

CANADA / JUDGMENT

Hutchinson v. Dyck

2015 BCSC 1039

COURT

Supreme Court of British Columbia

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2015 BCSC 1039 Hutchinson v. Dyck

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Hutchinson v. Dyck,

2015 BCSC 1039

Date: 20140618

Docket: M144745

Registry: New Westminster

Between:

Mark Steven Hutchinson

Plaintiff

And

Cliff Dyck, South Coast British Columbia Transportation Authority dba Translink, and Coast Mountain Bus Company Ltd.

Defendants

And

City of Surrey

Third Party

Before: The Honourable Madam Justice Duncan

Reasons for Judgment

Counsel for the Plaintiff:

P. Kent-Snowsell

Counsel for the Defendants:

B. Home

Place and Dates of Trial:

New Westminster, B.C.

January 12-14, 16, 2015

Place and Date of Judgment:

New Westminster, B.C.

June 18, 2015

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Introduction

[1] The plaintiff, Mark Hutchinson, was a passenger on a bus driven by the defendant, Clifford Dyck. The other defendants own and operate the bus company. The bus went over a depression or dip in the road. The plaintiff was ejected upwards from his seat and hit the seat on the way down. He was subsequently diagnosed with a T12-L1 flexion distraction burst injury. Liability and damages are in issue. The claim against the third party City of Surrey was discontinued prior to the commencement of this trial.

The Accident

The Plaintiff

- [2] The plaintiff customarily took public transit from his home in Langley to his job in Delta. His route involved a bus from Langley to the Scott Road SkyTrain station, and from there another bus to his office in Delta. On the morning of October 29, 2010, the plaintiff boarded the bus at Scott Road station. It was dark and damp but not raining, although the plaintiff agreed it could have started raining after he got on the bus. The plaintiff sat on a bench seat at the back of the bus where the lights were on so he could read the paper.
- [3] The bus left Scott Road station and after five or ten minutes was travelling along the Grace Road portion of the route. The plaintiff described this portion of the route as twisty and windy and uphill. All of a sudden, without any shout or other warning, the plaintiff and two seatmates were thrown upwards off the bench seat. He felt like he was suspended three feet in the air but knew that was not physically possible. As the plaintiff fell back down the seat dropped away then rose up and struck him.
- [4] The plaintiff was left kneeling on the floor next to his seat, holding the bar to the ceiling, in a great deal of pain. Someone yelled to the driver to stop. An ambulance came and the plaintiff got out of the bus by using the overhead handrails for support. He was transported to Surrey Memorial Hospital where doctors diagnosed the injury as a fractured vertebrae.
- [5] The plaintiff believed the speed limit where the accident occurred was between 60 and 80 kilometres per hour. He did not recall buses slowing down on that road in the past. Until he was bounced off his seat, the plaintiff did not note anything unusual about the way the bus was being driven. He had no sensation of the bus slowing down; rather, he felt the speed

was continuous. He thought it was a well-travelled route and drivers did not need to slow down or speed up. He did not know there was a dip in the road and does not recall other drivers slowing down for the dip.

Robert Legace

- [6] Robert Legace is an incident analyst for Coast Mountain Bus Ltd. Mr. Legace investigates all incidents of damage to or injury on a bus. He investigated the incident in which the plaintiff was injured. He described the general area of the accident as the 11600 block of Grace Road in Surrey. Mr. Legace has investigated this area in the past for numerous other incidents where passengers were allegedly injured due to the dip in the road.
- [7] The parties agreed Mr. Legace's evidence was of limited application as it appeared he examined a different dip or depression on Grace Road, not the one involved in the matter before the court.

The Defendant Bus Driver

- [8] The defendant, Cliff Dyck, had been a driver for Coast Mountain Bus Company for 32 years at the time of the accident. When he started with the company he took a six week intensive training course. He had a 25 year safe driving record and retired about three and a half years before trial.
- [9] The defendant started work on October 29, 2010 at 3:30 a.m. He did not have a shift booked so he looked at the spare board, which indicates routes that require drivers. He drove the Scott Road route first and then took the River Road route.
- [10] The defendant had not driven the River Road route for just over a year. Part of the route is along Grace Road. The defendant was familiar with Grace Road, having driven on it since 1997. At some point in the past he had driven the River Road route every day for three months at a time, but he had not driven on Grace Road in any fashion since the beginning of 2009. At that time Grace Road was in comparatively good shape. The speed limit is 50 kilometres per hour, the road is curved and the pavement is uneven.
- [11] The defendant described driving along the River Road route to 117th Street where there is a T intersection. In that area there is a "huge up bump" that has to be taken at about 10 kilometres per hour. There is a street light at 117th Street and a bus stop located just west of that intersection. Since it was rainy and dark the defendant slowed down to see if anyone was at the bus stop. Nobody was there so he carried on around the curve in Grace Road to 116 Street where there is a sign warning of a bump in the road. The sign has been there for years and is not removed when the road is repaired.
- [12] The defendant testified he kept his foot off the power pedal and thought he was going about 30 kilometres per hour. He thought the road was still level but was not going to take a chance and travel 50 kilometres per hour. He knew there used to be a bump in the area before the

gate to the container yard and he was looking for it when suddenly the bus "bumped." The depression in the road was so wide the bus wheels went right into it. The defendant slammed on his brakes because he did not want the back wheels to hit the depression. He felt two impacts, the front axle and then the back axle. Somebody yelled about a person falling.

