
CANADA / JUDGMENT

Love v. Pai

2003 BCSC 900

COURT

Supreme Court of British Columbia

DECIDED

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2003BCSC0900

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Robert Love v. Chien Te Pai,

2003 BCSC 900

Date: 20030609

Docket: B992478

Registry: Vancouver

Between:

Robert Love

Plaintiff

And

Chien Te Pai

Defendant

Before: The Honourable Mr. Justice Warren

Reasons for Judgment

Counsel for the Plaintiff

A. Vertlieb, Q.C.

Counsel for the Defendant

A. Mersey

Date and Place of Trial/Hearing:

February 17-21, 24-27, 2003

Vancouver, B.C.

Introduction

- [1] The plaintiff, a 51 year old medical doctor, was injured on April 7, 1998 when the defendant's vehicle hit the plaintiff's stationary vehicle twice and forced the plaintiff's car into the car ahead. The defendant had failed to apply his brakes and following the first collision with the plaintiff's car, mistakenly applied the accelerator and drove into the back of the plaintiff's vehicle a second time. The evidence was that the first collision was at a speed of approximately 30 mph. The photographs showed that the damage to the plaintiff's car appeared to be minimal and the cost of repairing both vehicles was between \$6,000 and \$8,000.
- [2] There is no dispute as to liability.
- [3] The plaintiff claims compensation for his personal injuries, his past income loss, lost earning capacity, lost future income, lost business opportunities and costs of future care.
- [4] The main dispute is as to the nature and extent of the injuries suffered by the plaintiff and whether his ability to work has been impaired and, if so, whether there is a causal connection with the accident. If the plaintiff's ability to work is impaired, then there are serious disagreements as to the appropriate amount of compensation to be awarded.

The evidence

- [5] A number of witnesses, including the plaintiff, testified to the change in the plaintiff following the accident in the spring of 1998. I will refer to only some of their evidence, as well as the evidence of his present and former employer. I will refer to the evidence of the various experts who filed reports or who were called to testify during my summary of counsels' submissions.
- [6] The plaintiff was avidly interested in, and vigorously participated in, athletics and other physical activities. He also played an active role in the day to day lives of his three children.
- [7] The plaintiff arranged his work week to permit him to work Friday and Monday nights and Saturdays and Sundays. This allowed him to spend time with his family during the week and to actively participate in his extensive athletic activities. At the time of the accident, the plaintiff had a strenuous exercise routine. He exercised three times a week at the gym and also bicycled, swam and ran long distances. He was in very good physical condition prior to the accident. Some of those with whom he exercised spoke of his strenuous exercise regime.

- [8] The plaintiff's father testified of his life-long passion for sports, particularly golf. The plaintiff himself told of his interest in tennis, swimming, golf, hockey and skiing when he was younger. The plaintiff's wife testified he never missed work and had no physical problems other than asthma and the usual aches and some low back pain when he exercised too much. She said her husband changed after the accident. She described the gradual decline in the plaintiff's attitude and the complaints of neck and back pain. She testified he tried to continue with his normal routine. She told how the plaintiff had to gradually give up his golf, running, racquet ball, tennis and his usual activities with their children. He now exercised at a gym using aerobics and exercise machines. Instead of his usual energetic self, she said her husband had to rest after work, looked pale and exhausted and was guarded in his movements. In the spring of 2001, she said her husband's condition appeared to decline steeply and he complained more of severe pain and difficulty working.
- [9] The plaintiff had neck surgery in December 2001. Ms. Borwick said that after the operation her husband lost his voice for a period of time, complained of considerable neck pain and was severely restricted in his activities for a period of six weeks. He was obliged to wear a neck support collar and could not exercise or do most activities for four months. She described him as irritable and under stress: it was a very difficult time.
- [10] Ms. Borwick said the plaintiff returned to work for the month of June 2002, and, although he wanted to return to work, was not able to continue. She said her husband continued with his exercises, but he did no other athletic or sporting activities. On the advice of his doctor, she said her husband decided to switch his place of work to one that required less physical exertion. She said that in December 2002 he started working at a walk-in clinic and is limited to four hour shifts, four times a week.
- [11] In cross-examination, Ms. Borwick said her husband took up hockey after the accident and played the 1999/2000 and the 2000/2001 seasons. He appeared to enjoy the activity. She said he practiced once a week, played once a week and went to the gym a couple of times a week for weight training and aerobic exercises. At present, her husband goes to the gym three times a week for a couple of hours at a time. She testified the family has taken holidays since her husband's accident and he has driven, with breaks, as far as the Okanagan but she will spell him off for longer trips to Alberta. Her husband had disability insurance which paid him \$4,000 a month while he was not able to work.
- [12] The plaintiff called a number of people who worked out at the same fitness facility, each of whom told similar versions of the complaints of the plaintiff and their observations of his declining physical abilities. Barbara Goodridge has known the plaintiff since about 1996 and testified to his fitness before the accident, his deterioration after the accident, and particularly, his upper body fitness. She said his left arm was not as strong as his right arm and his left upper arm muscles were noticeably smaller than his right. She said the plaintiff had recovered some of his strength since his surgery but not the same as he was before the accident and he is weaker on his left side, winces and favours his neck.

