

CANADA / JUDGMENT

Holder v. MacLean

2001 BCSC 1474

COURT

Supreme Court of British Columbia

DECIDED

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IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

BRYAN COLLIN HOLDER
PLAINTIFF

AND:

KENNETH DALE MACLEAN, TRANS-ISLE FREIGHTWAYS INC.
AND INSURANCE CORPORATION OF BRITISH COLUMBIA
DEFENDANTS

REASONS FOR JUDGMENT

OF THE

HONOURABLE MR. JUSTICE EDWARDS

Counsel for the Plaintiff: Donald E. Taylor

Counsel for the Defendants,

MacLean and Trans-Isle Freightways Inc.:

G. Glen Ridgway, Q.C.

Date and Place of Trial: October 15, 16 & 18, 2001

DUNCAN, BC

[1] This is an assessment of damages arising from a motor vehicle accident which occurred October 10, 1997.

Background

- [2] The plaintiff, now age 60, was driving a pickup truck which was "rear ended" by the defendants' tractor-trailer truck.
- [3] The plaintiff suffered injuries to his neck, shoulders, left knee and left ankle. He has intermittently experienced headaches related to the neck and shoulder injuries. The ankle injury is the most serious of the injuries not resolved by the date of trial. The plaintiff underwent three steroid injection treatments for the ankle injury which did not cure it. The prognosis is that the subtalar joint may continue to deteriorate, requiring surgery. The medical evidence is divided on the likelihood this surgery will be required. If it is, the plaintiff will be immobilized for eight to twelve weeks and permanently lose mobility in the ankle.
- [4] As a result of these injuries the plaintiff has attended many medical appointments and some 225 physiotherapy sessions, which continue at the rate of about one per week.
- [5] The injuries affected the plaintiff's enjoyment of life and restricted his household and recreational activities. He became sedentary and de-conditioned and gained weight because the ankle injury reduced his mobility. Headache and other pain negatively affected his mood and ability to concentrate.

Past and Future Loss of Income Earning Capacity

- [6] The most difficult aspect of this case is the assessment of the plaintiff's loss of income earning capacity. Frequently, loss of past income earning capacity equates with actual past income loss. A plaintiff is off work and loses pay due to injuries. That loss can be readily calculated.
- [7] Here the plaintiff is self-employed. He operates a small business seasonally employing four or five employees who fabricate and install sun decks, railings and awnings. The business is operated through a limited liability company of which the plaintiff is sole shareholder.
- [8] The plaintiff began the business a few months before the motor vehicle accident and continued to work regularly at it despite the injuries he sustained in the motor vehicle accident.
- [9] On November 19, 1998, the plaintiff suffered a fracture of his right elbow and injuries to his left hand and wrist in a slip and fall accident. These injuries were unrelated to those arising from the motor vehicle accident. Plaintiff's counsel submitted these later injuries accounted for 25% of the plaintiff's loss of ability to earn income.
- [10] The plaintiff and other witnesses gave evidence that he worked long hours six and sometimes seven days per week at the business before the motor vehicle accident and curtailed his hours somewhat thereafter because of his injuries from both accidents.

- [11] The plaintiff also assigned certain duties he had previously done himself, such as estimating jobs, to employees, because of his injuries.
- [12] Although the plaintiff's income tax returns and the financial statements of the company were in evidence, what the plaintiff earned through the company is unclear.
- [13] The plaintiff declared personal income from the company of \$7,500 for each of 1997 and 1998, \$9,000 for 1999 and \$13,500 for 2000.
- [14] During the corporate fiscal years 1996-2001 the company's sales increased continuously each year from \$212,000 to \$524,000. The company's gross profit (sales less cost of sales) also increased in each of those years from \$57,000 to \$170,000 and ranged from a low of 11.2% of sales in 1997 to a high of 32.4% in 2001.
- [15] Nevertheless the company had a net loss after deductions for expenses in each year but 2001, when it had a \$38,000 net income. The losses ranged from \$12,000 in 1996 to \$84,000 in 2000.
- [16] I infer the plaintiff obtained some financial benefit from the company each year beyond the modest earnings he reported on his income tax returns. No one would put in the hours he worked each year for the modest hourly return reflected in his declared personal income.
- [17] Neither the financial information for the company nor the evidence of Mr. Hayes, the company's accountant, or Mr. Salton, an accountant who prepared a report for the defence, provided any insight into what total financial benefit, equivalent to income or increased shareholder value in the company, the plaintiff derived from the company.
- [18] Mr. Hayes produced a projection of the company's monthly gross profit (which he referred to as "income lost to Mr. Holder") for the period after the accident, based on a rate of increase in sales of \$2000 per month from the months April to November 1997. Mr. Hayes calculated the accumulated "losses of earnings" or "differences between actual profits and projected profits" for the period November 1997 to March 2001, based on this projection, at \$162,000.
- [19] Mr. Hayes also estimated a future "continuing loss" of \$7,500 per year based on the assumptions that the plaintiff will be disabled from performing "certain physical activities on construction sites" and will employ someone else for 25% of an annual salary of \$30,000 to do them.
- [20] Mr. Hayes' assumption is that the plaintiff's injury creates an unavoidable and perpetual future fixed cost for the company and that cost will reflect directly on the plaintiff's future ability to earn income from the company. I find this one small employee salary component of the company's variable costs has no necessary or logical impact on the plaintiff's future income earning capacity.

