

CANADA / JUDGMENT

Austin v. Reardon

2014 BCSC 37

COURT

Supreme Court of British Columbia

DECIDED

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2014 BCSC 37 Austin v. Reardon

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Austin v. Reardon,

2014 BCSC 37

Date: 20140110

Docket: 12-1846

Registry: Victoria

Between:

Robert Austin

Plaintiff

And

Sherry Reardon and Jayson Reardon

Defendants

Before: The Honourable Mr. Justice Barrow

Reasons for Judgment

Counsel for the Plaintiff:

J.S. Godfrey

Counsel for the Defendants:

R. Goldstone

Place and Dates of Trial/Hearing:

Kelowna, B.C.

November 20-22, 2013

Place and Date of Judgment:

Victoria, B.C.

January 10, 2014

- [1] The plaintiff was injured in a motor vehicle accident on July 2, 2010. Liability has been admitted. The matter proceeded to trial for the purpose of assessing damages.
- [2] The defendants agree that the plaintiff is entitled to non-pecuniary damages. Although they do not agree with the amount of the damages sought by the plaintiff, the extent of the parties' disagreement on this point is not particularly significant. The real issue is whether the plaintiff has proven a loss of future income earning capacity.

The Plaintiff's Background and The Accident

- [3] The plaintiff is now 20 years old. At the time of the accident he was 17. He grew up in Lumby where his parents still live and work. At the time of the accident he was living at home and had just completed Grade 11.
- [4] The plaintiff's father is a logging truck driver. His grandfather was a logging contractor and still works in the logging industry. As a result, the plaintiff grew up around heavy equipment. He described himself as an average student in academic courses in high school. He excelled in "hands on" courses. He has always had an interest in mechanics, and in particular working on heavy equipment.
- [5] The accident happened when the plaintiff was driving his 1985 Toyota 4Runner westbound on Highway 6 en route to his parents' home in Lumby. He was wearing his seatbelt. He came to a stop because a vehicle in front of him was turning left. The defendant, who was also westbound, rear-ended him. The collision was reasonably significant, but the plaintiff was able to drive his vehicle from the scene. Neither the plaintiff nor the defendant thought it necessary to summon the police or an ambulance; rather, they just exchanged information and proceeded on their way.
- [6] The rear bumper and the trailer hitch on the plaintiff's vehicle bore the brunt of the impact. Both were bent underneath the body of the vehicle. His vehicle was not otherwise damaged. The defendant's vehicle sustained reasonably substantial damage to its front end.

- [7] The plaintiff drove from the scene of the accident to the office of his insurer in Lumby. By the time he arrived there he was beginning to feel stiff in his upper back. By coincidence his mother drove by the insurance office and noticed her son's vehicle. She stopped to chat with him. She realized he may have been more significantly injured than he thought and she took him to the hospital in Vernon.
- [8] The plaintiff was examined at the hospital and x-rays were taken of his thoracic and lumbar spine. Those x-rays were normal and the plaintiff was discharged. About 10 days later he had an x-ray of his cervical spine and it too was normal.
- [9] On July 8, 2010 the plaintiff saw his general practitioner, Dr. Barss. Dr. Barss referred him to physiotherapy. The plaintiff attended "a few times", but found that he was sorer after the treatments than he was before and as a result he stopped going.
- [10] The plaintiff had worked for a masonry company in the summer of 2009 and again during the spring break in 2010. He had been hired by the company for the summer of 2010 and was scheduled to begin work on the Monday following the accident. His job with a masonry company involved heavy labour - mixing concrete, carrying it to the masons and bricklayers and setting up and taking down scaffolding. The plaintiff attempted to work but found that he was simply too sore. He remained off work for the month of July and tried again to work in early August. He worked for about a week and one-half before concluding that he was simply unable to cope with the physical demands of the job and the pain he was experiencing.
- [11] The parties have agreed that the plaintiff lost \$4,200 in income he would have earned that summer. The defendants argue, although not particularly strenuously, that the plaintiff failed to mitigate his loss by failing to investigate alternative less physical occupations during that summer. I am not persuaded that the defendants have established a failure to mitigate. Viewed in prospect, the plaintiff did not know he would not recover during that summer. In fact, I infer his condition did improve somewhat given that he thought he could return to the masonry job in early August. By mid-August, when he realized that was not possible, the summer was almost over. I am satisfied that the plaintiff is entitled to recover judgment in the sum of \$4,200 plus pre-judgment interest for his past loss of income.

The Plaintiff's Injuries and The Course of His Recovery

- [12] As noted above, the plaintiff saw his family doctor about a week after the accident. He saw his doctor again at the end of July 2010. It appears that the only other time he saw his family doctor in connection with the injuries he sustained in the accident was in June 2012. Dr. Barss has not provided a report, nor did he testify at the trial.
- [13] In terms of passive therapies, the plaintiff saw a physiotherapist on a few occasions in the month after the accident. He stopped going because he was in reasonably significant pain and he found that the treatments aggravated rather than alleviated his symptoms. He returned to physiotherapy in April 2011 and continued treatments until November of that

year. Although he experienced some short-term benefit from those treatments, he did not receive any long-term relief. He also received massage therapy on a referral from his family doctor but, as with the physiotherapy, they provided little relief and he soon stopped going.