- [13] Simon Roberts had worked out with the plaintiff and he was a team mate during the two seasons of hockey. He described the plaintiff after the accident as appearing to have difficulty with his left arm. He said the plaintiff seemed to be struggling and having more difficulty with his left arm during the second season of hockey. Mr. Roberts acknowledged that there were some collisions during the no contact hockey games and that sometimes players fall, including the plaintiff. He said the plaintiff was about medium in his playing ability and although the players statistics showed he had fourteen goals and thirteen assists, the statistics were not reliable. Nevertheless, the plaintiff was a better than average player who attended all of the games and went to the hour long practices once a week. With reference to his work-outs, Mr. Roberts said he remembered the plaintiff was more interested in his cardiovascular fitness and spent some time socializing.
- [14] The plaintiff's former employer, Dr. Mosely, and Linda Brown, the office manager of PRS, described the plaintiff's work ethic. Both said that he was popular with the patients, many of whom asked if he had his own practice. PRS provides after hours physicians for their doctor/clients who do not wish to be disturbed at night and on weekends. Dr. Mosely told of his offer to sell a half interest in PRS to the plaintiff and gave evidence of some of the proposed terms. He said the proposal was declined because the plaintiff was not able to meet the physical demands of a full partner.
- [15] The plaintiff's father described how his son had changed, particularly after the December 2002 surgery. He described the plaintiff as previously energetic and outgoing, but now lacks energy and self confidence. For the first year after the accident, the plaintiff was not able to play his weekly game of golf and efforts to play after 1999 were few and appeared to be painful for the plaintiff.
- [16] James Roy is the vice-president of Care Point Medical Centres, the plaintiff's present employer. The plaintiff works out of the Victoria Drive location doing four shifts of four hours each week. Mr. Roy testified the plaintiff bills MSP for each patient, but assigns the payment to Care Point which keeps 40% as a fee and remits the balance to the doctor. He estimated the plaintiff could see between eighteen and twenty four patients a four hour shift, which translates into an annual income of between \$55,000 to \$65,000. The work is good for their doctors because it provides flexibility and improves their lifestyle. He also testified to Care Point's business doubling in one year and it now operates nine clinics and employs over a hundred doctors. Care Point has had no complaints about the plaintiff. He described the plaintiff as a terrific doctor with compassion and drive. He said that if the plaintiff were to work the regular six hour shift instead of his present four hour shift, then his income could increase by about 33%.
- [17] The plaintiff related his early history and his love of athletics and commitment to his family. For that reason, he worked the weekends and nights which allowed him the freedom to be with his family during the weekdays and also to engage in fitness training. He testified that by 1996/97 he was running thirty to thirty five miles as well as golfing and swimming a mile three times a week. He also bicycled twenty to thirty km two or three days a week. By April

1998, his health was good other than some mild asthma. He described the accident, the immediate after effects and the pain the following days although he was able to work, albeit with pain which he treated with Tylenol. Since the accident, he has had neck and back pain all day and every day, which gradually worsened. He experienced left side weakness starting in the fall of 2000 particularly in his left arm. He related how his left arm pain was reduced significantly by the December 2001 surgery, but said it has worsened again over the past three or four months.

- [18] Following his surgery, the plaintiff was not able to rotate his neck and could not drive until May 2002. After he started a new type of physiotherapy he was able to resume driving and could return to work at PRS. He worked three shifts a week, but only for June. The plaintiff had to stop because of the back pain he was experiencing. He started to work for Care Point, but continues to experience serious pain. He has tried to treat the pain with a long acting narcotic, but it made him nauseous and "dopey" so he stopped taking it. He takes no pain medication during the day so he can stay alert. However at night he treats his pain with Tylenol 3, Flexoral which is a muscle relaxant, and brandy. He continues to work because he needs the money and he does not want to sit around all day collecting the disability income of \$4,000 a month tax free which he began to receive after his surgery.
- [19] Under cross-examination, the plaintiff agreed he had missed no shifts since December 2002 and tries to continue with his fitness exercises, two or three times a week for one or two hours a visit but with light weights and a lighter cardio routine. He is not able to swim because it is too hard on his neck and back and it is too painful to ride a bicycle outdoors. He has not been able to play golf, squash or tennis since the spring of 2000.
- [20] He had reviewed the report of Ms. Quastel, the Occupational Therapy Consultant, and agreed that in the summer of 2002 he was able to do twenty seven push-ups in sixty seconds and thirty two sit-ups in sixty seconds. He said that for some unknown reason he was in more pain between June 2002 and December 2002.
- [21] He agreed that before the accident he had a number of physical complaints and he had received a variety of treatments, including an Achilles tendon problem, right shoulder injury, low back pain and neck pain. He said that a lot of the physiotherapy and manipulation treatments he received were because he was not able to take anti-inflammatories.
- [22] Ms. Quastel's report opined that the plaintiff is capable of working only part time and at an occupation with limited physical requirements. She made a number of recommendations that were intended to improve the plaintiff's comfort while working or provided therapy for his complaints. Under cross-examination, Ms. Quastel agreed the plaintiff required a "pretty high level" of fitness in order to perform the tests as well as he did and that he was well above average fitness when she tested him in June 2002. When she tested him again in December 2002, the plaintiff's fitness level had declined from excellent to bordering on fair with greatly reduced lifting scores and with some reduction in his mobility and increased

complaints of pain.

