

CANADA / JUDGMENT

Schulze v. Tull

2017 BCSC 781

COURT

Supreme Court of British Columbia

DECIDED

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2017 BCSC 781 Schulze v. Tull

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Schulze v. Tull,

2017 BCSC 781

Date: 20170510

Docket: M137431

Registry: Vancouver

Between:

Mark Schulze

Plaintiff

And

Jeffrey Tull

Defendant

Before: The Honourable Mr. Justice G.P. Weatherill

Reasons for Judgment

Counsel for the Plaintiff:

W.D. MacLeod

Counsel for the Defendant:

M.J. Straw

Place and Date of Trial:

Vancouver, B.C.

April 3 - 7, 2017

Place and Date of Judgment:

Vancouver, B.C.

May 10, 2017

Introduction

[1] The plaintiff claims damages for personal injuries resulting from a motor vehicle accident on August 26, 2012, at the intersection of East Hastings Street and Boundary Road in Burnaby, B.C. ("Accident"). The defendant admits liability, leaving only the quantum of damages to be determined.

The Plaintiff

[2] The plaintiff is currently 50 years of age. He has worked as an auto body mechanic for 26 years until recently. His interest in that trade started at a young age. His father was also an auto body mechanic and they enjoyed restoring vehicles together.

[3] He has been in a common law relationship with Ms. Cerniauskas since March 2007. The couple have three children: a daughter, age 10, and twin boys, age 8. The couple and their family have lived on a one acre rural property in Langley, B.C., since 2008. They purchased a "fixer-upper" and the plaintiff involved himself in renovating the property inside and out in his spare time.

[4] The plaintiff graduated from high school in 1985 and started working in the auto body repair business immediately. He had decided that was going to be his career.

[5] While working, he successfully obtained his red seal journeyman certificate in auto body repair from Camosun College in 1989 and carried on working for various auto body repair companies over the years including starting his own business in the early 2000s.

[6] At the time of the Accident he was working for 'Able in Grove Collision' in Langley ("Able") where he had been working for two years. Auto body technicians are typically paid on "piece work"; that is, paid according to their productivity. The more efficient an auto body repairman is and the faster the job can be completed, the more income is earned. The plaintiff's pre-Accident earnings at Able were in the \$60,000 per annum range.

[7] Because Able is a relatively small shop, was not very busy, and the plaintiff felt he could earn more money in a larger operation, he was planning on applying elsewhere once his children were more independent. He testified that he had no plans of leaving the auto body trade in the future; it was the only job he knew.

- [8] The Accident was on a Saturday. The following Monday, the plaintiff returned to work but was in pain. He went to see Dr. Paterson, a chiropractor he had seen shortly before the Accident, who suggested he see a physician. He then saw a physician at a walk-in clinic who suggested he take a week off work.
- [9] The plaintiff complied and took time off. He returned to full-time work one week later and continued working full-time, albeit in pain and with numbness in his hands. He expected his symptoms would resolve on their own.
- [10] In March 2013, one of his good friends recommended a career in the refrigeration business to him. The plaintiff decided to register for the Joint Apprentice Refrigeration Training School ("JARTS"), a four year journeyman program.
- [11] On April 24, 2013, and after some 26 years in the auto body business, he resigned from Able by writing this letter:

After a thorough amount of consideration, I have decided to leave my job at Able Autobody to pursue a different career path. Ever since my car accident in August of 2012 I have had constant numbness and an inability to feel properly with my left hand, which has greatly affected how I perform my job as a collision technician. Therefore, please accept this as my resignation. My last day of employment with you will be on Wednesday, May 8th unless you would prefer me to leave before that date.

- [12] His last day of work at Able was May 8, 2013.
- [13] The plaintiff says that he left the auto body repair business because the injuries and ongoing symptoms from the Accident were making the job difficult for him. He was less efficient and was in pain. For approximately eight months after the Accident he tried to adapt but found it difficult. He felt he needed to find a new career.
- [14] He started the JARTS program on June 24, 2013.
- [15] He successfully completed Level 1 on December 20, 2013, and began looking for work. His family lived off a line of credit until he obtained employment with Redline Refrigeration on July 2, 2014. He was laid off by Redline Refrigeration due to a shortage of work on November 8, 2014. Because of the winter season, he was not able to find replacement work right away.
- [16] On January 26, 2015, he ruptured his right Achilles tendon while working on his 1968 AMC Javelin, a vintage vehicle. His foot was casted for 6 weeks. His family doctor, Dr. Field, cleared him to return to work in May 2015, and he began looking for work again.
- [17] On September 1, 2015, he obtained employment with Enviro-Tech Mechanical Services ("Enviro-Tech") in Burnaby. On April 6, 2016, the plaintiff sustained a low back injury while employed at Enviro-Tech and missed one week of work. He received further chiropractic treatments from Dr. Paterson ending on June 2, 2016. He had low back issues afterwards.

- [18] He worked at Enviro-Tech until July 8, 2016, when he moved to Chill Air Conditioning in Chilliwack ("Chill") where he continues to work. His duties are mainly maintenance and service calls which he is able to manage. He does very little of the heavier installation work.
- [19] On January 9, 2017, he took a leave of absence from Chill to complete his Level 2 of the JARTS program, completing it on February 17, 2017, shortly before the trial. He is now back working with Chill on a full-time basis earning \$28.00 per hour. He has Level 3 and Level 4 of the JARTS program to complete before he will qualify as a journeyman. He hopes he will be able to complete the program and become a journeyman refrigeration technician in early 2019.

Pre-Accident Medical Health

- [20] The plaintiff testified that his pre-Accident health in the two to three years leading up to the Accident was pretty good. He had no neck, arm or hand issues.
- [21] The plaintiff was involved in a motorcycle accident at age 35, sustaining multiple injuries including injuries to his neck and back. His main injury was a crushed left foot that required him to temporarily cease work. He had to close his auto body repair business as a consequence. He says he recovered nicely from those injuries and had no further complications. There is no evidence that suggests he missed any further work or that he was impacted in any way from those injuries following his recovery. He settled his claim arising from that accident in 2008.
- [22] A few weeks prior to the Accident, he was having work related back, shoulder and neck issues and went to Dr. Peterson for adjustments. He did not miss any work; the adjustments seemed to work and he felt better. Dr. Paterson's clinical notes for August 21, 2012, note increased back pain, left shoulder pain and stiffness for three weeks in duration. His clinical note of August 24, 2012, says "better".

