
CANADA / JUDGMENT

Manson v. Kalar

2011 BCSC 373

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Supreme Court of British Columbia

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2011 BCSC 373 Manson v. Kalar

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Manson v. Kalar,

2011 BCSC 373

Date: 20110328

Docket: M100153

Registry: Vancouver

Between:

John Ernest Manson

Plaintiff

And:

Indraj Kalar

Defendant

Before: The Honourable Madam Justice Boyd

Reasons for Judgment

Counsel for the Plaintiff:

J.F.R. Chouinard

A. Kuntze

Counsel for the Defendant:

R. Von Ruti

Place and Date of Trial:

Vancouver, B.C.

March 9-10, 2011

Place and Date of Judgment:

Vancouver, B.C.

March 28, 2011

Introduction:

- [1] This is a claim for damages for personal injuries arising from a motor vehicle accident which occurred on April 1, 2008 when the plaintiff's vehicle was rear-ended by a vehicle owned and driven by the defendant. Liability has been admitted. The trial was limited to an assessment of damages.

Background Facts:

- [2] The plaintiff is 55 years of age and was just short of 53 years of age when the accident occurred on April 1, 2008. On that date he was driving a friend's large Ford F150 truck with a super cab--that is a one-half ton pickup truck with an extended cab--in "stop and go" traffic, merging with other traffic onto the Alex Fraser Bridge. While his vehicle was stopped it was rear-ended by the defendant's vehicle. Immediately prior to the impact he heard no squealing of brakes and had no opportunity to brace himself. While he had his foot on the brake, the force of the impact was sufficient to move the truck forward. While he was wearing a seatbelt, he was still thrown forwards and then backwards in his seat, striking his head against the headrest in the backward movement. He believes that the force of the seatbelt restraint left some bruising on his chest. He did not lose consciousness. While he was shocked by the collision he and the defendant managed to pull their vehicles to the side of the road where they exchanged the necessary information. Damage to the plaintiff's vehicle exceeded \$5000 in value.
- [3] A few days later, on April 4, 2008, the plaintiff attended the Nordel Crossing Medical Clinic and was examined by a Dr. William Tardos. The plaintiff had no family physician of his own and various friends had recommended he consult with Dr. Peach at that clinic. However Dr. Peach was not available on this first appointment and accordingly, he was seen by Dr. Tardos.
- [4] Dr. Tardos noted the plaintiff's complaints of tenderness and pain in the upper back, lower back and the soft tissues on either side of his neck. He diagnosed his condition as a soft tissue strain to the neck, back and chest wall. He prescribed muscle relaxants and analgesics.

- [5] Dr. Peach first saw the plaintiff just over a month later, on May 12, 2008. He noted the plaintiff's complaints of morning stiffness, particularly in the lower back, as well as an almost constant stiffness and soreness of the neck. Dr. Tardos diagnosed a paralumbar strain and paracervical strain and referred him to a clinic for physiotherapy.
- [6] Between May 26, 2008 and June 27, 2008, the plaintiff attended six physiotherapy treatments. However in early July 2008, he discontinued treatment since his wife had become seriously ill with pneumonia. She was admitted to hospital where her condition deteriorated rapidly, leading to her death eleven days later on July 27, 2008.
- [7] Sometime later in 2008 the plaintiff's elderly mother also died. He spent some time organizing the funeral and attending to the winding up of his late mother's estate.
- [8] It was not until January 27, 2009 that the plaintiff returned to visit Dr. Peach, almost eight months after his last visit. He reported continuing complaints of pain in his lower back as well as stiffness in the neck. He complained of intermittent muscle spasms in his neck and low back region. Dr. Peach found a "good preserved" range of motion of the lumbosacral spine, some tenderness of the paralumbar muscles, but no tenderness of the central lumbosacral spine. Range of motion of the neck was full, with the exception of some slight decreased range of motion on the left side of the neck. He recommended that the plaintiff continue with physiotherapy treatments and continue to follow a conservative therapy program.
- [9] Within less than a week, the plaintiff returned to Dr. Peach on February 3, 2009, continuing to complain of ongoing neck and back pain. While there was a diminished neck rotation to the right side, he otherwise displayed a full range of motion. Dr. Peach diagnosed his condition as an ongoing paracervical strain and paralumbar strain. He once again referred the plaintiff to a physiotherapist, this time recommending a sports physiotherapy clinic.
- [10] His final assessment of the plaintiff occurred on September 10, 2009, approximately six months before trial. He noted the plaintiff continued to complain of low back pain on a regular basis. Indeed the plaintiff complained that he suffered some level of discomfort "all of the time". While he displayed a full range of motion of the lumbosacral spine, his neck rotation was somewhat limited in both directions. He diagnosed him as having sustained a back and neck strain secondary to the injuries sustained in the accident.
- [11] On that date, Dr. Peach ordered x-rays of the cervical and lumbar spine. The cervical spine x-ray showed that the disc spaces were well maintained and that there is a very slight anterior lipping of the inferior margin of C6. As to the lumbar spine, there is slight degenerative lipping at L5. The L5-S1 disc space is slightly narrowed. The remained discs are normal. Dr. Peach concluded the degenerative changes shown in the neck and spine were most likely incidental findings, which changes could not be related to the motor vehicle accident or could be said to have been exacerbated by the injuries suffered in the accident. In his view the x-ray findings were normal and in keeping with what one would expect to find in the case of a 55-year-old patient.

