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CANADA / JUDGMENT

## Toevs v. Williams

2019 BCSC 2030

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COURT

Supreme Court of British Columbia

DECIDED

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2019 BCSC 2030 Toevs v. Williams

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Toevs v. Williams,

2019 BCSC 2030

Date: 20191126

Docket: M179952

Registry: New Westminster

Between:

Ryan Jeremy Toevs

Plaintiff

And

Michael Ronald Williams

Defendant

Before: The Honourable Mr. Justice Affleck

Reasons for Judgment

Counsel for the Plaintiff:

J.L. Gray

Counsel for the Defendant:

B.J. Lorimer

K. Nandha, Articled Student

Place and Date of Trial/Hearing:

New Westminster, B.C.

August 19-23 and 26, 2019

Place and Date of Judgment:

New Westminster, B.C.

November 26, 2019

Table of Contents

Liability. 3

A. The Plaintiff's Evidence. 3

B. Viva Voce Evidence for the Defendant 10

C. Expert Engineering Evidence. 11

Discussion of Liability. 13

Assessment of Damages. 15

Non-Pecuniary General Damages. 18

Cost of Future Care. 22

Past and Future Loss of Earning Capacity. 23

## **Special Damages. 24**

[1] The plaintiff was injured in a motor vehicle accident in Vancouver, BC on July 24, 2014, which he alleges was caused by the negligence of the defendant. The defendant denies he was negligent.

Liability

### **A. The Plaintiff's Evidence**

[2] On the morning of the accident, the plaintiff drove his Ford pickup truck to West 4th Avenue and parked on the south side of that street facing east. At that location, West 4th Avenue has two eastbound lanes of travel and a parking lane. The plaintiff testified that he parked in the parking lane with his truck's right side tires 4 to 6 inches from the curb. He then left his vehicle from the driver's door and went directly across West 4th Avenue to the north side to leave an envelope at a friend's residence. He then returned directly to his truck. Before doing so, he saw that the westbound lanes of travel on West 4th Avenue were clear, and he could see approaching eastbound traffic. He decided that the eastbound traffic was far

enough away that it was safe to cross directly over West 4th Avenue to his truck, and he did so in a "quick-ish" manner.

- [3] When the plaintiff reached the driver's door of his truck, he saw an eastbound Range Rover vehicle travelling towards him; it was about 3 to 5 car-lengths to the west. He decided not to open the driver's door of his truck but "basically waited politely" for the Range Rover to drive past him.
- [4] The plaintiff could not remember if he then saw the face of the driver of the Range Rover but he testified that it was apparent to him that the driver did not see him, and he believed he would be hit by the Range Rover if he did not move away. He "panicked" and tried to get into his truck. With his back to the truck, he grabbed the door handle with his left hand, opened the door, and attempted to enter the truck "like normal" but his door was hit by the Range Rover when he was "halfway" into the truck.
- [5] The plaintiff testified that it "felt like" his door was opened less than a foot when it was struck. When the door was struck, the plaintiff was struck by it.
- [6] Photographs of the left side of the truck became exhibits. They show damage to the back edge of the driver's door.
- [7] The plaintiff testified that there was no impediment to the defendant driving his Range Rover in its own lane of travel and thus avoiding the risk of contact with the truck. The plaintiff did not see the Range Rover either slow down or move to its left to create more space between it and the truck.
- [8] In cross-examination, the plaintiff described his return across West 4th Avenue to his truck as a "brisk walk". When he placed his back against his truck the Range Rover was 3 to 5 car-lengths away. It did "not occur" to him at that time to go to "a place of safety" at the front of his truck. What did occur to him was to go to the door of the truck and wait. The Range Rover was one and a half car lengths away when he decided to open the door of his truck and jump into it. His door was making a "closing motion" when it was struck.
- [9] Following the evidence of the plaintiff, his counsel read in to the record extensive passages from the examination for discovery of the defendant, which are reproduced in an Appendix to these reasons.
- [10] When the plaintiff's counsel concluded reading in the passages from the defendant's discovery, I asked her, "should I take it from the fact you have read in all of these questions and answers from the defendant's examination for discovery that you are adopting the answers as part of your case?" Ms. Gray's answer was "yes my Lord, in the event the defendant does not take the stand, they are there to stand alone but of course I will be cross-examining the defendant". I then pointed out to Ms. Gray that the answers of the defendant that had been read in are exculpatory, and I asked again if the answers were adopted as part of the plaintiff's case. Ms. Gray agreed she was adopting them.

- [11] During the next day of the trial, I was advised by defence counsel that he intended to make a no evidence motion. I pointed out that it was premature to make such a motion when the plaintiff had not closed his case. I was then informed that the defendant intended to call a witness who would testify about her observations of the accident and an engineer to give expert evidence, but the defendant would not be testifying.
- [12] Ms. Gray informed me that she proposed to call an engineer to give expert evidence that would refute the defendant's version of how the accident happened. Ms. Gray informed me that the evidence of the defendant on discovery had been read in for the "sole purpose" of "demonstrating it cannot be true". Ms. Gray added that the engineering evidence would demonstrate that the defendant could not have been driving at a safe distance from the plaintiff's truck. It was her view that if she had not read in the defendant's discovery evidence and he chose not to testify viva voce, then there would be no evidence from the defendant himself that the plaintiff could demonstrate through an engineer was not reliable or credible.
- [13] Defence counsel withdrew his intention to make a no evidence motion, and counsel made submissions on the implications of the reading in by the plaintiff of exculpatory evidence from the defendant. I will address the law on that issue.
- [14] There is no general rule governing whether a party is bound by reading in evidence from the examination for discovery of an opposing party. In *W.E. Sherlock Ltd. v. Burnett and Bullock*, [1938] 1 W.W.R. 141 (B.C.C.A.) the court stated:
- [12] It is neither possible, nor desirable to attempt, to lay down any general rule as to the extent to which a party may be bound by using in evidence the examination of an opposite party, because that result depends upon the circumstances of each case:
- [15] A leading case with respect to the plaintiff reading in evidence of the defendant that contradicts the evidence of the plaintiff is *Tsatsos v. Johnson*, [1972] B.C.J. No. 778 (C.A.). In *Tsatsos*, a pedestrian plaintiff was struck by a car driven by the defendant. The plaintiff testified to his version of the accident and his counsel then read in portions of the defendant's examination for discovery which provided a different version of that event. The defendant led no other evidence and submitted that by introducing the contradictory evidence, without seeking to challenge it, the plaintiff had approbated the defendant's evidence. The trial judge held that the accident could have happened either way and concluded his judgment thus:

"There was no need to put in this evidence of the defendant's version of how the accident happened. The plaintiff has, in effect, offered two versions and is not entitled to have me choose in favour of his client, since the burden of proving his case remains with him. Here there is no issue of credibility since the defendant's version has not been challenged and since the defendant did not testify in person. In the circumstances I cannot pick either story and must hold the plaintiff has not proved his case and must dismiss his action."

