
CANADA / JUDGMENT

Chekoy Sr. v. Hall

2013 BCSC 790

COURT

Supreme Court of British Columbia

DECIDED

7 May 2013

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2013 BCSC 790 Chekoy Sr. v. Hall

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Chekoy Sr. v. Hall,

2013 BCSC 790

Date: 20130507

Docket: M090906

Registry: Vancouver

Between:

Evghenie Chekoy Sr. (aka Cecoi Sr.)

Plaintiff

And:

Kenneth Brandon Hall

Defendant

Before: The Honourable Mr. Justice D.M. Masuhara

Reasons for Judgment

Counsel for the Plaintiff:

Y. Gertsoyg

Counsel for the Defendant:

K.R. Tonge

Place and Date of Trial:

Vancouver, B.C.

December 3-7, 10-14, 2012

Place and Date of Judgment:

Vancouver, B.C.

May 7, 2013

Introduction

- [1] This is a personal injury case arising from a motor vehicle collision that occurred at or near the intersection of 8th Ave. and 20th St., New Westminster on September 5, 2007 (the "Accident"). The plaintiff, Mr. Chekoy, was a passenger in a 1994 Suzuki Sidekick convertible driven by his son. The defendant, Kenneth Brandon Hall was the driver and owner of the vehicle that collided with the Suzuki. Immediately following the collision, Mr. Hall for some reason fled the scene in his car. His licence plate and Audi emblem from his car were recovered by the police officer who attended the scene. Counsel advises that Mr. Hall reported the Accident to ICBC the next day. The police later attended Mr. Hall's residence and issued him a traffic ticket for leaving the scene of an accident. I am advised that the fine was paid.
- [2] The injuries alleged to have been caused by the Accident and for which damages are sought are:
- (a) back strain (soft tissue injuries to the back);
 - (b) neck strain (soft tissue injuries to the neck);
 - (c) right forearm bruise;
 - (d) headaches, anxiety and insomnia due to MVA related injuries;
 - (e) abdominal wall bruise; and
 - (f) chronic cervical radiculopathy.
- [3] The defendant admits liability but contests causation and the extent of the injuries suffered. The defendant takes the position that the plaintiff had a pre-existing injury of the same nature which was symptomatic at the time of the Accident, and that the plaintiff also suffered an injury of the same nature subsequent to the Accident, and asks for apportionment of the different causes of such symptomology. The defendant also pleads that the plaintiff has failed to mitigate in two ways: failing to follow and adhere to a prescribed or reasonable treatment plan; and failing to seek adequate alternative employment opportunities or return to work in a timely fashion.

- [4] The witnesses called in the plaintiff's case in addition to Mr. Chekoy were: Dr. P. Golin, the plaintiff's family doctor; Dr. M. Badii, rheumatologist and spine specialist; Dr. D. Lee, chiropractor; Dr. R. Sahjpal, neurosurgeon; Mr. W. Kelley, vocational consultant; Mr. Evghenie Chekoy Jr., son of the plaintiff; Mr. Dennis Gladyskiy, friend of the plaintiff; Mr. Alexander Cecoi, son of the plaintiff; and Ms. E. Chekoy, the plaintiff's wife.
- [5] The witnesses called in the defendant's case were: Constable S. Schultz of the New Westminster police and investigating officer at the Accident; and Ms. M. Wisotzki, a physiotherapist who assessed and treated the plaintiff.
- [6] Mr. Chekoy has limited skills in English and testified through an interpreter. He also indicated during the trial that his ability to read English is limited. I infer he also has limited ability to write English.

Background

- [7] The plaintiff is 49 yrs old. He emigrated from Russia to Canada in 2003 with his wife and two sons. He is a diabetic. Mr. Chekoy served in the Soviet military until 1983. He then attended a technical college to become what he called a tuner of radio equipment. He found work after graduating with a communications company and then with an energy distribution company. With the communications company he installed stationary and mobile radio stations. This included raising tall and heavy antenna masts. In the energy distribution company, he was a manager who calculated energy consumed by customers and valued goods submitted as payment. He explained that payment for electricity was often done by barter and part of his responsibilities was to determine the value of the goods provided by customers. He left that job in 2003 and came to Canada.
- [8] Mr. Chekoy has not had the best of health. He had health problems before he immigrated to Canada. He likely had diabetes before he came to Canada as he was told by his doctor there that he probably did and was prescribed medication for his symptoms. Both his brother and father were diabetics. He says that he ceased using the medications when he left for Canada. In January 2005, Dr. Golin diagnosed the plaintiff with type 2 diabetes. Mr. Chekoy was also diagnosed with gastrointestinal bleeding and peptic ulcer disease prior to coming to Canada. In 2007, Dr. Golin diagnosed Mr. Chekoy with gastro-esophageal reflux disease (GERD). Mr. Chekoy has received treatment for chronic symptoms related to GERD since 2004. He has also been diagnosed with H. Pylori infection, dyspepsia and indigestion. In 2010, tests revealed that Mr. Chekoy has minor coronary artery disease and eschismic heart disease. His father died of a heart attack at the age of 66 years and his brother is now deceased.
- [9] Dr. Golin also reported Mr. Chekoy had depression and an anxious personality prior to the Accident.

[10] Following the Accident, Dr. Golin referred the plaintiff to physiotherapy. He attended Guildford Physiotherapy for 12 sessions from October 29, 2007 to December 14, 2007. On February 26, 2008, Mr. Chekoy went to CBI Physiotherapy and was put in the care of Ms. Wisotzki.

[11] Mr. Wisotzki recorded the plaintiff's complaints as:

- (a) constant left shoulder pain with symptoms radiating into his arm;
- (b) his left shoulder also feels a bit numb;
- (c) his pain radiates up to the left side of his neck and down his mid-back on the left and shoulder blade area;
- (d) he is unable to lift because of his shoulder pain;
- (e) left neck rotation hurts his left shoulder and neck the most and bending his neck backwards relieves his pain;
- (f) right trunk rotation increases his mid-back pain the most and sitting helps to release it a bit; and
- (g) walking and standing do not interfere with either of his pains.

[12] Ms. Wisotzki also recorded Mr. Chekoy's comment that he had difficulties sleeping because of the pain, but that lying on his left side with his arm up helps to relieve some of this pain.

[13] The recommended plan for Mr. Chekoy was:

that Mr. Cecoi participate fully in all aspects of the program for up to 6 weeks... . Before starting the 6-week program, as he has some restrictions in his thoracic and rib mobility and some cervical joint compression issues, it is recommended he attend for one on one physiotherapy visits to address these issues and then start the program. His program will focus on cardiovascular exercises, general and specific strengthening and stretching exercises, spine stabilization exercises, work simulation activities, education and physiotherapy treatment as needed. It is anticipated that Mr. Cecoi will be ready to begin a work trial during or after treatment. Mr. Cecoi will be re-evaluated at the midway point to ensure that his progress is on target, further recommendations will be made at this point.