- [13] The last time the defendant drove the River Road route there was no bump or dip, but it was daylight and he could see the road was fine. This time it was dark and rainy with a reflection off the road from headlights. He testified he did not see the bump until he felt it. There was one light back by the bus stop and one by the sign indicating a bump but nothing actually shining light on the bump.
- [14] The defendant did not complete an incident report form within 24 hours. He took one home with him and handed it in on the following Monday. He has never read the notation on the bottom of the second page of the incident report form which says:

Whenever involved in a collision, pedestrian, onboard or wheelchair/scooter incident, however minor, litigation is to be anticipated. Operators are required to complete the appropriate Company reports within 24 hours of the incident or accident. Obtain as many witnesses and provide as many details as possible.

- [15] The defendant agreed that at examination for discovery he said the accident happened at 5:30 a.m. but his note of 6:55 a.m. on the incident report form was actually the correct time. He was shown photographs of the area where the incident occurred. They were taken by his supervisor shortly after the accident. He agreed they did not depict a rainy and dark scene.
- [16] The defendant acknowledged he did not fill in all the boxes on the incident report form, including the injured person's name, whether an ambulance attended, names of witnesses or a diagram of what occurred. He did not fill in how long the bus was delayed at the scene, the speed he was travelling, the speed at contact, how long he was delayed at the scene or the direction of travel.
- [17] The incident report form has a box captioned "Employee's description of incident including relevant details prior to and after." The defendant agreed he wrote "I knew that there was a bump in the road as I had driven the route about a year ago. I could not see how deep it was due to the darkness and heavy rain."
- [18] The defendant did not have his high beam lights on to assist with looking for the dip or judging its depth. He agreed the dip was significantly worse since the last time he drove over the road and it was the same one he had driven over before. The condition of Grace Road before this incident was the subject of discussion with other bus drivers. Their consensus was that it was a terrible patch of road, notwithstanding numerous attempts to fix it. The condition of the road was constantly changing and even without the sign warning of a bump the defendant knew he should watch out for one.

- [19] The defendant agreed it was his job to transport people safely and he had to proceed with caution when he saw the bump sign because it gave him little information about the size of the bump or depression. He was aware the road conditions could have changed since he last drove the route and that is why he reduced his speed. The prudent thing to do in those circumstances is to reduce speed and proceed with caution. He was taught in driver training to be vigilant and avoid passenger injury and vehicle damage. The road safety training program he took taught the following principles: look beyond the headlight spray, aim high, look wide and long, keep your eyes moving, leave an out or cushion to avoid mishaps, check your mirror and get the big picture.

The Law

- [20] In *Prempeh v. Boisvert*, 2012 BCSC 304, Dardi J. provided a helpful and comprehensive summary of the law governing accidents on public carriers:
- [15] The principles that govern the disposition of this case are uncontroversial. The reasonable foreseeability test informs the analysis of liability. The standard of care owed to a plaintiff passenger by a defendant bus driver is the conduct or behaviour that would be expected of a reasonably prudent bus driver in the circumstances. This is an objective test that takes into consideration both the experience of the average bus driver and anything the defendant driver knew or should have known: *Wang v. Horrod* (1998), 48 B.C.L.R. (3d) 199 at para. 39 (C.A.); *Patoma v. Clarke*, 2009 BCSC 1069 at para. 6.
- [16] It is well-settled on the authorities that the standard of care imposed on a public carrier is a high one. However the principle to be derived from the authorities is that the standard to be applied to the bus driver is not one of perfection nor is a defendant bus driver effectively to be an insurer for every fall or mishap that occurs on a bus: *Patoma* at para. 7.
- [17] *Day v. Toronto Transportation Commission*, [1940] S.C.R. 433, is the seminal case dealing with the liability of public carriers. The plaintiff, a passenger in a street car owned by the defendant, while standing and picking up a parcel in preparation to disembark, was thrown to the floor and injured by the sudden application of the emergency brake. The articulation of the standard of care was stated as follows by Hudson J. at 441:

Although the carrier of passengers is not an insurer, yet if an accident occurs and the passenger is injured, there is a heavy burden on the defendant carrier to establish that he had used all due, proper and reasonable care and skill to avoid or prevent injury to the passenger. The care required is of a very high degree: 4 Hals., p. 60, paras. 92 and 95. In an old case of *Jackson v. Tollett* (1817) 2 Starkie 37, the rule was stated by Lord Ellenborough, at p. 38, as follows:

Every person who contracts for conveyance of others, is bound to use the utmost care and skill, and if, through any erroneous judgment on his part, any mischief is occasioned, he must answer for the consequences.