- [16] The Court of Appeal upheld the trial judge.
- [17] In *Clock Holdings Ltd. v. Braich*, 2008 BCSC 1697, the plaintiff presented its case through viva voce testimony; documents and read-ins from the examination for discovery of certain defendants. In final argument, the plaintiff disputed the truth of some answers given by the defendant, which the plaintiff had read in. The defendant submitted that the plaintiff was not entitled to contradict by other evidence the discovery evidence it chose to read in as part of its own case. By doing so, the defendant submitted, the plaintiff must be taken to have adopted the evidence read in as accurate and true. In support of this proposition the defendants relied on *Welsh Enterprises Ltd. v. M. Milligan and Assoc. Ltd.*, 2005 BCSC 1095.
- [18] At para. 38 of her reasons in *Clock Holdings Ltd.*, Dickson J. (now J.A.) disagreed with the defendants as follows:
- [38] I do not agree that Welsh stands for the proposition advanced by the defendants. In *Welsh*, Chamberlist J. held that, by reading in the defendant's discovery evidence, the plaintiff made the defendant's explanation of its actions part of his own case. He noted that no contradictory evidence was led by the plaintiff and, given the nature of the explanation read in, concluded there was no case to be met by the defence.
- [19] After confirming that there is no general rule establishing the extent to which a party is bound by portions of examination for discovery of the opposing party that are read in, Dickson J. continued:
- [40] Generally speaking, the Court can accept some, all or none of the evidence of a witness. In some cases, when a plaintiff presents contradictory accounts of a crucial event by way of viva voce testimony, on one hand, and discovery evidence, on the other, the two competing versions, without more, simply cancel one another out. In such circumstances, the burden of proof is not met and the claim will be dismissed: *Tsatsos v. Johnson*, [1970] B.C.J. No. 115. In other cases, however, the Court is able to consider and analyse the competing accounts together with the other evidence presented in order to determine the appropriate weight to be attached to each: *Noel v. Mayer*, 2007 BCSC 1892.
- [41] In this case, I conclude that Clock is not bound by the discovery evidence it read in at trial. Erwin, Surjeet, and several other witnesses, including an appraiser, testified at length regarding the contentious matters with which the discovery evidence is concerned. Although it was, in my view, unusual for Clock to read in unhelpful discovery evidence, I am able to weigh it, together with the other evidence, to decide whether it is reliable or otherwise: see *Atkins v. Ulrichsen* (1973), 37 D.L.R. (3d) 368.
- [20] In *Noel v. Mayer*, 2007 BCSC 1892, the plaintiff alleged that the defendant had assaulted her. While both parties had testified, the plaintiff also read in evidence from the defendant's discovery. The trial judge wrote the following at paras. 25 and 26:

[25] I have taken into consideration the evidence that the plaintiff read in from the defendant's discovery, perhaps intending to show that Ms. Mayer was not credible, but if taken for its truth, it was that the assault did not occur. I repeat the words of Aikins J. in *Atkins v. Ulrichsen* (1973), 37 D.L.R. (3d) 368 (B.C.S.C.) at 379 on the no-evidence motion where he said:

I am of the opinion that the questions and answers put in evidence are evidence in this case just like any other evidence and that I must consider it and weigh it and attempt, in conjunction with a consideration of the evidence to decide whether the evidence is reliable or otherwise.

[26] I have weighed the evidence read in by the plaintiff but I do not give it much weight, because I find Ms. Mayer's evidence about what occurred at the house extremely suspect.

[21] In *HSBC Bank Canada v. Singh*, 2017 BCSC 1893, the plaintiff read in numerous answers from the examination for discovery of the defendant even though many were exculpatory. Unlike the matter at bar, the defendant testified at trial. At paras. 125, 135, 136, and 137 of the reasons in that case, there is the following:

[125] The defendant cites *Welsh Enterprises Ltd. v. M. Milligan & Associates Ltd.*, 2005 BCSC 1095, for the proposition that because there was no evidence to contradict the portions of the defendant's discovery transcripts which were read in by the plaintiff, in which the defendant testified, for example, that the margin reports were accurate, the plaintiff's case must fail for that reason.

[135] The defendant submits the ratio in *Welsh* on this issue ought to apply because, as in *Welsh*, there was no evidence at the trial contradicting the discovery evidence of the defendant which was read in to the effect that the margin reports were accurate and that he had no reason to believe otherwise. I agree that the analysis is correct in a trial where two competing versions of important facts "cancel one another out" but that approach cannot be applied here. The factual and legal situations are distinguishable in the matter before me and in *Welsh*.

[136] The matter before me alleges deceit, which, by its nature, may make it impossible for a plaintiff to present direct evidence of the defendant's knowledge and motives and thus the court is often invited to infer from the evidence as a whole that there was an intention on the part of the defendant to deceive, or at least a reckless indifference as to whether representations were true or false.

[137] I find that the plaintiff is not bound by the answers read in from the defendant's discovery transcripts. Accordingly, like Dickson J. in *Clock*, I have weighed the excerpts from the discovery transcripts along with the other evidence adduced during trial in coming to my decision.

