
CANADA / JUDGMENT

Easton v. Wolovets

2015 BCSC 210

COURT

Supreme Court of British Columbia

DECIDED

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2015 BCSC 210 Easton v. Wolovets

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Easton v. Wolovets,

2015 BCSC 210

Date: 20150216

Docket: M130510

Registry: New Westminster

Between:

Daryl Alan Easton

Plaintiff

And

Mitchell Curtis Wolovets

Defendant

- and -

Docket: M147357

Registry: New Westminster

Between:

Daryl Alan Easton

Plaintiff

And

Chane Neil Joseph Munro and

Marie Levesque

Defendants

- and -

Docket: M152239

Registry: New Westminster

Between:

Daryl Alan Easton

Plaintiff

And

Roger Eric Deglan

Defendant

Before: The Honourable Mr. Justice Williams

Reasons for Judgment

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Place and Dates of Trial:

New Westminster, B.C.

June 2-6; 9-13, 2014

Place and Date of Judgment:

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February 16, 2015

Table of Contents

Introduction.	4
The Evidence and the Circumstances.	5
Discussion.	10
Prior Accidents.	10
The Plaintiff's Credibility.	10
Causation.	11
Mitigation.	12
Multiple Motor Vehicle Accidents.	16
Non-Pecuniary Damages.	17
Past Income Loss.	19
Loss of Future Earning Capacity.	20
(a) Richard Carlin, Vocational Rehabilitation Counsellor	21
(b) Dr. R.D. Hamm, Occupational Medicine Specialist	21
(c) Louise Craig, Certified Functional Evaluator	22
(d) Dr. Dean Powers, Vocational Rehabilitation Expert	22
(e) Robert Carson, Labour Economist	22
Cost of Future Care.	27
(a) Chronic Pain Program..	28
(b) Physical Exercise.	28
(c) Psychological Counselling.	29
(d) Occupational Therapy.	30
(e) Vocational Services.	30
(f) Non-Professional Services.	30
Special Damages.	31
Summary.	31

Introduction

- [1] These reasons for judgment are rendered in respect of three actions in negligence brought by the plaintiff Daryl Easton claiming damages resulting from injuries sustained in three separate motor vehicle accidents. All three actions were tried together. Liability has been admitted by the defendants for each of the collisions. Accordingly, these reasons deal with the assessment of the claims for damages.
- [2] The plaintiff was 33 years old as at the date of trial. He is a carpenter by trade, although his ability to work at that vocation has been significantly impacted by the injuries he has suffered, and that is a major component of his claim for compensation.
- [3] Mr. Easton is married; he and his wife have a son, age two at the time of trial. As well, the birth of a second child was expected shortly.
- [4] The claims which are advanced by the plaintiff fall under a number of separate heads:
- non-pecuniary damages;
 - past income loss;
 - future income loss / loss of capacity;
 - cost of future care; and
 - special damages.

The quantum of the past income loss and the special damages has been agreed upon by the parties. The other heads of damage are at issue.

- [5] The defendants do not dispute that injuries were incurred by the plaintiff and that he is entitled to an award of damages. However, they take issue with the extent of the claims advanced and the amount of the sums sought.

The Evidence and the Circumstances

- [6] A significant body of evidence was adduced at trial, including the opinions of a number of medical practitioners and other persons with expertise in other relevant matters. As well, six lay witnesses were called to testify as to the practical aspects of the accidents' effects on Mr. Easton's life respecting his personal and family circumstances and also his employment. Of course, Mr. Easton testified as well.
- [7] By way of general overview, I will set out a description of the motor vehicle accidents and the injuries that Mr. Easton says that he sustained; his work circumstances at the relevant times; and the medical and therapeutic resources that he accessed.

- [8] The first motor vehicle accident occurred on October 6, 2008 at an intersection in Langley. The plaintiff was driving his 1994 GMC Sonoma pickup on 208th Street. He came to a complete stop near 84th Avenue because of a traffic jam. The defendant Mr. Wolovets was travelling behind Mr. Easton in his own pickup truck. He did not stop and drove into the back of Mr. Easton's vehicle. The force of the collision was apparently significant. There was substantial damage to Mr. Easton's vehicle and it was ultimately written off as a total loss.
- [9] At the time, Mr. Easton was employed as a lead hand/foreman carpenter by Marino General Contracting ("Marino"). The company's work was principally custom home renovations and some new construction. The plaintiff had been employed there since 2006 and was well regarded by the employer and those with whom he worked as a confident, capable and reliable tradesmen. He performed a full spectrum of responsibilities, including managing jobs and supervising employees, as well as hands-on responsibilities: various site work, demolition, rough carpentry and framing, through to fine finish work. He was also sometimes called upon to do the work of other related trades, such as plumbing and tiling. He was well able to perform those tasks.
- [10] Three days after the first accident, the plaintiff went to the clinic where his family doctor, Dr. Pabani, practiced. Dr. Pabani was not available but Mr. Easton saw another doctor there, Dr. Lee. Mr. Easton complained of soreness in his left shoulder and neck, as well as discomfort in his lower and mid back. He returned two weeks later and was seen by Dr. Pabani. He was directed to take anti-inflammatory and muscle relaxant medications and was referred to physiotherapy.
- [11] In November, Mr. Easton attended at the Marpole Physiotherapy & Rehabilitation Clinic where he underwent five sessions of therapy. Otherwise, he carried on with his work and his usual activities, although he reports that he was experiencing weakness and tingling in his left arm, particularly when he was doing overhead work. Because of that, he went back to see Dr. Pabani in August 2009. The doctor observed what he thought to be a muscle spasm in the plaintiff's neck and upper trapezius area, especially on the left side. He advised Mr. Easton that he should work on conditioning and strengthening exercises and considered that this might be a matter of carpal tunnel syndrome.
- [12] Between April and June 2010, the plaintiff attended a physical therapy program, Life Force, for a total of 15 sessions.
- [13] In January 2011, because of the persisting discomfort, Mr. Easton was examined by Dr. Travlos, a physiatrist. Based upon his examination, Dr. Travlos diagnosed Thoracic Outlet Syndrome ("TOS") of the left upper extremity. To further investigate, he recommended that MRI tests be conducted. That information was subsequently communicated to Dr. Pabani, who ordered a nerve conduction study and also referred the plaintiff to Dr. Fry, a surgeon with substantial expertise and considerable experience in dealing with TOS.

