
CANADA / JUDGMENT

McFadyen v. Dean et al

2006 BCSC 779

COURT

Supreme Court of British Columbia

DECIDED

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2006 BCSC 779 McFadyen v. Dean et al

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

McFadyen v. Dean et al,

2006 BCSC 779

Date: 20060516

Docket: M011679

Registry: Vancouver

Between:

Alex McFadyen by his Guardian Ad Litem

Alda McFadyen

Plaintiff

And

Firoz Dean, Copytek Duplication & Graphics Ltd., D & G Auto

Services Ltd., Victoria McCann and Michael McCann

Defendants

And

Insurance Corporation of British Columbia

Third Party

Before: The Honourable Mr. Justice Cullen

Reasons for Judgment

Counsel for the plaintiff

D.N. Osborne

M. Lyons

Counsel for the defendants and third party

L. J. Bell

M.A. Chaudhary

Date and Place of Trial:

February 13 - 17, 20 - 22, 24;

& March 8, 2006

Vancouver, B.C.

INTRODUCTION

- [1] The plaintiff's claim for damages for personal injury relates to an accident which occurred on January 18, 1999, when he was 13 years old. There is no real issue as to liability. The plaintiff was a passenger in the front passenger seat of a vehicle driven by Victoria McCann (the "McCann vehicle"). Ms. McCann was driving the plaintiff and her son, Brandon, to a soccer practice northbound on the King George Highway in Surrey when the defendant Firoz Dean drove his vehicle (the "Dean vehicle") eastbound on 96th Avenue through a stop sign and broad-sided the McCann vehicle. As a result of the impact, the McCann vehicle was pushed eastbound into a lamp standard located on the east side of the King George Highway. The McCann vehicle struck the lamp standard on the passenger side where the plaintiff was seated, causing the plaintiff's seat to break and pitch forward. The plaintiff was trapped between the seat and the dashboard until he was extricated by ambulance attendants who subsequently attended the scene. The plaintiff was taken to Surrey Memorial Hospital by ambulance and he reported going in and out of consciousness and having pain in his lower abdomen, right hip, neck and back. An x-ray revealed an avulsion type fracture involving the front of the pelvic bone. He was discharged from the hospital that same day.
- [2] I am satisfied on the evidence that the defendant Dean, who did not enter an appearance and did not appear at the trial of this action, should be found 100% liable for the accident. There is no evidence which allows a conclusion that Ms. McCann had any responsibility for the accident or that the plaintiff was contributorily negligent in any way. It follows that the defendant Copytek Duplication & Graphics Ltd. ("Copytek"), the registered owner of the vehicle driven by the defendant Dean, is vicariously liable, as is the defendant's employer, D & G Auto Services Ltd., as the defendant Dean was driving the vehicle in the course of his employment.

- [3] The issue in this case is the nature and extent of the injuries suffered by the plaintiff and the corresponding nature and extent of an appropriate award for damages, including general damages, damages for past income loss, damages for loss of earning capacity and damages for cost of future care.
- [4] The plaintiff, in his evidence and through his witnesses, claims to have suffered pain to his right hip and pelvis, his upper, middle and lower back, and to his neck. He claims that his injuries have developed into a chronic condition and, particularly his lower back, have impaired his past, present and future earning capacity and have diminished his enjoyment and quality of life.
- [5] The defendant Copytek contends, on the other hand, that the plaintiff's ongoing complaints have no objective basis and in such circumstances, I should heed the caution of McEachern C.J.S.C. (as he then was) in *Price v. Kostyba* (1982), 70 B.C.L.R. 397 at 399 (S.C.), quoting from *Butler v. Blaylock*, [1981] B.C.J. No. 31 (S.C.), when he observed that "the court should be exceedingly careful when there is little or no objective evidence of continuing injury and when complaints of pain persist for long periods extending beyond the normal or usual recovery." The defence contends that in view of all the evidence, the case for the existence of chronic and disabling pain is not made out and fails to justify an award for past loss of income, loss of earning capacity, or any significant cost of future care.
- [6] The case for the plaintiff consists of his evidence and the evidence of his parents to provide an account of the long term effects of the accident upon him; evidence from several of his friends as to their observations of the plaintiff in specific circumstances; and the evidence of both treating and independent medical professionals as to their examinations and assessments of the plaintiff's past and present condition and its implication for the future. The plaintiff also relies on the report and evidence of an economic consultant to address the possible financial implications of his injuries.
- [7] In response, the defence relies on evidence from independent medical professionals to offer an assessment of the plaintiff based on their examinations of him and the records and reports produced in the plaintiff's case. The defence also called an economic consultant in response to the plaintiff's evidence of possible financial consequences flowing from the accident.
- [8] At the core of the plaintiff's case is the contention that the accident left him with residual injuries involving pain to his neck, mid back, and, most significantly, in his lower back. It is the plaintiff's contention that his injuries, primarily the lower back in which he feels daily pain, have impaired his ability to work in a variety of occupations causing him both past loss of income and a future loss of earning capacity.

THE PLAINTIFF'S MOTHER, ALDA BISHOP

- [9] The plaintiff's mother, Alda Bishop, described the plaintiff before the accident as an average student who worked hard and was very athletic, mainly playing soccer but also basketball, baseball, volleyball and bike riding. He played soccer at the gold level - the highest competitive level for his age group - at the time of the accident. His other activities included hiking and fishing. Following the accident Ms. Bishop saw the plaintiff at the hospital. He appeared frightened, was crying and in obvious discomfort. He was discharged and went home that day, missing about a week of school thereafter. He had headaches, bruising to his right side with a lot of pain in his right hip. She testified that for a while, the plaintiff would have to be driven to and from school, with this eventually developing into the need to pick him up after school at least once a week.
- [10] She testified in the two to three month period before the end of the soccer season, the plaintiff was unable to play because of pain and his other activities were also limited. She recalled he returned to soccer in the fall of 1999, but never played at the same level of competitiveness and needed frequent breaks because of the pain and discomfort he experienced while playing.
- [11] She said initially the plaintiff complained of pain on a daily basis, but as he got older, the frequency of his complaints decreased, although he still to this day complains more or less on a weekly basis about the pain he experiences. Ms. Bishop testified the plaintiff went through special physiotherapy and learned about strength training. She said he learned how to take care of himself and adapted to his condition by going swimming and exercising. She said he kept active and kept up with his soccer, but to a lesser degree than his involvement prior to the accident.
- [12] Ms. Bishop testified the plaintiff experienced an improvement in his condition overall because he increased his strength through the use of a personal trainer, he had a good gym teacher and he worked hard on his strength training.
- [13] She described how after high school graduation the plaintiff went to Capilano College to attend film school. Due to a lack of space in the North Vancouver campus, he spent the first four months of his film course at the Sechelt campus and then returned to the Lower Mainland in December of 2003 when he began living at home again.
- [14] She said her observations of him were the same in that he still complained of discomfort and pain and she described his sleeping pattern as being "not good."
- [15] She was asked about him going to work at the factory where his father worked as a steel fabricator at Tree Island Steel. She said the plaintiff appeared to have great difficulty with that job and would be in tears when he came home and expressed his inability to do the job.
- [16] She testified that from grades 9 through 12, she saw the plaintiff displaying symptoms of pain. In particular, he would come home from school and lie on the floor, would use ice packs and heating pads and would do stretching to try and alleviate his condition. She said

there was some improvement over the years and the frequency of him doing these things decreased. Ms. Bishop said when the plaintiff worked at Tree Island Steel he would come home in pain and would either lie on the floor or soak in the hot tub. She said he medicated himself with Ibuprofen or Robaxacet and she would regularly get those medications to replace what he used.

- [17] Ms. Bishop was asked about the later employment the plaintiff secured at Armaur Plumbing. She said she was aware he worked there for about nine months and that he had the same kinds of reactions he did while at Tree Island Steel. The plaintiff would often go into the bathroom for pain pills, would lie on the floor and would express anger and frustration over his condition.
- [18] Ms. Bishop said there was an incident at work where the plaintiff injured his back and received benefits from the Workers' Compensation Board (the "WCB"). She said it was his lower back that bothered him from the work injury and that he went to a rehabilitation program. She testified the plaintiff appeared to be in significant pain during that period. He did not go back to Armaur Plumbing, but worked at Eecol Electric Ltd. ("Eecol") in the fall of 2005. During that period she saw him stretching his back and continuing to medicate himself and also using ice packs.
- [19] The plaintiff is now working for Telus, involved in cellular telephone sales. Ms. Bishop testified he still appears to suffer from back pain, but that the severity of the pain is less than before.
- [20] With respect to camping, Ms. Bishop testified they had to buy an airbed for the plaintiff and special neck pillows to help him sleep at night.
- [21] She testified that she saw him struggle physically and emotionally because of his pain.
- [22] In cross-examination Ms. Bishop agreed the plaintiff had other health issues including mononucleosis when he was about 16 years old, and a sprained ankle some time in 2000 which occurred initially in soccer and was aggravated by skateboarding. She said there were a number of times when skateboarding caused injury to his ankle and that various doctors had conducted a fair bit of investigation of his ankles. Ms. Bishop testified the plaintiff had been using an ankle brace for some years, but did not know whether he took pain medications for his ankle. She described the plaintiff as a keen skateboarder who did quite a bit of skateboarding and suffered several injuries including an elbow injury to his chin. She agreed he continued to play soccer through grade 11 but stopped in grade 12. She testified he went back to soccer in the silver level, one level below the gold, after initially going back to bronze. She was aware of the plaintiff snowboarding after the accident, but was never with him during these times.

- [23] Ms. Bishop agreed that the plaintiff had a number of jobs at various restaurants while he was in high school and she agreed he was on the honour roll at school. She described his marks as being high in electives such as art, physical education and community participation types of courses. She agreed he must have participated well in physical education.
- [24] Ms. Bishop also agreed the plaintiff has a keen interest in physical fitness and regularly attends to the gym four to five times per week. She said he also has an interest in film and film making. He worked cutting lawns in the townhouse development where they live, and she said in grades 10 and 11 the plaintiff talked about drafting or architecture as a profession, but said that he struggled in math, which would be necessary for those occupations. Ms. Bishop agreed the plaintiff took a course at Douglas College in business management and that he expressed an interest in starting a business.

THE PLAINTIFF'S FATHER, JAMES McFADYEN

- [25] The plaintiff's father, James McFadyen testified that he is a wire puller at Tree Island Steel, where he has worked for the past 17 years. He made \$65,000 in 2005 and has medical and dental benefits and a pension.
- [26] Mr. McFadyen testified that he currently makes approximately \$30 per hour with overtime and has had only two lay-offs in the past 17 years.
- [27] He testified that the plaintiff worked briefly at Tree Island Steel in a weekend clean-up job and said that sometimes people who worked in that job used it to obtain full-time employment within the organization.
- [28] Mr. McFadyen described the plaintiff before the accident as a good hiker and described occasions when they would hike for seven hours at a time with no difficulty. He described the plaintiff as being very energetic and a sports enthusiast, excelling at soccer and enjoying various other sports.
- [29] Mr. McFadyen said he taught the plaintiff to do cabinetry and building and to fix his bike. He described the plaintiff as being handy at taking things apart and putting them back together again.
- [30] He described seeing the plaintiff in the hospital and the plaintiff being in pain. He believed the plaintiff was off school for approximately a week following the accident, and that when he did return to school, they had to drive him to and from school for several months.
- [31] Mr. McFadyen said the plaintiff regularly complained about pain in the months following the accident and that at some point, he got into a special physiotherapy program and began swimming.
- [32] He said he separated from the plaintiff's mother in the fall of 1999 and did not see the children regularly for the next six months.

- [33] Mr. McFadyen testified that after the plaintiff resumed playing soccer, he noticed the plaintiff displayed a higher level of frustration. The plaintiff would only play for approximately five minutes at a time before he required a break. He agreed with Ms. Bishop that the plaintiff never returned to the gold level after his accident.
- [34] Mr. McFadyen said that he and the plaintiff did not hike or camp as much as they had before the separation, and when he was with the plaintiff, it seemed as though there were limitations as to what the plaintiff could do. The plaintiff could not achieve the same level of participation as he had in the past in his activities without pain. Mr. McFadyen testified the plaintiff always exhibited some degree of soreness and that it bothered the plaintiff.
- [35] Mr. McFadyen recalled that the plaintiff's job at Tree Island only lasted for two to three weekends.
- [36] He said he saw the plaintiff after he began his job at Armaur plumbing and noticed some difficulties the plaintiff appeared to be having during that period. Mr. McFadyen testified the plaintiff was bothered by the work and he would quite often see the plaintiff stretching.
- [37] Mr. McFadyen agreed that both he and the plaintiff currently work out together at the YMCA with the plaintiff doing more cardiovascular and stretching exercises and Mr. McFadyen doing more weight work. He agreed that the plaintiff continued to play soccer at a competitive level until he stopped playing altogether, but that the plaintiff never again played at the highest possible level of competitiveness.
- [38] Mr. McFadyen testified the plaintiff liked to ski and snowboard and that he had snowboarded since the accident.
- [39] Mr. McFadyen was aware that the plaintiff was interested in trying to pursue a career as a filmmaker, but did not know a great deal about other things the plaintiff was interested in such as the business course that he took at Douglas College. He said the plaintiff had talked about other career options as physical jobs caused him pain and the plaintiff wanted to explore non-painful occupations. Mr. McFadyen testified he thought the plaintiff was unable to keep up with his friends at skateboarding based on his observations.