[18] The principles articulated in Day have been interpreted by the courts in this province as endorsing the following analytical approach - once a passenger on a public carrier has been injured in an accident a prima facie case of negligence is raised and it is for the public carrier to establish that the passenger's injuries were occasioned without negligence on the part of the defendant or that it resulted from a cause for which the carrier was not responsible: Planidin v. Dykes, [1984] B.C.J. No. 907 (Q.L.)(S.C.); Visanji v. Eaton and Coast Mountain Bus Co. Ltd., 2006 BCSC 656 at para. 26.

Findings of Fact

[21] The plaintiff was ejected from his seat on the bus while simply sitting there and minding his own business. He was injured as a result and has proven a prima facie case of negligence against the defendants. The analysis shifts to whether the defendants have established that the plaintiff's injuries were caused without negligence or from a cause for which the carrier was not responsible.

[22] The defendant bus driver owed the plaintiff a duty of care. The pleadings allege 14 particulars of the breach of duty but the plaintiff's case turns on a consideration of four breaches:

- failing to drive the bus in a careful and prudent manner;
- driving the bus at a speed or in a manner unsafe for the conditions on the road;
- failing to either stop or reduce the speed of the bus reasonably or in time to avoid a hazard; and
- failing to drive the bus in a careful manner having regard to its weight and size and the nature and condition of the road.

[23] The defendant was an experienced bus driver. The plaintiff was entitled to expect that he would operate the bus in a safe, proper and prudent manner. The plaintiff is not expected to assume any risk associated with the operation of the bus which could not reasonably be anticipated by a passenger on the bus. The usual route along Grace Road would not cause a passenger to be thrown up off his seat in such a violent fashion.

[24] The defendant believed he was travelling 30 kilometres per hour when he hit the dip, but he made no note of that or other salient details on the incident form. The first time his estimate of 30 kilometres per hour was recorded came at his examination for discovery. This was an important detail which should have been noted on the incident form. The defendant was aware someone had been injured after he hit the dip in the road. The ambulance attended and took the plaintiff away. It was not a trivial matter. The defendant's recollection of his speed well after the incident is not credible.

[25] In addition, the defendant agreed he noted on the incident report form that he knew there was a bump in the road but could not see how deep it was due to the dark and rain prevailing at the time. In other words, he saw it but did not approach it in such a fashion as to judge it

properly. The defendant's recollection of the conditions as dark and rainy are at odds with photographs taken by his supervisor shortly after the incident was called in. While it would obviously be more light out as the morning progressed, the photographs do not depict a roadway soaked with heavy rain, further calling into question the defendant's recollection of how the accident occurred.

- [26] In all the circumstances, I find the defendant was travelling faster than he thought on a stretch of road he knew contained a dip. He was going too fast to fully appreciate how significant a dip it was and too fast to take evasive action and brake to minimize the impact once he saw the dip. On balance I am not satisfied the defendants have shown the driver conducted himself in a reasonable and careful manner consistent with the high duty of care imposed on those engaged in public transit and I find the defendants negligent.

Damages

The Plaintiff's Work History

- [27] The plaintiff is 58 years old. He obtained a science degree in 1978 and a food processing certificate in 1981. He started work as a quality assurance technician in a food processing operation and gradually worked his way up through management positions in BC Packers. BC Packers was part of the Clover Leaf brand which was purchased by Bumble Bee Foods. The plaintiff was kept on by Bumble Bee to oversee the quality management program for importers, which involved liaising with the Canadian Food Inspection Agency and compliance with its regulations.
- [28] At the time of the accident the plaintiff had a staff of five people responsible for Bumblebee's U.S. labels, consumer complaints for Bumble Bee and Clover Leaf, quality compliance for imports to Canada and the U.S. as well as traceability and recall responsibilities. He worked in an office and when product testing was required samples were couriered to him. He traveled to Bumble Bee facilities around the world to work with other staff members and provide training. He had no difficulty carrying out his job prior to the accident. In the three years prior to his layoff, which is discussed below, he earned an average of \$107,000.

The Aftermath of the Accident

- [29] The plaintiff was in immediate pain after he landed on the floor of the bus. He described it as severe and intense pain in the area of his spinal column. He began sweating heavily. The plaintiff could not get up without the assistance of the ambulance attendants. He used the overhead handrails to get to the front of the bus and was transported by ambulance to Surrey Memorial Hospital.