- [14] Dr. Fry met with and examined the plaintiff in May 2011. He concluded that Mr. Easton had "functional thoracic outlet syndrome on the left side" and also suspected that he might have multiple crush syndrome. Based upon his findings, he recommended surgery for Mr. Easton, namely first rib resection of the left side.
- [15] The plaintiff also had a number of sessions with a kinesiologist in 2011, Mr. Tsai, who conducted an evaluation and then began a strengthening program for Mr. Easton.
- [16] The surgery was scheduled for December 6, 2011. Prior to that, on November 15, 2011, Mr. Easton was involved in the second of the subject motor vehicle accidents. He was in the parking lot outside a bowling alley with his wife and son. He was putting his son into a car seat in the rear of the vehicle. At that point, another automobile, parked nearby and operated by the defendant Ms. Levesque, began to move and came into contact with the door of the Easton vehicle, pushing the door into Mr. Easton. While this was an upsetting incident, the actual consequences in terms of injury were relatively minor.
- [17] Dr. Fry conducted the operation on December 6, 2011. The surgery proceeded in a normal and straightforward fashion without any apparent complications. Mr. Easton was subsequently released from hospital and directed to remain away from work. It is to be noted that up to the time shortly before the surgery, he had not taken time off but had continued to work at Marino.
- [18] On February 3, 2012, the plaintiff returned to see Dr. Pabani. At that point he was eight weeks post-surgery. Matters appeared to be progressing well; however, Dr. Pabani recommended that Mr. Easton remain off work for a further two months. At the next visit, in April, Mr. Easton reported experiencing left arm pain and had a reduced range of motion. His grip strength on his left side was decreased. Dr. Pabani recommended exercise and physiotherapy.
- [19] Mr. Easton attended at the Glover Physiotherapy and Hand Clinic in Langley and received treatment between April and August 2012. Some improvement in his condition was noted.
- [20] From an employment perspective, the plaintiff's circumstances continued in an unfortunate state. He remained unable to return to work at Marino.
- [21] That situation came to a head in June 2012. Mr. Easton had repeatedly indicated to his employer that he would be returning to work. When that did not happen and he was unable to return to work, the employer decided that he could not wait indefinitely. He advised Mr. Easton that his employment was terminated.
- [22] In the summer of 2012, Mr. Easton returned to see Dr. Fry, who was concerned about the condition of the plaintiff's left shoulder. He suspected a scapular/thoracic left shoulder dysfunction syndrome and advised Mr. Easton that he was not fit to return to work.

- [23] Mr. Easton remained off work. On October 12, 2012, as part of his rehabilitation, he began an extensive work reconditioning program at a facility called HealthEx. The program was comprised of four hours per day of physical therapy and extended over a total of 12 weeks. This was undertaken on the basis that Mr. Easton had not recovered sufficiently so as to be able to return to work. In the early stages of this program, the plaintiff saw Dr. Pabani. He concluded that Mr. Easton appeared to be making a proper recovery and felt that in short order he would be able to engage in light duties and probably be able to return to full work duties at the conclusion of the program.
- [24] Matters did not proceed as hoped. On January 7, 2013, the plaintiff again visited Dr. Pabani. He reported that there had been a flare-up of his symptoms while performing the HealthEx program. He complained of experiencing soreness and tightness in his left neck and shoulder area and having tingling in his left arm and finger. Dr. Pabani advised the use of heat, muscle relaxants, anti-inflammatories and stretching.
- [25] Mr. Easton found those measures alleviated some of the symptoms but he continued to experience pain in his left arm.
- [26] The third subject motor vehicle accident occurred on March 19, 2013. Mr. Easton was driving his Ford truck, travelling eastbound on 28th Avenue in Langley. Approaching an intersection, he slowed with the intention of turning left. A van operated by the defendant Mr. Deglan came through the stop sign without stopping and drove into the left side of Mr. Easton's truck. The damage was fairly significant and again the vehicle was deemed a total loss. Mr. Easton was wearing his lap and shoulder belt. He described having sustained a sore jaw, and said that his left side arm and shoulder were inflamed and tightened up. Two days after the accident, the plaintiff attended at Dr. Pabani's clinic where he saw Dr. Carlson. His injuries were observed and he was advised to continue his physiotherapy and to take a low dose of nortriptyline as Dr. Travlos had earlier recommended.
- [27] A further medical complication developed in that the doctors who were involved in the case, particularly Dr. Travlos and Dr. Pabani, recognized that circumstances appeared to be taking a psychological toll on Mr. Easton. Both observed evidence of low mood and some suggestion of depressive symptoms. In August 2013, Mr. Easton saw Dr. Anderson, a psychiatrist. Dr. Anderson found that the plaintiff was emotionally withdrawn, irritable and having concentration difficulties.
- [28] Earlier in the year, in May of 2013, Mr. Easton had met with a psychologist, Dr. Chung, for an assessment. Dr. Chung had diagnosed the plaintiff with an anxiety disorder and depressive symptoms, and began a course of cognitive behavioural therapy. Dr. Anderson concurred in that view. In his opinion, Mr. Easton's symptoms were consistent with a diagnosis of moderately severe major depressive disorder. He recommended continuing psychotherapy with a psychologist and antidepressant medication.

