

CANADA / JUDGMENT

Halbauer v. I.C.B.C.

2000 BCSC 570

COURT

Supreme Court of British Columbia

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2000 BCSC 570

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2000 BCSC 570 Docket No.:

C946421

Registry: Vancouver

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

WAYNE HALBAUER

PLAINTIFF

AND:

INSURANCE CORPORATION OF BRITISH COLUMBIA

DEFENDANT

REASONS FOR JUDGMENT

OF THE

HONOURABLE MR. JUSTICE DROST

Counsel for the Plaintiff: L.B. O'Neill

Counsel for the Defendant: G.A. McFarlane

Date and Place of Hearing: Vancouver, BC

January 11, 1999 and November 23-24, 1999

INTRODUCTION

- [1] The plaintiff seeks a declaration of entitlement to receive continuing total disability benefits from the defendant at the rate of \$300 per week pursuant to Part 7 of Revised Regulation (1984) under the Insurance (Motor Vehicle) Act R.S.B.C. 1979, c. 204.

- [2] The defendant says that it has paid all compensation and benefits to which the plaintiff is entitled.

THE REGULATION

- [3] Section 80(1) of the Revised Regulation provides, in part, that:

- (1) Where, within 20 days after an accident for which benefits are provided under this Part, an injury sustained in the accident totally disables an insured who is an employed person from engaging in employment or an occupation for which he is reasonably suited by education, training or experience, the corporation shall pay to the insured for the duration of the total disability or 104 weeks, whichever is shorter, the lesser of the following amounts:

- (a) the applicable amount of disability benefits set out in section 2 of Schedule 3;

...

- (4) Where disability benefits are payable under this section in respect of an accident that occurred prior to January 1, 1991, the amount calculated under subsection (1)(b) on and after January 1, 1991 shall be multiplied by the weekly benefit multiplier in Column B of Table 1 of Schedule 3 opposite the year of accident in Column A.

ISSUES

- [4] The issues to be resolved are:

1. Whether the plaintiff is totally disabled from engaging in employment or an occupation for he is reasonably suited by education, training or experience; and
2. If so, should the amount of weekly disability benefits payable be the sum of \$200 per week or \$300 per week.

THE PLAINTIFF'S INJURIES

- [5] On September 21, 1990, the defendant was severely injured in a motor vehicle accident. He was 24 years old at the time.
- [6] Following the accident he was first taken to the nearby hospital at Stewart, B.C. where he was found to have suffered multiple trauma, including serious injuries to his head, chest, right arm and both knees. After emergency treatment there, he was flown to the hospital in Terrace, B.C. for further resuscitation. Then he was airlifted to St. Paul's Hospital in Vancouver where a full scale examination was performed and it was ascertained that his injuries included a flail chest, a severe right subclavian artery, a fractured condyle and injuries to both knee joints.

- [7] He was transferred to the intensive care unit where multiple surgical procedures were undertaken in the repair of his arterial injuries, including artery and vein grafts. Despite a number of post-operative problems, the plaintiff made a gradual but steady recovery and he was discharged from St. Paul's Hospital on October 22, 1990.
- [8] Following his discharge, the plaintiff was examined periodically by Dr. Tutassaura, a cardiac and vascular surgeon. In a letter dated February 22, 1991, Dr. Tutassaura advised that a further examination was to be performed in six months' time to ascertain the condition of the left bypass graft and his left upper limb and that, until then:

...it would be premature to make a decision regarding permanent employment ... in the logging business. On the other hand, if his condition continues to improve, then allowing him to pursue light employment would not only be indicated but probably therapeutic to the patient.

- [9] In a letter dated August 8, 1991, the plaintiff's family doctor, Dr. J.H. Dudley, stated that, as a result of the injury to the plaintiff's subclavian arteries, circulation to both of his upper extremities was limited, with a resulting decrease in strength and endurance. He opined that the plaintiff was not fit for employment in the logging industry "in any capacity that requires physical labour with his upper extremities", but that he would be able to perform sedentary employment, and should be retrain into the type of work where no lifting is required.
- [10] Following an extensive review of the available medical records and reports, Dr. Peter Rees, a neurologist, stated in a letter dated June 6, 1995, that the plaintiff:

... sustained severe life-threatening multiple injuries including fractured ribs with flail chest, lung contusion, hemothorax, ruptured spleen, injury to right knee and extensive vascular injuries comprising transaction of the right subclavian artery and injury to the left subclavian artery producing false aneurysm.