JASON WOOLSEY

- [40] Jason Woolsey testified that he is a friend of the plaintiff, having known him for the past four years. One of the things they did together was skateboarding. He described the plaintiff's style as "conservative" and "lower impact." He said while the plaintiff did do jumps, he would not be very aggressive or try and achieve any great height. He said the plaintiff's back would get sore and he would see the plaintiff stretching his back and hear his complaints about being sore.
- [41] Mr. Woolsey testified he saw the plaintiff fall on a fairly routine basis, and saw him hurt his ankle.

- [42] He said he believed the plaintiff no longer skateboarded due to his back, but that the plaintiff did continue to snowboard. He said the plaintiff's style in snowboarding was similar to his skateboarding style in that he was not aggressive and would "take it easy". He said after snowboarding he would see the plaintiff stretching his back. Mr. Woolsey did see the plaintiff fall when he snowboarded, but never saw him hurt himself. The last time he and the plaintiff had gone snowboarding was over a year ago. He said the plaintiff had not gone snowboarding since then because of his back, even though he was often invited to go.
- [43] Mr. Woolsey testified that he currently works he works now as a labourer making \$23 per hour. Mr. Woolsey's job involves heavy lifting and shovelling and is physically demanding. While Mr. Woolsey was aware of employment openings in his company paying \$17 per hour, he testified that he had not advised the plaintiff of the job opportunities because he felt the plaintiff's back problems would have precluded him from taking such jobs. Mr. Woolsey said he had told other friends about the positions and these other friends had applied for and secured the jobs.
- [44] In cross-examination Mr. Woolsey testified that he and the plaintiff skateboarded together on a weekly basis, sometimes more than once a week. He was asked about the plaintiff doing a manoeuvre called a "lolie" on his skateboard, but said he was not aware of what that manoeuvre entailed. Mr. Woolsey was asked if the plaintiff referred to his ankle as to the reason why he stopped skateboarding and he stated no. Mr. Woolsey described himself as being more aggressive in skateboarding than the plaintiff. He agreed he saw the plaintiff hurt his ankle, but did not see him hurt his wrist or cut his chin.
- [45] Mr. Woolsey said he had snowboarded with the plaintiff o perhaps five occasions. The two of them would go to Mount Baker or Mount Seymour.
- [46] He agreed that he probably saw the plaintiff less since he entered into a relationship with his girlfriend about a year previously.

TORY HALETA

- [47] Tory Halleta is also a friend of the plaintiff and has known him for about five years. They had worked together at Armaur Plumbing, although Mr. Halleta no longer worked there because of an accident he was involved in about seven months before the trial. Mr. Halleta said the sporting activities they did together included snowboarding. He did not see the plaintiff undertake any stunts or tricks and had only been snowboarding one time with him. He said he worked with the plaintiff a few days at Armaur Plumbing carrying cast iron fixtures to locations in buildings which they had been working on. Mr. Halleta said that the plaintiff needed help in lifting because of his back problems. He testified he saw the plaintiff having difficulties and asking if he could do lighter work. He said when they were carrying things upstairs the plaintiff had to go more slowly because his back was "bugging him". Mr. Halleta was asked about the expectations on the job site and he said that they were expected to work "hard and fast and not be slow".

- [48] Mr. Haleta testified that after the plaintiff left Armaur Plumbing he continued to see him but they had not done any activities together because of Mr. Haleta's own injuries.
- [49] In cross-examination Mr. Haleta said he worked at Armaur Plumbing for 9 ½ months and left that job before he got injured because he was unable to get to the job site. He said he only worked side-by-side with the plaintiff on two days when the plaintiff was working on apartments that were being built and they needed help to lay down the pipes before the cement was poured. He testified although they both worked on the apartments for two days, they actually only worked together for one day of the two, and that was when he helped the plaintiff carry the pipes.

SARAH OVERIN

- [50] Sarah Overin is the plaintiff's girlfriend and is a grade 11 student. They had been dating for a year and a half. She agreed that she had been dating the plaintiff during the period that he worked at Armaur Plumbing, at the fireplace store, at Eecol and at Telus.
- [51] She said she noticed his movements when they were together and how he would appear to be a bit stiff and would stretch. She said he often complained about the pain he was feeling.
- [52] Ms. Overin testified that the only sport they do together is going to the gym, where the plaintiff does a lot of cardiovascular work and swimming, but is careful with weights because they put his back at risk. She said if the plaintiff sits for a while he becomes stiff, including his neck, and he finds it hard to twist. As far as walking is concerned, the plaintiff can walk for 45 minutes but requires a break to sit or stretch.
- [53] She testified that she sees the plaintiff mainly on the weekends because of her school schedule and his work schedule. When they do see each other they would relax and take it easy, go to movies and try to have fun.
- [54] Ms. Overin testified the plaintiff tries to avoid lifting or bending and that she had never seen him lift anything heavy. She said she would help him by massaging his back and had done so every week or a few times a month. She said after the gym, the plaintiff would often lie down as the workout affected him a bit, and that when the plaintiff felt really stressed out sometimes his back would seize up.
- [55] In cross-examination Ms. Overin described the plaintiff's workouts as mainly involving swimming and the bike and lasting about 20 to 30 minutes after a warm up. She agreed that she worked as well as going to school and therefore only saw the plaintiff when she was not working or at school, in addition to weekends.

THE PLAINTIFF'S EVIDENCE

- [56] The plaintiff testified that he began working at the Telus cellular telephone store selling cellular devices about three months before the trial date. He states he received about 1 to 1 ½ months of training and he currently lives in Surrey with his mother, step-father, two

sisters and step-sister. The plaintiff was healthy before the accident and was very active in soccer, baseball, football, skateboarding, skiing and other related activities. He said he had no trouble keeping up with anyone. He confirmed that he had been playing in the gold level of soccer at the time of the accident and he had intended to take his soccer as far as he could go with it. He also confirmed that he had often gone camping and hiking, activities which involved swimming, fishing and boating as well.

- [57] The plaintiff agreed the accident, which occurred on January 18, 1999, was a violent collision and that after the accident he found himself tucked in towards the dash, between the seat and the dashboard. He said he was helped out of the car initially by a bystander and then by an ambulance attendant, and he recalled being scared. The plaintiff testified he was in shock and described feeling pain all over his body. He said initially the most painful spot was his hip, though his whole body ached. He described being very scared, even after he got home and not being able to believe that the accident had happened. The plaintiff thought he had missed a week or so of school because he had not felt physically or mentally capable. He confirmed that he had been driven to and from school for a period.
- [58] The plaintiff testified that initially he saw no improvement in his condition. He said the first night was excruciatingly painful and after that, the pain started to settle into his hip, leg, back and neck. He said he got headaches which lasted until after he returned to school. The plaintiff limped for a period after the accident, though he was unsure for how long.
- [59] He agreed he saw his family doctor, Dr. Simon, beginning on January 20, 1999.
- [60] The plaintiff testified that at school in his physical education class, he was "at a lower intensity for a while". He also undertook physiotherapy at the Newton Wave Pool where he went several times a week for a few months. He said his physiotherapy treatments involved stretching, weight and core exercises and also going into the pool. He said the treatments were helpful and the plaintiff was unsure why he had stopped them. He was given instructions to follow and continued to follow them. He said he saw different physiotherapists beginning in June of 1999 at the Surrey Sports and Physiotherapy Clinic. He said when he went there, he explained where his body was hurting in a diagram located in the records of that clinic and it accurately depicted the pain he was feeling when he saw the physiotherapist. He stated that while the physiotherapy was helpful for a time, it eventually stopped being helpful. The diagram showed pain to his neck, shoulders, mid and lower back as well as his hip.
- [61] The plaintiff testified that in grades 9 and 10 he stayed as active as he could and tried to do everything that he could. He said there was some improvement in his symptoms in his leg and hip, but only slight improvement in his neck and mid and low back.

- [62] He said all of his activities were affected because the pain bothered him when he participated in any physical activities. While the plaintiff felt something with everything that he did, he stated that if he was doing something with his friends, he tended to forget the pain although it was always in the back of his mind.
- [63] The plaintiff said he resumed playing soccer in grade 9, though the experience was not the same as before. Prior to the accident, the plaintiff did not feel the need to rest, but after the accident, he realized he had to take rests and be more careful. He said he would feel pain in his neck and back and if he fell down it would feel worse, so he had to be more cautious while playing. He said he continued to play for three to four years as he was never told not to play and it was always recommended to him that he stay active. He was asked whether there was an improvement in his back since he entered high school and he said no. The plaintiff said he went back to all his activities but at a reduced rate. He said as far as snowboarding was concerned, he rarely participated in it and if he did jumps, it would hurt him. The pain from jumping in snowboarding was similar to what he felt if he jumped while skateboarding. The plaintiff said after snowboarding he would try to keep his body as still as possible and he would feel pain for about a week. On good days, the plaintiff stated he could get to 80% to 85% of how he used to be in skateboarding, while on medium days he would just do a few things and then pick up the camera and film others. The plaintiff testified that he took pain killers from time to time including Ibuprofen.
- [64] He said at school it bothered him if he sat for a long time and he found it very painful to sit in uncomfortable chairs all day. He said he had pain problems during his high school years and would stretch to try to alleviate them. He testified that when he was younger, he would stretch all the time. As he got older, he became more stable and more controlled. The plaintiff was asked how the injuries affected the quality of his life in his high school years and he said it affected and changed everything that he did, whether it was physical or going to school. He said at first, the pain bothered him every day, but then eventually he learned how to control it.
- [65] The plaintiff began working while he was in grade 10 or 11 at a restaurant. He also did some lawn mowing in the summer for a neighbour for which he was paid. While he experienced some problems with pain, it did not escalate to the point that he could not do the work.
- [66] The plaintiff also worked at McDonald's during grade 12 and while he was at college. He worked at McDonald's up to 30 hours a week in the summertime. He also worked at the Surrey Crime Prevention office doing some videotaping and in those jobs there was nothing he could not do. He said how he was feeling would depend on what he was doing, and that his back could bother him if he was standing up for long periods of time. At the end of the day he might have felt pain in his back and neck. He undertook a film studies course at Capilano College which he passed. He said that by the end of the course he regarded film making as a hobby more than a prospective job, but he nevertheless obtained his certificate for the course.

- [67] Following the course at Capilano College, the plaintiff began to look for a job to support himself and took a job at his father's plant, the Tree Island Steel Factory, doing weekend clean-up. He started on May 7, 2004, but only lasted until May 16, 2004.
- [68] The job involved sweeping, shovelling, moving things and doing whatever it took to clean the factory. The shift lasted between 6:30 a.m. and 2:30 p.m., with a half an hour lunch break.
- [69] The plaintiff said that he found the job physically demanding and felt terrible after the first weekend of work. He said he went home to lie down on his bed until the next morning. He testified he had not felt pain like that for a long time and said he did not feel well enough to go back to work after five days off so when he went back he asked for lighter duties. He said at that point he was earning \$12 to \$13 per hour, but without benefits.
- [70] The plaintiff testified he regarded the opportunity to work at Tree Island Steel as a possible way to work into the field and find full time employment.
- [71] It was his evidence that after he asked for lighter work, his supervisor told him they would not keep him on because they were concerned that he had not been honest with them about the nature and extent of his injury, and whether he had any physical limitations.
- [72] He was shown a form he filled out on May 7 when he began his job at Tree Island Steel on which he had indicated that he had a previous medical history including back and neck injuries from 1999.
- [73] The plaintiff was let go from Tree Island Steel and did not try and secure further work there. He went to work at Milestones restaurant doing dishwashing and food preparation for minimum wage for a couple of months. He testified that while his back was sore at that job, he was able to withstand it.
- [74] He said in June of 2004 he got a job with a Painter's Union ripping asbestos out of buildings. The plaintiff was paid \$11 per hour.
- [75] The plaintiff testified at that time he was thinking about working in the trades because he was not making enough money otherwise and he regarded it as a respectable career with the prospect of making good money.
- [76] He testified that during the asbestos removal work he had consistent problems with his back and his neck but he denied having any specific ankle problems, although it would flare up from time to time.
- [77] He testified the work at the Painter's Union eventually ran out but he heard about a job at Armaur Plumbing which he applied for and got in October of 2004. He went to work as a plumber's assistant, working an eight hour day with some overtime and making \$15 per hour.

