
CANADA / JUDGMENT

Cripps v. Overend

2010 BCSC 1779

COURT

Supreme Court of British Columbia

DECIDED

10 December 2010

Source: bccourts.ca · Research copy typeset by Esheria. Not court-issued or certified.

2010 BCSC 1779 Cripps v. Overend

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Cripps v. Overend,

2010 BCSC 1779

Date: 20101210

Docket: M081055

Registry: Vancouver

Between:

Robert Cripps

Plaintiff

And

Scott Overend and Paul Overend

Defendants

Before: The Honourable Madam Justice Stromberg-Stein

Reasons for Judgment

Counsel for the Plaintiff:

L. G. Harris, Q.C.

Counsel for the Defendants:

M. D. Wilhelmson

Place and Date of Trial:

Vancouver, B.C.

October 25 - 29, and

November 1 - 3, 2010

Place and Date of Judgment:

Vancouver, B.C.

December 10, 2010

Introduction

[1] The 36-year-old plaintiff, Robert Cripps, claims damages for personal injuries resulting from a motor vehicle accident on April 22, 2006. He was wearing his seatbelt in the front passenger seat of a Dodge 4 x 4 truck driven by his father-in-law, Glenn Olinek, travelling northbound on 168th Street in Surrey. The truck was struck on the right side, in a T-bone type impact, by the defendants' car, which came through a stop sign at a high speed. The significant impact caused the truck to spin in a circle and fly across a ditch before landing on a lawn. Mr. Cripps was jolted and his body impacted the interior of the truck. Damage to the truck was extensive and the passenger door was jammed. Mr. Cripps was assisted out the driver's door. He was dazed. He was aware of impacts to his head and right knee, and felt severe pain in his rib cage. He had difficulty breathing and received oxygen from ambulance attendants. Following the advice of the ambulance attendants regarding a lengthy wait time at the hospital, he and Mr. Olinek took a taxi home.

[2] Liability is admitted.

Issue

[3] At issue is the extent of Mr. Cripps' accident injuries.

Position of the Plaintiff

[4] Mr. Cripps asserts that pain from his injuries has caused him to have a limited tolerance for standing, sitting, walking, and bending, and has caused him pain and discomfort in his work, in his enjoyment of life with his family, and in his leisure activities. Mr. Cripps maintains changes in his outlook and mood brought on by his pain from the accident played a significant role in the break-up of his marriage. His claims are for non pecuniary damages of \$100,000; past wage loss from his Canadian Innovative Services (CIS) employment of \$10,000; loss of future earning capacity of \$300,000 to \$500,000; and cost of future care of \$80,500.

- [5] There is no dispute that he is entitled to past wage loss for his Consolidated Envirowaste Inc./ Answer Garden (Answer Garden) employment of \$5,760 gross (net \$4,500), and special damages of \$646.24.

Position of the Defendants

- [6] The defendants admit Mr. Cripps suffered soft tissue injuries in the accident, but maintain that his injuries have resolved or continue to resolve. The defendants dispute he is disabled, and to the extent that he may have lingering symptoms, the defendants argue they are not as severe as he claims and he has not proven his future losses. The defendants question Mr. Cripps' credibility, and therefore the medical and economic expert evidence, as well as evidence relating to his employment, which relies on his account of his pre-accident health and plans as well as his post-accident pain and limitations. The defendants argue that Mr. Cripps' reports of pain did not in fact translate into disability prior to his promotion to a sales job. Further, the defendants assert that Mr. Cripps experienced impediments to his physical and emotional health, as well as a reduction in his capacity to perform heavy work, before the accident.
- [7] It is the position of the defendants that the painful rib cage and initial soft tissue injuries, those that required him to miss work and slowly work himself back into full time duties, place the value of his claim for non-pecuniary damages at \$30,000 to \$50,000. The defendants submit there must be a deduction for failure to mitigate, in the range of 25% to 40%, because Mr. Cripps failed, until May 2009, to follow the recommendations of his doctors to exercise and lose weight because he was "feeling sorry" for himself; and since he started an exercise and weight loss program his improvement has been dramatic.

FACTS

Pre-Accident Physical and Mental Health, and Capacity

- [8] Mr. Cripps was born on November 18, 1974. He left school in Grade 10 and returned in 1995. Although he believed he completed Grade 12, at trial Mr. Cripps learned that his permanent school record indicates he did not graduate from high school because he did not complete Math 11. The mistaken fact that Mr. Cripps graduated from high school was relied upon by the vocational expert and economists.
- [9] Mr. Cripps never played sports. He told the ICBC adjustor he engaged in no extra-curricular activities. He testified that before he was married he did some off-road riding and camping. He went to the gym and weightlifted up to three times a week with his wife before their marriage, to look good at the wedding ceremony. Mr. Cripps liked to work outdoors. He helped with yard work and mowing, and he helped his father-in-law dig out a septic system, construct a bridge over a fish pond and build a gazebo.

- [10] In January 2004, Mr. Cripps' family doctor, Dr. Froese, made a clinical note that Mr. Cripps reported fatigue from overwork. In April 2004, Mr. Cripps reported a left shoulder weightlifting injury, which led to a referral to a neurologist in June 2004 and the diagnosis of a "very slightly unstable shoulder". Mr. Cripps dislocated this shoulder in 1987, leading to ongoing pain and discomfort with certain movements. Eight months before the April 22, 2006 accident, he reported right knee pain, especially on stairs. Dr. Froese acknowledged this was an overuse injury, diagnosed a right patellar tendonitis, and prescribed ibuprofen and ice. Mr. Cripps reported multiple work injuries to WorkSafeBC, including an injury to his right shoulder or right forearm on December 4, 2003 while lifting 40 pound pallets, and a flash burn injury to his eye while welding in November 2004. Mr. Cripps' weight fluctuated before the accident.
- [11] Excerpts from a marital counselling record suggest Mr. Cripps admitted that he always had problems with his temper. The weight of the evidence is that Mr. Cripps' temper was not an issue during the marriage until after the accident. Mr. Cripps testified his father suffered a horrific work injury when Mr. Cripps was only seven years old, which included the loss of/or blindness in one eye. He admitted he was traumatized by and is still emotional about this event but he never received any counselling.