Recommendations:

The recommended rehabilitation program parameters are outlined below:

- Anticipated duration: One-on-one physiotherapy -- 4 sessions
- Program: 6 weeks
- Frequency: Week 1 - 6: 4 hours/day, 5 days/week
- # of in-clinic treatment days: 30 days

· Return to Work Coordination: ~2 - 4 hours pending on whether a gradual return to work is available.

- [14] Mr. Chekoy attended only five of six one-on-one sessions and none of the recommended six weeks of daily exercise sessions. In mid-March 2008, for personal reasons Mr. Chekoy left for Russia for two months. As a result, the plaintiff was discharged from physiotherapy on March 12, 2008. Despite Mr. Golin's advice, he did not return to physiotherapy. In January 2009, on the recommendation of Dr. Golin, the plaintiff sought out chiropractic therapy from Dr. Lee. In total he received 91 treatments.
- [15] The writ of summons for this action was filed February 2009.
- [16] On November 19, 2009, Dr. Golin recorded in his notes that Mr. Chekoy had experienced dizziness and had fallen off a chair that month.
- [17] In about January 2010, Mr. Chekoy told Dr. Lee that he had experienced pain when he lifted a truck tool box and that the numbness in his left arm returned.
- [18] After continuing complaints of heart pain, Mr. Chekoy was sent for tests in mid-2010. He was diagnosed with mild eschemic heart disease.
- [19] Dr. Golin's evidence indicates that the plaintiff for significant periods did not manage his diabetes well by not properly taking his medication, not exercising and poor diet.
- [20] From November 22, 2011 to November 17, 2012, Mr. Chekoy received 21 acupuncture treatments.
- [21] At this point, the plaintiff complains of pain between the shoulder blades, frequent headaches, pain in the left arm, no strength, and a lack of feeling in two fingers on the left hand - the ring and baby fingers.
- [22] Mr. Chekoy's wife also has a significant health problem, irritable bowel syndrome. Her symptoms have been sufficiently severe that she will lose consciousness and has required transportation to hospital by ambulance on multiple occasions. She also has had thyroid cancer. Her condition understandably causes Mr. Chekoy considerable stress and anxiety.
- [23] The evidence indicates that prior to the Accident, in January 2005, Dr. Golin had sent Mr. Chekoy for x-rays of his cervical spine and neck areas. The x-rays showed degeneration at C5, 6, and 7. He was diagnosed with osteoarthritis in the neck. Mr. Chekoy agreed that he must have complained of pain in his neck area.
- [24] Mr. Chekoy was also involved in two other motor vehicle accidents prior to September 2007. One was in February 2005 and the other was in March 2007. He was not found at fault in either. In the February 2005 accident Mr. Chekoy was a passenger and suffered back and shoulder injuries. In the 2007 accident, Mr. Chekoy was a driver and was rear-ended. His car was a 'write off' as a result of the collision. Two days after the accident he reported to Dr. Golin complaints of back and neck pain and headache. His injuries from both accidents

resolved within a short period.

- [25] In terms of Mr. Chekoy's employment, shortly after arriving in Canada he saw an ad for a mechanic in a Russian language newspaper. The company was Star West Auto. He stated that the company rebuilt cars. He has never been certified as a mechanic but says his father was a mechanic in Russia and that he learned mechanical skills watching him. He answered the ad and was hired as a shop helper and janitor in 2003. His duties he said included taking out and reinstalling engines, gear boxes and transmissions, and taking apart car cabins and then reassembling them. He then left and worked at Elma Electrical Services for about one month, December 2004 to January 2005, repairing and servicing electrical equipment. He quit as he found working day and night shifts too difficult. From approximately February 2006 to September 2006 he worked at Carter GM washing and detailing cars. His employment there ceased as the location was closed.
- [26] In January 2007 he returned to Star West Auto as a subcontractor and carried out the same work as he had in the past for them. He was paid an hourly wage.
- [27] After the Accident, Mr. Chekoy attempted a return to Star West Auto but felt unwell and did not return after one day. The plaintiff helped at a construction site with drywall cleanup where he earned \$400. He also worked for his two sons doing general cleanup work at their workshop which housed construction equipment and supplies. He also assisted his sons in doing car repairs on his sons' and friends' vehicles. Because of his condition he says that he can only diagnose car problems, change spark plugs, sort out wiring, and change ignitions.
- [28] He has also had some work assisting a friend who is a cabinet maker install cabinets.
- [29] At some point following the Accident Mr. Chekoy fell and suffered bruising to his right knee. He says that the bruising went away.
- [30] In 2009, Mr. Chekoy applied for and obtained social assistance income. He also took and completed various courses for industrial certifications. He obtained the following certificates:
- (a) DGS Canada Fall Protection - July 23, 2009
 - (b) WHMIS - July 27, 2009
 - (c) DGS Canada Aerial Lift/Boom Lift - July 17, 2009
 - (d) Forklift Operator Safety Course Class 3 - July 22, 2009
 - (e) Power Tools Safety Course - July 21, 2009
 - (f) Construction Safety Awareness Course - July 20, 2009
 - (g) Warehouse Safety Course - July 28, 2009
 - (h) Skid Steer Loader Operator Course - July 15, 2009

- (i) DGS Canada Aerial Lift/Scissor Lift Course - July 16, 2009
- (j) Forklift Operator Safety Course Class 1, 4 and 5 - July 25, 2009
- (k) Forklift Operator Safety Course Class 2 - July 19, 2009

The documentation tendered indicates that Mr. Chekoy received classroom training, practical hands on training operating the equipment listed, and exams to obtain these certificates to operate and work in an industrial setting as indicated.

[31] He says that he sent out his resume and got one interview but was not hired. He also took an English course for a short period. However, because of his condition he missed several classes.

[32] He has not earned additional income since obtaining social assistance.

[33] At trial, the income shown to have been earned by Mr. Chekov was as follows:

Year

Amount

2004

\$10,000

2005

\$12,000

2006

\$13,497

2007

\$15,900 (8½ months) annualized this would be \$20,084

2008

nil

2009

\$10,559 (social assistance)

2010

\$9,623 (social assistance)

2011

\$10,596

2012 to December

\$9,713

[34] He is now considering whether to proceed with surgery which has been identified as an option by Dr. Sahjpaul for his neck and arm pain.

[35] Recently his first grandchild was born. She was about 8 months at the time of trial and is starting to walk. He spends time with his wife babysitting this child.

[36] The granddaughter has brought much joy and happiness to him.