[22] There may be a distinction to be drawn between discovery evidence read in by the plaintiff that contradicts the plaintiff's version of events and evidence read in that absolves the defendant of any wrongdoing thereby meeting the plaintiff's case on every material fact. The

defendant's submissions in this regard seems to be that where the evidence read in entirely absolves the defendant of liability, the judge must find against the plaintiff. The defendant submits the "turning point can be whether the read in evidence is merely inconsistent evidence or found to be exculpatory evidence" and that the standard form civil jury charge instructions provide direction on this issue. Those instructions read:

## **VI. Admissions Read In Inconsistent with Evidence of the Plaintiff [\$4.17.5]**

User Note: Read paragraph 5 when the plaintiff has read in part of the discovery evidence of the defendant that is inconsistent with other evidence led by the plaintiff.

5. When counsel for [the plaintiff] read in part of the evidence given on discovery by [the defendant], some of it was inconsistent with other evidence given by [the plaintiff] as part of (his/her) case. You are entitled to look at all the evidence, including the discovery evidence read in, and decide what facts you choose to accept. You are not bound to adopt the discovery evidence and ignore the other evidence given during the trial, nor are you bound to accept the testimony given at trial and ignore the discovery evidence.

## **VII. Admissions Read In Absolving the Defendant of Blame [\$4.17.6]**

User Note: Read paragraph 6 only where the evidence of the plaintiff suggests liability and counsel for the plaintiff reads in discovery of the defendant that indicates that there are two inconsistent versions with respect to liability. This is an issue that is more likely to arise on a motion for nonsuit at the end of the case for the plaintiff.

6. During the case for [the plaintiff], (his/her) counsel read to you from the examination for discovery of [the defendant]. You will recall that [the defendant] did not testify. In these circumstances, [the plaintiff] has offered two different versions as to [e.g., how the accident happened]. In effect, [the plaintiff] asks you to choose between the two versions. Since the burden of proof rests upon [the plaintiff] to prove liability on a balance of probabilities, (he/she) failed to do so when asking you to select one version offered by (him/her) over another version. Therefore, you should find against [the plaintiff] and dismiss the action.

[23] While the jury instructions appear to frame this issue as an absolute rule, it is my view that para. 6 from the instructions should be read to a jury only in a trial where the plaintiff presented no further evidence that would challenge the defendant's discovery evidence that was read in. That, however, is not the case before me.

[24] In *Hynna v. Peck*, 2009 BCSC 1057 at para. 26 Ballance J. wrote:

[26] Even if Mr. Peck's discovery evidence read in as part of the plaintiff's case genuinely contradicted other evidence led in the plaintiff's case, there is no absolute rule that would compel the Court to treat the conflicting evidence as cancelling itself out. My preference would be to follow the authorities that endorse the more flexible proposition that such evidence must be considered in conjunction with all of the evidence in the particular case:

Atkins v. Ulrichsen, [1973] 3 W.W.R. 406, 37 D.L.R. (3d) 368; Noel v. Mayer, 2007 BCSC 1892; Clock Holdings Ltd. v. Braich, 2008 BCSC 1697, 44 E.T.R. (3d) 271.

- [25] I conclude that if a plaintiff reads in exculpatory answers from the defendant's examination for discovery and the defendant leads no evidence at all the trial judge will probably be faced with two contradictory versions of liability and the action will be dismissed.
- [26] On the other hand if, as here, the plaintiff reads in exculpatory answers from the defendant on liability and the defendant chooses to testify at the trial on liability the trial judge is entitled to weigh all of the evidence.

## B. Viva Voce Evidence for the Defendant

- [27] Shirley Smith testified for the defendant. At the time of the accident she was driving east on West 4th Avenue in the lane nearest to the parking lane. There were a number of cars parked in that lane. She had been following what turned out to be the defendant's Range Rover for "a few blocks". She was driving a Mini Cooper vehicle. There were vehicles to her left. She could not see the traffic immediately ahead of the Range Rover. She drove "certainly" below the speed limit.
- [28] Ms. Smith suddenly saw a door open on the plaintiff's truck and heard "some kind of crash" and saw some debris. She stopped her vehicle near the Range Rover and spoke briefly to the driver (who was the defendant), and said to him "there was nothing you could do".
- [29] Ms. Smith had seen a person get out of a parked vehicle, which was the plaintiff's Ford truck, but she did not see that person before the door of the truck opened. She could not recall the make or model of the vehicle from which the person emerged.
- [30] Ms. Smith was asked for her recollection of the distance between the Range Rover and the parked vehicle at the moment she saw the door open. Her answer was "I would imagine 3 feet. We were both driving in the correct position in that lane, not too close to anybody". She volunteered that she "is not great at estimating distances".
- [31] In cross-examination, Ms. Smith agreed her attention was first drawn to the two vehicles when she saw the door of the truck opening. She could not identify the model of the truck. She did not see the plaintiff standing outside the truck before the contact occurred between the two vehicles. She "assumed" the two vehicles were too close together to allow the door of the parked vehicle to open. She thought the Range Rover was "in a sensible position in the lane".

## C. Expert Engineering Evidence

- [32] Michael Araszewski is a professional engineer who gave opinion evidence for the plaintiff. He was asked to assume that the truck had been parked 10 to 15 cm from the curb and, when struck by the Range Rover, sustained damage to its left driver's door, which damage is shown in photographs. The damage "included the trailing edge of the front left door" (the truck had

two doors on either side), which "was deformed forward or buckled". Photographs of the Range Rover show damage to its right side extending from its right fender to the leading edge of the right rear door. The damage is described as "longitudinal scuffs". The mirror on the right side of the Range Rover was partially detached with its casing missing and with broken wires exposed.

