
CANADA / JUDGMENT

Garcha v. Duenas

2011 BCSC 365

COURT

Supreme Court of British Columbia

DECIDED

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2011 BCSC 365 Garcha v. Duenas

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Garcha v. Duenas,

2011 BCSC 365

Date: 20110325

Docket: M081331

Registry: Vancouver

Between:

Sukhdev Garcha

Plaintiff

And:

Romeo Caraig Duenas,

Agueda Dastas Duenas and Nirmal Sing

Defendants

Before: The Honourable Madam Justice Boyd

Reasons for Judgment

Counsel for the Plaintiff:

M.D. Fahey

Counsel for the Defendants:

D.M. De Baie

Place and Date of Trial:

Vancouver, B.C.

February 28, 2011

and March 1-4, 2011

Place and Date of Judgment:

Vancouver, B.C.

March 25, 2011

Introduction:

- [1] The plaintiff claims damages arising from injuries suffered in a motor vehicle on January 27, 2007. Liability has been admitted. This trial was limited to an assessment of the quantum of damages arising from the injuries suffered.

Credibility:

- [2] I should note at the outset that the defence has challenged the plaintiff's credibility and in particular the reliability of his evidence regarding his pre-accident medical history as well as the evolution of his recovery since the accident. In particular, the defence has focused on inconsistencies between what he told the Court and what he told Dr. Tarazi, Dr. Parhar, or Mr. Shew regarding: (i) when he resumed his full complement of work duties after the accident; (ii) how the hernia injury accident occurred at work; (iii) whether or not he returned to his gym activities after the accident; (iv) whether or not he worked all overtime available to him after the accident; and (v) whether his consumption of painkillers increased or not following the hernia injury.
- [3] I do not intend to review each of these examples here. Suffice it to say that the plaintiff struck me as a very intelligent, yet unsophisticated individual, eager to perform well as a witness and respond satisfactorily for the Court. While he was able to provide his evidence without an interpreter, his English language skills were nevertheless poor and it was often difficult to understand his answers. Likewise, he often appeared to not entirely grasp the question asked. In my view, in almost every example of the inconsistencies set out earlier, it is clear that there was an obvious communication error between the plaintiff and the doctor or caregiver involved.
- [4] Significantly, in cross examination, Dr. Tarazi (the orthopaedic surgeon who examined the plaintiff in June 2010) described how he spent some time with him eliciting his history and then recorded that his low back pain had improved by 70% and his neck pain by 80% by that date. When confronted with this statement on cross examination, the plaintiff testified that he could not recall providing Dr. Tarazi with such figures. At most he believed he had told

Dr. Tarazi that "the neck pain goes on and off". Dr. Tarazi himself had some doubts about the accuracy of the history he recorded. He explained that since the plaintiff's English language skills were "not very good", it was difficult to communicate with him and hence, it was difficult to know whether the plaintiff had understood his questions. Since this was the same dynamic which occurred at trial I would concur with Dr. Tarazi's reservations.

- [5] It is interesting that the two witnesses who had the clearest grasp of the plaintiff's history since the accident (and those who are most seriously challenged by the defence) are Dr. Parhar and Mr. Ranu, the two witnesses who were able to communicate directly with the plaintiff in the Punjabi evidence.
- [6] In any case, I will simply note for the record that I have no concerns regarding the plaintiff's credibility or reliability. He impressed me as a very truthful, honest witness. He testified as best he could in a forthright manner, with no embellishment or evasiveness. Despite all of the language difficulties, he struck me as a sincere and responsive witness. His evidence was overall consistent with that of his wife, his fellow worker, and his family physician, all of whom fully corroborated his evidence.

Plaintiff's background and employment history:

- [7] The plaintiff is now 52 years of age and was 48 years of age on the date of the accident. He is married and has three adult children, twins age 21 and 23, all studying at university.
- [8] Mr. Garcha was born and raised in India. He completed Grade 10 and then, consistent with the pattern of schooling in India, completed a two-year machinist program at an Industrial Training Institute. He worked for one year as a parts inspector at a local bicycle manufacturing plant. At that point he decided to further upgrade his training and attended the Central Training Institute, thus qualifying as a machinist instructor. He then worked for 5-6 years as a production supervisor at a large bicycle parts manufacturing plant.
- [9] In 1984 the plaintiff's wife and her family had emigrated from India to Canada. Her father and the plaintiff's uncle were related. In 1984, after her father travelled to India to meet the plaintiff and confirm his suitability, a marriage was arranged between the plaintiff and his wife and the couple was formally engaged. The plaintiff's wife (then his fiancée) applied for him to be granted a Visa for entry to Canada. It took two years for that application to be processed following which the couple married in India on April 11, 1986. The plaintiff moved to Canada in July 1986.
- [10] On his arrival in Canada the plaintiff lost no time seeking immediate employment. He first worked as a general labourer in a warehouse but quickly tired of that job since it paid no more than a minimum wage and did not reflect his skill set. Recognizing that his skills required some upgrading in Canada, he enrolled at the British Columbia Institute of Technology (BCIT) to take an evening course in Computer Numerical Controls. He completed that course in the late spring of 1987.

