

CANADA / JUDGMENT

Boren v. Vancouver Resource Society for the Physically Disabled

2002 BCSC 1134

COURT

Supreme Court of British Columbia

DECIDED

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Citation: Boren v. Vancouver Resource Society for the Physically Disabled et al

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2002 BCSC 1134Docket: C980618
Registry: Vancouver
IN THE SUPREME COURT OF BRITISH COLUMBIABETWEEN: STEPHEN LAURENCE BOREN
PLAINTIFFAND: VANCOUVER RESOURCE SOCIETY FOR THE PHYSICALLY
DISABLED, HOLLY LETHEREN, JOHN DOE NO. 1, JOHN DOE
NO. 2, HER MAJESTY THE QUEEN IN RIGHT OF THE
PROVINCE OF BRITISH COLUMBIA, MINISTRY OF HEALTH
AND THE MINISTRY RESPONSIBLE FOR SENIORS
DEFENDANTS

REASONS FOR JUDGMENT

OF THE

HONOURABLE MR. JUSTICE WILLIAMSON

Counsel for the Plaintiff

Wesley D. Mussio

Counsel for the Defendants, Vancouver Resource Society for the Physically Disabled and Holly Letheren

Mark M. Skorah

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Dates and Place of Trial:

July 2 to 17, 2002

Vancouver, BC

Introduction

- [1] The plaintiff, now 35, was rendered quadriplegic after a bicycle accident in 1982 when he was 15 years old. Since 1987, he has lived in Vancouver in a shared care situation at premises called Kelly Court. He submits that as a result of certain injuries inflicted upon him during transfers from his wheelchair to bed or wheelchair to commode, or the reverse, he has developed severe spasticity and persistent urinary tract infections and related bladder problems. As a result, the quality of his life, he claims, has changed, including the fact that he is unable to work at his chosen field of computer programming.
- [2] From the time that he moved into Kelly Court in 1987, the plaintiff's personal care needs were provided by employees of the Vancouver Resource Society ("VRS"). The defendant Holly Letheren, a registered nurse, was at the time of the alleged injury or injuries a supervisor at Kelly Court.
- [3] After his original accident, the plaintiff, although described as a quadriplegic, had some use of his arms. Thus, he was able to work at a computer keyboard. In the years before the injury, which he alleges took place in 1996, he claims he was able to work long hours. He also attended a full-time program at Simon Fraser University. He completed his Bachelor of Computer Science in 1999, almost 12 years after he started the program. He claims there was a delay in his graduation because of the injuries which he sustained in 1996.
- [4] The evidence is that before October of 1996 he was a competent and even a creative computer programmer. A number of witnesses testified as to his skill. They also testified as to the long hours which he worked. He claims the injury impaired seriously his capacity to work.

The Transfer Issue

- [5] As a quadriplegic, the plaintiff must be transferred from his wheelchair to the bed and from the bed or the wheelchair to a commode and back again. While in good health, he would undergo a bowel routine at a specified time each day. He used a condom with a bag for voiding his bladder. He would be transferred from his bed to his wheelchair at the beginning of the day and then again in the evening. As a result, the number of transfers was limited.