Medical Evidence

1. Dr. P. Golin

[37] Dr. Golin has been the plaintiff's family physician since 2004 and over the years has seen the plaintiff for a variety of health issues. Three medical reports by Dr. Golin were filed. His latest is dated April 13, 2012. In that report he opines that as a result of the Accident the plaintiff suffers from soft tissue injuries to his neck and back, a right forearm bruise, anxiety and insomnia, an abdominal wall bruise, and chronic radiculopathy.

[38] The opinion further states that:

The patient continues to suffer from pain, numbness, and tingling in his left arm. The MRI shows that the C6/7 foramen is markedly narrow, likely pinching the left nerve exiting from that foramen.

It is very probable that the motor vehicle accident also aggravated the patient's pre-existing degenerative changes, especially at the C6/7 level.

[39] It is Dr. Golin's opinion that at present the plaintiff has:

fully recovered from his right forearm bruise and abdominal wall bruise. He continues to suffer from soft tissue injuries to the back, soft tissue injuries to the neck, anxiety related to his MVA related injuries and also from his cervical radiculopathy.

[40] Dr. Golin further opines that the plaintiff's soft tissue injuries to his neck and back will continue to improve and that he will recover over the next two years. He opines that the plaintiff will require ongoing therapy including stretching and strengthening exercises. He recommends an active rehabilitation program and states that chiropractic therapy for another 12 months would be very beneficial. Tylenol #3 and Ibuprofen will also be required over the next two years on an intermittent basis.

[41] With respect to anxiety and insomnia, Dr. Golin opines that these will continue over the next several years "due to many factors, a small portion of that being due to his MVA related injuries". Dr. Golin states that the insomnia and anxiety arising from the Accident is "not significant enough to prevent him from participating in further treatment such as rehabilitation, chiropractic therapy, exercises, and his anxiety alone is not significant

enough to prevent him from working". He also stated at trial that these symptoms will improve with a return back to work which could then take care of his finances.

- [42] Dr. Golin stated that Mr. Chekoy's "more significant symptoms involve his chronic cervical radiculopathy which is likely due to an aggravation of his pre-existing degenerative changes, especially at the C6-7 level, as well as possible new disc herniation at C5/6, which is pushing on the left anterior nerve cord and the left C6 nerve root".
- [43] Dr. Golin noted that Mr. Chekoy waiting to see a neurosurgeon in regard to these symptoms.
- [44] In regard to work, it was Dr. Golin's view that he did not believe that the plaintiff would be able to return to work as a "heavy body mechanic at any time in the future". However, he believed that the plaintiff was fit to do light duties, including light duty mechanical work and that he was fit to be retrained for other types of light duty work.

2. Dr. Badii

- [45] Dr. Badii was qualified as an expert in general medicine, rheumatology, internal medicine, and spine medicine. He provided a report dated July 23, 2010 and a supplementary report dated January 4, 2011. Dr. Badii saw the plaintiff on February 12, 2010. Based on the history presented, which included the two prior motor vehicle accidents from which he understood Mr. Chekoy's symptoms had resolved completely before the Accident, it was Dr. Badii's view that there were no significant pre-accident musculoskeletal diagnoses. He noted that Mr. Chekoy was free of any abdominal wall symptoms or lower back pain and his right forearm bruising had resolved shortly after the Accident. He also noted that Mr. Chekoy had complaints of persistent low-grade headache interspersed with more severe headaches after strenuous activity. Dr. Badii opined that these were most likely tension-type headaches and secondary to soft tissue injuries in the neck, sustained during the Accident.
- [46] He noted according to Mr. Chekoy that the main symptom that continued to bother him was neck and left upper back pain. Mr. Chekoy said initially he was having constant numbness and tingling in the left arm and that presently the numbness was not constant but happens frequently, particularly after heavy lifting and strenuous activity or if he sleeps with his left arm in certain positions. Dr. Badii noted that the plaintiff advised that when he elevated his left arm over his head he is able to sleep but when he brings down the arm along his side he will have increased pain, numbness and tingling. Dr. Badii noted that this specific comment is usually made by patients presenting with acute or chronic cervical radiculopathy (nerve root irritation), which can be due to a disc herniation or spinal stenosis.
- [47] In terms of causation, Dr. Badii opined that the Accident "was directly responsible for subsequent symptoms of neck and upper back pain, as well as pain, numbness and tingling in the left arm. This opinion is based on the temporal relationship between the accident and onset of symptoms, as well as the medical plausibility of that accident ultimately resulting in the type of symptoms he is now complaining of."

[48] In terms of functional capacity Dr. Badii opined that:

Based on my interview and examination of Mr. Chekoy, and taking into account Dr. Golin's comments, in my opinion Mr. Chekoy can be considered as having been completely disabled from work, as a result of the injuries he sustained during the accident of September 15, 2007, until the end of January 2008.

In my opinion, he has been partially disabled from work as of February 2008, being able to do light duties since that date.

At present, in my opinion, he is capable of doing certain type of work as long as it does not involve regular lifting or carrying of anything heavier than 30 pounds, or sitting with the head fixed in one position for more than 2 hours at a time.

[49] He further recommended that Dr. Chekoy have an MRI of his cervical spine, along with thoracic outlet and sagittal thoracic spine screen.

[50] Dr. Badii noted that both Dr. Golin and Dr. Lee were optimistic in their overall assessments that Mr. Chekoy would fully recover in a finite period of time but that he was less optimistic and offered a "rather guarded" prognosis. He stated that "once symptoms have reached a plateau and have remained unchanged for a period of two years there is a less than 5% chance of any significant improvement after that." He noted however, that if there existed an "obvious radiculopathy...then medical or surgical treatments could be available that could potentially improve symptoms and quality of life."

[51] Following his report, Mr. Chekoy underwent an MRI for his cervical spine and thoracic outlets on August 11, 2010. Dr. Badii reviewed the report and provided an addendum to his report which is dated January 4, 2011.

[52] Dr. Badii noted that the MRI findings included:

In the cervical spine there was spondylosis maximal at C5/6 and C6/7

At C5/6 there was a moderate sized left paracentral focal disc protrusion, contacting the left anterior cord and the left C6 nerve root.

At C6/7 there was marked narrowing of the left neural foramen due to an uncovertebral osteophyte, resulting in left C7 nerve root compression.

Thoracic outlets were reported as showing no abnormalities.

In the thoracic spine there were changes of mild to moderate disc degeneration in the mid and lower levels, in the form of Schmorl's nodes, as well as focal central disc protrusions at T7/8 and T8/9.