- [78] The plaintiff testified he thought this job would lead to an apprenticeship. He did not tell the person who hired him about his back problems, and nor was he asked. He said throughout his time working for Armaur Plumbing he had difficulties with pain. He testified that it varied from day to day, but was always there.
- [79] He explained that he tried not to tell anyone about his problems because of what had earlier happened at Tree Island Steel, and he testified he did as well as he could to meet the job expectations, but he nevertheless was criticised for being too slow. He was also told he complained too much because he asked to do different things which would not affect his back. He said he had not wanted to specify why he wanted to do other tasks because he was worried that he would lose the plumber's assistant job.
- [80] In April of 2005 the plaintiff was working on a machine called a coring machine that has a large drill that cuts through concrete. Usually the concrete core falls out on the other side of the wall, but on one occasion it stayed in the drill and when the plaintiff took the drill out of the hole, it pulled him over and twisted his back.
- [81] The plaintiff went to the first aid attendant and then to his doctor, who told him to take a few days off. After taking some time off he went back to work, but felt worse than he had before the incident. He worked for a week or so after going back but found it very painful and went off work again when he aggravated his injury prying pots out of cement. He was enrolled in the WCB Rehabilitation Program; he reported pain to the lower back and went through a regime of rehabilitation.
- [82] In his rehabilitation he was asked to lift a 20 pound bag and found the task very painful.
- [83] After finishing the program it was recommended that he go back to work, but he was told there was no more work for him at Armaur Plumbing.
- [84] He described the work atmosphere at Armaur as being inflexible.
- [85] Following his job at Armaur Plumbing, the plaintiff found work at a fireplace factory. He testified he did not enjoy that job and had no interest in it, although he made about \$14 per hour. He said he was dismissed after about a month because he had a lack of enthusiasm for the job.
- [86] The plaintiff testified that throughout his time with Armaur Plumbing he was on Tylenol or Ibuprofen and would take them three, four or even five times per day, depending on the day.
- [87] The plaintiff testified that over the course of the week while working at Armaur Plumbing, he would feel worse and worse and would feel a lot more pain by Friday afternoon. His weekends would be spent mainly resting up.
- [88] The plaintiff testified that he was seen and examined by Lila Quastel, an occupational therapist, in November of 2004, who recommended against doing the kind of work he was doing because, she told him, he would probably get hurt.

- [89] He said after he did get hurt while working at Armaur Plumbing, his attitude toward such jobs changed because he realized that what Ms. Quastel had told him was true.
- [90] After the fireplace manufacturing factory, the plaintiff went to work at Paul's Boutique, a skateboard wear shop, in September of 2005. He earned \$8 per hour and worked there for approximately one month before being let go because he "made some mistakes" and did not get on well with his supervisor.
- [91] The plaintiff's next job was at Eecol Electric Ltd. That was a shipping job involving supplying electricians with equipment and material. His job was to pick the equipment and materials ordered from the warehouse shelves and package it. He worked at Eecol for approximately three weeks and was paid \$1,400 per month in net pay.
- [92] The plaintiff testified he had some physical difficulties while at Eecol because he had to use a pallet jack to pump up the pallet, and when using it, he got sharp pains in his back, specifically in his lower back. The plaintiff eventually resigned from this job after visiting Dr. Lau for his pain and hearing Dr. Lau recommend against staying there.
- [93] The plaintiff's current job involves selling cellular phones and Blackberry units. He works at a kiosk in Guildford Town Centre and is paid \$9 per hour plus commission. He expects to earn between \$500 and \$1,000 per month in commissions. He began this job at the end of October of 2005, and although his back continues to bother him, the plaintiff stated he can handle it and rarely has to take medications.
- [94] He was asked about his interest in a trade and he testified that he was no longer interested in trades because of all the trouble he experienced in a short period of time. The plaintiff did not believe he would be able to undertake a trade for a career.
- [95] He testified he was interested in perhaps going back to school and revealed he had taken a business course.
- [96] The plaintiff said he is uncertain of what his present ambitions are. He had done "alright" at his business course but could not follow through on it because he had to begin working and earning some money.
- [97] He said his headaches usually correlate to his neck pain but not his back pain. The plaintiff testified his lower back pain is the most serious, his neck pain less serious and his headaches the least serious. He testified that there is a link between his mood and his pain, as he tended to get more irritable the more he felt pain. He sometimes felt anger as well.
- [98] The plaintiff characterized his sleep as never being good; he said he has difficulty becoming comfortable at night. The plaintiff testified his doctor recommended that he get special pillows and he did so, as well as a foam mattress. He said they did not really help his sleep a great deal.

- [99] He was asked about his present state of health compared to his health prior to April of 2005 when he injured his back at work, and he testified that his health is back to what it was before April 5, 2005. He still felt pain, but not the same as he felt after April 5.
- [100] The plaintiff said while skateboarding or snowboarding he never re-injured his neck or back, but did suffer ankle injuries from skateboarding.
- [101] He described how he injured his left ankle in 2002 and how he re-injured it in January of 2005. He said he had not missed any work as a result of his ankle injuries and it only affected him at work for a couple of weeks. He agreed that he had discussed his symptoms with his family and close friends.
- [102] The plaintiff testified that when he went to the gym he would spend 20 to 45 minutes on cardio workouts and would also do some weights, but he would not allow the weights to get too heavy. He worked mainly on his core exercises.
- [103] The plaintiff testified that in a normal month he would have both good days and bad days, but usually his days were intermediate, although the bad days outnumbered the good days by quite a bit.
- [104] The plaintiff testified that he has been making skim boards for some time now and was selling them for between \$50 and \$75 per board. While he had thought about setting up a business with his skim boards, the plaintiff did not think it was feasible because of the money he would need to set up a workshop.
- [105] The plaintiff testified about seeing the defendant's medical examiner, Dr. Maloon, on April 21, 2005. The plaintiff said he saw him for under an hour and told Dr. Moloon what he had told all the other doctors he spoke to about his injuries. The plaintiff was also seen by Christopher Cook for a work capacity evaluation in December of 2005 and he said he tried his hardest on the tests and followed the instructions he was given.
- [106] The plaintiff agreed that according to his tax return he made \$3,556.52 in 2003 and \$11,027 in 2004, but that he did not yet have his T-4 slips for 2005.
- [107] In cross-examination the plaintiff agreed that according to his school records he was only away for three days in grade 8, which meant that he was back to school within a week of the accident.
- [108] He also agreed that by March of 1999 he was getting better and was more active generally, except with respect to football. He went to see Dr. Anne Wachsmuth in May of 1999 and reported an improvement in his condition by approximately 50%.
- [109] He agreed it was likely he went camping with his family in the summer of 1999, but had no specific recollection of such incidents.

- [110] He agreed that as of September of 1999 he resumed playing soccer and played for three seasons after the accident. He eventually upgraded to the silver level from the bronze level. He agreed in grade 9 he received all A's in physical education and that he likely went camping in the summer of 2000. He also agreed he received straight A's in physical education in grade 10 and was away from school for about four days. He recalled physical education involving lots of academics, baseball and volleyball, but could not recall all of the things they specifically did in the class.
- [111] He agreed that he was into skateboarding prior to the accident, and that it took him a while to get back into it after the accident. He agreed there were several reports in Dr. Lau's records of him falling down after the accident while skateboarding.
- [112] He recalled seeing Dr. Jaworski in December of 2001 and told Dr. Jaworski that he was very actively taking part in soccer, skateboarding and gym workouts, doing one of those activities daily. He agreed he told Dr. Jaworski that he did not feel restricted in his lifestyle by his pain problems because he tried to do as much as he could, although he still felt the effects.
- [113] He agreed he took physical education in grade 11 and by election.
- [114] He acknowledged getting ankle and wrist injuries from skateboarding after the accident.
- [115] The plaintiff agreed that he worked at Little Caesars between October of 2002 and April of 2003 during the school year. His job was to take orders over the phone and make pizzas, sweep up and wash the counters. His shifts were usually six hours long. He agreed he reported another skateboarding injury to Dr. Lau on December 11, 2002, when he injured his ankle. He described what he was doing at the time as a "lolie". He agreed that that led to a referral to Dr. Shearer who diagnosed him as having a hyper-flexion injury.
- [116] He agreed he had another injury from skateboarding on February 5, 2004 when he was riding along and slipped, hitting his chin against a ledge.
- [117] He also agreed that he took a full time academic load at Capilano College in addition to his work schedule at the time.
- [118] He was asked about whether he wanted to pursue film making and he said it was difficult to get started and he felt that he needed to know somebody to get into the business.
- [119] He agreed that when he applied for the Tree Island Steel job he gave as his reason for seeking a part time job was to finance college, but he said that it was a rush to get his resume in and he did not customize it for that job. He agreed that when he worked as a dishwasher at Milestones, his shifts were eight hours. He would be upright during the shifts and bending over to spray the dishes. He agreed he had to clean things, but did mostly sprayed motions rather than scrubbing. He described his job at Milestones as one not involving a lot of heavy lifting.

- [120] The plaintiff was asked if he skim boarded himself in addition to making them and he said he did sometimes when he started more recently. Skim boarding is a sport where you run with the board, drop it and then jump on it. He started doing skim boarding in the summer of 2003.
- [121] The plaintiff was shown a copy of Lila Quastel's notes when she did a functional capacity test of the plaintiff in the November of 2004 where she noted the plaintiff had told her he had wanted to save up his money and go back to school for architecture. He agreed he had said that and that he had also told her he wanted to pay back his student loans. He agreed that he had various ideas as to his career choices including desk top publishing and getting into a business making t-shirts with logos.
- [122] He agreed he passed the three month probation period with Armaur Plumbing and did not miss any work. He also agreed that his ankle became an issue again in January of 2005 when Dr. Lau referred him to Dr. Shahid concerning his left ankle pain. The plaintiff said that he re-injured his ankle in January of 2005 but it had not been painful since December of 2002. He said he wore an ankle brace for approximately two months, starting in January of 2005. He also received a bone scan, a CT scan and underwent tests of his ankle in 2005. The plaintiff will be seeing Dr. Shearer concerning his ankle injury, but a date has yet to be set for the appointment. When asked whether it was the ankle problems that stopped his skateboarding, the plaintiff responded that was part of the reason but his back was also an issue because he was taking falls. He said he ended his participation in skateboarding in mid 2005. He agreed he told his doctors that he had quit because of his ankle.
- [123] The plaintiff agreed that he gave up soccer before he gave up skateboarding.
- [124] He testified that to do his core strengthening he would do sit-ups and ball exercises and when he did weights he would lie across the ball and exercise using free weights.
- [125] The agreed that he applied to the WCB as a result of his work injury in April of 2005 and his claim was accepted and he was eligible to receive benefits. He said he believed he told the WCB about the car accident. He agreed he was on benefits until early July of 2005 and that up until the April incident he had not taken much time off from work. He agreed that the WCB declared him fit to return to work in early July but he said he was unsure why the WCB had reached that conclusion. He testified it was after that he contacted Armaur Plumbing and was told there was no further work for him.
- [126] The plaintiff agreed he had considered a lot of different jobs over the years including a physiotherapy career, but had often made inquiries more so out of curiosity. He testified that he is seriously considering various options now as careers.
- [127] When was asked whether he had incorporated things in his exercise routine that he had been told to do by a physiotherapist, the plaintiff responded that he had.

THE MEDICAL EVIDENCE

[128] The medical evidence called on behalf of the plaintiff consists of medical legal reports and testimony from Dr. Lau, the plaintiff's treating family physician; medical legal reports and testimony from Dr. Mark Adrian, a physical medicine and rehabilitation specialist; and medical legal reports and testimony from Dr. Ronda Shuckett, a specialist in internal medicine and rheumatologist. The medical evidence called on behalf of the defence consists of the reports and testimony of Dr. Maloon, an orthopaedic surgeon. The difference in the medical evidence of the parties focuses on first, whether are objective signs of the plaintiff's reported injuries from the accident, and second, whether the reported injuries account for the pain symptoms and associated difficulties he testified to experiencing.

[129] The contest as between Lila Quastel, an occupational therapist called on behalf of the plaintiff, who conducted a functional capacity evaluation of the plaintiff on November 2, 2004, and Dr. Christopher Cook, a vocational evaluator who conducted a work capacity evaluation of the plaintiff on December 1, 2005, is whether and to what extent the plaintiff is limited in his choice of occupations as a result of the injuries he sustained in the accident.

DR. SCHUCKETT'S EVIDENCE

[130] The primary objective evidence of injury the plaintiff relies on comes through the reports and testimony of Dr. Schuckett who reported that when she examined the plaintiff on June 8, 2005:

[H]e had some straightening of the dorsal kyphosis which even has a somewhat lordotic curve at some points. He was tender over the spinous processes of T3 and T4. Thoracolumbar rotation was full without pain.

On examination of the lumbar spine there was some straightening of the normal lumbar lordosis and this flattening of the lordosis can be characteristic of muscle spasm in the lumbar spine. He had palpable muscle spasm with firmness of the paraspinal muscles on the right side of the lumbar region. These felt significantly firmer than the left sided paraspinal muscles all along the lumbar spine.

[131] Dr. Shuckett also noted in her report that the plaintiff "was told he had an avulsion fracture of a piece of the right hip bone ". She testified that is a projection of the bone where the quadracep muscles originate and noted it was the portion of his hip closest to the car door that was struck by a lamp standard during the accident. She said this sort of injury can occur in sports activities.

[132] The plaintiff underwent an MRI scan of his lumbar spine on December 12, 2005 which, accordingly to the radiological report, showed "Mild disc desiccation and slight circumferential disc bulging at L4-5."