- [30] The plaintiff was x-rayed at the hospital and advised right away that he had a fracture of the L1 vertebra. He was given morphine, which helped with the pain. While lying on a gurney his first thought was to call the office to cancel his upcoming business trip to Chile. He then contacted his wife to come and get him, although he felt bad about calling her because she was in the midst of dealing with her mother's illness.
- [31] On discharge the plaintiff was provided with morphine tablets and advised to see his doctor. The morphine did not eliminate his pain. He could not stand or sit at the hospital while he waited for his wife to pick him up.
- [32] The plaintiff's wife, Marian Buechert, said her husband looked pale and shaken at the hospital. Once home the plaintiff could not do very much. He lay on the couch for the next two or three days until he felt more physically able to move. The plaintiff had a prescription for Naproxen and took over the counter muscle relaxants but did not get very much relief from the pain. After a few days the plaintiff asked Ms. Buechert to drive him to work so he would not leave his colleagues short staffed.
- [33] In the first week after the injury the plaintiff had a lot of pain through his spinal column, up to his neck and down his hips and legs. He felt shattered and it took a great deal of effort to get out of the only comfortable position he could find, which was lying on his back. He had strong pain for the first two months after the accident, about an eight out of ten. His doctor recommended a return to normal activities as soon as possible but he could not get relief from the pain. He went to work in pain, came home in pain and woke up in pain. The pain exhausted him.
- [34] The plaintiff worked in a small office and felt obligated to continue working. His doctor did not recommend staying off work. He could not drive for two months and it was painful to be a passenger. At work he would take long breaks to lie down on the floor of his office. Once he was home he would have to lie on the couch for an hour or more to recover. He arranged his office so he could stand at his computer instead of sitting down. The plaintiff testified he had a "pretty miserable" time for the first two months.
- [35] The plaintiff did not do much over the Christmas season in 2010. He would have to get up during social events due to the pain. He attended five sessions of physiotherapy at his doctor's direction in November and December 2010. He stopped after a follow up x-ray indicated he might be doing more harm than good and saw Dr. Thompson, the orthopedic specialist.
- [36] By the summer of 2011, the plaintiff was still in a lot of pain, about six or seven out of ten on average. He continued to take long breaks during the work day and had other inspectors do some of his travel for him. He found it difficult to sit down on a plane. The pain was mainly in his mid to lower back with some hip pain after sitting for a long time. He also experienced numbness in both legs to varying degrees, left worse than right. He was still taking over the counter muscle relaxants at this time. The plaintiff and his wife and teenaged son were supposed to go to South Africa that summer. They decided to cancel the

trip because the plaintiff was not in good shape and could not face long flights or driving.

- [37] By Christmas of 2011, the plaintiff said the pain was much the same as during the summer, with strong back pain in his middle and low back and hips. He still needed to move around to minimize the pain.
- [38] In the summer of 2012, the plaintiff still had pain in his middle and low back and hips. The pain level had dropped to about a six out of ten and was more manageable; however, he was not pain-free. By the Christmas season of 2012 the plaintiff's condition was generally the same but the pain level sometimes dropped down to a five.
- [39] In early 2013, the plaintiff felt physically able to do more activities. On one business trip to Los Angeles in early 2013 he was working in a research laboratory, lifting four pound cans of food and twisting and standing. At the end of the day he felt some pain and when he tried to get out of his car at the hotel he could not move his legs he was in so much pain. Following the Los Angeles trip the plaintiff had to go to Chile. Since he could not back out of the trip he monitored his activities to avoid a flare up. His pain level was about four out of ten on the trip but occasionally the pain got worse. He was able to tolerate the flight but had to get up from time to time. Overall, he did not have the same energy level as before the accident.
- [40] The plaintiff's sitting tolerance improved in 2013 when he began using a higher seat at work. Sitting for half an hour is manageable, depending on the position of the chair. Prior to the accident he would work for two to four hours with no break but he still needs to take breaks more frequently than that. His concentration was poor if he had to sit in a conference or sales or marketing meeting. Despite his physical discomfort the plaintiff received very positive evaluations at work.
- [41] The plaintiff's co-worker, Nuzhat Malik, testified. She described the plaintiff as a very hard worker. She noticed a difference in him after the accident. He was not walking right and she could tell he was in pain. At times he would lie on the floor to deal with the pain. He would read files or papers while lying down, something he never did before the accident. He would stand during meetings, something he never did before the accident. When boxes of samples came in other co-workers would pick up the boxes of large cans so the plaintiff would not have to strain himself.
- [42] The plaintiff went for more physiotherapy in 2013. He felt stronger by then but at times the stretches would hurt. He does physiotherapy exercises at home about four days per week. He finds he cannot bend without pain or do repeated bending without severe pain. Twisting to do a task like raking the lawn is painful and he needs to monitor how much he does. He cannot lift more than about 30 pounds without pain. Since 2013, he characterizes his pain level at about a four. He is never pain free.

