CANADA / JUDGMENT

Tomas v. Sticha

2019 BCSC 1204

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2019 BCSC 1204 Tomas v. Sticha

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Tomas v. Sticha,

2019 BCSC 1204

Date: 20190724

Docket: M084975

Registry: Vancouver

Between:

Branko Tomas

Plaintiff

And

Aurora Malabega Sticha

Defendant

Before: The Honourable Mr. Justice Tammen

Reasons for Judgment

Counsel for Plaintiff:

A.M. Bernardo

Counsel for Defendant:

C.J. Hope

Place and Date of Trial:

Vancouver, B.C.

February 25-28,

March 1 and 4-8, 2019

Place and Date of Judgment:

Vancouver, B.C.

July 24, 2019

Table of Contents

Introduction and Overview.. 3

Facts. 3

Background. 3

The Accident 5

Events Post-Accident 5

Issues. 8

Causation. 8

Non-Pecuniary Damages. 10

Loss of Income Earning Capacity. 15

Past Wage Loss/Subrogation. 21

Failure to Mitigate. 26

Cost of Future Care. 28

Special Damages. 31

Conclusion. 31

Introduction and Overview

[1] The plaintiff, Branko Tomas, claims damages for injuries suffered in a motor vehicle accident which occurred on November 11, 2006 (the "Accident"). The defendant admits liability but disputes the nature and extent of the injuries sustained as a result of the Accident. The issues to be determined are therefore the nature and extent of the injuries caused by the Accident, and the resulting assessment of non-pecuniary damages, loss of income earning capacity, and cost of future care. The defendant argues that non-pecuniary damages should be discounted to reflect the plaintiff's failure to mitigate. An ancillary issue

is damages for past wage loss, specifically in relation to a subrogation claim advanced on behalf of Mr. Tomas' employer, Westshore Terminals Limited Partnership ("Westshore").

Facts

Background

[2] Mr. Tomas was 55 at the time of the Accident and 67 at the time of trial. He was born in the former Yugoslavia, what later became Croatia. He left school after completing grade seven and entered the workforce. He obtained training as a welder and worked in a shipyard.

[3] In 1970, at age 19, Mr. Tomas came to Canada. He worked various labour jobs until 1984 when he obtained his welding certification from Kwantlen College. For many years following, Mr. Tomas obtained sporadic postings through the International Longshore and Warehouse Union ("Longshore Union"). Mr. Tomas testified that it took him 14 years to become a full member of the Longshore Union, and it was not until 2004 that he obtained his full time permanent position with Westshore.

[4] Mr. Tomas' official start date as a full time employee at Westshore was December 23, 2004. He was then 53.

[5] Mr. Tomas is a large man who has always been physically fit and active. In the past, he attended the gym regularly and played both soccer and recreational ice hockey. Francesca Tomas, Mr. Tomas' spouse, emphasized in her testimony the importance of physical strength and stature to Mr. Tomas' sense of self.

[6] Unfortunately, Mr. Tomas has suffered from several physical ailments over the years and he has endured many workplace injuries.

[7] He was unsure of the number of WorkSafeBC ("WCB") claims he made prior to the Accident, but acknowledged several such claims when they were put to him in cross examination. Those claims included a shoulder injury in 1978; a low back injury in 1989; and a head and neck injury in 1990.

[8] Mr. Tomas also suffered several injuries at work for which he saw his family physician, Dr. Janice Peace. Among those were a head and neck injury in January 2003; a low back injury in July 2003; a right forearm injury in September 2004; and a low back injury in September 2005.

[9] Following the injury in September 2005, Mr. Tomas missed significant time from work and was referred to physiotherapy.

[10] Mr. Tomas also suffered soft tissue injuries as a result of two separate car accidents, one in 1995 and another in 2003. After the latter accident, he missed significant time from work and underwent physiotherapy and chiropractic treatments.

[11] Mr. Tomas then had intermittent physiotherapy and chiropractic treatments for his shoulder, hip, and low back between 2003 and 2006, up until the Accident.

[12] Dr. Peace referred Mr. Tomas for magnetic resonance imaging (MRI) in 2007. According to Dr. Peace, the imaging revealed longstanding degenerative problems in Mr. Tomas' low back, right hip, and neck which pre-dated the Accident. She agreed that the degenerative problems could be traced as far back as 2002. Although Mr. Tomas was asymptomatic and pain free immediately prior to the Accident, he had endured and worked with pain associated with those injuries and conditions sporadically over the years.