- [11] With that certificate in hand, he found new employment at Terminal City Ironworks ("Terminal City") in Vancouver, commencing in August 1987. He worked there full-time as a machinist, mostly performing lathe work producing fire hydrants and related parts. The work required significant strength to lift various items and create the torque required to tighten various parts.
- [12] In 1994, while employed at Terminal City, he successfully challenged the journeyman's certificate exam offered by the B.C. Machinist Association and was granted a Machinist Journeyman's Certificate. Despite this Terminal City did not recognize him as a journeyman.
- [13] In 1995 there was a slowdown of work at Terminal City and his hours of employment were cut back. He looked around and found other supplementary work at NAFCO where he was provided with a journeyman's position. Thus a new pattern of work was created. On each weekday he started work at 7:00 a.m. at Terminal City in Vancouver, finished up at 2:30 p.m. and then drove to Port Coquitlam and worked there for another 4-5 hours at NAFCO.
- [14] This pattern of work continued from 1995 until 1996 when he left Terminal City and began to work full-time for NAFCO. NAFCO produced large crushing machines for the mining industry, with parts weighing 2-3 tons and sometimes as much as 6 tons in weight. Each part would be lifted with a crane and then manually hammered into place by the machinists with a sledge hammer, so as to ready the part for tooling. The work was very heavy physical work. At that time the plaintiff was paid \$22 per hour. He continued work full-time at NAFCO for a period of four years, working that entire period on the night shift.
- [15] In March 2000 he moved to Avcorp Industries ("Avcorp"), a company then located in Richmond, B.C., which manufactured aircraft parts. While, at that time, Avcorp only paid an extra \$1.40 per hour, the plaintiff welcomed the more generous employment benefits package, as well as the fact that his work schedule was much better and not limited to the night shift.
- [16] From 2000 until the motor vehicle accident in January 2007 the plaintiff worked as a journeyman machinist at Avcorp. During that seven year period he enjoyed various pay raises, consistent with the collective agreement in the union shop plant.
- [17] Over that period, as is the case in the aeronautics industry, the volume of work has waxed and waned. In approximately 2005 the company obtained a large order of work to produce Cessna airplane parts with the result that the work force was called on to work substantial overtime hours. Rather than simply work a regular 37.5 hour week (from Monday to Friday, with each second Friday off work), the plaintiff now had the opportunity to work overtime on each second Friday, (for 1.5 times the hourly rate) as well as Saturdays and Sundays (for double the hourly rate). Throughout most of 2006, he worked overtime every second Friday as well as every Saturday, although he tried to reserve Sundays for his family and temple attendance. As a direct reflection of his substantial overtime work, I note that he reported earnings of \$89,800 in 2005, which earnings jumped to \$99,466 in 2006 (Exhibit 1, Tab 13-14). In 2007 the Cessna work slowed down and in the years which followed, there have been

layoffs at the plant.

- [18] At the time of the accident in January 2007, the plaintiff was working on either a horizontal or vertical lathing machine on the plant floor. But for his days off and holidays, he almost always worked side by side with the charge-hand, Mr. Swaran Ranu. Like the plaintiff, Mr. Ranu had also been born and raised in India although he emigrated to England at the age of 10-12 and had completed his middle and high school education, as well as his technical industrial training, in England before leaving for Canada in 1987.
- [19] The plaintiff and Mr. Ranu initially met in 1994 while both men were attending night classes at BCIT. Like the plaintiff Mr. Ranu challenged the journeyman's exam and obtained his journeyman's certificate. Mr. Ranu almost immediately moved onto Avcorp in 1995, and was promoted to his present position as a charge hand in 1999.
- [20] I should note here that the charge hand is handpicked by the employer company as the individual who will meet daily with the plant supervisor to identify the jobs for completion on the upcoming shift. Once the work load is outlined, it is the charge hand who assigns the jobs on the plant floor. The charge hand then works side-by-side with a particular machinist on a particular machine, although he will leave his machine station from time to time to ensure the work is progressing as planned on the plant floor.
- [21] Mr. Ranu testified that as the charge hand he has the ability to choose which of the other 3-4 machinists on the floor he will work with. He explained that since the plaintiff has always been the most knowledgeable and experienced of the machinists, as well as such a reliable, hard working producer, he has been the obvious choice as a workmate. In addition, whenever Mr. Ranu is ill or away on holiday, it is the plaintiff who substitutes as the charge hand in his stead.
- [22] Mr. Ranu described the plaintiff as "wonderful" employee--cheerful, hardworking, a good time keeper, never late for work and only very rarely absent from work due to illness. He described him as a "very hard worker" and for that reason, had always selected him as his workmate.
- [23] While Mr. Ranu admitted that he and the plaintiff are friends and that they have, on occasion, shared a beer after work, I reject the defence submission that I should therefore discount Mr. Ranu's evidence. It would be surprising if two men who shared very similar cultural and trade backgrounds and had worked shoulder to shoulder for over ten years were not friends. Beyond a beer after work, there was no evidence of any deep friendship, common family ties or general social engagement. Mr. Ranu struck me as a very honest, forthright witness, not given to exaggeration or embellishment. I accept that his description of the plaintiff and his work ethic was the honest assessment of the plaintiff's immediate supervisor. Indeed the fact that Mr. Ranu has chosen him as his workmate for the past ten years and has assigned him the post of charge hand in his stead speaks volumes of his positive assessment of the plaintiff and his abilities.