Pre-Accident Employment

- [12] In 1996, Mr. Cripps commenced work with Answer Garden, which has been his employer for the past 15 years, except for a few months in 1997 when he left to try construction work. He started as a general labourer at \$12.50 per hour, and worked in shipping and receiving as a forklift operator and a loader operator. In the year before the accident, he worked as a millwright's assistant. This position involved physical labour, including lifting bags up to 60 or 70 pounds, operating heavy equipment on paved and unpaved sections of the work premises, climbing, bending, crawling and stooping. He did some welding. His job was physically demanding. He continued to perform this job until a year after the accident when he was transferred to a salaried sales job that included some yard work but was predominantly an indoor position.
- [13] His wage increases in his 15 years of employment at Answer Garden reveal a steady progression upward: 1998 - \$24,867; 1999 - \$20,380; 2000 - \$24,963; 2005 - \$31,678; June 12, 2007 - \$35,360; October 1, 2007 - \$39,600; Current- \$42,164.

Post-Accident Diagnosis and Treatment

- [14] Following the accident, Mr. Cripps felt dazed for a few days and complained of chest and rib pain, shortness of breath, and right knee pain. Neck and back pain developed within a few days.

- [15] Two days after the accident, on April 24, 2006, Mr. Cripps saw Dr. Froese. Dr. Froese diagnosed a possible concussion, traumatic headache, possible right rib fractures, a cervical strain, a shoulder girdle strain, pectoral muscle strain or tear, hematoma of the right knee, and neck and lower back strain.
- [16] On April 26, 2006, X-rays were taken of Mr. Cripps' right shoulder and right ribs and revealed no fractures.
- [17] Dr. Froese prescribed Tylenol #3, ibuprofen and Amitriptyline, which Mr. Cripps took for about a month. Thereafter, for pain control Mr. Cripps relied on over-the-counter medications such as Tylenol and Advil.
- [18] A week after the accident, Dr. Froese prescribed physiotherapy which Mr. Schneider oversaw. Mr. Cripps attended 15 sessions between May 10, 2006 and June 19, 2006. Mr. Schneider thought Mr. Cripps had a lumbar strain and a Grade II whiplash. Mr. Cripps responded quickly to treatment of his neck and back and by the sixth session, on May 26, he was feeling much better. Improvement continued until his last treatment on June 19. He missed his last two appointments. Under Mr. Schneider's direction, Mr. Cripps attended the clinic gym and received instruction in passive and active exercises by a staff kinesiologist.
- [19] Mr. Cripps was denied further physiotherapy treatment by his insurer. This coincided with his return to work on June 25. There were no further referrals for physiotherapy by his family physician or any other doctor. Mr. Cripps says he continues to do some of the exercises prescribed by the physiotherapist.
- [20] Because of persistent back symptoms, Dr. Froese ordered a CT scan of the lumbar spine. The report, dated November 12, 2006, noted no abnormality in the sacroiliac joints, but showed a mild degree of disc bulge at the L5-S1 level. Two years later, on November 12, 2008, Mr. Cripps had a MRI of the L5-S1 level of his spine. The report noted a small central and left disc herniation at the L5-S1 level.
- [21] Mr. Cripps received one steroid injection in late 2008, which resulted in a reduction of low back pain for several weeks before the pain gradually returned. Mr. Cripps was twice referred for another injection but for some reason was unable to get in to see a doctor. It appears there was no follow up by his family doctor.

Present Physical Condition

- [22] Gradually, over about six months, Mr. Cripps recovered from most of his injuries. However, four and a half years after the accident he continues to experience lower back pain. He describes this pain as a generalized aching, which is present most of the time, although it can be absent for as long as one to two weeks. The pain is often dependent on his level of activity. The pain will frequently travel up his back into his neck and become a headache, and occasionally the pain will be referred into his left thigh and upper left calf.

- [23] The medical professionals who have examined Mr. Cripps have drawn somewhat divergent conclusions. His family physician, Dr. Froese, stated Mr. Cripps' injuries have "been a life changing event for him". Physiatrist Dr. Adrian provided the opinion in January 2009 that Mr. Cripps had mechanical neck and lower back pain, and cervicogenic headaches. Dr. Adrian was of the opinion that although it was unlikely that the injury would undergo progressive deterioration over time, further recovery was unlikely and his prognosis was poor.
- [24] On the other hand, when neurologist Dr. Teal saw Mr. Cripps in July 2010, his opinion was that Mr. Cripps had made excellent recovery from his Grade II cervical strain. Dr. Teal felt that while he occasionally may develop some soreness of the neck, Mr. Cripps had a good range of motion and there were no restrictions or limitations arising from his neck regarding recreational or occupational activities. Dr. Teal described Mr. Cripps' infrequent headaches as tension headaches. In Dr. Teal's opinion, Mr. Cripps has no cognitive or neurobehavioral sequelae attributable to the accident. There was no significant injury and no cognitive deficits with respect to a possible concussion. Mr. Cripps had limited forward flexion of the lower back and persistent low back pain, but there were no neurologic abnormalities of the lower back. Dr. Teal stated that Mr. Cripps was not currently capable of heavy physically demanding work, but could perform sedentary or light physical jobs. Dr. Teal felt the prognosis was "guarded", meaning the outcome was uncertain, but there was a possibility he could recover.
- [25] The weight of the expert evidence is that Mr. Cripps suffered a soft tissue, mechanical injury to his low back. He suffered a lumbar sprain. I accept the evidence of Dr. Teal there is no nerve injury and there are no neurological deficits. Dr. Teal testified the MRI clearly shows the bulge "nowhere near the nerve". The type of bulge observed on the MRI is found in asymptomatic individuals in the population. There is no likelihood of a need for surgical intervention in the future; there is little likelihood of deterioration. Speculation, such as that undertaken by Dr. Adrian and Dr. Froese, of some "stuttering" or undetectable nerve involvement, is unpersuasive and does not satisfy the burden of proof. Further, Dr. Froese's opinion is beyond the scope of his expertise.