The Accident

[13] On November 11, 2006, Mr. Tomas was travelling southbound on Panorama Drive in Surrey. At approximately 7:15 a.m., another vehicle, driven by the defendant and travelling eastbound on 58th Avenue, failed to stop at a marked stop sign and collided with the front passenger side of Mr. Tomas' vehicle. Mr. Tomas was wearing his seatbelt and had been travelling at a speed of approximately 40 kilometers an hour at the time of the collision. There was no evidence as to the speed at which the defendant was travelling, the severity of the impact, nor the amount of damage caused to either vehicle.

[14] On impact, Mr. Tomas said his head went to the right, then to the left, and hit the door frame. In cross examination, Mr. Tomas agreed that he had not previously described hitting his head in his accounts of the Accident to medical professionals shortly afterward. In his examination for discovery, he said he could not remember if any part of his body hit any part of the car. Ultimately, his evidence at trial was that "something happened, that's all I can say." Mr. Tomas was clear, in discovery and trial evidence, that he either heard or felt a "crack" in his neck immediately after impact.

[15] I am satisfied that Mr. Tomas' head snapped from side to side on impact, causing the cracking in his neck. However, I do not find that his head contacted any part of the car.

Events Post-Accident

[16] After exchanging information with the other driver, Mr. Tomas went to work. Part way through his shift, he had to go to the first aid room because he had begun to feel dizzy while bending over. After lunch, he had a headache and felt nauseous so he went to the Delta hospital by ambulance.

[17] According to Mr. Tomas, the doctor who examined him at the hospital said he likely had a mild concussion, advised him to take a week off work, and see his family doctor if symptoms persisted.

[18] Mr. Tomas attended a walk-in clinic on November 16, 2006, and then saw his family doctor, Dr. Peace, on November 21, 2006. On his visit with Dr. Peace, Mr. Tomas complained of posterior neck pain, headaches, and numbness in several digits of his right hand. Dr. Peace did not diagnose a concussion, nor did Mr. Tomas say anything to her about such a diagnosis having been made by the doctor at the Delta hospital on November 11, 2006.

[19] I am not satisfied that Mr. Tomas suffered a concussion as a result of the Accident. Surely, if he received such a diagnosis on November 11, 2006, Mr. Tomas would have relayed that information to Dr. Peace at the first opportunity.

[20] Mr. Tomas testified that he started to feel pain in his right jaw area shortly after the Accident. He first complained of this pain in a visit to Dr. Peace on December 14, 2006. At that time, Mr. Tomas told Dr. Peace that the pain began right after the Accident and had been slowly getting worse.

[21] On January 12, 2007, Dr. Peace examined Mr. Tomas' temporomandibular joint (TMJ) and found instability with significant cracking on opening. Dr. Peace ultimately concluded that Mr. Tomas had suffered an injury to the right temporomandibular joint, leading to symptoms of severe pain and a diagnosis of trigeminal neuralgia.

[22] Mr. Tomas described the initial pain sensations in some detail. He said it started with tingling and at times felt like a mild electric current running down his face. The pain first occurred while he was shaving and thereafter could be triggered by such things as combing his hair. However, the pain can also come on suddenly, without any triggering event. Mr. Tomas testified that the episodes of pain sometimes last as long as twenty minutes, and are made worse by the cold. In addition to pain, Mr. Tomas said that his jaw often makes a loud cracking noise, particularly while eating.

[23] Mr. Tomas has seen many medical specialists over the years in relation to his pain symptomology and the cracking noise in his jaw. He was ultimately referred to Dr. Christopher Honey, a neurosurgeon with a subspecialty in trigeminal neuralgia. Dr. Honey first saw Mr. Tomas in April 2013, and determined that Mr. Tomas was a candidate for microvascular decompression surgery, aimed at rendering him symptom free from trigeminal neuralgia.

[24] The surgery was scheduled for November 2013, but Mr. Tomas cancelled at the last minute, for fear of an adverse outcome.

[25] Dr. Honey saw Mr. Tomas again in February 2014, and ultimately the surgery was rescheduled for November 2014. Again, Mr. Tomas cancelled at the last minute. Dr. Honey had recommended that Mr. Tomas see a psychiatrist prior to the second scheduled surgery, in order to address his anxiety about surgery. Despite Dr. Honey's efforts to make a specific referral in that regard, for reasons which are unclear, Mr. Tomas did not see a psychiatrist prior to November 2014.