- [11] Dr. Rees noted that the plaintiff's residual physical symptoms included sensations of coldness and tingling throughout both hands (left more than right, and worse in cold weather), dizziness, headaches, and low back pain.
- [12] At trial the plaintiff testified that he still suffers from these symptoms although to a much lesser degree than in 1995.
- [13] Based on his physical examination of the plaintiff on May 30, 1995, and his review of the medical records and reports, Dr. Rees concluded that the plaintiff was then employable and would remain so. However, he stated that he would have to defer to the vascular specialist as to whether he would be fit to undertake a logging occupation or other heavy work in light of the limitations of function in his arms from the vascular injuries.

RESIDUAL PROBLEMS

[14] In fact, the medical evidence demonstrates clearly that the plaintiff is unable to return to any outdoor physical occupation such as the logging business. For example, on November 18, 1993, Dr. Theo van Rijn, a specialist in physical medicine and rehabilitation, reported that:

Although the vascular supply was restored, he still has a precariously placed blood vessel that overrides his right collarbone. Because of this he has to place a shoulder safety restrain belt under his right arm when he is a passenger in a vehicle. This area is always vulnerable to a blow or fall and an injury to this area would seriously compromise the blood flow to his right arm and likely result in an urgent vascular surgical consultation.

The injuries around his left upper thoracic area also compromises his left arm blood flow. This doesn't really cause much discomfort for doing mundane activities, but as the activity level is increased, the increased to the left arm circulatory demands exceeds the capacity of his compromised blood vessel(s), causing muscle fatigue, cramping and discomfort. As his arms are elevated, this compromises the neurovascular bundle even more, and is probably responsible to some extent for changes in the sensation he experiences in his hands either because of mechanical obstruction of stretching of the nerve bundle and/or because of alteration of blood supply to this area. This problem is now unlikely to improve with time.

His knee complaints affect his ability to squat, to kneel and to lift to some extent, but not excessively; I would think that in time, these difficulties will increase.

His upper shoulder and arm problems will always affect heavier lifting. I think there is a small chance that he would require some assistance for heavier homemaking and maintenance chores in the future, if he was unable to have assistance from his family and friends.

...

Mr. Halbauer has suffered a considerable loss in job opportunities as a result of his accident. Well in excess of 50% of available jobs in the work force for persons of his age involved moderate to heavy work related activities. I suspect that he is predominantly restricted to sedentary work, although he might be able to manage some light work activities. I suspect he will even have some restrictions with some sedentary work. He reports problems with repetitious and coordinated movements of his hands ...

Given the overall picture of his musculoskeletal complaints, he is best suited to sedentary employment. He is capable of working, but the type of work he does will have to be suited to his particular physical problems. I believe he will be competitive in certain sedentary jobs, but this is not by all means applicable to all sedentary types of work. I think it would be very prudent to consider his job interests and can [sic] obtain training in that will lead him into the work force. I strongly suggest a vocational consultant be used to explore job opportunities and retraining options with him. He expressed career choice as the major source of concern in his life at this time, and it is a considerable issue that must be addressed to allow him to return to the work

force.

[15] Following a clinical evaluation of the plaintiff, Dr. Peter Fry, a specialist in vascular surgery, report on July 18, 1994, that:

... He clearly is not a candidate to return to his previous occupation as a logger, which would expose him to increased risk of injury and would also in my view be impossible for him to perform, given the limitations of his current physical activities.

I believe that he requires job retraining. ...

....

Finally, I find this patient to be a very honest, genuine individual who is extremely well motivated and is anxious to get back to his original occupation. I suspect that he will not be terribly happy with the idea of job retraining to a more sedentary occupation, but nevertheless he must be made aware of the hazards of increased physical activity, given his vascular abnormalities and the severity of the injuries that he sustained originally, which were clearly life threatening.

...