The motor vehicle accident:

- [24] The motor vehicle accident occurred on January 27, 2007 when the plaintiff joined his brother and a friend, to assist in moving furniture. The plaintiff was seated in the rear behind the front passenger seat. The truck was an older vehicle so he was limited to wearing a lap seat belt only. As the plaintiff's vehicle travelled along 10th Avenue, the defendant's vehicle made a sudden left hand turn across its path, resulting in a collision between the front end of the plaintiff's vehicle and the left front side of the defendant's vehicle. I understand that the collision was sufficiently violent that both vehicles were write offs. As I noted at the outset, liability is admitted by the defence.
- [25] The plaintiff could not say whether he was thrown about within the vehicle on impact. He only recalls that following the impact he was shaking and in shock. He was able to exit the vehicle and telephone his wife who was at home, just blocks away. She drove to the scene of the accident and found him obviously shaken and bleeding from the shin. An ambulance attendant examined him and asked whether he wished to go to hospital. He elected instead to visit his own doctor.

The injuries:

- [26] After returning home to clean up and have a cup of tea, the plaintiff attended his own doctor's clinic. While his doctor was unavailable, he was examined by one of the staff doctors on duty. He felt dizzy and complained of neck and back pain and stiffness. He also complained of pain in both shoulders, wrists, hips and the left shin which was bloodied and bruised. The doctor recommended conservative treatment, including physiotherapy and massage treatments.
- [27] On January 31, 2007 he was examined by his own family doctor, Dr. Gurdeep Parhar. Dr. Parhar noted he was tender to palpation in the paralumbar muscle region and in his left right and that he had a decreased range of motion in his cervical spine and lumbar spine. On subsequent visits he continued to complain of lower back pain, left shoulder pain, neck pain and left leg pain.
- [28] The plaintiff was off work for four months, during which time he pursued physiotherapy and massage treatments. The left shin bruise resolved within three months. The pain in both wrists (the left wrist being the worst) resolved over the next year. The pain in his hips resolved over the next two years.
- [29] After four months off work, his family doctor, Dr. Parhar, approved his return to work on a graduated basis commencing with four hours per day in May 2007, with the stipulation that he not lift any heavy weights at work. By June Dr. Parhar approved him increasing his workload to 6 hours per day. Later that month he approved his return to work on a full-time basis, provided he not lift anything over 15 pounds. However the return to full-time work failed. By July 13th, Dr. Parhar noted that the plaintiff was having a good deal of difficulty at work. His pain had increased substantially, requiring him to take painkillers every four

hours. Dr. Parhar ordered him off work altogether for a few days of rest. By July 18th, the plaintiff was back to work part-time, four hours per day.

- [30] Notwithstanding his doctor's orders to restrict his hours at work, by late July he gradually increased his hours to 6 hours per day before his regular two week summer holiday finally provided some respite. Dr. Parhar described his frustration dealing with Mr. Garcha who he described as a very hard working man, under considerable financial pressure to support his three adult children at university. In his view he was returning to work too early--not because he was ready to work, but rather because he simply had to.
- [31] By early September 2007 the plaintiff had returned to work full-time, although he avoided the heavy work. He continued to suffer low back pain, particularly on the left side, upper back pain, and intermittent headaches. He was treated with painkillers (Tramacet), ice, heat, stretching exercises and rest.
- [32] This pattern of discomfort and treatment continued through the early fall and winter until February 2008 when he suffered a hernia injury at work. Until that date, the plaintiff insisted that while he was working full-time, he had never returned to his full pre-accident complement of duties, when he had split his time between the horizontal and vertical lathe machines. Now, with his superior's approval, he restricted most of his work time to the vertical machine which required no heavy lifting above waist level and no leaning over the machine.
- [33] The plaintiff's evidence was entirely corroborated by his workmate, Mr. Ranu, who testified that after the accident, the plaintiff was a very different employee. Rather than operate both machines, he now spent 80-90% of his time operating the vertical machine only. He noted that the plaintiff was unable to lift anything over his waist height and that he could not lean forward over the machine without complaining of pain. Mr. Ranu noted that he was a much slower worker, his attitude was different and that his production level was much lower. The two men discussed the plaintiff's limitations and Mr. Ranu reassured him that he would take care of the situation and accommodate his restrictions, which he did by performing most of the horizontal machine work himself.
- [34] In February 2009, while lifting a "fixture" at work, the plaintiff suffered an inguinal hernia injury. Mr. Ranu explained that a particular fixture weighing 22-25 pounds was tagged with a red tag, designating the item as one which had to be given priority attention, since any delay in the machining of that fixture would effectively bring the rest of the assembly line to a halt, pending the completion of that job. Due to the plaintiff's physical limitations, Mr. Ranu had not called on the plaintiff to lift similarly weighted fixtures before. However now faced with time constraints, he instructed him to lift the object to the machine table, which the plaintiff did. As he did so, the plaintiff noted that his right shoulder was not handling the weight, with the result that he recruited his abdominal muscles to help carry the load. In the next instant, he felt a sharp pain in his groin. After consulting with the first aid attendant on the plant floor he returned to his work station, but again suffered more pain. He was advised

to consult with his doctor. Dr. Parhar examined him later that day and confirmed he had suffered an inguinal hernia.