[133] In a report dated December 23, 2005, Dr. Shuckett observed that she viewed the plaintiff as being "rather young to have disc desiccation [it] is more a finding in older individuals."

[134] She concluded in her report:

I am of the opinion that the disc dessication or drying out of the disc is not normal for such a young patient and reflects trauma to the disc at the time of the MVA. I do not think the dessicated disc is the major source of back pain but that it attests to the trauma which his lumbar spine sustained with the MVA of 1999.

[135] Dr. Shuckett regarded the MVA as the stimulus for the desiccation and opined that the plaintiff "is at significantly heightened risk and will probably develop progressive degenerative disc disease at the L4/5 level in future decades".

[136] She did not similarly regard the bulging of the disc to be consequential as it "is a normal enough phenomenon in the general population".

[137] Dr. Shuckett testified the plaintiff told her his low back pain was the most severe of his pain symptoms. She regarded the lower back injury the plaintiff received at work on April 5, 2005 to be an aggravation of an existing injury because it was in the same area as his original injury.

[138] Dr. Shuckett noted no pain behaviour on the part of the plaintiff which she described as a patient dramatizing his or her pain in various ways.

[139] She described the dorsal kyphosis as a straightening of the normally outward curve of the thoracic spine, indicative of muscle spasm. She noted in a similar vein a loss of lordosis, a straightening of the normally inwardly curving lumbar spine which she regarded as an objective sign of lumbar back pain. She also found the muscle more firm and tender on the right side, which she viewed as an objective sign of tenderness.

[140] Dr. Shuckett testified that finding tenderness through palpation is regarded as an objective sign although it is reliant on a patient's interpretation.

[141] Dr. Shuckett also noted that in her June 8 examination the plaintiff had "abnormal dynamics of straightening up" from a forward flexion which she took as an objective sign of his injury.

[142] Dr. Shuckett testified that the plaintiff had been diagnosed with chronic mechanical back pain which was an injury as contrasted with an inflammatory or transient injury.

[143] Dr. Shuckett testified that disc desiccation is drying out of a disc which means that the molecules that make up the disc are being lost and the loss of hydration is one of the first signs of degeneration. She said mechanical back pain in young people usually is trauma related and she would not normally expect to see a single disc desiccation where there is no physical injury associated.

- [144] She testified that the plaintiff was able to point to specific areas of pain and described the areas of pain quite easily.
- [145] She also said that if a person shows no evidence of pain behaviour and a lack of non-organic complaints are found (for example, a psychological basis for the complaints), as was the case with the plaintiff, this suggested that there was no exaggeration or amplification of the plaintiff's symptoms or signs.
- [146] She said the objective signs she found of the plaintiff's injuries included the fact that his reported neck and back pain and headaches worsened with certain body functions that were correlated to his abnormal lumbar lordosis. They were also correlated to his abnormal straightening up and the tenderness of the right side of his lumbar spine and were all objective signs.
- [147] She testified that the majority of people, but not all, do recover from soft tissue injuries within certain time frames, but the plaintiff did not appear to be getting better. She thought the avulsion injury "fit nicely" with the motor vehicle accident as a cause.
- [148] Dr. Shuckett agreed under cross-examination that she could not measure subjective reports of pain. She agreed that all the tests she had the plaintiff perform regarding his range of motion were normal except his forward flexion, although his forward flexion was still "pretty good". Dr. Shuckett was asked whether the abnormal dynamics of straightening up from the forward flexion could be the result of either a hip, knee or ankle injury and she responded she did not think a knee or ankle injury would be an issue, but a hip problem could be a possibility. She said her primary objective findings were muscle spasm and abnormal straightening from forward flexion. She agreed that Dr. Adrian, who examined the plaintiff on August 19, 2004, made no findings of muscle spasm and Dr. Shuckett also agreed that the term "neutral alignment" in Dr. Maloon's report indicated no straightening of the lumbar lordosis. She further agreed that in Ms. Quastel's report relating to the functional capacity evaluation, there was an indication of a straight posture and no reference to any spasms. Dr. Shuckett noted however that Ms. Quastel's report made reference to pain on palpation, but no finding of any straightening of the lumbar lordosis.
- [149] Dr. Shuckett agreed that Dr. Maloon did not find the same objective signs that she did and that the report from Dr. Wachsmuth dated June 7, 1999, made no reference to spasm or spinal straightening. She similarly agreed that Dr. Jaworski's report made no reference to spasm or straightening lordosis. Dr. Shuckett confirmed she was the only one to make such findings and that she examined the plaintiff after he had had one or more work related injuries.
- [150] Dr. Shuckett was cross-examined on several articles, including one in Spine magazine, which seemed to suggest that lumbar degeneration often occurs in second and third decades. She stated that the Spine magazine article was not based on an actual clinical study as it was conducted post-mortem. She agreed with the suggestion that disc desiccation or degeneration did not necessarily relate to pain conditions and pain

conditions, do not necessarily flow from disc degeneration or desiccation. Dr. Shuckett did not believe the disc desiccation was a major source of pain for the plaintiff or that the disc bulge was a source of pain either.

DR. ADRIAN'S EVIDENCE

[151] Dr. Adrian's specialty involves the assessment and management of various injuries, including musculoskeletal injuries, leading to chronic pain. Dr. Adrian conducted a medical assessment of the plaintiff on August 19, 2004. Dr. Adrian noted that when he conducted his examination of the plaintiff, he was able to localize the pain on his body. In his report dated August 19, 2004, Dr. Adrian concluded as follows:

In my opinion, Mr. McFadyen has suffered a musculoligamentous strain/sprain injury involving his neck and low back. There is no clinical or radiologic evidence of instability. In my opinion, the forces involved in the accident were sufficient to place stress on the anatomical structures of the neck and low back to cause injury and pain. Potential structures responsible for persistent pain symptoms involving these spinal segments are the spinal facet joints and capsules, the intervertebral discs, and the soft tissue structures (muscles, ligaments and connective tissue). In my opinion, Mr. McFadyen's neck and low back pain symptoms are causally related to the accident.

Mr. McFadyen reports pain symptoms between his shoulder blades. In my opinion, this represents referred pain from the injured structures involving his cervical spine.

Mr. McFadyen's x-rays report demonstrate an avulsion fracture of the anterior aspect of the right pelvic bone. He suffered pain symptoms in this following the accident and walked with a right sided limp for several months following the accident. A subsequent bone scan one year later was normal of this region. His pain symptoms have now resolved over this area. In my opinion, the fracture is stable and healed.

[152] Dr. Adrian noted that the plaintiff asserted no significant change in his symptoms and functioning in over two or three years, despite participating in physical therapy and chiropractic treatments. He concluded that the data "suggests a poor prognosis for further symptomatic or functional improvement." In his opinion, it was "unlikely that Mr. McFadyen's symptoms or function will progressively deteriorate over time as a result of the accident." Dr. Adrian concluded that Mr. McFadyen "will probably suffer intermittent temporary flares of his symptoms that will require further temporary modification of his activities."

- [153] Dr. Adrian recommended a functional capacity evaluation to objectively test the plaintiff's physical capabilities. He read the report prepared by Lila Quastel dated February 7, 2005, following her functional capacity evaluation of the plaintiff and noted that Ms. Quastel indicated that the plaintiff put forth full effort and was competitive in his behaviour during the testing. He opined that that meant the plaintiff's performance in the evaluation was a valid indicator of his physical functional capacity.
- [154] Dr. Adrian was asked about indications in Dr. Maloon's report that the plaintiff evidenced no pain behaviour and that Dr. Maloon made no findings of a non-organic source. Dr. Adrian said to him, that implied that the plaintiff's presentation correlated to his activities and did not result in physiological responses.
- [155] When asked about Dr. Maloon's observation that the plaintiff's complaints were non-specific in nature, Dr. Adrian responded that his interpretation was that the plaintiff's descriptions were very specific and he was unsure what Dr. Maloon was referring to in his report. Dr. Adrian testified that people can have persistent pain as a result of musculoskeletal injury despite the passage of time and chronic pain can ensue from injuries such as those suffered by the plaintiff because of injury to the structures in the back.
- [156] In cross-examination, Dr. Adrian acknowledged that he saw the plaintiff only once; that he had a full range of movement in all areas of his spine; that he had neutral alignment which meant he had normal spine curvatures; and that he found no flattening of the spine. Dr. Adrian stated that flattening could be indicative of a spasm. He said he considers spasm found through palpation and tenderness to be subjective rather than objective tests.
- [157] While Dr. Adrian agreed that the plaintiff had full motion of his spine, he was not prepared to agree that it was good motion as there was some abnormal motion of the lumbar spine. Dr. Adrian agreed that taking a patient's history is very important in making a diagnosis or prognosis. He did not have his full file with him as his notes were destroyed after he wrote his report and he was unaware of the need to keep them. Dr. Adrian did not discuss any high school jobs that the plaintiff had worked and could not recall what ideas the plaintiff had about going to college. He thought that the plaintiff's ankle injury had been resolved at the time of his assessment of him, though he could not recall which ankle was involved and he was not certain if he had available to him that portion of Dr. Lau's clinical records relating to the plaintiff's ankle injury.
- [158] He agreed that in terms of the plaintiff's ability to work in the future, he basically deferred to Ms. Quastel's opinion. Dr. Adrian also agreed that Ms. Quastel's report was the only opinion he received on the plaintiff's functional or working capacity.
- [159] In re-direct, Dr. Adrian said the plaintiff presented with a history of symptoms and with mechanical back pain and tenderness over areas where he reported back pain. He said the plaintiff's clinical presentation was consistent with back pain.

DR. LAU'S EVIDENCE

- [160] Dr. Lau prepared a medical legal report dated February 16, 2004. In his testimony, Dr. Lau confirmed that he became the plaintiff's family doctor as of September 21, 2001 when the file was transferred from Dr. Simon, the plaintiff's paediatrician. He testified he treated the plaintiff for his whiplash injury and for his lower and mid back, as well as for other injuries and illnesses including injury to his ankle from skateboarding in December of 2002 and an injury to his left arm when he fell in October of 2002.
- [161] Dr. Lau first saw the plaintiff on September 26, 2001. He reported that on that date, the plaintiff told him he had injury to his neck, back and right leg. While his neck and back remained painful, he was still active in soccer and skateboarding even though the sports bothered him because of his neck and back injury. Dr. Lau noted that the plaintiff saw Dr. Wachsmuth in June of 1999 and was encouraged to continue weight training, swimming and physiotherapy. Dr. Lau also noted that the plaintiff's paediatrician, Dr. Simon, reported he was back to his sports by September of 1999 but continued to see her for follow-ups because of persisting neck and back pain.
- [162] On examination, Dr. Lau noted that the plaintiff's range of movement of his neck and back were normal and there was no pain with neck and back movement. On October 15 the plaintiff reported he was experiencing intermittent neck and back pain after prolonged sitting at school, and Dr. Lau found tenderness at the base of the plaintiff's neck and paraspinal area of the thoracic lumbar spine.
- [163] At that time, because the plaintiff's symptoms were unresolved, Dr. Lau referred the plaintiff to Dr. Jaworski, a specialist in physical medicine and rehabilitation. The plaintiff was encouraged to continue his physical activity and use anti-inflammatory medications for his pain. On March 18 the plaintiff reported continued pain in his upper and lower back being on and off again. On September 27, 2003, the plaintiff again reported his back being painful "off and on" with exercise and prolonged sitting. At that time, the range of movement in his neck and back were normal but rotation of his neck and extension of his back were painful. On January 23, 2004, the plaintiff reported intermittent neck pain after physical activity. His back remained painful, with the plaintiff able to feel the pain almost all the time, even when he was not engaged in any activities. According to Dr. Lau, his examination showed tenderness at the lower back with pain symptoms on extension of the plaintiff's back. The plaintiff told Dr. Lau he had stopped playing soccer and had to take longer rests after skateboarding or snowboarding. Dr. Lau prescribed stretching exercises, back strengthening exercises and good posture.
- [164] Dr. Lau concluded that although the plaintiff returned to his sports by September of 1999, he continued to suffer residual symptoms of pain affecting his neck and back sporadically, particularly with respect to physical activity. He opined that because five years since the accident had lapsed, the plaintiff's residual symptoms could be long term.