Marriage Breakdown and Emotional Health

- [26] Mr. Cripps met Charity Olinek in 2001. They were engaged in April 2002, moved in together at the Olinek family residence complex in Langley in March 2003, and were married in August 2003. Their son was born in October 2004, and their daughter was born January 2007.
- [27] Following the accident Mr. Cripps said he sustained a loss of "my manhood": he was unable to work outdoors as he had done before; he was unable to play with his son as he had done before; he was unable to enjoy family activities such as playing in the yard or going for walks, as he had done before.

- [28] Mr. Cripps contends his relationship with his children was impaired by his physical limitations. However, at his examination for discovery he testified this relationship was "second to none" and that he continued play and 'wrestle' with his kids. Facebook photos show him in a pumpkin patch and in a lake with his kids. He took them on a hayride to the pumpkin patch. He is shown bending and twisting his back while having fun at a wedding with no signs of pain or discomfort.
- [29] Following the accident, Mr. Cripps felt he became increasingly withdrawn, isolated and depressed. He was treated by Dr. Froese for depression in 2008, which Dr. Froese attributed to the accident. He tried numerous anti-depressant medications for a short time. He is not on anti-depressant medication now.
- [30] There were problems in the marriage both before and after the accident. There were some "heated discussions" about money pre-accident. Steven Cripps, Mr. Cripps' brother, recalled an incident post-accident where Charity Cripps called her husband a 'lazy bastard' because he would not get off the couch and play with his kids. Mr. Olinek confirmed Charity was strong willed and was prepared to speak her mind, and that she had a temper. Mr. Olinek commented that Mr. Cripps was mad his wife was "picking their friends". The final straw was a blow up over Mrs. Cripps' reminder to Mr. Cripps to take out the garbage.
- [31] Charity Cripps places the root causes of the fighting to a time when Mr. Cripps could barely move. This would have been in relation to the rib injury which resolved within six months, three years before the separation.
- [32] The marriage counsellor, Shannon Simms, testified that the couple admitted to issues with communication, parenting, lack of respect and a simple lack of effort. The parties had a fight after their first and only counselling session and Mr. Cripps indicated he did not want to pursue marriage counselling.
- [33] The issues surrounding the marriage breakdown are too complex to be pinned entirely on the accident injuries. There are issues of causation and foreseeability. Mr. Cripps was treated for depression in 2008 and showed improvement in the year before the marriage breakdown in 2009. The separation has been amicable; both parties seem content the marriage is over and they are moving on. Overall, the proposition that the accident caused the marriage breakdown is not proven on a balance of probabilities. However, it is no stretch to conclude that Mr. Cripps' injuries and slow recovery following the accident were factors that contributed to stress and strain in the marriage preceding the marriage breakdown.
- [34] Mr. Cripps' mental and physical outlook has improved since separation. This improvement is likely a result of intervention from his brother in the form of emotional support and encouragement to get out and exercise and socialize.

Return to Work and Welding Career Plans

- [35] Following the accident, Mr. Cripps was off work from April 24 to June 25, 2006. He has not missed a day of work since. Mr. Cripps returned to his work duties at Answer Garden, gradually increasing his work hours, until by July 2006 he was able to work a full day of eight hours, although with some nagging back pain. He testified he "never returned to his capabilities" or performed up to his capabilities. He said he went from "gungho" and "born to work" to walking around like an "eighty year old".
- [36] The clinical records indicate Mr. Cripps did not see Dr. Froese until a month after his return to work. Dr. Froese's clinical records document Mr. Cripps' work progress: on July 26, 2006, Mr. Cripps was working full time but avoiding heavy lifting; in September 2006, Mr. Cripps was doing some rowing at the gym and operated a front end loader for 5 hours; on February 16, 2007, he was working full time and driving a forklift but had left shoulder complaints due to shoulder checking; on March 15, 2007, he was continuing to work full time with occasional overtime; on April 20, 2007, a month before he moved to the sales position, and a year after the accident, he was driving a forklift; on June 24, 2008, and on November 4, 2008, he was mowing the lawn. Mr. Cripps admitted he can wash his car and take out the garbage.
- [37] On September 24, 2007, Dr. Adrian saw Mr. Cripps. Mr. Cripps told him he was able to return to his work activities as a millwright on a gradual basis, but he was slower with the majority of his work activities.
- [38] The weight of the evidence establishes that Mr. Cripps was moved to his current sales position based on his seniority, knowledge of the business and the desire of management to promote within the company. Mr. Cripps worked at his pre-accident job for a full year before he was moved to a sales position. The sales position required less physical work. Randy Mayer, the millwright, testified he played no part in the move, which took him completely by surprise. He said the job of millwright's assistant is a young man's job.
- [39] There is no proof of accommodation due to the effects of the accident. Mr. Cripps' move to an inside sales job was a promotion. He had the option of returning to laboring if he did not like his new job. He received a raise. He received another raise in October 2007 as well as a commendation letter. There are no documented complaints, concerns, or adverse performance reviews.
- [40] Mr. Cripps does not like his indoor sales job. He would prefer to work outdoors as a laborer but feels restrained by his lower back injury. Mr. Cripps has been given duties in the yard, including pile monitoring, which allow him to stretch and move around during the day. He knows the business, the clients and the drivers. His duties include dispatching, some PR work over the telephone and occasional attendances at client job sites. Mr. Moser has delegated a number of duties to Mr. Cripps. Some of these duties are akin to those performed by the yard foreman, before that position was discontinued.

