

CANADA / JUDGMENT

Reimer v. Cultus Lake Waterpark Ltd.

2008 BCSC 1577

COURT

Supreme Court of British Columbia

DECIDED

18 November 2008

Source: bccourts.ca · Research copy typeset by Esheria. Not court-issued or certified.

2008 BCSC 1577 Reimer v. Cultus Lake Waterpark Ltd.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Reimer v. Cultus Lake Waterpark Ltd.,

2008 BCSC 1577

Date: 20081118

Docket: L040259

Registry: Vancouver

Between:

Robert Henry Reimer

Plaintiff

And

Cultus Lake Waterpark Ltd., doing business

as Cultus Lake Waterpark & Waterslides,

and Jane Doe

Defendants

Before: The Honourable Mr. Justice Slade

Reasons for Judgment

Counsel for the Plaintiff:

D.J. Wallin

Counsel for the Defendant:

R. McLennan

Date and Place of Trial:

March 31, 2008

April 1-4, 7-11, & 15, 2008

July 4, 2008

Vancouver, B.C.

I. OVERVIEW

- [1] On a sunny day in August 2003, Mr. Reimer and his family were enjoying a day at the Cultus Lake Waterpark when the unfortunate incident that led to this litigation occurred.
- [2] The waterpark features numerous waterslides. These range in gradient from moderate to extreme. The most terrifying slide is called the "Valley of Fear", which towers approximately 72 feet from ground level.
- [3] While Mr. Reimer waited in line to ascend the stairs to the Valley of Fear, he was struck on the head by an object that had fallen from above. This object, a length of plastic pipe with brass stoppers at both ends, was used to measure the height of would-be riders. It had fallen from the platform at the top of the stairs.
- [4] The blow was completely unexpected. Although the laceration was small, and there was no fracture, injuries sustained by Mr. Reimer have produced chronic neck pain. This, in turn, has led to persistent anxiety and depression.
- [5] Mr. Reimer went to a medical clinic. A physician sutured the laceration. In the following days, he felt tired and dizzy, and experienced double vision. He returned to work six days after the accident, though he felt unwell. In the immediately ensuing period, he found his work tasks overwhelming due to frequent and intense headaches. He had some sensitivity to light. Concentration problems made it difficult for him to focus on tasks.
- [6] Mr. Reimer's ongoing difficulties led him to see his family doctor, Dr. Purkis, on September 19, 2003. Dr. Purkis arranged for a CT scan, and referred him to a neurologist, Dr. Ho, for evaluation. The CT scan did not reveal any organic injury. As of December 23, 2003, Dr. Ho's assessment revealed the following complaints: (1) persistent pain in the base of the neck, aggravated by computer work; (2) mild dull headaches once or twice each week, lasting most of the day; (3) forgetfulness and lack of concentration; (4) impatience and irritability; (5) occasional dizziness; and (6) chronic fatigue.

- [7] Mr. Reimer had, long before the accident, established himself as a leading salesperson of sanitary paper products and janitorial supplies. Although not academically inclined, he had earned a bachelors degree in business administration from the University of Illinois. A gifted athlete, he attended university on a full scholarship, and did well in his studies despite full participation in NCAA college hockey. He took his strong work ethic to his chosen career in sales. While employed by major distributors of products, he received the highest awards in the industry, and promotions in his employment.
- [8] In 2002, at 36 years of age, Mr. Reimer had joined four others, all with successful track records, to form their own business. By October 2002, after six months of operations, the business had begun to break even. Mr. Reimer's primary involvement was generating new business and selling deeper with existing customers. He also had some administrative chores. His monthly sales exceeded his own expectations up to the time of the accident.
- [9] In the months following the accident, Mr. Reimer felt overwhelmed at work. Difficulties with memory, concentration, organizational ability, and irritability were all out of character for him.
- [10] The headache complaints decreased in frequency over time. The persistent neck pain became the most troublesome symptom of injury.
- [11] Mr. Reimer pursued numerous treatment modalities, as recommended by his family physician. On neuropsychological testing, no indication of organic brain injury was found. In his report dated February 28, 2007, Dr. Read, a neuropsychologist, attributes the changes in Mr. Reimer's functioning to the injury sustained in the accident. He says that Mr. Reimer's anxiety and depression is due to the distracting effects of his neck pain.
- [12] Mr. Reimer's success was largely attributable to his energy and resolve to develop new business for the company. Due to his lack of energy and drive following the accident, he transferred many of his accounts to a business partner, Mr. Gerhardt. He also delegated some of his administrative duties to staff.
- [13] The profitability of the business slowed in the fall of 2004. This, according to Mr. Reimer, was due to his inability to grow the business in the way he had prior to the accident. In December 2004, an opportunity for Mr. Reimer and Mr. Gerhardt to go into business with another person appeared. This individual was the exclusive distributor of a premium brand of paper products. This business' performance was comparable to Mr. Reimer's business, each having gross annual sales of around \$2 million. The partnership in which he and Mr. Gerhardt were involved was terminated, and the two joined with the other person to form a new business entity. He considered this new partnership a "saving grace", as the residue of his injuries had an impact on his ability to generate new business. The availability of the exclusive distributorship of premium products would, he believed, help offset the decline in his performance.