- [6] In the plaintiff's early years at Kelly Court the transfers used were manual, so called Quad Lift or Tilt and Pivot transfers. However, over the years there were a number of injuries to residential care attendants at that facility. As a result of concerns raised by staff and the Workers' Compensation Board VRS desired to move, as a general rule, to transfers by a form of mechanical lift. Thus, in or around 1994 the personal care attendants began to transfer the plaintiff using a mechanical lift, known in these proceedings as an "Arjo".
- [7] However, the plaintiff found that he suffered severe pain as a result of the use of this lift. He understood, and his doctor subsequently confirmed, that this was because earlier he had steel rods inserted into his back (Luque rod fusion) to ameliorate worsening scoliosis. He therefore instructed his attendants that they should not use the mechanical lift. He also informed the supervisor and nurses. An orthopaedic spine surgeon confirmed that the mechanical lift was inappropriate.
- [8] It is evident that this caused some tension. Some of the personal care attendants, or at least one of them, refused to do manual lifts. For a time some of his transfers were manual, and others utilized the mechanical lift. After a number of meetings, the plaintiff returned to the G.F. Strong Rehabilitation Centre for an assessment of his transfers. As a result of that assessment, a form of transfer called a sliding board transfer was instituted for the plaintiff's transfers.
- [9] A sliding board transfer utilizes a slippery board which is placed as a bridge between the place from which the client is being transferred and the place to where he is being transferred. For example, the evidence was that if the plaintiff was in bed, he would be rolled onto his side, the board would be placed one end on the bed and one end on the chair, and he would then be rolled back on to the top of the board. He would be pulled up so that he was in effect sitting on the board. Then he would be lifted slightly, so that his full weight was not on the board, and slid across into the chair. Sometimes something was placed between him and the board such as a sheepskin or a towel.
- [10] If he were in the chair, one of the attendants would lift his right buttock (the bed being to his right) and the board would be placed under the lifted buttock. He would then be lowered back onto the board and, once again with some of his weight taken off the board, he would be slid onto the bed. There was evidence from some witnesses about the proper method of inserting the board between the chair cushion and a client's buttocks.
- [11] It is the allegation of the plaintiff that in the several months before September and October of 1996, he repeatedly suffered injuries to his buttocks, particularly his right buttock, as a result of sliding board transfers. I have no doubt in concluding that this is so. Various records of VRS confirm that fact. VRS' "history of significant events", a contemporaneous document kept by the care givers, notes a one half inch cut on the plaintiff's right buttock July 17, 1996, and a week later notes the area "continues to open up with transfers".

- [12] A note dated August 27, 1996 and signed by a number of VRS staff observes that the sliding board transfer "can scrape his butt", "has a tendency to scrape Steven's [sic] delicate tissues around his anal area", and further that "not all staff are fully aware and consistant [sic] in knowing how to transfer Steven properly".
- [13] The plaintiff claims that as well as a number of minor injuries over the period, two serious injuries occurred - one on September 22, 1996, and one on October 10, 1996.
- [14] The plaintiff's mother and his sister both assisted regularly with his care. On the first of the above incidents, on September 22, 1996, the plaintiff was transferred from his chair to his bed via the sliding board transfer technique. His mother and sister arrived somewhat later and found blood in his bed. They then looked at the trousers and underwear that he had been wearing at the time of the transfer and found significant blood. The plaintiff's sister, Michelle Boren, photographed the blood on the trousers and the underpants.
- [15] These four photographs were an exhibit in the proceedings. The defendants say these photographs were not taken on that date (the month had been changed on one of the pictures), and that it is unlikely this incident even occurred. Counsel for the defendants says the photographs were taken in October to persuade authorities to provide the plaintiff with a new chair cushion. That suggestion is speculative. In any case, having heard the sister testify and her response to the suggestion she did not take the photographs on that evening, I accept her testimony that she took the photographs September 22.
- [16] On Friday, October 10, 1996, at the start of the long Thanksgiving weekend, the plaintiff suffered another significant injury during a sliding board transfer. As he described it, he heard "a popping sound" when the attendants were "inserting" the board under his buttocks. He said that the board had been held from behind and thrust downwards, leveraged into his "butt". Once he was in bed, one of the attendants found a large amount of blood. It turned out that the plaintiff had a large gash, as he put it, "between the thigh and the buttock".
- [17] The plaintiff considered, having been told by the attendant about the cut (which of course he could not see), whether he should go to an emergency ward. However, he said that the attendant reported that the bleeding had stopped and as the plaintiff knew this had happened before, and it had cleared up, he decided calling an ambulance to go to emergency was not necessary. Instead, he treated the cut as he had treated previous injuries with antibiotic cream.
- [18] His mother returned to Kelly Court the following Tuesday or Wednesday. She participated in treating the cut as she had treated previous cuts. It was her evidence, as well as the plaintiff's, that at first the cut seemed to be healing well.
- [19] In late October, the mother observed that the cut on the buttock appeared infected. The plaintiff's family doctor, Dr. Stan Lubin, was called and he came to the plaintiff's residence on October 29, 1996. On examination, he found a laceration with obvious infection. He prescribed antibiotics.