- [23] Defendant's counsel objected to a number of opinions in Ms. Quastel's report as being outside the area of her expertise. I conclude that those portions which appear to express a medical opinion are outside her area of expertise. Where, however, Ms. Quastel expresses an opinion on improved work environment, treatments, facilities necessary or desirable to enable Dr. Love to work with low pain or no pain, her evidence is admissible. Accordingly, I accept her opinions for a work site ergonomic evaluation; equipment; some of home maintenance assistance; and some of the gardening assistance.
- [24] The plaintiff has carried on the practice of medicine under the aegis of a private company. In approaching the income loss calculations the plaintiff's expert, Robert Mathews C.A., among other things, reviewed the company's financial statements and corporate tax returns. It was his initial opinion that the past wage loss of the plaintiff amounted to \$197,000 and the future wage loss from the date of trial until 2021, the date of retirement, was either \$1,836,020 or \$3,060,990. It would be the higher amount if the plaintiff had bought an offered 50% interest in his employer's company, PRS. This lost opportunity opinion was based on the financial documents provided to the plaintiff by Dr. Mosely without any independent analysis and, in arriving at a standard net income which formed the basis for both calculations, Mr. Mathews deducted certain of the same expenses shown by the plaintiff on his financial statements.

Plaintiff's submissions

- [25] Before the accident, the plaintiff had lived a full and active life. Now he suffers constant back and neck pain and other less serious problems. As a result of his injuries, the plaintiff's work activities have changed significantly and his lifestyle has been detrimentally affected. He faces a difficult and uncertain physical, emotional and financial future.
- [26] The initial diagnosis was of a whiplash - myofascial strains - to the neck and thoracic spines, and it was expected he would make an eventual recovery. Counsel argues the evidence shows the injuries were more significant. The plaintiff experienced increasing symptoms and chronic fatigue which was described as myofascial pain syndrome, right shoulder flare-up and chronic ITB friction syndrome worsening since the accident. Further, the plaintiff suffered an asymptomatic right shoulder problem, and by December 2001 Dr. Fritz discussed the chronic problems and prolapsed disc. More significantly, the plaintiff was suffering worsening neck pain with associated weakening and ultimately, a full herniation of a disc which required surgical intervention with the related speech problem. The surgery was designed to deal with arm pain and weakness and not the neck pain which, in spite of the surgery, the plaintiff continues to experience. His chronic neck and back pain prevents him from working full time and from returning to his previous active life-style. As a further result of his injuries, the plaintiff suffered from major depression and required treatment with antidepressants. Although the plaintiff is not clinically depressed at the present, counsel submits the evidence shows there is the risk of recurring depression.

- [27] The plaintiff's medical evidence was that the cause of the herniated disc at C 6/7 was the accident and the forward/backward mechanism which tore the annulus fibrosis. Dr. Honey, the plaintiff's orthopaedic expert testified how the dynamics of the collision tore or dislocated the annulus at or near C 6/7. All three of the plaintiff's doctors point to the accident as the origin of the tear to the annulus which caused the disc to deteriorate over time and result in the complete tear with leakage of the inner disc material or herniation. The disc herniation resulted in neck and arm pain and weakness. There was no evidence of disc narrowing or osteophytes as would normally be found in a person with a pre-existing degenerative disc disease. The evidence of the lay witnesses showed a gradual weakening of the left arm of the plaintiff and decreasing physical ability, a symptom consistent with nerve injury. The plaintiff argues that Dr. Honey's opinion noted that the "final push" leading to the herniation was likely the standard physiotherapy the plaintiff had in the summer of 2001 to help him deal with his ongoing problems.
- [28] Mr. Vertlieb argues that there was a continuous temporal link between the accident and the onset of neck pain on a gradual and increasing basis until the diagnosis of disc herniation and, at the very, least the accident must be considered as a material contributing cause as defined by the Supreme Court of Canada in *Athey v. Leonati*, [1996] 3 S.C.R. 458. Even the defendant's expert, Dr. Turnbull, long a respected orthopaedic specialist, agreed that there could be inadequate healing of a torn annulus which, in counsel's submission, would make the accident a materially contributing cause of the plaintiff's condition.
- [29] There is no disagreement that the plaintiff suffered, and continues to suffer, significant and chronic neck and back pain and that he requires pain relief medication which in turn impedes the plaintiff's ability to work.
- [30] Dr. Fritz, the plaintiff's general practitioner, was guarded in his prognosis of the plaintiff's neck and back problems. He opined that there was a real risk of further disc degeneration either above or below the present fusion site. Dr. Condon, the Musculoskeletal Pain Management specialist, expressed the opinion that the prognosis was for chronic intractable posterior neck pain and low back pain which would prevent the plaintiff from returning to his previous level of activity and would also limit his choice of practice in medicine. The plaintiff submits the evidence supports the conclusion that there will be further degenerative changes to the neck and these will eventually give rise to headaches, neck pain, shoulder pain and radiating symptoms to both hands. Given the chronic pain has been present for four and a half years and more likely than not will continue in the future, it is bound to affect the plaintiff's employment and recreation. The fact he has suffered these problems for so long suggests they will be permanent and will cause ongoing and lasting disability.
- [31] Lila Quastel, the occupational therapist, was of the opinion that the plaintiff could better manage his pain if he did not over-stress his neck and back and this is a significant problem because of the plaintiff's occupation as a treating physician.