- [33] Mr. Araszewski observed that West 4th Avenue at the location of the accident has a solid centreline painted yellow and a dashed line painted white separating the two lanes of eastbound travel. The distance from the concrete curb to the dashed white line is 5.6 metres. The distance from the dashed line to the yellow centreline is 3.0 metres.
- [34] Mr. Araszewski concluded, from the photograph showing the damage to both vehicles, that the door of the truck "was only partly open when contact between the vehicles occurred". The truck itself was not available for inspection.
- [35] Mr. Araszewski considered available data for the plaintiff's type of vehicle, which showed the front left door to be 127 cm in width. When that door was fully open, "it extended a lateral distance of 109 cm to the left of the left side of the Ford" at a 60 degree angle. Mr. Araszewski opined that if the door had been fully open at the moment of impact, this "would likely have resulted in a different damage pattern". He concluded the door was likely open 50 to 60 cm at the moment of impact.
- [36] The body of the truck was 201 cm wide, and its mirrors "would likely protrude an additional distance of about 25 cm from the left and right side panels". Taking into account the 10 to 15 cm the Ford was parked from the curb and its full width, there was likely a gap of about 3.5 metres from the left side of the Ford to the white dashed line separating the two eastbound lanes of travel.
- [37] Mr. Araszewski considered "published literature" on the Range Rover to determine that its width from the two side panels was 203 cm, and it had mirrors that "likely extended a distance of about 20 cm past the left and right sides" of the vehicle. The total width of the Range Rover was approximately 2.4 metres including the mirrors. Taking into account the width of the lanes for eastbound travel on West 4th Avenue, the distance the truck was parked from the curb, and the width of the two vehicles, Mr. Araszewski reached the conclusion that the "separation gap" between the left side of the truck and the right side of the Range Rover at the moment of impact was likely about 50 to 60 cm. In his opinion, "at impact" the Range Rover "was likely biased towards the right side of the travel portion of the eastbound right lane" and the Range Rover "could have moved further left and remained within the right eastbound lane without any contact occurring with the Toevs Ford". .

- [38] Craig Luker is a professional engineer who gave opinion evidence for the defendant. He was asked to address the speed of the Range Rover "prior to the accident"; the positioning of the Range Rover in "the outside eastbound travel lane of West 4th Avenue relative to the stationary Ford at the moment of impact"; and the degree to which the door of the Ford was opened at the moment of impact.
- [39] Mr. Luker examined photographs of the Ford showing damage "primarily on the trailing edge of the driver's door". The Range Rover had "scrape marks" beginning "just aft of the right front wheel well opening" and extending back to the passenger door. The "right side view mirror was torn off".
- [40] Mr. Luker concluded that he is a slightly smaller man than the plaintiff, "therefore the minimum distance the door could have been opened to permit Mr. Luker to enter the Ford would likely match the minimum distance the door would have needed to be opened to permit the plaintiff to enter the Ford." Mr. Luker calculated that distance to be 44 cm.
- [41] Mr. Luker examined the characteristics of the damage to both vehicles and opined that the Ford's door was in motion outwards at the moment of contact. He also opined that there is no reliable means to determine the Range Rover's impact speed. Further, he opined that the damage to the Ford confirms that its door "was not fully opened when it was hit". If it had been fully opened, Mr. Luker would have expected to see hinge damage. There was none. In his opinion, the Ford's door was open no more than 82 cm or 45 degrees. Fully open would be 63 degrees. Mr. Luker concluded the Range Rover's "right side body panels were likely 44 to 82 cm north of the Ford's left side body panels at impact". Further "if the Ford was parked 10 to 15 cm from the concrete curb the centre of the Range Rover would have been between 10 to 53 cm to the south of the middle of the travel portion of the curb lane".
- [42] Mr. Luker provided an addendum opinion that changed the assumption of the distance the Ford was parked from the curb from 10 to 15 cm to 23.5 cm. The new number was chosen to conform with measurements Mr. Luker had taken of other vehicles he had later seen parked in the location where the Ford had been parked at the time of the accident.
- [43] I am not persuaded the addendum report assists me in this matter. It is intended to overcome the difficulties distinguishing Mr. Luker's opinions from those of Mr. Araszewski. That could be done by applying different distance measurements, but the addendum report is not based on any actual evidence about where the Ford was parked in relation to the curb. Mr. Luker's assumption of 23.5 cm from the curb relies on the distance other vehicles that were parked from the curb on a later day.

## Discussion of Liability

- [44] I find the plaintiff took reasonable care for his own safety when he crossed West 4th Avenue, returned to his Ford, and stood beside it with his back against it while waiting for traffic to pass before he opened the door to enter the Ford. There was adequate space for vehicles to drive eastbound to the right of the dashed white lane marking. In my view, the plaintiff was

appropriately cautious as he stood with his back against his Ford. Did he cause the accident by unnecessarily opening the driver's door of the Ford thereby eliminating the space between the Ford and the Range Rover and thus preventing the Range Rover from passing by the Ford without contacting its door? In my opinion, the answer to that question is no.

- [45] I have not found the evidence of Ms. Smith helpful. I have no reason to criticize her credibility, but she did not see the plaintiff standing beside the Ford and she acknowledged that her estimate of the distance between the Range Rover and the Ford may not be accurate. Even if it is approximately accurate, I find the defendant ought to have steered his vehicle to its left to widen the gap between it and the Ford when he saw the plaintiff with his back to the Ford. There was nothing in his lane that would have prevented him from doing so.
- [46] The engineers who testified do not have significant disagreements. Mr. Luker's opinion about the distance between the vehicles at the time of contact does not differ markedly from that of Mr. Araszewski.
- [47] I find the contact between the vehicles was caused by the defendant's failure to take reasonable care to avoid driving too close to the plaintiff and to the Ford so that the Range Rover could pass them both in safety. I do not fault the plaintiff for attempting to open his vehicle door partially to try to jump into it to avoid being struck by the Range Rover. I accept that his fear of being struck by the Range Rover was reasonable. I reject the defendant's evidence from his discovery that the door of the Ford was opened "viciously". The use of that word suggests a deliberate attempt by the plaintiff to inflict damage on the Range Rover. I find the plaintiff, when he realized he might be struck by the Range Rover, tried to avoid that outcome by the only means readily apparent to him at that moment. There may have been an alternative to attempting to enter the Ford, but given but a moment to decide what to do, I accept the plaintiff behaved reasonably.
- [48] I find the injuries to the plaintiff were caused solely by the negligence of the defendant.

### Assessment of Damages

- [49] The plaintiff is 42 years old. He is divorced and has two children ages 11 and 6 who live with him during alternate weeks. Prior to the accident he was in good health and physically active.
- [50] In the accident he was struck on his left side by the door of his Ford when it was struck by the Range Rover. Immediately after the accident he and the defendant exchanged information. The plaintiff then drove to the Kensington Medical Clinic in Burnaby where he reported pain to the left side of his neck, shoulder, arm, lip, leg and upper back as well as left-sided head pain and left eye pain. Despite the doctor's recommendation to travel to hospital by ambulance he drove himself to Lions Gate Hospital. There he was x-rayed, told he had no fractures, was placed in a neck collar and advised to follow-up with his family doctor who at that time was Dr. Chalmers.