- [14] Mr. Austin has never been prescribed any pain or anti-inflammatory medication for his condition. His consumption of over-the-counter medications has been modest. He testified that he takes Advil about twice a month, and sometimes more frequently. He said, and I accept, that he is generally opposed to taking any form of medication if he can avoid doing so.
- [15] The plaintiff was referred to Dr. Duncan Laidlow, a physiatrist, by his lawyer. Dr. Laidlow examined him on two occasions: first, on March 23, 2012, and again a year later on March 22, 2013. Dr. Laidlow prepared reports following each of his examinations and he was cross-examined about them at trial.
- [16] In March 2012, Dr. Laidlow diagnosed the plaintiff as suffering from a musculoligamentous strain of the cervical spine, mid-back and lumbar spine. He concluded that as a result of this strain the plaintiff had developed "significant myofascial tightness" which in turn gave rise to mechanical pain primarily in the mid-back but also in the neck and lower back. Dr. Laidlow confirmed that diagnosis following his March 2013 assessment. The only other doctor whose evidence is before the court is Dr. Michael Piper, an orthopedic surgeon who the plaintiff saw at the defendants' request in February 2013. Dr. Piper concluded that the plaintiff had suffered a "moderate musculoligamentous injury to the cervical and thoracic spine".
- [17] The plaintiff reported to Dr. Laidlow, and confirmed in his evidence at trial, that in the first six months after the accident his condition seemed to be improving. Since then, however, it has not improved. In fact he thinks it is getting worse. The most significant aspect of the plaintiff's injury is the injury to his mid-back in an area just below his shoulder blades. He testified that he has pain in that area every day. It is aggravated if he sits for extended periods of time and, according to Dr. Laidlow, it is reduced when he is moving about or lying down.
- [18] The pain he experiences in his neck is more variable. It is only intermittently present and seems to be aggravated by periods of prolonged sitting. His low back pain is even less frequently present and not particularly severe or functionally limiting.
- [19] In March 2012, Dr. Laidlow found that Mr. Austin's range of motion in his neck was somewhat reduced (60 degrees in lateral rotation to either side, whereas the normal range for a person of the plaintiff's age is about 80 to 90 degrees). In addition, the plaintiff's ability to flex his neck was about one-half of normal. He could, however, fully extend his neck. As to the plaintiff's mid-back, Dr. Laidlow found that his ability to rotate to either side was about one-half of the normal range of motion for individuals of the plaintiff's age. Finally, Dr. Laidlow found some reduction in the plaintiff's ability to flex his low back. In all other respects, the plaintiff's physical abilities were unremarkable.

[20] Dr. Laidlow thought the plaintiff's prognosis in March 2012 was "guarded". He expressed the view that it was "extremely important" that the plaintiff pursue a community-based exercise program focused on restoring his mobility. He thought the plaintiff's symptoms would wax and wane according to the extent to which he was able to re-establish full mobility. As a result, he recommended a supervised exercise program focusing on the various muscle groups controlling the mid- and upper back. He concluded his March 30, 2012 report by noting:

If he is able to carry on with his stretching program for a minimum of six months to a year and regains flexibility, I do feel that his symptoms will lessen over where they are now. Having said that, the fact that his symptoms have persisted this long suggests that he still will be prone to mechanical pain into the future.

[21] Following Dr. Laidlow's initial assessment, the plaintiff attended a fitness facility in Vernon and began a focused stretching program under the supervision of a kinesiologist. There is no report from the kinesiologist, but the plaintiff testified that he participated in the program at the gym for "about a month or two". Thereafter, he continued to do the stretching and other exercises demonstrated for him by the kinesiologist, at home. He testified that he continues to do those stretching exercises today.

[22] In March 2013, Dr. Laidlow again examined the plaintiff. Again, the plaintiff's most significant area of pain was his mid-back. He told Dr. Laidlow that he experienced pain there all the time. Further, and notwithstanding the exercises he had been doing, he reported that he did not think he had improved at all over the previous year. To the contrary, he felt he was still getting worse. In spite of his perception, Dr. Laidlow found that the plaintiff's range of motion in his neck had improved inasmuch as his ability to forward flex, which the year before had been one-half of normal, was found to be unimpeded. His lateral range of motion in his neck remained approximately what it had been the year before. His mid-back had also improved in that his range of motion in rotation to either side had been one-half of normal in March 2012, it had improved to three-quarters of normal by 2013. As for his low back, whereas in March 2012 there was "significant tightness" and his ability to flex forward was only one-half of normal, by March 2013 he was no longer tender and had "good basic flexibility in forward flexion, extension and lateral bending to each side."

[23] Dr. Laidlow expressed the view in his March 22, 2013 report that:

The exercises given within a trainer supervised program seemed to aggravate him and were not changed to prevent that. He has been doing stretching exercises and strengthening at home, but has not been able to change the tightness in the upper back, mid back and lower back.

I note that Dr. Laidlow had the benefit of a report prepared by the kinesiologist who designed and supervised the exercise program that the plaintiff participated in. That report was not, however, tendered in evidence at the trial.