- [32] One other problem the plaintiff has is his continuing vocal difficulties. His treating specialist believes the vocal difficulties are now mostly related to the reported muscle tension and pain in his neck and back. The plaintiff might benefit significantly through voice rehabilitation and therapy from a speech pathologist. Dr. Morrison believes that the vocal difficulties will impact the plaintiff's work as a physician in a way similar to the problems with his neck and back, although with satisfactory re-education "he may well get to the point of being able to talk for long periods of time more effectively".
- [33] In addressing the heads of damage, his counsel argues there can be no suggestion that the plaintiff has not worked hard to overcome the accident related problems. The plaintiff is well motivated, and, although he was entitled to simply stay at home and collect a tax-free disability payment of \$4,000 a month, he went back to work at a medical clinic and will likely earn less after tax income.
- [34] With reference to the claim for past wage loss Mr. Vertlieb convincingly argued there should be no deduction for tax imputed expenses which although not actually incurred, are nevertheless allowed for income tax purposes. Mr. Vertlieb argued that the past wage loss claim found in the plaintiff's expert's report of \$197,000 should be reduced by \$17,000 actually earned i.e. \$180,000, an amount not much more than the amount of the defendant's expert, Mr. Rob MacKay, whose refined opinion was approximately \$172,000.
- [35] As for the "Future Wage Loss", and using the defendant's expert's approach as well as his adjustments for an increase of 12.7% in revenues and adjusting for the charge of 10% which PRS deducts for its services, both experts arrive at a future annual income loss of \$132,000. Assuming the plaintiff is able to earn \$60,000 a year based on the calculations of the plaintiff's valuer, he still has a future income loss to age seventy of roughly \$1,180,000. This is based on an annual income loss of \$90,000 a year, after taking into account non-participation due to illness or injury. Each \$1,000 of lost income should be multiplied by \$13,100 to age seventy, which counsel argues is the realistic retirement age of his client given his financial circumstances which made it unlikely the plaintiff would be able to retire earlier than that age.
- [36] Further, the plaintiff is no longer able to work full time, and whether he continued to work at PRS or at the medical clinic where he presently works, the plaintiff has lost the ability to earn more income by working more hours. The plaintiff should be compensated for this lost opportunity.
- [37] There is another claim for compensation for lost opportunity advanced by Mr. Vertlieb. There was evidence that the owner of PRS had proposed selling an interest in the business to the plaintiff. Mr. MacKay did not perform an independent audit when he calculated a stream of income of \$61,000 a year whereas the owner of PRS, Dr. Mosely, projected annual revenues of \$180,000 when he suggested the plaintiff might buy in. Using an average earnings stream from PRS, the plaintiff could look forward to additional income of \$75,000 a year until age seventy, resulting in a lost opportunity, Mr. Vertlieb argues, of \$982,500.

Counsel agrees that the court should consider some contingency deductions to reflect the possibility the business may not have proceeded as planned. Counsel argues that this was not a speculative investment for Dr. Love who had worked in the business as a well considered physician and one who would have "fit the bill" perfectly. Accordingly, any deductions should be minimal.

[38] Mr. Vertlieb submits that any consideration of the appropriate compensation for pain and suffering [the non-pecuniary claim] should include: the plaintiff's chronic neck and back pain; the risk of future disc degeneration and herniation; the risk that surgery is not available to relieve the pain; the risk of future depression caused by the constant pain, financial stress and low self image; the loss to the plaintiff of his recreational pursuits including golf, swimming, cycling and the ability to compete in triathlon events; and, as well, a general decline in cardiovascular conditioning and fitness. Further, there is the plaintiff's loss of satisfaction caused by the need to change his work from PRS, which he enjoyed, to the medical clinic which is not as enjoyable. The plaintiff's counsel relied on four cases where the plaintiff had suffered similar injuries and similar loss and where the range of compensation was \$100,000 to \$125,750. His counsel argues the suitable compensation should be at the higher end of this range: *Deol v. Narcisse*, 2002 BCSC 1748; *Larwill v. Lanham*, 2001 BCSC 1597; *Switzer v. Buchi*, [1998] B.C.J. No. 1904 (SC); and *Dyson v. Purnell*, [1997] B.C.J. No. 741 (SC).

[39] In summary the plaintiff's claims are as follows:

Non-pecuniary \$ 125,750

Past wage loss \$ 180,000

Future loss - decreased earnings \$1,179,000

- lost business opportunity \$2,878,000

Loss of capital asset \$ 982,500

Future care costs \$ unspecified

Total \$5,345,250

Defendant's submissions

[40] While acknowledging that the plaintiff suffered some injuries in the accident of April 8, 1998, the defendant argues that there is not sufficient evidence of a causal link between the accident and the disc herniation which manifested itself three years later. Mr. Mersey submits that the clinical records of the plaintiff's doctor show that the day after the accident the plaintiff did not show signs of nerve injury and he had a full range of motion. Because there was no radiation or indication of nerve injury, Dr. Fritz did not order X-rays or CT scans and he felt it was most likely a "typical whiplash".