[12] In his report dated October 17, 2010, Dr. Peach opines:

...it would seem reasonable that he may have a period of total disability lasting anywhere from four to eight weeks followed by a period of partial disability which typically last anywhere from eight but up to as many as twenty-six weeks. This is quite a broad variable period for partial disability and that is because, when it comes to neck and back pain problems following a motor vehicle accident, it is very difficult to predict a period of time for which a person will endure a partial disability. In fact, I could argue that he continues to have a partial disability with respect to his back and neck pain issues. He is not totally disabled, and he continues to work despite his ongoing neck and back pain issues.

However he does have significant ongoing pain to his neck and back and this would certainly limit him from doing any labour intensive type work if this were part of his job description.

It is reasonable to assume that Mr. Manson will continue to suffer with at least some mild to moderate degree of neck and back pain on a recurrent basis for the foreseeable future.

[13] At trial Dr. Peach testified that so far as the plaintiff's prognosis was concerned, he would adopt the medical "party line"--that is that generally speaking one would expect the plaintiff's symptoms to improve over time; but conversely, given the amount of time which has elapsed with continuing symptomology, it was more likely that he would continue to suffer some level of discomfort for another 2-4 years.

[14] The defence noted that the plaintiff stands 5'9" tall and weighs 195 lbs. Dr. Peach agreed that he was "slightly overweight" and that it would be helpful to his overall health if he lost some weight. While the excess weight likely exacerbates his mid and low back pain, he rejected the suggestion that the weight itself caused the pain. He agreed that had the plaintiff followed his recommendation of pursuing sports physiotherapy and engaging a personal trainer to structure a fitness program, some weight loss might have resulted. While that in turn may have improved the plaintiff's core muscle strength and his overall functional level, he rejected the notion that his pain level would necessarily have also been reduced.

Non Pecuniary Damages:

[15] The plaintiff submits that he has suffered a cervical and paralumbar strain which has left him with ongoing pain of the upper back and neck, but most particularly the low back for a period of almost three years, which has not resolved to the present date. While he has also suffered headaches from time to time since the accident, he admitted that he had likely not raised this complaint with Dr. Peach.

[16] By way of ongoing treatment, he has not pursued any further physiotherapy treatments since he discontinued attending the Sun God Physiotherapy Clinic in June 2008. Nor has he undertaken any other treatment, including chiropractic, acupuncture, or massage therapy. He has not joined a gym nor has he pursued a program with a personal trainer. His single self-treatment is his own stretching routine in which he attempts to duplicate some of the stretching exercises which his physiotherapist taught him, using a rubber resistance band.

He tries to perform these exercises at home 3-4 times a day, with some relief. Occasionally, at home, he also applies hot or cold packs to those areas where he is suffering pain.