- [165] Dr. Lau drew diagrams in his chart to illustrate where the plaintiff said he was feeling tenderness and pain on a number of occasions including October 25, 2001, September 27, 2003, March 11, 2005 and May 9, 2005. The diagrams revealed the location of the tenderness and pain the plaintiff complained of to be consistent at the back of the neck and in the lower back. In the October 25, 2001 diagram, Dr. Lau noted the plaintiff complained of pain between his shoulder blades.
- [166] On January 12, 2005, the plaintiff complained of injury to his left ankle again, saying that it rolled over easily since the initial injury in December of 2002. He complained that whenever the ankle rolled over, it was painful. On February 25, 2005, the plaintiff reported his left ankle was still painful and Dr. Lau referred him to Dr. Shahid.
- [167] On March 14, 2005, Dr. Lau noted tenderness in the plaintiff's neck and lower back, which were painful on flexion and extension. The plaintiff reported at that time that he had not played soccer for two years or done any skateboarding for the past six months.
- [168] On April 6, 2005 the plaintiff reported to Dr. Lau that he had injured his back at work the previous day while he was coring holes through concrete up a ladder. He indicated that as he tried to take the instrument out, it was too heavy and pulled his back forward. Both the plaintiff's neck and back were painful, with the plaintiff's back painful on extension and flexion.
- [169] Dr. Lau testified that the plaintiff's pain was in the same area as he had been previously treating him for. He noted the areas on the diagram he drew on his chart at that time. The plaintiff was off work and started a WCB claim. He returned to work on April 11, 2005.
- [170] On May 6, 2005, the plaintiff saw Dr. Lau and reported increased pain to his upper and lower back in the same areas as before. On May 9, he reported increasingly worse pain since his return to work on April 11 and he had to leave work because of increased back pain. Dr. Lau testified he did not think the plaintiff returned to work at any time after that and he sent him for physiotherapy.
- [171] On May 18 the plaintiff reported that his back was still painful and his physiotherapist advised him not to work for one month. A bone scan of the plaintiff's left ankle ruled out degenerative problems. Dr. Lau stated the plaintiff's ankle was eventually diagnosed as a laxity of the ligament.
- [172] On May 23, 2005, the plaintiff reported to Dr. Lau he was experiencing a great deal of back pain that day. While he was doing cardiovascular and light workouts, he was not working at the time.
- [173] On June 13 the plaintiff again reported his back was sore and that he was still on the WCB Rehabilitation Program. There was tenderness to the right side of his lower back. On June 16, 2005, Dr. Lau filled out an insurance form for the plaintiff. On June 23, the plaintiff had an eye issue and was sent to an optometrist. On July 4, 2005, the plaintiff complained of back pain following a rehabilitation session in which he had picked up a punching bag that

weighed about 80 pounds. Dr. Lau noted tenderness on the left side of the lower back on that occasion.

- [174] On July 15, the plaintiff had a "WCB visit" and reported his back as being still very painful. Dr. Lau noted tenderness on both sides of his back. The plaintiff told Dr. Lau on August 15 that he had been told that there was no longer a job available for him at Armauer Plumbing and he was looking for another job or considering going back to school. At that time Dr. Lau noted low back pain and tenderness on both sides of the plaintiff's back.
- [175] On October 14, 2005 the plaintiff reported that his back was still painful and that he had started a new job in a shipping warehouse using what Dr. Lau described as a power jack. The plaintiff reported he felt pain in his lumbar spine while using the jack. Dr. Lau at that time diagnosed chronic back pain and advised the plaintiff to avoid using the jack.
- [176] On November 12, the plaintiff reported his back as still being painful. He also stated that since his last visit, he had quit his warehouse job and was now working for Telus Mobility. Dr. Lau diagnosed chronic back pain again. On November 30, the plaintiff reported increased back pain over the past few days. Dr. Lau noted right side tenderness on the lower back and pain with flexion. The plaintiff told Dr. Lau that he wanted to get an MRI done privately.
- [177] On February 9, 2006, the plaintiff complained of chest pain and having difficulty breathing. Dr. Lau diagnosed acid reflux and prescribed a "stomach pill".
- [178] In cross-examination, Dr. Lau was referred to the ongoing difficulties the plaintiff experienced with his ankle and he agreed that he had referred the plaintiff to Dr. Shahid because the ankle had been painful and seemed to be getting worse. Dr. Lau agreed that Dr. Shahid felt it was unclear why the plaintiff's ankle was episodically painful and referred him on to Dr. Younger on September 21, 2005. Dr. Lau explained that it would take a long time for the plaintiff to see Dr. Younger and as of the trial date, he did not have an appointment.
- [179] Dr. Lau was shown his reports to the WCB with the first one being dated April 6, 2005. He agreed that he had completed the form and he also agreed that he had not filled in the portion of the form in which the question was posed, "Are there prior or other problems affecting injury, recovery and disability?" Dr. Lau also did not comment in that same portion of the form he filled out on May 6, 2005. Similarly on May 9 when he filled out a third Physician's Report, he again did not fill out that portion of the form.
- [180] In the insurance form arising out of the plaintiff's WCB claim which Dr. Lau filled out for the plaintiff on June 16, 2005, Dr. Lau checked a box that indicated that the injury was not related to a motor vehicle accident. Dr. Lau testified he realized he was indicating the plaintiff's problem as being new and not related to the plaintiff's earlier injuries. He agreed that the reason the question was asked on the form about any prior claims was to ensure that the claim was a valid WCB claim.

- [181] In re-direct Dr. Lau testified that he was not concerned that if he referred to a previous back problem the plaintiff might be cut off from WCB benefits.

THE EVIDENCE OF DR. MALOON

- [182] Dr. Maloon is an orthopaedic surgeon who was retained by the defendant to conduct an independent medical examination of the plaintiff and to provide his opinion of the nature and extent of the plaintiff's injuries arising from the accident.
- [183] Dr. Maloon examined the plaintiff on April 21st, 2005 after reviewing various medical records and reports presented to him including: the clinical records of Dr. Simon; a consultation note from Dr. Wachsmuth dated June 7, 1999; a bone scan report from Peace Arch Hospital on April 13, 2000; the clinical records of Surrey Memorial Hospital which included a radiograph report of the plaintiff's right hip; records of the Surrey Orthopaedic & Sports Physiotherapy Clinic; the clinical records of Dr. Lau; a consultation note from Dr. Jawarski dated December 14, 2001; Dr. Lau's medical report dated February 16, 2004, and Dr. Adrian's report dated August 14, 2004.
- [184] Dr. Maloon wrote an initial report on April 21, 2005. He opined that the plaintiff had "probably sustained soft tissue strains to his neck and back as well as to his right hip in the acceleration/deceleration incident dated January 18, 1999". Dr. Maloon also noted the plaintiff presented "ongoing complaints of non-specific neck and back pain that has failed to resolve despite the time elapsed and therapeutic modalities received since the incident."
- [185] Dr. Maloon wrote that the injuries complained of by the plaintiff "have failed to resolve" within six to eight weeks, which he described as the normal expected time for soft tissue healing. He characterized the plaintiff's complaints as "vague and non-specific" and consistent with the result of mild wear and tear that was common in the general population, although Dr. Maloon noted the plaintiff was "a little young to be experiencing discomfort of this nature." He opined that it was "extremely unlikely that [the plaintiff's symptoms] represent any specific musculoskeletal injury."
- [186] Dr. Maloon concluded, based on his evaluation, that there was no clinical evidence that the plaintiff was physically impaired by his injuries. He saw nothing to attribute ongoing physical disability to the accident, but did wish to view the radiographs taken on the day of the accident as well as more recent ones of his cervical, thoracic and lumbar spine "to be able to exclude evidence of any structural injury that may account for his ongoing complaints of pain."
- [187] On April 27, 2005, Dr. Maloon received the x-rays of the plaintiff done at Surrey Memorial Hospital on the day of the accident. He reported finding no evidence of acute bone injury or bone or joint abnormality in the radiographs of the plaintiff's cervical spine. He noted that the x-ray of the right hip revealed an avulsion fracture but no other abnormality.

- [188] Dr. Maloon characterized the avulsion fracture as having the appearance of an old rather than a recent injury because it was "well corticated". He opined that such an injury is often a "traction injury" not associated with the type of cause described by the plaintiff and is, in any event, benign and not associated with long term problems. He found nothing in the x-rays to detract from his original opinion of April 21, 2005.
- [189] Dr. Maloon wrote a third report dated January 19, 2006, commenting on the MRI of the plaintiff's lumbar spine performed on December 12, 2005 and on Dr. Shuckett's December 23, 2005 report. Dr. Maloon reviewed the MRI study finding a loss of signal intensity at the L4-5 disc indicating a loss of hydration. He found no evidence of any other acute bony or soft tissue injury in the lumbar spine, or any other injury or pathology. It was Dr. Maloon's opinion that the changes in the lumbar spine revealed by the x-ray were "age appropriate". Dr. Maloon disagreed with Dr. Shuckett that the plaintiff was young to be experiencing disc desiccation. He opined the loss of signal intensity in the L4-5 disc reflected early wear and tear in the disc and disputed Dr. Shuckett's view that the desiccation was the result of an acute injury and that it attested to the degree of trauma associated with the motor vehicle accident. Dr. Maloon concluded the MRI showed no evidence of acute injury and the mild disc desiccation could not be connected to a six year old motor vehicle accident. He viewed the bulging disc as associated to the desiccation and both conditions consistent with early wear and tear. He agreed with Dr. Shuckett's view of the disc bulging as a normal enough phenomenon in the general population, but characterized her view of it as inconsistent with her view of the desiccation as, in his opinion, the two were causally linked. Dr. Maloon did not believe the MRI revealed any conditions that were abnormal "for an active 20 year old".
- [190] In his testimony, Dr. Maloon confirmed that he found no deformity in the cervical, thoracic or lumbar spine. He also noted normal movement of the spine downward and back up in flexion forward and a normal range of movement in the plaintiff's neck.
- [191] He explained that the reference to the plaintiff having mild, mechanical or activity related neck and back pain refers to pain arising from the moving parts of the back - multiple joints in the neck and back, all of which are subject to "wear and tear changes" through activity. He testified that the plaintiff's description of the extent of his pain was significant, but without pain behaviour, and he could not correlate what he found to what the plaintiff complained of. Dr. Maloon explained the avulsion fracture depicted in the January 18, 1999 x-ray was a little piece of bone pulled off from the pelvis above the hip joint, which is a common injury in children where muscles contract forcefully and can pull off a little piece of bone. He described it as commonly seen in kicking sports. He said a recent broken bone will have a sharp jagged edge, whereas an older break will appear "well corticated" or smoothed over, as was the appearance of the bone in the January 18, 1999 x-ray.
- [192] With respect to his review of the December 12, 2005 MRI showing the desiccated disc at L-4/5, Dr. Maloon said it is common to see disc desiccation as the earliest sign of wear and tear changes in the joints in the back. He testified such changes can begin in the teens and

the MRI, which is a sensitive test, reflects very mild wear and tear changes in the disc. He explained his view that disc desiccation and bulging are part and parcel of the same thing, so it is contradictory to describe one as part of the trauma, attesting to its degree of force, and the other as inconsequential because of its commonplace occurrence in the general population.

- [193] In cross-examination, Dr. Maloon testified that 30% of 20 year olds will have MRI evidence of wear and tear changes in the spine. He agreed with Dr. Shuckett that there was no indication that the bulging disc was causing pain. Dr. Maloon agreed with the suggestion that it was possible to have back pain without objective signs of injury. He testified that although he described the plaintiff's complaints as being vague and non-specific, he could not recall whether any of the other examining or treating doctors had made the same observation. Upon looking through the reports he had, he referred to Dr. Jaworski's report of December 14, 2001, which referred to long standing neck and back pain with a normal physical examination and he referred to the plaintiff's initial report to Dr. Simon within two days of the accident at which time the plaintiff complained of being sore all over.
- [194] Dr. Maloon agreed the plaintiff did not display pain behaviour and that sometimes patients do overreact, but he testified that given the plaintiff's rating of his pain between 4 to 9 out of 10, he would have expected to see some pain behaviour. He agreed he found a lack of non-organic signs, meaning there were no unexpected findings, and he agreed he performed the "Waddell tests" on the plaintiff, which are tests performed without the patient's knowledge to test for symptoms being reported which should not be. Dr. Maloon also agreed the plaintiff passed all "distraction testing" done, which involves examining one aspect of the patient's reported injury while noting his reaction to casual stimulation of another. Dr. Maloon agreed that he had no reason to believe the plaintiff was not experiencing neck and back pain discomfort, although he commented that the plaintiff's clinical presentation seemed incongruent with the severity of the symptoms he reported.
- [195] Dr. Maloon agreed the plaintiff's symptoms were consistent with neck and back pain, that the pain could have been caused by trauma, and that chronic pain could be incapacitating. Dr. Maloon did not agree with the suggestion that lack of improvement of that pain in four to five years necessarily reflected a low likelihood of improvement because it depended on the cause of the pain. He said if there was a specific cause it perhaps could be treated surgically or medically. He agreed however that with respect to the plaintiff, without being able to identify the source of his subjective complaints there as no magical treatment. Dr. Maloon agreed that even sedentary work could be affected by chronic back or neck pain. He testified as far as he was aware, the plaintiff had followed all the recommendations made to him for ameliorating his condition and had made continued attempts to keep working. He expressed some reservations about the value of functional capacity testing because of the subjectivity of the testing, but did acknowledge such testing could be reliable if the evaluator concluded that full effort was being used.

- [196] Dr. Maloon agreed avulsion fractures could be caused by trauma such as motor vehicle accidents and he agreed that the occupants of the McCann vehicle would have been subjected to angular and tortional forces at the time of the accident. He testified that if the plaintiff's complaints were real and ongoing to the point of the trial, they would probably continue into the future.
- [197] Dr. Maloon testified he could not recall seeing diagrams in which the plaintiff localized his pain complaints in Dr. Lau's clinical notes. His assertion that the plaintiff's symptoms were vague and non-specific was based on his assessment of the plaintiff on the day of the evaluation, and not on other clinical notes or reports.

