would not have fallen. There is no evidence here that I can rely on to suggest that by Mr. White using an additional jack at the back of the bus contributed to the failure of the jacks and/or stands at the front of the bus and that caused the bus to collapse and pin Marc.



[58] Aside from the failure to fulfill the obligation that Five Star and Andre had to take the appropriate steps to see that the bus was properly jacked, I also find that in this case Marc was contributorily negligent in going under the bus and placing himself in a very dangerous position. The only conclusion I can arrive at on the evidence is that for reasons of his own, Marc decided to go under the bus to see if he could find out why the part that Andre was trying to remove remained stubbornly in place. It may well be that he had discussed the issue with Andre, but there is no reliable evidence that Andre asked or directed Marc to go under the bus or even knew he did. Marc's repeated statements in his testimony that he "believed" Andre had told him to do so is not something I am prepared to accept given his statements prior to trial that he stated he had no clear recollection of the events immediately leading up to the incident, including why he went under the bus. The evidence that I accept is that Andre only knew that Marc was under the bus after it collapsed and pinned him.

[59] Marc is not an ordinary member of the public when it came to being present at the premises on the date of the incident. He had been permitted access to the premises by Andre from time-to-time to help clean and wash the bus. It was not unusual for him to be around the area where the bus was being worked on. Given his general familiarity with the operations being carried out on the premises, knowing the type of work being carried out on the bus on the day of the incident and based on his prior employment history with heavy vehicles, it should have been very evident to him that the work being done by Andre and by Mr. White required not only precautions generally, but also a high degree of caution on his part.

[60] At one time Marc held a licence to operate large commercial trucks and was a truck driver for a time before the incident. Indeed, he spoke to Jason about going back to work prior to the incident even though it is clear to me that being already severely disabled prior to the incident it would not be likely that he would ever be able to do so. Although he was not a bus driver or a certified mechanic, it is a reasonable inference to make, based on the evidence, that despite any disability he had at that time, he was aware of the inherent danger that working in and around these large, heavy vehicles presented. Marc placed himself in a dangerous position by going under the bus. Given his background, his familiarity with heavy equipment and no demonstrable or justifiable reason for placing himself under the bus, he contributed through negligence to his own injury and therefore also bears a substantial portion of the responsibility for the injuries he suffered during the incident.

[61] Along with the quantification of damages, the challenge in this case is to determine an appropriate apportionment between the respective failures of Five Star and Andre to meet the required legal standard and the negligent conduct of the plaintiff which contributed to his injuries. In apportioning liability between Marc, Andre and Five Star I have considered, *inter alia*, the following provisions of the **OLA** and **The Tortfeasors and Contributory Negligence Act**, R.S.M. 1987, c. T90 ("**TCNA**"). The **OLA** provides:

7        The Tortfeasors and Contributory Negligence Act applies to and in respect of damages arising from a breach of the duties imposed under this Act.

[62] The **TCNA** provides at s. 4:

4 Contributory negligence by a plaintiff is not a bar to the recovery of damages by him and in any action for damages that is founded upon the negligence of the defendant, if negligence is found on the part of the plaintiff which contributed to the damages, the court shall apportion the damages in proportion to the degree of negligence found against the plaintiff and defendant respectively.

[63] I have reviewed the facts in the preceding paragraphs setting out why I have concluded that Five Star and Andre have not met the standard imposed by the **OLA** as well as why the conduct of the plaintiff amounts to negligence on his part. In considering the issue of apportionment the court in **Lou Anna Roberts v. The Government of Manitoba**, 2021 MBQB 43 (CanLII) held:

[36] Section 4 of **The Tortfeasors and Contributory Negligence Act** says that in apportioning liability as between the plaintiff and the defendant, the court must compare the degree of negligence of each. In the case of **Cempel v. Harrison Hot Springs Hotel Ltd**, 1997 CanLII 2374 (BC CA), 1997 CarswellBC 2762, (BCCA), the court reviewed the approach in determining apportionment under differently worded legislation. There, the statute indicated that apportionment was based upon “the degree to which each person was at fault” as distinct from the words in the Manitoba legislation, namely “the degree of negligence found against the plaintiff and defendant respectively”. I see no material difference in the concept behind both wordings. At para. 19 of **Cempel**, the majority wrote:

19 ... The *Negligence Act* requires that the apportionment must be made on the basis of “*the degree to which each person was at fault*”. It does not say that the apportionment should be on the basis of the degree to which each person’s fault *caused* the damage. So we are not assessing degrees of causation, we are assessing degrees of fault. In this context, “fault” means blameworthiness. So it is a gauge of the amount by which each proximate and effective causative agent fell short of the standard of care that was required of that person in all the circumstances.