The Accident and Aftermath

- [23] The plaintiff and his family were on their way to Ms. Cerniauskas' father's 70th birthday. They were travelling from their home in Langley to North Vancouver. The plaintiff was driving Ms. Cerniauskas' Honda Odyssey and was stopped at a traffic light on East Hastings Street at Boundary Road. The plaintiff had his head turned to the right as he was talking to Ms. Cerniauskas when the impact occurred from behind. It was without warning. He felt a "jolt".
- [24] Although the Honda was pushed forward, it did not strike the vehicle that was stopped in front of them. The plaintiff believes a trailer hitch on the rear of the Honda took the brunt on the impact. The repair costs to the Honda were approximately \$2,160.00

- [25] At the scene, the plaintiff felt shocked more than anything else. He was more concerned about his family's well-being than his own. Both vehicles were damaged but drivable and so the plaintiff and Ms. Cerniauskas continued on their way to the party in the Honda. The police and ambulance did not attend.
- [26] The plaintiff developed pain symptoms later that evening and the following morning and he realized he had been injured in the Accident.
- [27] He went to work the Monday following the Accident. He testified that he did not feel very well and that his feet and hands were numb. Later that day, he went to a nearby walk-in clinic and was assessed by the physician who advised him to take a week off work.
- [28] He also saw Dr. Paterson for more adjustments. Dr. Paterson treated him until the end of September 2012. The plaintiff was feeling some relief from the chiropractic adjustments. He expected his symptoms would soon settle down and he would get better, but that was not the case.
- [29] Because the physician at the walk-in clinic recommended physiotherapy, he next went to a physiotherapist. Physiotherapy also seemed to help at first but then plateaued. On the advice of his physiotherapist, he went to see his family doctor, Dr. Field, who arranged for an MRI of his neck and upper back. Unfortunately, the MRI triggered the plaintiff's claustrophobia and after two attempts and two panic attacks, could not be completed.

The Plaintiff's Injuries

- [30] During the days and weeks following the Accident, the plaintiff experienced numbness in both hands and feet, a sore neck, headaches, and pain in his upper back and left shoulder. The symptoms that caused him the most concern were the numbness sensations.
- [31] The neck symptoms seemed to improve with time and he no longer experiences constant throbbing. The numbness in his feet slowly resolved. The pain in his lower and mid back resolved in 2-3 weeks. The last treatment he has had for his symptoms was in the fall of 2012. He now manages the pain with Advil on almost a daily basis.
- [32] The plaintiff listed his ongoing symptoms from the Accident as:
- a) occasional numbness in his right (dominant) hand;
 - b) occasional headaches that he uses Advil to control;
 - c) intermittent neck pain that seems to have plateaued and he controls with Advil. He estimates his neck bothers him for about one-half of each month;
 - d) left shoulder issues that can be quite painful and seem to be getting worse over time, increasing in frequency and intensity. Sleeping on his left shoulder aggravates it;

- e) left arm and elbow pain and constant weakness, with the elbow pain being more frequent and more severe than the arm pain. Advil helps control the pain, but does not improve the weakness; and
- f) left hand numbness, particularly with the left thumb and occasionally extending to other fingers. The sense of weakness remains unchanged. He describes the sensation as like wearing a glove.

Medical Assessments and Evidence

[33] The plaintiff was assessed by Dr. Mark Adrian, a physiatrist, on August 24, 2016. Dr. Adrian prepared a medical-legal report and also testified. His diagnosis was that the plaintiff was suffering from mechanical neck pain and that was the source of his shoulder pain, left arm pain and weakness, and left hand numbness.

[34] In his October 31, 2016 report, Dr. Adrian discussed causation of the plaintiff's ongoing symptoms from a medical perspective:

Mr. Schulze was involved in a rear impact type collision in August 2012. He developed pain affecting his neck shortly following the impact. He experiences persistent pain involving his neck since the accident that affects his activity levels. The symptoms spread to his left shoulder region. Objective physical loading tests of the tissues of his neck reproduce his pain symptoms. These clinical features are consistent with Mr. Schulze suffering physical forces to the tissues of his neck during the course of the accident resulting in an injury and chronic mechanical neck pain.

Mechanical neck pain implies there is structural damage to the tissues of the spinal column. The spine is made up of a column of bones (vertebrae). The vertebrae are linked together and supported by spinal tissues. These tissues include the intervertebral discs; the spinal joints; and the soft tissue structures. If damaged, these spinal tissues can become sources of chronic (ongoing) mechanical spinal pain. Mechanical spinal pain implies that the source of the pain originates from these damaged tissues when they are mechanically (physically) stressed, as occurs with activities that involve awkward spinal positioning, neck motion, pushing and pulling, and carrying.

In Mr. Schulze's situation, he describes a pattern of neck pain consistent with suffering an injury to the spinal tissues described above. The physical examination findings are consistent with the symptoms that Mr. Schulze experiences; the injuries suffered in the accident; and the diagnosis of mechanical neck pain.

[35] In dealing with the pre-Accident issues that the plaintiff described, Dr. Adrian stated:

Mr. Schulze experienced symptoms affecting his left shoulder prior to the accident and underwent chiropractic treatments. Mr. Schulze indicates the symptoms did not affect his activity levels. The shoulder and neck are closely anatomically related. Due to his pre-accident symptoms affecting his shoulder, Mr. Schulze was probably vulnerable to experiencing neck pain symptoms radiating to the shoulder. It is unlikely that Mr. Schulze would have spontaneously developed

persistent regularly occurring and physically limiting pain involving his neck and spreading to his left shoulder had it not been for the motor vehicle accident.