I would very strongly counsel against him ever returning to the forest industry or indeed any other occupation that would expose him to increased demand for physical work or an increased risk of physical injury.

[16] On January 23, 1995, Dr. David C. Chan, specialist in psychological and rehabilitation services, reported the results of the neuropsychological assessment of the plaintiff. He concluded his report by stating:

Based on available information and my assessment findings of Mr. Halbauer, I found him to be highly motivated in his rehabilitation. After the accident he was involved in upgrading his academic skills and finding employment. It is indicated from work evaluations and the medical specialists' opinions that he is not suited to return to his former job as a logger but would be able to carry out sedentary work.

[17] Dr. Chan also observed that Mr. Halbauer was then in need of vocational rehabilitation to assist him in his educational/vocational planning.

[18] And, in an updated assessment report dated July 27, 1998, Dr. van Rijn stated:

In my last report I noted Mr. Halbauer had suffered a loss in his ability to work and I maintain this is the case. As a result of his left shoulder, arm, lower back and knee complaints, and, to a lesser extent, his chest wall and right arm/shoulder symptoms, he continues to work restrictions. He is best suited to jobs involving sedentary or light physical restrictions where he has the capacity to move about when he becomes increasingly uncomfortable.

Even in such occupations, he would experience increasing difficulty within a period of time if he has to perform work which involves elevation of his arm to any extent or prolonged positioning of his arm away from his body. ...by extension his MVA related complaints likely would restrict him from the majority of jobs he would have been able to access in the logging industry prior to the accident in question.

As a result of his complaints, Mr. Halbauer had some care needs for home and property maintenance for activities requiring heavier physical demands. I noted such needs in my past report and it would appear that such requirements would persist in the future.

[19] Mr. Halbauer has lingering problems, but he has not sought medical treatment for at least three years, and the only medication he takes now is one aspirin per day as a blood thinner.

OCCUPATIONAL AND VOCATIONAL REPORTS

[20] In a vocational assessment report dated December 22, 1992, Mr. Richard Carlin, a vocational consultant, reported that:

The physical limitations identified by the medical and occupational therapy reports as well as the client's personal experience following his accident point to his need to seek alternative vocational options outside of the Logging industry. Unfortunately, given the nature of Mr. Halbauer's residual problems, I believe he will also find it difficult to perform a number of other physical demanding jobs. These will include labouring positions in Construction, Autobody and Mechanical Repair, and a variety of other Trades position. This leaves Mr. Halbauer little in the way of transferable skills that can be applied to other occupational areas.

[21] Mr. Carlin went on to note that the plaintiff had upgraded his academic qualifications and recommended that he take a one to two year vocational training program after further academic upgrading. He said, as matters currently stood, Mr. Halbauer would only be competitive for those unskilled or semi-skilled positions of a lighter nature that provide for on the job-training.

[22] In a subsequent report, dated July 6, 1995, Mr. Carlin stated that:

In light of the current medical opinions, I am more strongly convinced that Mr. Halbauer's only means of compensating for his physical restrictions is through gaining new technical skills which will allow him to be competitive for a wider range of sedentary type jobs. He started this process in 1992 but apparently was discouraged by the restrictions placed upon him by ICBC. From a vocational rehabilitation perspective, this advice sidetracked his momentum toward retraining and delayed his return to the labour market. If it is at all possible I would recommend that Mr. Halbauer return to his original plan of obtaining new vocational skills. This will enhance his ability to competitively work with his restrictions rather than having to rely on the altruism of an employer, which currently would be his father.

[23] In summary, Mr. Carlin stated:

I am more strongly convinced that as a result of his injuries, Mr. Halbauer has lost a significant opportunity to participate in the labour markets. His one means of mitigating his circumstances would be to gain additional vocational skills in order to make available a wider range of sedentary occupations. His fatigue levels may realistically cause him to acquire more time to complete a standard two year diploma program. This same issue may interfere with his ability to work full-time and still have the energy and stamina to experience a life away from work. From a vocational rehabilitation view point, it is a shame that Mr. Halbauer's momentum in upgrading and retraining was diverted by an attempt to find a direct-entry job which would not serve to maximize his future earning capacity. In my opinion, he should be encouraged to quickly return to this route in order to maximize his life-term employment potential.