Activities Before and After the Accident

- [43] Prior to the accident the plaintiff felt he was a fairly fit middle-aged man. He did all the yard work, chopped wood and did minor maintenance on the exterior of the house. If he works an hour or two in the yard now he has to stop and rest, whereas before the accident he would go all day. He feels 10 years older than his age.
- [44] As for leisure activities, before the accident the plaintiff enjoyed canoeing, hiking, walking the family dogs, biking and dancing. He could not lift the family canoe onto the roof of the car in the summer of 2011 and after that they tended to rent canoes on location. Paddling is painful because of the sitting. Hiking is less uncomfortable but he cannot go more than a couple of hours before back pain starts, whereas before he would go for four to six hours. He tried swimming but he could only do a few lengths of the pool before his back hurt. The plaintiff cannot participate in as many activities with his son, such as going on amusement park rides. He finds these types of limitations annoying.
- [45] The plaintiff feels his wife has been very patient with him, particularly since the pain and discomfort has made him more irritable. He has improved a lot since late 2012 but is not doing as much work around the house and has to rest more due to the pain. As noted above, his tolerance for sitting is limited which means he is not very comfortable at music or other events. He used to go dancing with his wife but had to give that up. Their sex life was compromised for months after the accident because he was in pain and he feels they have sex less frequently now than before the accident.
- [46] The family has travelled to Australia and Namibia since the accident. The plaintiff characterized family vacations now as sedate with frequent stops when they drive and low key activities such as bird watching and going to the beach. Prior to the accident they would hike up mountains or go snorkelling.
- [47] Ms. Buechert said her husband is very unselfish and puts the needs of others before his own. He does not like to talk about his own discomfort. Before the accident he would rake leaves, fix the fence, paint and do general yard work. On one occasion they were having trouble with the septic field on their property. Ms. Buechert went to bed and awakened at 3:00 a.m. to find her husband out in the yard digging up the septic tank in the pouring rain to determine the source of the problem.
- [48] After the accident Ms. Buechert has noticed the plaintiff has to pace himself. He will rake or trim trees for 30 to 45 minutes and then rest but he refuses to hire people to do things. He cannot carry a full basket of dirty laundry downstairs. At least once a day Ms. Buechert will catch her husband gasping or wincing in pain. Sometimes he cries out in pain in his sleep. His sleep patterns are badly disrupted by pain which adds to his exhaustion and irritability. He was not irritable before the accident.

The Plaintiff's Current Employment

- [49] In the fall of 2013, Bumble Bee notified its employees that it was closing operations. The plaintiff received a severance package and remained on salary until March 2015. Since shortly after the layoff he has been actively engaged in looking for work in the food processing industry as a quality assurance manager, but as of the date of trial had not secured a new job.
- [50] The plaintiff feels for the most part he can work as a quality assurance manager again. The job is a flexible one and he can move between desk and factory work as he needs. He would let a prospective employer know he might need some accommodation. He did some contract work prior to trial which involved working on a food plant floor most of the day. He felt strain and exhaustion as a result. He does not tell potential employers at first contact about his limitations.

The Expert Evidence

- [51] The plaintiff tendered reports from three experts: two doctors and one physical capacity evaluator. The defendants did not seek to cross-examine any of them.

Dr. Fareidoon Rezazadah

- [52] Dr. Rezazadah is the plaintiff's family doctor. He saw the plaintiff on November 3, 2010, four days after the accident. The plaintiff complained of some pain. The doctor noted diffuse tenderness in the plaintiff's lower back and limited flexion. Dr. Rezazadah reviewed the x-ray that had been taken at the hospital and sent the plaintiff for a bone mineral density test to rule out osteoporosis. He saw the plaintiff again on November 9. The plaintiff said he was still in pain. The doctor referred him to physiotherapy and encouraged him to minimize his use of Tylenol 3 if the pain could be managed by other medication, as Tylenol 3 has side effects.
- [53] By the November 30, 2010 visit the plaintiff was using over the counter pain medication rather than Tylenol 3. He reported that back pain interrupted his sleep because he was constantly changing positions. While the plaintiff was still tender in the area of the fracture, his overall movement was much better. A repeat x-ray was ordered.
- [54] The plaintiff's next visit to Dr. Rezazadah was on January 27, 2011. He reported he still had pain in his back, sharp pain in both hips and numbness along the left leg if he sits for a long period of time. He displayed no tenderness and his range of motion was intact. The doctor recommended recommencing physiotherapy and swimming along with a visit to a rehabilitation specialist.