FUNCTIONAL CAPACITY EVALUATION AND WORK CAPACITY EVALUATION

- [198] A significant difference of opinion emerged between the evidence of Lila Quastel and Dr. Christopher Cook as to the implications of their respective evaluations of the plaintiff's ability to work in limited, light, medium and heavy categories of occupation as a result of the effects of the accident.
- [199] The categories of occupation are established by reference to the National Occupational Classification ("NOC") which provides a definition of what constitutes limited, light, medium and heavy work, and ties those definitions to the amount of weight handled in a particular job and the degree of body dexterity or body positions which are required by the job. The classification system is generic and does not rest on assessments of individual jobs and nor does it attempt to comprehensively define the required capacities for specific occupations.
- [200] The strength requirements for the various categories involves handling loads up to the following weights: for limited, up to 5 kg (11 lbs); for light, 5 kg to 10 kg (22 lbs); for medium, 10 kg to 20 kg (44 lbs); and for heavy, handling loads over 20 kg.
- [201] In her report dated February 7, 2005, and corresponding evidence, Ms. Quastel relied on an evaluation of the plaintiff which she carried out on November 2, 2004. She concluded that the plaintiff had lost occupational opportunities due to the accident. She asserted the following in her report:

Absent the accident, he likely would have been able to work at occupations for which he was suitably qualified in all the strength categories including the heavy category. His choices now are limited to occupations in the limited and light categories. Even within these categories his choices are limited, as he needs to alternate between sitting, standing and moving around. He would have difficulty maintaining employment in occupations which require sustained standing throughout an eight-hour shift or sustained sitting throughout a shift. He may have difficulty with a desk-type job, or job tasks requiring a work-intensive posture. He may be able to do jobs at the light end of the medium strength spectrum, but he would have to be very selective. He definitely should avoid the majority (at least 75%) of occupations in the medium category and all occupations in the heavy category. Direct-entry jobs in the medium and heavy categories usually

pay more than those in the limited and light categories, so his losses include potential earnings as well as loss of range of choices.

[202] In his report dated December 1, 2005, based on the work capacity evaluation undertaken on November 7, 2005, Dr. Cook concluded the following:

Mr. McFadyen continues to report ongoing subjective discomfort in the neck, mid-upper back, right hip and low back following the motor vehicle accident of January 18, 1999. The results of the current assessment suggest Mr. McFadyen perceives most of his subjective physical complaints to increase slightly during some loaded situations while other loaded situations resulted in no discomfort change or, in some instances, a reduction in symptom severity.

Objective observations of functional performance patterns showed no change in functional performance between non-fatigued and fatigued conditions for some activities, such as a comparison of early day and late day lifting and carrying tolerances, with no effect of perceived subjective discomfort levels on functional performance over time and with repetitive use. Unchanged symptom levels in the neck and upper back and improved symptom levels in the right hip following completion of 6 hours and 52 minutes of activities in the HEAVY (S4) strength range supports the notion that "motion is lotion" for Mr. McFadyen regarding his subjective complaints in these areas, and that he would benefit from ongoing exercise, activity and work-related activities.

Mr. McFadyen is encouraged to continue his career exploration in the area of business and commerce. The results of the current assessment suggest Mr. McFadyen is capable of competitive employment up to the HEAVY (S4) strength range, and that he has not sustained any reduction in his work capacity in relation to occupations that he has performed in the past, or for any of those occupations for which he is suitably trained, as a result of his motor vehicle accident of January 18, 1999.

[emphasis in original]

[203] Dr. Cook testified that what he meant by the phrase "up to the heavy strength range" was up to "and including" heavy strength.

[204] In fact, the results of the physical testing of the plaintiff administered by Dr. Cook on November 7, 2005 and that administered by Ms. Quastel on November 2, 2004, were largely similar.

[205] Both Ms. Quastel and Dr. Cook assessed one another's evaluation of the plaintiff in their respective testimony. In her testimony, Ms. Quastel questioned Dr. Cook's use of the phrase "subjective pain", pointing out that all pain or discomfort is a "subjective phenomena" not objectively measurable. She questioned whether Dr. Cook, who is not medically trained but has a PhD in educational psychology and special education with a bachelor and master's degree in physical education, took sufficient account of the medical opinions of Dr. Lau and Dr. Adrian both of whom identified the difficulties the plaintiff had with heavier lifting and higher impact recreational activities. In particular, Dr. Lau had cautioned the plaintiff

against carrying on in such activities. Ms. Quastel also questioned whether Dr. Cook took adequate notice of the fact that while working as a plumber's assistant, the plaintiff aggravated his lower back.

- [206] Ms. Quastel disagreed with Dr. Cook's assertion that "motion is lotion" in the case of the plaintiff, pointing out that heavy physical activity "very likely" contributed to his pain condition. She also did not agree with Dr. Cook's assessment that the plaintiff "has not sustained any reduction in his work capacity in relation to occupations that he has performed in the past or for which he is suitably trained".
- [207] In Ms. Quastel's view, Dr. Cook's conclusion went against the weight of the evidence he developed in his evaluation in addition to the medical and opinion evidence.
- [208] For his part, Dr. Cook noted that in her evaluation of the plaintiff, Ms. Quastel only used one test involving the methods time measurement (the "MTM") format which he described in his report as an "industrially based standard for the assessment of speed and efficiency work expressed as a percentage on a scale from 0 - 140[%], with performance ratings above 70% considered to be within employable standards." In the only test Ms. Quastel administered using the MTM format - the valpar nine - the plaintiff scored at 140%. The valpar nine test is a standardized test used to determine the individual's ability to work in a variety of positions while reaching and screwing 3/8 inch diameter pegs into various levels of panel in an upright board. Ms. Quastel noted the plaintiff's back pain increased when his reach was combined with certain postures.
- [209] Dr. Cook noted some apparent discrepancies between Ms. Quastel's raw data and final report. He also characterized her evaluation as a functional capacity and not a work capacity assessment because, except for the valpar nine test, it was normative based and not performance based. He testified that normative based testing had been abandoned since 1991 on the basis that it discriminated against people who were not included in the original normative data base. He testified that Ms. Quastel's testing was not related to the physical demands of work and this compromised its effectiveness or utility. He pointed out the lifting and carrying data was related to the height of the plaintiff and not the heights of the generic workplace which are standard. In Dr. Cook's view, this also compromised the utility of Ms. Quastel's measurements. Dr. Cook suggested that Ms. Quastel should have administered more tests to gauge the consistency of the plaintiff's efforts and their internal validity. He also suggested that she ignored the results of the carrying and lifting tests which she administered and decided somewhat arbitrarily what the plaintiff's capacities were. He also pointed out that the end points of the plaintiff's capacity were pain related rather than based on Ms. Quastel's observations of his using compensatory mechanisms or displaying biomechanical breakdown in his actions.
- [210] In her evidence, Ms. Quastel testified that she set a lower lifting and carrying threshold for the plaintiff than the evaluation established he could do without complaint, because she felt it was necessary to build in a safety margin. She testified it was her clinical judgment that

he should not have been lifting more than 40 pounds on a one-time lift and no more than 35 pounds in repetitive lifting to avoid the potential for re-injury or aggravation of his existing injury. She acknowledged that he had lifted up to 55 pounds without pain complaints in the course of her evaluation.

- [211] In his evidence, Dr. Cook testified he based his opinion as to the plaintiff's capacity on seeing no compensatory mechanism or biomechanical breakdown experienced by the plaintiff in the course of his evaluation. He acknowledged however that the plaintiff reported pain when lifting 60 pounds and increased pain on repetitive lifting. He concluded nevertheless the plaintiff could carry up to 60 pounds occasionally for 0 - 33% of the work day and testified that test data allowed him to make that extrapolation which would allow the plaintiff to work in the heavy lifting category.

THE ECONOMIC EVIDENCE

- [212] The plaintiff led the evidence of Gerry Taunton an economic consultant, who calculated a future income loss for the plaintiff based on the assumption that absent the accident and subject to certain contingencies, the plaintiff would have completed an apprenticeship and subsequently worked as either a fabricator or a plumber and since the accident, would have either earned 75%, 100% or 130% of the minimum wage. In his computations, Mr. Taunton allowed for negative contingencies including non-participation in the labour force, unemployment, part-time employment, part-year employment and premature death. After discounting for those negative contingencies, and adding in non-wage benefits, Mr. Taunton calculated the present value of the plaintiff's future income as a fabricator to be \$1,102,247, and the present value of his future income as a plumber to be \$881,934.

- [213] He calculated the present value of with-accident income as \$262,725 at 75% of minimum wage; \$350,300 at minimum wage; and \$455,390 at 130% of minimum wage. In the result, the loss of future income projected by Mr. Taunton for loss of income as a fabricator was \$839,522 (at 75% of the minimum wage); \$751,947 (at minimum wage); or \$646,857 (at 130% minimum wage). The future value of loss of income as a plumber was \$619,209 (at 75% minimum wage) \$531,634 (at 100% minimum wage); or \$426,544 (at 130% minimum wage).

- [214] In response, the defendant called the evidence of Mark Gosling, also an economic consultant. Mr. Gosling made the following comments on Mr. Taunton's report:

Ø We have no difficulty with Mr. Taunton's technical calculations. If the Court finds that the assumptions underlying Mr. Taunton's loss estimates are appropriate, then his loss estimates are reasonable.

Ø The two absent-accident occupations considered by Mr. Taunton (fabricator, plumber) may not be representative of the opportunities that would have been available to the Plaintiff. For relatively young individuals who have not yet established themselves in a particular occupation or undertaken training towards a particular occupation, it is more common to estimate future earnings based on education level rather than occupation. Educational averages include a wide

range of potential occupations and may be more representative of an individual's probable earnings when that individual's occupation cannot be predicted with confidence.

[215] Mr. Gosling employed a method of estimating the plaintiff's "with-accident earnings" based on broad educational averages adjusted downwards if the plaintiff's injuries impaired his capacity, rather than on specific occupations. Mr. Gosling's estimate of the future value of the plaintiff's capacity to earn, based on broad educational averages, were as follows:

1. High School Diploma - \$957,498;
2. College Diploma (over one year) - \$1,165,678; and
3. Bachelor's degree - \$1,309,040.

THE POSITION OF THE PLAINTIFF

[216] It is the plaintiff's position that the evidence establishes the accident caused significant ongoing injuries to the plaintiff involving chronic neck, back pain and headaches which have had an impact on his enjoyment and quality of life, his past ability to earn income and his future capacity to earn income.

[217] It is the plaintiff's counsel's contention that the plaintiff's evidence as to the nature and extent of his injuries when considered in the context of the medical evidence and the evidence of his friends and intimates establishes that he suffers from a chronic condition of neck and back pain - particularly in the low back - despite the subjectivity of the evidence. The plaintiff points to his loss of work at Tree Island Steel and the job performance appraisal at Armaur Plumbing as indicia of the existence of his chronic condition. Counsel for the plaintiff also points out the plaintiff's evidence was given in a straightforward and credible manner and was not the subject of any cross-examination as to prior inconsistent statements or assertions. Counsel for the plaintiff further relied on the evidence that in all of his medical assessments and functional evaluations, the plaintiff passed all validity measures for candour. He also highlights the consistency in the plaintiff's complaints over time to his right hip, neck and back. He questions the validity of Dr. Maloon's characterization of the plaintiff's complaints as being vague and non-specific.

[218] Counsel for the plaintiff submits I should accept Dr. Shuckett's view of the implication of the desiccated disc over that of Dr. Maloon, which the plaintiff's counsel described as "overly cautious". The plaintiff argues I should accept his account of his chronic pain condition and the consequences which have flowed from it, including the impact on his ability to do medium or heavy work; his anger and irritability; the limited prospects for further improvement; his vulnerability to aggravation of his injury; and, the economic implications.

[219] The plaintiff submits the evidence of the difficulties he has encountered in the adult working world should be accepted, based on the confirmation of Sarah Overin, Tory Haleta and his parents. The plaintiff contends that a suitable measure of his past loss of income

could be established by accepting one of three possible, without-accident scenarios: the first scenario is that he would have worked full-time (less 15% for negative labour market contingencies) from September 1, 2003 until trial, earning \$12.00 an hour, netting him \$62,400; the second scenario is that he would have spent a year in college and then worked full-time (less 15% for negative labour market contingencies) from July 1, 2003 to September 1, 2003, and from May 1, 2004 to November 1, 2004, earning \$12 per hour, and then from November 1, 2004 to February 13, 2006, earning \$20 per hour, netting him the sum of \$68,208; the third scenario is that he would have worked full time (less 15% for negative labour market contingencies) from July 1, 2003 to July 1, 2004, earning \$12 per hour and from July 1, 2004 to February 13, 2006 (the trial date) earning \$20 per hour, netting him the sum of \$89,712.