- [29] Matters have continued in that general trajectory for the plaintiff. He has continued to experience pain in his upper left extremity. He has been unable to return to his usual work as a carpenter. He has attempted a number of courses of physical therapy; some have been of some benefit. He has made efforts to find other work, mostly without success. In order to make ends meet, he found a number of odd jobs. Because of the fact he was unable to generate a regular income, his wife has had to continue working at multiple jobs, mostly of a quite basic type. Mr. Easton also found himself forced to sell a number of his recreational possessions in order to have money for day-to-day purposes. As well, he has had to borrow funds from his father.
- [30] In the course of preparing for this litigation, Mr. Easton met with a vocational counsellor Dr. Powers. In addition to conducting an evaluation of the plaintiff's circumstances, Dr. Powers made active efforts to find suitable employment for Mr. Easton. In late 2013, a placement was found at a small construction company, Intrinsic General Contracting ("Intrinsic"). In fact, Mr. Easton's younger brother is the lead hand at Intrinsic and was instrumental in organizing a place for the plaintiff, although that entailed substantial accommodation. Initially Mr. Easton worked there on an unpaid basis but in early 2014 he was taken on at a reduced workload and reduced salary. As at the date of trial, that arrangement was continuing although it could fairly be described as somewhat tenuous.

Discussion

- [31] Before examining the specific heads of damages that have been claimed, I wish to make certain observations and deal with a number of matters that are of general relevance to the claims at bar.

Prior Accidents

- [32] The evidence disclosed that Mr. Easton had been involved in two relatively minor motor vehicle accidents, one in 2001 and one in 2002. I am satisfied that the consequences of those accidents had fully resolved by the time of the first accident at issue in this case, and that neither of those prior accidents has any bearing upon the claims at issue in this litigation.

The Plaintiff's Credibility

- [33] In a trial such as this, the issue of credibility is often raised, particularly the credibility of the plaintiff. Here, the defendants have made submissions in that regard: they contend, quite forcefully, that Mr. Easton is a witness whose credibility should leave the Court with real reservations. A number of specific instances are cited as examples of the unreliability of his testimony.
- [34] I have considered those carefully in the course of examining the evidence in this trial. I have had the opportunity to see Mr. Easton in the witness stand and to reflect upon the issue. My conclusion is that the plaintiff is essentially a credible witness. For the most part, he is

something of a stoic and non-complaining individual. He is not an especially sophisticated or glib person. He is plain-spoken. There were times in the course of the trial where his frustration became apparent. There were times that he was confronted, as almost inevitably will be the case, with discrepancies in records. Having considered those circumstances, I am satisfied that he has attempted to be truthful and that his testimony is believable.

Causation

- [35] A central issue in this trial is the diagnosis of TOS, which is Mr. Easton's principal injury and the one that I find is the driver for most of the difficulties that found his claims.
- [36] The defendants urge this Court to conclude that the plaintiff has not established that the TOS condition was caused by the negligence of the defendants, individually or collectively. Instead, they submit that it is reasonable to find that this condition resulted from some pre-disposition Mr. Easton had, in conjunction with the effects of the work that he performed. In that scenario, it is the submission of the defendants that the plaintiff sustained no more than soft tissue injuries in each of the subject accidents, and that the TOS diagnosis, which was not made until some time after the 2008 accident, could well have been precipitated by repetitive strain, heavy lifting and overhead work. They also suggest there is a possibility that the earlier motor vehicle accidents in 2001 and 2002 may had a causal role.
- [37] I am unable to accept that characterization of the matter. The medical evidence, and there is a substantial body of such evidence here, taken in its totality, leaves me entirely satisfied that the TOS was caused by the 2008 accident. The fact that its full manifestation was delayed and not immediate, namely that he was able to carry on with his work and other activities for some time after the accident, accords with the opinions of those who have expertise in the matter. It is telling, in my view, that the medical expert of the defendants, Dr. Woolfenden, supports that conclusion.

Mitigation

- [38] The defendants submit that the plaintiff has failed to mitigate his damages by not complying with recommendations made by his treating medical professionals, specifically, with respect to medications and exercise. They also raise the issue of mitigation with respect to what they say was a failure to have taken timely steps to find other work that was compatible with his diminished capability.
- [39] The defendants rely on the general principle of the duty to mitigate and make specific reference to three decisions where plaintiffs were found not to have complied with recommendations to take specific medications and where the plaintiffs had not followed through with exercise programs which had been recommended: *Besic v. Kerényi*, 2011 BCSC 1277 [the court reduced the non-pecuniary damages by 10%]; *Pond v. Bucsis*, 2013 BCSC 2001 [30% reduction in non-pecuniary damages]; *Middleton v. Morcke*, 2007 BCSC 804 [a 40% reduction in non-pecuniary damages].

- [40] In the submission of the defendants, the result of the plaintiff's failure to mitigate his damages in this case should be a reduction of 30% to 40% in the non-pecuniary award. The defendants also submit that "arguably, that deduction should also carry over to the issue of past income loss and future loss of income". They say that if the plaintiff had appropriately followed his physicians' advice with respect to treatment, his symptoms would have been reduced and his function would have improved. He accordingly would have been able to return to work sooner and in a less limited capacity than he did. Additionally, they say that if the plaintiff had maintained the very significant improvement in his function that he gained in his exercise program in the spring and summer of 2013, he likely could be working regular hours rather than the reduced hours that he currently works and may continue to work in the future.
- [41] One element of this allegation is that the plaintiff chose not to take medications as he ought to have and was not sufficiently aggressive in asking his doctor to prescribe medications for him. In response, the plaintiff says that he took the medication that was prescribed for him but points out that he experiences difficulty in taking pills. However, it is also evident that this information may not have been fully communicated to Dr. Pabani. As well, the defendants suggest this Court should be wary of accepting the plaintiff's claim that he has difficulty tolerating medications. They say it is more a matter of him taking them when it suits him.
- [42] The facts of the matter are, it seems to me, not straightforward.
- [43] I note that for example with respect to the Neurontin medication Lyrica, there is no evidence that Dr. Pabani prescribed that medication to Mr. Easton.
- [44] The issue is made somewhat more complicated because, over the relevant time, there were four separate medical practitioners involved: Dr. Pabani, Dr. Travlos, Dr. Fry and Dr. Anderson.
- [45] The reality is that there was a significant element of confusion with respect to recommendations that were being made for medications. With the benefit of hindsight, it is apparent that instructions should have been given and prescriptions should have been written, such that the plaintiff would have been provided with directions to take specific medications. In fact, that did not happen.
- [46] It is also a factor that Mr. Easton is not one who is keen to take medications or who seeks them out. That is in keeping with what appears to be a general attitude of some stoicism and reluctance to make appointments to see doctors frequently.
- [47] However, where the treating medical professionals have not prescribed medications, I am not prepared to lay the blame at the feet of the plaintiff and find that he failed to take reasonable measures such that he can be said not to have mitigated his losses.