- [14] The advent of the new business entity placed new demands on Mr. Reimer for greater involvement in administration. He feels that he has not, due to his injuries, been able to hunt new accounts, or effectively mentor other sales staff.
- [15] Mr. Reimer, and his spouse, testified that their relationship has suffered due to his ongoing difficulties. He is irritable, and intolerant of the ordinary noise and disorder of family life with three young children. His physical condition has deteriorated. He did not play hockey at all in the year following the accident, and played only a few games in 2004 and 2005. He no longer plays, and has given up jogging as this activity induces sharp neck pain. He has eased up on his coaching of hockey, and intends to stop coaching altogether. He was a scratch golfer when he attended university, but is now very limited in the amount of golf that he is able to play.
- [16] Liability is not in issue. Mr. Reimer claims general damages for pain, suffering, and loss of enjoyment of life. He also seeks damages for past loss of income, lost earning capacity, and cost of future care.

II. INJURIES

A. Overview

- [17] The physical injury sustained by Mr. Reimer in the accident appears, on the evidence, to be a facet joint injury to the cervical spine. The injury has not significantly affected his mobility, strength, or dexterity. However, the persistent pain has affected his endurance, concentration, mood and attitude.
- [18] The plaintiff tendered in evidence a work capacity evaluation prepared by Mr. Gerard Kerr, occupational therapist. Based on the results of physical testing, Mr. Kerr concluded that Mr. Reimer is physically able to tolerate full-time work with some restrictions. His limitations relate primarily to neck pain.
- [19] There is substantial agreement among medical experts called by both parties that Mr. Reimer's anxiety and depression are a consequence of his persistent, albeit not severe, pain. This has resulted in feelings of anxiety and hopelessness. Frustration over his ongoing discomfort, and limitations that appear to be associated with his depressed mood, have resulted in his becoming highly irritable. His neck pain and depression contribute to his fatigue.
- [20] The primary focus of Mr. Reimer's evidence at trial was on the mental, not the physical, impediments to his effective performance at work.
- [21] There is no contest between the medical experts over causation. Mr. Reimer's problems have developed as a consequence of the accident.

[22] The medical opinion evidence, and the evidence of Mr. Reimer and Mrs. Reimer, support my conclusion that it is the psychological harm that has produced the greatest damage to Mr. Reimer. This has affected his ability to promote the growth of the business in the way that gained him success and recognition prior to the accident.

[23] It must be kept in mind that his psychological state is a consequence of the physical pain, now chronic, from the injury to his neck. The relationship between his depression and his neck symptoms will be discussed further below.

B. Physical Injuries

[24] In his June 22, 2007 medical-legal report, Dr. Purkis, Mr. Reimer's family physician, summarized his injuries as follows:

- scalp laceration
- mild traumatic brain injury
- mechanical neck strain
- myofacial pain secondary to the mechanical neck strain
- bilateral inferior brachial plexus syndrome, secondary to myofacial pain, and
- adjustment disorder with anxiety and depressive features.

[25] Dr. Purkis states that Mr. Reimer suffers from ongoing symptoms of mental confusion and personality change due to his anxiety disorder. He feels that it is the neck pain that is the "primary driver in his anxiety and depression".

[26] Dr. Chu, Mr. Reimer's treating physiatrist, said, in his February 2, 2006 report, that the following ongoing medical problems are present:

- lower neck mechanical pain
- mood disturbance and anxiety as a result of chronic pain, and
- some cognitive difficulties.

He said that the mechanical neck pain is a direct result of the compression and extension injury of the neck in the accident. He says that Mr. Reimer's neck pain is not likely to resolve, and will continue at the present level for the foreseeable future.

[27] Mr. Friesen, a treating physical therapist, saw Mr. Reimer eleven times for assessment and treatment. In his December 27, 2006 report, he notes Mr. Reimer's limited cervical range of motion and Mr. Reimer's report of tingling and numbness into the fourth and fifth fingers in both hands. He conducted a follow-up assessment on January 14, 2008, and reported that Mr. Reimer's physical complaints and functional outcomes had progressed in the year between the assessments. He identified new functional limitations that had not been noted in his earlier report.