DAMAGES: LAW AND ANALYSIS

Non-Pecuniary Damages

- [41] In *Stapley v. Hejslet*, 2006 BCCA 34, at paragraph 46, Kirkpatrick J.A. set out the factors that are to be considered in awarding non-pecuniary general damages. These categories are stated below with a brief description of how Mr. Cripps says he has been impacted in this case.
1. **Age:** Mr. Cripps is a relatively young man of 36 years. He maintains he will likely have chronic back pain into the future. However, he has demonstrated marked improvement since undertaking an exercise program.
 2. **Nature of the Injury:** The impact was a severe sideways collision, which gave rise to significant soft tissue injuries. Mr. Cripps was totally disabled from all activities for approximately two months. Following a year working as a millwright's assistant, he found it difficult to perform to capacity the heavy outdoor labour that he loved, as it involved lifting, climbing, riding, bending, crouching and stooping.
 3. **Severity and Duration of Pain:** The pain from the rib injury was severe in the first couple of months. The current neck pain is very mild; the lower back pain is more significant and will likely continue into the future.
 4. **Disability:** Mr. Cripps was totally disabled for the first two months, and remains partially disabled from performing labouring jobs which he enjoyed. He maintains he is less able to sustain some activities which he enjoyed, such as off-roading, walking, and physical play with his children.
 5. **Emotional Suffering:** Mr. Cripps was diagnosed with and treated for depression by his family doctor. A number of different anti-depressant medications were tried and caused erectile dysfunction.
 6. **Loss or Impairment of Life:** Mr. Cripps considers the accident to have been a life changing event. He was healthy and happy before the accident and feels that his life has been permanently altered for the worse.
 7. **Impairment of Family, Marital or Social Relationships:** Mr. Cripps' marriage broke down, in part he claims, as a result of his inability to cope with the aftermath of his injuries. He withdrew from activities with his family, including his wife and children, and his friends.
 8. **Impairment of Physical and Mental Abilities:** Dr. Quee-Newell describes Mr. Cripps as below-average in most general aptitudes with few "transferable skills". Due to his inability to do heavy labour, he claims he has lost the ability to work with his hands, including heavy manual yard work. However, he is still able to do less demanding manual labour.
 9. **Loss of Lifestyle:** Mr. Cripps says he has experienced a reduction in the extent to which he can participate in physical activity that he previously enjoyed, including off-roading, which he stopped doing before he married, and physical play with his children.

10. Stoicism: Mr. Cripps maintains he should not be penalized by his ability to persist in attempting to return to his old job duties. The reality is that he once he returned to work he never missed a day of work.
- [42] Mr. Cripps relies on the following cases in support of an assessment of damages in the amount of \$100,000: Ayoub v. Campbell, 2009 BCSC 317; Eccleston v. Dresen, 2009 BCSC 332; and Murphy v. Jagerhofer, 2009 BCSC 335.
- [43] The defendants assert that essentially there has been recovery and resolution of Mr. Cripps injuries. The rib injury resolved in six months; the knee injury is fine; and his neck doesn't bother him very much. As early as June 2006, Mr. Cripps reported no backaches and he acknowledged that since August 2006, he can go one or two weeks without any back problems. There is no evidence the degenerative changes seen in the MRI at L5-S1 were caused by the accident. Before the accident, Mr. Cripps was a laborer and he had reported problems caused by overuse of other parts of his body. The defendants argue it is reasonable to consider the possibility of such changes becoming symptomatic in any event. The defendants assert the evidence demonstrates Mr. Cripps has been more active and remains more capable than he alleges. Relevant to the assessment is the fact he was off work only a few months and has missed no work since. The position of the defendants is there is evidence of amplification and exaggeration of symptoms; there is evidence that he is improving and will continue to improve.
- [44] The defendants rely on the following cases to support an assessment of non-pecuniary damages in the range of \$30,000 to \$50,000: Zrnoh v. Stauber, 2009 BCSC 944; Beick v. Webb, 2003 BCSC 1251; .Schrauwen v. Slater, 2001 BCSC 987; Lubke v. Mattin, 2009 BCSC 709; Travis v. Kwon, 2009 BCSC 63; Ghani v. Umran, 2008 BCSC 585; Hrnic v. Fast, 2004 BCSC 1411; Kahle v. Ritter, 2002 BCSC 199; Co v. Watson, 2010 BCSC 950.
- [45] An award for non-pecuniary damages must have regard to an appreciation of the individual's loss and meet the specific circumstances of the individual in each case. Having regard to the totality of the evidence and to the authorities, I conclude an appropriate award for non pecuniary damages in this case is \$75,000.

Past Wage Loss

- [46] Mr. Cripps missed work from April 24, 2006 to June 25, 2006. His gross wage loss is \$5,760. Deductions for income tax and EI premiums would reduce the net income to \$4,500.
- [47] It is the position of Mr. Cripps he continued to work as a crew member for CIS, but his ability to function was impaired. After earning reduced amounts in 2008 and 2009, he ceased work with CIS altogether. According to Mr. Olinek, before the accident he had a bright future with this company. Loss of income to the date of trial is therefore claimed at \$10,000.
- [48] Mr. Cripps delivered invoices for work he performed before and after the accident. In the year before and the year after the accident, the invoices totalled about the same amounts.