- [21] On the basis of Mr. Hayes' report, plaintiff's counsel argued for an award of \$100,000 for "loss of past income earning capacity" and \$75,000 for "loss of future income earning capacity".
- [22] Mr. Salton criticized Mr. Hayes' methodology for projecting decreased monthly net income on two bases; first, that sales increased significantly in fiscal 1998 after the motor vehicle accident and second, the projected rate of increase in sales Mr. Hayes extrapolated from the April-November 1997 sales was based on too short and aberrant a period to be reliable.
- [23] Two assumptions underlie Mr. Hayes' projection. The first is that if the plaintiff had been able to carry on working as hard after the motor vehicle accident as before, sales would have increased faster. The second is that the business would have been more effectively run, translating into higher gross profits. Mr. Salton acknowledged these were intuitively reasonable assumptions. However, Mr. Salton was of the opinion that these assumptions could not be verified from the available data. I agree.
- [24] I did not find the methodology adopted by Mr. Hayes helpful in quantifying the plaintiff's income from the company or the change in shareholder value of the company since the accident. Since the evidence disclosed neither of those things, it was not possible to calculate, or even estimate, how much they might have been diminished by the effect of his injuries on the plaintiff's ability to work at his business.
- [25] In short, while the plaintiff has proved he was partly disabled by the accident and therefore worked fewer hours and less effectively at his business, the financial evidence does not provide a reliable basis for quantifying past income loss.
- [26] Damages are awarded for future loss of income earning capacity to compensate plaintiffs for loss of the capital asset of the ability to earn income in the future, where future income loss cannot be calculated or projected with certainty. There are cases that indicate a judicial "crystal ball" may be employed to determine such awards.
- [27] By seeking an award for past loss of earning capacity the plaintiff is asking the court to employ the judicial crystal ball to make an award for past loss, which cannot be proved on a balance of probabilities. This approach was expressly disapproved by the Court of Appeal in *Sales v. Clarke* (1998) 57 B.C.L.R. (3d) 36. In that case Finch JA (as he then was) at paragraph 15-16, rejected the submission that the onus for establishing possible future events applied to a "past hypothetical fact" and concluded that the fact that an injury caused a loss of income had to be proved on a balance of probabilities.
- [28] Damages are a question of fact. Past facts, like loss of income, must be proved on a balance of probabilities, whereas to obtain an award for future loss of income earning capacity the onus on the plaintiff is only to show a "real" or "substantial" possibility that his ability to earn income in the future will be diminished by his injuries.

- [29] In the absence of proof of income loss the claim for loss of past earning capacity is somewhat analogous to an assertion that a plaintiff who was not employed at the time of a tortious injury would have become employed before the trial but for the injury. Such a loss is compensable by an award taking into account contingencies as to the likelihood the plaintiff would have been employed and what the plaintiff's likely earnings would have been if employed.
- [30] Here however there is no contingency about the plaintiff being employed. The plaintiff continued to work. The contingency here is what he might have earned but for the accident.
- [31] In the absence of proof of what income or increased shareholder value the plaintiff derived from the company, over and above the nominal income he declared for income tax purposes, I find it impossible to conclude there was a real or substantial likelihood, let alone proof on a balance of probabilities, he would have earned more but for injuries caused by the motor vehicle accident. Many factors apart from the plaintiff's ability to work would bear on the performance of the company. There is no basis for determining how, or even if, more time worked by the plaintiff would have produced higher personal earnings or increased shareholder value.
- [32] On the facts of this case, the question also arises whether the plaintiff has met even the lower standard of proof respecting loss of future earning capacity. That is because the evidence does not prove past loss of income or the substantial likelihood of reduced past earnings. The company has continuously improved its performance since the motor vehicle accident and the plaintiff's ability to work in future as a result of his injuries from the motor vehicle accident may or may not deteriorate as a result of surgery to his ankle which may or may not be necessary.
- [33] I have considered whether it is appropriate to make an award for future loss of income earning capacity in the light the factors just mentioned. Bearing these things in mind together with the fact the plaintiff is approaching the normal age of retirement, I have concluded there is no real or substantial possibility that he will suffer future loss of income earning capacity.
- [34] I make no award for past or future loss of income earning capacity. I am mindful that in final submissions defendants' counsel suggested there might be an award of \$35,000 for "lost income and prospective loss of income". However, for the reasons stated I have concluded there is no basis for such an award. Defendants' counsel made an alternative submission that the fact the plaintiff's injuries made his job more difficult should be reflected in the award of non-pecuniary damages. I accept that submission.

Special Damages

- [35] Counsel agreed the special damages for out of pocket expenses were \$3,000, which I award.

Cost of Future Care

[36] The evidence indicates that the plaintiff may continue to benefit from physiotherapy treatments costing about \$40 each for an indefinite period. At the current rate of one per week the cost is about \$2,000 per year. There is no evidence that the possible surgery to the plaintiff's ankle will result in additional care costs, or that physiotherapy would be required after that surgery. I award \$10,000 for future care.

Non-pecuniary Damages

[37] Counsel, referring to numerous cases where the predominant injury was an ankle injury, submitted the range of non-pecuniary damages for the injuries sustained by the plaintiff, in light of their severity and duration, was \$35,000 to \$60,000.

[38] I award the plaintiff \$75,000 non-pecuniary damages for past and future pain, suffering and loss of enjoyment of life including a component for loss of the ability to work as long and hard and with as much satisfaction at his business as he had done before the injuries caused by the motor vehicle accident.

"E.R.A. Edwards, J."

The Honourable Mr. Justice E.R.A. Edwards

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