- [35] Dr. Parhar diagnosed the injury as an inguinal hernia and recommended he take one week off work and then to try to return to work, albeit with no pushing, pulling or heavy lifting.
- [36] The plaintiff did return to work for a short period on "modified duty", and then coincidental with a slowdown and general layoffs at work, he was laid off. He underwent a hernia surgery repair in April 2009. Approximately 4-6 weeks post-surgery, he remained off work on WCB benefits.
- [37] In January 2010, he attended a full-time 8-10 week rehabilitation program and was then ready to return to work, albeit on a modified basis. By July 2010, some modified work was finally available and he returned to work on a graduated basis. By late August 2010, he was back to work on a full-time basis, albeit performing modified work with no lifting over shoulder level, no leaning forward and no lifting of weights over 23 pounds.
- [38] Then in November 2010, he fell at home and cracked a few ribs. He was advised to rest and apply ice and heat. At the time of trial he was waiting for his return to work full-time commencing March 14, 2010.

Present condition:

- [39] At the present date, the plaintiff says that all of his injuries have resolved save his neck, back and shoulder pain. His neck is painful 1-2 times per week. The pain radiates down both sides of his neck. The pain is sometimes, but not always, associated with a headache. It seems worse in cold weather.
- [40] The headaches are triggered by neck pains, but sometimes by particular movements of his neck. They will only last a half hour if he takes medication, but he avoids doing so at work since the medication makes him sleepy. He finds the headaches make him very cranky and irritable.
- [41] Over the course of two years his left shoulder pain gradually improved, while it was aggravated by weather changes and any attempt to sleep on his left side. The pain has now resolved.
- [42] It is the plaintiff's right shoulder which poses the greatest problem. He has ongoing pain which is aggravated by overhead activities as well as by lying on his right side and lifting. He is unable to sleep on his right side.
- [43] In the fall of 2010, Dr. Parhar referred him to a Dr. Carl Shearer, a Sports Medicine doctor, for treatment of the right shoulder pain. Dr. Shearer provided him with two cortisone injections to the shoulder which, together with ongoing physiotherapy treatments, have provided some relief.

- [44] His mid-back continues to hurt when he sits, stands or walks for anything more than 45 minutes. The pain is aggravated by changes in weather. He has difficulty at work and tries as much as possible to change positions, sitting and standing, as well as using a stool, but this is not always allowed. When he was working full-time, on returning home, he would take a shower and apply a heating pad for relief.

Medical evidence and causation:

- [45] In his report dated November 2, 2010, Dr. Parhar opines that the following injuries resulted from the motor vehicle accident: paracervical muscle strain, paralumbar muscle strain, bilateral shoulder strain and bilateral shoulder tendinitis, aggravation of pre-existing asymptomatic osteoarthritis of the cervical spine, left wrist contusion and left wrist traumatic tendinitis, left leg contusion and hematoma, muscle tension headaches and anxiety.
- [46] Although the defence has not adduced any medical evidence, the defence theory is that the plaintiff's right shoulder and low back complaints all pre-dated the accident and cannot be causally related to the accident. In particular, the defence relies on the fact that in April 2004, Dr. Parhar sent the plaintiff for a cervical (neck) x-ray. From October to December of 2005, he was sent for eight massage therapy treatments. Then in May 2006, almost a year pre-accident, the plaintiff had complained to Dr. Parhar that his right shoulder was stiff and sore. He was referred to physiotherapy.
- [47] Accordingly the defence theory is that the plaintiff was suffering from osteoarthritis prior to the accident and that his present neck and back symptoms simply reflect the natural progression of that disease process. As to the right shoulder, the defence theory is that prior to the accident, the plaintiff had likely developed a repetitive strain injury, which resurfaced after the accident.
- [48] Regarding the right shoulder, Dr. Tarazi (the orthopaedic surgeon who provided the plaintiff with an independent medical legal consultation in June 2010) noted that an MRI scan taken in October 2009 revealed osteoarthritis of the AC joint which likely pre-dated the motor vehicle accident. In his opinion the physical examination of the right shoulder was consistent with a tendinitis condition which ought to be treated conservatively over the next 12-18 months and would not lead to any long term disability or functional limitations.
- [49] Dr. Parhar entirely rejected these theories. Regarding the plaintiff's neck and back, while acknowledging that the 2004 x-rays reflected mild to moderate changes associated with osteoarthritis, so far as he was concerned, those x rays provided no diagnostic explanation for the symptoms the plaintiff suffered in 2005. In his opinion, at that time, the plaintiff's osteoarthritic condition was asymptomatic and he had more than likely suffered a muscle sprain associated with his heavy work. He noted that significantly, in the visits to his office which followed that date, there were no complaints of neck or back pain as would be expected had the osteoarthritic condition been activated.