[36] In dealing with the plaintiff's prognosis, Dr. Adrian stated:

In general, individuals suffering from mechanical neck pain following an injury experience improvement over time. Some individuals, however, experience persistent pain despite the passage of time. In other words, not all individuals recover from these types of injuries. In my experience, individuals suffering symptoms beyond two years from the injury date are unlikely to experience further meaningful improvement.

In Mr. Schulze's situation, over two years have elapsed since the accident. He experiences persistent regularly occurring and physically limiting pain affecting his neck. The prognosis for further recovery of the injuries suffered in the accident into the future is poor.

[37] Dr. Adrian testified that this means the plaintiff is not going to get better. He opined that the plaintiff:

will continue to experience difficulty performing employment, household and recreational activities that require prolonged static or awkward positioning; heavy or repetitive lifting; forceful pushing and pulling; prolonged heavier carrying. Due to the numbness sensations involving his left hand, he will probably experience difficulty performing activities that require fine motor control and prolonged forceful gripping. These limitations are unlikely to improve.

[38] The defendant arranged an independent medical assessment by Dr. Bernard Tessler, a neurologist, who saw the plaintiff on November 7, 2016. Dr. Tessler also prepared a report but did not testify. He opined:

As a result of the motor vehicle accident of August 26, 2012, he sustained a hypertension and flexion soft tissue cervical injury of musculoligamentous type.

His nerve injury is minor, consisting of altered sensation of the thumb and index finger, possibly the 3rd digit but he still has preservation of sensation.

He therefore has a minor impairment but he is not disabled.

The symptoms of numbness of his thumb and index finger are permanent but they are mild.

[39] Dr. Tessler did not describe what he meant by the terms "minor" and "mild", but I infer he meant "mild" from a medical perspective. An injury that is minor or mild from a medical perspective can still be significantly vocationally or functionally limiting depending on who the individual is and that individual's activities.

[40] Dr. Tessler believes the plaintiff's left thumb numbness is permanent. Given that it has persisted for over two years, he believes the prognosis for recovery is poor.

Functional Capacity Evaluation

- [41] A functional capacity evaluation ("FCE") was conducted by Ms. Gerda Murray on November 30, 2016. Ms. Murray has experience assessing workers in the auto body repair trade.
- [42] Ms. Murray testified that during the FCE she observed the plaintiff engaging in compensatory behaviours seemingly to minimize pain in his neck, left arm and hand during tasks that he found difficult. He did not seem to be aware of these compensatory movements until they were pointed out to him.
- [43] Ms. Murray's opinion is that the FCE results show that the plaintiff did not meet the National Occupational Classification ("NOC") qualifications for auto body repair in November 2016, even after his symptoms improved since the Accident. At page 14 of her report, she stated that "[o]verall, he does not meet multiple physical demands of this position, with the position requiring more than his current demonstrated abilities".
- [44] In assessing the job NOC requirements for a refrigeration repair technician, her opinion was that:

Mr. Schulze does not meet the strength requirements for heavy strength work, as is reportedly involved in the installation work. Furthermore, he presented with limitations to bilateral and left arm reaching which would preclude him from meeting the full physical demands for installation work.

- [45] Her opinion was that the plaintiff meets the physical requirements for medium strength jobs and not heavy strength jobs.

Issues

- [46] The sole issue in this proceeding is the quantum of damages.
- [47] The main dispute between the parties relating to that issue is the reason for the plaintiff's decision to leave his career in the auto body repair field and retrain as a refrigeration service technician.
- [48] The plaintiff's position is that the injuries from the Accident forced him to retrain in a career that was less physically demanding and he is therefore entitled to damages for all losses flowing from that decision.
- [49] The defendant's position is that the plaintiff had plans to leave the auto body repair business and retrain in another trade in any event of the Accident and hence he is not entitled to recover the losses flowing from his unrelated decision to leave.
- [50] Accordingly, the resolution of this point of contention will go a long way in determining the plaintiff's measure of damages.

Discussion

i. The Plaintiff's Position

- [51] The plaintiff says that his decision to leave the auto body repair trade and retrain to become a refrigeration technician was prompted by the ongoing difficulties he has had since the Accident. He says that he would not have left the only job he knew and that he enjoyed but for the Accident.
- [52] For about seven months after the Accident, he persevered at Able working through the difficulty and pain. The job requires both hands to feel imperfections, bang out dents and use heavy sanders. He tried to make it work but his neck, shoulder and arm pain, and numbness in his left thumb made it difficult. He also noted that most significantly, his left arm was numb and weaker than it was pre-Accident. He felt his production level was much slower than before the Accident and he needed more breaks.
- [53] The auto body repair job became frustrating and harder for him to perform due to his injuries. He felt his career was over and needed to find other work. He talked to Dr. Field and Ms. Cerniauskas about a change of careers and both supported his decision. He was introduced to the refrigeration technician trade by a friend and decided to follow up with it.

ii. The Defendant's Position

- [54] The defendant does not dispute that the plaintiff sustained soft-tissue injuries to his neck, back and shoulder in the Accident. The defendant's position is that the Accident caused an aggravation of pre-existing injuries that continue to cause occasional, but mild, pain and discomfort. He also maintains that the plaintiff's injuries from the Accident were minor and were by no means as bad as the plaintiff says. He accepts that the plaintiff has had ongoing numbness and altered sensation in his left thumb and index finger and possibly the third digit on his left hand. However, the defendant relies on Dr. Tessler's opinion that the numbness issue, although likely permanent, results in only a minor impairment.
- [55] The defendant asserts that the plaintiff had aches and pains leading up to the Accident as a result of his prior motorcycle accident and as a result of some 26 years working in the very physically demanding auto body repair industry. The defendant says that the plaintiff would have likely changed careers in any event of the Accident.
- [56] In support, the defendant points out that the plaintiff's participation in the JARTS program was confirmed on April 3, 2013, approximately three weeks before he submitted his letter of resignation to Able. Also, he had not had the MRI that Dr. Field had requisitioned to help assess the cause of the numbness to his hands. The defendant argues that there could have been a solution to the numbness issue for all he knew and that retraining would not have been required.

iii. Credibility Findings

- [57] The plaintiff presented as a straightforward and believable witness. He responded to questions clearly and without hesitation. I accept his testimony.