- [220] The 15% negative labour market contingency would yield \$53,040 for the first scenario, \$57,977 for the second scenario, and \$76,255 for the third scenario. After reducing his actual earnings of \$33,150 after taxes for the period July 1, 2003 to February 13, 2006, this yields potential loss of earnings of \$19,890 in the first scenario, \$24,827 in the second scenario, and \$43,105 in the third scenario. After a further 20% reduction for income taxes, this results in possible losses of \$15,912, \$19,862, and \$34,484 respectively.
- [221] Based on those scenarios, the plaintiff claims \$25,000 as a fair and reasonable measure of his past income loss to the date of trial.
- [222] As far as the loss of future earning capacity is concerned, the plaintiff's position is that in the absence of the accident, he could have qualified for and successfully managed any vocational trade open to him and that given his scholastic aptitudes and background, that was a likely scenario for him. The plaintiff contends that his alternative choices of becoming a physiotherapist or going into business are not likely to occur because of the competitiveness of the latter and his lack of background or support in achieving the former. The plaintiff relies on Mr. Taunton's evidence but does not rely on the overly mathematical approach taken in that report, preferring instead to submit it as a useful guide or measure of the plaintiff's loss, depositing approximately \$500,000 as a possible measure of his loss of earning capacity or some variation on that sum.
- [223] As far as general damages are concerned, counsel for the plaintiff submits a range of \$100,000 to \$125,000 is appropriate. Counsel relies on a series of cases including *Charlebois v. Vandas* (2004), 29 B.C.L.R. (4th) 323, 2004 BCCA 356 (\$110,000); *Fox v. Danis*, 2005 BCSC 102 (\$100,000); *Karim v. Sangha*, [1998] B.C.J. No. 1951 (S.C.) (\$90,000); *Majer v. Beaudry*, 2002 BCSC 746 (\$95,000); *Prince-Wright v. Copeman*, 2005 BCSC 1306 (\$100,000); and *Zylstra v. Hughes*, [1999] B.C.J. No. 2616 (S.C.), *aff'd* 2001 BCCA 326 (\$100,000).

- [224] The plaintiff contends that his injuries are ongoing and permanent and has affected all aspects of his daily life from an early age. His weekends are largely devoted to rest and recuperation so that he can continue to work. This plaintiff argues he is irritable and often angry over his situation, and that the preponderance of evidence demonstrates the problems the plaintiff experiences are not likely to improve.
- [225] With respect to the plaintiff's low back and neck strain experienced while at Armaur Plumbing on April 5, 2005 and aggravated by his return to work later that month, the plaintiff's position is that those were simply aggravations of the original injury for which the defendants remain solely responsible. In support of this position, the plaintiff cites *Athey v. Leonati*, [1996] 3 S.C.R. 458.
- [226] The plaintiff does not seek any special damages as there is no evidence of the specific expenditures made by or on behalf of the plaintiff. The plaintiff does seek \$15,000 as the cost of future care based on the recommendations of Ms. Quastel.

THE POSITION OF THE DEFENDANT COPYTEK

- [227] Counsel for the defendant Copytek relies on the decision of Chief Justice McEachern (as he then was) in *Price v. Kostyba*, *supra*, cautioning trial judges to be "exceedingly careful when there is little or no objective evidence of continuing injury when complaints of pain persist for long periods extending beyond the normal or usual recovery."
- [228] Counsel for the defendant submits it is particularly important to bear that caution in mind where there is a soft tissue injury and when it is impossible for the defendant to disprove the nature and extent of the injury at issue.
- [229] Counsel for the defendant submits I should weigh all the evidence to gauge the plaintiff's injuries and their effects upon him. Defence counsel notes that according to the plaintiff's school records, the plaintiff missed only three days of school in the entire term, ending in June of 1999. He points out that in April of 1999 the plaintiff was regarded as being "50% improved" and that by the end of May of 1999, while there was reference to his neck, shoulder and mid-back pain, there was no reference to his lower back pain. In addition, at around the same time the plaintiff was attempting to play football.
- [230] Defence counsel points to the June 7, 1999 examination report by Dr. Wachsmuth in which she described her examination of the plaintiff as being a fairly normal examination with "not a lot going on". Counsel also relies on the physiotherapy reports in the summer of 1999 which referred to the plaintiff going camping for 15 days.

- [231] Counsel for the defendant highlights the fact that the plaintiff began skateboarding seriously in the fall of 2001 and the plaintiff must have been fairly active to have sustained injuries including a cut chin, ankle injuries and other skateboarding related injuries. It is submitted it is hard to conclude, given all the activities the plaintiff was involved in, that he was seriously limited. In addition, the fact that he was constantly injuring himself meant that the plaintiff was actively participating in the sports he was involved in.
- [232] Defence counsel notes that the plaintiff quit skateboarding because of his ankle, and not because of his back.
- [233] Defence counsel also points out that the plaintiff started working in 2001 and 2002 cooking at a restaurant and was on his feet four to five hours a day while he worked. The plaintiff worked for several months at that job, and there is no evidence the plaintiff needed any time off. Similarly, the plaintiff worked at McDonald's during his last year of high school and did not appear to have any time loss there either. The plaintiff also continued to take a physical education class into grade 12 and participated in kayaking and rock climbing as a result of the course.
- [234] Counsel for the defendant argues that Dr. Lau's clinical notes made no reference to any back problems for a one and a half year time period between March of 2002 and September of 2003. In the spring of 2003, the only significant problem noted was the plaintiff's ankle injury. Defence counsel argues the summary of the overall evidence which must be considered in weighing the significance of the plaintiff's described symptoms at trial is as the defence has described it.
- [235] The defence submits that although the plaintiff did not return to the gold level of soccer, he nevertheless still played at a high level of competitiveness and participation. It is also submitted that the plaintiff's scholastic records portrayed him as a better student than as described by his mother. He had more scholastic aptitude, and therefore a broader range of vocational possibilities open to him.
- [236] With respect to the evidence given by the plaintiff's father, counsel for the defendant submits that I should weigh the evidence of a parent carefully and that particularly in the case of the plaintiff's father, he did not have a great deal of interaction with the plaintiff over the years. With respect to the evidence of Mr. Haleta, the defence notes that he had really only worked with the plaintiff for one day. As far as Ms. Overin's evidence is concerned, she only regularly sees the plaintiff on weekends, and during those days she also works. Thus there is relatively little opportunity for her to observe the plaintiff.
- [237] While the defence concedes that Mr. Woolsey's evidence was supportive of the plaintiffs' contention that he "held back" in skateboarding, the defence notes that Mr. Woolsey apparently did not see the plaintiff doing the acts that caused him injury. Defence counsel also questions how frequently Mr. Woolsey and the plaintiff had actually skateboarded together.

- [238] With respect to the medical evidence of Dr. Adrian, Dr. Lau and Dr. Shuckett, the defence argues the doctors had essentially deferred to the evidence of Ms. Quastel as far as the plaintiff's working capacity was concerned.
- [239] Counsel for the defendant take issue with the evidence of Ms. Quastel, noting the apparent discrepancy in her report in which she identified problems with the plaintiff lifting and carrying 30 to 40 pounds, and in her raw test data which revealed the plaintiff had complained of pain at 60 pounds. Ms. Quastel had initially placed a limit of 35 pounds repetitive lifting on the plaintiff, then changed it to 30 to 35 pounds and then changed it again to 30 pounds. Ms. Quastel had acknowledged that the 30 pound change was probably in error. In reference to her evidence that she built in a safety margin, the defence submits that was not in keeping with her test data and questioned the utility of using the test but not relying on the data. The defence submits that if Ms. Quastel had used her actual data as to the limits of lifting and carrying, then the plaintiff would have met the NOC standards for all medium and some heavy occupations. It is further submitted that I should rely on Dr. Cook's evaluation rather than on Ms. Quastel's because Dr. Cook used criterion based testing, which is the MTM format based on efficiency and speed. Utilizing that approach, the plaintiff was at or above the norm in relation to each test, including carrying, lifting and pulling, and was into the heavy range in all tests.
- [240] Counsel for the defence submits I should rely on Dr. Maloon's evidence that he found no deformity or curvature of the spine and no spasm of the muscles in the back. He found normal retrieval from forward bending and the plaintiff's lumbar spinal rhythm was "normal". Counsel submits that Dr. Maloon was the only orthopaedic specialist to testify or provide a report and he could not account for the plaintiff's complaints on the basis of anything he saw. It is also submitted I should accept Dr. Maloon's characterization of the disc desiccation over that of Dr. Shuckett's, given the apparent contradiction in Dr. Shuckett's opinion as to the significance of the bulge and the significance of the desiccation. In addition, Dr. Maloon's opinion was based on his more cogent qualifications and experience as compared to those of Dr. Shuckett.
- [241] It is the defence submission that non-pecuniary damages should be in the range of \$40,000 to \$45,000. Defence relies on *Bowing v. Lang*, [1999] B.C.J. No. 2025 (S.C.), in which the Court ordered \$40,000 for non-pecuniary damages for a person permanently affected by chronic pain; *Chiacig v. Chiacig*, 2001 BCSC 1709, in which the Court awarded non-pecuniary damages of \$35,000 for permanent mild to moderate flexion extension injuries restricting the plaintiff's physical activities; *Gorosh v. Bowen*, 2005 BCSC 917, in which the Court ordered general damages of \$40,000 for a moderate soft tissue injury causing permanent ongoing chronic pain to some degree; and *Leo (Litigation Guardian of) v. Leo*, 2005 BCSC 1300, in which the Court ordered \$45,000 for non-pecuniary damages for permanent back injuries.

- [242] Defence counsel submits that the evidence simply does not support damages for loss of earning capacity, particularly if I prefer Dr. Cook's evidence to Ms. Quastel's. In the alternative, the defence submits that any loss is minimal and that the theory of the plaintiff is flawed; there is no evidence at all to suggest the realistic likelihood that the plaintiff would become a plumber or fabricator or some other tradesman. In particular, the plaintiff was still interested in film making and had asserted an ongoing intention to return to school.
- [243] Counsel for the defendant submits it is unlikely the plaintiff will settle in a minimum wage job and points to the fact that the plaintiff currently earns between \$2,000 and \$2,500 per month, which is between \$24,000 and \$30,000 per year.
- [244] The defence submits in the alternative that if I find the basis to award damages for loss of earning capacity, I should base any assessment of the plaintiff's earning capacity on the education model and not a variant of minimum wage. It is submitted an award of \$30,000 to \$40,000 is appropriate to allow for retraining to overcome any potential effects of the plaintiff's disability.
- [245] The defence further submits that the injuries suffered by the plaintiff at work should not be treated as an aggravation or attributed to the accident under the principle enunciated in *Athey v. Leonati*, *supra*, in light of all the evidence.
- [246] The defence further submits there is no basis for the claim of \$15,000 for the cost of future care and submits that an award of \$1,000 for the plaintiff replacing his bed and a further \$675 for physiotherapy might be justifiable, despite the evidence of Dr. Maloon that it was not likely necessary.

ANALYSIS AND CONCLUSION

- [247] In this case there is a body of evidence from which I am being asked to draw divergent conclusions. The plaintiff's case is that the impact of the accident has had an enduring and prospective impact upon him with ongoing physical and economic consequences for which he is entitled to compensation. The defendant's case is that notwithstanding the plaintiff's testimony and the surrounding evidence, his claim of long term effects and consequences is not made out because there is discordance between his subjective accounts of his condition and the objective evidence. The defendant argues that although the plaintiff is entitled to compensation, it should not at the level or for the consequences as claimed.
- [248] I start with the determination that the accident involving the plaintiff was a relatively significant one with not one, but two, impacts. The first impact involved the Dean vehicle striking the McCann vehicle on the driver's side and the second involved the McCann vehicle striking the lamp standard on the passenger side adjacent to the plaintiff, applying direct force to his right hip and breaking the seat he was sitting on.

- [249] The plaintiff was only 13 years old at the time of the accident. The only contemporary and objective sign of injury was an avulsion fracture of his right hip. While there is some controversy as to whether that injury was caused by the accident due to the appearance on the x-ray of what Dr. Maloon described as a well corticated break, I am satisfied that the accident was the likely cause of the injury. There is no evidence that the plaintiff had experienced any pain or discomfort to the hip before the accident, and Dr. Maloon's evidence indicated that the accident could have caused the injury even though it was ordinarily associated with sporting events.
- [250] The fracture healed with no complications and the hip, although painful to the plaintiff for some weeks following the accident, no longer presents a source of pain, discomfort or problem to him.
- [251] The only other objective signs said to be related to the plaintiff's injury from the accident emerged in the evidence from examinations conducted in 2005. The first set of objective signs were identified by Dr. Shuckett during her examination of the plaintiff on June 8, 2005 during which she noted signs of spasm, a flattening of the lumbar lordosis and a straightening of the dorsal kyphosis. She also noted some abnormal dynamics of straightening up from a forward flexion of his back.
- [252] The second objective sign said to be related to the accident was the L4/5 disc desiccation revealed by the MRI performed on December 12, 2005.
- [253] Despite Dr. Shuckett's evidence on the latter point, I am not satisfied that the disc desiccation or the associated bulge was a condition caused by the accident. While I accept that such a condition is not the norm in a 20 year old individual and raises the possibility of an external or traumatic cause, I also accept that it is not an anomalous condition and can and does occur in people of similar age as the plaintiff. While that does not preclude the accident as the cause of the desiccation and bulging, without more, the link between the accident and the desiccation found six years later falls into the realm of the possible, but not the probable. I therefore do not regard the desiccated disc or the possible future degeneration that it augers to be effects of the accident.
- [254] I note, in any event, that Dr. Shuckett did not attribute the plaintiff's present pain condition to the disc desiccation.
- [255] As to the other signs noted by Dr. Shuckett and characterized by her as objective in nature, I accept those characterizations and I find them to be objective signs of the plaintiff's injury from the accident, notwithstanding that they were observed six years later and have not been observed by any other medical caregivers or evaluators before or since. In making that finding, I accept that the injuries the plaintiff sustained while working in April and May of 2005 were aggravations of his original injury because they were in the same area which he has consistently identified as the source of his pain and were caused by activities similar to those that he has consistently identified as increasing his level of pain.