- [53] Given the MRI findings and the plaintiff's clinical presentation, Dr. Badii was of the view that the Accident "resulted in a diagnosis of chronic cervical radiculopathy. (The possibility of a secondary diagnosis was also alluded to by Dr. David Lee, who used the term 'double crush injury')".
- [54] Dr. Badii added that he believed that the Accident "rendered previously asymptomatic cervical degenerative changes symptomatic".
- [55] He further stated that: "In addition to aggravating of pre-existing degenerative changes (i.e. the reported multi-level spondylosis, as well as the left C6/7 neural foramen narrowing), I believe the MVA likely resulted in a "new" disc herniation at C5/6 (described by the radiologist as: 'a moderate sized left paracentral focal disc protrusion, contacting the left anterior cord and the left C6 nerve root')".
- [56] Dr. Badii stated that cervical decompression surgery may be an option to improve pain in the plaintiff's neck and left arm. In this regard, he recommended a neurosurgical opinion to examine all possibilities. He cautioned that the decision to have surgery cannot be taken lightly; that there can be serious complications associated with spinal surgery, particularly in the neck. He also added that "although neurological symptoms may be relieved, the majority of patients continue to experience a certain degree of neck pain, as well some reduction in cervical range of movement, following cervical decompression and fusion".
- [57] Dr. Badii also concluded that he did not anticipate Mr. Chekoy ever being "able to return to work as a heavy duty mechanic" as a result of the injuries he suffered from the Accident.

3. Dr. R. Sahjpaul

- [58] Dr. Sahjpaul, a neurosurgeon, saw the plaintiff on April 17, 2012. His report is dated September 9, 2012. From the examination, Dr. Sahjpaul made findings consistent with left arm sensory motor deficits with weakness in biceps and triceps and reduced sensation in the left arm and impaired reflexes. He found no evidence of myelopathy, i.e., spinal cord compression. He reviewed the August 10, 2010 MRI and formulated a treatment plan which included the possibility of surgery.
- [59] It was Dr. Sahjpaul's view that the Accident, more likely than not, caused the plaintiff's symptoms. In this regard, his report notes that "cervical spondylosis, i.e., disc osteophyte complexes, foraminal stenosis, etc, are a common finding in the general population and most of the time are asymptomatic. Traumatic events can render these otherwise asymptomatic changes symptomatic and can lead to requirement for treatment (medical or surgical)". He was also of the view that given the duration for which there had been a lack of meaningful improvement that Mr. Chekoy would remain with some degree of persistent symptomatology and that he was a candidate for surgery.
- [60] If surgery was selected by the plaintiff, Dr. Sahjpaul stated that

the goal of the surgery would be to try to improve and possibly relieve his left upper extremity symptoms, i.e., numbness, tingling, weakness and pain. It is important to recognize that such surgery will NOT predictably relieve myofascial neck pain symptoms. The surgery would involve a two-level cervical discectomy and fusion at C5-6 and C6-7. This surgery takes approximately 90 minutes, overnight stay in hospital, and three months recovery time before he is allowed to increase his activities. Given his history and given the surgical requirements, it would be my advice that he not return to any manual labour-type job after this surgery, however there are other vocations that he could entertain.

Even if surgery is successful, it is my opinion that Mr. Chekoy will not be able to return manual labour work or indeed any work that requires repetitive cervical flexion/extension manoeuvres. In my experience, it is also probable that Mr. Chekoy will not be able to assume any vocation that requires prolonged desk work, as this quite often precipitates cervical spine complaints, including myofascial injury-related complaints. Two-level cervical discectomy and fusion does result in a very slight reduction in cervical spine range of motion, but typically not to the degree that is noticed by an individual. However, with a two-level cervical discectomy and fusion, there is a very small but definite risk of increased adjacent level disease, i.e., at some point in the future Mr. Chekoy may present with problems at the C4-5 or C7-T1 level that may or may not require surgical intervention. This is a direct result of the surgical procedure at C5-6 and C6-7. The chance of this occurring is very small, but not zero.

In terms of surgical risks for a C5-6 and C6-7 disc removal and fusion procedure, the overall chance of any serious complication is very low but not zero. Again, it is also important to note that the goal of the surgery is to improve or relieve his left arm symptoms, but improvement of neck pain cannot be predicted and is typically not experienced by most individuals. The majority of individuals do experience some degree of ongoing neck discomfort which is more a reflection of the myofascial injury sustained.

[61] At trial, Dr. Sahjpaul stated that the manual labour limitation he was referring to in the above passage was heavy duty labour such as a firefighter or forestry worker.

4. Dr. Lee

[62] Dr. Lee has been the plaintiff's treating chiropractor since January 2009. His report is dated November 11, 2009. His report stated the following:

Diagnosis:

Post traumatic joint dysfunction of the cervical spine that produces brachial neuralgia of the left arm.

He may also have a 'double crush' syndrome involving the scalene or pectoralis minor muscles contractures.

A subluxation of the 3rd and 4th rib from the vertebrae on the left side may contribute to muscle spasm, neck and arm pain.

...

Prognosis

The overall effect of the injury on this patient has been severe. For the last two years he has been in constant pain, experienced muscle weakness, and severe headaches. He has also suffered from lack of sleep. He was only able to sleep with his left arm above his head, and would wake frequently.

Mr. Chekoy is still suffering with some degree of disability and pain: headaches, thoracic pain, neck pain, and poor sleep due to pain.

His last visual analogue scale (pain severity scale) was four, (down from eight). He has made slow but steady progress but may be left with some disability. Physically he may not return to his pre-accident status and he may have to modify his lifestyle around his injury.

Lack of sleep and strength in his neck and back may be an on going problem. The probability of re-injury is greater in this condition and he is likely to need on going chiropractic or physiotherapy to reach his maximum response to treatment.

He still has pain but his condition is gradually improving. He will likely need another year of chiropractic care with diminishing frequency and a lot of active care to reach his optimum improvement.

[63] Dr. Lee testified that between the date of his report and his February 1, 2010 appointment with Mr. Chekoy, there has been no complaint of numbness or tingling.

[64] As at trial the plaintiff had received approximately 91 chiropractic treatment.

[65] Dr. Lee acknowledged the delay of two years in Mr. Chekoy seeking treatment has contributed to the chronicity of his pain. He stated that this could also apply to a delay in returning for physiotherapy treatment of six or nine months.

5. Other

[66] I would note that no functional evaluation report was prepared for the plaintiff.

[67] Though the plaintiff attended an independent medical examination requested by the defence. The defence did not adduce any medical evidence challenging the plaintiff's medical evidence. Mr. Gertsoyg produced a letter which stated that his client would attend an independent medical exam requested by the defence in exchange for a copy of the resulting report. Ms. Tonge wrote back agreeing to do so. For some reason, a copy was not provided to Mr. Gertsoyg. During the course of the trial, Ms. Tonge was requested by Mr. Gertsoyg to produce the report. Ms. Tonge refused and when asked by Mr. Gertsoyg in court to provide the report she stated that she did not have with her. She did not offer to get and provide it.