- [50] As to the eight massage therapy treatments in late 2005, he stated that where a worker has an extended benefits health policy which allows for \$250 worth of massage treatments per year (as the plaintiff insurance coverage did), it is not at all uncommon for the doctor to approve a course of such treatments which simply provide the patient with some relief and comfort for the stiffness associated with such heavy labour jobs. However the patient is not actually disabled or in pain.
- [51] At this point in time, he expects that while the plaintiff's neck pain has recently improved, his symptoms will continue to wax and wane, while his overall osteoarthritic condition will continue to degenerate. In his opinion, the plaintiff's pre-accident asymptomatic osteoarthritic condition was activated or aggravated by the injuries suffered in the accident (Dr. Tarazi concurs with that opinion). Dr. Parhar expects those symptoms will likely worsen over time.
- [52] As to the right shoulder injury, he acknowledged that almost eight months prior to the motor vehicle accident, the plaintiff had complained of right shoulder pain and stiffness. However he noted that no complaints followed and the plaintiff was not required to take any time off work--as is usually the case in a repetitive strain scenario. He noted that it was not until some 6½ months post-accident, when Mr. Garcha made his first complaint of right shoulder pain. While he acknowledged that it was possible the plaintiff was suffering a repetitive strain injury, in his opinion this was not likely since the plaintiff had been working at his job for many years pre-accident, adopting the same postures and repetitive movements without complaint. Had it been a repetitive strain injury, he would expect it to have surfaced much earlier and not been triggered by a return to work, on a part-time basis, at which time he was adopting a narrower range of movements.
- [53] Dr. Parhar holds the opinion that since the accident the plaintiff has been suffering the ongoing effects of a shoulder tendonitis, that is an inflammation of the shoulder tendons, resulting from the acute trauma suffered at the time of the motor vehicle accident. I note here that on cross examination, Dr. Tarazi also opined that the right shoulder complaints were likely related to the injuries suffered in the motor vehicle accident. Even if the injury was related to repetitive movements, he believed that this was due to the fact that due to his injuries, the plaintiff was likely posturally over- compensating in some way, thus giving rise to the shoulder complaints. In the absence of the motor vehicle injuries, he doubted the shoulder complaints would have arisen.
- [54] Dr. Parhar disagreed with the prognosis Dr. Tarazi delivered in his report in June 2010, namely that the plaintiff's shoulder injury would resolve within 12-18 months post June 2010--that is by June-December 2011. He noted that rather than see the patient on a single occasion as Dr. Tarazi had in June 2011, as the family physician he had seen this patient regularly throughout the entire period and in his view, his recovery has been much longer and much more difficult than anticipated. (I note here that on cross examination even Dr. Tarazi clarified that his prognosis was based on his single assessment of the plaintiff in June 2010. He conceded that at that time the plaintiff was not working, so it was possible that his

prognosis was overly optimistic and did not materialize as expected.)

- [55] Finally, the defence theorized that many of the plaintiff's ongoing complaints, including his inability to do his full complement of machinist work, are related to his hernia injury and are not causally related to any injury suffered in the accident.
- [56] On cross examination Dr. Parhar acknowledged that when the plaintiff returned to work post-hernia injury, his work restrictions were related to both the hernia surgery as well as his neck, back and shoulder symptoms. While the hernia injury has taken a long time to resolve, he is confident that eventually the plaintiff will be symptom free and that all remaining work restrictions will be entirely related to the motor vehicle accident injuries.
- [57] The defence placed particular weight on the fact that the WorkSafeBC recently sent a letter to the plaintiff, providing him with a 2.5% scheduled award arising from a finding that he was permanently partially disabled as a result of chronic pain related to the hernia injury. The letter was not filed in evidence. Since he has an extensive background as a physician specializing in disability assessments, Dr. Parhar noted that this award effectively comprised a chronic pain award. He advised that the award does not concern an actual assessment of disability but rather only a finding that the plaintiff has suffered chronic pain for a period beyond six months. In the absence of any evidence from the defence, and based on Dr. Parhar's own evidence concerning such an award, I am unable to find that the chronic pain award impacts on the assessment of damages before the court.
- [58] On a review of all the evidence I am satisfied the plaintiff has proven on a balance of probabilities that his continuing complaints are legitimate and that they are indeed causally related to the injuries suffered at the time of this motor vehicle accident. I reject the defence theory that the neck, back and shoulder complaints all pre-date the accident or that his ongoing work limitations are related to the hernia injury.

Pre and post-accident lifestyle:

- [59] I accept the plaintiff's evidence that given his ongoing neck, back and right shoulder pain, his general lifestyle and enjoyment of life have been significantly affected. Apart from his inability to perform his full workload on the job, many other aspects of his life have also been affected.
- [60] Prior to the accident his favourite activities were gardening, swimming, walking with his wife, attending local Hindi movie theatres and attending the local Sikh temple where he attended weekly Sunday prayer services and then performed volunteer work serving the community luncheon in the Temple social hall.
- [61] Since the accident he has gardened very little. He no longer tends to the lawn in the front of family home property. He no longer enjoys the 1-1.5 hour evening walks with his wife. He has not returned to his gym activities, nor his swimming, although he completes the exercises prescribed by the physiotherapist as part of a home exercise program. While he has tried to attend the Temple, he has found it impossible to sit cross-legged on the floor

without suffering back pain. Even sitting with his back supported against the wall of the Temple sanctuary, with his legs straight out on the floor, has not been comfortable enough to sustain. While he still attends the temple for the occasional wedding or other feast, he restricts his prayer and meditation sessions to home. He is no longer able to withstand the hours standing as a volunteer in the temple kitchen. He has also given up attending Hindi movies since he is unable to sit the three hours which those movies entail. In effect his social life outside the work and home has ended.