[26] I will address Mr. Tomas' stated reasons for cancelling the surgery when I consider whether he has failed to mitigate his damages.

[27] Before I set out the issues which I must decide, I will briefly address the parties' submissions that I should draw adverse inferences based on Mr. Tomas' failure to call certain medical doctors who he had consulted.

[28] In short, this case is clearly not one in which any adverse inferences should be drawn. The submissions of both parties on this score seemed to be almost afterthoughts. In essence, each party sought to have me draw an adverse inference against the other on the same issue, namely, the existence and cause of trigeminal neuralgia based on a failure to call an expert or experts in neurology who saw the plaintiff.

[29] It was somewhat puzzling to me that I heard no opinion evidence from a neurologist in a case in which the major complaint related to a neurological disorder. The one neurologist who testified, Dr. Honey, was called simply as a "fact" witness, and offered no medical opinion. As a matter of common sense, I infer the existence of trigeminal neuralgia from the fact that Dr. Honey was prepared to undertake the surgical procedure required to repair that medical condition. The only remaining issue is what caused the trigeminal neuralgia. I will not speculate on the evidence that could have been provided by an expert witness in the field, but will decide the issue on the evidence before me.

Issues

[30] The issues I must decide are as follows:

1) Causation of the Mr. Tomas' trigeminal neuralgia and temporomandibular joint problems;

2) Non-pecuniary damages;

3) Loss of earning capacity;

4) Past wage loss in relation to Westshore's subrogation claim;

5) Failure to mitigate;

6) Cost of future care; and

7) Special damages.

Causation

[31] For the reasons which follow, I am satisfied that Mr. Tomas' TMJ syndrome and trigeminal neuralgia were caused by the Accident. The legal test I must apply is well known, namely whether the defendant's negligence was a cause of the plaintiff's injury, beyond de minimus. The defendant's negligence need not be the sole cause of the injury. Even if the plaintiff was predisposed to the particular injury, so long as I am satisfied on a balance of probabilities that the defendant's negligence was a cause of the injury, the defendant is liable for damages

in tort, and should be required to compensate the plaintiff: Athey v. Leonati, [1996] 3 S.C.R. 458 at paras. 13-17; Farrant v. Laktin, 2011 BCCA 336 at para. 9.

[32] In this case, Mr. Tomas was symptom free prior to the Accident. He started feeling pain in the right side of his face and a clicking noise in his jaw shortly after the Accident. Dr. Peace examined Mr. Tomas on January 12, 2007, and made objective findings which support the subjective complaints insofar as is possible. Dr. Peace made a preliminary diagnosis at that time.

[33] More recently, in her report dated November 10, 2018, Dr. Peace opines that the trauma of the Accident caused injury to Mr. Tomas' temporomandibular joint, leading to episodes of severe pain and a diagnosis of trigeminal neuralgia.

[34] Dr. R. Nairn Stewart, an expert in physical medicine and rehabilitation, conducted an examination of Mr. Tomas and provided a report on May 29, 2018. Dr. Stewart, like Dr. Peace, testified at trial. Her report contains the following assessment of the cause of the trigeminal neuralgia:

It is my opinion that, but for the accident, Mr. Tomas would probably not have developed trigeminal neuralgia. Although his particular anatomy predisposed him to that condition, it was likely the neck pain and secondary tension in his neck and jaw muscles caused by the accident that triggered the facial pain.

[35] In cross examination, Dr. Stewart agreed that, at the time she prepared her report, she believed Mr. Tomas had struck his head in the Accident. However, she said that fact played no part in her opinion on causation.

[36] Dr. Stewart could not state the exact medical cause of the trigeminal neuralgia. From her review of other records, she believed that the Mr. Tomas' right trigeminal nerve was particularly close to the cerebellar artery, and that proximity predisposed him to the condition. In large part, Dr. Stewart's opinion that the accident caused the trigeminal neuralgia was based on the onset of symptoms shortly after the Accident, when none existed previously.

[37] Dr. Stewart believed that the pain from the neck injuries likely caused Mr. Tomas to clench his jaw forcefully and the jaw clenching may have triggered the trigeminal neuralgia. She could not be certain of the exact mechanism of injury.

[38] Nonetheless, Dr. Stewart was firmly of the view that, but for the Accident, Mr. Tomas would not have developed trigeminal neuralgia. I share that view. As with Dr. Stewart, I find the temporal evidence compelling. It cannot be coincidence that the symptoms, in particular the episodes of shooting pain, so vividly described by Mr. Tomas, commenced within weeks of the Accident. There is no evidence of any other trauma which might have caused those symptoms.