- [28] Dr. S. Jung, a chiropractic specialist in rehabilitation, stated that Mr. Reimer sustained facet joint injuries, soft tissue injuries to the neck and upper back, brachial plexopathy, and chronic pain syndrome. Most soft tissue injuries resolve in a matter of months, but Mr. Reimer revealed ongoing symptoms on palpation almost three-and-one-half years after the accident. He says that the injuries have not resolved or the tissues remain in tension as a response to an underlying injury such as facet joint syndrome. He observed significant weakness in Mr. Reimer's neck and upper back muscles. He believes it is unlikely that Mr. Reimer will experience further improvement.
- [29] Mr. Reimer had seen a neurologist, Dr. Ho, in December 2003. Dr. Ho reported to Dr. Purkis that his neurological examination was normal, and diagnosed a mild concussion and post-concussion syndrome. In an April 1, 2006 medical-legal report, Dr. Purkis says that the post-concussion syndrome symptoms began to clear up in January 2004, and had mostly resolved by June 2004.
- [30] The weight of the medical experts' opinions was that Mr. Reimer likely suffered a facet joint injury at C7/T1. This, based on the medical evidence that I accept, is the source of his neck pain. There is much in the evidence to suggest that this neck pain is not particularly severe:
1. Mr. Reimer did not recall experiencing neck pain immediately following the blow to his head. According to Mr. Reimer and his wife, he did not experience significant neck pain until at least October 2003.
 2. Dr. Purkis' first notation of a report of neck pain was in December 2003.
 3. Dr. Hepburn, an orthopaedic surgeon who testified for the defence, said that a significant facet joint injury would cause pain that would be immediately noticeable.
 4. Dr. Purkis stated, on cross-examination, that with facet joint injuries one would not normally expect a delay in the onset of pain for a matter of weeks, and that with a severe neck injury pain would be experienced immediately.
 5. Dr. Hirsch, a physiatrist who testified for the defence, said that over-the-counter medication would not mask the pain unless the pain was mild. Mr. Reimer was using pain medications in the period immediately following the accident.
- [31] The evidence does not indicate any progressive deterioration of the neck as a consequence of the accident. After a consultation with Mr. Reimer early in 2008, Dr. Chu said that his view regarding the prognosis, as expressed in his February 2, 2006 report, had not changed. He confirmed his belief that the underlying mechanical problem with the neck would remain the same. In his April 2007 report, Dr. Chu stated that Mr. Reimer, though he has ongoing pain, is not in danger of causing himself any more harm or damage by engaging in normal activities.

- [32] Dr. Hirsch, a physiatrist who testified for the defence, said that the neck injury was minor, and while chronic, the pain should be manageable. He confirmed that Mr. Reimer would have pain, obstacles, and likely fatigue associated with his condition, but that he could work up to a moderate strength level. He also said that Mr. Reimer will not do himself any further harm with activities that cause pain.
- [33] On cross-examination, Dr. S. Jung said that he would not "completely disagree" with the categorization of Mr. Reimer's facet joint injury as being mild, but qualified his view regarding the underlying injury because of the development of the chronic pain syndrome. This syndrome incorporates psychological factors.
- [34] The evidence was that Mr. Reimer developed myofacial pain in or around the summer of 2006. In his June 22, 2007 report, Dr. Purkis said that, with regard to the myofacial pain, the long-term prognosis should be good. On cross-examination, Dr. Chu confirmed his opinion, as stated in an April 2007 consultation report that an active exercise program could alleviate the myofacial pain.
- [35] The symptoms of the brachial plexus injury or thoracic outlet syndrome, in particular the tingling in the arms and hands, did not appear until after Dr. Hirsch's examination in February 2007. It is Dr. Hirsch's evidence, which I accept, that if Mr. Reimer has thoracic outlet syndrome, it would not have been caused by the accident.

C. Psychological Injuries

- [36] Dr. Read, a neuropsychologist, testified. It is his opinion that Mr. Reimer did not sustain any organic injury to his brain in the accident. Tests he administered confirmed that Mr. Reimer was experiencing "moderately severe symptoms of depression and severe symptoms of anxiety". Dr. Read found no impairment of Mr. Reimer's powers of concentration and memory on testing. He said that Mr. Reimer's subjective complaints of persistent post-accident problems in these areas are a direct result of the distracting influence of his depression and anxiety. He says that the depression, anxiety, and irritability are changes in Mr. Reimer's functioning, that "are a direct reaction to the events of the accident". In his February 28, 2007 report, Dr. Read says that as long as Mr. Reimer continues to suffer from the distracting effects of pain, he is likely to remain highly anxious, depressed, and irritable.
- [37] Dr. Chuck Jung, a treating clinical psychologist, authored two medical-legal reports, and testified. His January 17, 2008 medical-legal report includes the following:

Since the accident, he is more tearful. Irritability is a problem. Motivation and drive has diminished. He feels guilty and has self-doubt. Libido has declined. He is more socially withdrawn. There has been a decline in his family relationships. The marital relationship is more stressed. He is tense and edgy. He has difficulty in relaxing. He ruminates about his problems.