- [41] After the accident the plaintiff continued with his normal activities, returned to work as scheduled on the weekend and, within a few months he had resumed his regular fitness schedule five days a week. Further evidence of his return to pre-accident condition is found in the fact the plaintiff did not miss one work period until his discectomy in December 2001 and, in the evidence that he resumed playing hockey, an activity he had given up when he was in his teens. Accordingly, the defendant argues there is such a large temporal gap between the accident and the disc herniation that there is no nexus between the accident and the herniation.
- [42] The medical evidence from both orthopaedic experts, Drs. Honey for the plaintiff and Dr. Turnbull for the defendant, was that the first X-rays of Dr. Love's cervical spine taken in April 1999 show a normal, healthy spine with no indications of disc space narrowing. The first clinical picture showing any problem was the CT scan done in July, 2001. This showed disc space narrowing at C 6/7 and the development of osteophytes which are a sign of degenerative changes to the spine. Dr. Honey was of the opinion that these degenerative changes occurred between 1999 and 2001, but without CT scans performed in April 1998 there was no way of knowing whether any injury was suffered as a result of the accident. Dr. Turnbull was of the opinion that the complaints of Dr. Love were characteristic of a soft tissue injury. Mr. Mersey argues that maintaining the pain was due to a tear of the annulus is simple speculation on the part of the plaintiff.
- [43] It is common ground between the two orthopaedic specialists that the first neurological signs appeared in June 2001 following a physiotherapy session. The plaintiff's physician noted no complaints of muscle weakness prior to that date. However, the plaintiff testified to left arm weakness as early as 2000. Mr. Mersey submits the reliability of the plaintiff's evidence is not as good as it should be. Although there is no suggestion that the plaintiff fabricated his evidence, Mr. Mersey submits there were inconsistencies between the plaintiff's evidence at the discovery and the trial and between his evidence and some notations in the clinical records. The symptoms of radiculopathy complained of were not consistent with those described by both Dr. Turnbull and Dr. Honey who said the pain starts in the neck, then moves to the arm followed by arm weakness.
- [44] The defendant maintains that the disc degeneration experienced by the plaintiff is a common occurrence in people in their mid to late forties. There were other disc protrusions noted in the July 2001 CT scan in the plaintiff's cervical spine and Dr. Fritz, Dr. Turnbull and Dr. Honey all agreed that tearing of the disc can occur through degeneration, which is the natural wear and tear over a person's life time. Further, there was the evidence of the plaintiff's very active and physical athletic interests: hockey and running. There was evidence from the team mate that the plaintiff had had falls while playing hockey even though the game was supposed to be "non-contact". Dr. Fritz testified that running can cause a pounding which sends shock to the spine and the likelihood of sustaining an injury increases with running more than twenty miles a week. The defendant points to the evidence that in the two years before the accident Dr. Love regularly ran more than thirty

miles a week.

- [45] Mr. Mersey also pointed to the evidence of Drs. Fritz and Turnbull that there could be spontaneous herniation without any evidence of trauma prior to the disc herniation. While Dr. Honey did not agree with many parts of Dr. Turnbull's opinion of causation, Mr. Mersey says that Dr. Turnbull is a more experienced practitioner with over thirty years of operational experience compared to the six years of surgical and clinical experience of Dr. Honey.
- [46] Turning to the post operative condition of the plaintiff, Mr. Mersey submits the evidence of Dr. Honey was that the discectomy went well, the complete disc was removed and fusion had happened. There was an almost immediate reduction in pain which is consistent with the recovery of the nerve. The occupational therapist, Ms. Quastel, had extensively tested the plaintiff in the summer following his December 2001 surgery and found him to be extremely fit and strong. The plaintiff was capable of doing many sit-ups and push-ups six months post surgery, and although the results of a test performed in November 2002, three to four months before trial, were not as good, the defendant argues the reduction cannot be accounted for on any medical evidence, for neither Dr. Turnbull nor Dr. Honey, both of whom saw the plaintiff in November 2002, suggested any deterioration in the plaintiff's condition.
- [47] Mr. Mersey argues that the plaintiff has failed to meet the burden upon him of establishing the accident caused the disc herniation, the cause of the plaintiff's inability to work following his surgery. The plaintiff's other complaints, the right shoulder, the right iliotibial band [right lower leg] and the low back pain all were pre-existing conditions clearly documented in the clinical records. As a result, the plaintiff has failed to show on a balance of probabilities the accident injured any of these areas.
- [48] In reply to the plaintiff's submissions on general damages, Mr. Mersey argues that the proper range of damages for someone with this type of soft tissue injury is \$20,000 to \$25,000: *Taschereau v. Scarfo*, 2002 BCSC 604, *Pierce v. Pandhi*, 2002 BCSC 791, *Swyers v. Drenth*, [1995] B.C.J. No. 1012 (S.C.); and *Sattar v. Hasan*, [1994] B.C.J. No 3063 (S.C.). Where there is a soft tissue injury and a causally connected need for a discectomy, the range is between \$45,000 and \$60,000: *Ricci v. Mann*, 2003 BCSC 65, *Barchard v. Brown*, [1992] B.C.J. No. 2017 (S.C.).
- [49] The defendant argues there should be no award for past wage loss because the plaintiff worked until the time of his surgery and the surgery for the disc herniation was not the result of any trauma caused by the accident. Alternatively, if it is found the accident caused or contributed to the herniation, then there is no recovery because the plaintiff testified he lost no time and responded to every call from patients until the surgery. Further, any reduction in his income after April 1998 was the result of declining business at PSR which predated the accident and is reflected in the plaintiff's tax returns from 1994 to 1998. If this Court finds that there was accident attributable income loss post surgery, then the revised

Estimate of Income Loss prepared by Mr. McKay shows a maximum gross figure of \$86,767. However, this figure should be adjusted if the Court finds that the accident only partially contributed to the past wage loss. Mr. Mersey argues that the wage loss calculations of the plaintiff's expert, Robert Mathews, are incorrect because he: did not include certain expenses found in the plaintiff's tax returns and estimated expenses without a detailed analysis; there was no documentary support for the numbers; and Mathews ignored the plaintiff's use of a corporate vehicle which gave him a more favourable corporate tax rate.