[39] Nor is there any contradictory medical evidence. The one medical expert called by the defence, Dr. J.P. Thompson, a specialist in orthopaedics, expressed no opinion on the symptoms related to the right side of the Mr. Tomas' face.

[40] On all the evidence, I am satisfied on a balance of probabilities that Mr. Tomas' trigeminal neuralgia was caused by the negligence of the defendant.

Non-Pecuniary Damages

[41] Both Mr. Tomas and Ms. Tomas testified about the impact of the Accident on Mr. Tomas' overall functioning and enjoyment of life. In particular, both said that Mr. Tomas has been less socially outgoing and more withdrawn since the Accident. In addition, his physical activities have decreased. Mr. Tomas was very fit and active prior to the Accident. Post-Accident he no longer engages in the same athletic pursuits. In particular, he testified that he no longer participates in downhill skiing, hockey or soccer, and that his gym attendance has declined significantly.

[42] In cross examination, Mr. Tomas agreed that he had not engaged in downhill skiing for more than twenty years prior to the Accident. Ms. Tomas confirmed that he had not skied since they had been married. Mr. Tomas provided no details regarding the cessation of his participation in soccer and ice hockey. I am unable to conclude that he ceased participating in those activities because of the trigeminal neuralgia. It seems more probable than not that the degenerative problems in his back, hips, and neck, in addition to the two major shoulder surgeries, are the root cause of his non-participation in sports such as soccer and ice hockey.

[43] I do accept that Mr. Tomas no longer works out at the gym as frequently as he once did, and that this decreased participation relates, at least in part, to the injuries he suffered in the Accident.

[44] I also accept his evidence, supported by that of Ms. Tomas, that he has suffered a general decrease in overall enjoyment of life since the Accident because of the symptoms related to trigeminal neuralgia. Obviously, the most serious of these is extreme pain which he experiences without warning. Mr. Tomas said these episodes can be so severe that he is forced to assume the fetal position until they pass. When they occur at work, he must go to the first aid room and remain still for up to half an hour. Because Mr. Tomas finds these pain episodes extremely embarrassing, he and his spouse no longer socialize outside the home as much as they once did.

[45] In addition, there is evidence from both Mr. and Ms. Tomas that family meals are adversely impacted by the clicking noise made by Mr. Tomas' jaw. Apparently, both Ms. Tomas and at least one of their two adult sons find the clicking to be very annoying and this detracts from general family enjoyment at meal time.

[46] I accept that Mr. Tomas' overall ability to enjoy time at home has been adversely affected by his symptoms. Since the Accident, he is more irritable, impatient, and intolerant of other family members. Ms. Tomas testified that Mr. Tomas is, post-Accident, more withdrawn, and not as outgoing and energetic as he was pre-Accident.

[47] Mr. Tomas' sleeping has also been adversely affected by the jaw pain. It often wakes him up during the night, and disrupts his sleep patterns. Mr. Tomas has tried different pain medications, but none has been entirely effective. He has, to some extent, learned to live with daily pain.

[48] In addition to the evidence of Mr. and Ms. Tomas, two of Mr. Tomas' co-workers testified about the differences in his physical stature and abilities since the Accident. Dennis Doiron said that prior to 2006, Mr. Tomas was "like a Greek god", and was one of the strongest men on the waterfront. Since the Accident, Mr. Doiron has noticed that Mr. Tomas is often in pain and "is not the man he used to be". Roger Dusanjh first met Mr. Tomas in 1983 at a gym they both frequented at the time. Mr. Dusanjh described Mr. Tomas as having been very large and muscular then, but now he is "a shell of a man". Mr. Dusanjh recalled that Mr. Tomas suddenly gave up his gym membership. He described Mr. Tomas as being much more withdrawn than he was prior to the Accident.

[49] I accept the general accuracy of the limited observations of both Mr. Doiron and Mr. Dusanjh, but I find them to be of little assistance in assessing any difference in Mr. Tomas' physical condition pre and post-Accident. More than twenty-five years have passed since Mr. Dusanjh first met Mr. Tomas at the gym. There is no doubt that Mr. Tomas' physical abilities would have changed in that interval. It would be difficult for Mr. Dusanjh to determine how much, if any, of that physical decline is attributable to the Accident, and how much is a combination of aging and other injuries and physical ailments.