- [17] In terms of his loss of amenities and enjoyment of life, he complains that the accident has had a substantial effect on his overall lifestyle.
- [18] In his youth, the plaintiff played a wide variety of sports but in his middle age, he restricted himself to golf, skiing and fishing. Prior to the accident, he was a talented and enthusiastic golfer who boasted a 5 handicap and enjoyed regular rounds of golf. Over ten years ago he participated in competitive golf with the BC Amateur Golf Tour. Prior to the accident he said that he had suffered what he believed to be a rotator cuff tear of the right shoulder. Relying on the recommendation of some friends, he took a nutritional supplement which "fixed" his shoulder in 60 days. Prior to the accident, he says that he would take that supplement as well as Ibuprofen before or during a game of golf, and was able to play without difficulty.
- [19] However since the accident, he complains that he has not golfed very much, largely due to the pain in his neck and back pain. Since he can no longer windup and rotate his torso adequately, he lacks the power to execute any significant golf swing and as a result, he cannot hit the ball as far. While he has continued to golf from time to time when his friends invite him along, he has effectively withdrawn from the sport.
- [20] At trial, a fellow work colleague, Mr. Robert Reilly, and a close friend, Mr. James Hendricks, both testified about the changes they have observed.
- [21] Mr. Reilly is also a talented golfer (9 handicap) and noted that he and the plaintiff used to golf regularly and essentially shared the same skills level. Since the accident, he has asked the plaintiff on a number of occasions to join him on a round of golf but each time he says that the plaintiff has declined. Once he told him that his shoulder "could not handle it". On other occasions, he says that the plaintiff just said "no I can't", without further explanation. The two men have not discussed the accident nor the injuries the plaintiff suffered as a result of the accident. Overall he described the plaintiff as "a little more reclusive" since the accident.
- [22] On cross-examination the plaintiff conceded that he may have declined Reilly's invitations to golf on the basis of his shoulder injury some 5-6 years ago, but he was unable to say whether he had recently employed that excuse.
- [23] Mr. Hendricks is the plaintiff's an old childhood friend. They met while playing Pee Wee hockey in Kerrisdale some 35-40 years ago. He said that prior to the accident, despite the plaintiff being a much more talented golfer, they often played together at a variety of the local courses He estimated they played 2-3 times a month during the good weather months. He said that since the accident the plaintiff has regularly declined any of his invitations to play golf, simply mentioning that "he can't play", but without going into any details.

- [24] The plaintiff also complains that he used to enjoy skiing before the accident but that he has been unable to do so since the accident. He told Dr. Peach that prior to the accident he was an "avid skier". In the statement he provided to the ICBC adjuster after the accident, he stated that prior to the accident he used to ski about once a week during the ski season.
- [25] I find that both statements were obvious exaggerations. In fact the plaintiff only used to ski 5-6 times a season at Grouse Mountain and a handful of other occasions on other local mountains. He explained that when he described himself as an "avid" skier he was referring to his ability to ski any slope, and not to the frequency of his skiing outings. Further when he referred to skiing once a week, he said this estimate included all the times he drove up to the mountain, found it was raining, and then turned back.
- [26] In any case, however infrequent his skiing before the accident, I accept that since the accident, he has indeed found it too painful to ski. He tried on two different occasions in the spring of 2009 to ski at Grouse Mountain but could not ski more than a single run due to pain. Mr. Hendricks confirmed that he had skied with him a few times per year before the accident, but has not since.
- [27] The plaintiff also used to enjoy annual trips to his friend, Mr. Hendricks' cabin in the Cariboo, where a group of buddies formed a "work team" to pull up the dock, chop wood, and generally ready the cabin for the summer season. Whereas the plaintiff always participated in that heavy work, he says that his ongoing pain has made it impossible to participate in that work since the accident. Mr. Hendricks corroborated that evidence.
- [28] The plaintiff has however been able to continue to fish. Indeed since the accident he bought himself a small boat for fishing, although that has broken down. He continues to enjoy river fishing on Gabriola Island at least once a year and continues to fish locally along the Fraser River with his daughter.
- [29] My own sense of the plaintiff's situation is that while the accident injuries have caused him some ongoing pain and discomfort, his overall lifestyle and activities have also been affected by the after effects of his wife's death followed by his mother's death some time later. When his wife died, his children were 13 and 17 years of age, in Grades 8 and 12 respectively. His wife was a stay-at-home parent who had always managed the home, supervised the children, and performed most of the household tasks. While he insisted that since her death, his life had not changed a great deal and that his sports activities and social life had not been substantially curtailed, I was left with a very different impression.
- [30] He admitted that his wife's and mother's death have had an "absolute effect" on his life. Since his wife's death, he has been careful to keep much "closer to home", particularly to supervise his young teenage daughter so as to ensure she is keeping good company and coping well emotionally. He spends as much time as possible with her and tries to find activities they can enjoy together, particularly local fishing outings. He struck me as a loving and committed father who has done his best to meet both his children's needs, and particularly the youngest child's needs, since his wife's death.