- [51] The plaintiff testified Dr. Chalmers recommended he rest and apply heat and ice to relieve his pain.
- [52] At that time the plaintiff was self employed in the construction industry. He took about a month away from work. When he returned to work he avoided heavy lifting which caused pain in his neck, left shoulder and upper back. On occasion he hired help to perform some tasks that he found caused more pain.
- [53] The plaintiff continued to consult Dr. Chalmers who recommended massage therapy. The plaintiff was treated by Alisha Tacoma, a registered massage therapist, on 28 occasions from October 3, 2014 to December 14, 2015.
- [54] The massage therapy was helpful but did not resolve the plaintiff's symptoms. Ms. Tacoma testified about her treatments but was not sought to be qualified to give opinion evidence. She testified she could feel inflammation, heat and swelling in the plaintiff's body particularly in his left shoulder, neck and upper back.
- [55] The plaintiff had five chiropractic treatments in early 2015 which also failed to resolve his symptoms.
- [56] Dr. Chalmers then recommended physiotherapy. The plaintiff had nine sessions in August through November 2015. He was recommended to perform exercises and stretching. He testified he would have continued to attend on the physiotherapist but could not afford to pay for it.
- [57] The plaintiff returned to Dr. Chalmers for a consultation late in 2016. He was complaining of continuing neck pain, left shoulder and upper left back pain. Dr. Chalmers recommended that he see Dr. Wayne Phimister. Shortly thereafter Dr. Chalmers died.
- [58] Dr. Phimister is a family physician with a "special interest" in the management of soft tissue pain. He provided his written opinions on the plaintiff's injuries and ongoing symptoms and testified at the trial.
- [59] Dr. Phimister began to treat the plaintiff in November 2016 with trigger point injections which the plaintiff described as the most effective treatment he has received. He continues to have those treatments from time to time with Dr. Phimister.
- [60] The plaintiff has continuing complaints of pain in his neck which "flares up" about every month particularly when he works with his arms above his head. He works for his father installing blinds in buildings. About one half of his working day involves reaching overhead. He also experiences difficulty with physical play with his children.
- [61] Dr. Phimister examined the plaintiff in December 2016 and found tenderness in his neck, thoracic and lumbar spines, tightness in "both iliotibial bands and his neck had a full range of motion".

- [62] Over the following months the plaintiff attended Dr. Phimister with his complaints following their usual pattern except for manifestation of left bicep pain. Dr. Phimister described this as fasciculating which involves twitching and spasms in muscle. The plaintiff is a weightlifter but Dr. Phimister did not attribute the left bicep phenomenon to that activity. Dr. Phimister opines that the left bicep pain has been present since the accident but was "overlooked".
- [63] In a report to the plaintiff's counsel in May 2018 Dr. Phimister opines that the plaintiff's progress is "good with compliance with the recommendations for further treatment". Dr. Phimister testified the plaintiff's functional abilities are "very good" but continuing treatment is recommended including massage therapy for the following six months then to be reduced in frequency to twice a week and if pain-free then there ought to be therapy every two or three weeks throughout Mr. Toevs' life to keep his symptoms under control. If the symptoms do not remain controlled Dr. Phimister recommends weekly massage therapy "lifelong". Further Mr. Toevs ought to engage in physiotherapy exercises performed daily for the rest of his life. Physiotherapy treatment is also recommended if he experiences neck and upper back spasms.
- [64] Dr. Phimister recommends that gym workouts along with aerobic exercises such as walking, cycling, hiking and jogging should be undertaken for at least 150 minutes each week. Trigger point injections for four weekly sessions if there are relapse episodes of neck and back spasms with severe headaches that last more than 24 hours. "Cognitive behavioural therapies" such as mindfulness and autosuggestion ought to be maintained to optimize the plaintiff's health.
- [65] In cross-examination Dr. Phimister acknowledged that in preparing his letter of opinion dated May 27, 2018 he had overlooked a note on November 25, 2016 which was the first occasion on which he had met the plaintiff and on which he had recorded that the plaintiff's left arm pain had resolved. Dr. Phimister agreed that the plaintiff's blood pressure of 170/110 could explain his headaches. No other evidence was offered of the plaintiff's blood pressure.
- [66] The evidence of the plaintiff about continuing headaches is meagre. He spoke of a blow to the left side of his head in the accident which effected his left eye but he gave no other evidence about headaches following the accident. Dr. Phimister recorded that the plaintiff had told him about headaches but that is inadmissible hearsay unless confirmed by the plaintiff which it was not. There are notes by the massage therapist Alisha Tacoma about headaches but the notes are hearsay and were not confirmed by the plaintiff.
- [67] The plaintiff's counsel referred to recent changes in the Supreme Court Civil Rules, B.C. Reg. 168/2009 that limited her ability to seek further expert evidence to address some of these matters. Be that as it may I am entitled to assess damages only on the evidence presented at the trial not as it might have been presented in other circumstances. I accept the plaintiff gave his evidence about his injuries and their continuing impact on him honestly and accurately.

[68] The defendant offered no medical evidence.