- [49] Prior to the accident, Mr. Cripps worked on weekends with CIS, primarily installing windows and doors on residential premises. This was heavy physical labour which involved ladder work, lifting doors and windows, cutting out windows with a saw, installing new windows both at ground level and while on a ladder or a scaffold. He was paid on a piecework basis.
- [50] In the year after the accident, the invoices described work such as installing windows; moving bricks; installing shutters; checking inventory; yard work; powerwashing; and scaffolding repairs. Mr. Cripps alleges the invoices are inaccurate and do not reflect the actual work done by him as they overstate what he did. He maintains the type of work he performed and his ability to perform it changed to the role of an assistant and "go-fer".
- [51] Mr. Olinek testified that he expected his subcontractors, like Mr. Cripps, to accurately record their work. He said the invoices rendered by Mr. Cripps reflected the work he performed. Mr. Olinek confirmed Mr. Cripps did not turn down jobs.
- [52] The plan was for Mr. Olinek's two sons and Mr. Cripps to take over the CIS business some day. In May 2009, Mr. Cripps says he ceased work for CIS following his separation from his wife because he felt awkward coming onto the Olinek premises, where his wife and children resided, to load his truck with job materials. Mr. Cripps maintains he lost an indeterminate amount of work both in the past and in the future at CIS because of the accident.
- [53] Mr. Cripps has established a loss from CIS because of the accident. Although he continued to work performing the similar duties and earning a similar amount in the year after as before the accident, and there is no proof of missed jobs, the evidence demonstrates a reduction in earnings from August 2007 to June 2009.
- [54] In the result, there is a loss of income to the date of trial in the amount claimed, at gross \$10,000.

Future Wage Loss: CIS

- [55] In my view, Mr. Cripps has not proved a real and substantial possibility of a future income loss for CIS. There is no future loss attributable to the accident. Mr. Cripps' feelings of discomfort about continuing to work at CIS are not related to the accident. The marriage breakdown contributed to Mr. Cripps' feelings of discomfort about continuing to work at CIS. Mr. Olinek confirmed this but testified he would welcome Mr. Cripps' continued involvement in CIS. The separation has been amicable and the parties have moved on with their lives. There is no reason why Mr. Cripps cannot work for CIS if he chooses.

Impaired Earning Capacity

Welding

- [56] Mr. Cripps testified he was interested in pursuing a career in welding and this plan has been made impossible by the accident. He indicated that he and his wife would have willingly relocated to pursue this career change.
- [57] Two months before the accident, Mr. Cripps applied for a seat in the Level C Welding Program at Kwantlen College. He was tested in March 2006 and July 2006. After the accident he received confirmation from Kwantlen that he was accepted in the August 2007 to March 2008 program. He declined the position due to "an ongoing medical condition". He received a delayed entry but did not pay for the March 2008 session so his name was removed from the list.
- [58] On his application to Kwantlen, he checked the box indicating he was taking the welding course for "self-improvement". He did not check the box for "career advancement". Mr. Moser and Mr. Mayer knew he was registered for the welding course, but Mr. Cripps admitted he had no discussion with Answer Garden about welding opportunities and there was no promise he would make more money. In fact, Answer Garden did not need another welder as that job was performed by Mr. Mayer. Mr. Cripps hoped Mr. Mayer might have given him some "harder jobs". Mr. Mayer described Mr. Cripps as "puttering at welding"; he did some welding at Answer Garden and Mr. Mayer believed "he was going to take the course so he could be better at those things". This evidence suggests the welding course was not intended to be taken to be used on the general market.
- [59] The evidence suggests it was very unlikely the Cripps would have moved away from the Olinek estate to pursue a very uncertain welding career. Mr. Cripps and Charity Olinek were well-established on the Olinek estate. Their living arrangement, with its low rent, nearby family support and childcare, and supplemental employment for Mr. Cripps at CIS, was ideal for the couple and their two small children. Mr. Cripps denied any difficulty with the close arrangement. Mr. Cripps and Mr. Olinek testified about a possible business plan to make security bars as part of his contract work for CIS. Before the accident, the Olineks had built a shed that was wired for welding. Between the evidence that a facility for welding work had been installed on the Olinek estate, the evidence that he pursued the welding course in order to supplement his work at Answer Garden and CIS, and his favourable living arrangement, it seems clear that he had no intent to leave town to pursue other work.
- [60] In fact, as Mr. Cripps told Dr. Quee-Newell in December 2007:

Mr. Cripps reported that he intended to continue working for his pre-MVA employer in the capacity of millwright's assistant and shipper/receiver had he not been involved in the 2006 motor vehicle accident in question. In his pre-MVA job he had the opportunity to perform some welding tasks and the applied nature of his type of work is generally compatible with Mr. Cripps' measured occupational aptitudes and interest. To this end, he successfully applied to Kwantlen University College's welding programme.