- [31] As I noted earlier, his colleague Mr. Riley described him as "more reclusive" than before. His old friend Mr. Hendricks was surprised when the plaintiff recently passed up the opportunity to join a group of old schoolmates to meet up with an old hockey pal who was travelling through town from Australia. He described his friend as now being "much less accessible as a person". He said that he was not as "open" as he used to be and that it seemed to be difficult to make arrangements to get together anymore. Both Mr. Riley and Mr. Hendricks testified that they had never heard the plaintiff specifically discuss the accident to any degree, nor had they heard him articulate any complaints about his injuries. Neither of them specifically attributed the plaintiff's lack of involvement in skiing or golf, or his lack of social involvement to the effects of his injuries.
- [32] Whether as a single parent, the plaintiff is simply too busy to participate in a full social life, or whether he is continuing to adjust emotionally to his wife's sudden death and his new status as a single man and single parent, or both, I cannot say. Neither of the plaintiff's friends provided any evidence to shed any light on this topic. Nor did the plaintiff seem to have any particular insight into the matter.
- [33] Defence counsel submitted that the Court ought to draw an adverse inference in this case on the basis that the plaintiff had failed to call his adult son as a witness on his behalf. The defence submitted that the son, now age 20, would have been in the best position to advise the Court about the impact the injuries have had on all aspects of his father's life since he sees the father in the home and presumably daily witnesses the effects of accident injuries.
- [34] I am not prepared to draw such an adverse inference here. I have no evidence as to whether the son was even available to testify. Nor in any case is it clear that a 20-year-old would have the maturity or insight to understand the difficult and complex dynamics involved in his father's recovery from the combined effects of his soft tissue injuries and the death of a long time spouse. I expect that the son himself has faced his own challenges since his mother's death.
- [35] The final result however is that the plaintiff has failed to lead sufficient evidence to persuade the Court that the significant change in his activities and general lifestyle is solely attributable to the lasting effects of his soft tissue injuries. I believe that at least one additional factor which is at play here is his own emotional adjustment to his wife's death.
- [36] In any case, on the basis of Dr. Peach's prognosis and the likelihood that the plaintiff's complaints arising from his soft tissue injuries will persist for some time to come, the plaintiff's counsel has submitted that an award in the range of \$60,000 would be appropriate.
- [37] In this regard the plaintiff relies particularly on the decision of Bernard J. in *Lamont v. Stead*, 2010 BCSC 432. There the plaintiff's vehicle was also rear ended. She sustained soft tissue injuries and complained of neck pain and muscle spasms across her upper and middle back. She was referred to physiotherapy and attended treatments for the next six months. In the interim she attempted unsuccessfully to return to work, but had to discontinue. She was able to return to work as a hospital physiotherapist a couple of months

later and since that time her employer had accommodated her physical limitations by limiting her work duties. She complained of almost constant mechanical neck pain, the inability to do any heavy household work, and the inability to enjoy her wide variety of pre-accident sports including skiing, running, kayaking, swimming and boating prior to the accident.