- [48] My view is informed by the fact that Mr. Easton is a relatively unsophisticated individual and that was a factor in his dealings with the doctors with whom he dealt. It is also relevant that, for a substantial portion of the time, he was, I am satisfied, impacted by depression, and that is a consideration.
- [49] With respect to exercise programs, while there is room to conclude he could have been more diligent, when the evidence is examined, the case does not rise to the point that it warrants finding that Mr. Easton should be penalized.
- [50] As examples of his shortcoming in that regard, the defendants make reference to the program he undertook with Mr. Tsai in 2011, noting that he did not complete the program because its scheduling conflicted with his work obligations. Reference is also made to the occasion in 2012 when he attended the Glover Physiotherapy program. It now appears that the therapy which he was receiving there may not have been optimal: it seems to have been focused upon stretching and passive activities. However, I am unable to see how the fault for that deficiency can be attributed to the plaintiff.
- [51] In 2013, both Dr. Pabani and Dr. Travlos were recommending strengthening and conditioning. Dr. Travlos specifically said that Mr. Easton should be engaging in sessions of approximately 80 minutes of cardio and core strengthening, in the order of three to four times per week.
- [52] The evidence suggests that Mr. Easton was not complying with that recommendation; he was doing less. However, a short while later, he commenced a program under the supervision of Mr. Tsai, a kinesiologist. That therapy was effective and resulted in significant improvement - his pain levels decreased, his strength and endurance improved markedly. Accordingly, I cannot see that there was any significant harm done.
- [53] Mr. Easton did not continue on his own at that level. What he did subsequently was less intensive, consisting of some stretching but no strength training. In determining what significance should be assigned to this, I consider it to be relevant that the evidence establishes that at the relevant time Mr. Easton was coping with a serious depression. The testimony of Dr. Anderson indicates that an effect of that condition is a degree of apathy that can adversely impact the focus and discipline necessary to carry on with self-directed exercise programs. To my mind, there is a striking logic to that explanation, and I find that to have been a factor in the present case.
- [54] As I understand the submissions of the defendants, there are other aspects as well to the contention that the plaintiff did not conduct himself in ways that would have lessened the effects of the accidents upon his health and his ongoing prospects for vocational success. As an example, issue is taken with what is alleged to have been Mr. Easton's failure to make mention to Dr. Pabani of his symptoms of depression. Another matter raised in this regard is that the plaintiff did not really make the necessary modifications to his duties at work while he was still at Marino. Those changes would have presumably been more accommodating and more forgiving of the physical problems he was experiencing. Finally,

the defendants say that the plaintiff should have recognized from the results of the medical investigations that it was unlikely that he would be able to return to the same level of work performance that he had previously had. By persisting in the expectation that matters would resolve, rather than actively taking steps to find and qualify for another vocational path, they submit he has failed to take reasonable steps to mitigate his damages.

[55] With respect, I am unable to accede to these submissions.

[56] When considering whether a plaintiff should be found not to have mitigated his losses, the standard of judgment to apply must be one of reasonableness: what would be expected of a sensible and responsible person in the circumstances of the plaintiff: *Gregory v. Insurance Corporation of British Columbia*, 2011 BCCA 144 at paras. 53, 56. It is not a state of near perfection, assisted by the benefit of 20:20 hindsight. In this case, the facts are somewhat unusual in that the problems which ultimately came to define the extent of this man's condition were not immediately apparent following the first accident. Mr. Easton continued his work, as would be expected of a reasonable plaintiff. Only later did the full extent of the effects of the accidents manifest themselves. He then sought medical care and complied in a reasonable way with the advice of medical professionals.

[57] That he was not especially ardent in attending upon doctors is not, in the circumstances, a basis to penalize him. Nor is the fact that he did not pursue every possible inquiry with his doctors. It is quite relevant as well that, when the evidence is examined in detail, much of what is complained of respecting the medication issue is due to the fact that the doctors, and particularly Dr. Pabani, did not prescribe the medications that, as now seems apparent, should have been prescribed.

[58] In short, I am not prepared to find that Mr. Easton failed to mitigate his damages so as to warrant a reduction in the entitlement to the appropriate awards.

Multiple Motor Vehicle Accidents

[59] It is my conclusion that the first of the three subject motor vehicle accidents was the event which has substantially resulted in the injuries with which this trial is concerned. The second and third accidents resulted in what I would describe as relatively minor and fairly transitory effects, aggravating the symptoms that were already established from the original 2008 event.

[60] In the course of trial and in the submissions which have been made, the defendants have not suggested that the Court should allocate damages as among the individual defendants. Accordingly, the awards of damages that are made here are not apportioned among the defendants or the specific accidents.

[61] With those matters addressed, I will now turn to a discussion of the various heads of damages claimed.