- [58] The defendant says that the plaintiff was an unreliable witness respecting both his pre and post-Accident symptoms because he did not tell either Dr. Tessler or Ms. Murray about missing one week of work in April 2016, because of a back strain.
- [59] The defendant also criticizes the plaintiff for failing to recall any history of low back pain in his discussions with Dr. Tessler. While this may be the case, I find this lapse in memory was more likely because his back strain resolved within one week and, because of the normal human tendency to forget events that are later on not significant, it became a non-event in his mind. It did not change my impression of the plaintiff's credibility.
- [60] Although his memory was not perfect, he impressed me as someone who did his best to recall facts and did so in an under-stated fashion. He struck me as stoic and not a complainer. He did not strike me as a person seeking to maximize his claim. In fact, I had the opposite impression of him.
- [61] Likewise, both Ms. Cerniauskas and Martin Schulze, the plaintiff's younger brother, presented as credible witnesses. Their evidence was not challenged in any material respect and they gave their evidence in a straightforward manner. I accept their corroborating evidence, in support of the plaintiff's evidence, about the symptoms the plaintiff exhibited post-Accident and how his ability to function as an auto body technician, recreationally and at home was affected.
- [62] The defendant called Mr. Doug Hannesson, Able's owner, to prove his theory that the plaintiff would have changed careers in any event of the Accident. Mr. Hannesson testified that when the plaintiff approached him for a job as an auto body technician in 2010, the plaintiff said he was not sure how long he planned to stay in the business and was looking at other career options.
- [63] Mr. Hannesson's professed clear recall of a conversation he claims to have had with the plaintiff some seven years ago was not believable. No contemporaneous notes were taken and he would have had no particular reason to remember their discussion with such precision. It is doubtful that he would have such a clear memory now.
- [64] Moreover, instead of simply answering questions, Mr. Hannesson's responses were consistent with someone going out of his way to have his evidence accepted. He was simply too eager to have me accept what he was saying.
- [65] His evidence was also inconsistent at times. He stated, for instance, during his direct evidence that he did not read the plaintiff's resignation letter until after meeting with the plaintiff. That evidence changed on cross-examination when he suggested that he read the letter while they were still in the meeting.
- [66] More generally, his answers on cross-examination were long and rambling to the point of not being believable.

[67] In the end, I did not find Mr. Hannesson's evidence reliable or persuasive and I give it no weight.

Damages

[68] It is trite law that once the plaintiff has established on a balance of probabilities that his injuries and loss were caused by the defendant's negligence, he is entitled to an award of damages that will place him in the same position, so far as it is monetarily possible, as he would have been in had the injuries not occurred. He is not, however, entitled to be placed in a better position than he would have been in had the Accident not occurred. The difference between his pre-Accident position and his injured position is the measure of his loss: *Athey v. Leonati*, [1996] 3 S.C.R. 458 at paras. 14, 32; *Mocharski v. Ngo*, 2016 BCSC 1165 at para. 102.

[69] In assessing the plaintiff's pre-Accident position, the defendant argues that the evidence strongly suggests that the plaintiff had pre-existent, chronic and ongoing symptoms of neck, left shoulder and back pain and urges me to consider:

- a) his 2002 motorcycle accident, where he sustained injuries to his neck, back and left foot, with evidence that his symptoms continued at least until 2008 when his claim was settled, and Dr. Adrian's opinion that if injuries of this type persist for over two years, they are likely to be permanent;
- b) that despite the plaintiff's denial that he had ongoing symptoms, the evidence that the plaintiff saw Dr. Paterson in January 2009, reporting chronic symptoms of neck pain and stiffness;
- c) that the plaintiff returned to Dr. Paterson on August 21 and 24, 2012, just days before the Accident for treatment of left shoulder pain and the reasonable inference that the post-Accident August 28, 2012 visit with Dr. Paterson was booked before the Accident occurred;
- d) Dr. Tessler's opinion that if the plaintiff did have pre-existent pain, then the Accident resulted in an aggravation of pre-existent symptoms;
- e) the labour intensive nature of the plaintiff's work in auto body repair, which may well have aggravated his pre-existent conditions.

[70] The defendant also argues that the plaintiff has been quite functional since the Accident and points out:

- a) that after taking one week off from work he returned to work full-time and continued working full-time until leaving Able in May 2013, over eight months after the Accident;

- b) since beginning his apprenticeship to become a refrigeration technician, he has worked full-time except when in classes and when he was off work between November 2014 and July 2015 after being laid off from Redline Refrigeration, and then after rupturing his Achilles tendon on January 26, 2015, in an unrelated incident;
 - c) he was able to continue working on his home project restoring his AMC Javelin;
 - d) he has been able to return to riding his mountain bike, although at a reduced level;
 - e) he has continued to perform duties at home including home renovations;
 - f) his neck pain has plateaued and he now experiences neck pain about one-half the time;
 - g) during the FCE performed by Ms. Murray, his self-reported pain ratings generally decreased overall from the beginning of the evaluation to the end.
- [71] As noted, the difference between the parties' positions on damages rests in large part on the reason the plaintiff left his career as an auto body technician. The issue then is whether the plaintiff would have made a career change in any event of the Accident.
- [72] The defendant relies on *Vagramov v. Zipursky*, 2010 BCSC 414, involving an auto body mechanic who claimed that he was forced to change occupations to an auto parts salesman because of his motor vehicle accident related injuries. The court ultimately rejected that assertion.
- [73] The defendant argues that *Vagramov* has very similar elements to this case and, similar to the result in *Vagramov*, I should reject the plaintiff's claim that he left his job as an auto body technician as a result of his injuries and find that he had been planning to change careers in any event of the Accident.
- [74] However, a feature that distinguishes the result in *Vagramov* with this case is that the trial judge in *Vagramov* did not find the plaintiff credible. The court rejected his claims that he could not continue to work as an auto body technician or that his career change was necessitated by his injuries. The finding was that Mr. *Vagramov* decided to seek a new career because it would provide him with the potential to earn more money.
- [75] That is not the case here. Contrary to the finding in *Vagramov*, I am satisfied that Mr. Schulze's change of careers was triggered by his ongoing accident related injuries. I have already accepted his testimony on that point and have rejected Mr. Hannesson's evidence to the contrary.
- [76] I am satisfied that the plaintiff continued to enjoy his work as an auto body technician and that he would not have likely made a career change but for Accident. I resolve this issue in the plaintiff's favour.
- [77] My assessment of the plaintiff's damages will flow from that finding.