- [20] On November 9, 1996, the plaintiff was seen by another doctor from Dr. Lubin's office. She ordered wet to dry dressings twice a day. Nine days later, Dr. Lubin saw him again and concluded that the plaintiff had a persistent ulcer and possibly a persistent infection.
- [21] On November 28, 1996, the plaintiff was seen by Dr. Claire Weeks at the outpatient offices of G.F. Strong. She examined the wound carefully, reported it as a decubitus ulcer, and upon probing found that it was about two centimetres deep and undermined in several directions underneath the skin. In other words, there was a cavity under the skin much larger than the opening would indicate.
- [22] Despite debridement, packing and other therapy, the wound never healed. Eventually, the plaintiff had skin flap surgery on May 23, 1997. He remained in hospital post-operation for five weeks. Subsequently, he was at G.F. Strong for two months for rehabilitation and reassessment of his urinary tract infections and his seating. He returned to his residence at Kelly Court in September of 1997.
- [23] A photograph of the wound in question was entered in evidence. This photograph was taken at the time that it was packed and before the skin flap surgery.

Issues

- [24] The issues concerning liability are: (1) was the plaintiff significantly injured during sliding board transfers; (2) during 1996, did VRS know injuries were occurring during these transfers; and (3) if the answers to the above two questions are yes, was the injury a cause of the increased spasticity and increased urinary tract infections?
- [25] The issues concerning damages, if liability is found, are: (1) in what amount should non-pecuniary damages be assessed; (2) should there be an award for cost of future care; (3) did the injury cause a past wage loss; (4) has the plaintiff suffered a reduced capacity to earn; and (5) has an in trust claim been made out?

Liability

- [26] I am satisfied that the plaintiff was injured a number of times during sliding board transfers conducted by employees of VRS. I am also satisfied that the most serious of these injuries, the one which occurred on October 10, 1996, was the cause of the cut or puncture wound eventually treated by Dr. Weeks and resolved through surgery by Dr. Foley on May 23, 1997.
- [27] VRS' clinical records show that on October 10, 1996, the plaintiff "sustained a laceration to buttock whilst transferring from the WC to bed using sliding board on October 10/96. Apparently wound was about one-half inch deep". Further, VRS' form "history of significant events" for October 11, 1996, includes the following notation:

Steve has a one-half inch deep cut on his left buttock. It bled heavily after he went to bed, but has clotted over. Blamed the transfer to bed last night, or maybe because he was positioned badly all yesterday? It's not a scrape, but certainly looks like a puncture of sorts. Steve used sliding board to go to bed.

[28] I conclude that the reference to the left buttock in the above note is in error.

[29] The description of the wound as a "puncture" is important, for Dr. Weeks also observed a puncture and testified that a puncture is not consistent with a pressure sore, but with an insult that is acute and traumatic.

[30] The plaintiff himself testified that he knew he had been injured because of the sound he heard and because of the subsequent bleeding. His testimony that he asked the attendant to look at it was confirmed. His testimony that he spoke to his mother on the telephone about the injury was confirmed by his mother. His mother also confirmed the presence of the injury when she returned to Vancouver following the long weekend.

[31] There was much evidence about the sliding board transfer technique. There was evidence from medical personnel as to the appropriate way to do a sliding board transfer and in particular, the appropriate way to insert or place the board under the buttocks of the subject of the transfer. Dr. David Keast, a specialist in wound management who has observed many sliding board transfers, described the procedure as lifting the patient, placing the end of the board under the portion of the patient which has been lifted, then lifting the patient and planting him on the board, sliding, and then lifting the patient off the board. This wording "placing the board under the patient" is to be contrasted with the evidence of at least one of the witnesses for VRS who testified that in a two-person sliding board transfer, the attendant in front lifts up the leg "so the board can be slid under". He repeated his description of sliding the board on cross-examination.

[32] Further, a number of witnesses testified that when placing the board under the client, the board should be inserted at a downward angle so that there is no danger of it pinching or injuring the buttocks. The same VRS attendant who described sliding the board in said that "you want the board to be at least level" and not angled up.

[33] The plaintiff says that on a number of transfers the board was "rammed" under him. I find this an exaggeration. Several residential care attendants from VRS testified that they had performed this sort of transfer with the plaintiff and that on no occasion had any one of them rammed the board under the plaintiff, nor seen any other attendant do it. On the evidence I am certain that none of the personal care aides intended to injure the plaintiff.

[34] However, I am also satisfied that there were injuries as a result of improper procedures during sliding board transfers; particularly the inappropriate sliding of the board under the plaintiff at the start of the procedure. That there were injuries is evident from a review of VRS' own records.