### Non-Pecuniary General Damages

- [69] This head of damages recognizes that a plaintiff injured by the negligence of another is entitled to an award to compensate the plaintiff for pain and suffering, loss of enjoyment of life and loss of amenities. The award is to replace those losses so far as money is able to do so.
- [70] The plaintiff relies on several cases to establish the appropriate award of non-pecuniary general damages. The first is *Larlee v. Shier*, 2008 BCSC 1610. The plaintiff in that case was 62 years old on the day of trial that is 20 years older than the plaintiff in the present matter. It is submitted that the plaintiff has more years ahead of him to continue to experience the adverse health effects of his injuries from the accident.
- [71] Ms. Larlee experienced pain in the left side of her neck and shoulder and pain in her back and a bruised knee and left elbow. She also had headaches. The headaches resolved several months after the accident as did the back pain. More than three years after the accident Ms. Larlee continued to have pain every day in her left neck and shoulder areas. She had become anxious while travelling in a car and "by sitting in the back seat and looking out the side window". She could do little housework without pain. Gardening and playing the piano and sitting at a counter had become much restricted. The non-pecuniary damage award in that instance was \$60,000.
- [72] I consider the injuries in *Larlee* to be more serious than those of Mr. Toevs. He remains active, although in discomfort, and his prognosis is good but not for a complete recovery from his pain and discomfort. The plaintiff continues to work at a physical job with some restrictions from pain and continues to work out at a gym lifting weights. This is recommended by Dr. Phimister.
- [73] The plaintiff relies on *Bove v. Wilson*, 2016 BCSC 1620. The plaintiff in that case was 31 years old at the time of the accident. She was healthy. Following her accident Ms. Bove's neck and back "seized up". She had vision and concentration problems. She became anxious. Soon she experienced severe headaches. Six months later her neck and back continued to improve off and on. Nevertheless her neck and back pain continued to interfere with many of her activities. Concentration problems persisted. The expert evidence in that case indicated that the difficulties had become chronic and were "unlikely to subside or resolve".
- [74] At para. 42 in *Bove Jenkins J.* wrote:
- [42] There is no doubt as to the pain and discomfort the plaintiff has suffered as a result of the accident and that some degree of pain and discomfort will continue indefinitely. The factors emphasized by Madam Justice Kirkpatrick in *Stapley v. Hejslet*, 2006 BCCA 34, have been referred to and followed by judges of this court on many occasions and are most instructive in assessing non-pecuniary damages. At paras. 45 and 46, Kirkpatrick J.A. stated:

[45] Before embarking on that task, I think it is instructive to reiterate the underlying purpose of non-pecuniary damages. Much, of course, has been said about this topic. However, given the not-infrequent inclination by lawyers and judges to compare only injuries, the following passage from *Lindal v. Lindal*, *supra*, at 637 is a helpful reminder:

Thus the amount of an award for non-pecuniary damage should not depend alone upon the seriousness of the injury but upon its ability to ameliorate the condition of the victim considering his or her particular situation. It therefore will not follow that in considering what part of the maximum should be awarded the gravity of the injury alone will be determinative. An appreciation of the individual's loss is the key and the "need for solace will not necessarily correlate with the seriousness of the injury" (Cooper-Stephenson and Saunders, *Personal Injury Damages in Canada* (1981), at p. 373). In dealing with an award of this nature it will be impossible to develop a "tariff". An award will vary in each case "to meet the specific circumstances of the individual case" (Thornton at p. 284 of S.C.R.).

[Emphasis in original.]

[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).

[75] The award to the plaintiff in that case from non-pecuniary general damages was \$60,000.

[76] The plaintiff refers to *Abdalle v. British Columbia (Public Safety and Solicitor General)*, 2012 BCSC 128. The plaintiff in that case was 42 years old. He was employed as a vehicle service attendant cleaning and detailing cars. He suffered a laceration to his head with various sequelae. Madam Justice Ross at paras. 93 and 94 wrote the following:

- [93] With the passage of time his symptoms improved. As he conceded in his examination for discovery, the dizziness was essentially resolved after a year. By October 2009 he was experiencing headaches perhaps twice a month and flare ups of neck pain every couple of months. I accept that he continues to experience periodic flare ups of neck and back pain and headache.
- [94] He was able to return to work in September 2007 and has been able to function at the workplace since that time. While he has not returned to his pre-accident level of activity, I find that the injuries he suffered in the accident do not and will not prevent him from taking part in any vocational or recreational activities. Upon a review of the cases cited by counsel and having regard to my findings concerning Mr. Abdalle's injuries and their impact on his activities and the quality of his life, I assess non-pecuniary damages prior to reduction for mitigation and contributory fault at \$50,000.
- [77] The defendant submits that that the non-pecuniary general damage award ought to be significantly less than the plaintiff recommends. The defendant points out that the plaintiff remains active notwithstanding his injuries and points to a number of cases with the damage awards in the range of \$30,000-\$45,000 in circumstances similar to those of the plaintiff. Those cases are *Kailey v. Dhaliwal*, 2007 BCSC 759; *Cummings v. Shanks*, 2012 BCSC 1731; *Sikora v. Brown*, 2014 BCSC 30; *Pond v. Bucsis*, 2013 BCSC 2001; *St. Germain v. Jemmott*, 2012 BCSC 1041; and *Jones v. McLerie*, 2016 BCSC 763.
- [78] I consider each of those cases to have involved plaintiffs with less serious injuries than those experienced by Mr. Toevs. Moreover the task of assessing non-pecuniary general damages is not limited to comparing injuries between plaintiffs and adjusting the award either up or down. The purpose of non-pecuniary general damages is to provide the plaintiff with substitute "solace" for what the plaintiff has lost as a result of the tortiously caused injuries. My impression of Mr. Toevs is that he is a stoical man who is not adept at expressing himself concerning his own complaints and difficulties in life. I have no doubt the accident injuries have adversely affected his life to a significant degree in part because they were caused by an accident which was a frightening event.
- [79] I assess non-pecuniary general damages at \$65,000.

### Cost of Future Care

- [80] The defendant did not attempt to minimize this head of damages except through cross-examination of the plaintiff. As I have mentioned there is no defence medical evidence nor evidence assisting the court to determine the cost of future care.
- [81] Dr. Phimister describes the functional abilities of the plaintiff as very good but also opines that his chronic pain may be lifelong. In his letter of opinion he wrote the following:

I recommend massage therapy on a weekly basis for 6 months then reduce to every 2 weeks. If his body remains relaxed and pain free these can be reduced to every 3 or 4 weeks lifelong as long as his symptoms remain controlled. If not, weekly massage sessions are recommended lifelong.

I recommend physiotherapy exercises daily or every second day lifelong. If he has neck and upper back spasms he should attend physiotherapy for additional assistance for 2-4 weeks. I also recommend gym workouts along with aerobic exercise, such as walking, cycling, hiking or jogging for 150 minutes per week.