- [62] Quite apart from the discontinuance of all his favourite activities, his relationship with his wife and family has also undergone a change. His wife described him as having undergone a change of personality. As a result of the ongoing pain, he has been transformed from a happy, good humoured man to one who is regularly cranky and irritable. He tearfully described his great regret that he has been unable to physically tolerate his children attempting to lay their heads on his lap on the home chesterfield or otherwise engage in embraces or horseplay. He no longer enjoys sitting watching television with his wife but instead is often to bed early to try to read lying down. He spends much of the night in discomfort. His sexual relations with his wife have been strained.
- [63] While he used to share much of the housework with his wife--she did all the kitchen and laundry work; he did all of the vacuuming, gardening, car washing and yard work--he now finds it difficult to do any of these tasks, including the vacuuming. The children have now been asked to contribute to these efforts. Someone has been hired to cut the lawn.

Non pecuniary damages:

- [64] Relying on *Bove v. Lauritzen*, 2009 BCSC 1698, *Taylor v. Grundholm*, 2010 BCSC 860, *Pascoa v. Xue*, 2008 BCSC 791, *Klein v. Dowhy*, 2007 BCSC 1151, *Vershinin v. Hayward*, 2010 BCSC 1315, *Peters v. Kay*, 2004 BCSC 1160 and *Comeau v. Siemens*, 1996 CarswellBC 1672, (25 July 1996), *Prince George Registry*, 28546 (B.C.S.C.), the plaintiff submits that an appropriate range of damages is \$70,000-\$90,000.
- [65] The defence contests this assessment of damages, submitting that the plaintiff suffered no more than mild to moderate soft tissue injuries of his neck, upper back and lower back, all of which are continuing to improve. The defence submits that the right shoulder tendinitis is the result of a repetitive strain injury unrelated to the accident. Likewise, the defence submits the plaintiff's hernia complaints have caused ongoing pain and ongoing functional limitations, which are again unrelated to the accident. Relying on *Lee v. Jarvie*, 2010 BCSC 1852, *Sharpe v. Tidey*, 2009 BCSC 948 and *Haines v. Shewaga*, 2009 BCSC 340, the defence submits that an appropriate range of damages is \$35,000-\$40,000.
- [66] None of the defence authorities are of any assistance in this case. As I noted earlier, I reject the defence theories concerning the plaintiff's injuries. I am satisfied that the plaintiff's ongoing complaints of neck, mid and low back and shoulder pain are causally related to the accident and have resulted in some significant change in his lifestyle and his overall enjoyment of life. The plaintiff is permanently, partially disabled and while he has been able

to return to work, he has only succeeded by virtue of his employer's willingness to substantially modify his work duties.

[67] Considering all of the evidence, I find that an appropriate award of general damages for pain and suffering and loss of enjoyment of life is \$70,000.

Past income loss:

[68] The parties have agreed the past income loss is \$32,384.45 (Exhibit 1, Tab 10). This represents the income loss during the period from the date of the accident to the date of the plaintiff's graduated return to work, as well as the income loss following that date until July 24, 2010.

Special damages:

[69] The parties have agreed that these damages total \$759.97. The amount is not substantial since most costs have been covered, either by the plaintiff's extended health plan or the ICBC Part VII benefits coverage.

Future care loss:

[70] Regarding this head of damages, the plaintiff relies on the report of Mr. Dominic Shew of Harbourview Rehabilitation (Exhibit 1, Tabs 6 and 7). Mr. Shew has provided a breakdown of the costs of services and equipment recommended by Dr. Tarazi:

- Physiotherapy: 16 initial sessions - \$896
- Kinesiologist: Initial sessions of 2 times per week for 4-8 weeks followed by once per week for 4-8 weeks. Assuming 12-20 sessions @\$50 per hour - cost of \$672-\$1,120
- Fitness membership: 3-4 months - \$101-\$134
- Basic Exercise equipment: \$245
- Massage: Twice a month for one year - \$1,344
- Vocational consultant: 1 six hour session; 3 eight-hour sessions - \$605 - \$2,410
- Retraining BCIT: \$4,720- \$14,500
- Medications: Tramacet - present value of annual cost for life \$1,116

[71] These various costs total \$8,647-\$20,000. The plaintiff's counsel recognizes that these costs are variable and submits that an award of \$15,000 would be appropriate.

- [72] The defence relies on the report of Mr. Emnacen of Back in Motion Functional Assessments Inc. dated January 14, 2011 (Exhibit 7). Mr. Emnacen takes no significant exception to the Shew report other than to question the need for the physiotherapy program, since the plaintiff has already participated in a return to work program. Further he suggested that the kinesiology sessions which Mr. Shew recommended follow the proposed physiotherapy sessions might also not be necessary.
- [73] I agree with the defence submission that some of the physiotherapy and kinesiology sessions recommended may well amount to a repetition of some of the training the plaintiff has already received in his post-accident rehabilitation programs. Assuming that he has already gained the necessary knowledge concerning his exercise program, some portion of those costs could be saved. That said, he will at least require an initial physiotherapy session to establish his knowledge level and the need, if any, to restructure his exercise program.
- [74] Overall, I am satisfied that the future care costs suggested are appropriate, are properly supported by medical evidence, and are largely supported by the defence expert. I find that an appropriate award for future care costs is \$15,000.