[24] Dr. Laidlow concluded his March 22, 2013 report by noting that Mr. Austin's prognosis "for further recovery is poor." He did, however, add:

I think that his symptoms will continue, although it is possible that they might improve to a degree if he is able to restore the mobility to the areas that are tight at the present time.

I think it is extremely important that he is set-up with a community-based program that would have a chance of restoring the mobility to normal. There should, if anything, be a reduced emphasis on strengthening and a concentration on daily stretching. I would suggest that he be set-up with a trainer, again, to be sure that he is doing a home program concentrating on improving the flexibility of the scalene musculature, in the upper back and the lumbar musculature in the lower back.

Dr. Laidlow also noted that the plaintiff found his exercise program aggravated his symptoms. He thought that was likely because the program involved too much weight training and that the plaintiff may have overdone the stretching.

[25] I conclude from Dr. Laidlow's reports and his evidence at trial that although the plaintiff himself does not think that his situation has improved, his situation has in fact improved. He has achieved measurable gains in the range of motion in his neck and low back and in particular in his mid-back. This is important because, as Dr. Laidlow pointed out, the plaintiff's symptoms are likely to vary in accordance with his ability to recover mobility. Second, although not optimistic, Dr. Laidlow is not convinced that the plaintiff has reached maximal recovery. As I understand his evidence, he is of the view that improvement remains possible if the plaintiff participates in a further supervised exercise program focusing on stretching.

[26] Dr. Piper's findings on his examination of the plaintiff, which took place about a month before Dr. Laidlow's second assessment, were largely consistent with those of Dr. Laidlow. Dr. Piper found that the plaintiff had "a very good range of motion" on rotation of his neck. Flexion and extension of his neck were about 80 percent to 90 percent of normal. As to his thoracic spine, Dr. Piper found that "[h]e had perhaps slightly diminished thoracic rotation both to the right and left." He noted, however, that Mr. Austin had some muscle spasm in his mid-thoracic region and complained of tenderness on deep palpation to the muscle groups in the upper thoracic area.

[27] Dr. Piper, like Dr. Laidlow, is of the opinion that the plaintiff will benefit from further structured and supervised exercises. He wrote that:

As far as therapy is concerned I do believe at this point it would be appropriate for him to be involved in a very aggressive rehabilitation program such as is available at the CBI or KARP clinics. With such a program and a continuing involvement in the appropriate therapeutic exercises provided I think Mr. Austin's symptoms will become less with the passage of time.

What the programs at the "CBI" or "KARP" clinics are was not addressed in the evidence.

[28] With this background in mind, I turn to the question of damages.

Analysis

Non-Pecuniary Damages

- [29] The plaintiff argues that an award of \$80,000 is appropriate in these circumstances. Support for that contention is said to be found in several cases, including *Bergman v. Standen*, 2010 BCSC 1692; *Wiener v. Ralla*, 2009 BCSC 1743; *Esau v. Myles*, 2010 BCSC 43; and *Jackson v. Mongrain*, 2010 BCSC 1866.
- [30] The defendants argue that an award of between \$40,000 and \$45,000 is appropriate. In support counsel points to *Fifi v. Robinson*, 2012 BCSC 1378; *Perry v. Ismail*, 2012 BCSC 123; and *Lee v. Jarvie*, 2010 BCSC 1852.
- [31] Mr. Austin is now 20 years old. It has been some 40 months since the accident and he remains in reasonably constant pain. His pain is such that it interferes with his ability to sleep. He finds that he wakes up in the night about twice a week as a result of his pain. According to Dr. Laidlow, his prognosis for further recovery is poor. I accept that his condition is chronic and likely permanent. Further, I am satisfied that with participation in an exercise program that takes account of the recommendations of Dr. Laidlow there is some prospect that the plaintiff will experience an improvement in his functionality and a corresponding reduction in his symptomology. In addition, I am satisfied that there is little chance that his condition will further deteriorate.
- [32] I am satisfied that the plaintiff was in reasonably significant pain during the summer of 2010 and into the fall of that year. By the beginning of 2011, I am satisfied that his pain had ameliorated to the point where he returned to physiotherapy, albeit without any long-lasting benefit. I accept that his symptoms were elevated during the nine months he spent in the pre-apprenticeship program. His participation in that program involved long days of sitting, either in a classroom or during his commute back and forth between Lumby and Kelowna. Once he finished the classroom portion of his pre-apprenticeship training and began working as an apprentice heavy duty mechanic, I am satisfied that his symptoms, and specifically the pain he experienced, moderated.
- [33] I recognize that attendances on one's family doctor are not necessarily an indication of the level of pain one experiences. Further, and for similar reasons, the consumption of either prescription or non-prescription analgesics is not necessarily a reliable gauge of the pain being experienced. Having said that, I think it of some significance that Mr. Austin has never taken prescription medication to control his pain and rarely takes over-the-counter analgesics for that purpose. Further, he saw his family doctor twice in the month following the accident, but did not see him again, at least as a result of the injuries he sustained in the accident, for the next two years.