- [256] Furthermore, in the functional capacity testing done by Ms. Quastel and the work capacity testing done by Dr. Cook, the plaintiff was consistent in relating increased low back pain to lifting activities which I find revealed a susceptibility to both pain and re-injury in that area. Similarly, the plaintiff reported lifting an 80 pound punching bag while undergoing therapy in 2005 to a worsening of his pain symptoms. I also accept Ms. Quastel's opinion that lifting contributed to the plaintiff's pain condition and find her caution to the plaintiff against continuing at his Armaur Plumbing job because of the risk that he would aggravate his injury supports the conclusion that indeed that is what happened in April and May of 2005.
- [257] Dr. Maloon did not similarly note objective signs during his examination of the plaintiff on April 21, 2005 after the initial aggravation, but that examination was after the plaintiff had been cleared to return to work, but before the second aggravation when his condition justified both Workers' Compensation Board benefits and physical therapy.
- [258] I do not regard Dr. Lau's evidence of his failure to identify the plaintiff's work injuries as causally related to the motor vehicle accident in the WCB and insurance forms as determinative of whether they were or were not. I am satisfied on the evidence as a whole that the accident was a material cause of the injuries experienced by the plaintiff in April and May of 2005.
- [259] Thus I find support for the plaintiff's evidence of his ongoing chronic pain condition in the totality of the evidence, including the objective signs of injury observed by Dr. Shuckett, the straightforward and essentially uncontradicted evidence of the plaintiff, his friends and family, the fact that the plaintiff passed all validity testing during his medical examinations and functional capacity assessments, the consistency and specificity of his complaints, the consistency of the functional and work capacity evaluation results, the plaintiff's inability to work at certain jobs including at Tree Island Steel and Armaur Plumbing, and the accuracy of Ms. Quastel's prediction that if he carried on as a plumber's assistant, he would aggravate his injury.
- [260] While I accept that throughout his life since the accident the plaintiff has maintained an active lifestyle, I also accept his evidence that he has done so despite a pain condition, and not in the absence of one. As a result, the plaintiff has had to limit his participation in activities to the extent he found necessary.
- [261] I have considered Dr. Maloon's evidence to the effect that the plaintiff's clinical presentation did not match his complaints, that his complaints were vague and non-specific, that he (Dr. Maloon) found no objective signs of a chronic condition and that he attributed the plaintiff's complaints to early wear and tear rather than to the accident. I find on the basis of all the evidence that the plaintiff's complaints were both specific and consistent over time, regardless of how he may have presented himself to Dr. Maloon. Furthermore, while there may have been no objective signs of the injury when Dr. Maloon saw the plaintiff on April 21, 2005, there clearly were objective signs later on when Dr. Shuckett saw him after further aggravation of his injury.

- [262] I accept that the plaintiff was essentially able to perform the tasks involved in the examination conducted by Dr. Maloon and that he did not display pain behaviour, which Dr. Maloon felt would have been consistent with his complaints. In considering that however, it must be borne in mind that the plaintiff has lived with his condition since the age of 13, has attempted to maintain as high a level of activity and fitness as he could since then and has learned to accommodate his pain condition. Furthermore, it was the plaintiff's evidence that the pain and discomfort he experienced would often occur at the end of a day or week of activity, not necessarily during it. Finally, all individuals who examined the plaintiff agreed that he passed all validity measures and did not appear to be exaggerating or making up his symptoms. Thus, while accepting the need for caution in cases where injuries have not resolved by when they might be expected to, in this case I accept the plaintiff's account of the nature and extent of his injuries and do not find that his complaints relate to wear and tear or any other non-tortious cause. I also find that there has been no substantial improvement in the plaintiff's condition in the past four or five years and I accept that his condition can be expected to continue.
- [263] With respect to the controversy between the evidence of Dr. Cooke and Ms. Quastel, I accept the validity of each of the tests performed, but I prefer the evidence of Ms. Quastel as to the limitations faced by the plaintiff in seeking and maintaining employment. Both evaluations produced essentially the same results. The difference in opinion between Ms. Quastel and Dr. Cooke lies in their respective interpretations of their respective results.
- [264] I find that in his interpretation, Dr. Cooke was too optimistic about the plaintiff's capacity. The plaintiff clearly had pain symptoms while lifting in the heavy range and he had previously experienced exacerbations of his back injury while working in a non-clinical setting. In my view, the evidence taken in full does not support the conclusion that the plaintiff has the capacity to work in the heavy category as he is clearly susceptible to pain or aggravation of his condition if he does so. I also accept the wisdom of Ms. Quastel's clinical judgment that he should avoid about 75% of the occupations in the medium strength category in order to avoid re-injury or aggravation of his condition.
- [265] Therefore on a balance, I find that the accident has diminished the plaintiff's opportunities for employment in occupations involving the medium and heavy strength categories.

DAMAGES

1. General Damages

- [266] I have reviewed the cases relied on both by the plaintiff and the defence in connection with the issue of general damages.
- [267] I conclude that an award of \$50,000 is appropriate in this case. The plaintiff, when injured, was relatively young and has had chronic pain since that time and is likely to have it for the balance of his life. Although he has remained as active and fit as his circumstances permit him to be, I accept that he has had to limit his physical activities and has experienced both

pain and discomfort as the price of his continuing participation. I accept that the plaintiff's condition is constant and can be aggravated by physical activity and that his neck pain, although less intrusive, still leads to sporadic headaches. I also accept that it has an effect on his mood and leads to irritability. At the same time, the plaintiff has not been precluded from his sporting activities, but only limited in how he performs them. I conclude that the cases the plaintiff relies on as establishing a range of between \$100,000 and \$125,000 involved more serious or more extensive injuries. I find the plaintiff's injuries and their consequent effect on his enjoyment of life to be somewhat closer to the cases that counsel for the defendant relies on.

2. Past Income Loss

[268] Since his graduation from high school, the plaintiff has earned approximately \$39,000 before taxes. His earnings spanned a period that included his attendance at Capilano College between September of 2003 and April of 2004. Apart from his attendance at Capilano College during which he worked part time, he has essentially had constant employment. It appears that his injuries prevented his ongoing employment at two jobs, namely Tree Island Steel and Armaur Plumbing. While he was unemployed between May to July of 2005 because of the aggravation of his injuries, he did receive benefits from the WCB. He is presently working at Telus Mobility and earns between \$24,000 and \$30,000 annually at that job. It is very difficult to quantify the effects of the accident upon the plaintiff's income earned to date. The plaintiff's contention that \$25,000 is a fair and reasonable measure of his past income loss, based on the realistic possibilities outlined in his submissions assumes the plaintiff would have obtained more remunerative employment but for the accident. On a balance, I am satisfied that it is a realistic possibility had the accident not happened that the plaintiff would have worked at more remunerative employment for a period since his graduation from high school. However, I am not satisfied that the more remunerative employment would have dominated the plaintiff's employment to the extent submitted by counsel for the plaintiff as I am satisfied that even absent the accident, the plaintiff would have attended college. In addition, even absent the accident it is a realistic possibility that the plaintiff would have shifted jobs from time to time while exploring occupational possibilities. I am satisfied that the figure of \$10,000 represents his past loss of income from more remunerative employment and the loss represented by the difference between his WCB benefits and his income from Armaur Plumbing.

3. Future Loss of Income

[269] This is a case in which the plaintiff was involved in the accident long before he could be expected to have established a career path. Accordingly, it is difficult to assess with any measure of certainty what, in the absence of the accident, he would have taken up vocationally. The plaintiff advanced the proposition that he likely would have followed in his father's footsteps and entered a trade such as a fabricator or a plumber with a certain income stream as reduced by negative contingencies. The plaintiff further contended that

the accident has placed him in a position where he is now likely to earn a variant of the minimum wage. In my view, the basis for a claim of loss of future income advanced by the plaintiff is simply too speculative to give effect to. There is no doubt the plaintiff has had his capacity to earn income impaired by the accident in that occupations in the heavy and medium categories have been foreclosed or limited to him. That this represents an impairment of his earning capacity, there can be no doubt. In *Kwei v. Boisclair* (1991), 60 B.C.L.R. (2d) 393 at para. 25 (C.A.), the Court quoted with approval from *Brown v. Golaiy* (1985), 26 B.C.L.R. (3d) 353 at para. 8 (S.C.):

The means by which the value of the lost, or impaired, asset is to be assessed varies of course from case to case. Some of the considerations to take into account in making that assessment include whether:

1. The plaintiff has been rendered less capable overall from earning income from all types of employment;
2. The plaintiff is less marketable or attractive as an employee to potential employers;
3. The plaintiff has lost the ability to take advantage of all job opportunities which might otherwise have been open to him had he not been injured; and
4. The plaintiff is less valuable to himself as a person capable of earning income in a competitive labour market.

[270] Similarly in *Palmer v. Goodall* (1991), 53 B.C.L.R. (2d) 44 at 59 (C.A.), Madam Justice Southin said:

Because it is impairment that is being redressed, even a plaintiff who is apparently going to be able to earn as much as he could have earned if not injured or who, with retraining, on the balance of probabilities will be able to do so, is entitled to some compensation for the impairment. He is entitled to it because for the rest of his life some occupations will be closed to him and it is impossible to say that over his working life the impairment will not harm his income earning ability.

[271] In my view, it is on the principles expressed above that the plaintiff's claim for impairment of earning capacity rests, and the quantum of his entitlement is not ascertainable by reference to specific occupations. Here, whatever course of training, study or apprenticeship the plaintiff chooses to pursue will be conditioned by his physical limitations. Similarly, his ability to compete for jobs in the occupation of his choice is impaired by the effects of the accident. The fact that the plaintiff is limited in certain physical activities and suffers from chronic pain will likely have an ongoing long term effect on his ability to earn income, whatever its source. I conclude in all the circumstances that an award of \$100,000 is justified to reflect the diminuation in the plaintiff's capacity to earn income over the course of his working life and to assist him in receiving training in areas that will be less affected by his physical limitations.

4. Cost of Future Care

- [272] In her report, Ms. Quastel recommended that the plaintiff have access to another 15 to 18 sessions of physiotherapy at a cost of \$45 per session. She also recommended that he have an allocation to cover the cost of an ongoing annual membership at his fitness centre. The plaintiff did not pursue that latter expense on the footing that it was his evidence that he would have maintained a membership in a fitness centre in any event.
- [273] Ms. Quastel also recommended that the plaintiff have ergonomically appropriate furniture for his back including a firm and supportive mattress. She recommended that he have an occupational therapist assess his home environment and identify the specific equipment he would require at a cost of \$400. She anticipated the cost of an appropriate mattress at \$650, a bed with a wooden base at \$1,000, an ergonomically appropriate work station at \$1,500, an ergonomic office chair at \$850 and some \$200 worth of adaptations such as wrist rests, arm rests and manuscript holders. She quantified the total for assessment and equipment as approximately \$4,600 and recommended a similar allocation for ergonomic equipment if the plaintiff chooses an occupation requiring a significant amount of computer access.
- [274] I conclude that it is appropriate to award the sum of \$675 for physiotherapy sessions for the plaintiff, and the further sum of \$6,000 for assessment of the plaintiff's needs by an occupational therapist and the cost of associated equipment that he may require. I have increased the amount from \$4,600 to \$6,000 in order to accommodate the realistic possibility that the plaintiff will require an allocation for ergonomic equipment if he chooses an occupation requiring a significant amount of computer access. Accordingly, I award \$6,675 for the cost of future care.
- [275] The plaintiff concedes that he waives any claim to special damages because his family has not kept receipts for accident related expenditures such as medications, bedding and orthopaedic pillows.

SUMMARY OF DAMAGES

[276]

(a)

Pain and Suffering and Loss of Enjoyment of Life

\$ 50,000.00

(b)

Past Income Loss

\$ 10,000.00

(c)

Impairment of Earning Capacity

\$100,000.00

(d)

Cost of Future Care

\$ 6,675.00

TOTAL:

\$166,675.00

[277] There will also be an order of interest on the plaintiff's past income loss.

[278] The plaintiff is awarded costs on Scale 3 unless there is some matter which I am unaware of, in which case the parties have liberty to apply.

"A.F. Cullen, J."

The Honourable Mr. Justice A.F. Cullen

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