- [50] Turning to the future income loss claims, Mr. Mersey submitted the defendant is not liable for any future income loss if the plaintiff's reduced ability to work was due only to the surgery. If there is a determination of entitlement to future income loss compensation, then of course the Court should consider the plaintiff's future employment, age of likely retirement and then apply the appropriate multiplier.
- [51] The defendant's counsel argues the plaintiff will likely continue working with the clinic because the profitability of PRS was declining while the Care Point clinics business was expanding, the income would likely be greater and the plaintiff would not have the burden of driving. Working at Care Point reduces the physical demands on the pre-existing knee, back and shoulder injuries.
- [52] The physical examination performed by Dr. Turnbull showed the plaintiff to be well muscled, physically fit, with a good range of motion in the lumbar and thoracic spine with full power in the shoulders, arms and hands. Drs. Pitcethly and Turnbull both stated the plaintiff was capable of working and the plaintiff has a demonstrated ability and desire to work. This demonstrates the plaintiff is capable of working for his present employer, and he should even be able to increase the number of hours worked.
- [53] With reference to the anticipated age of retirement, counsel argues the evidence shows that before the accident the plaintiff was very focused on maintaining a good lifestyle, one where he could spend a lot of time with his children and as well work out at a fitness centre and run long distances many times a week. Accordingly, it is unlikely the plaintiff would have worked past the age of sixty-five particularly because the pre-existing injuries to his shoulders, Achilles tendon and right ITB band were not improving with treatment.
- [54] Counsel argues that the appropriate multiplier is that of Mr. Hildebrand, which is adjusted for non-participation due to voluntary withdrawal, unemployment, illness and disability and also for part time work, all of which are clearly applicable to the plaintiff. The appropriate age is, on the evidence, sixty-five rather than seventy and the multiplier of \$8,983 calculated by Mr. Taunton under cross-examination is appropriate. If only non-participation in the work force is considered then the multiplier is \$9,229. Rob McKay calculated a future income loss based on the present value of an annual loss of \$21,880 to be \$196,548. However, Mr. Mersey submits that this may be an over estimation because it does not take into account the plaintiff's ability to work more hours.

- [55] Mr. Mersey relies on *Milina v. Bartsch* (1985), 49 B.C.L.R. (2d) 33 (S.C.); *Andrews v. Grand and Toy*, [1978] 2 S.C.R. 229; and *West v. Cotton* (1995), 10 B.C.L.R. (3d) 73 (C.A.) for a deduction of 20% for contingencies. Mr. Mersey also argues the Court should take the well-documented pre-existing injuries and the plaintiff's commitment to his life-style and reduce any future income loss award.
- [56] Defendant's counsel says the plaintiff has failed to establish any loss of business opportunity arguing that if Dr. Love had paid fair market value for an interest in PRS, he would have received an asset of equal value and there is no loss. Further, the vendor, Dr. Mosely, testified he wanted a partner who was prepared to work half of the sixteen shifts a week. This would require that the plaintiff work eight shifts a week, four more than he had already been working and which the plaintiff had described as stressful. Mr. Mersey argues that given the plaintiff's history, his commitment to his family and to fitness training and leisure time, it is unlikely he would have wanted to double his work load at this stage in his life. Further, the profitability of PRS had been declining and there was the increasing competition from walk-in clinics, which all combined to make the "investment" less attractive to the plaintiff. Alternatively, if the Court concludes that the plaintiff would have entered into the sale/purchase agreement with Dr. Mosley, then the preferred approach to valuing the loss is that prepared by Mr. McKay in Ex. 10 using a range of discount rates of 2.5% and 3% and which yield a loss of between \$40,000 and \$71,000.
- [57] Finally, in determining whether it is appropriate to make an award for the cost of future care, the Court must be satisfied that there is a medical justification for such claims and the claims must be reasonable: *Milina v. Bartsch*, supra, at 84. Mr. Mersey argues that none of the recommendations of Ms. Quastel are suggested by the medical practitioners treating Dr. Love, and for that reason alone, they should not be allowed. Only Dr. Van Rijn and Dr. Fritz make recommendations concerning future care for medications and gym passes. However, the plaintiff had had memberships in fitness centres/gyms for many years and would likely have continued to be a member had the accident not intervened. Accordingly, the defendant is not liable for the cost of any future care.

Conclusions

- [58] I find that the plaintiff sustained injuries in the three impacts caused when the defendant drove into the rear of the plaintiff's car of April 8, 1998 and these injuries have caused him significant and progressive pain and disability and have seriously encroached on his enjoyment of life and on his ability to work pain free. I further find that he has a diminished capacity to work and earn income.
- [59] The plaintiff was a fit man prior to the accident and he has made every effort to overcome his injuries and to work through the pain and discomfort. That has worked somewhat to the benefit of the defendant because, as a result of his efforts, Dr. Love suffered little past income loss prior to his surgery in December 2001.

- [60] The pivotal issues are: the extent of any pre-existing conditions and their role in the plaintiff's claims; what, if any effect, the injuries had on the offer from PRS; and, whether the injuries suffered in the accident are going to affect his income earning capacity. I will deal first with the claim for general damages.
- [61] While the plaintiff had a number of complaints prior to the accident, I conclude they were in the normal range for someone who was as intensely involved in fitness as was this plaintiff. These include the leg, back and shoulder complaints for which the plaintiff received treatment but which did not prevent him from continuing with work, interfere with his family life, or his athletic pursuits. I will deal later in these reasons with the extent of the role they played in his complaints after the accident.
- [62] While I am grateful to counsel for providing me with the useful decisions supporting their submissions on awards for general damages, each case must be decided very much on its own unique set of facts. The authorities cited do provide a helpful guideline of what other judges have awarded to other plaintiffs, given their circumstances, and I do not mean to discourage counsel from continuing to provide authorities.
- [63] As I have said, I find the plaintiff suffered considerable pain and suffering from the injuries caused by the accident and I find that these progressed in intensity as time passed. Whether the complaints were aggravated by the plaintiff's athletic pursuits such as running and hockey does not lead me to find any award should be reduced because a defendant takes his plaintiff as he finds him. In any event, I find that they did not have an impact, and, in fact, I find that the plaintiff made a much greater effort to recover from his injuries than could be reasonably expected. He continued to work through his pain and continued with his fitness regime in an effort to recover. I award the plaintiff general damages of \$100,000.
- [64] The plaintiff's claim for damages for the lost business opportunity is dismissed. Whatever offer was made by Dr. Mosley was so vague and uncertain as not to amount to an offer and, for that reason alone, it should be dismissed. Further, it is impossible to define any value based upon the paucity of financial information provided by PRS. Further, the income of PRS was declining and there was the increasing competition from the walk-in clinics. As well, there does not appear to have been a financial base on which the plaintiff could draw in order to find the funds necessary to make the investment. The evidence is just too vague and ephemeral to support the claim. In any event, from my observations of the plaintiff, and considering the body of evidence as a whole, I am satisfied that the plaintiff would not have ventured into a business enterprise that would have impinged on a lifestyle which suited his and his family's needs well. The plaintiff historically wanted a work schedule that allowed him to spend weekdays at home so he could be with his wife and children and exercise as he desired. I conclude that in all probability he would not have accepted the offer from Dr. Mosley and that the injuries he suffered had no part in his decision to not accept the proposal from PRS.