i. General Damages

[78] The Court of Appeal provided an in-exhaustive list of factors to consider in making a general (i.e. non-pecuniary) damages award in *Stapley v. Hejslet*, 2006 BCCA 34 at para. 46:

[46] The inexhaustive list of common factors cited in *Boyd* that influence an award of non-pecuniary damages includes:

- (a) age of the plaintiff;
- (b) nature of the injury;
- (c) severity and duration of pain;
- (d) disability;
- (e) emotional suffering; and
- (f) loss or impairment of life;

I would add the following factors, although they may arguably be subsumed in the above list:

- (g) impairment of family, marital and social relationships;
- (h) impairment of physical and mental abilities;
- (i) loss of lifestyle; and
- (j) the plaintiff's stoicism (as a factor that should not, generally speaking, penalize the plaintiff: *Giang v. Clayton*, [2005] B.C.J. No. 163 (QL), 2005 BCCA 54).

[79] I find that the plaintiff had no significant pre-existing injuries. My assessment of Dr. Paterson's clinical notes, which were somewhat cryptic, is that they are consistent with the plaintiff's evidence that he had some pre-Accident pain and stiffness in his neck and back, which can be expected from such a labour intensive occupation, but that it was short lived. It was not a chronic problem as the defendant suggests. Indeed, the plaintiff's active lifestyle in the years leading up to the Accident and lack of medical evidence of ongoing chronic pre-Accident symptoms, suggest to the contrary.

[80] The plaintiff's decision to change careers was not made lightly. The evidence satisfies me that the plaintiff's symptoms of numbness in his left arm and fingers negatively affected his ability to work as an auto body technician. That had implications on his productivity and was the source of much frustration. The fact he was ultimately forced to give up the only career he had ever known, one that he was good at and enjoyed, due to his injuries must have taken a significant toll.

- [81] The evidence satisfies me that the plaintiff has always been a physically active person. The recreational activities and hobbies he enjoyed before the Accident included mountain biking (his long-time favourite past time), camping with his family and restoring vintage vehicles. He also enjoyed renovating his home in Langley, adding to the property, and repairing and updating its many components. I find that his injuries have taken much of the pleasure out of these activities and have limited his participation in them.
- [82] The JARTS program has not been easy for the plaintiff. Although he is motivated, he has doubted his ability to succeed. The evidence makes clear that the program has caused financial stress and hardship for his family by placing them deeper into debt to fund the family expenses while the plaintiff is attending school and not earning an income. He has at least two years before he can graduate from the program.
- [83] Based on the medical evidence, and particularly the relevant opinions of Dr. Adrian and Dr. Tessler, I find that the plaintiff's ongoing symptoms (described above) are likely to be permanent. They will likely result in a change in his lifestyle and will require ongoing management with medication and medical treatments.
- [84] The plaintiff refers to the following cases in support of a general damages award in the \$85,000 - \$100,000 range:
- a) Hooper v. Nair, 2009 BCSC 862, involving a female plaintiff with post-traumatic thoracic outlet syndrome causing left shoulder and arm pain. She had intermittent tingling in her fingers and some low back pain that improved. There was also some depression. The prognosis was for decreasing symptoms with treatment. Her general damages award, grossed-up to 2017 dollars was \$108,700;
 - b) Kwong v. Leonard, 2012 BCSC 1818, involving a 38 year old female with neck, right shoulder and upper back pain with numbness and tingling in her right arm and wrist. She had poor sleep and fatigue. Her prognosis was unclear. General damages of \$80,200 in 2017 dollars were awarded;
 - c) Kodelja v. Johal, 2017 BCSC 164, involving a 40 year old female with chronic myofascial pain syndrome and post-traumatic thoracic outlet syndrome resulting in "mild to moderate" pain to her neck, shoulder and upper back: at para. 79. She had numbness in her left arm and intermittent headaches. General damages of \$80,000 were awarded;
 - d) Mowat v. Orza, 2003 BCSC 373, involving a female with soft tissue injuries leading to chronic post-traumatic thoracic outlet syndrome. The finding was that she would likely have permanent "measurable" discomfort: at para. 29. Her general damages award grossed-up to 2017 dollars was \$63,000;

- e) *Gosal v. Singh*, 2009 BCSC 1471, involving a 45 year old female with neck, shoulder and back pain with tingling sensations in both arms and hands, severe headaches and some depression. She was experiencing continued slow improvement and was pain free two to three days per week. It was expected that with a regular exercise regime her symptoms would continue to improve but not completely resolve. General damages of \$108,000 in 2017 dollars were awarded;
 - f) *Kovac v. Moscone*, 2012 BCSC 845, involving a 32 year old female with arm and hand numbness, moderate soft tissue injuries to the upper and lower back and thoracic outlet syndrome. Her upper and lower back issues resolved within two years but the symptoms of thoracic outlet syndrome persisted. The award for general damages was \$80,000 in 2017 dollars;
 - g) *Cimino v. Kwit*, 2009 BCSC 912, involving a 44 year old female with permanent thoracic outlet syndrome and pain in her right arm. Her award in 2017 dollars was \$96,800.
- [85] The defendant refers me to the following cases in support of his position that general damages of \$45,000 are more appropriate:
- a) *Gorosh v. Bowen et al.*, 2005 BCSC 917, involving a 14 year old female who suffered a moderate soft tissue injury to her neck, upper and lower back, periodic numbness in some of her limbs, headaches and depression. The court held that it was probable she would suffer permanent symptoms and would continue to experience ongoing chronic pain that would place limitations on her activities. She would need to adopt a guarded approach to life. General damages of \$46,637 (adjusted to 2017 dollars) were awarded;
 - b) *Tino v. Kirson*, 2004 BCSC 878, involving a 55 year old male who suffered pain in his shoulders, back, neck and spine, and headaches in two separate motor vehicle accidents. He had been suffering similar symptoms for three years prior to the first accident as a result of a prior, serious accident. He also had a pre-existing degenerative condition in his neck. It was held that the subject two accidents made his pre-existing condition worse, but not to the extent of causing any significant functional issues. His award in 2017 dollars was \$47,591;
 - c) *Menhinick v. Lobesz*, 2008 BCSC 1285, involving a 47 year old female who suffered neck pain, back pain, elbow pain and numbness in her hands and some dizziness as a result of a rear-end collision. Her ongoing symptoms of elbow pain, neck pain and headaches persisted. She had difficulty performing her household activities as before. The court found that she would continue to be affected by her injuries for an indefinite period. General damages of \$49,000 (in 2017 dollars) were awarded;