- [35] I also find that the VRS personnel knew for some months prior to October 1996 that the sliding board transfers were problematic. The defendant Holly Letheren, supervisor at the time, confirmed that this was so. A number of notations in documents support this conclusion. For example, in May of 1996, the client committee at Kelly Court complained to VRS and to Ms. Letheren specifically that a more formalized training process was needed with respect to, among other things, transfers. Some months later, in August of 1996, a number of staff signed a document headed "Difficult Aspects of 107's Transfer" in which they reported upon various problems with the sliding board transfers.
- [36] I observe that in cross-examination Holly Letheren agreed that she knew about these reports, but that she did nothing to further the training of the staff as she believed "they were doing it properly". I find this belief inconsistent with her evidence that she knew injuries were occurring on transfers.
- [37] The job description for the personal care attendants at VRS was in evidence. It included the following specific responsibilities:
- Lifts, transfers, porters and ambulates residents in a manner which promotes safety and comfort, using good body mechanics and techniques.
- Performs skin checks for ulcers, open wounds, infections or any other skin problems, and reports any occurrences to the Director of Care.
- [38] I conclude, as Ms. Letheren testified, that she, and therefore VRS, was aware of ongoing problems with the sliding board transfers throughout much of 1996.
- [39] The defendants say that the plaintiff improperly declined to get medical attention for the injury after October 10. They point to a visit by a nurse to the plaintiff's apartment while he was working with an associate on computer programming. The plaintiff testified that on that occasion he was not prepared to go through a transfer to the bed and back to facilitate an examination. He had been told earlier by the attendants and his mother that the wound was healing. Several earlier similar injuries had healed. He therefore suggested the nurse return at a time when he would be doing a transfer anyway, and when no one else would be in the apartment. This did not happen.
- [40] In the circumstances, I do not find fault with the plaintiff's actions. I note that Holly Letheren, the supervisor, testified she would not expect an R.N. to arrive intending to examine a client without prior notice. I also accept that at the time the plaintiff believed the injury was healing.

Causation

- [41] Having found that the plaintiff was injured during sliding board transfers, and particularly during the transfer of October 10, 1996, and that VRS had known for some time that these transfers were injuring the plaintiff, I turn to the question of whether the injury was a cause of the increased spasticity and increased urinary tract infections in the plaintiff.
- [42] I conclude that it was.
- [43] I come to this conclusion for two principal reasons. First, the temporal connection between the significant increase both in spasticity and urinary tract infections is compelling. A number of witnesses testified about the marked increase, if not the onset, of spasticity shortly after the injury. The plaintiff himself testified that the spasms were insignificant before the injury, and both constant and severe after. The plaintiff's sister, who had lived with him for the first year he lived in Vancouver in 1987, said that she first observed him in spasms in late 1996 and that she had never seen them before, stating "I never knew what it was".
- [44] Robert Suggitt, who had known the plaintiff in the early 1990s when involved in design work for tilting beds, was out of the country for a period and did not see the plaintiff again until 1997. When they did reconnect, Suggitt thought the plaintiff looked "beaten up" and tired. He testified that he observed spasms which he had "never seen before".
- [45] One of VRS' personal care attendants who frequently worked with the plaintiff sent a memorandum to Holly Letheren in January of 1997 in which he wrote that the plaintiff had "very intense spasms" and that they were "unlike anything he has had before". Others, who had not known him before 1996, gave descriptions of the impact of the frequency of spasms. André Brisson, who worked with the plaintiff after 1999 said that he often, "if not constantly", observed spasms and said that "many times" it was necessary to pull him forward, an action which "apparently provided some relief". I add that throughout the twelve days of trial the plaintiff's attendant frequently executed this same movement, bracing herself in front of him and pulling forward on his shoulders for several seconds.
- [46] Dr. Fenster, the urologist, referred to the change in the severity of the spasms when he concluded they were "far too severe to have been caused by urinary tract infections", and that "the change was far too great". And Holly Letheren, the VRS supervisor, agreed in cross examination that "after the fissure" he developed spasticity, and that any spasticity before did not amount to a "functional limitation".
- [47] The second principal reason I conclude the wound to be a major causal factor is that a majority of the medical opinions proffered in evidence conclude that the trauma was a significant cause of the subsequent spasticity and infection.
- [48] Dr. Weeks concluded in her report that the effects of the injury were significant. She noted that from November of 1996 on he was experiencing "a great increase in spasticity". She wrote that this increase in spasticity was due "at least in major part" to the injury. Dr.