- [55] On February 1, 2011 the doctor had updated x-ray results of the plaintiff's fracture. It appeared to be worsening and the plaintiff denied any further injuries or falls. The doctor advised the plaintiff to "take it a little easy" until he was assessed by an orthopedic surgeon. On a September 2011, visit the doctor discussed the plaintiff's need for medication to deal with his osteoporosis. The plaintiff started on calcium and vitamin D supplements.
- [56] The plaintiff did not see his doctor again until May 2013. He reported no significant changes in his back pain since September 2011. He said the pain still starts in his back and radiates to the lower back if he is still for a long period of time. In June 2013, the plaintiff reported to Dr. Rezazadah that he was doing better but continued to suffer from back pain after small routine daily activities.
- [57] In May 2014, the plaintiff continued to complain about his back pain. He wakes up early and feels pain in his back. It continues all day and radiates up and down his back. Sitting makes it worse. Dr. Rezazadah found the plaintiff to be slightly sore in the T12 and L1 level but his range of motion was intact. At a second visit that month following an updated x-ray of the plaintiff's back, the doctor encouraged him to go back to routine activities and focus on strengthening and rebuilding his back.
- [58] During a final visit before this trial in September 2014 the plaintiff again complained of back pain that worsens with little physical activities or long sitting. He denied it radiating to his lower back and leg. He was slightly distressed with sitting so he stood during the visit.

Dr. J.P. Thompson

- [59] Dr. Thompson is an orthopedic surgeon with a specialty in spinal issues. He saw the plaintiff on March 24, 2011 and noted:

At the time of consultation, he described a plateau in his improvement. He continued to have a residual ache in the back that occurred in proportion to sitting and bending activity. Intermittently, he would experience some lower extremity numbness involving the foot.

- [60] In x-rays taken that day the doctor diagnosed the plaintiff with a consolidated L1 fracture, consistent with healing. The healing resulted in a slight kyphosis at the T12-L1 of 20 degrees.
- [61] Dr. Thompson saw the plaintiff again on April 18, 2011. A CT scan confirmed a healing L1 vertebral body fracture with a small retropulsed fragment that resulted in minimal encroachment on the spinal canal with no neurologic compression. While the plaintiff reported continuing sensory changes in his foot the doctor found no compressive lesion and opined the sensory symptoms may be caused by initial trauma or residual inflammation, edema or scarring.
- [62] On the basis of the CT scan findings (interspinous widening and facet joint distraction), Dr. Thompson diagnosed a T12-L1 flexion distraction burst type of injury. He recommended follow up in one year with a gradual increase in activity but limited bending, lifting and impact.

[63] Dr. Thompson followed up with the plaintiff on January 3, 2012 by telephone in response to the plaintiff's email to him of early December. Dr. Thompson said:

[The plaintiff] was counselled that he could expect permanent residual chronic mechanical back pain secondary to his injury and deformity. Sitting would be expected to increase the discomfort because of the compression on the anterior vertebral column at the site of the injury. In terms of treatment, physiotherapy to work on core, posture and low impact fitness would probably be helpful in reducing symptoms. He was advised that it would be unlikely that he would risk further damage to his spine with lifting and carrying items such as a canoe and back pack. However, lifting activity would potentially increase his residual symptoms. He was advised that it would be safe to carry weight using ergonomic principles and using his symptoms as a guide. Further injury at the site of his injury would probably require a degree of trauma similar to what he experienced in October 2010.

[64] Further follow up in October 2012 with the plaintiff revealed no change in the magnitude of post traumatic deformity.

[65] Dr. Thompson's opinion was that the mechanism of the bus accident was consistent with the type of spinal fracture suffered by the plaintiff. The plaintiff would have permanent impairment with prolonged sitting or flexed postures and repetitive heavier lifting. He might have to make some ergonomic changes to his office setting to improve his tolerance for sitting.

[66] The doctor was of the view that if the plaintiff's work situation changed and he could not avoid prolonged static positioning or heavier repetitive lifting there would be implications in his capacity to earn income. The nature of the injury put him at risk of progressive degeneration from osteoarthritis and deformity and the site of the injury. If the pain worsens and function is diminished, surgery may be a consideration to correct the deformity and stabilize it with instrumentation and fusion. Recovery time for this type of surgery is lengthy, in the range of six to twelve months.

Mary Richardson Carman

[67] Ms. Richardson Carman is an Occupational Therapist. She performed a physical capacity evaluation of the plaintiff on June 3, 2014. The plaintiff was required to complete a variety of tasks over a period of seven and one half hours. They tested his ability to sit, stand and walk as well as his body dexterity. Body dexterity testing engages activities such as bending to test the lower back, stooping to test the upper back and kneeling and crouching. Elements of limb coordination, strength testing and overall activity tolerance were also scrutinized. Ms. Richardson Carman concluded:

In my opinion, with consideration only to his present physical capacity, Mr. Hutchison [sic] is considered to be employable (i.e., with some physical restrictions) on a part-time and full-time basis, with the potential to work in limited or light strength occupations. His physical restrictions are listed below and relate primarily to any work that requires significant use of static postures, frequent bending or crouching, or repetitive lifting.