Economic Evidence

- [68] Mr. Kelley, the economic witness for the plaintiff, prepared a report dated August 20, 2012 which provided estimates of the plaintiff's past and future earning losses.
- [69] In terms of background, he stated that Mr. Chekoy was trained and experienced in work as an automotive electrical mechanic and a servicer of electronic appliances in Balti, Moldova. He stated that upon arrival in Canada the plaintiff succeeded in entering the field of automotive mechanics and service (which he had done in the Army). He was of the view that the plaintiff was "quite steadily employed from his arrival in Canada up to the car crash of September 15, 2007". Based on what he was told Mr. Kelley was of the view that Mr. Chekoy had steady employment and physical capacity to do the work of an automotive mechanic, which requires working from a full range of body positions, extensive use of arms and hands, and strength to frequently exert force or lift up to 20 kilograms.
- [70] Mr. Kelley was of the view that based on the Mr. Chekoy's actual performance in Canada, his limited fluency in English clearly was not preventing him from being employed, but undoubtedly was slowing his progress in finding jobs that would advance his career faster.
- [71] Mr. Kelley in considering the work history and medical opinions related to Mr. Chekoy was of the view that Mr. Chekoy "has lost significant annual person earned income due to this injuries from the September 15, 2007, [sic] with consequent time fully and then partially disabled from all work. He continues to be partially disabled and limited to light work".
- [72] Mr. Kelley's table of lost earnings assumed that Mr. Chekoy would have been able to work as an automotive mechanic. This occupation includes both licenced/certified and non-licenced mechanics. He provided high, medium, and low ranges of earnings for the position. Against this he assumed that as a result of Mr. Chekoy's injuries he would only be able to work 50% of the time at a minimum wage level. Deducting the latter earnings from the earnings he estimated for a mechanic, the following present value of lost earnings were identified:

Mechanic High Est.

Mechanic Medium Est.

Mechanic Low Est.

Revised NPV & Bens thru 67

\$623,874

\$561,066

\$499,066

Future LOSS vs. Inj. High Est.

-\$480,083

-\$417,619

-\$355,275

Future LOSS vs. Inj. Low Est.

-\$601,391

-\$538,927

-\$476,583

[73] Mr. Gertsoy in his closing argument submitted the reasonable range of loss was in the range of \$200,000 to \$350,000.

Findings

[74] Credibility is the first matter which I will address. This was the first topic raised by defence counsel in her closing argument.

[75] There were reliability concerns with testimony of the plaintiff. Mr. Chekoy's memory revealed weakness. There were instances of exaggeration. They included his recounting at trial that the car he was travelling in spun around 5, 6, 7 times on impact and that at his discovery he stated that the police had counted the tire marks on the road to support this. However, he also stated that he had not spoken to the police and that he did not recall how many times the car had spun around. I note that Constable Schultz testified that he did not observe any markings on the road and that he would have noted them if there had been.

[76] At trial Mr. Chekoy indicated that he was paid on a monthly basis to, in my view, create the sense that his earnings were greater. However, the pay documents indicate that he was paid at an hourly rate. He also exaggerated to ICBC that he earned \$12 to \$15/ hour. He also indicated that he worked 50 hours a week five days a week. He conceded these things were exaggerations. He actually had been paid approximately in the range of \$10.69 to \$10.85 an hour.

[77] Mr. Chekoy acknowledged that he had indicated to his physiotherapist that his job demands required him to lift up to 100 lbs from his waist to his shoulders and on average 60 lbs. He also said the same for lifting from the floor to his waist. He conceded at trial that if there was any such lifting it would be with the help of lifting equipment and other workers.

[78] In an application for disability benefits to the Ministry of Social Development and Housing he declared that he had a brain injury. At trial he stated that he was mistaken and had been told by Dr. Golin his symptoms were due to his depression. I note that Dr. Golin also filled out portions of the application. There has never been a diagnosis of brain injury. Mr. Chekoy in the same application stated that as a result of the Accident he had "partial deafness" and a "general tic". This was not supported by the medical evidence. He also stated that he had difficulties preparing meals, cleaning, laundry and shopping. At trial however, he stated that these activities were the responsibilities of his wife.

- [79] He also indicated in direct examination that he enjoyed outdoor activities but agreed that this was his first mention of this. He also spoke of a social life in direct examination but he agreed that in his discovery he stated that he and his wife did not have much of a social life due to both his and her health condition.
- [80] He also stated in direct examination that he attended an English course for one to one and a half years. In cross examination he acknowledged that he had only attend from September to December 2009 and had stopped because of his health concerns.
- [81] He also stated that he had not suffered injuries from the February 2005 motor vehicle accident yet Dr. Golin advised that Mr. Chekoy had registered complaints of injury to him.
- [82] He also indicated at trial that he had only been diagnosed with diabetes after his arrival in Canada. However, in cross examination it became clear, in my view, that he had been advised prior to arriving in Canada that he had diabetes and been prescribed medication for elevated blood sugar levels.
- [83] It would have been helpful if Mr. Chekoy's past employer was called as a witness as indicated in the plaintiff's opening.
- [84] The cumulative effect of the foregoing, including other instances where it was apparent that his testimony varied from prior statements which indicated a weakness in his recall, lessens the weight that I can attribute to the evidence of Mr. Chekoy. I have in this taken account of the plaintiff's submission noting Mr. Chekoy's actions in past accidents where he did not stop working; as well as, the fact that he did not seek welfare when he came to Canada - rather, he sought out work and found a job.
- [85] In any event, the medical opinions all support objectively the fact that Mr. Chekoy has symptoms from cervical radiculopathy. As noted earlier the defence did not tender any medical evidence though it obtained an independent medical examination and report of the plaintiff. The failure of defence counsel to produce the medical report which counsel had agreed to provide to plaintiff's counsel, without an adequate explanation, allows for an adverse inference to be drawn in this regard. The defence's theory that the plaintiff's neurologic problems relate to physiotherapy treatments, chiropractic treatments, or from the plaintiff lifting a tool box on the back of a pickup has not been established; I note Dr. Golin's did not accept that theory. While the defence raised the question of the delay in symptoms, I accept the medical evidence that there is considerable variability in symptom onset.
- [86] On balancing the totality of the evidence including the failure of the defence to produce its independent medical report, I find that the Accident is the cause of the plaintiff's cervical radiculopathy and not from the natural progression of the plaintiff's pre-existing degenerative disk disease, subsequent treatments, or other events.