[24] In another occupational assessment report, dated July 14, 1998, Ms. Alison Henry of OT Consulting/Treatment Services Ltd., stated that she considered Mr. Halbauer to be employable. She said that:

His ability to work full time versus part time, will depend on the physical demands of his job. He may benefit from starting work or school on a part-time basis to build his tolerance and to allow him to continue with his exercise program.

[25] However she also said that she did not consider Mr. Halbauer to be suited for work in occupations where sitting is the primary work position, or is required for prolonged periods. She felt that he would be able to work in a standing position for two hours but that his tolerance to standing would depend on the activities performed. She stated that "It would not be recommended that Mr. Halbauer work in an occupation where standing is the primary work position."

[26] Ms. Henry further stated that:

Assessment findings show that [Mr. Halbauer] would perform best in occupations where he was able to alternate between sitting and standing at up to 2 hour intervals over the course of a day. The majority of the work should be performed in his mid-range with minimal requirements for reaching and with requirements for use of body dexterity positions being occasional rather than frequent or sustained.

Mr. Halbauer's feasibility for competitive employment as outlined is based on his present physical capacity. In reviewing the medical reports provided, including the results of the Work Capacity Evaluation performed in 1992, it appears he has made significant gains and that his vocational options may be greater than were anticipated. Mr. Halbauer appears to be uncertain about his work choices and re-assessment of his vocational options would be useful in providing him with direction and assistance in making choices....

THE PLAINTIFF'S EDUCATION AND WORK EXPERIENCE

- [27] After graduating from high school in 1983, the plaintiff went to work at his father's logging operation, doing such things as bucking logs, bundling cables and setting chokers. In 1984, he spent a few months working at autobody shop in Nanaimo. He then moved to Toronto, where he spent eight or nine months working at various jobs including autobody repairs and bricklaying.
- [28] After returning to British Columbia, the plaintiff went back to work at his father's logging business. He became a hook tender, a physically demanding and hazardous job, but one that he found rewarding. He enjoyed the outdoor life and the strenuous physical work. In the 1990s, his father expanded his business into road building and the plaintiff took on the supervision of that operation while, at the same time, continuing his hook tending job. He claims that at the time of the accident he was working 10-12 hours a day, six days a week.
- [29] Beginning in the spring of 1991, the plaintiff began to upgrade of his academic qualifications. By the end of 1993 he had completed several academic courses, including English 12, Biology 11, Chemistry 11 and 12, Physics 11 and 12, and Algebra 12, earning "A" and "B" grades for those courses. But, because he found the amount of time spent sitting rather exhausting, he and his vocational advisors concluded that any future schooling would have to be taken on a part-time basis.
- [30] In February 1994, following further vocational counselling, the plaintiff started working as a warranty clerk and service writer at an automobile dealership. It was the type of "on the job training" recommended by Mr. Carlin. He began in a part-time capacity working four to five hours per day and, in March 1994, he was taken on as a full-time employee. It was then that the defendant discontinued the temporary disability payments of \$300 per week.
- [31] When Dr. Peter Fry, a vascular surgeon, examined the plaintiff on July 4, 1994, Mr. Halbauer told him that he had no specific problems with the work, but he did not particularly enjoy it. He told Dr. Fry that he wanted to return to his original job, partly because it was far more financially rewarding than his job at the dealership, and also because he liked physical activity.
- [32] Dr. Fry reported that he found the plaintiff to be a very honest, genuine individual who was extremely well motivated and anxious to get back to his original occupation, and went on to say that:

I suspect that he will not be terribly happy with the idea of job retraining to a more sedentary occupation, but nevertheless he must be made aware of the hazards of increased physical activity, given his vascular abnormalities and the severity of the injuries that he sustained originally, which were clearly life threatening.