- [34] Prior to the accident, Mr. Austin was an active teenager. He enjoyed snowboarding and playing pick-up sports. Further, he enjoyed riding his BMX bicycle, something he did virtually every day, at least from the spring until the fall. In addition, he liked to ride an off-road motorcycle or dirt bike.
- [35] Mr. Austin found that he was unable to ride his BMX bicycle after the accident because the posture he had to assume in doing so was very uncomfortable. He sold his bicycle and has not replaced it. In addition, he has been unable to ride his dirt bike since the accident, again because the jarring nature of that activity causes him more pain than the enjoyment he derived from the activity.
- [36] As against the foregoing, several matters are worthy of note. First, although Mr. Austin no longer rides an off-road motorcycle, he has purchased and uses an off-road 4-wheel drive ATV. The ATV he drives is known as a "side by side" and it allows him to sit much as if he would if driving a car. He testified that he drives that vehicle over rough roads and can do so for up to six hours in an outing. Oddly, the plaintiff testified that he enjoyed wakeboarding before the accident, but since the accident he has found that he cannot tolerate that activity for as long as he used to. On cross-examination, however, he acknowledged that he only wakeboarded occasionally prior to the accident and only took up the activity more frequently in 2012 after his parents purchased a power boat.
- [37] I accept that the plaintiff's injuries caused him to stop riding his BMX bicycle. I also accept that since January 2011 he has had much less free time to engage in recreational activities. He has been working full-time and from time to time long hours since January 2012 and for the year before that was going to school and enduring a fairly time consuming commute. In addition, I accept that he can no longer enjoy off-road dirt biking but he can and does enjoy riding an off-road ATV. Finally, I accept that the pain he experiences fatigues him. I accept that he generally spends evenings after work either lying down or otherwise resting his back. I accept that he would not do so but for the injury he sustained.
- [38] Turning to the authorities, in *Bergman v. Standen*, the 32-year-old plaintiff suffered soft tissue injuries to her back. At the time of trial, some four years after the accident, she was still experiencing relatively constant discomfort and pain. She perceived herself to be more functionally limited than she in fact was. Her injuries were not expected to significantly improve. The impact on her life was, if anything, greater than the impact that Mr. Austin's injuries have had on his life. The plaintiff in *Bergman* was awarded \$75,000 in non-pecuniary damages.
- [39] The plaintiff in *Wiener v. Ralla* was a 40-year-old married father of two. He suffered from chronic mechanical back pain as a result of a significant motor vehicle accident. His pain caused him fatigue, although he was able to continue with his career and indeed able to take on and then expand a business that involved some physical activity. He was awarded \$75,000 in non-pecuniary damages.

- [40] The plaintiff in *Esau v. Myles* was a 24-year-old male working in physically demanding jobs. He suffered a mechanical strain to his lower back which left him in permanent pain. His pain was such that he was unable to work for about a year after the accident. It remained constant at the time of trial. He had followed all of the recommendations provided to him by his health care providers and, like Mr. Austin, had a strong work ethic and a stoic approach to life. Unlike Mr. Austin, however, the plaintiff in *Esau* was unable to carry on with the heavy labour jobs that he had formally pursued. Further, his ability to work around his home and his intimacy with his partner had been affected. He was awarded \$70,000 in non-pecuniary damages.
- [41] Finally, in *Jackson v. Mongrain*, the 38-year-old plaintiff was engaged in heavy labour up to the time of the accident. He sustained an injury to his neck and back which left him with chronic pain. His injuries were such that he could not continue with his former occupation. Stewart J. described Mr. Jackson's pain as "nagging", something that was always with him, but only caused real and substantial discomfort when he was at work or otherwise engaged in a physically demanding activity (para. 53). His pain had, if anything, a more significant effect on his recreational activities than is the case in Mr. Austin's situation. He was awarded \$75,000 in non-pecuniary damages.
- [42] In *Fifi v. Robinson*, the 22-year-old plaintiff suffered soft tissue injuries to her neck, shoulder and back areas. She suffered fairly acute discomfort following the accident, but by the time of the trial the pain she was experiencing was "relatively minor" and not significantly limiting. Moreover, her injuries were not likely to give rise to any significant ongoing disability. She was awarded \$42,000 in general damages.
- [43] In *Perry v. Ismail*, the 27-year-old plaintiff suffered soft tissue injuries to his neck, lower back, shoulder and knee. He was awarded \$42,000 in general damages. His injuries had not completely resolved at the time of trial, but the trial judge found that he had not followed medical advice in relation to physio and massage therapy, nor had he participated in a rehabilitation program.
- [44] In *Lee v. Jarvie*, the court found that his soft tissue injuries to his neck and back had substantially resolved within a year following the accident. He was awarded non-pecuniary damages of \$40,000.
- [45] I accept that the plaintiff's condition is permanent, although there remains some possibility of improvement. His condition has affected his ability to enjoy life, but not to a particularly marked degree. He is still able to, and does, participate in recreational activities that have a physical dimension to them. He is able to work at a very physically demanding occupation. I accept, however, that he is left fatigued, particularly at the end of a day's work, and that his fatigue is in part due to the pain that he struggles with. His situation is more serious than the situations of the plaintiffs in *Lee v. Jarvie*, *Perry v. Ismail* and *Fifi v. Robinson*. His circumstances are not, however, as significant or pronounced as the plaintiffs in *Bergman v. Standen*, *Esau v. Myles*, and *Jackson v. Mongrain*.