In other words, Mr. Hutchison would not have the physical capacity to be able to access, in an open labour market, any jobs that have the requirements for those restrictions as given below, despite being qualified in other ways (for example, by education, training, interests and aptitudes). He may require modified job duties or other environmental/ergonomic intervention related to the restrictions listed below, and this may limit the number of job titles that he is able to obtain or maintain.

[68] I have summarized the restrictions identified by Ms. Carman Richardson as follows:

Sitting: the plaintiff is restricted from work where he is required to sit for prolonged periods frequently or constantly, but he is able to perform work involving sustained sitting for period of 20 to 40 minutes frequently. He benefits from opportunities to get up and move around or change positions to manage his symptoms.

Standing: the plaintiff is restricted from work with significant demands for prolonging standing, particularly static standing. He is able to stand for one to two hours occasionally or for shorter periods frequently, as long as he can move around while on his feet.

Body dexterity: the plaintiff is restricted from work with significant demands for frequent or sustained bending or crouching. He is able to perform work requiring stooping, bending or crouching occasionally for a few minutes at a time.

Lifting: the plaintiff is restricted from work with significant demands for frequent lifting, carrying, pushing or pulling, but he can perform those kinds of tasks on an occasional basis and is better suited to work requiring limited or light strength.

[69] The plaintiff met the demands of his job in the food processing/packaging field with some limitations in terms of his ability to sit or stand on a sustained basis. Recommendations were made for ergonomic office equipment to accommodate his limitations, such as alternative seating and desk options.

Credibility

[70] Counsel for the defendants took the position that the evidence of the plaintiff's wife and co-worker should be given little weight as they were clearly biased in his favour. I found both Ms. Buechert and Ms. Malik gave their evidence in a fair and objective way. Their evidence that the plaintiff was a dedicated worker who did not like to complain about his condition after the accident was in harmony with the tenor of the plaintiff's evidence. As well, the expert reports support the conclusion that the plaintiff has worked hard to feel better and is not malingering or overstating the effects of the accident.

[71] While the defendants identified a small discrepancy between how the plaintiff described his pain levels at examination for discovery and trial, I did not find this affected his overall credibility.

Non-pecuniary Damages

[72] The purpose of non-pecuniary damages is to compensate a plaintiff for pain, suffering, loss of enjoyment of life and loss of amenities. The award should be fair and reasonable to both parties. The considerations which apply in assessing an award for non-pecuniary damages are well known and were summarized in *Stapley v. Hejslet*, 2006 BCCA 34 at para. 46 as follows:

- (a) age of the plaintiff;
- (b) nature of the injury;
- (c) severity and duration of pain;
- (d) disability;
- (e) emotional suffering;
- (f) loss or impairment of life;
- (g) impairment of family, marital and social relationships;
- (h) impairment of physical and mental abilities;
- (i) loss of lifestyle; and
- (j) the plaintiff's stoicism (as a factor that should not, generally speaking, penalize the plaintiff: *Giang v. Clayton*, [2005] B.C.J. No. 163 (QL), 2005 BCCA 54).

[73] The plaintiff seeks an award of \$110,000. He points to the fact that his injury is permanent and he is at risk for future degeneration and possibly surgery. While the plaintiff can do some of the activities he used to do, such as canoeing, hiking and biking, he cannot do them for long periods of time and he experiences pain even after shortening the duration of the activities. He has given up dancing with his wife. His participation in family vacations is limited to fairly sedate activities whereas formerly he would engage in more rigorous activities.

[74] The defendants maintain the plaintiff's injury has been stable since November 18, 2011 and while he has some ongoing lower back discomfort, it is not disabling. The plaintiff has resumed all of his pre-accident activities, with the exception of dancing. He has gone on lengthy vacations to Africa and Australia and is able to do yard work. The defendants acknowledge the plaintiff must modify some of his activities due to pain. An award for non-pecuniary damages in the range of \$40-45,000 is submitted as appropriate.