[65] I turn now to deal with the claim for future income loss or diminished earning capacity and a consideration of the evidence of what, if any, effect the injuries sustained in the accident affected the plaintiff's prospects and potential. The most recent authority on an award of loss of earning capacity also neatly summarizes the principles and supporting authorities. In *Reilly v. Lynn* (2003), 10 B.C.L.R. (4th) 16 (C.A.), (2003), B.C.C.A. 49, the majority wrote at ¶ 100-101:

An award for loss of earning capacity presents particular difficulties. As Dickson J. (as he then was) said, in *Andrews v. Grand & Toy Alberta Ltd.*, [1978] 2 S.C.R. 229 at 251:

We must now gaze more deeply into the crystal ball. What sort of a career would the accident victim have had? What were his prospects and potential prior to the accident? It is not loss of earnings but, rather, loss of earning capacity for which compensation must be made: *The Queen v. Jennings*, *supra*. A capital asset has been lost: what was its value?

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 in original]

[66] There is sharp disagreement between Dr. Honey and Dr. Turnbull on whether the injuries suffered by Dr. Love were the cause of his disc herniation and the required surgical intervention. The defendant says I should give more weight to the opinion of Dr. Turnbull because of his vast experience in this field. Dr. Turnbull's evidence was that, in his opinion, the plaintiff had a pre-existing condition that was not affected by the accident at all and the plaintiff would have inevitably suffered a herniation or herniations that would have required surgery, and there was no causal connection between the accident and the disc herniation. In his report of November 26, 2002, Dr. Turnbull wrote that he did not believe the accident caused the disc herniation at C6-7. Although Dr. Honey believed it did, Dr. Turnbull was of the opinion that the passage of

...over three years in time before the onset of left arm pain makes it most likely that the disc herniation occurred much later. In fact the history is quite clear that it occurred in June 2001. [As a result of the physiotherapy?] Over a period of a day or less he developed the characteristic symptom of shoulder and arm pain which was associated with the subsequent development of neurological dysfunction. Dr. Love believes that the weakness in the triceps may have come on about six or eight months earlier. Weakness from a cervical disc herniation follows the onset of pain and does not precede it. His present symptom that left arm pain is associated with some tingling of the ring and little fingers does not correspond to the disc that was involved with the herniation. I would judge that the present arm pain is part of his overall chronic pain picture.

[67] Dr. Turnbull went on to note that, leaving aside the possibility that the disc herniation was caused by the accident, the period of recovery from the accident caused injuries would be one or two years. Then,

[t]he main pain that would characteristically follow the accident that he sustained would be in the neck and upper thoracic spine, which in fact was a prominent problem right from the beginning. There is absolutely no objective evidence of dysfunction of the lower back or in any of the nerves that originate in the lumbar spine. Plain x-rays and the CT-scan of the lumbar spine are completely normal. Chronic pain that Dr. Love suffers in his low back can only be regarded as a continuation of pre-existing low back problems and cannot be associated with any identifiable physical pathology.

[Emphasis added]

[68] Dr. Turnbull found a limited range of motion of the cervical spine but he attributed this to a deterioration since the first year or two after the accident. However, there is little radiological evidence of deterioration and he could not account for it on a "clear cut physical basis". There are a wide variety of causes of chronic pain, often in combination, and one may include "ill advised exercises applied to the painful part of the body". I would note that most experts counsel on the advisability of exercising the affected areas and I do not infer of Dr. Turnbull's evidence anything other than that the plaintiff may have conducted ill advised exercises. I have heard no evidence however that specifically points to that as a cause of Dr. Love's pain, unless his demonstrated ability to perform a remarkable number of sit-ups for

Ms Quastel can be considered "ill advised". In any event, Dr. Turnbull opined that the discectomy would remove the herniation and relieve the pressure from the nerve and thereby "under usual circumstances lead to a marked reduction in the pain problem"[my emphasis].