- [46] Given all of the foregoing, I am satisfied that an award of \$65,000 in non-pecuniary damages is appropriate.

Loss of Future Income Earning Capacity

- [47] Counsel for the plaintiff argues that the evidence establishes that there is a real and substantial possibility of a future event leading to an income loss and as a result the plaintiff is entitled to an award of damages under this head. He argues that although the plaintiff has not missed any time from work as a result of his injuries, that is so largely because of his perseverance, his stoic nature and his willingness, at least in the short term, to attempt to work through his pain in the hope that he may achieve his dream of becoming a journeyman heavy duty mechanic.
- [48] The plaintiff points to Dr. Laidlow's March 22, 2013 report in which he recommended that the plaintiff seriously consider altering his vocational course to pursue a less physically demanding trade. Counsel concedes that it is not certain that the plaintiff will make this change, but there is a real and substantial possibility that he will find it necessary sooner rather than later to do so.
- [49] Counsel for the plaintiff argues that the evidence establishes that the plaintiff has both an aptitude for, and an interest in, electrician's work. Electrician's work is less physically demanding than the work of a heavy duty mechanic. Counsel argues that on the evidence it is appropriate to quantify the plaintiff's loss using the "earnings approach" as opposed to the "capital asset approach". Employing that approach involves recognizing the fact that the plaintiff will be out of the work force entirely for the duration of the pre-apprenticeship schooling necessary before beginning a formal apprenticeship as an electrician. Further, the approach involves accounting for the reduced earnings that an apprentice receives, and finally accounting for the fact that electricians earn less than journeyman heavy duty mechanics. All of this gives rise to a loss in the order of \$500,000. Counsel argues, however, that because it is not certain that the plaintiff will experience this loss, the amount should be reduced to reflect that contingency. The plaintiff suggests that an award of \$250,000 under this head of damages is reasonable.
- [50] Counsel for the defendants argues that no award should be made for loss of future income earning capacity because the plaintiff has not proven that there is a real and substantial possibility of a future event leading to an income loss. In support, counsel points to the fact that the plaintiff has completed both his pre-apprenticeship schooling, which involved extended periods of sitting (which is among the most difficult postures for the plaintiff to sustain), and two years of apprenticeship. Generally speaking, apprentices do the heaviest and most physically demanding jobs. Given that the plaintiff has completed both of these things without losing any time, counsel argues that there is not a "real and substantial possibility" that he will change his vocational pursuit in future. In addition, counsel points out that the plaintiff has been able to complete his duties without any accommodation from his employer. Indeed, it appears that until just before the trial his employer was not even

aware that he had been involved in an accident. In these circumstances, the defendants argue that no award should be made under this head of damages.

- [51] As noted, the plaintiff had just finished Grade 11 when the accident occurred. He returned to school in September 2010 to begin Grade 12. He remained in school until the end of the calendar year. In January 2011 he began a pre-apprenticeship course in heavy-duty mechanics with Okanagan College in Kelowna. He took this course as part of his high school curriculum, and thus while he did not attend high school after December 2010, he graduated on schedule in May 2011. He completed his pre-apprenticeship program in October 2011.
- [52] The pre-apprenticeship program was difficult for Mr. Austin primarily because it involved seven hours of classroom work five days a week. In addition, he commuted from his home in Lumby, a drive of over an hour each way. All of this sitting aggravated the symptoms in his lower back and neck and to a lesser degree in his mid-back. In spite of this, he did not miss any time either from high school or from the pre-apprenticeship program.
- [53] Before the pre-apprenticeship program ended, Mr. Austin had obtained a job with Gudeit Bros. Contracting Ltd. in Lumby. He worked there on the weekends, doing general labour work and assisting the mechanics. When his pre-apprenticeship training finished, he was hired by Gudeit Bros. as a full-time apprentice mechanic. Gudeit Bros. are in the logging business and most of the mechanical work that Mr. Austin did was on logging trucks. He worked at Gudeit Bros. from October to the end of December 2011. He missed no time from that employment.
- [54] During Mr. Austin's pre-apprenticeship training program, he completed a two-week work placement with Great West Equipment, a dealership in Vernon that sells and services heavy duty Volvo equipment. Mr. Austin enjoyed his time with that company, both because of the variety of work and, I infer, the quality of Great West as an employer. As a result, once he finished his pre-apprenticeship program he contacted Great West Equipment seeking employment. He took the job with Gudeit Bros. hoping that if a position opened up at Great West he would have an opportunity to work there. A position did open up and Great West offered it to him. Mr. Austin began work there in January 2012 and remains employed there today. He is about to begin his third year as an apprentice. Assuming he continues in his present job, he will finish his apprenticeship and become a journeyman heavy duty mechanic at the end of 2015.
- [55] Mr. Austin works primarily at his employer's shop in Vernon. When working at that location his hours are from 7 a.m. until 3:30 p.m. Monday through Friday. From time to time he accompanies journeyman mechanics off site to carry out repairs on equipment throughout the Okanagan, the Kootenays and as far away as Mackenzie.
- [56] Regardless of where the plaintiff is working, the tasks he performs are generally the same. He is required to do a significant amount of welding, and that involves assuming awkward and strenuous postures in order to access areas of machines that require repair. He works on both wheeled and tracked equipment. His job often involves removing the tracks from