- [75] Both parties submitted a number of cases to support their submissions on the non-pecuniary award. The cases illustrate a range from a low of \$35,000 in *Elgood v. Ellison*, 2010 BCSC 442, to a high of \$110,000 in *Benson v. Day*, 2014 BCSC 2224, for injuries similar to the one sustained by the plaintiff. While the cases are helpful, each plaintiff is different and must be assessed on an individual basis.
- [76] The plaintiff is 58 years old. Until the accident he was a fit and active individual. The injury caused by the accident was painful and initially debilitating. While the plaintiff's pain levels have decreased over the years since the accident, he always has some degree of pain and he may require surgery in the future. In addition, while the fracture healed he is left with kyphosis, a deformity in his spine.
- [77] The plaintiff has tried to live a normal life notwithstanding the injury but he has had to curtail many of his former activities by engaging in them for shorter duration. While the plaintiff can still travel with his wife and son, the trips have become less adventurous. I found the plaintiff to be a quiet and understated individual. He struggled to articulate the impact this has had on him emotionally but his wife noted he is less even tempered now. He presented as a stoic in the face of his injury.
- [78] In all the circumstances, I award the plaintiff \$90,000 in non-pecuniary damages.

Loss of Housekeeping Capacity

- [79] The plaintiff seeks an award of \$15,000 to compensate for his diminished capacity to do routine yard and maintenance work on the family home. He relies on *McTavish v. MacGillivray*, 2000 BCCA 164. An award under this head of damages reflects the loss of a personal capacity and is not dependent upon whether replacement housekeeping costs are actually incurred: *O'Connell v. Yung*, 2012 BCCA 57 at para. 67.
- [80] The plaintiff's capacity to perform routine yard and maintenance work on the family home has been diminished. Prior to the accident the plaintiff could work for hours. Now he requires frequent breaks. While this is a loss which ought to be compensated I consider it proper to account for it in respect of the quantum of non-pecuniary damages, and I have done so. When housework has been rendered more difficult and time consuming due to accident-related injuries, the loss may be appropriately addressed in a non-pecuniary damages award: *Campbell v. Banman*, 2009 BCCA 484; *Travis v. Kwon*, 2009 BCSC 63.

Past Wage Loss

- [81] The plaintiff makes no claim for past wage loss.

Loss of Income Earning Capacity

- [82] The plaintiff seeks the equivalent of two years' salary to compensate him for his loss of income earning capacity.

- [83] A claim for loss of future earning capacity raises two key questions: 1) has the plaintiff's earning capacity been impaired by his or her injuries; and, if so 2) what compensation should be awarded for the resulting financial harm that will accrue over time.
- [84] The plaintiff maintains he is employable, but with limitations related to sitting, standing, body dexterity and lifting. He returned to his employment after the accident and managed his limitations because he was in a director position and could delegate things such as plant tours and inspection. Plaintiff's counsel argues that now he is on the job market, he may not be able to take advantage of all opportunities available to him as a result of his limitations.
- [85] The defendants maintain the plaintiff has not been rendered less capable overall of earning income from all types of employment reasonably available to him. The accommodations or modifications he requires are minor and likely to be offered by any potential employer. The plaintiff wants to work as a manager and is fully capable of working in that capacity.
- [86] The defendants rely on *Graydon v. Harris*, 2014 BCCA 412. In that case the plaintiff was 60 years of age at the time of the accident. He retired from welding shortly before the accident but was re-hired as a project superintendent and was working in that capacity at the time of trial. This was primarily a light duty job although sometimes he was called upon to weld. The trial judge found the injuries would have no compensable impact on his ability to earn income in the future. The Court of Appeal upheld the trial judge, noting:
- [27] In any event, establishing a real and substantial possibility of a future event causing an income loss that is attributable to the plaintiff's injury suffered in the accident means that any employment said to have been lost to the plaintiff by reason of the injury must be shown to be realistic, having regard for what the plaintiff's circumstances would have been absent the injury: *Perren v. Lalari*, 2010 BCCA 140 at para. 32, citing *Steward v. Berezan*, 2007 BCCA 150. There is otherwise no proof of a loss.
- [87] The evidence in this case is that the plaintiff returned to work after the accident and at trial testified he felt he could work as a quality control manager again. He characterized it as a flexible job which would allow him to move between desk duties and other duties and in so doing control his discomfort. He is actively seeking similar work, albeit at a lower salary range than his former director position. This is realistic given that he became a director after working there for a number of years as a manager and it is unlikely he would enter a new company at a director position.
- [88] Considering all of the evidence, in particular the plaintiff's evidence that he could do his job with small accommodations and expected he could do the same type of work in the future, I do not find the plaintiff has established his earning capacity has been impaired by his injuries. He has not identified employment lost or unavailable to him by reason of the injury.

Cost of Future Care

[89] The plaintiff makes no claim for the cost of future care.

Special Damages

[90] The parties agreed on special damages in the amount of \$1,785.39 and I so order.

Summary

[91] The defendants are liable for the accident that caused the plaintiff's injuries. Damages are awarded to the plaintiff in the amount of \$91,785.39.

[92] Unless there are matters of which I am not aware, the plaintiff is entitled to his costs of the trial at Scale B. If the parties need to address costs they must contact Trial Scheduling in New Westminster within 30 days of the release of these reasons.

"Duncan J."

The Honourable Madam Justice Duncan

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