- [69] Dr. Turnbull was not able to say why Dr. Love's neck was not moving better than it was. He concluded his opinion by writing that the plaintiff, who uses 130 to 150 mg of Codeine a day in the Tylenol 3, is narcotic dependant in controlling his pain.
- [70] Dr. Honey opened his first report by describing the plaintiff in early August 2001 as presenting "with a new onset of left sided upper limb radicular pain. As part of his treatment following his car accident, he was having physiotherapy in June this year when some mild manipulations of his neck resulted in sudden left arm radicular pain" [my emphasis]. Dr. Honey reviewed the CT scan performed in June 2001 and noted a moderate side protrusion at C6-7 encroaching on the C7 nerve root. He concluded that this was likely due to his left C6-7 disc herniation.
- [71] In his report prepared for counsel in anticipation of this trial, Dr. Honey opined that the mild manipulation in June 2001 resulted in sudden left arm pain which was likely due to impingement of the left C7 nerve root. His evidence was that most fifty year olds have some degree of degeneration of the cervical spine, but without a pre-accident scan it would be difficult to say if the protrusions were present before the accident. However, he wrote that the plaintiff said he had no pre-accident symptoms suggestive of cervical pathology. He then wrote that:

the main cause of the cervical disc herniation (and resultant neck pain and ultimately arm pain and weakness) was his motor vehicle accident. There was sufficient trauma to cause the problem. The patients symptoms, although multi-focal, always pointed to the cervical spine as the main problem. The quality of pain was characteristic of cervical disc injury initially. Tearing of the cervical disc can cause upper back or intra-scapular pain. Once the disc has been weakened it took some time to herniate sufficiently to impinge on the nerve root and compress it. The final push that resulted in sufficient herniation to compress the nerve was likely his physiotherapy in the summer of 2001. This physiotherapy is standard treatment for neck pain and was unlikely of sufficient force to cause a cervical disc herniation had the disc not been previously weakened.

- [72] It is with this opinion that Dr. Turnbull strongly disagrees. Dr. Turnbull agreed with Dr. Honey's evidence that patients usually make a complete recovery following a discectomy for the relief of pressure on the nerve because the operation is designed to reduce the radiating arm pain and weakness but has little effect on the chronic neck pain and the operation has no beneficial effect on lower back symptoms.

[73] Dr. Condon, the pain management specialist, has been treating the plaintiff since he was referred by Dr. Honey. Dr. Honey wanted to try conservative treatments prior to any surgery. Dr. Condon concurred with the opinion of Dr. Honey that the cause of the initial annular ligament injury was the motor vehicle accident and the weakened ligament allowed herniation of the disc during the subsequent three years. It was Dr. Condon's opinion that the long term prognosis for the plaintiff

...is for chronic intractable posterior neck pain and low back pain which would prevent him from retuning to his previous level of physical activity and limited choices within the medical field. In the cervical area he is likely to develop further degenerative disease at C 4/5 and C 5/6 levels with development of osteophytes an outlet foramina stenosis at all three of the affected levels. Development of such degenerative changes will eventually give rise to headache, neck pain, shoulder pain and radiating symptoms to both hands. It is likely that his ability to engage in any kind of work will be impossible. Surgical resolution of his problems would be a major undertaking as he would require spinal fusion and possibly canal decompression at three separate levels. Such surgery should not be undertaken lightly but progressive stenosis of the spinal canal in this area could lead to development of quadriplegia in the future. [emphasis added]

[74] Without in any way detracting from Dr. Turnbull's well known expertise in his field, I prefer the evidence of Drs. Honey and Condon and conclude that the accident was the cause of the disc herniation and that the prognosis for the plaintiff is guarded, at best.

[75] Accordingly, I find that the injuries sustained by the plaintiff in the accident of April 8, 1998 have had an impact on the plaintiff's capacity to earn income and this capacity has been diminished by his injuries.

[76] The plaintiff was able to continue to earn income in spite of his injuries, but there was still some income lost. The plaintiff's expert, Mr. Mathews, calculated these to amount to \$197,000 based on the amount the plaintiff actually earned after the accident to the date of trial and deducting that amount from the average annual income he had earned prior to the accident. Mr. Mackay used a similar approach, but with more deductions for business expenses. During the trial, they discussed their differences and arrived at some consensus. I am satisfied that the correct amount to ascribe for past income loss is \$175,000.

[77] I turn now to a determination of the claim for future income loss and diminished capacity. Looking into the murky crystal ball and testing what it shows against the evidence tendered at trial, which I accept, I find it likely the plaintiff will work to age seventy. He has some capacity to earn income and, allowing for the usual contingencies due to illness or injury, both of which are more likely than not, I conclude the plaintiff will likely earn \$70,000 a year from employment and his annual income loss to age seventy therefore would be \$62,000. For the reasons earlier stated, I do not allow for lost income from the PRS proposal and limit the recovery based on a lost annual income in the future of \$62,000. I leave it to counsel to apply the multipliers Table 2(a) in Mr. Hildebrand's report to arrive at the final figure under

this head of damages. I prefer Mr. Hildebrand's calculations as it contains contingencies more in keeping with the history of this particular plaintiff.

[78] With reference to the future care costs, I am satisfied that there is appropriate evidence before me to make an award on some of the facilities and services recommended by Ms. Quastel which are objective and supported by some medical evidence. The plaintiff is entitled to recover for the cost of twelve physiotherapy sessions a year and a work site evaluation. Because the plaintiff works out of a clinic I presume the necessary equipment and facilities will be either in place or provided by the clinic. There is not sufficient evidence to support an award for a fitness centre membership, which the plaintiff had historically had in any event, or for home and gardening costs.

[79] Unless there are circumstances of which I am not aware the plaintiff is entitled to his costs.

"T.P. Warren, J."

The Honourable Mr. Justice T.P. Warren

June 11, 2003 - Corrigendum to the Reasons for Judgment issued by Mr. Justice T.P. Warren advising that in paragraph 39, summary of the Plaintiff's claims total should read \$5,345,250.

July 10, 2003 - Corrigendum to the Reasons for Judgment issued by Mr. Justice T.P. Warren advising that in paragraph 77, the words "Table 2(a) of" should be inserted after "I leave it to counsel to apply the multipliers in" and before " Mr. Hildebrand's report to arrive".

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