Fenster, the treating urologist, felt that while urinary tract infections played some role in spasticity, they are not the major cause. Rather, he concurs with the family doctor, Dr. Lubin, that the injury to the right buttock is the major cause of the spasms. Dr. Lubin wrote that in his opinion it was the injury to the buttock which was:

...the cause of the infection, the development of a chronic ulcer, and the need for surgery with prolonged postoperative course. I also believe it was the cause of his chronic pain and spasms...

- [49] Dr. Keast was of the opinion that the injury was one causal factor which led to the ulcer and ultimately to the increase in spasms. As he put it, the ulcer in or around October 1996 arose "from the confluence of multiple factors" which included, among other things, injury during the sliding board transfers.
- [50] Dr. Kunimoto, like Dr. Keast a specialist in the treatment of wounds, and a practitioner with considerable experience with quadriplegic patients, prepared a report for the defendants in which he concluded that the sliding board transfer injury was similar to previous injuries caused by sliding board transfers which had healed uneventfully. He concludes that the location of the injury suggests it was a problem with the seat cushion for the wheelchair.
- [51] I have concluded that in that opinion he is wrong and I will deal with that matter below. It is significant, however, to note at this time that Dr. Kunimoto understood the injury was a pressure sore. Dr. Kunimoto did not examine the plaintiff, rather he relied upon the medical records, including those of Dr. Weeks, who originally described the injury to the right buttock as a "grade IV decubitus ulcer". Dr. Weeks, who testified, said that she did not mean what Dr. Kunimoto thought she meant when she used that expression. She testified that she used that term in a more general sense. She noted that it is an "historical term" and that she used it in a generic sense. She testified "I certainly didn't use it to imply that pressure was the cause of the problem". In other words, she was not talking of a pressure sore but rather of what she described as a wound (which is consistent with Dr. Lubin's testimony). Dr. Kunimoto's opinion, therefore, must be read in light of his erroneous but understandable assumption that Dr. Weeks meant "pressure sore" rather than cut and undermining.
- [52] I return to Dr. Kunimoto's suggestion that the cause of the injury to the plaintiff was the problem with the seat cushion for the wheelchair. He reached this conclusion after reading a statement that the cushion was "bottoming out" on October 22, 1996, just prior to the deterioration of the wound in question, and that the plaintiff had ordered a new cushion earlier in the year.
- [53] This suggestion comes from the evidence that the plaintiff's mother found a hard portion in the cushion which was being used by the plaintiff at the time. However, her evidence was that this hard portion was a tiny bit about the size of a fingernail. She points out that when the plaintiff had a seat assessment some months later at G.F. Strong he was still using the same cushion and that there had been no difficulties, including an absence of pressure sores, after the surgery in the spring of 1997. There was also testimony that such cushions have a life expectancy of five or six years, and that one orders a replacement early as the

bureaucracy moves rather slowly.

- [54] I conclude that difficulties with the cushion were not the cause of the plaintiff's injury.
- [55] There was much evidence that there was a significant increase in urinary tract infections after the injury sustained in October of 1996. Prior to the injury, the evidence of the plaintiff, his mother, and Dr. Fenster the treating urologist, was that while there were urinary tract infections from time-to-time, they were not a major clinical problem which interfered with the plaintiff's functional living.
- [56] After the injury, the urinary tract infections became more severe. Spasms became a problem and the retention of urine after voiding became critical. As a result, Dr. Fenster recommended an "indwelling" or permanent catheter to allow for better drainage. After this was removed, intermittent catheterization was required and continues to the present day.
- [57] It is Dr. Fenster's opinion that the injury, the resulting infection and surgery contributed to the urinary retention which required catheterization and to the increasing frequency of infection. I accept that finding. In so doing, I have considered the opinion of Dr. Krahn, a urologist called by the defendants, who considered Dr. Fenster's reports. However, Dr. Fenster was the treating physician and I find that his conclusion, based in part as it is upon the significant difference in the frequency and degree of urinary and bladder infections before and after the injury, persuasive.
- [58] I therefore find that the injury inflicted upon the plaintiff as a result of the negligently performed sliding board transfers was a cut rather than a pressure sore and was a major cause of the onset of severe spasticity and the increase in the frequency of urinary tract infections.
- [59] This brings the injury as a cause of the damage well within the principles set out by the Supreme Court of Canada in *Athey v. Leonati*, [1996] 3 S.C.R. 458. In that case, the court stated, at para. 15, that causation is established where the defendant's negligence "materially contributed" to the occurrence of the injury and went on to say that a contributing factor is material if it is more than de minimus. I find upon the evidence here that the injury sustained by the plaintiff October 11, 1996 was a major contributing factor.