Non-Pecuniary Damages

- [62] Mr. Easton seeks an award of damages to compensate him for the pain, suffering and loss of enjoyment of life resulting from the negligence of the defendants.
- [63] In the plaintiff's submission, an appropriate award under this head is in the amount of \$200,000. In support of that, he relies upon two cases, *Stapley v. Hejslet*, 2006 BCCA 34, and *Hubbs v. Escueta*, 2013 BCSC 103.
- [64] The defendants say that an appropriate award is in the range of \$28,000-\$30,000 if the Court concludes that the plaintiff's TOS condition was not caused by their negligence.
- [65] As indicated, I reject that position. I find on a balance of probabilities that the TOS was a consequence of the collisions, specifically the first collision.
- [66] In that event, the defendants submit that an appropriate award of non-pecuniary damages is in the range of \$90,000-\$100,000. The authorities relied upon are *Carr v. Simpson*, 2010 BCSC 1511 and *Gillam v. Weib*, 2013 BCSC 565.
- [67] I am satisfied that the effects of the injuries which Mr. Easton sustained, have had both directly and indirectly a serious negative impact upon a number of aspects of the quality of his life.
- [68] His pain and discomfort have been significant. The effects of the TOS include myofascial pain and chronic pain. His relations with his spouse and his ability to properly participate in the upbringing of his infant son have been impacted. His ability to work at his trade was an important part of his life. As a result of the accidents, that has been radically changed. His ability to provide for his family has been greatly altered. Prior to the accidents, Mr. Easton was active in a number of outdoor pastimes; those have been substantially limited. As well, the injuries and their effect upon him have had a significant psychological dimension, including depression and anxiety in an automobile. The distress that he has experienced and continues to experience is real and serious.
- [69] Many of his symptoms were continuing at the date of trial, and there is good reason to expect that those problems will continue, albeit with some level of resolution to be expected.
- [70] In a related vein, I was struck by the benefit achieved by Mr. Easton in the physical therapy program which was provided by Mr. Tsai. While I do not suggest that such a program is a means of achieving total relief from his symptoms, it is apparent to me that a diligent pursuit of a serious program of that nature could have very positive effects.
- [71] I turn now to the authorities to which I have been referred.
- [72] *Stapley* is an oft-cited case. It is principally recognized for the very helpful framework it provides for assessing non-pecuniary damages and the many considerations that bear upon the issue. In terms of the actual facts of that case as a meaningful comparator to the present

case, I find it to be of quite limited value. That is because the circumstances of the plaintiff Mr. Stapley were unusual in that the injuries that he had sustained resulted (and were inevitably bound to result) in consequences specific to him: the company-provided accommodation which was a substantial part of his community connection would be lost to him. That is not a feature which is present in Mr. Easton's situation.

- [73] In the result, I am not able to accept that Stapley is useful in attempting to determine an appropriate quantum of non-pecuniary damages for Mr. Easton.
- [74] Similarly, the facts of Hubbs do not provide a particularly useful comparison. The plaintiff there incurred significant orthopedic injury: a serious fracture of his ankle. The injury necessitated two surgeries; he was left at risk for arthritic complications and deteriorating physical capabilities. The injuries were quite unlike those in the present case.
- [75] The plaintiff in Gillam was a 32-year-old production worker at a meat processing facility. She sustained serious injuries in an accident including neck and shoulder chronic pain, TOS, headache and low mood. The TOS affected her dominant hand. In the matter at bar, the effect of Mr. Easton's TOS is fortunately to his non-dominant arm and hand. Ms. Gillam's neck and shoulder injury and her TOS caused her ongoing pain and limitation of function. Her prognosis was poor in that it was expected that she would have a permanent limitation of function and pain. While she was a healthy, active, outgoing and sociable person prior to the accident, all of that was substantially diminished by the event. The impact upon her life was substantial. The court found an appropriate award of non-pecuniary damages to be \$90,000.
- [76] Carr also involved a plaintiff who incurred a number of injuries with similarities to those of Mr. Easton. The plaintiff, Ms. Carr, was 39 years old at the time of her accident. She had been a housekeeper by vocation. At trial, some five years later, she had not been able to return to work. Her injuries included: neck, upper back and trapezius pain; bilateral TOS; injury to her right wrist that required surgery and for which more surgery was indicated; injury to the left knee that had been treated surgically; low back pain; hip pain; headaches; dizziness; and depression. Her non-pecuniary damages were assessed at \$100,000.
- [77] Obviously, no two cases are the same. Nevertheless, decisions of other courts in similar situations are of value in assessing a fit and proper award. I find that the latter two cases are useful in providing guidance in the present matter.
- [78] In this case, it is my conclusion that an appropriate award of non-pecuniary damages for Mr. Easton is \$125,000.

Past Income Loss

- [79] The parties have agreed upon an amount for past income loss of \$125,000, net of taxes.

Loss of Future Earning Capacity

- [80] The law regards an individual's earning capacity as a capital asset. Where the court determines that this asset has been diminished as a consequence of a tortfeasor's conduct, the plaintiff is entitled to a compensatory award: *Pallos v. Insurance Corp. of British Columbia*, 100 B.C.L.R. (2d) 260 at paras. 26-27, [1995] 3 W.W.R. 728 (C.A.). Determination of the appropriate compensation is in most instances not a straightforward matter. The court is obliged to determine a fit and proper award not by any mathematical calculation, but rather by an assessment. Essentially, the exercise is to compare the likely future of a plaintiff if the accident had not happened and the plaintiff's likely future with the effects of the accident considered.
- [81] To establish a claim for the loss of future earning capacity, the plaintiff is required to prove that there is a real and substantial possibility of a future event leading to income loss. Once the plaintiff discharges that burden of proof, then the quantification of the loss will be determined on one of two alternate approaches, either an earnings approach or a capital asset approach: *Perren v. Lalari*, 2010 BCCA 140 at para. 32. Either is an acceptable approach to the assessment.
- [82] At the outset, I have no reservation in concluding that the plaintiff has proven that there is a real and substantial possibility of a future event leading to income loss. Mr. Easton was, prior to the accidents at bar, an able-bodied and active participant in the workforce. He was fully and productively engaged in the trade of carpentry. He has demonstrated a clear pattern of employment establishing that.
- [83] As a consequence of the accidents and the injuries which he has sustained, I am satisfied that he is unable to function at the same level of productivity in that field, and that it is likely that this diminishment will continue for the balance of his working life.
- [84] The challenging issue is to establish the quantum of an appropriate award.
- [85] This head of damages constitutes far and away the most significant component of the claims advanced by Mr. Easton. It is his submission that the loss he has sustained under this head warrants an award of \$1,200,000.
- [86] The defendants take issue with that amount. While they do not dispute that Mr. Easton is entitled to an award for this loss, it is their position that the quantum is substantially less. They say that the appropriate award is in the range of \$200,000-\$350,000.
- [87] The evidence which informs this aspect of the claim includes the following.
- (a) Richard Carlin, Vocational Rehabilitation Counsellor
- [88] Mr. Carlin interviewed the plaintiff and administered a number of vocational tests. He then prepared reports which are exhibits in this trial. He was not required to attend for cross-examination. Mr. Carlin says that:

[The plaintiff's] ongoing physical limitations, pain and related emotional issues have, in my opinion, significantly impaired his capacity to earn income and continue in his pre-collision career trajectory. Mr. Easton faces a difficult future; either he will have to be satisfied working at unskilled or semiskilled occupations or will need to retrain in a formal vocational program.