heavy equipment when it is necessary to either replace them or to access areas behind them. Simply removing and later reinstalling the tracks is a physically demanding task. Each segment of track is held on by two bolts. Those bolts are first tightened using a heavy impact drill and then torqued using a seven-foot long wrench. Removing other parts of heavy equipment often requires the use of heavy sledge hammers to remove pins and cylinders. While the shop is equipped with hoists that can be of some assistance in accomplishing some of these tasks, much of the work involves heavy lifting and sustaining awkward postures.

- [57] The field work which the plaintiff is sometimes required to do involves similar tasks but longer hours. Carrying out repairs on equipment in Mackenzie involves working in camp. When there the mechanics work seven days straight, between eight and ten hours a day.
- [58] According to Derek Nordin, a vocational consultant, the pay structure for apprentices in most trades follows a set formula. New apprentices, that is those in the first six months of their apprenticeship, are generally paid 40 percent of the journeyman rate. Every six months there is a pay increase of 10 percent, such that in the last six months of an apprenticeship the apprentice is paid 85 percent of the journeyman rate. A journeyman heavy duty mechanic earns approximately \$40 an hour. When Mr. Austin began his apprenticeship with Great West Equipment he was earning \$16.20 an hour. At the time of trial he was earning \$24.70 an hour. During the first 11 months of 2012 he earned approximately \$73,000, an income that reflects the substantial amounts of overtime he was able to work.
- [59] Journeyman electricians earn \$35.55 an hour. The pre-apprenticeship electrician's program is a 24-week program which costs \$4,150, inclusive of tuition, books and supplies. In addition, tuition for each subsequent year of the program is \$1,152.
- [60] Mr. Austin has not told his employer about his accident (although by happenstance his employer may now be aware of it). He testified that he deliberately did not tell his employer for fear that it might compromise his prospect of completing his apprenticeship. As noted above, he has not missed any time from his employment due to his injuries, nor has he declined any opportunity to pursue overtime. He testified that he has no pain-free days and that of the various tasks he is required to perform, installing and removing tracks, carrying out repairs on the undercarriage of equipment, and welding cause him the most difficulty. He testified that he thinks he is slower than other workers and is quicker to require assistance. Devan Pollard, a co-worker and fellow apprentice of the plaintiff, testified that the plaintiff seems to require assistance more often than others and is more careful in how he approaches jobs, particularly if those jobs that involve heavy lifting.
- [61] The plaintiff testified that while he is able to do his job, it causes him significant pain.
- [62] Dr. Laidlow concluded that because the plaintiff's symptoms have persisted as long as they have, he will be prone to mechanical pain into the future. As to this prospect, he wrote:

This does cause me concern when he has chosen as his future career to be a heavy duty mechanic. Of all of the trades it probably would be very hard to find one that is heavier in nature and more likely to aggravate mechanical pain in the neck, mid back and lower back. I would suggest that he consider a change of plan to a trade or alternate work that would be lighter in nature than this. He is not causing himself physical harm in carrying on and becoming a heavy duty mechanic, but he is causing himself a lot of pain, which is likely to continue as long as he is doing this job.

[63] Dr. Laidlow's opinion in this respect is not contradicted by Dr. Piper. Dr. Piper noted the plaintiff's concern about his ability to continue with his vocation. Mr. Austin told him that while he is able to do his work, he is exhausted at the end of each day and on returning home has to lie down. Dr. Piper was asked, in the letter of instruction sent to him by defence counsel, to comment on the degree to which the plaintiff is disabled, either from recreational pursuits or his job, as a result of the injuries he sustained in the accident. Dr. Piper did not offer an opinion, one way or the other, on either of these issues nor did he express an opinion on the implications of the plaintiff's injuries on his ability to pursue his chosen vocation.

[64] The first issue in determining whether a loss of future earning capacity has been proven is whether the evidence establishes that the plaintiff's earning capacity has been impaired to any degree by his injuries. If so, the second issue is valuing or quantifying that impairment.

[65] The parties disagree on whether the plaintiff has met the threshold burden. That burden was described by Garson J.A. in *Perren v. Lalari*, 2010 BCCA 140 at paragraph 32 as follows:

[32] A plaintiff must always prove that there is a real and substantial possibility of a future event leading to an income loss.

(emphasis in original)

If this threshold is met, then:

Hypothetical events (such as how the plaintiff's life would have proceeded without the tortious injury) or future events need not be proven on a balance of probabilities. Instead, they are simply given weight according to their relative likelihood.

(*Athey v. Leonati*, [1996] 3 S.C.R. 458 at para. 27 per Major J.).

[66] The defendants point to two circumstances which militate against the plaintiff's claim in this regard. First, the plaintiff has completed the more physically demanding aspects of his apprenticeship and did so without missing any time from work. Second, the plaintiff's condition has improved inasmuch as both Dr. Laidlow and Dr. Piper have objectively measured an improvement in his flexibility or range of motion. According to Dr. Laidlow, an increase in flexibility should result in a reduction of symptoms and an improvement in function.