- [38] I agree with the defence that the circumstances in Lamont are substantially different to those in the case at bar. The plaintiff here has suffered injuries which are limited to his lower back and neck. He has pursued very little treatment for his injuries and, despite his doctor's recommendations, he has not attended few physiotherapy treatments or undertaken any core muscle conditioning programs. Nevertheless it is expected that he will recover in the foreseeable future. As I have already noted, while I satisfied that his ongoing pain and discomfort has limited his participation in his former sporting activities, some of his social withdrawal appears to be the result of other factors.
- [39] The defence has criticized the plaintiff's failure to follow the course of treatment recommended by Dr. Peach--specifically to attend physiotherapy and to strengthen his core muscles, adopting a gym program optimally under the supervision of a personal trainer. Defence counsel submits that a reduction of the non pecuniary damages award by as much as 30% would be in order.
- [40] While I acknowledge the plaintiff's failure to pursue those avenues of treatment, it remains that Dr. Peach admitted that while each of these modalities of treatment might improve the plaintiff's overall health, he could not say any of these treatments would necessarily reduce the amount of pain he suffered. In these circumstances, I see no foundation for any reduction of damages to reflect a failure to mitigate.
- [41] The defence relies on series of authorities, most particularly: Morrison v. Peng, 2010 BCSC 562; Al-Mandlawi v. Gara, 2005 BCSC 740, and Hrnic v Fast, 2004 BCSC 1411.
- [42] In Morrison, the plaintiff suffered soft tissue injuries of the neck, upper and lower back with symptoms which lasted approximately a year after the accident. Non pecuniary damages of \$18,000 were awarded.
- [43] In Al-Mandlawi, the 38-year-old plaintiff was awarded non pecuniary damages of \$8000. He suffered mild soft tissue injuries of the neck and back which were largely resolved within two months and fully resolved within eight months of the accident.
- [44] In Hrnic the plaintiff also suffered soft tissue injuries. She was unable to work for two weeks but her neck, shoulder and arm complaints were all resolved within six months after the accident, and her low back complaints within approximately 16 months following the accident. The Court awarded non pecuniary damages of \$12,000.

- [45] On a review of all of those authorities, the defence submits an appropriate award of damages would be approximately \$15,000, to account for inflation since those awards were made.
- [46] In my view, those decisions involved less serious soft tissue injuries which were largely resolved within several months or at most a year after the accident. In the case at bar, the plaintiff has suffered a mild to moderate soft tissue injuries, where the symptoms have persisted for almost three years since the accident and are still not resolved. In these circumstances, I find that a fair and reasonable award of damages is \$25,000.

Loss of past income:

- [47] As I noted at the outset, the plaintiff returned to work after the accident. There is no claim advanced under this head of damage.

Special damages:

- [48] The parties have agreed that the net special damages, following the payment of \$100 to date, total \$404.60. There will be an award of this sum under this head of damages.

Loss of future income earning capacity:

- [49] This was perhaps the most difficult of the various claims advanced by the plaintiff. Although he returned to work full time after the accident and has not incurred any wage loss to date, he claims that he has suffered a loss of future income earning capacity.
- [50] The plaintiff has been employed as a commission salesman at Brown Bros Ford since 1993. Prior to the accident, he earned approximately \$60,000+ per year. He earned \$60,623 in 2005, \$65,914 in 2006, and \$90,619 in 2007. It is not clear but the 2007 income may have been augmented by certain Ford Motor Company benefits which were paid out that year.
- [51] However since the accident the plaintiff's income has declined. In 2009, he earned \$41,684.60, the first drop in his income in the last five years. In 2010, his income declined further to \$37,856.77. In 2011, he testified that his earnings have been "okay, but not great" and that unless this pattern changed, he expected to earn no more than \$40,000 this year.
- [52] I should note here that the plaintiff does not attribute this decline in earnings to any of his accident injuries. As I understand it, his daily work involves reporting to the downtown office, attending sales meetings, walking about and checking the stock on the lot several times a day, sitting at his desk checking computer data, and sometimes taking prospective customers on test drives. There are constant opportunities to stand and sit, so as to accommodate one's position. Approximately eight times a year, as a means of providing service to his customers, he arranges to drive a truck up to Prince George and Fort St. John for delivery. In those cases, he is required to drive for several hours at a stretch and he finds this difficult to tolerate, given his low back pain. However apart from those occasions, there is no suggestion the plaintiff is unable to do his work or that he has actually lost any income as a result of his injuries.