- [61] It is also uncertain that Mr. Cripps would have been able to complete the welding course and work as a welder. He twice failed to complete high school. He had never completed anything as demanding as the Kwantlen program, which would run five hours a night, five nights a week, for 28 weeks, while keeping up his day job from six a.m. to two p.m., as well as doing weekend piece work for CIS. The C course also required 30 to 45 minutes of homework per night. He did not have a plan to do the 1000 hours of welding work required to complete the C course. He had not contacted any other prospective welding employers. Further, this was at a time when he had a newborn and a three-year-old son. Mr. Cripps admitted the plan would likely have required him to lose sleep and "give up family time".
- [62] Mr. Al Sumal, the chair co-ordinator of the Kwantlen Department of Welding, noted that Mr. Cripps failed the vocational math test for welding. Mr. Sumal assumes he gained admission into the program by some concession during the interview. There is evidence that Mr. Cripps' aptitude for welding was borderline. Dr. Quee-Newell's vocational testing indicates Mr. Cripps failed all but one aptitude test for the classification of a welder. She suggested, however, that he might still succeed if he was motivated and "worked harder."
- [63] Even had he completed the program, Mr. Sumal confirmed that the market for welders has been poor. Income is higher for welders in oil, gas and mining, and it is lower in manufacturing, where new welders usually find work. Both Mr. Cripps and his wife stated that if an appropriate job came up outside the lower mainland they would take it. Mr. Szekely, Mr. Carson, and Mr. Sumal testified that there were many millwright jobs and welding jobs outside of the lower mainland that paid higher wages than those in the lower mainland, and many jobs in Alberta that paid higher wages still.
- [64] On the weight of the evidence, there is more than a real possibility that Mr. Cripps would not have completed the welding program in any event of the accident. If he did work as a welder, it is far more likely he would have worked in the local market, which attracts lower wages. Mr. Carson's Table 1 provides income data for welders in the Greater Vancouver area, which includes Abbotsford. A sampling of data for welders in the Abbotsford area shows a median wage of \$37,489, below Mr. Cripps' current income in his sales position.
- [65] The test for loss of income-earning capacity was recently restated in *Perren v. Lalari*, 2010 BCCA 140. In that case the Court of Appeal upheld the four-fold test initially enunciated in *Brown v. Golaïy* (1985), 26 B.C.L.R. (3d) 353, and stated again in *Kwei v. Boisclair* (1991), 60 B.C.L.R. (2d) 393. In those cases, it was stated that:
- ... some of the considerations to take into account in making that assessment include whether
- (1) the plaintiff has been rendered less capable overall 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: Perren at para 11.

[66] The Court in Perren went on to state that:

32 A plaintiff must always prove, as was noted by Donald J.A. in *Steward*, by Bauman J. in *Chang*, and by Tysoe J.A. in *Romanchych*, that there is a real and substantial possibility of a future event leading to an income loss. If the plaintiff discharges that burden of proof, then depending upon the facts of the case, the plaintiff may prove the quantification of that loss of earning capacity, either on an earnings approach, as in *Steenblok*, or a capital asset approach, as in *Brown*. The former approach will be more useful when the loss is more easily measurable, as it was in *Steenblok*. The latter approach will be more useful when the loss is not as easily measurable, as in *Pallos* and *Romanchych*. A plaintiff may indeed be able to prove that there is a substantial possibility of a future loss of income despite having returned to his or her usual employment. That was the case in both *Pallos* and *Parypa*. But, as Donald J.A. said in *Steward*, an inability to perform an occupation that is not a realistic alternative occupation is not proof of a future loss. [Emphasis in original]

[67] Perren concerned a plaintiff who, although still suffering some affects of her injuries, remained in her pre-accident employment. The Court referred to the judgement in *Pallos v. Insurance Corp. of British Columbia*, [1995] 3 W.W.R. 728 (BCCA), paras 16-19. In that case it was noted that "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": *Pallos* at para. 29.

[68] At paragraph 21 in Perren, the Court noted that "*Pallos* is not authority for the proposition that, in the absence of any real possibility of a future loss, a plaintiff is nevertheless entitled to an award for loss of earning capacity."

[69] Even in cases of apparent accommodation, there may still not be a substantial loss. In *Co v. Watson*, the 31-year-old plaintiff required accommodation to remain at work; however her long-term career had not been established. Her loss of capacity was assessed at \$35,000.

[70] In *Gignac v. Rozylo*, 2010 BCSC 595, at paras. 74-89, the plaintiff returned to work with accommodation. No award made for loss of earning capacity. See also: *Chandra v. Chen*, 2010 BCSC 838 at para. 28; *Fillmore v. McKay*, 2010 BCSC 1401 at paras 168, et seq.

[71] In Perren, the Court quoted and thereby reaffirmed the words of Finch J. A. (as he then was) in *Pallos* at paragraph 29:

The plaintiff's claim in [the *Pallos*] case, properly considered, is that he has a permanent injury, and permanent pain, which limit him in his capacity to perform certain activities 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: Perren at para. 19.

[72] In Perren, the Court allowed the appeal and set aside the award for future loss of income-earning capacity, commenting that the facts in Perren were different from the facts in Pallos. The Court stated at para. 21:

I observe first that, on its facts, Pallos is distinguishable from the case at bar. While it is true that, like Ms. Perren, Mr. Pallos continued to earn the same income from the same employer as he did before the accident, he was disabled from his previous duties. His employer had assigned him to lighter duties. He was disabled from his usual duties and had proven a loss of income earning capacity.

[73] Mr. Cripps claims that the above quoted words exactly describe his own situation. He argues there is no reason to deprive him of a significant loss of earnings award, based on his significant disability, merely because he happens to be given lighter duties by a sympathetic employer.

[74] It is the position of Mr. Cripps that at the time just prior to the accident, he was just starting out in family life. He had a grade 11 education, which he thought was a grade 12 education. He had worked under millwright Mr. Mayer, had done some welding and he thought he would further his career in welding. He applied to Kwantlen College, and was accepted after the accident. He understood there was no position as a welder at Answer Garden. He had the expectation he would eventually move on to a higher paying job. Mr. Cripps enjoyed heavy labour, and was skilled in operating heavy equipment and machinery like a loader and forklift, repairing and maintaining machines.

[75] The evidence of Dr. Teal and Dr. Adrian is that Mr. Cripps is not presently capable of performing physically demanding work. He is probably not suited to employment activities that require prolonged sitting, prolonged walking, standing, bending, and heavy or repetitive lifting.