Mr. Carlin expressed the opinion that there are very few job opportunities in the field of carpentry that will be available to Mr. Easton and that Mr. Easton's limited educational background will substantially restrict other direct entry jobs which would be available to him. He included in that short list delivery driver, retail sales, counter clerk, cashier and inside wholesale jobs.

(b) Dr. R.D. Hamm, Occupational Medicine Specialist

[89] Dr. Hamm concluded that the plaintiff has residual left TOS, left ulnar sensory neuropathy, left cervical -scapular myofascial pain syndrome, and a situational adjustment disorder with mixed mood. It is his opinion that Mr. Easton's "ongoing problems due to the accident of October 6, 2008 will adversely affect his employment opportunities for the foreseeable future. In particular, he will have ongoing difficulties in sustained use of his left upper limb and he is not capable of heavy physical demand work with his left upper limb". He expresses the view that Mr. Easton has a permanent disability with respect to his left upper limb and that the plaintiff is not at this time "fit for sustained work at heavy physical demand activities".

(c) Louise Craig, Certified Functional Evaluator

[90] Ms. Craig conducted a functional capacity evaluation of Mr. Easton. She prepared a comprehensive report which was tendered in evidence. That report was also taken into account by the witnesses Mr. Carlin, Dr. Hamm and Dr. Powers.

(d) Dr. Dean Powers, Vocational Rehabilitation Expert

[91] In addition to preparing a report with respect to the employment prospects of Mr. Easton and recommending certain supports, Dr. Powers made efforts to assist Mr. Easton to find job duties similar to his pre-injury occupation, albeit in a significantly reduced capacity. As a result of that search, he was instrumental in placing Mr. Easton with Intrinsic on a restricted duty/accommodated basis.

[92] Dr. Powers has expressed certain opinions, including that "Mr. Easton is likely only employable on a part-time accommodated basis in occupations within light to medium (modified medium) work strength demands and likely for the foreseeable future". He also opines that Mr. Easton will likely find it difficult to obtain part-time employment in the \$25 per hour range; rather, he believes it more likely that the plaintiff will be relegated to a lower wage, something in the order of \$15-\$18 per hour. He also recommends that the plaintiff be provided with support for ongoing vocational rehabilitation services.

(e) Robert Carson, Labour Economist

- [93] Mr. Carson has provided the Court with a report respecting Mr. Easton's past and future income loss and has also provided a report in response to a critique report that was prepared by an economist retained by the defendants, Mr. Hildebrand.
- [94] The task for a court, simply stated, is to determine as best it can the circumstances that the plaintiff would have experienced, were it not for the accident. The court will then attempt to determine a realistic projection for what the plaintiff's actual circumstances will be, taking into account the effects of the accident.
- [95] It is this second aspect of the exercise which is particularly challenging. There is no way of knowing with any certainty what the future holds for Mr. Easton, and there are a number of different avenues which his life might take. Vocationally, it would seem that Mr. Easton's alternative courses of action provide three general possibilities. The first is that he will continue to attempt to carry on in the carpentry trade. Because of the limitations which have been imposed upon him by the consequences of the accident, he will not be able to pursue that vocational path as fully as he would otherwise. As an example, as at the date of trial, he was employed at Intrinsic. His duties were limited because his capacity to do the work is limited; he was working four days per week. There is no question that the employer was making accommodations for him. In the result, his earnings were less because both his hours per week and his hourly rate were less than he would have attained without the limiting effects of the injury. As well, his work scenario is tenuous. His employers cannot assign him a full spectrum of work and so there is a more precarious quality to his employment situation. It will be harder to find and harder to maintain jobs of that sort.
- [96] The second scenario which is available to Mr. Easton is that he would re-orient himself but find work which uses the skillset he has as a carpenter. In that regard, it may be that there will be job opportunities such as a building inspector or estimator, or he may find work in sales at a building supply distributor. The prospect for those jobs is less robust than it would be for a carpenter without limitation; the rates of remuneration are likely less.
- [97] A third alternative that is available to Mr. Easton is to retrain to learn a new vocation which will accommodate his more limited physical abilities. In his favour is the fact that he seems to have a natural interest in and ability to do mechanical tasks. As well, the evidence indicates he has a strong work ethic. The ultimate outcome of such an approach is difficult to know: there may be jobs which will provide an income equivalent to his carpentry job. On the other hand, many of the jobs of that nature will pay less. As well, there is a complication because Mr. Easton, objectively and by his own admission, is not particularly academically inclined. He described himself as one who learns by doing. Accordingly, the scope of his opportunities by way of retraining to some other vocation is necessarily somewhat limited.
- [98] As can be seen, looking into the crystal ball to predict what the future holds for Mr. Easton is challenging indeed. It cannot be foretold with any degree of confidence.