Damages

Non-pecuniary

- [60] Counsel for the defendant submits the award for non-pecuniary damages should be limited to a consideration of the physical injury sustained October 11. I disagree. Rather, the circumstances here raise issues similar to those in *Bracey (Public Trustee of) v. Jahnke*, [1995] B.C.J. No. 1850 (S.C.), varied on other grounds (1997) 34 B.C.L.R. (3d) 191 (C.A.), in which Oliver J. observed at para. 27 that:

To rob a disabled person of what little she has left is a monstrous injury, for that little she has is, for her, the whole of her life.

[61] Non-pecuniary damages were assessed at \$105,000. This amount was not disturbed on the appeal.

[62] Here, the plaintiff sustained catastrophic injury at age 15. Rendered a quadriplegic, but with some use of his hands and arms, he persisted and developed an expertise in computer programming. The results of the injury in 1996 have curtailed his capacity to pursue that vocation. They have also interfered with the quality of his life, curtailing his independence and mobility, and requiring that he be restrained in bed and in his wheel chair.

[63] I assess non-pecuniary damages at \$120,000.

Cost of Future Care

[64] Lindsey Townsend, an occupational therapist, prepared an assessment of the cost of future care based upon the difference in the plaintiff's needs before and after October 1996. She interviewed the plaintiff, observed some of the care routines, and reviewed a considerable number of medical reports and records. Dr. Nairn Stewart, a physician who specialises in rehabilitation, including that of patients with spinal cord injuries, reviewed Ms. Townsend's report and agreed that the additional needs and expenses set out are "reasonable and medically necessary". Dr. Rubin Feldman, a similarly qualified physician, also reviewed Ms. Townsend's report and concluded her "considerations were accurate and the summary of costs...reflected accurately what it would cost for this man to maintain as appropriate a lifestyle as possible". Dr. Fenster, the urologist, accepted Ms. Townsend's recommendations concerning urinary tract issues as medically necessary. Her estimate, depending on the type of catheterization utilized, varies from \$892,541 to \$986,729 present value according to economist Robert Carson who testified.

[65] Ruby Schulstad, a rehabilitation nurse consultant, reviewed Ms. Townsend's assessment and raised a number of concerns. She did not assess the plaintiff herself, nor did she provide an alternative cost assessment.

[66] The difficulty with costs of future care is in determining the increase of future costs beyond what costs would be involved regardless of the 1996 injury. I conclude that an increase in the cost of attendant care of approximately four hours per day is warranted. The fact that the plaintiff now needs assistance to feed himself, to deal with the restraints associated with the frequency of spasms during the day and during sleeping hours, and to counter the spasms themselves warrants increased time with attendants. But a number of items in the Townsend report, such as the differences in the type of catheterization and prescription costs, are problematic.

- [67] Further, the contingencies are substantial indeed. The plaintiff's care has been funded by public funds, and will continue to be so. There is a history of medical difficulties common to persons with the plaintiff's circumstances prior to this injury. It is difficult indeed upon the evidence to assess what costs of future care might have arisen in any case.
- [68] The plaintiff concedes a negative contingency should be factored in and submits 20% would be appropriate. I conclude the contingency factor is much higher. A more reasonable figure would be 50%. I assess the present value of the cost of future care at \$450,000 (approximately 50% of Mr. Carson's lower calculated figure).