Future loss of income/Future loss of income earning capacity:

- [75] The plaintiff's position is that he is now permanently partially disabled and accordingly, has suffered a substantial loss in his income earning capacity. While he has been able to return to work full-time, he submits it is only as a result of his employer's continuing accommodation of his physical restrictions that he has been able to do so.
- [76] The defence insists that post-accident the plaintiff has returned to his regular fulltime duties and that any restrictions have been the result of his hernia injury and are not related to the accident. The defendant submits the plaintiff was able to return to full duties, including performing overtime work after the accident, for a period of 1.5 years after the accident. At that point he suffered the hernia injury at work, which injury took him out of the workforce for almost another 1.5 years. The defence says that after returning from this work related injury, he was on restricted duties, not as a result of the accident injuries, but strictly as a result of the hernia injuries. He never returned to full duties from that injury before he was off again for another unrelated injury. The defence says that the plaintiff has not demonstrated a real and substantial possibility that he will not be able to return to full hours and full duties again as it pertains to the accident injuries.
- [77] As I have noted earlier, I completely reject the submission that the plaintiff did in fact return to his regular work duties after the accident. Based on the evidence of the plaintiff, Mr. Ranu and Dr. Parhar, I am satisfied that for most of the time since the accident, the plaintiff has only managed to do his work by virtue of his charge hand's permitting him to do a restricted range of work, limiting himself to the vertical machine alone. On one occasion when the plaintiff did exert himself and lift an item weighing over 23 lbs, he suffered the resulting inguinal hernia.

[78] In the end result, I am satisfied the plaintiff has proven that he is now permanently partially disabled. Adopting the opinion of Dr. Parhar, I am satisfied that given the activation of his osteoarthritis, his condition will likely worsen over time.

[79] The functional work capacity evaluation tests conducted by Mr. Dominic Shew corroborate the plaintiff's evidence concerning his physical limitations and graphically detail his restricted work capacity. In his report dated July 30, 2010, Mr. Shew found that the plaintiff:

consistently demonstrated restrictions in his capacity for activity requiring vertical reaching as well as below the waist work requiring bending, stooping, squatting and crouching. There were some functional restrictions with repetitive forward reaching. There were measured restrictions in upper extremity strength as well as one handed carrying, two handed carrying, one handed lifting and two handed lifting. There were also restrictions in his tolerance for sitting. Overall, there were restrictions in his mobility (cervical, right shoulder, right elbow and bilaterally in his forearms) and endurance.

[80] Based on his test results, while Mr. Shew concluded the plaintiff demonstrated the basic strength to perform the requirements typically expected of a machinist, he noted that the upper strength requirements are likely approaching his safe capacity. In his view, the heavier tasks should be limited to an occasional basis only in order to maintain his safety. Thus he concluded the plaintiff is:

likely safe and able to perform his work on a part and full time basis with the accommodations/modifications presently in place. These accommodations/modifications would include that he is not required to lift/carry any loads over 23 lbs, for any heavier loads he is able to utilize an overhead hoist and he is not required to perform any tasks above his head. If his accommodations were removed, I anticipate that will have difficulties in such an occupation (or an occupation requiring similar physical demands) and maybe be unsafe in performing his regular duties.

[81] Mr. Shew's conclusions are not significantly challenged by the defence occupational therapist, Mr. Emnacen.

[82] Thus I find that the plaintiff faces the real possibility of a future income loss on several fronts: If Mr. Ranu or some other charge hand at Avcorp is no longer able to accommodate his physical restrictions and requires that he perform a full range of machinist's duties, he may well lose this employment. Even if he does not lose this employment, if there are periods when there will be opportunities for significant overtime work, it is unlikely he will be able to work those longer hours. If he loses his employment at Avcorp, or if there are layoffs at Avcorp and he looks for alternative or supplementary work pending a resumption of work at Avcorp, then I expect he will very likely have difficulty finding alternative employment or supplementary employment as a machinist. Relying on both the plaintiff's and Mr. Ranu's evidence, I find that the machinist work at Avcorp is very much on the "lighter" end of the scale and that machinist work in other plants often involves much heavier work. Based on the evidence of Dr. Parhar and Mr. Shew I find that the plaintiff

would not be able to perform that heavy work.

- [83] Finally I expect that in the event the plaintiff retires at age 65, he will likely not be able to pursue the many machinist jobs he would have likely searched for and obtained, even in his older years. I say this since, in my view, the plaintiff has, both in the past and on an ongoing basis, demonstrated a very strong work ethic and a desire to optimize his earnings at every opportunity.
- [84] I find that the plaintiff has proven there is a significant possibility of any of these future events occurring, which would all obviously result in a pecuniary loss. This is not the case of a white collar worker complaining he is unable to return to the heavy labour job he performed in his youth. This is the case of a senior journeyman machinist who has been rendered unable to perform the full scope of the work in his lifelong career of choice.
- [85] In *Reilly v. Lynn*, 2003 BCCA 49 at para. 101, Mr. Justice Low, writing for the majority, summarized the relevant principles in assessing damages for loss of future earning capacity stating:
- [101] The relevant principles may be briefly summarized. The standard of proof in relation to future events is simple probability, not the balance of probabilities, and hypothetical events are to be given weight according to their relative likelihood: *Athey v. Leonati*, [1996] 3 S.C.R. 458 at para. 27. A plaintiff is entitled to compensation for real and substantial possibilities of loss, which are to be quantified by estimating the chance of the loss occurring: *Athey v. Leonati*, supra, at para. 27, *Steenblok v. Funk* (1990), 46 B.C.L.R. (2d) 133 at 135 (C.A.). The valuation of the loss of earning capacity may involve a comparison of what the plaintiff would probably have earned but for the accident with what he will probably earn in his injured condition: *Milina v. Bartsch* (1985), 49 B.C.L.R. (2d) 33 at 93 (S.C.). However, that is not the end of the inquiry; the overall fairness and reasonableness of the award must be considered: *Rosvold v. Dunlop* (2001), 84 B.C.L.R. (3d) 158, 2001 BCCA 1 at para. 11; *Ryder v. Paquette*, [1995] B.C.J. No. 644 (C.A.) (Q.L.). Moreover, the task of the Court is to assess the losses, not to calculate them mathematically: *Mulholland (Guardian ad litem of) v. Riley Estate* (1995), 12 B.C.L.R. (3d) 248 (C.A.). Finally, since the course of future events is unknown, allowance must be made for the contingency that the assumptions upon which the award is based may prove to be wrong: *Milina v. Bartsch*, supra, at 79. In adjusting for contingencies, the remarks of Dickson J. in *Andrews v. Grand & Toy Alberta Ltd.*, supra, at 253, are a useful guide:

First, in many respects, these contingencies implicitly are already contained in an assessment of the projected average level of earnings of the injured person, for one must assume that this figure is a projection with respect to the real world of work, vicissitudes and all. Second, not all contingencies are adverse ... Finally, in modern society there are many public and private schemes which cushion the individual against adverse contingencies. Clearly, the percentage deduction which is proper will depend on the facts of the individual case, particularly the nature of the plaintiff's occupation, but generally it will be small...

[Emphasis added]

- [86] The plaintiff invites the Court to approach the quantification of this loss of earning capacity, either on an earnings approach as in *Steenblok v. Funk*, [1990] B.C.J. No. 1158 (C.A.) or a capital asset approach, as in *Brown v. Golaiy* (1985), 26 B.C.L.R. (3d) 353 (S.C.).
- [87] As Smith, Nathan J. noted in *Edmundson v. Payer*, 2011 BCSC 118, "the differing approaches to assessment of damages that have been stated are not inconsistent with one another or with the basic principles, but are only applicable if the plaintiff first proves a real and substantial possibility of a future loss."
- [88] Regarding the earnings approach, Mr. Fahey notes that pre-accident, in 2006 the plaintiff was able to earn as much as \$100,000, relying on substantial overtime hours which were then available while Avcorp completed the large Cessna contract. Without such overtime, I understand that the plaintiff's regular income would be in the range of approximately \$55,000-\$60,000. Thus, depending on the availability of overtime work in future years, his annual income might be reduced by as much as \$30,000-\$45,000. Since the plaintiff is only 52 years of age and has a remaining working life of at least 13 years, he submits that he faces a substantial future loss of income earning capacity. That said, the plaintiff admits that the aviation manufacturing industry is one which waxes and wanes, thus sometimes resulting in extensive and lengthy layoffs.
- [89] Assuming an annual future loss of employment income of \$30,000-\$45,000 to age 65, discounted for present value and taking the labour market contingencies into account (British Pacific Consulting Report, Exhibit 8), yields an award for future loss of earning capacity of \$187,050-\$280,575. This figure of course assumes a solid stream of future overtime work which the plaintiff concedes has not been the case in the past. The figure however ignores the likelihood the plaintiff would have continued to work past age 65.
- [90] If the Court chooses to adopt the *Brown* approach, since the future loss here may not be so easily measurable (since the plaintiff has returned to work), the plaintiff's counsel submits that nonetheless, the plaintiff has proven that he has suffered an impairment in his earning capacity.
- [91] In all of these circumstances, he submits an appropriate award would be in the range of \$200,000.
- [92] Even accepting that the plaintiff has proven a real and substantial possibility of a future event leading to an income loss, the defence submits that any award ought to be minimal and ought to only reflect the real and substantial possibility of occasional flare-ups of pain that may cause a temporary disability. Of course, this position rests on the defence theory that the plaintiff did return to his regular full-time duties after the accident and before suffering the hernia injury. I have rejected that position since it is not supported by the evidence.

- [93] On a review of all of the evidence, I am satisfied that the plaintiff has proven a real and substantial possibility of the many different future events outlined earlier, all of which would lead to an income loss. I am satisfied these events are not limited to a few occasions when the plaintiff will have flare-ups of symptoms. Rather I find that he is permanently partially disabled and now effectively excluded from performing heavy machinist work and any substantial amount of overtime work. This will substantially reduce his overall employability, make him less marketable and less competitive as an employee, and finally, less valuable overall.
- [94] Whether adopting the earning approach or the "capital asset" approach, I am satisfied there will be some financial harm accruing to the plaintiff over the course of his working life.
- [95] This is not a case which lends itself to any mathematical calculation but rather to an assessment of this loss. In all of these circumstances I find that an appropriate award of damages is \$175,000.

Costs

- [96] Since I am unaware of whatever settlement offers may have been exchanged by the parties, I will make no award of costs at this time. I leave it to counsel to address this matter between themselves. If they are unable to reach any agreement, I invite them to contact the Registry to arrange a date to make oral submissions, or alternatively to file written submissions.

"The Honourable Madam Justice Boyd"

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