- [33] Mr. Halbauer quit his job at the automobile dealership on November 15, 1994. Under cross-examination, he acknowledged that he did so because he did not enjoy sitting indoors at a desk.
- [34] His supervisor, the service manager, testified that plaintiff had good work habits, that he tried hard, was punctual, demonstrated a good attitude, and was on good relations with his co-workers. Nevertheless, he said, had the plaintiff not quit his job, he would have been fired. He said that Mr. Halbauer had difficulty grasping the requirements of the job; that his work was slow and he made repeated mistakes.
- [35] After quitting his job at the automobile dealership, the plaintiff did nothing until the spring of 1995 when he went back to work, outdoors, for another of his father's businesses. This time he worked on a seasonal basis for Aqua Lake Logging, a company in the reforestation business. Once again, he acted as a supervisor, laying out the areas to be replanted and transporting fertilizer and seedlings to the worksites.
- [36] Mr. Halbauer carried on this seasonal work during the months of May through September in each of the years 1995, 1996 and 1997. Then, according to his father, FRBC ran out of money, and there was no more reforestation work for his company. It is reasonable to conclude that, had the funding not dried up, the plaintiff would have continued that work on a seasonal basis.
- [37] The plaintiff has had no real work since the fall of 1997. He testified that, after the Aqua Lake Logging job came to an end, he planned to take a year off and try to get into shape, then look for a job. As it happened, however, in January 1999, his son was born and, as a result of some family difficulties, about two weeks before this trial began the plaintiff was awarded sole custody of the child. The plaintiff now says that he intends to look after his son until he is about two years of age, when he will be old enough to go into day care, and then look for work.

ANALYSIS

- [38] In *Kenni v. Insurance Corporation of British Columbia* (1993), 14 C.C.L.I. (2d) 62 (B.C.S.C.), Holmes J. stated:

I accept that "total disability" within the meaning of s. 80 does not require an inability to do any of the acts or duties required in employment or an occupation. It bears a more contextually reasonable meaning as suggested in an insurance jurisprudence.

Appropriate guides to a meaningful definition here would therefore be:

When an injured person cannot perform any substantial requirement of his ordinary duty of employment ... and where the disability is as to an "... inability to do substantially all the material acts ... in substantially his usual and customary manner."

[39] That definition of "total disability" has been followed in several subsequent cases including *Rashella v. Insurance Corporation of British Columbia* [1977] B.C.J. No. 689 (B.C.S.C.) in which Madam Justice Satanove stated, in paragraph 20, that:

In order to bring himself within Section 80(1) the plaintiff must first prove on a balance of probabilities that:

- (a) he was a 'employed person',
- (b) who sustained an injury in an accident,
- (c) which totally disabled him,
- (d) within 20 days after the accident.

[40] However, as Melnick J. pointed out in *Brewer v. Insurance Corporation of British Columbia*, unreported, August 26, 1999, Cranbrook Registry No. 9591 (B.C.S.C.), there is a further requirement. In order to bring himself within s. 80 of the Regulation, the plaintiff must also prove, on a balance of probabilities, that he is not only totally disabled with respect to his previous employment, he is also totally disabled from engaging in "employment or an occupation for which he is reasonably suited by education, training, or experience".

[41] Section 86(1) of the Revised Regulation provides that:

86. (1) Where an injury for which disability benefits are being paid to an insured under section 80 or 84 continues, at the end of the 104 week period, to disable the insured as described in the applicable section, the corporation shall, subject to subsections (1.1) and (2) and sections 87 to 90, continue to pay the applicable amount of disability benefits to an insured described in section 80 or 84
- (a) for the duration of the disability, or
 - (b) until the insured reaches 65 years of age,

[42] As previously noted, the plaintiff received temporary total disability benefits up to and including March 21, 1994, when the 104 week period prescribed by s. 80(1) expired. By then, he had achieved a significant upgrading of his academic qualifications and been accepted for full-time employment at the automobile dealership. Understandably, the defendant concluded that he was no longer totally disabled.

[43] In this case, the vocational reports indicate the plaintiff was and still is "employable" in certain types of sedentary jobs. That, however, is not necessarily inconsistent with being "totally disabled" within the meaning of s. 80. Certain decisions of this court, such as *Labelle v. Great West-West Life Assurance Co.* [1986] I.L.R. 8137 and *Fraser v. Insurance Corporation of British Columbia* [1993] B.C.J. No. 1673 (Q.L.), support the view that the words "reasonably suited by education, training or experience" are to be interpreted with particular regard to the plaintiff's pre-accident background, not simply an abstract exploration of what jobs the plaintiff might conceivably be capable of undertaking. Being "employable" will not

necessarily refute the claim that the plaintiff is unable to do the type of work to which he is "suited".