- [87] In terms of his forearm bruise and abdominal wall bruises and headaches, these injuries resolved in a short period of time following the Accident. In terms of his soft tissue injuries to his neck and back, I find based on medical evidence that these injuries have continued but should resolve in about two years as Dr. Golin opined. The more recent complaints of headaches, anxiety, insomnia and depression are in my view unrelated to the Accident. In regard to the plaintiff's cervical radiculopathy, I find that the plaintiff experiences pain weakness, tingling and numbness in his left arm.
- [88] I accept the prognosis that Mr. Chekoy will not be able to do heavy duty mechanical work; work which requires repetitive cervical flexion/extension manoeuvres including prolonged desk work where his head will have to remain fixed for extended periods. However, given my earlier mentioned concerns with the plaintiff's reliability and his activities post-Accident, which include his work at a construction site, his auto repair and janitorial-like work at his son's workshop, his ability to attend for industrial training courses and certification to operate industrial equipment, and the employment which he stated that he had sought to obtain, it is my view that Mr. Chekoy is not as severely disabled as he says and that he is able to work regularly in the light duty category.
- [89] I now turn to the various heads of damage.

General Damages

- [90] A non-exhaustive list of common factors to consider is set out in the often referenced case of *Stapley v Hejslet*, 2006 BCCA 34:
- (a) age of the plaintiff;
 - (b) nature of the injury;
 - (c) severity and duration of pain;
 - (d) disability;
 - (e) emotional suffering;
 - (f) loss or impairment of life;
 - (g) impairment of family, marital and social relationships;
 - (h) impairment of physical and mental abilities;
 - (i) loss of lifestyle; and
 - (j) the plaintiff's stoicism (as a factor that should not, generally speaking, penalize the plaintiff).
- [91] The plaintiff seeks non-pecuniary damages in the range of \$75,000 to \$120,000. The plaintiff has submitted the following cases as a guide in supporting this range in the assessment of non-pecuniary damages: *Switzer v. Buchi*, [1998] B.C.J. No. 1904 (S.C.); *Freeland-Clayton v.*

Murphy, [1997] B.C.J. No. 1705 (S.C.); Liu v. Hansen, [1996] B.C.J. No. 591 (S.C.); Fletcher v. Meyer, [1993] B.C.J. No. 508 (S.C.); Mirisklavos v. Manhas, [1996] B.C.J. No. 2038 (S.C.); Gill v. Probert, [1999] B.C.J. No. 2436 (S.C.); Coles v. Spriggs (1998), 61 B.C.L.R. (3d) 228 (C.A.). Mr. Gertsoyg notes that these cases were all decided in the 1990's and that the effects of inflation should be considered on those awards.

- [92] The defendant submits that the range of damages should be in the range of \$45,000 to \$60,000. The supporting cases are: Brechin v. Pickering, 2012 BCSC 1300; Coutaskis v. Lean, 2012 BCSC 970; Niitamo v. I.C.B.C., 2003 BCSC 608; Zawislak v. Karbovanec, 2012 BCSC 666; and Zigawe v. Rance, 2009 BCSC 1816.
- [93] As previously mentioned, Mr. Chekoy's health prior to the Accident was not good. He had diabetes, chronic GERD symptoms, a peptic ulcer, general anxiety, and depression, all of which negatively affected his quality of life. Additionally, since the Accident he has been diagnosed with eschismic heart disease. Dr. Golin advised that diabetes is a serious life threatening disease which can cause complications to the heart, kidneys, eyes and nerves. Persons with the disease also experience depression. His recreational and social life had been limited by his pre-Accident condition as well as by his wife's health condition which is ongoing. He experienced anxiety and insomnia largely from factors unrelated to the Accident. In terms of home activities, Mr. Chekoy testified that he was not responsible for housekeeping duties such as cleaning and cooking. He stated that this was the responsibility of women. So, it appears that his injuries did not affect housekeeping. Emotionally, he agreed that he is positive as a result of the birth of his first grandchild.
- [94] As already mentioned I unfortunately cannot place as much weight on Mr. Chekoy's testimony as to the impact of his injuries from the Accident on the quality of his life.
- [95] The cases provided by the parties were helpful, though the high value cases of the plaintiff related to more significant injuries than in the instant. The plaintiffs in some of the cases also had better health pre-accident and were more active than in the instant case. I note however that the plaintiff's cases were awards made many years ago. Some of the defence cases are distinguishable on the bases such as the plaintiff's age and nature of injuries. Each case is unique and decided on its specific details. My assessment of non-pecuniary damages for Mr. Chekoy is \$75,000.

Special Damages

- [96] At the commencement of trial, the parties advised that they had agreed on the plaintiff's special damages in the amount of \$8,750. As a result, there will be an order to this effect.

Cost of Future Care

- [97] The cost of future care is a pecuniary claim for the amount which may reasonably be expected to be expended in putting the injured party in the position he would have been in if he had not sustained the injury: *Andrews v. Grand & Toy Alberta Ltd.* (1978), 83 D.L.R. (3d) 452 at 462.
- [98] The award is "based on what is reasonably necessary on the medical evidence to promote the mental and physical health of the plaintiff": *Milina v. Bartsch* (1985), 49 B.C.L.R. (2d) 33 (B.C.S.C.) and adopted in *Aberdeen v. Zanatta*, 2008 BCCA 420 at para. 41.
- [99] There must be some evidentiary link drawn between the physician's assessment of pain, disability, and recommended treatment and the care recommended by a qualified health care professional: *Aberdeen* at paras. 43 and 63.
- [100] In assessing damages under this head, it is necessary to analyse each item sought by the plaintiff with respect to whether there is "some evidentiary link between the physician's assessment of pain, disability and recommended treatment and the care recommended by a qualified health professional": *Gignac v. Insurance Corporation of British Columbia*, 2012 BCCA 351 at para. 32.
- [101] It may also be appropriate to adjust an award for contingencies both positive and negative.
- [102] The plaintiff seeks damages under this head of \$22,984. This figure is comprised of the following:

One Time or Lump Sum Costs

Canadian Back Institute (Modified program)

3,560

Medication (Estimate assuming no samples)

500

SUB-TOTAL

4,060

Yearly Costs

Physiotherapy - \$55 X 12 sessions annually

660

Chiropractic - \$57.35 x 2 sessions annually

114.7

Acupuncture - \$55 x 12 sessions annually

660

SUBTOTAL

1,434.7

Net Present Value (X 13.19)

18,923.69

Total Cost of Future Care

\$22,983.69

[103] In terms medications, Dr. Golin's recommends the intermittent use of Tylenol #3 and Ibuprofen over the next two years.