- d) Wong v. Robillo, 2013 BCSC 1104, involving a 58 year old male construction worker with neck and lower back pain, later developing numbness in the little fingers of both hands. His neck and back pain improved over time but the tingling in his fingers did not. The court found that the accident aggravated his pre-existing degenerative spinal condition leaving him with chronic intermittent pain. He was able to perform his usual activities but in discomfort. General damages of \$50,000 (in 2013 dollars - \$53,000 in 2017 dollars) were awarded.

[86] Taking everything into account, including the Stapley factors and all other relevant factors, and the case authorities cited by the parties, I award the sum of \$85,000 in general damages.

ii. Proof of Past and Future Loss of Earning Capacity

[87] The Court of Appeal has very recently clarified the principles that must be considered in assessing both past loss of earning capacity (i.e. past income loss) and future loss of earning capacity claims. In Grewal v. Naumann, 2017 BCCA 158, Goepel, J.A. (dissenting) summarized those principles at paras. 45 - 49:

[45] The governing authority in this Court is Smith v. Knudsen, 2004 BCCA 613. In Smith, this Court, after an extensive review of the authorities, rejected the proposition that a claim for past loss of opportunity had to be established on a balance of probabilities. Rowles J.A. wrote for the court. She explained that the plaintiff in the first instance was required to establish both liability and causation on a balance of probabilities. This required the plaintiff to establish that the respondent's negligence, in whole or in part, caused the accident, and that the injuries the appellant sustained in the accident caused or contributed to the loss for which damages were sought (para. 26).

[46] Rowles J.A. then went on to discuss the assessment of damages. She noted that the same test applies regardless of whether you are assessing past or future loss of earning capacity. In both situations the judge is considering hypothetical events. She reasoned:

[29] What would have happened in the past but for the injury is no more "knowable" than what will happen in the future and therefore it is appropriate to assess the likelihood of hypothetical and future events rather than applying the balance of probabilities test that is applied with respect to past actual events.

[47] I note that neither Reynolds nor Ostrikoff referenced Smith. To the extent that those decisions could be read to hold that a past hypothetical event must be proven on the balance of probabilities, they must be regarded as per incuriam.

[48] In summary, an assessment of loss of both past and future earning capacity involves a consideration of hypothetical events. The plaintiff is not required to prove these hypothetical events on a balance of probabilities. A future or hypothetical possibility will be taken into consideration as long as it is a real and substantial possibility and not mere speculation. If the plaintiff establishes a real and substantial possibility, the Court must then determine the measure of damages by assessing the likelihood of the event. Depending on the facts of the case, a loss may be quantified either on an earnings approach or on a capital

asset approach: *Perren v. Lalari*, 2010 BCCA 140 at para. 32.

- [49] The assessment of past or future loss requires the court to estimate a pecuniary loss by weighing possibilities and probabilities of hypothetical events. The use of economic and statistical evidence does not turn the assessment into a calculation but can be a helpful tool in determining what is fair and reasonable in the circumstances: *Dunbar v. Mendez*, 2016 BCCA 211 at para. 21.
- [88] The assessment of the plaintiff's claims for past and future loss of earning capacity involves a consideration of hypothetical events. Following *Grewal*, he is not required to prove these hypothetical events on a balance of probabilities but rather they are to be taken into consideration as long as they are real and substantial possibilities and not mere speculation.

iii. Past Income Loss

- [89] The plaintiff's claim for past income loss is based on what the plaintiff would have earned from the time of the Accident to trial, but for the Accident and his resultant injuries.
- [90] The issue then, is but for the Accident, what is the difference between what the plaintiff would have earned and did earn from the time of the Accident to the date of trial.
- [91] The defendant accepts that the one week the plaintiff took off work at Able in August 2002, was Accident related and the parties have agreed that the plaintiff's net past income loss for that week is \$945.00.
- [92] The parties also agree that the plaintiff received \$2,271.00 gross in severance from Redline Refrigeration when he was laid off.
- [93] Notwithstanding the \$945.00, the defendant objects to any award for past income loss. The defendant asserts that the plaintiff has not proven that his decision to leave his career as an auto body technician was Accident related and therefore any lost income resulting from his leaving is not recoverable.
- [94] I have already rejected this position. As noted, I am satisfied that the plaintiff changed careers as a result of his injuries and is entitled to recover the associated losses flowing from that decision.
- [95] The defendant further argues that the plaintiff did not lose any income while at Able due to his injuries. He points out that despite the plaintiff's evidence that his production level and efficiency at work slowed down as a result of his injuries, and negatively affected his income, the fact is he was averaging more per month in 2013 to the time he left Able than he averaged in the years leading up to the Accident.
- [96] The plaintiff's tax returns from 2006 to 2016 are in evidence. They disclose that the plaintiff earned the following amounts:

Year

Amount

2006

\$86,673

2007

\$96,629

2008

\$93,353

2009

\$81,318

2010

\$62,278

2011

\$58,999

2012

\$60,290

2013

\$27,667

2014

\$17,598

2015

\$15,002

2016

\$62,744

[97] Using these figures, the defendant says that the plaintiff averaged \$4,917 per month in 2011, \$5,024 per month in 2012 and \$6,916 per month in the four months of 2013 that he worked at Able before he quit. Indeed, the defendant says, in February 2013, the plaintiff made the most he had ever made in one month while working at Able.