Mr. Reimer continues to have a chronic neck injury. Unfortunately, his neck injury significantly impacts his emotional, cognitive, and physical functioning. I am concerned that as long as Mr. Reimer continues to experience his neck pain, he will continue to have this constellation of cognitive, emotional, and physical difficulties.

[38] The defendants say that the medical and other evidence relating to Mr. Reimer's condition demonstrate that it is the psychological sequelae, and not the underlying physical injury to his neck, that are the main contributing source of his pain and disability. This is supported by the evidence of Dr. O'Shaughnessy, a psychiatrist, who assessed Mr. Reimer in December 2006 and February 2008. Dr. O'Shaughnessy prepared three medical-legal reports, and testified at the trial.

[39] In the course of the second assessment, Mr. Reimer reported to Dr. O'Shaughnessy that his neck pain had substantially worsened since his previous attendance. Under the heading "Summary and Opinion" in his February 14, 2008 report, Dr. O'Shaughnessy says:

Mr. Reimer reports daily neck pain that is fairly constant and affecting him substantially. By his account, he is preoccupied with the pain and has difficulties in suppressing his preoccupation with the difficulties. He also evidences a number of specific fears and likely cognitive distortions in which he is particularly fearful that ongoing pain now will mean that he will experience substantial impairment in functioning later in life. This is not consistent with the actual medical records and I think it would be helpful if this were clarified for Mr. Reimer. He certainly acknowledges preoccupation with the pain to the point where he rarely is able to take his mind off his pain and literally complains of pain daily even though he attempts not to.

In addition to increasing complaints of pain, it is clear Mr. Reimer also has had an increase in symptoms of depression and anxiety since I last saw him. I think there is a general consensus that his anxiety and depression are worsened as a result of the aggravation of his neck pain. He now has the complex interaction of anxiety and depression with the pain in which likely there is a bidirectional aggravation of symptoms. Putting it simply, it is likely that his symptoms of anxiety and depression aggravate his perception of pain and likewise he experiences increasing symptoms of anxiety and depression resulting from the pain and resulting dysfunction in the neck. This is a very common scenario and typical of that seen in a "Pain Disorder".

A Pain Disorder is a psychiatric term in which psychological factors are deemed to play a significant role in a person's complaints of pain. The most common subtype is a mixture of physical causes with psychological factors that is apparent in this case. Putting it simply, he clearly suffered a neck injury with mechanical neck pain but there is a significant emotional overlay to his pain. Psychological factors are now clearly playing a significant role.

[40] The evidence of both Dr. Jung, who treated Mr. Reimer, and Dr. O'Shaughnessy, emphasized Mr. Reimer's preoccupation with his neck pain, depression, and irritability. Dr. O'Shaughnessy points out the relationship between Mr. Reimer's symptoms of anxiety and depression and his perception of pain.

- [41] Dr. Jung, Mr. Reimer's treating psychologist, testified that, with regard to prognosis, the pain/adjustment disorder is circular in that the pain creates the anxiety and depression and, in turn, the anxiety and depression aggravate the perception of pain. He agreed that if the depression and anxiety can be stabilized that could help with the perception of pain and would increase his threshold for pain tolerance.
- [42] Mr. Reimer's neck pain remains present after five years. None of the medical experts predict a full recovery. His perception of pain is affected by his psychological state. The injury that causes the pain is also the cause of his psychological state.
- [43] Dr. O'Shaughnessy spoke to the potential benefits of antidepressant medications for Mr. Reimer's condition. In his February 14, 2008 report, he said:

I think this man could benefit substantially from antidepressant medication such as Effexor or, if it fails, an SSRI. I would expect to see improvement in his moods, energy, drive, and motivation as well as reductions in his irritability coupled with an improvement in his general life satisfaction. It is also hoped that treating the anxiety and depression pharmacologically may also assist him in coping with his chronic pain and getting on with pleasurable activities in his life in addition to the work activities that he has continued. At this point, Mr. Reimer describes his life as focusing around his duties and obligations but with relatively little in the way of pleasurable activities and the quality of his life has diminished. It is hoped the antidepressants would improve that quality of life even if he still experiences ongoing pain.

- [44] Dr. Jung said that it is important to combine an antidepressant trial with cognitive behavioural therapy and he would defer to a psychiatrist with regard to the antidepressants because of their medical experience with such medications.