[Underlining added.]

[37] At para. 24, the majority wrote:

24 In the apportionment of fault there must be an assessment of the degree of the risk created by each of the parties, including a

consideration of the effect and potential effect of occurrences within the risk, and including any increment in the risk brought about by their conduct after the initial risk was created. The fault should then be apportioned on the basis of the nature and extent of the departure from the respective standards of care of each of the parties.

[Underlining added.]

[64] Based on the foregoing reasons, I find that Five Star and Andre breached the duty of care owed to Marc and did not abide by the necessary standard of care. However, bearing in mind the principles set out in statute and case law to which I have previously referred, and considering the conduct of each of the parties as identified earlier in these reasons, I am of the opinion that Five Star and Andre are each 25 percent liable while the plaintiff is 50 percent contributorily negligent. I also note that in respect of the responsibility for the liability of the defendants, s. 5 of the **TCNA** provides:

5 Where two or more defendants are found negligent they are jointly and severally liable to the plaintiff for the whole of the damages apportioned against both or all of them.

### **ASSESSMENT OF DAMAGES**

[65] Five Star and Andre, both unrepresented by legal counsel, did not provide me with any substantive submissions on the issue of apportionment of liability between the parties based on contributory negligence or otherwise. Furthermore, neither of those two parties provided me with submissions in respect of the assessment of damages. Only the plaintiff provided me submissions in this respect. This is unfortunate. Nevertheless, while I am not bound to make out the case for Five Star or Andre in respect of the assessment of damages, it is nevertheless incumbent upon me to ensure

that the substantive submissions as to the assessment of damages made by plaintiff's legal counsel are appropriate.

[66] In respect of the position of the plaintiff on the quantum of damages involving his bowel and colon, the plaintiff relies on the decision of ***Kennedy v. Jackiewicz***, 2003 CarswellOnt 1755, where the plaintiff suffering many of the same conditions, including pre-existing abdominal pain, was awarded general damages in the amount of \$125,000. Other cases cited by the plaintiff range from a low of approximately \$50,000 to \$200,000.

[67] The plaintiff argues that since the incident took place almost eleven years ago, he will never fully recover from the pain he experiences or the psychological trauma he suffers from. In this case, bearing in mind the injuries to his abdomen including chronic pain, broken ribs and psychological injuries, the plaintiff submits his general damages should be \$360,000 with the loss of opportunity to invest calculated from 2014, at the rate of 3 percent would be an additional \$138,324.19.

[68] The special damages claimed by the plaintiff, including the deductions from his prescriptions (\$22,877), interest on prescriptions (\$4,544.82), the Manitoba Health account (\$133,568.24), anticipated costs of lawn care (\$11,000), anticipated costs of snow removal (\$18,000), anticipated costs of laundry (\$22,000), total \$211,99.06. Accordingly, the claim for general damages and special damages by the plaintiff total \$710,314.25.

[69] In arriving at the assessment for general and special damages, I have considered the evidence regarding Marc's condition after the incident but also prior to the incident.

The plaintiff is a 58-year-old male whose work history consisted of mainly physical labour and driving large commercial trucks. He worked for his brother Andre, a defendant in this action, a number of times. However, his work history is spotty and not particularly successful, with his employment sometimes being terminated by Andre for reasons related to his unsatisfactory work performance.

[70] In his testimony, Marc stated that he was involved in a truck accident in which his leg was injured, but he stated that injury was not particularly troublesome. In 2008, he stated he was hospitalized with pneumonia for four months and developed a very serious (stage 4) bed sore as a result. He also experienced lower back pain which continued until the incident. In 2010, Marc suffered a stroke which created various physical problems, effecting mainly the left side of his body. He had difficulty walking, speaking, writing and swallowing. He had to relearn many basic tasks such as banking. During this time his nephew Jason would come and help him out on a regular basis and as he was still married at this time, his wife would also assist him with many of his tasks.