- [67] In addition, the defendants point to two cases which, counsel argue, have some factual similarity to the matter at hand. Those cases are: *Lee v. Jarvie* and *Kosoric v. Maitland*, 2009 BCSC 108. In both of these cases no award for loss of future income earning capacity was made.
- [68] In *Lee v. Jarvie* the plaintiff was injured shortly before he was to begin training as an RCMP officer. He completed that training with "stellar" reviews (para. 233). Further, his performance as an RCMP officer after he finished training was "equally positive" (para. 232). His claim for an award for loss of income earning capacity was based on his assertion that he no longer met the physical requirements for some specialized aspects of RCMP work. His claim was rejected in part because the trial judge did not consider that he was unable to meet the physical requirements for those specialized units and because precisely what the physical criteria were was not established in the evidence.
- [69] In *Kosoric v. Maitland*, the plaintiff was 22 years old when she was involved in an accident. She had just finished high school and was about to start post-secondary education. At the time of trial she was two years into a four-year program leading to qualification as a registered nurse. Her psychiatrist testified that she would probably have difficulty working full-time as a nurse and might be unsuitable to some kinds of nursing jobs. The trial judge noted that while the plaintiff continued to experience pain, her injuries had not limited either her work or her personal life (para. 115). Further, she concluded that if the plaintiff participated in the exercise routine that had been recommended by her various care givers it was likely that her symptoms would "substantially improve" (para. 118). The trial judge concluded that the plaintiff had not proven she would suffer any future wage loss as a result of her injuries. She reached this conclusion based in part on the plaintiff's abilities and performance during that portion of her training program that she had completed by the time of trial, and in part on her conclusion that her symptoms would improve over time if she exercised in the manner recommended. In the result, no award was made for diminished income earning capacity.
- [70] I accept the plaintiff's evidence in this case. In particular, I accept that he is in relatively constant pain. Further, I accept that the physical demands of his job aggravate his pain. Aside from simply causing him discomfort, his pain is generally enervating to the point where on completion of a day's work he finds it necessary to simply lie down and rest in the evening. Finally, I accept that the plaintiff has a strong work ethic and is a generally stoic individual.
- [71] Mr. Austin wants to work as a heavy duty mechanic. He has wanted to do so for some years. He is reluctant to abandon this career both because he is suited to the work and he because he has a good paying job working for an employer he likes and with colleagues he enjoys. He said, however, that he does not know how much longer he can continue to pursue his chosen career. If his pain increases or if he simply finds it intolerable to continue living with the pain he is now experiences, he said he may have to make a change. He also said that one reason he has not made a change to this point is that he simply cannot afford to.

- [72] I am satisfied that there is a real and substantial possibility of a future event leading to an income loss. I think it unlikely his condition will deteriorate but that remains a possibility. I think there is a real and substantial possibility that even if his pain remains relatively constant, there may come a point at which the "cost" extracted by the pain is not worth the benefit he derives from his job. The physical demands of his job give rise to increased levels of pain. His pain interferes with his ability to sleep. Both the lack of sleep and the pain itself, leave him exhausted at the end of the working day. If the plaintiff were to conclude that the pain he experiences as a result of the physical demands of his work will continue unabated and indefinitely, he might reasonably decide that the satisfaction and financial benefit he takes from his work is simply not worth the price he must pay in terms of physical discomfort and fatigue. It seems to me that such a decision would be reasonable. My impression is that while the plaintiff is able to carry out his tasks now, he is only just able to do so. He might reasonably conclude that as he ages he will reach the point, assuming all other things are equal, that he will be simply be unable to continue paying the price necessary to pursue his chosen vocation.
- [73] As against the foregoing, however, there is the possibility that his condition will improve. His condition did improve between March of 2012 and March of 2013. His range of motion improved over that time and Dr. Laidlow allows for the possibility of further improvement. He wrote that it is "extremely important" that Mr. Austin participate in a community-based program designed to restore his "mobility to normal". It was his view that increasing or improving his flexibility would likely result in a decrease in his symptomology. In addition, to the extent the physical demands of his job may change once he becomes a journeyman mechanic, the change will involve a reduction in the heavier aspects of the work.
- [74] In summary, I am satisfied that if participation in a further supervised exercise and stretching program does not result in an improvement in functionality and a reduction in symptomology, then it would be reasonable for the plaintiff to change vocations and pursue a trade that is less physically demanding. On the other hand, if further supervised stretching and exercise gives rise to even a modest improvement in his functionality and a corresponding reduction in his symptomology, then I think it unlikely the plaintiff will alter his vocational course. Perhaps more to the point, it would be unreasonable for him to do so. These conclusions satisfy me that there is a real and substantial possibility of a future event that will lead to an income loss.
- [75] The next issue is quantifying the compensation to which the plaintiff is entitled. As was pointed out in *Perren v. Lalari*, there are two generally accepted methods of assessing damages under this head: the earnings approach and the capital asset approach. In *Jurczak v. Mauro*, 2013 BCCA 507, Stromberg-Stein J.A. wrote:

- [36] This process is "an assessment rather than a calculation" and "many different contingencies must be reflected in such an award": *Barnes v. Richardson*, 2010 BCCA 116 at para. 18. "Ultimately, the court must base its decision on what is reasonable in all of the circumstances. Projections, calculations and formulas are only useful to the extent that they help determine what is fair and reasonable": *Parypa v. Wickware*, *supra*, at para. 70.
- [37] With that said, if there are mathematical aids that may be of some assistance, the court should start its analysis by considering them. For example, in *Henry v. Zenith* (1993), 31 B.C.A.C. 223 at paras. 44-48, 82 B.C.L.R. (2d) 186 (C.A.), this Court held that a trial judge's failure to consider an economist's projections of a plaintiff's lost future earning capacity contributed to the judge committing an error in principle, which "resulted in a wholly erroneous estimate of the damages".
- [76] The mathematical approach in this case involves accounting for the period of time the plaintiff would have no income as a result of the need to repeat the pre-apprenticeship program, the loss of income associated with the two additional years of apprenticeship that he would have to complete, and the lower income that electricians earn.
- [77] According to Mr. Nordin, and based on the 2006 Census estimates but adjusted to reflect 2013 dollars, heavy duty mechanics earn an average of about \$80,000 a year. Electricians earn about \$57,500 a year. A journeyman heavy duty mechanic earns \$41 per hour; a journeyman electrician earns \$35.55 an hour. I think it reasonable to use those hourly rates in determining the plaintiff's notional loss. I recognize that his employer pays \$1.50 per hour towards an RRSP on his behalf and that he is able to work significant overtime. There is no reason to conclude that similar benefits would not be available in another trade and in any event this approach to quantifying his loss is necessarily somewhat rough. As noted above, the hourly rates of electrician and heavy duty mechanic apprentices follow the same pattern: both are paid a percentage of the journeyman's rate and the percentage increases during the apprenticeship.
- [78] Given the pay formula, and working as a heavy duty mechanic, the plaintiff will earn \$27 per hour for the first six months of 2014 and about \$30 per hour for the final six months, for an annual income of about \$60,000. He will earn about \$32 per hour or \$66,500 during 2015, his fourth and final year as an apprentice. In 2016 he will earn the journeyman rate of \$41 an hour or \$85,280 annually.
- [79] If the plaintiff were to switch to the electrician's trade now, and if the transitions first to school and then to the paid workforce were seamless, he would earn about \$14,500 in 2014 (\$14 per hour for the second half of the year). In 2015 his income would be about \$38,800; in 2016 it would be about \$46,000; and in 2017 or his fourth year as an apprentice it would be about \$60,000. Thereafter his income as a journeyman electrician would be about \$74,500 annually.

- [80] His notional loss would be about \$45,500 in 2014; \$27,700 in 2015; \$39,280; in 2016; and \$25,280 in 2017. Thereafter his annual loss would be \$10,780. Summing these values and discounting them to reflect present value (using the rates derived by Robert Carson in his August 6, 2013 report) the plaintiff's notional loss to age 65 would be \$365,000 plus the cost of tuition and books of about \$5,000 for a total loss of about \$370,000.
- [81] It remains to account for the relative likelihood of the plaintiff experiencing a loss of the sort postulated. In attempting to divine this likelihood, I consider the following matters to be significant. First, during the most acute phase of the plaintiff's injuries (from the time of the accident until sometime after the first assessment by Dr. Laidlow), the plaintiff did not miss any time either from the academic portion of his training or his actual apprenticeship. Second, the plaintiff has not missed any time from his apprenticeship since, and that period includes the most physically demanding aspects of his training. Third, there is the prospect of further improvement in the plaintiff's condition. Finally, the plaintiff's commitment to his job and his career are factors that make it less likely that he will make a change. Based on all of these matters, I consider the prospect of a change from heavy duty mechanics to the trade of electrician to be about 25 percent. Further, it is a change which, if it happens, will not likely happen for at least a year. I reach that conclusion on the basis that I think it likely that the plaintiff will re-double his efforts at a structured exercise program of the kind recommended by Dr. Laidlow in his second report, before making any decision.
- [82] On the other hand, it is not realistic to assume a seamless transition between pre-apprenticeship schooling and the paid work force. Further, whether the plaintiff's condition deteriorates or not, if he has to change jobs for any reason, he will be at some competitive disadvantage as a potential employee. Taking all of these considerations into account, and acknowledging that what is at issue here is an assessment of the plaintiff's loss of earning capacity, I find that he is entitled to an award of \$90,000.

Summary and Costs

- [83] As noted above, the parties agree that the plaintiff's past loss of income is \$4,200. Given that I am not persuaded he failed to mitigate that aspect of his claim, he is entitled to judgment for that amount plus pre-judgment interest. He is entitled to non-pecuniary damages in the sum of \$65,000 and damages for loss of future income earning capacity of \$90,000.
- [84] Unless there are matters touching on the issue of costs about which I am unaware, the plaintiff is entitled to his costs calculated under Rule 15-1.

"G.M. Barrow J."

The Honourable Mr. Justice Barrow

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