Past Wage Loss

- [69] The first issue concerning wage loss is whether the plaintiff's graduation from Simon Fraser University was delayed. He testified he originally thought he would graduate with his Bachelor of Computer Science in June of 1997, but that because of his injury he did not graduate until 1999.
- [70] I find this portion of the claim has not been proven. A review of the university records discloses that from the time the plaintiff commenced his studies at Simon Fraser University in 1987 there were numerous interruptions in his progress prior to 1996. He withdrew from six semesters in the period 1987 to 1995 apparently for health reasons. Other semesters he opted for reduced academic loads. I am not satisfied, therefore, that he would have graduated in 1997 as planned.
- [71] The plaintiff worked for Plasma Computer Products in the early 1990s. This was a "co-op" position and part of his academic program, and he left it to return to studies. For the latter reason, it cannot support a claim for past wage loss. Nor can his second co-op position with Beier Software, as he also left it to return to school. The Plasma position is significant, however, in that it was in North Vancouver and he travelled to and from the job via Handi-Dart and the Seabus, something he cannot now do.
- [72] Nor can his work with one Charles Haynes sustain a claim for past wage loss. The evidence disclosed that while he worked with Haynes they were partners and directors of a new company. While the plaintiff did cease to work with Haynes in 1996 because of his injury, neither had received any income as the project was at its developmental stage. Haynes subsequently went on to found another company which did become profitable, although he says, albeit somewhat hesitantly, that its success is based upon technology developed after the plaintiff was no longer involved. There is no evidence the original project would have earned a profit, simply a suggestion it might have. This aspect of the claim is not proven upon a balance of probabilities.

- [73] In August 1996 the plaintiff along with two others established BBR Technologies. One of the others was Tony Beier who had worked with the plaintiff at Plasma Computer Products. Mr. Beier was able, therefore, to compare and contrast the plaintiff's work before and after the injury. He testified that prior the plaintiff had no difficulty completing work assignments, but that after when faced with deadlines or stress he would begin "to shake or have convulsions". This is consistent with the evidence of increased spasticity reviewed above.
- [74] In 1999 André Brisson, who described himself as "an entrepreneur" working in the area of security systems for computers, met the plaintiff and recognized his conceptual skills with computers. They began working together and Mr. Brisson described the plaintiff as "the resident genius". However, the project upon which they are working is still in the development stage and has to date not generated any income. It cannot sustain a past wage loss claim.
- [75] I conclude the past wage loss has not been proven.

Lost Capacity to Earn

- [76] There was considerable evidence from those who worked with the plaintiff prior to his injuries that he was a dedicated worker who worked long hours. It is evident that his capacity to earn has been impaired. He can sit at a computer for substantially fewer hours at a time, and the speed at which he works in those reduced hours has also been curtailed.
- [77] However, the evidence is that he remains employable. Dr. Stewart assessed the plaintiff in January of 2002. Her report notes he told her that he works 20 to 40 hours per week at his consulting business.
- [78] Dr. Dennis Magrega, a psychologist, also assessed the plaintiff, interviewing him and others, and conducting psychological testing. Dr. Magrega found the plaintiff in the "superior range" of the general population with respect to cognitive and intellectual functioning, possessed of a positive "self-concept", and "well suited to software development and many other roles in the science/technical area". I find, however, that his stamina is reduced, and that he will probably lose substantially more time from work than he would have if the deterioration in his general health, and in particular his increased spasticity and frequency of urinary tract infections, had not occurred.
- [79] I am satisfied from the evidence of witnesses, expert and lay alike, and from my own sense of the plaintiff having read a great deal about him, heard much evidence about him, assessed his performance in chief and in cross-examination, and observed him in court through out 12 days of trial that he is an intelligent, determined individual who will, to his credit, make the best of his circumstances.
- [80] Dr. Magrega provided some information from a national survey entitled Spinal Cord Injury Workforce Participation conducted by the Canadian Paraplegic Association in 1996. It demonstrated, not surprisingly, that workforce participation reduces with the severity of the

injury, that paraplegics have a higher rate of return to work than quadriplegics, as do occupants of manual wheelchairs over those in powered wheelchairs. Dr. Magrega also noted that post injury educational achievement is "highly correlated" to post injury employment.