[104] The defendant is willing to concede a modest claim under this head which includes physiotherapy and an active exercise or other conservative treatment as recommended. The defendant points to the testimony of Ms. Wisotzki, who advised that physiotherapists can obtain certification in acupuncture and provide it in therapy. The defence submits that Dr. Golin's prognosis that the plaintiff's soft tissue complaints will likely resolve within the next two years also should be taken into account. It is also submitted that there is no evidence from any expert that the plaintiff will require treatment until he is 65 years old. On this point, I note the evidence of Dr. Badii to the contrary. The defence also points to evidence of the plaintiff's past history of choosing not to take medications or attend therapy for extended periods and the deleterious effects for this.

[105] It is the position of the defence that an assessment under this head of \$2,000 to \$4,000 is appropriate.

[106] In my view, acupuncture can be obtained as part of physiotherapy treatment. Further, while Dr. Badii's report recommends 6-12 annual physiotherapy treatments to the age of retirement, if he has managed to return to work in any capacity, Dr. Golin's opinion is that the plaintiff's soft tissue injuries will resolve fully within two years. His recommendation for physiotherapy, active rehabilitation as well as medications relate to this two-year period. In considering the foregoing as well as the positive and negative contingencies, I find on the evidence that such treatments should extend for the next six years.

[107] As a result, I assess damages under this head as \$10,000.

Loss of Past Income

[108] I accept the medical evidence that Mr. Chekoy was unable to work from the date of the Accident to the end of January 2008; and was partially disabled since; which I took as meaning that Mr. Chekoy could do light duty work. This in Dr. Badii's opinion means that the plaintiff was capable of doing work "as long as it does not involve regular lifting or carrying anything heavier than 30 pounds, or sitting with his head fixed in one position for

more than two hours at a time". I accept the plaintiff's submission that his lack of English language skills and trade skills certification in Canada is a disadvantage. However, I do not accept that Mr. Chekoy is precluded from doing all manual labour given the evidence of his activities post-Accident such as performing janitorial-like work. Mr. Kelley's report on past loss of wages is too pessimistic and in my view is not supported by the evidence. Mr. Chekoy was employable and could work albeit at a lower level than what he was able to pre-Accident.

[109] The defence is agreeable to paying the full past wage loss for the 4½ months that Mr. Badii opined that the plaintiff was fully disabled. The amount is in the range of \$4,500 to \$5,175 based on the plaintiff's pay stubs at Star West Auto. The defence is not however prepared to compensate the plaintiff for the time he spent in Russia, which I find was from mid-March to the end of April 2008. I agree with that submission. The defendant is in total prepared to consider an additional \$12,000 to \$15,000 towards past wage loss. I assess loss under this head at \$15,000.

Loss of Future Earning Capacity

[110] In *Moore v. Cabral*, 2006 BCSC 920, McKenzie J. (as she then was) provided a useful summary of the approach to assessing damages under this head as follows:

[68] In *Pallos*, Finch J.A. for the court, confirmed that the plaintiff must prove that the future loss is a real possibility, and that there is a reasonable chance such loss will occur, but he also added that a consideration of the issue should not be limited to this test and added the following at [paragraph] 29:

The plaintiff's claim in this case, properly considered, is that he has a permanent injury, and permanent pain, which limit him in his capacity to perform certain activities and which, therefore, impair his income earning capacity. The loss of capacity has been suffered even though he is still employed by his pre-accident employer, and may continue to be so employed indefinitely.

[69] Finch J.A. also noted at [paragraph] 43, that various actuarial or arithmetic approaches may be taken in assessing an award for loss of earning capacity, all of which are arbitrary and ultimately, the duty of the court is to make a "fair assessment of damages."

[70] Furthermore, Huddart J.A. provided a useful review of the principles relating to an award for loss of earning capacity in *Rosvold v. Dunlop* at [paragraph] 8-12, which were subsequently applied in *Paller* at [paragraph] 50. Those principles can be summarized as follows:

1. The plaintiff is entitled to be put into the position he would have been in but for the accident so far as money can do that.

2. Where a plaintiff's permanent injury limits him in his capacity to perform certain activities and consequently impairs his income earning capacity, he is entitled to compensation. What is being compensated is not lost projected future earnings but the loss or impairment of earning capacity as a capital asset. In some cases, projections from past earnings may be a useful factor to consider in valuing the loss but past earnings are not the only factor to consider.
 3. The standard of proof to be applied when evaluating hypothetical events that may affect an award is simple probability, not the balance of probabilities. Possibilities and probabilities, chances, opportunities, and risks must all be considered, so long as they are a real and substantial possibility and not mere speculation. These possibilities are to be given weight according to the percentage chance they would have happened or will happen.
 4. The trial judge's task is to assess the loss on a judgmental basis, taking into consideration all the relevant factors arising from the evidence.
 5. Once impairment of a plaintiff's earning capacity as a capital asset has been established, that impairment must be valued. The valuation may involve a comparison of the likely future of the plaintiff if the accident had not happened with the plaintiff's likely future after the accident has happened. As a starting point, a trial judge may determine the present value of the difference between the amounts earned under those two scenarios. But if this is done, it is not to be the end of the inquiry, the overall fairness and reasonableness of the award must be considered taking into account all the evidence.
 6. Even if a plaintiff is able to earn the same amount of income from alternative employment, he would still be entitled to compensation for loss if occupations previously available were closed to him.
- [71] Finally, in considering the relevant factors, the case law has consistently applied the factors set out in *Brown v. Golaiy*, being whether:
1. the plaintiff has been rendered less capable overall from earning income from all types of employment;
 2. the plaintiff is less marketable or attractive as an employee to potential employers;
 3. the plaintiff has lost the ability to take advantage of all job opportunities which might otherwise have been open to him, had he not been injured; and,
 4. the plaintiff is less valuable to himself as a person capable of earning income in a competitive labour market.
- [111] The plaintiff did not seek a functional capacity evaluation which could have provided better evidence as to the abilities and limitations of Mr. Chekoy.