- [53] Rather, as I understand the plaintiff's position, he accepts that as a result of the recent recession, the auto industry has suffered national losses and that accordingly his income, like that of many other salespeople, has dropped. He complains that his present income level is unsustainable" and insufficient to allow him to support his family. He said that accordingly, at some point in the future, he may be forced to consider an alternative means of employment.
- [54] It is in this regard that his claim arises. Prior to commencing work in the automotive sales industry, he had worked for many years for the Canadian Forest Products company, at the local Eburne Sawmill Division, working his way up the ladder until he ultimately became the senior Shift Supervisor. After the forestry industry's general decline throughout the Province, he turned to car sales and joined Brown Bros Ford in 1993. He says that over the last 18 years he has enjoyed his work at Brown Bros, that he respects the corporate family owners, and that he has always enjoyed the nature of the work as well as the fellowship of his colleagues.
- [55] Approximately ten years ago he left Brown Bros Ford for a short period to manage another dealership but ultimately returned to Brown Bros. While he has not made any job applications or engaged in any search for alternative employment over the last ten years, he says that he has always remained open to other opportunities, particularly since, as a commission salesman, he has no pension benefits, no secure income, and limited employment stability.
- [56] By way of alternative employment, his counsel has submitted the Court ought to consider the possibility of the plaintiff working as a lumber grader. Indeed at trial he produced a re-issued copy of the lumber grading certificate which was issued to him in 1986, some years before he left Canadian Forest Products company. (On reviewing the Work History document--Exhibit 1, Tab 15--I note that the plaintiff specifically worked as a lumber grader in 1987). He explained that he obtained a re-issued copy of that Certificate in March 2011 for the purposes of producing that document at trial.
- [57] The plaintiff submits that but for the accident and the injuries suffered, he would have the ability to consider returning to work as a lumber grader. The plaintiff says that now it is highly unlikely he could perform that work, given his ongoing disabilities. Specifically, he says that he could not stand on his feet for most of the day, lift heavy pieces of lumber (weighing up to 80 lbs) and then turn them over during the grading inspection process. He says that he would be unable to manage the standing, bending, lifting and reaching involved in such employment.
- [58] While no evidence of any comparative income losses was adduced, his counsel submits that he has suffered a loss of his income earning capacity which he values at \$25,000.

- [59] The defence submits that there is no evidence to support this alleged loss. First, as he admitted in cross-examination, the plaintiff is not having any difficulties performing his present work, other than the long haul delivery trips to the North of the province. The decline in his income is not related to his injuries but rather to the international recession. His own work colleague, Mr. Reilly, testified that the auto industry is undergoing a resurgence and that he expects his own income will rise this year.
- [60] Secondly, even if the plaintiff did chose to find alternative employment, I agree that even without the accident injuries, it was unlikely he would have sought or obtained work as a lumber grader. He has suffered shoulder problems for some time and according to Dr. Peach, the plaintiff would find it difficult lifting heavy objects above his waist level. Given his age, his chronic shoulder pain, and his loss of union seniority over his many years of absence from the lumber industry, I find it is highly unlikely he would ever returned to work in that industry. Further he admitted that most of this work is available outside the Lower Mainland and that as a single parent, with an adolescent child who has established friends and school relationships here, it was unlikely that at this stage of his life, he would move his family to those outlying areas to pursue such work.
- [61] In every case involving a future loss of income earning capacity claim, the plaintiff bears the burden of proving there is a substantial possibility of a future event leading to an income loss. Here I find the plaintiff has not proven impairment of a realistic employment opportunity and accordingly, there is no need to consider an assessment of this claim adopting either an income approach or the capital asset approach (*Steward v. Berezan*, 2007 BCCA 150).
- [62] In my view, given his long standing history in the sales industry, it is more likely that in the event the plaintiff chooses to leave Brown Bros Ford, he will seek alternative sales or sales management positions in any number of different fields, involving any number of different products. There was no evidence led that he is less able to do such work, or that he is less marketable as a salesman or that his injuries have made it more difficult to compete for employment as a salesman.
- [63] For all of these reasons, this loss of income earning capacity claim must fail.

Cost of future care:

- [64] While the plaintiff has not advanced any specific claim, his counsel submits that since his physician has recommended physiotherapy in the past, as well as a gym membership and the engagement of a personal trainer, all of these items should be assessed under the rubric of future care costs. I see no foundation for making any award under this head. The plaintiff has clearly indicated that he has no intention of joining a gym or attending physiotherapy, much less engaging a personal trainer. He strikes me as an individual who is generally reluctant to seek out medical care and assistance or pursue such therapies. Since there is little or no likelihood of him pursuing such treatment, I will make no award under this head of damages.

Costs:

[65] Since I am unaware of whatever offers of settlement may have been exchanged by counsel, I will make no award of costs at this point. I leave it to counsel to resolve this matter between themselves and failing that, to contact the Registry so as to arrange to make short written submissions on the matter.

"The Honourable Madam Justice Boyd"

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