[98] While I agree that these calculations might suggest the plaintiff's production level at Able was not slowing after the Accident, I am not persuaded that they can be taken as far as the defendant suggests. They are only part of the story; there is no evidence about the nature of

the piece work jobs that the plaintiff was assigned and how profitable they were for Able. Indeed, the inference from Mr. Hannesson's evidence was that Able was becoming one of the better body shop facilities in the area and took on more profitable work which may explain the plaintiff's piece work earnings increasing despite his Accident related difficulties.

- [99] As already noted, I have accepted the plaintiff's evidence that the Accident related injuries had a negative impact on his work at Able. I believe the plaintiff's evidence that his injuries left him less efficient than he could have been and needing more breaks which had a negative impact on his earnings.
- [100] What remains is to quantify the plaintiff's past income loss by comparing his actual earnings post-Accident with what he would have been expected to earn but for the Accident. As has been pointed out in Grewal, this involves the assessment of the likelihood of hypothetical events.
- [101] The plaintiff provided detailed calculations of his claimed past income loss based on two scenarios. The first scenario is that but for the Accident, he would have continued to work at Able earning \$60,000 annually. The time off from January 26, 2015 to July 2, 2015, due to his Achilles injury (a period of approximately five months although the plaintiff's calculations incorrectly suggest a period of 6 months) has been deducted.
- [102] The second scenario assumes the plaintiff would have left Able and moved to a different auto body shop; for example Craftsman Collision, where he would have earned more money, perhaps as much as \$90,000 per year. This scenario assumes the plaintiff would not have been content to stay working at Able earning only \$60,000 per year.
- [103] I accept the plaintiff's methodology and assumptions respecting the first scenario. I am unable to rely on the second scenario which calls for too much speculation. Although the scenario of the plaintiff moving from Able to another body shop might have been a real possibility, I am not persuaded that it was a substantial possibility as would be required to rely on it: Grewal at para. 48.
- [104] Therefore I find that but for the Accident, the plaintiff would have earned a gross income of \$255,000 from January 1, 2013 to April 1, 2017 (\$60,000 per year x 4.25 years). His actual earnings as set out in his tax returns for 2013 through 2016 were \$123,011. From January 1, 2017 through March 31, 2017, he has earned \$11,531. His total with Accident earnings are \$134,542. The difference is \$120,458 (\$255,000 - \$134,542).
- [105] From that amount must be deducted \$25,000 reflecting the approximate 5 months he would have been off work in any event of the Accident because of his Achilles injury (\$5,000 per month x 5 months).
- [106] The plaintiff is awarded the sum of \$95,458 for past income loss. At the parties' request, I will leave it to them to determine the plaintiff's income loss net of tax.

iv. Special Damages

[107] The plaintiff claims the following costs under special damages:

- a) Physiotherapy: \$200.00;
- b) Chiropractic: \$315.00;
- c) JARTS program: \$6,060.00 (paid to date); and
- d) Advil: \$1,080.

[108] The defendant does not dispute the physiotherapy and chiropractic costs but disputes that the cost of the JARTS program is related to the Accident.

[109] However, again, I have found that the plaintiff decided to leave his career as an auto body technician in favour of retraining because of his injuries from the Accident. That decision was reasonable in the circumstances and he is entitled to the cost of that retraining.

[110] The plaintiff's claim of \$1,080 for Advil represents his estimate of the cost of the over-the-counter Advil he has consumed to date. He bases this claim on his estimate that he consumed approximately one bottle of Advil per month since the Accident at a cost of between \$15 and \$25 per bottle. Using an average of \$20 per bottle, he submits he has spent \$1,080 (\$240 per year x 4.5 years).

[111] While I accept that the plaintiff relies on Advil to control his pain on a regular basis, the plaintiff did not provide any receipts or other proof of the amount of Advil he consumed. His testimony on this point was clearly an estimate. In my view, a reasonable award for the Advil since the Accident is \$500.

[112] Accordingly, I award the plaintiff special damages of \$7,075.00.

v. Cost of Further Retraining

[113] The plaintiff seeks the sum of \$2,398 for the remaining Levels 3 and 4 of the JARTS program. The defendant does not dispute the amount, but does dispute entitlement.

[114] Given my earlier finding that the JARTS program is related to the Accident, the plaintiff is awarded \$2,398 under this head.

vi. Cost of Future Care

[115] The test for determining a future care award is an objective one based on medical evidence. The claimed items must be reasonable and medically justified: *Milina v. Bartsch*, [1985] B.C.J. No. 2762 at para. 199 (C.A.). Accordingly, the plaintiff is entitled to reasonable and medically justified future expenses related to his injuries.

[116] The plaintiff seeks a modest amount (\$5,000 in total) for his ongoing future care needs to cover medication and treatment costs.