[71] He testified that after his stroke he did a lot of physical exercise, which included getting a dog and going on walks with the dog. He stated that he wanted to get back to driving commercial trucks but admitted that he did not know how realistic that would be. Marc testified that in January 2013, he went to the hospital emergency department complaining of symptoms that included pain when exposed to light and sound. He stated that he underwent an operation to his head and resulted in blood being drained

from the area of his brain. During this time, he applied for and qualified for CPP disability benefits and continues to receive CPP disability benefits to this day.

[72] Marc testified that in 2014 before the accident, he was still experiencing health difficulties but that he was getting better by exercising and seeing Dr. Luk, his physician, regularly. He stated that he would also go see Andre at the premises a number of times a month and "hang around the shop", talking to Andre about various things. He was also paid to carry out various tasks like cleaning the bus. He stated that he met Mr. Gordon at the shop during this time.

[73] Marc testified that at the hospital, he underwent surgery and was heavily medicated and received multiple blood transfusions. Along with the pain and anguish suffered as a result of the incident, he also harboured thoughts of suicide but indicates that because of his religious beliefs he would not do so. During this time, he received assistance from his wife, but she was also quite busy working at her own job. He would often speak to Jason numerous times a day and Jason would come to visit him at home.

[74] He says he is still in physical pain and finds it very frustrating. He stated that in addition to the physical pain, he suffers mentally and emotionally, often being distraught and suffering from nightmares related to the incident. He stated that he cannot walk as much anymore and that his health, which had been improving prior to the accident has stopped improving. He still has a driver's licence, but not a licence to drive large commercial vehicles. He stated that over time his pain is getting worse. He stated that he suffers from pain in the buttocks and especially in the sternum. He says

his pain is debilitating. He stated he still has accidents with his bowels and is unable to go on vacations. He stated he goes to church every day and spends a lot of time reading. He stated that socially he sees his church friends, but has difficulty doing day to day tasks, such as laundry, cutting the grass or shovelling snow. He says that Jason continues to help him with those tasks.

[75] Much of Marc's testimony as to his condition was confirmed by his wife, Natalie, from whom he has been separated since 2018. She testified that he had been in a truck accident in 2007, after rolling a truck and as a result was off work for three months. She confirmed that he stayed in hospital for four months because of his pneumonia in 2008 and that he developed a serious bed sore as a result. He said that after being discharged the sore healed in about a year. After that he could go walking, fishing, working around the yard, as well as doing the laundry.

[76] In 2010, because of his stroke, he lost the use of his left side, and it took about five or six months to learn to walk. In 2013, he began to suffer from headaches and after about three weeks he was hospitalized and underwent brain surgery. However, after a few months he was back to doing the things he was doing before the brain surgery. She testified that prior to the incident "he was doing pretty good".

[77] Natalie testified that after the incident and his discharge from hospital, he was often emotionally distraught, crying, screaming and crouching in a fetal position for hours. He needed assistance bathing and suffered from irregular sleep. She said that after the incident his pain increased appreciably and that he was "delusional" and often woke up screaming. She testified that in 2016, a year after bowel related surgery,



issues related to his bowels and pain continued. She stated that while he still had pain related to his health prior to the incident, the pain after the incident was much more painful.

[78] Dr. Luk, Marc's family doctor, whose testimony I have previously summarized, spoke of Marc's pre- and post-incident health, including his levels of pain, the medication used to address the pain, and his PTSD, depression and lack of finances. Prior to the accident, his pain was on a level of 4 out of 10 while afterwards it increased to 7 out of 10. He said Marc was more depressed after the incident and that while his pain had increased after the accident, he is now "much better than after the accident".

[79] Dr. Luk also testified that the medication prescribed for Marc is now not just for depression, but for nerve pain and that Marc's biggest complaint is sternum pain which occurred since the accident. He testified that his bowel condition, including IBS, is often related to his anxiety. PTSD continues to be a problem and that as of 2023, Marc still harbours suicidal ideations, and struggles with financial issues, lack of food, and difficulty sleeping. Before the incident he stated that Marc had been looking forward to going back to work. In cross-examination by Andre, Dr. Luk stated that since 2013 he has been attempting to manage Marc's pain. He also testified that prior to the incident Marc's level of depression was 8 on a scale of 10 and that strokes may cause long term effects.