D. Mitigation

- [45] Mr. Reimer has, on the advice of his family physician, pursued many modalities of rehabilitative treatment. However, he has not, despite the repeated advice and inquiries of his family physician, pursued a regular regimen of cardiovascular exercise. He was physically active in or around January 2006, and, in Dr. Purkis' view, this was helping him. In April 2006, Dr. Purkis encouraged him to increase his cardiovascular exercise. In November 2006, in the context of a discussion after Dr. O'Shaughnessy had suggested a trial of SSRI antidepressants, Mr. Reimer told Dr. Purkis that, due to fatigue, he has had no regular cardiovascular exercise for months. Mr. Reimer told Dr. Purkis that he wished to get on with a cardio routine, to see if that would help, before going to SSRI medications. However, as of January 29, 2007, he had not initiated a regular cardio program. Dr. Purkis agreed that this may have been slowing his rehabilitation.
- [46] Dr. Purkis' notes, on which he was cross-examined, indicate that, as of July 19, 2007, Mr. Reimer had not initiated a regular cardio program.
- [47] As for the benefit of exercise, Dr. O'Shaughnessy testified, on cross-examination, as follows:

Well, we just chatted about that. There's general conditioning, but there's also an improvement general - in overall functioning. So with exercise, again, it improves chronic pain, it improves mood, it improves brain functioning, it improves concentration, memory. All of those things have been demonstrated with, again, a fairly concerted exercise. I mean, you've got to do it, kind of, every day. It's not, you know, once a week, kind of, stuff. You've got to be doing it every day. Recent stuff is pointing to even 30 minutes a day.

E. Recovery Contingency

- [48] Dr. Chu, Mr. Reimer's treating physiatrist, testified of his suggestion that Mr. Reimer take a sclerovein or prolotherapy injection. These, if successful, numb the nerve roots at the location of the facet joint injury. In around fifty percent of cases there is a reduction in pain. The associated risk is that if the injection misses its target, the wrong spot may be rendered numb. Dr. Chu has performed approximately 200 of these injections, and has never missed the target.
- [49] On assessment by Mr. Kerr, Mr. Reimer's self-rating of pain intensity in the neck was between two and three on the standard ten point scale. Although it is apparent that it is more the chronicity of the pain that leads to Mr. Reimer's other problems, and not its severity, the injections suggested by Dr. Chu give rise to a realistic possibility that Mr. Reimer's pain could be reduced to a very low level.
- [50] The psychologist who treated Mr. Reimer, Dr. Jung, and Dr. O'Shaughnessy, addressed the relationship between Mr. Reimer's chronic pain and his mood disorder. They say that his pain creates the anxiety and depression and, in turn, the anxiety and depression aggravate his perception of pain. Dr. Jung agreed that if the depression and anxiety can be stabilized, this could alleviate the perception of pain and increase the threshold for pain tolerance.
- [51] The family physician, Dr. Purkis, and Dr. Jung, testified that the present litigation is a major stressor for Mr. Reimer. Dr. Purkis felt that the stress from the litigation was delaying Mr. Reimer's recovery, and mitigating the benefits of prescribed medication.
- [52] In his February 14, 2008 report, Dr. O'Shaughnessy notes that, since he saw Mr. Reimer in 2006, he complains of increased neck pain. There does not appear to be a physical explanation for his increased neck pain. Dr. O'Shaughnessy comments that it is likely that Mr. Reimer's symptoms of anxiety and depression aggravate his perception of pain, and that he "could benefit substantially from antidepressant medication such as Effexor or, if it fails, an SSRI".
- [53] In his March 12, 2008 report, Dr. O'Shaughnessy took issue with suggestions from Drs. Jung and Read that Mr. Reimer's condition was likely to deteriorate in the future. He says "there is certainly no medical indication of any degenerative disorder or worsening physical complaint". I accept the evidence of Dr. O'Shaughnessy in this regard.
- [54] Dr. O'Shaughnessy says further that:

Generally speaking, we can improve of their life [i.e. persons with significant chronic pain or depression] with a combination of cognitive-behavioural therapy, antidepressant medication, and some lifestyle changes.

[55] Dr. O'Shaughnessy testified that with a multifaceted approach to Mr. Reimer's psychological condition, including physical activity, cognitive-behavioural therapy, and antidepressant medication, there is a significant chance that Mr. Reimer will have substantial improvement. He referred to a general acceptance among psychiatrists that approximately 75% of individuals with a major depressive disorder will show statistically significant improvement with medications. This does not, of course, mean that Mr. Reimer will, with antidepressants, have a 75% chance of improvement, or that, if his condition improves, it would be to the extent of 75%. I do, however, find that the evidence establishes a basis for a finding that there is a real and substantial possibility of a significant improvement in Mr. Reimer's mood disorder. I also accept that an improvement in this area would give rise to a real and substantial possibility that his perception of pain would be ameliorated.