- [112] The plaintiff submits that damages under this head should fall within the range of \$200,000 to \$350,000. The plaintiff handed up the following cases as support for his position: *Switzer v. Buchi*; *Freeland-Clayton v. Murphy*; *Liu v. Hanson*; *Fletcher v Meyer*; *Mirisklavos v. Manhas*; *Gill v. Probert*; and *Moukhine v. Collins*, 2012 BCSC 118.
- [113] The plaintiff submits that regardless of the approach to assessing loss under this head the plaintiff's remaining residual earning capacity is a fraction of the plaintiff's pre-Accident earning capacity. The plaintiff in final argument suggested remaining capacity was no more than one-half to one-quarter.
- [114] The defendant submits that an appropriate loss of capital asset assessment, as done in *Niitamo*, is an award of two years' pre-Accident salary. Based on the income evidence, the award would then be in the range of \$30,000 to \$40,000. The defence referred to the following cases in support of its position: *Rosvold v. Dunlop*, 2001 BCCA 1 and *Perren v. Lalari*, 2010 BCCA 140. It is submitted that rather than rely upon the hypothetical loss of earnings approach that it is more appropriate to step back and consider other factors at play in this case which may lend to a more appropriate assessment. In this regard, the defendant submits that while the plaintiff has been rendered less capable overall from earning income from medium to heavy types of employment, he is also less marketable or attractive for factors unrelated to the Accident, which includes his lack of fluency in English and potentially his other negative health conditions. The defence points out that the plaintiff's reason for being on social assistance is multi-factorial. The defendant disputes the claim that the plaintiff is unable to do sedentary work. The defence submits that that there was limited evidence with regard to very limited circumstances of sedentary work, that the experts agreed that adjustments can be made by both the plaintiff and any potential employer. The defendant says common sense supports this premise, regardless of whether a person is already employed at the time or not.
- [115] While I find that Mr. Chekoy has suffered a loss of a capital asset as a result of the Accident; the loss is not as great as has been argued. As mentioned Mr. Chekoy has several health issues which either pre-existed the Accident or is unrelated to it. As well, he has a significant lack of proficiency in English and is not certified as an automechanic in Canada. His employment in Canada has been at the minimum wage or low end of the wage scale. That Mr. Chekoy was able to attend and obtain certificates and tickets from several industrial courses that included in class, hands on training, and exams, indicates in my view that Mr. Chekoy was able to apply himself both mentally and physically for work, not just sedentary work, albeit at a lesser level than pre-Accident.
- [116] In considering the loss of capacity, the real and substantial possibility approach is to be applied. In this regard, my view is that the report of Mr. Kelley is too pessimistic in regard to Mr. Chekoy working only half-time in the future and that he would be confined to minimum wage type jobs. His holding static the projected income of Mr. Chekoy under the injured high income scenario is not persuasive. I also take into consideration both positive and negative contingencies including the prospect that the surgery proposed for Mr. Chekoy

could improve his condition, permitting him to do more, though I recognize the comment of Dr. Sahjpaul that there can be ongoing difficulties. I also have taken into consideration the complications from the plaintiff's pre-Accident health problems which are ongoing and significant. In assessing damages and stepping back to look overall reasonableness and fairness to the parties, I award damages for loss of future income earning capacity of \$170,000.

Mitigation

- [117] The defendant submits that the plaintiff did not take reasonable steps to mitigate his pecuniary and non-pecuniary damages. The defendant says that the plaintiff's refusal for treatment and lack of effort to find alternative employment evidence the lack of reasonable steps.
- [118] The defendant submits that based on the evidence and in particular, the opinions of the plaintiff's own medical experts, the effects of the plaintiff's injuries, most particularly his soft tissue injuries, would have been reduced and improved had he followed his doctor's advice and attended therapy upon his return from Russia in 2008. There is no doubt that Dr. Golin expressed to him the importance of therapy and an active exercise program in managing his symptoms from the Accident.
- [119] I note Dr. Lee concurred in the view that the failure to continue with a recommended program of physiotherapy or chiropractic treatment would negatively affect the resolution of chronicity of pain.
- [120] He did not adhere to a regular exercise program which Dr. Golin specifically addressed as problematic to his increase in diabetic symptoms. The defendant submits that the plaintiff's own evidence that when his diabetes is well-managed that he feels better overall is telling. It was during the period when he was not receiving any therapy, not doing exercises, not taking medications that he "felt bad" and yet did virtually nothing for 10½ months to improve.
- [121] Evidence from Dr. Golin, Dr. Lee and Dr. Badii is all consistent: the plaintiff's complaints with regard to his soft tissue injuries may well have been improved had he followed his doctor's advice. In the words of Dr. Lee, this failure to attend therapy likely had a deleterious effect on the chronicity of the pain from his soft tissue injuries.
- [122] The defendant states that the plaintiff further failed to mitigate his damages by failing to return to work, in any capacity, after January 2008.

- [123] It is submitted that the plaintiff's professed desire to get back to work is inconsistent with the evidence on a number of grounds: that the plaintiff's evidence on subsequent job applications is jumbled and confusing; his failure to apply for any further jobs beyond 2009 as confirmed by his wife; beyond very few applications done following his retraining through the programs offered with Social Assistance, the plaintiff has not sought employment in order to mitigate his economic loss.
- [124] It is further submitted that the plaintiff's lack of effort to improve his English skills, which is obviously unrelated to the Accident also hampered his ability to work in Canada. The defence noted Mr. Kelley's opinion that the plaintiff's need to become fluent in English is all the more important now in order to further expand his employment horizons. Having made no effort to take ESL classes since 2009, it is submitted that the plaintiff has acted unreasonably and as a result, failed to mitigate his economic losses.
- [125] The defence submitted a 15%-20% reduction in damages was in order.
- [126] In deciding whether the plaintiff took reasonable steps, the plaintiff is not held to a high standard of conduct. It is for the defence to establish that the defendant did not act reasonably. I accept the plaintiff's submission that the physiotherapy treatments had not recognized the plaintiff's disc herniation or the cervical radiculopathy. Ms. Wisotzki testified that had this been known then the program would have been modified and that medical clearance would have been required for any program to be delivered to the plaintiff. I accept the plaintiff's submission that Mr. Chekoy's non-return to physiotherapy based on his view that his condition was getting worse combined with the fact that his program did not recognize the aforementioned conditions should not be held against him. It is my view that a reduction is unwarranted in respect to Mr. Chekoy's soft tissue injuries. In regard to employment, Mr. Chekoy has not sought employment beyond 2009. It is my view that he was capable albeit at a lesser level than what he was pre-Accident to seek out employment and that he was able to take measures to upgrade his proficiency in English. I do note his measures to obtain industrial training as a part of receiving social assistance and his statement that he was interviewed for one job but was unsuccessful. However it appears that his efforts were not sustained reasonably. I was not convinced that the listing of firms which he says he applied to was accurate, given what I have already mentioned regarding reliability. As a result, I find a reduction of \$8,000 for income and earning capacity loss is warranted.

Conclusion

[127] The following amounts are awarded to the plaintiff:

(a)

Non-pecuniary damages:

\$75,000

(b)

Special damages:

\$8,750

(c)

Cost of future care:

\$10,000

(d)

Loss of past income:

\$15,000

(e)

Loss of future earning capacity:

\$170,000

SUBTOTAL:

\$278,750

Less:

Failure to Mitigate:

(\$8,000)

TOTAL

\$270,750

[128] If the parties wish to address the issue of costs, an appearance should be scheduled in the usual way through Trial Scheduling.

"The Honourable Mr. Justice Masuhara"

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Prepared on 27 October 2026 · Esheria