[80] In respect of Marc's injuries, his nephew Jason testified that prior to the incident Marc suffered from the effects of a truck accident, the "brain bleed", pneumonia and the bed sore he had developed while in the hospital. However, he stated that he did go

on walks with Marc and that Marc expressed a desire to get back to work. He stated that after the incident and Marc's return home, he saw Marc three or four times a week and that he could not do much of anything after the incident. He testified that his mental health was not as vibrant as before the accident and that Marc wished he had been killed in the incident. He struggled with thoughts of suicide, was in pain and dealt with depression and anger.

[81] Jason stated that from 2015 to 2018, Marc improved "a little". In 2019, Jason moved in with Marc. He stated that Marc was in "lots of pain" and did lots of crying throughout the night. Marc did a lot of sitting around, spending most afternoons on the couch. Jason stated he no longer lives with Marc but he still helps with tasks like cooking, grocery shopping and mechanical work. Marc finds it difficult to get around, but he has a driver's licence and still drives a car. Pain, mental health and thoughts of suicide continue to be issues for Marc. He stated the separation from his wife and the death of his dog have had a big emotional impact on Marc.

[82] The evidence is clear that prior to the incident Marc was suffering from mental and physical disabilities. In 2010, he was held to be eligible for CPP disability benefits and he continues to receive those benefits. The eligibility for these benefits is set out in the CPP. It sets out eligibility at paragraph 42(2)(a) of the CPP, defining it as a physical or mental disability that is severe and prolonged. A person is considered to have a severe disability if he or she is incapable regularly of pursuing any substantially gainful occupation. A disability is prolonged if it is likely to be long continued and of indefinite

duration or is likely to result in death. (See ***J. B. v. Minister of Employment and Social Development***, 2017 CanLII 146501 (SST) at para. 21)

[83] Nevertheless, the finding by the tribunal which determines eligibility for CPP disability benefits based on the statutory criteria does not in my opinion disqualify Marc from obtaining damages for injuries suffered in the incident. It does, however, provide the court with an understanding of the magnitude of the disability Marc was suffering from prior to the incident and that the prior disability is a factor in assessing the damages attributable to the incident.

[84] The evidence of Dr. Luk is particularly helpful in assisting the court in assessing the state of Marc's health prior to the incident as compared to his health after the incident. In his testimony, Dr. Luk stated that prior to the incident Marc's lower back pain was moderate (6 or 7 on a scale of 10) or even severe (9-10 on a scale of 10). His depression was 8 or 9 on a scale of 10 as well. Changes in medication in 2013 and 2014 brought his pain level down from 8 or 9 to 4 on a scale of 10. After the incident, his level of pain increased to 7 on a scale of 10. However, recently, Dr. Luk stated that with the medication he is receiving, Marc's level of pain is back to where it was prior to the incident. Prior to the incident his level of depression was at 8 on a scale of 10. Based on the evidence, that level of depression does not appear to have gone up or down substantially.

[85] Notwithstanding that he was already suffering from significant physical pain well before the incident, I am of the opinion that his pain increased somewhat as a result of the incident, including the abdominal and sternal pain which he experiences and

according to Dr. Luk is as a result of the incident. He also suffers from diarrhea and constipation, as well as incontinence. In summary, both his physical and his mental or emotional difficulties have increased somewhat since the incident. The medications he takes to deal with his current state of disability are substantial.

[86] The plaintiff argued that the injuries suffered as a result of the incident justify damages at the higher end of the range which courts generally grant for these types of injuries. The cases the plaintiff relies on include:

- a) ***Kennedy v. Jackiewicz***, 2003 CarswellOnt 1755;
- b) ***Smith v. Liwanpo***, 2007 CarswellOnt 2492;
- c) ***DiGiorgio v. Smarkenka***, 2004 CarswellOnt 3701;
- d) ***Hoffman v. Jekel***, 2011 ONSC 1324; and
- e) ***Gill v. Apeldoorn***, 2019 BCSC 798.