- [81] Dr. Magrega concluded that the plaintiff was "an extremely bright gentleman" who "had as good a chance as anybody with quadriplegia to establish a strong career". He cautioned, however, that people with quadriplegia "really do have a number of strikes against him [sic] by virtue of their disability".
- [82] In the preparation of his tables with respect to future income loss, Robert Carson utilized data concerning all British Columbia males with Bachelor degrees in Computer Science. I conclude such data is optimistic given the circumstances of this plaintiff.
- [83] In the end, the assessment of reduced capacity to earn is very difficult given the contingencies confronting the plaintiff. Counsel for the plaintiff submits a simple use of Mr. Carson's tables, taking the starting point of the loss back to the plaintiff's planned graduation from Simon Fraser University in 1997, and assuming a residual earning capacity of 50%, leads to an assessment of \$552,700.
- [84] I find this number high. First, as I have noted above, I find it cannot be said upon a balance of probabilities that the plaintiff's injury delayed his graduation from university. Second, his history prior to the injury indicates his working life, as was his university career, was subject to frequent interruptions.
- [85] I am satisfied, however, for the reasons set out in *Palmer v. Goodall* (1991), 53 B.C.L.R. (2d) 44 that the plaintiff must be compensated for the reduced capacity to earn caused by his injury and its sequelae. I assess damages for reduced capacity to earn at \$200,000.

In Trust Claim

- [86] I noted above that while I found VRS was negligent in dealing with the manifest problems in the sliding board transfers, I rejected the suggestion by the plaintiff that the care attendants deliberately rammed the board under his buttocks. People acting with the best of intentions may be negligent or make mistakes. Indeed, listening to the many attendants who testified, and coming to an understanding about what they do, one is struck by the good fortune that disabled persons have to be served by such dedicated, decent care givers.
- [87] The same can be said about the plaintiff's mother and sister. The mother, Catherine Boren, has given herself generously to her son's care ever since he sustained his injury at age 15. But importantly for this claim, after October 1996, observing the deterioration in her son's condition, she gave up employment to devote more time to her son's care. She moved into his apartment and took up the slack when attendants were not available. She moved out only when her presence threatened to cause a reduction in funded services.

[88] The plaintiff's sister, Michelle Boren, has been equally supportive. Her evidence was that before the injury she spent about four hours a month assisting her brother. Since, she spends about 20 hours a week, mostly during evenings but sometimes after being awakened in the night, attending to the plaintiff. She feeds him, positions him, and deals with the restraints necessitated by his spasms. She has deliberately lived close to him to be available if called in the night. She has recently moved, and she and the plaintiff intend to share an apartment so that she can more conveniently be available.

[89] I accept the evidence of both the mother and the sister with respect to the time they spend assisting the plaintiff.

[90] In contemplating assessment of the in trust claim, I have considered the factors set out by Harvey J. in *Brennan v. Singh* (1999), 15 C.P.C. (5th) 17 at paras 94-95:

The subject of "in trust" claims has been given considerable attention in recent years, including, particularly, where the services in question have been rendered within the perspective of a husband/wife relationship or by a child or relative of the family. Here, the relationship is martial and brings into consideration the usual factors of such a relationship.

In my view, it is useful to review briefly the factors which are considered in the assessment of such claims. They are:

- a. where the services replace services necessary for the care of the plaintiff;
- b. if the services are rendered by a family member, here the spouse, are they over and above what would be expected from the marital relationship?
- c. quantification should reflect the true and reasonable value of the services performed taking into account the time, quality and nature of those services. In this regard, the damages should reflect the wage of a substitute care giver. There should not be a discounting or undervaluation of such services because of the nature of the relationship;
- d. it is no longer necessary that the person providing the services has foregone other income and there need not be payment for such services.

[91] Where the mother and sister have supplemented or substituted for the personal care attendants, I am satisfied the care provided was necessary. I also find this extensive time and effort is over and above one would expect to be provided for an adult by a mother or sibling.

[92] Counsel for the plaintiff submits that based upon the wages of the personal care attendants and the time said to have been provided by the mother and the sister, the in trust claim for past services is \$50,000 to \$60,000. He also submits that a similar figure should be assessed for future care expected to be provided by family members. I am satisfied that \$50,000 is appropriate given the evidence of the mother's and the sister's past services. However, considering the award in this matter, as well as contingencies, I conclude that it is too speculative to award a similar figure for future services. Rather, I assess the in trust claim for future services at \$25,000.

Summary

[93] In summary, I find the defendants liable for the injury to the plaintiff, and that the injury sustained is a major cause of the increased spasticity and urinary tract infections now plaguing the plaintiff. Damages are assessed at:

Non-pecuniary

\$120,000

Cost of future care

\$450,000

Lost capacity to earn

\$200,000

In Trust claim

\$75,000

[94] Unless there is something of which I am not aware, the plaintiff will have costs at scale 3.

"L.P. Williamson, J."

The Honourable Mr. Justice L.P. Williamson

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