I recommend trigger point injections for 4 weekly sessions for relapse episodes of neck and back spasms with severe headache that last more than 24 hours.

My final recommendation is for an ongoing positive mental attitude for health and recovery to maintain his positive lifestyle. Cognitive behavioural therapies (CBT), such as mindfulness and autosuggestion will need to be maintained to optimise his health.

[82] Dr. Phimister was not cross-examined on his recommendations for future care.

[83] In *Peters v. Ortner*, 2013 BCSC 1861, Madam Justice Harris wrote at paras. 141 to 144:

[141] The plaintiff is entitled to compensation for the cost of future care based on what is reasonably necessary to restore him to his pre-accident condition in so far as that is possible. The award is to be based on what is reasonably necessary on the medical evidence to preserve and promote the plaintiff's mental and physical health: *Milina v. Bartsch* (1985), 49 B.C.L.R. (2d) 33 (S.C.); *Williams v. Low*, 2000 BCSC 345; *Spehar v. Beazley*, 2002 BCSC 1104; *Gignac v. Rozylo*, 2012 BCCA 351.

[142] The test for determining the appropriate award under the heading of cost of future care is an objective one based on the medical evidence. For an award of future care: there must be a medical justification for claims for cost of future care and the claims must be reasonable: *Milina; Tsalamandris v. McLeod*, 2012 BCCA 239 at paras. 62-63

[143] Future care costs are "justified" if they are both medically necessary and likely to be incurred by the plaintiff. The award of damages is thus a matter of prediction as to what will happen in the future. If a plaintiff has not used a particular item or service in the past it may be inappropriate to include its cost in a future care award. However, if the evidence shows that previously rejected services will not be or be able to be, rejected in the future, the plaintiff can recover for such services: *Izony v. Weidlich*, 2006 BCSC 1315 at para. 74; *O'Connell v. Yung*, 2012 BCCA 57 at paras. 55, 60, 68-70.

[144] The extent, if any, to which a future care costs award should be adjusted for contingencies depends on the specific care needs of the plaintiff. In some cases negative contingencies are offset by positive contingencies and, therefore, a contingency adjustment is not required. In other cases, however, the award is reduced based on the prospect of improvement in the plaintiff's condition or increased based on the prospect that additional

care will be required. Each case falls to be determined on its particular facts: Gilbert v. Bottle, 2011 BCSC 1389 at para. 253.

- [84] The plaintiff calculates his cost of future care discounted to a present value and taking into account both positive and negative contingencies at \$38,000. This sum is intended to compensate the plaintiff principally for massage and physiotherapy for the next 25 years. There is no basis on the evidence to depart from that sum as an award under this head of damages.

### **Past and Future Loss of Earning Capacity**

- [85] The plaintiff returned to his employment about 4 to 5 weeks after the accident. He is not a good record keeper and was unable to give precise evidence of his income loss. I accept his evidence that from time to time he has not been able to work particularly when reaching over head and other persons have had to be hired to replace him for brief periods of time. There is no claim for that replacement cost.
- [86] The plaintiff's annual income has been modest ranging from about \$11,000 to about \$18,000.
- [87] If the plaintiff continues to receive the treatments recommended by Dr. Phimister his physical health will perhaps remain stable and he will continue to earn a similar income. This is subject to flare-ups of pain and disability from time to time it is impossible to predict them with any precision, but they will likely happen a few times each year. I assess his loss of income since the accident date until the date of trial at \$5,000 and I assess his loss of earning capacity in the future at \$30,000.

### **Special Damages**

- [88] The plaintiff claims \$3,702 in out-of-pocket expenses for mileage, prescription medications, physiotherapy and chiropractic treatments of which sum of \$970 has been reimbursed. He is entitled to an award of the balance outstanding of \$2,731.

- [89] I award the following damages:

Non-pecuniary general damages

\$ 65,000

Cost of future care

\$ 38,000

Past and future loss of earning capacity

\$ 35,000

Special damages

\$ 2,731

Total award

\$140,731

[90] The plaintiff is entitled to an award of costs on Scale B.

"Affleck, J."

#### APPENDIX

Q Okay, can you please describe to me what happened in the course of the accident in your own words please?

A Okay. I'm driving east on West 4th. Probably 100 yards ahead of me a man runs across the street. Then he starts walking along the street towards his car or truck. Then he moves to the door of his truck. He has his back to his truck. He takes - I'm continuing to proceed east on West 4th. I'm within 10, 15, 20 yards of his car and he takes it - his front door and he viciously just opens it up into traffic and he's standing with his back to his vehicle and I didn't have enough time to stop, so it went into the side of my car, created \$10,000 of damage to my car. I pulled over to the side. He came over to me. A woman who had witnessed all of this who was driving behind me pulled up in front, came to me and said: I saw this whole ridiculous act. Here's my name and phone number and if you need my help I'd be happy to help out. For someone to act the way he did, either he was drunk or hungover or had mental challenges because it wasn't a normal act.

Q Okay. Now, let's break some of that down. You say you were driving eastbound. Can you estimate your speed at the time?

A Thirty, forty kilometers an hour.

Q Do you know the speed limit in the area?

A I think it's 50.

Q Why were you going slower than that?

A Because that's why - that's what I was doing. There was a light probably a block of two before and probably I would be slowly accelerating. It's a residential - or it's a business district. It's a busy area. I think you go the speed limit in areas that permit. If it's a busier area you may go slower. So I believe I was going slower.

Q. Okay. So if I'm understanding you correctly what you're saying is, is that it's a fairly busy area, correct?

A Right.

Q The question was -

A Yeah.

Q -- are you accustomed to seeing pedestrians in that area?

A Yes.

Q Thank you. So I take it you're familiar with that area?

A Yes.

Q Now, when you see this person cross the street ahead of you what, if anything, do you do in terms of your driving? Do you slow down? Speed up? Pull to the left? Pull to the right? Do you do anything to alter your course?

A I think I slowed down.

Q So can you estimate what speed you slowed down to?

A Well, that's maybe why I was going 30 to 40. I wasn't going terribly fast. I was - somebody had run across the street and so I was alerted by that and decided to slow down.

Q Fair enough. I understand that that would be an estimate. What I am trying to understand today is your recollection of the individual.