- [117] Both Dr. Adrian and Ms. Murray believe that the plaintiff would benefit from physiotherapy to treat future flare-ups in his symptoms. Ms. Murray also recommended chiropractic treatments and working with a kinesiologist to establish an appropriate exercise program. The current cost of a kinesiologist is \$50 - \$75 per hour.
- [118] The plaintiff relies on Advil to reduce his symptoms. His evidence was that he consumes a large bottle of Advil monthly. He estimated the cost at between \$15 - \$25 per month. The plaintiff seeks \$240 per year for ongoing Advil costs.
- [119] The defendant submits the future care award should be \$1,500 for medications and \$500 for chiropractic and physiotherapy for a total of \$2,000.
- [120] Doing the best that I can with the evidence and having regard to the plaintiff's relatively young age and poor prognosis, I am satisfied that a fair estimate of the plaintiff's future care needs is more in line with what the plaintiff suggests.
- [121] I award cost of future care in the sum of \$5,000.

vii. Future Loss of Earnings/Earning Capacity

- [122] The plaintiff's loss of future earnings claim is founded on the earnings the plaintiff will lose while he is in school completing Levels 3 and 4 of the JARTS program and completing his journeyman's certificate.
- [123] The plaintiff seeks the sum of \$17,920 which he calculates as the future wages he will lose when he returns to the JARTS program to complete Levels 3 and 4 (\$28 per hour x 40 hours per week x 16 weeks = \$17,920).
- [124] The evidence satisfies me that such an award is reasonable. Each of the two remaining levels will require the plaintiff to be in school full-time for eight weeks during which he will receive no income.
- [125] I award the plaintiff \$17,920 under this head.

viii. Loss of Future Earning Capacity

- [126] The applicable principles in assessing a claim for loss of future earning capacity are well known and were summarized by Justice Abrioux in *Mocharski v. Ngo*, 2016 BCSC 1165 at para. 141 as follows:
- [141] As Justice Sewell recently stated in *Shongu v. Jing*, 2016 BCSC 901 at paras. 186-188:
- [186] The applicable principles in assessing loss of future income earning capacity have been the subject of a number of recent decisions of our Court of Appeal. In *Parker v. Lemmon*, 2012 BCSC 27, at para. 42, Savage J, as he then was, succinctly summarized the principles set out in *Perren v. Lalari*, 2010 BCCA 140:

- (1) A plaintiff must first prove there is a real and substantial possibility of a future event leading to an income loss before the Court will embark on an assessment of the loss;
 - (2) A future or hypothetical possibility will be taken into consideration as long as it is a real and substantial possibility and not mere speculation;
 - (3) A plaintiff may be able to prove that there is a substantial possibility of a future income loss despite having returned to his or her employment;
 - (4) An inability to perform an occupation that is not a realistic alternative occupation is not proof of a future loss;
 - (5) It is not the loss of earnings but rather the loss of earning capacity for which compensation must be made;
 - (6) If the plaintiff discharges the burden of proof, then there must be quantification of that loss;
 - (7) Two available methods of quantifying the loss are (a) an earnings approach or (b) a capital asset approach;
 - (8) An earnings approach will be more useful when the loss is more easily measurable;
 - (9) The capital asset approach will be more useful when the loss is not easily measurable.
- [187] In *Jurczak v. Mauro*, 2013 BCCA 507, the Court explained that while assessing an award for future loss of income is not purely mathematical, if available the Court should use factual mathematical anchors as a starting foundation to quantify the future loss of income.
- [127] The plaintiff's position is that his injuries have diminished his future earning capacity by limiting his job prospects and by compromising his ability to perform in his future occupations, including as a refrigeration repair technician.
- [128] The defendant's position is that the plaintiff has not proven that he has suffered a loss of earning capacity. He says that should the plaintiff obtain his qualification as a journeyman refrigeration repair technician, he will earn in the range of \$43.80 per hour - so long as he remains a member of the union. Working full-time, that translates into annual earnings of over \$90,000 plus other significant benefits. Hence, he says the plaintiff stands to earn substantially more than he was earning at Able and his earning capacity has not been diminished.
- [129] The defendant also asserts that the plaintiff currently earns as much as he did while working at Able. For example, in 2016 he earned \$62,044, approximating his income at Able. He says that means the plaintiff is capable of earning about the same income he earned before the Accident even if he fails to acquire his journeyman certificate.

- [130] I agree with the defendant that despite the plaintiff continuing to experience ongoing symptoms from the injuries he sustained in the Accident, he is now well on his way to earning as much or more as a refrigeration technician than he would have earned as an auto body technician.
- [131] However, that is not the end of the matter. The evidence is that the plaintiff struggled to complete Level 2 of the JARTS program and was surprised that he passed. He still has Levels 3 and 4 to complete before he can be a journeyman. I find that there is a real and substantial possibility that the plaintiff may not complete Level 3 and/or Level 4 and will not become a journeyman.
- [132] If he does not complete his training, he will likely be able to continue working in the field but his income will be limited. Further, the evidence satisfies me that the plaintiff will be restricted in being able to perform the heavier aspects of the refrigeration technician job which could very likely have an impact on the jobs he will be able to secure and the income he will be able to earn.
- [133] At age 50, the plaintiff is still relatively young. There is no evidence that he is wealthy and able to retire early. I suspect he will need to work well into his 60s and perhaps into his 70s, a period of at least 15 - 20 years. That long period leaves a good deal of uncertainty about what the future will hold for him.
- [134] In assessing the loss of his future earning capacity, I agree with the plaintiff that the capital asset (less formulaic) approach described in *Perren v. Lalari*, 2010 BCCA 140, is the approach that best fits the plaintiff's circumstances and particularly his uncertain future. I assess his loss of future earning capacity at \$60,000 given that: the plaintiff is now 50; is just starting out in a new career with no experience or track record; the earliest he will become a journeyman will be two years; he will have less job security; he is restricted to servicing and not installation; and the other uncertainties I have described.

Summary

[135] The plaintiff is awarded the following damages:

- a) General Damages: \$85,000
- b) Past Income Loss:
 - i. Initial wage loss from Able: \$945
 - ii. Lost income while retraining: \$95,458
- c) Special Damages: \$7,075
- d) Cost of Future Retraining: \$2,398
- e) Cost of Future Care: \$5,000

- f) Future Income Loss: \$17,920
- g) Loss of Future Earning Capacity: \$60,000

Total Damages: \$273,796

[136] The plaintiff is entitled to pre-judgement interest on his past income loss and special damages awards.

[137] The plaintiff's claims for income tax gross-up and deductions under s. 83 of the Insurance (Motor Vehicle) Act, R.S.B.C. 1996, c. 231, are adjourned to be determined at a subsequent hearing, if required.

[138] Subject to further submissions on matters of which I am not aware, the plaintiff is also entitled to Scale B costs.

"G.P. Weatherill"

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