[87] Marc claims damages on the higher end of the range. He experiences constant pain as a result of his injuries which has been described as chronic in nature. He experiences pain related to bowel movements, and fears eating and leaving his home as a result. He will live with his injuries for the rest of his life. He suffers significant psychological harm, and experiences frequent suicidal ideation. The evidence of multiple witnesses, including himself and Dr. Luk stated that the only reason he has not attempted to take his own life is because of his religious faith.

[88] After a long period of isolation, Marc has resumed some small activities such as going to church and occasionally meeting friends for coffee. However, many of the activities he once enjoyed, or was able to manage on his own are no longer possible.

He is unable to go to sporting events, go on walks, or do day-to-day tasks such as laundry or yard work without significant physical repercussions.

[89] The incident took place almost 11 years ago. It is almost a certainty that Marc will never recover fully from the pain he experiences or the psychological trauma he suffers from.

[90] As such, Marc submits that he should be awarded general damages at the higher end of the scale of general damages for these kinds of injuries, that is, in the range of \$320,000 to \$400,000, plus loss of opportunity to invest at the rate of 3 percent from 2014.

[91] At paragraph 81 of the plaintiff's written argument he breaks down the claim for damages as follows:

General Damages: Range \$320,000 - \$400,000

Injuries to abdomen including chronic pain - \$130,000 - \$160,000

Broken ribs - \$40,000 - \$60,000

Psychological injuries, PTSD and loss of quality of life - \$150,000 - \$180,000

The plaintiff submits General Damages should be \$360,000

Loss of opportunity to invest calculated from 2014, at the rate of 3%:

\$138,324.19

TOTAL GD = \$498,324.19

Special Damages

Prescriptions - \$22,877.00 (Exhibit 3)

Manitoba Health Account - \$133,568.24 (Tab 28)

Anticipated Costs of Lawn Care - \$11,000 (Exhibit 2)

Anticipated Costs of Snow Removal - \$18,000 (Exhibit 2)

Anticipated Costs of Laundry - \$22,000

Total Special Damages: \$207,445.24

Interest on Prescriptions: \$4,544.82

TOTAL SD = \$211,990.06

TOTAL (GD + SD) = \$710,314.25

[92] Unfortunately, neither Five Star or Andre provided the court with their position on damages owing no doubt to the fact that both were not represented by legal counsel. Their position is simply that there should be no finding of liability and did not provide the court with their respective positions on damages in the alternative.

[93] It is trite to say that the case law establishes that the finding of a plaintiff being contributorily negligent is inherently fact-specific and very much dependent on the circumstances of each case. Furthermore, neither can the assessment of damages be determined with scientific precision in most cases, including in the case at bar. My review of the case law, including the case law relied upon by the plaintiff, is that the claim for general damages here is on the higher end of the range established by the case law. In my opinion, the injuries to the abdomen including chronic pain and the broken ribs should be assessed at \$150,000. Bearing in mind the plaintiff's physical, emotional and mental disability prior to the incident, the psychological injuries, PTSD and loss of quality of life are assessed at \$50,000. The loss of opportunity to invest is calculated from 2014 in the amount of \$200,000, at the rate of 3 percent.

[94] The special damages for the prescriptions is set at \$22,877 plus interest at the rate of 3 percent and the special damages on account of the Manitoba Health Account is \$133,568.24. In respect of the anticipated lawn care, snow removal and costs of laundry and given the extent to which these tasks were already being carried out by others prior to the incident because of the plaintiff's existing disability prior to the incident, the award for special damages in respect of all three is a total of \$15,000.

### **CONCLUSION**

[95] I have found that Five Star and Andre breached the duty of care owed to Marc and did not abide by the necessary standard of care. As stated earlier, I find that Five Star and Andre are each 25 percent liable for the damages suffered by Marc. Marc is 50 percent contributorily negligent. Accordingly, pursuant to s. 5 of the ***TCNA***, Five Star and Andre are jointly and severally liable to Marc for 50 percent of the total award on account of special and general damages.

[96] Given that the plaintiff has been found to be 50 percent contributorily negligent, the costs to be awarded to the plaintiff are set at 50 percent of the applicable tariff. If costs cannot be agreed upon, the parties may provide me with written submissions regarding their respective positions.

\_\_\_\_\_ J.