- [99] The starting point of the analysis is to determine the likely outcome for Mr. Easton had he not experienced the injuries of the accidents. In that regard, the report of Mr. Carson provides information upon which I am satisfied it is appropriate to rely. While there is some dispute between the plaintiff and the defendants as to what number should be used, I conclude that the appropriate figure, the present value of his without-accident earnings is \$1,541,000, taking into account all relevant contingencies (all present value figures used here will be net of relevant contingencies). I note that Mr. Easton argues that the number should be somewhat greater, based primarily upon his "strong alignment to the workforce". On the other hand, the defendants contend that the number should be less. They say it is in the order of \$1,400,877.
- [100] The more uncertain task is determining a realistic projection for Mr. Easton's future, allowing for his post-accident limitations.
- [101] The plaintiff says that there are two alternative scenarios to consider:
- (a) Mr. Easton retraining on the job and in a 3 to 12 month community college program suited to his aptitudes, and then obtaining a job at the level of \$15 per hour, working 70% of a full-time work week. The present value of his lifetime earnings in that situation is projected by Mr. Carson to be \$381,835.50.
 - (b) Mr. Easton retraining on the job and in a 3 to 12 month community college programs suited to his aptitude, then obtaining a job in the approximate pay range of \$20 per hour and working 70% of a full 40 hour work week, Mr. Carson calculates the present value of the lifetime income from that scenario to be \$488,638.
- [102] The defendants urge a different approach to the matter. They invite the Court to embrace a scenario that was examined by Mr. Carson, which is captured in his projections at table 2. That entails Mr. Easton taking time out of the workforce to retrain for a different occupation. It assumes that Mr. Easton's injury would present no problem with regard to the time that he could spend on that new job or to the level of pay he could expect, other than the late entry. The present value of the projected lifetime income in that scenario is \$1,059,510.
- [103] In the submission of the defendants, there are in fact a number of positive contingencies attached to that approach. For example, it is suggested that his pre-accident work experience may be a significant asset in future employment endeavors, resulting in higher income.
- [104] Based upon that scenario, it is the submission of the defendants that the present value to be attributed to Mr. Easton's loss of capacity is in the order of \$340,000 or less.
- [105] I have difficulty accepting either position advanced by the parties.

- [106] Having considered carefully all of the specifics of Mr. Easton's circumstances, I have real reservations that he would be able to retrain and take up a new career as the defence submission assumes. My sense of Mr. Easton is that he is best suited to the trade he followed or something similar. I do not believe that he is as academically able as the submission assumes. Furthermore, there is no assurance that the limitations which have rendered him unfit for full-time carpentry will not have some limiting effects upon his future career path. I do agree that it is reasonable to expect that he might be able to retrain in another field, but I am not able to accept that it would be with the remuneration track that the defence position presumes.
- [107] Insofar as the plaintiff's submissions are concerned, I believe they are more pessimistic than the circumstances warrant. I believe that Mr. Easton will be able to find solid remunerative work, likely in a field related to carpentry, and that the abilities he has shown will serve him well. I also believe that the conclusion of this litigation and reasonable efforts being made by him toward physical rehabilitation will provide him with better prospects than his submissions assume.
- [108] The quantification of damages arising from my views of likely future happenings is informed by the information contained in Mr. Carson's report at table 1-A and table 2-A.
- [109] Applying table 1-A, if Mr. Easton continued in the carpentry trade but earned eight dollars per hour less, and worked a reduced week of 70%, that is 28 hours per week, the present value of his projected lifetime income would be \$753,830.
- [110] I consider that a realistic and reasonable projection.
- [111] Applying table 2-A, if Mr. Easton elected to retrain to an acceptable non-university certificate or diploma vocation, suitable to his aptitude and circumstances, and projecting an income of approximately \$22 per hour, with a projected 90% of workplace participation factor (that is, to allow some time off on account of his physical condition), the present value of his lifetime income would be in the order of \$700,000.
- [112] That too, in my view, is a viable and reasonable projection.
- [113] Considering each of the three scenarios that have been posited, it is my conclusion that the scenario urged upon the Court by the defendants is unrealistically optimistic and, as noted, I find the plaintiff's scenarios more pessimistic than the evidence warrants. Rather, I believe that the other two scenarios that I have described are solidly attainable, and I am quite staunchly of the view that Mr. Easton will make meaningful advances in terms of his physical and psychological condition as he moves forward, and those types of outcomes will be quite reasonably achieved.
- [114] In the final analysis, this is a matter for assessment, not calculation. The decisions I have explained are the result of my considered view of the totality of the evidence, and they represent my best assessment of the value of the loss.

[115] I conclude that an appropriate award of damages to compensate Mr. Easton for the loss of his capacity to earn income in the future is \$800,000.

Cost of Future Care

[116] Mr. Easton seeks an award of damages to compensate him for the cost of future care which will be required as a consequence of the injuries he sustained. In support of that, he has provided an assessment prepared by Kim Gibson, an occupational therapist. She testified at trial and her report was received as an exhibit.

[117] The plaintiff also relies upon the evidence of Mr. Carson who provided his calculation of the present value of the elements of the future costs of care claim.

[118] The defendants agree that there should be an award made under this head. However, they take issue with a number of the elements of the claim.

[119] In order to establish a right to compensation, the plaintiff must prove that the items sought are medically justifiable and that there is a reasonable need for them: *Hubbs v. Escueta*, 2013 BCSC 103 at para. 167; *Milina v. Batsch* (1985), 49 B.C.L.R. (2d) 33 at 84, 30 A.C.W.S. (2d) 257 (S.C.), *aff'd* (1987), 49 B.C.L.R. (2d) 99, 6 A.C.W.S. (3d) 233 (C.A.). The Court must also be satisfied that there is a reasonable likelihood of incurring the expense: *Penner v. Insurance Corporation of British Columbia*, 2011 BCCA 135 at paras. 12-13.

[120] The components of the claim advanced by Mr. Easton are set out below.

(a) Chronic Pain Program

[121] Mr. Easton seeks an award of damages to pay the cost of this program. The evidence establishes that this course of treatment is available in two ways. Such programs are available on a fee basis through private providers and they are also available through publicly-funded health facilities such as St. Paul's Hospital. Evidently accessing such a program through a public facility will ordinarily involve a substantial wait time. The cost of for-fee programs apparently can range in value up to \$15,000. The actual cost of accessing the publicly-funded programs is less clear although the evidence indicates that there is some cost for that model as well.