[76] Dr. Quee-Newell noted it appeared unlikely Mr. Cripps would return to his pre-accident work because the physical demands of his heavy labour job duties would aggravate his pain symptoms. Dr. Quee-Newell remarked this would be considered a significant vocational loss, particularly in view of Mr. Cripps' long-standing work experience and his relative dearth of transferable skills. In the event that he sought alternate work, he would be better served by making this change sooner rather than later, thereby minimizing the extent of vocational disruption imposed by such a change.

[77] Munirah Shivji, OT, of Integrated Functional Solutions, in her functional capacity evaluation, offers the opinion that Mr. Cripps' physical limitations left him unable to meet the demands of working as a millwright's assistant.

[78] Mr. Cripps will clearly not have access to jobs for which he was previously suited. The evidence is clear that he cannot do any of these things without the risk of further injury. This is a significant loss to him. It is not an answer to the whole of his claim for loss of capacity to assert he is earning the same money as before the accident. Relying on Mr. Szekely's

economist report, Mr. Cripps asserts the negative contingencies that suggest a higher loss includes loss of earnings at CIS, a possible worsening of his physical condition, and possible dismissal from Answer Garden due to economic conditions. If he had to retrain, he would face difficulties given his below average aptitudes and his belief he would need to find a sympathetic and accommodating employer. Therefore, Mr. Cripps seeks damages for loss of income-earning capacity of \$300,000 to \$500,000.

- [79] It is the position of the defendants that Mr. Cripps has not shown any real and substantial possibility of a future loss. While he attempted to prove he would have completed the welding course (C and probably B) and would have pursued a welding career somewhere in BC or Alberta, it was not a real and substantial possibility he would succeed at a welding career. His move to a sales position at Answer Garden was a promotion, not an accommodation. He received a raise and continues to work for the same employer performing varied duties. He has always been predisposed to stay with Answer Garden, his employer for the past 15 years. His the lack of a high school diploma makes his current arrangement attractive. The defendants assert Mr. Cripps claim to an impaired earning capacity should be dismissed as unproven. Alternatively, it should be a year's salary to account for all contingencies, such as retraining, further improvement in his capacity, as well as credibility.
- [80] Much has been made of welding as an occupation and whether Mr. Cripps possesses the aptitude or ability to succeed in this particular field. However, this was how his case was presented. I agree the point is that the evidence establishes Mr. Cripps has lost the capacity to perform heavy labour, and to access some trades that were consistent with his skill, aptitude, and ability. This represents a capital loss to Mr. Cripps. The residual employability of Mr. Cripps is in jobs that are less satisfying to him and which may pay less money. His claim is for substantial damages for what represents a substantial loss to him. As Dickson J. said in *Andrews v. Grand & Toy (Alta.) Ltd.*, [1978] 2 S.C.R. 229 at 251: "It is not loss of earnings but rather, loss of earning capacity for which compensation must be made ... A capital asset has been lost: what was its value?"
- [81] On the facts, the most likely outcome is that Mr. Cripps will not suffer any actual loss of employment as the result of the accident. He was promoted to a less physically active position one year after the accident, and experienced a pay increase as a result. His employer has expressed satisfaction with his job performance. However, there is a remote possibility that Mr. Cripps may not be able to continue in his present employment, either because he does not like his job and would prefer to work outdoors, or because in the event his company falls upon economic hard times he may have difficulty finding accommodation from a sympathetic employer.
- [82] In my view Mr. Cripps has shown a real possibility of a modest future loss of capacity caused by the accident. For this reason, I find that he is entitled to an award for loss of earning capacity of \$50,000.

Cost of Future Care

- [83] The test for determining the appropriate award for cost of future care is an objective one based on medical evidence: *Milina v. Bartsch* (1985), 49 B.C.L.R. (2d) 33 (B.C.S.C.), affirmed 49 B.C.L.R. (2d) 99 (B.C.C.A.) at para 198.
- [84] It is the position of the defendants that Mr. Cripps was given home exercises at physiotherapy in 2006 where he received counselling by a kinesiologist. He is now independent with his exercises and is losing weight and reconditioning. He is likely to improve. He has not taken prescription medications or antidepressants in years. He takes Advil but this is largely undocumented. He has exaggerated his limitations, claiming items that he does not need or would not use. The defendants assert Mr. Cripps has failed to establish the medical necessity of any award under this heading.
- [85] Munirah Shivji, OT prepared a report detailing future care costs totalling \$80,550. There is no evidence to substantiate costs of surgery and post-surgery follow-up as there is no plan or need for surgery. Physiotherapy and an ergonomic assessment of the workplace are recommended by Dr. Adrian. A supervised exercise program is recommended by most of the medical specialists. Other costs, for massage therapy, housekeeping, home and yard maintenance and moving expenses, are not specifically recommended by other professionals. Whether they are in Ms. Shivji's sphere of expertise to recommend or not, I do find them substantiated by the medical evidence.
- [86] Ms. Shivji found Mr. Cripps to be deconditioned and her opinion of the cost of future care assumes a complete reactivation is required, including physiotherapy, a supervised exercise program and massage. Neither her report nor her raw data referred to the fact Mr. Cripps told her he had returned to the gym two days a week. She was unaware he bench pressed 100 pounds, washed his car and took out the garbage. She did not know that pre-accident he had already reduced from lifting heavy weights to light weights due to shoulder problems.
- [87] In 2006, the physiotherapist who treated Mr. Cripps ensured he was instructed in appropriate exercises by a kinesiologist. Mr. Cripps has had no treatments since 2006. He has not needed prescription medications since 2006. He uses over-the-counter pain medication as needed, but he has no documentation past 2006. He admits he is doing fine on his own at the gym, but he would like input from a personal trainer. He would like to try yoga or Pilates.
- [88] Mr. Cripps does need to exercise, recondition and lose weight. He would benefit from a short term active physiotherapy program like he had in 2006. He would benefit from the services of a personal trainer for a short time.
- [89] With respect to future care, consistent with the other medical opinions, Dr. Teal states:

I anticipate that Mr. Cripps will require ongoing treatments for the next few years. Mr. Cripps' treatments should include weight loss, stretching, and back strengthening exercises. Mr. Cripps will be required to exercise appropriate bending and lifting techniques. From a neurological perspective, Mr. Cripps is fully capable of performing jobs that are sedentary or involve light physical activity. He is not capable of performing jobs with heavy physical demands at this time.