A It was the same individual that crossed the street, came five to ten yards up the street, went in front of his car - there wasn't two individuals. There wasn't three individuals. There was one individual. It was eight o'clock in the morning. There's no false - there's no misinterpretation of his identity.

Q Now, as he crossed the street, you described him as running across the street, correct?

A Right.

Q Was he full out hundred yard dash running?

A No.

Q Was he jogging? How would you describe that?

A I think he was moving quickly across the street.

Q Okay. Could it be described as a fast walk?

A Sure.

Q Did you observe as he was crossing the street where he was looking?

A I'm sure he would be looking at the traffic coming.

Q But did you actually see -

A No.

Q -- where he was looking?

A No.

Q No. okay. And as he crosses the street, the act of crossing the street, when you were at your position while he was crossing street did that concern you in terms of you thought you might strike him as he was crossing the street?

A No.

Q So there was no concern about him crossing the street?

A No.

Q But on the day of the accident he didn't stop in the middle of the street?

A No, he didn't.

Q Okay. Now, when you see this person arrive at the side of the pick-up truck that you've described -

A Yes.

Q -- okay, you say that he walks up to that truck with his back to the truck?

A Yes.

Q Whereabouts in relation to say the front driver's door was he standing? Was he standing toward the front of the vehicle beyond the door?

A No. behind the front driver's door.

Q Okay. So he was standing then with let's say his right shoulder close to the driver's side door?

A Right.

Q Fair? Okay. Okay. Now, as he was standing there would you describe him as standing flush or fairly close to the truck?

A Yes.

Q Okay. So he wasn't standing out in the middle of your lane?

A No.

Q Okay. He was standing quite close to that pick-up truck, correct?

A Yes.

Q And he remained standing there for some time, didn't he?

A I wasn't - no. No.

Q So he got there, he got his back to the door and then immediately ripped the door open? Yes?

A Yes.

Q That's your evidence?

A Yes.

Q He did not pause by that door for any length of time whatsoever?

A He would have paused for maybe a second or two. I think he thought about it and then I think he - and he told me after we stopped that he thought that my vehicle was too close to his car so he thought he would demonstrate to me.

Q Okay. So he informed you at the scene that he felt your vehicle was too close to the pick-up truck, correct?

A Yes.

Q And he informed you at the scene that he felt he couldn't remain standing in that position while you drove past, correct?

A He was fine in that position.

Q Okay. Can you describe for me, he stands next to - he's standing next to the vehicle and your description if that he next viciously opens his door?

A Yes.

Q I'm having trouble applying viciously to the situation. I'm not sure what I am understanding.

A Want me to show what he did?

A Yes.

Q He did not pause by that door for any length of time whatsoever?

A He would have paused for maybe a second or two. I think he thought about it and then I think he - and he told me after we stopped that he thought that my vehicle was too close to his car so he thought he would demonstrate to me.

Q Okay. So he informed you at the scene that he felt your vehicle was too close to the pick-up don't know, is that correct?

A I'm not sure.

Q Okay. So when he viciously opened the door did he - was his back still to the truck or did he move the position of his body at all?

A For the most part his back was to the truck.

Q Okay. So earlier you told me his back was to the truck and now you are telling me for the most part his back was to the truck so what had changed?

A Well, if you're completely with your back to the truck, which is the way he was originally, it would be difficult to get your hand around to open the door. So you'd probably have to take a step out in order to get the handle and open the door so he would have done what he had to do to open the door, but for the most part his back was facing the back of the truck.

Q Okay. So you've just given me a ton of information about what he probably would have had to do in order to accomplish something, but I asked what you saw.

A That's what I saw.

Q You saw him with his back to the truck?

A Yes

Q And then you saw the door open, but you can't tell me which hand he opened it with?

A Miss, I'm driving. I am keeping my eye on the road and I'm looking from the right-hand side with - about this action that's about to happen and - but at the most - at the same time I have a vehicle I have got to continue to operate. So I wasn't focused with both my - all of my attention on the side of the road. I was focused on the area in front of me.

Q Would you agree with me that your attention was focused on him when he crossed the lane of travel ahead of you, correct?

A Yes.

Q Okay. And once he left that lane of travel would you agree that your primary focus was back on the road?

A Yes. But I kept an eye on him continuing to go towards his vehicle.

A Towards the outside, towards the left portion.

Q So your vehicle was out towards the left portion of that lane?

A Right.

Q When your vehicle came into contact with the door of the pick-up truck can you describe for me how wide open that door was at the time that you struck it?

A Probably three quarters.

Q Three quarters of the way open?

A Right.

Q And you drove along it?

A Right.

Q Now, at the time of the accident did that door rip off?

A I don't believe so.

Q Now, if I'm understanding you correctly - and am I taking too much of your time sir? I will try to be quicker. As I understand it you're saying in some of the comments that you have made to date that had he simply stood there you would have passed him without incident, correct?

A Yes.

Q Okay. And if I were to suggest to you that had he remained where he was that you were driving so close to the parked cars that you would have struck him, would you agree or disagree with that statement?

A Disagree.

Q I'm going to ask you about that in a moment. Can you estimate the distance - as you're passing the area of the pick-up truck, can you estimate the distance between the tip of your passenger side mirror and the vehicles parked on the side of the road?

A Three, four feet.

Q Three or four feet clearance?

A Right.

Q So you decided he did the wrong thing and didn't deserve you swerving left; is that what you are telling me?

A No. I am telling you I didn't have enough time. I'm telling you I was probably within 20 yards of his vehicle when he decided to -

Q Right?

A -- to open the door. I didn't veer to the right, didn't veer to the left. I carried on in a straight.

Q Did it not occur to you that it may be courteous to allow a pedestrian standing near his vehicle a little extra room?

A If you have a car in the outside lane and if - and I'm driving a large - I am not sure if you know what a Range Rover SUV is.

Q I used to own one.

A Yeah. So you know that it's a large vehicle.

Q I do.

A So you know that it's - takes a fair amount of the lane.

Q Sure.

A And you know that if there's traffic in the outside lane that - and you're bordering on where the line is separating the traffic that it wouldn't be wise to go into the next lane and possibly create an accident.

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