- [44] In other words, the question here is not whether the plaintiff is physically capable of doing work of a sedentary nature, but whether he is "suited" to work of a sedentary nature given his past work experience training.
- [45] Clearly, he is best suited to physical work in the logging industry and other associated. But, given the physical restrictions noted by the several medical practitioners who have examined and treated him, and the opinions expressed by the vocational experts who have assessed and counselled him, there is no presently identifiable job opportunity available to him in those areas.
- [46] That said, when an injured person is no longer capable of performing the occupation to which he is best suited by his past work experience and training, it is reasonable for I.C.B.C. to expect, or even demand, that he take steps, such as vocational rehabilitation or on the job training, to improve his chances of finding other suitable employment. If I.C.B.C. reasonably demands that an insured person undertake such training or academic upgrading with a view to improving his suitability, and that person refuses or neglects to follow that course of action, then I.C.B.C. may discontinue his benefits pursuant to s. 90 of the Revised Regulation which reads as follows:

90.(1) Where, in the opinion of the corporation's medical adviser or vocational adviser and in the opinion of the medical practitioner attending an insured who is receiving benefits under section 80, 84, 86 or 88,

...

- (b) a retraining or educational program is likely to assist in the rehabilitation of the insured, the corporation may require the insured, at the expense of the corporation, to undergo treatment or complete the program.
- (2) Subject to subsection (3), where an insured refuses to comply with a requirement under this section, the corporation may, after giving the insured at least 60 days' notice in writing, by registered mail, postage prepaid, addressed to the insured at his last address according to the corporation's records, terminate payment of benefits under section 80, 84, 86 or 88.
- (3) The insured may, within the period of 60 days mentioned in subsection (2), apply to a judge of the Supreme Court for an injunction against terminating the benefits on grounds that
- (a) the treatment the insured is required to undergo
- (i) is unlikely to relieve the insured's disability, or
- (ii) may injuriously affect the balance of the health of the insured, or

- (b) the program the insured is required to complete is not likely to assist in the rehabilitation of the insured.
- [47] While the defendant does not rely upon s. 90 in this case, in my view, it is a factor to consider when assessing the nature and purpose of the Part 7 benefits provided for under the Act.

CONCLUSIONS AND DISPOSITION

- [48] Unquestionably, Mr. Halbauer has, as a result of the motor vehicle accident, suffered a marked loss of earning capacity and in the nature of employment available to him. But this is not a tort claim. The question here is whether or not he is totally disabled within the meaning of s. 80 of the Revised Regulations. It is not disputed that, as a result of the accident, he is totally disabled from carrying on his previous occupations in the logging industry. The question is whether he was, upon the expiration of the 104 day period, totally disabled from engaging in employment or an occupation for which he is reasonably suited by education, training or experience?
- [49] I conclude that he is not. The fact is, that after a probationary period, he was accepted for full-time employment at the automobile dealership. At trial, under cross-examination, he admitted that he left that job, not because of any specific problems, but because he did not enjoy working indoors at a desk. Obviously, he wanted to return to the woods in some capacity and the Aqua Lake Logging reforestation operation made that possible. He was not then "totally disabled" within the meaning of s. 80(1). But, since that work came to an end in the fall of 1997, Mr. Halbauer has made no attempt to obtain other employment or to further upgrade his vocational and academic qualifications.
- [50] In short, after the accident he obtained two jobs - service writer and reforestation supervisor - without specific training or preparation outside of that provided on the job. He chose to leave the first, and economic circumstances deprived him of the latter.
- [51] While one cannot criticize the plaintiff's earlier plan to take a year off, as it were, to get into better physical condition and then look for work, or his present plan to provide full-time care for his son until he is old enough for day care, neither of those reasons support a claim of total disability. He cannot reasonably expect the defendant to financially support either plan.
- [52] For these reasons, the plaintiff's claim is dismissed. The defendant is entitled to its costs at Scale 3.

"I.L. Drost, J."

The Honourable Mr. Justice I.L. Drost

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