[56] I would also give some effect to the evidence of Dr. Chu that injections to numb the transmission of facet joint pain offer the realistic possibility of a reduction of neck pain.

[57] Mr. Reimer will, it appears, have permanent neck pain. Further treatment, in particular cognitive behavioural therapy and anti-depressant medications, offer a substantial possibility of significant recovery. He would also benefit from a structured exercise program.

III. DAMAGES

A. General Damages

[58] Of the numerous authorities referred to by counsel for both parties, I found the following decisions to offer the most direction in the matter at hand: *Lomax v. Weins*, 2003 BCSC 1354; *Chancey v. Chancey*, [1999] B.C.J. No. 551, 86 A.C.W.S. (3d) 885 (S.C.); *Maillet v. Rosenau*, 2006 BCSC 10; and *Prince-Wright v. Copeman*, 2005 BCSC 1306. I would assess general damages at \$120,000 prior to taking into account Mr. Reimer's failure to mitigate, and prospects for recovery. The general damages are reduced by \$15,000 on that account, to yield a net award under this heading of \$105,000.

B. Loss of Earning Capacity

[59] Mr. Reimer's present ability to earn income from all types of employment that may reasonably be available to him has been diminished. It is fair to say that his education and employment history would best suit him to continued employment in sales, in particular in sales of sanitary paper and janitorial products.

[60] There is no evidence of the income range over careers in sales of merchandise of, or comparable to, the type sold by Mr. Reimer.

- [61] In the Peta Consultants report dated March 6, 2008, the plaintiff's expert, Mr. Taunton, used, as an earnings comparator, those of "the average B.C. male with a first university degree (excluding law) earning at least at the 75th percentile and as high as the 90th percentile, through to retirement no later than age 65 years".
- [62] Mr. Taunton attributes to Mr. Reimer a "with-incident employment income" at the 75th percentile of the comparator group. The figure, through to retirement at age 65 and adjusted to present value, is \$1,303,261. This figure reflects adjustments for labour market and survival contingencies.
- [63] If, but for the accident, Mr. Reimer would have earned at the 80th percentile, his adjusted income would be \$1,417,801. At the 90th percentile, the figure would be \$1,840,694. The difference, at the 80th percentile, yields a present value of \$114,640. At the 90th percentile, the figure is \$537,333.
- [64] The with-incident future earnings reflects an annual income at the 75th percentile of the comparator group of approximately \$94,000. The application of percentage reductions for labour market and survival contingencies result in adjustments to reduce the predicted income over time. The contingency adjusted figure for the year starting March 31, 2008 is \$84,684. This, I note, is roughly comparable to Mr. Reimer's three year average net employment income for the years 2000 to 2002, after adjustment for inflation.
- [65] Mr. Taunton's income comparators take account of employment income and income from business. It was elicited on direct examination that these figures do not take account of dividend income. There is, however, no evidence that would explain what is included in "business income". It seems to me that the phrase would take in all income from business, however realized.
- [66] The full-time 2008 income of persons earning at the 90th percentile level in the comparator group is \$129,980. The average annual income up to retirement is approximately \$132,000. As with projected earnings at the 75th percentile, the downward adjustments increase over time, as does the impact of discounting for present value.
- [67] It is, in my opinion, significant that Mr. Reimer's earnings between 2000 and 2002 include approximately one and one-half years in the start up phase for the business in which he, and his partners, were self-employed. His net employment income in 2000 was approximately \$81,500, and, in 2001, was approximately \$92,000. The 2000 income would, after adjustment for inflation, be comparable to the adjusted 2008 income at the 75th percentile for the comparator group of \$84,684. His net employment income in 2001 substantially exceeds the 2008 figure for the 75th percentile of the comparator group, even without adjusting for inflation. This suggests a pre-accident earning capacity at a level above the 75th percentile in Mr. Taunton's sample.
- [68] The defendants tendered an economist's report authored by Mr. Gosling of Columbia Pacific Consulting.