- [90] Career/vocational counselling is recommended by Dr. Quee-Newell but is unsubstantiated on the evidence. As for vocational help, he claims he has no idea what he will do, in part because he has learned he does not have a high school diploma. He said, "I have to reassess my future. I am at ground zero". He feels he is "damned if I do and damned if I don't". This has nothing to do with the accident. Nor does the fact he does not like his present job. As Dr. Quee-Newell said, his current situation appears ideal. Mr. Cripps' job is secure, subject to some unforeseen downturn in the business. Mr. Cripps does not need career counselling.
- [91] Having regard to the medical opinions the items allowed for short term future care, anticipated generously for one to two years, are as follows: physiotherapy: \$1,000; supervised exercise program: \$1,000; gym pass: \$1,000; OTC pain medications and products: \$500; ergonomic assessment: \$450; desk: \$1,300; angled work surface: \$195; headset telephone: \$150; stool: \$200; back support: \$80; foot support: \$45. The total award for cost of future care is \$5,920.

Tax Gross Up and Cost of Future Care

- [92] Hopefully the parties will be able to agree on any tax gross up, if necessary, on the award for cost of future care. As can be seen, the award is for care in the immediate future and I would not expect it would last much beyond one or two years.

Failure to Mitigate

- [93] Dr. Adrian noted deconditioning and recommended exercise in 2007. Dr. Froese agreed exercise was highly recommended in this case. Dr. Teal also agreed. Dr. Smith recommended "vigorous" exercise. Mr. Cripps needs weight loss, exercise, and reconditioning.
- [94] Mr. Cripps testified that he did not really begin exercising until May 2009, more than three years after the accident, and after his separation. Before that, he had done some stretching exercises prescribed by the physiotherapist. He is now going to the gym two to three times a week. He is lifting weights. He bench presses 100 pounds. The results have been dramatic as he is losing weight, reconditioning, and his mood is dramatically improved. He acknowledges, and his brother confirms, that an excuse for the delay in following medical advice to exercise was that he was feeling sorry for himself. Steve Cripps noted his brother to be wallowing in "self-pity" following the accident. He was "depressed to have to move in with his parents". He told Steve Cripps he "felt he had no life, just work and babysit the kids life was monotonous". When Mr. Cripps moved in with his brother, he encouraged Mr.

Cripps to go to the gym. Mr. Cripps lost weight and looked better. "It seemed to put a smile on his face". He "started to be happier started to have more of a life". Now, he is social and it is "doing him a lot of good". In light of this evidence, there is no foundation on the evidence to support the opinion of Dr. Smith that Mr. Cripps suffers from mild dysthymic disorder, a mood disorder.

- [95] Mitigation limits recovery based on an unreasonable failure of the injured party to take reasonable steps to limit loss. There is a positive duty to mitigate. The onus is on the defendants to prove failure to mitigate: *Graham v. Rogers*, 2001 BCCA 432, at para. 35.
- [96] There is evidence to satisfy the onus in this case. Mr. Cripps failed in his duty to mitigate his loss by exercising consistently and getting active. Mr. Schneider provided exercises in 2006. He had abandoned these by the time he saw Dr. Adrian in 2007. Dr. Adrian recommended reconditioning in 2007. There is no proof of any impediment to exercise other than Mr. Cripps felt sorry for himself. Dr. Smith highly recommends vigorous exercise to elevate mood.
- [97] The court must reduce damages based on its assessment of the consequences that flow from the failure to mitigate: *Taylor v. Loney*, 2009 BCSC 742.
- [98] The defendants seek a significant reduction of damages in the range of 25% to 40%: *Middleton v. Morcke*, 2007 BCSC 804; *Latuszek v. Bel-Air Taxi (1992), Limited* 2009 BCSC 798.
- [99] The benefits of exercise were proven when Mr. Cripps began to go to the gym in 2009. Once Mr. Cripps started this exercise program he was a different person. Had Mr. Cripps started and maintained an exercise program as his doctors and physiotherapist urged him to do, it is probable his prognosis would be more favorable. The failure to mitigate implicates not only his physical injuries, but any emotional ones, including irritability that may have contributed to his marriage breakdown.
- [100] There will be a reduction of damages of 25% for failure to mitigate.

Special Damages

- [101] Special damages totalling \$646.24 are admitted.

CONCLUSION

Summary of Damages

- [102] I find that Mr. Cripps is entitled to damages, with Court Order interest as relevant, as follows:

Non-pecuniary damages: \$ 75,000

Past wage loss: \$ 10,000

Loss of earning capacity: \$ 50,000

Cost of future care: \$ 5,920

Special damages: \$ 646.24

Total: \$141,566.24

There will be a 25% reduction for failure to mitigate.

Costs

[103] If the parties cannot resolve the issue of costs, they may make written submissions within 30 days.

"Stromberg-Stein J."

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.bccourts.ca/jdb-txt/SC/10/17/2010BCSC1779.htm>

CASE PAGE <https://chat.esheria.ai/case-law/canada/cripps-v-overend-2010>

Prepared on 29 October 2026 · Esheria