[122] The defendants note that the evidence in support of Mr. Easton accessing such a course was less than unanimous. Dr. Hamm was quite unequivocal in his support. Dr. Anderson and Dr. Travlos recommended the program, although not as resoundingly as did Dr. Hamm.

[123] Given the proposition that the plaintiff is entitled to the cost of care which is reasonably necessary to restore him to his pre-accident condition, and given the overarching importance of seeing him achieve that level of restoration, I am satisfied that he has established that it is appropriate that the chronic pain program should be part of his future care. Furthermore, I am satisfied that it is appropriate that he should be awarded the cost of attendance at a private clinic, as a means of maximizing his opportunities to achieve the

best restoration that he can so that he can get on with his life.

[124] There will be an award in the amount of \$15,000 to provide funding for that program.

(b) Physical Exercise

[125] Mr. Easton claims the cost of six supervised exercise sessions per year, as well as an annual gym pass, through to the age of 75, for an annual cost of \$1000. The present value of that expense, as calculated by Mr. Carson, is \$27,190.

[126] The defendants do not take issue with the benefits of physical exercise therapy. In light of Mr. Easton's evidence that attending at the gymnasium was a bother, and his track record of some reluctance on the physical exercise front, they say that the expense should not be allowed because the evidence clearly suggest that he will not participate in or use the program. They cite the authority of Coulter (Guardian ad litem) v. Leduc, 2005 BCCA 199, in support of that position.

[127] My view is that the evidence establishes that physical exercise is an important part of Mr. Easton being able to achieve maximum rehabilitation and deal effectively with the pain and psychological distress he experiences. At the same time, I agree that it is unlikely that Mr. Easton is going to avail himself of the supervised exercise sessions and regular attendance at a fitness facility as reliably and rigorously as his claim suggests.

[128] It is my conclusion that he should be entitled to a sum under this head, but in a lesser amount. In my view, an award of \$12,500 adequately addresses this need. I consider that this will allow him to have reasonable access, commensurate with his demonstrated commitment and motivation, to appropriate physical fitness support and facilities.

(c) Psychological Counselling

[129] Mr. Easton seeks an award of damages in the amount of \$3,700 to fund 20 sessions of psychological counselling at a rate of \$185 per hour.

[130] The defendants are not opposed in principle to that; however, they say that the amount claimed is excessive.

[131] On my review of the evidence, while the best estimate is that 20 sessions were required, some of that counselling has already been rendered. In the result, I would award the sum of \$1,850 for this purpose.

(d) Occupational Therapy

[132] The plaintiff seeks an award to provide funding for occupational therapy, specifically cognitive therapy, to teach to him cognitive remediation strategies. By that, I understand he would seek assistance to enable him to deal with concentration and memory issues. The amount sought is \$900.

[133] Given that Mr. Easton has had and will continue to have psychological counselling, I find that the medical necessity of this particular therapy has not been established and I would not be prepared to make an award for this service.

(e) Vocational Services

[134] Mr. Easton seeks an award to provide funding for a number of vocational services, principally related to enabling him to reorient his career targets. Specifically, he seeks the sum of \$3,000 plus tax for placement services, \$1,000 plus tax for counselling services, \$3,750 plus tax for ongoing vocational rehabilitation services and \$5,000 for the costs associated to retraining, namely tuition fees and other such costs.

[135] I agree that there is a basis to believe that services of this type will be necessary and will be utilized. However, with respect, it is my view that the sums sought are more generous than the reality would warrant. Accordingly, for the placement and counselling services, I conclude that the sum of \$2,500 should be awarded. Furthermore, the sum of \$1,750 should be awarded for ongoing vocational rehabilitation services as they may be required, and the sum of \$5,000 will be awarded to provide for the costs of retraining as may be required.

[136] In a result, the total sum of \$9,250 is awarded in respect of vocational services.

(f) Non-Professional Services

[137] Mr. Easton asks the Court to make an award of damages to compensate him for certain nonprofessional services that he says will be incurred annually and which his circumstances prevent him from being able to perform. These include heavy housecleaning in the amount of \$560 per year; house maintenance in the amount of \$1,820 per year; and yard maintenance in the amount of \$1,050 per year. The total present value of those services, until the plaintiff is 75 years old, is \$91,226.

[138] In my view, considering the criteria applicable for establishing a future care award, this is not a claim that should be allowed. The evidence does not establish that it is medically necessary. My sense of Mr. Easton's testimony is that he is able to perform those tasks, albeit not as quickly or nimbly as he once did. Nevertheless he is able to do so. Furthermore, he presently lives in rented quarters. The idea that he would be taking responsibility for heavy scale property maintenance is dubious in his present circumstances at least. If the time comes that he purchases a home, I would expect that he will be able to manage his needs.

[139] A modest lump-sum award should be made to provide for such special occasions that may require hiring help. There will be an award in the amount of \$5,000.

[140] It will be noted that the future cost of medication does not form any part of this claim. Mr. Easton conceded that while there may be times when medication is required, he accepts that he does not enjoy taking medications. Accordingly, he has advanced no claim.

[141] The total award under this head is \$43,600.

Special Damages

[142] The parties have agreed upon an amount of \$11,591.14 for special damages.

Summary

[143] the following damages are awarded to the plaintiff:

Non-pecuniary damages

\$ 125,000

Past income loss

\$ 125,000

Future income loss (capacity)

\$ 800,000

Cost of future care

\$ 43,600

Special damages

\$ 11,591.14

Total

\$1,105,191.14

[144] In addition, the plaintiff is entitled to prejudgment court order interest on the past income loss and special damages awards.

[145] Further, the plaintiff claims a tax gross up with respect to the award of future care and assistance. That is allowed and it will be for the parties to determine the appropriate sum.

[146] Finally, the plaintiff is entitled to recover his costs and disbursements. In the event there are relevant considerations of which I am unaware, then counsel are at liberty to make those known to me. Arrangements can be made to do so through the New Westminster Trial Scheduling office.

"The Honourable Mr. Justice Williams"

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