- [69] The comparator group used by Mr. Gosling is more appropriate than that used by Mr. Taunton. Mr. Gosling considers data on earnings for B.C. males with a Bachelor's degree in commerce, management, and business administration. The plaintiff has a Bachelor's degree in business administration. However, Mr. Gosling presents no information on the range of incomes for his comparator group. He estimates future losses by deducting the plaintiff's projected with-accident earnings from the average earnings of B.C. males with degrees in business administration. On this basis, the present value of the future income loss is calculated at \$63,945.
- [70] "Average" is not an adjective I would choose to describe Mr. Reimer. Although he is not academically inclined, he has the sort of practical intelligence that suits him to a career in business. This, combined with ambition, a strong work ethic, physical strength, boundless energy, and the capacity for attention to detail, suited him well to a career in sales. By all accounts, he is innovative in finding solutions to product placement and utilization encountered by prospective and existing customers. A congenial personality, and a thorough understanding of the sport of hockey, doubtless made him a popular figure among his targeted customer group.
- [71] I conclude that there is a substantial possibility, more likely a probability, that Mr. Reimer's earnings without the accident would exceed by a fair margin the average earnings of B.C. males with the same education.
- [72] Although Mr. Taunton's report was put in evidence by Mr. Reimer, he argues for a more substantial sum for diminished work capacity. This is on the basis of increased future earnings as gross sales of his business met his original projections.
- [73] When Mr. Reimer joined with four other partners in establishing the new business entity, they had projected annual sales between \$15 million and \$20 million within a ten to fifteen year time period. Sales grew quickly, due in large part to Mr. Reimer's abilities and untiring efforts. By the fall of 2004, the growth in sales had slowed. Mr. Reimer testified that, up until this time, the business had been living off the "seeds that had been planted" prior to the accident. Since the accident, he had been unable to engage in his accustomed activities toward the development of new business and deeper sales.
- [74] Mr. Reimer and Mr. Gerhardt left the business that had been established in 2002, and joined Mr. Peterson in the creation of a new business entity. Mr. Peterson, with his sole distributorship of a premium brand of products, owns a 50% interest in the new entity. Mr. Reimer has a 32% interest, and Mr. Gerhardt an 18% interest. Together, their vision was to grow their combined sales at the time of merger of \$4 million a year, to \$30 to \$40 million within a fifteen to twenty year period.
- [75] The plaintiff submits that his evidence, and that of others involved in sales, establish a basis for a finding of a substantial possibility that Mr. Reimer's without-accident income would have vastly exceeded the amount, at the 90th percentile, of persons with a business degree. The plaintiff suggests, based on the projected gross sales revenues, a 2008 income of

\$160,000, increasing annually to reach \$250,000 in 2017, and remaining at that level until age 65. The plaintiff suggests an annual income of \$100,000 from age 66 to age 70. If these figures are used, together with an assumed post-accident annual income of \$100,000 until age 65, the present value of the accumulated deficit would be \$2,490,000.

- [76] Mr. Gerhardt testified that he anticipated an annual income of \$250,000 at around fifteen years after the 2002 business start-up. This is the source of the income projection that yielded the loss of income presently valued at \$2,490,000.
- [77] Mr. Solaczek, one of the five partners in the business established in 2002, testified. It was his evidence that the five partners were a "dream team". They projected sales of between \$15 million and \$18 million, achievable within ten to fifteen years. If achieved, this would yield to each partner a dividend of approximately \$165,000, additional to a base salary.
- [78] The plaintiff adduced no evidence of the gross sales performance of businesses engaged in the sale of sanitary paper and other janitorial products. There is no evidence of gross sales by businesses engaged in the sale of products with comparable economic factors, such as sales volumes or percentage mark-ups, or the relationship, expressed as a percentage or otherwise, between gross sales and net income of such business undertakings.
- [79] A determination of future events is made on the basis of substantial possibility, not probability. There must be evidence to support the existence of a substantial possibility. The evidence in the present matter is not sufficient to establish the possibility that the plaintiff would, but for the accident, have achieved the income levels that would result in an accumulated annual deficit that would result in a loss, adjusted to present value, of \$2,490,000. The witnesses, Mr. Reimer, Mr. Gerhardt, and Mr. Solaczek, did not explain the basis for their projection at the time they established the business in 2002. Likewise, the basis for the projection of future sales of the business entity that was established in 2004 was not explained. I accept that these experienced sales people believed in their sales projections, but there is nothing in evidence other than their beliefs as to what the future may hold. Even if they were put forward as experts giving opinion evidence, there are no facts in evidence to support or establish a basis for their opinions.
- [80] The defendants say that the evidence does not support the argument that the prospects for Mr. Reimer's income growth have been affected by his injuries. They say that the administrative duties he took on when he and his associates formed their own business became the primary focus of his work, and that the expectation was that he would take an administrative role, while others promoted the growth of the business.
- [81] The evidence does support the contention that Mr. Reimer was intended to, and did, take on administrative responsibilities when the 2002 venture was launched, and likely would, even absent the accident, have taken on administrative responsibilities in the operation of the business established in 2004. The evidence does not, however, support the notion that Mr. Reimer would not, without the accident, have been active in promoting the growth of sales. I accept his evidence that he was, up to the date of the accident, very active in the

development of the book of business for the company he and his colleagues started up in 2002. His participation was, from the outset, intended to develop the business. Although his injuries limited him to administrative duties in the business established in 2004, there is no question but that he would, if able, have deployed all of his business development skills.

- [82] I find Mr. Taunton's evidence helpful in an assessment of Mr. Reimer's future income loss. Data on the range of earnings of people with credentials similar to those possessed by Mr. Reimer would be helpful, but the group used by Mr. Taunton is not inappropriate. Indeed, common sense would suggest that people with business degrees, and who have pursued careers in business, would, at the 90th earnings percentile, earn more than those in the entire population of people with Bachelor's degrees, excluding law, at the 90th percentile.
- [83] I conclude that Mr. Reimer's pre-accident abilities would place him in the 90th percentile. He has clearly lost the 'edge' that raised him well above those who would perform at the mid-level among the comparator group. His post-accident earnings put him over the median, but he is not as productive as he was prior to the accident. His indicated future loss is \$537,333. This, however, is subject to adjustment for failure to mitigate and the substantial possibility of recovery. On this account, I would apply a 40% reduction to yield an award of \$322,200 for loss of earning capacity.
- [84] I have applied a higher percentage reduction to loss of income earning capacity than to general damages. General damages takes account of pain, suffering, and loss of enjoyment of life from the date of injury onwards, while loss of earning capacity takes account only of loss from the date of trial. His failure to mitigate occurred a considerable time after the accident, thus a reduction on that account would not apply in the several years immediately following the accident.

C. Loss of Income to Date of Trial

- [85] I accept Mr. Taunton's opinion that past income loss up to March 31, 2008 and prior to Court Order Interest Act interest is \$21,243. Past loss of income at this level takes it into account that, at the time of the accident, Mr. Reimer's business was in its very early start-up phase, and that, in 2004, a new business was created that would have remained in its early phase for some time.

D. Special Damages

- [86] The parties agree that special damages total \$10,471.24, exclusive of interest.

E. Cost of Future Care

- [87] Mr. Reimer claims under the following headings:

- (a) Physiotherapy

Physiotherapy has apparently not assisted Mr. Reimer to date. I accept that Mr. Reimer would take significant benefit from an exercise program. I would award \$1,000 as the cost of a personal trainer to set up an exercise program, and occasional monitoring of his program.

(b) Psychological Treatment

Dr. O'Shaughnessy said that ten sessions of cognitive behavioural therapy would be sufficient. Dr. Jung said that Mr. Reimer should have bi-weekly sessions for one year, and monthly sessions for the following year.

I accept Dr. O'Shaughnessy's evidence that the form of therapy administered by Dr. Jung is not cognitive behavioural therapy as recommended by Dr. O'Shaughnessy. I would, on the basis of Dr. O'Shaughnessy's evidence, make an award based on the cost of fifteen sessions of cognitive behavioural therapy, at a cost of \$150 for each session. The award is \$2,250.

(c) Ergonomic Assessment

The award is \$600.

(d) Sit Back / Stand Workstation

The award is \$2,695.

(e) Angle Work Surface

The award is \$673.

(f) Telephone Headset

The award is \$1,683.

(g) Yard and Home Maintenance

Mr. Kerr estimated a need for up to twenty-five hours annually. I find that less than that is indicated, and award a lump sum present value of \$4,000 under this heading.

(h) Pain Clinic

The total cost of the Vancouver Pain Management treatment would be \$12,235. Although the psychological aspect of Mr. Reimer's condition does, I accept, contribute to his perception of pain, there is no question but that he has chronic pain. I award the sum claimed under this heading.

(i) Medication

The evidence indicates that Mr. Reimer would benefit from anti-depressant medication. I would award an amount at a present value of \$4,000.

The total for cost of future care is \$29,136.

IV. SUMMARY

[88] In summary, I find for the plaintiff as follows:

General Damages:

\$105,000.00

Loss of Earning capacity:

\$322,200.00

Past Loss of Income:

\$21,243.00

Special Damages:

\$10,471.24

Cost of Future Care:

\$29,136.00

TOTAL:

\$488,050.24

V. COSTS

[89] The parties may make submissions on costs. Subject to that, I would award Mr. Reimer his costs based on Schedule B.

"H.A. Slade J."

The Honourable Mr. Justice H.A. Slade

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.bccourts.ca/jdb-txt/SC/08/15/2008BCSC1577.htm>

CASE PAGE <https://chat.esheria.ai/case-law/canada/reimer-v-cultus-lake-waterpark-ltd-2008>

Prepared on 28 October 2026 · Esheria