[50] Mr. Doiron recalls working with Mr. Tomas on November 11, 2006 and accompanying him to the first aid room after Mr. Tomas suffered a dizzy spell while bending over to pick up a tool. Thus, Mr. Doiron has a specific frame of reference for his assessment that there has been a decline in Mr. Tomas' physical condition following the Accident. However, Mr. Doiron was completely unaware of the many other injuries Mr. Tomas had suffered at work since November 2006. Again, it would be difficult for Mr. Doiron to accurately assess how much of Mr. Tomas' physical decline is actually attributable to the Accident.

[51] Nevertheless, based on the evidence before me, it is clear that Mr. Tomas suffered moderately serious soft tissue injuries which prevented him from working for approximately three months. Those injuries caused some amount of pain and suffering, and loss of enjoyment of life, for which Mr. Tomas should be compensated. In addition, he continues to suffer from the symptoms associated with TMJ syndrome and trigeminal neuralgia, in particular bouts of acute pain in the right side of his face. Those episodes, which occur without warning, are temporarily debilitating and impact on Mr. Tomas' overall enjoyment of life. If Mr. Tomas does not have surgery to ameliorate the symptoms, he will experience

them for the rest of his life. Mr. Tomas is entitled to an award of damages that recognizes the overall negative effects of these injuries in the twelve and a half years since the Accident, and in the future.

[52] Counsel for Mr. Tomas seeks an award for non-pecuniary damages in the range of $140,000 to $170,000. She cites two recent decisions of this Court where non-pecuniary damages were awarded for chronic pain. In Ferguson v. Watt, 2018 BCSC 1587, the plaintiff was awarded $140,000. In Niessen v. Emcon Services Inc., 2018 BCSC 1410, the plaintiff was awarded $170,000.

[53] Defendant's counsel submits that an appropriate award for non-pecuniary damages is $100,000. In support of that submission, he cites the following decisions, all involving chronic pain:

· In Worobetz v. Fooks, 2015 BCSC 150, the plaintiff was awarded $90,000 for non-pecuniary damages.

· In Pham-Fraser v. Smith, 2010 BCSC 322, the plaintiff was awarded $95,000 for non-pecuniary damages.

· In Olson v. Ironside, 2012 BCSC 546, the plaintiff was awarded $100,000 for non-pecuniary damages.

· In Ahonen v. Thauli, 2013 BCSC 1607, the plaintiff was awarded $100,000 for non-pecuniary damages.

· In Fabretti v. Gill, 2014 BCSC 899, the plaintiff was awarded $100,000 for non-pecuniary damages.

· In Bricker v. Danyk, 2015 BCSC 2404, the plaintiff was awarded $100,000 for non-pecuniary damages.

[54] The defendant submits that although the two cases cited by Mr. Tomas are comparable to the case at bar, they both involve pain that was more unrelenting, or less episodic, than that experienced by Mr. Tomas. I tend to agree with that characterization.

[55] Counsel agree that the non-exhaustive list of factors I should consider in making this award is set out by the Court of Appeal in Stapley v. Heljslet, 2006 BCCA 34 at para. 45-46:

[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 added.]

[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).

[Emphasis in original]

[56] In addition to the chronic episodic pain, Mr. Tomas has suffered significant loss of enjoyment of life. Although I am not persuaded that the trigeminal neuralgia has impacted his pursuit of leisure and athletic activities to the extent he claims, I am satisfied that there has been a diminution in his ability to enjoy many daily activities. In addition, there is the embarrassment of the jaw noises and the debilitating bouts of pain.

[57] Mr. Tomas also gave evidence about some suicidal ideation he says was caused by his condition. This included one occasion when he contemplated jumping from the Port Mann Bridge. He also testified that occasionally he feels that, if he had a gun, he might end his life. I do not mean to minimize that evidence, but I believe that it was hyperbolic, to some extent. I note that the psychologist called by the plaintiff, Dr. Elizabeth Bannerman, opines that Mr. Tomas suffers from mixed anxiety disorder with depressed mood. She rated Mr. Tomas' risk of suicide as low to moderate.

[58] I do accept that the anxiety and depressed mood are related to the chronic pain condition.

[59] Taking into account all the symptoms from which Mr. Tomas continues to suffer, and the overall negative impact on his ongoing enjoyment of life, I am satisfied that an appropriate award for non-pecuniary damages is $120,000.

Loss of Income Earning Capacity

[60] The plaintiff seeks an award for loss of capacity to earn income, both past and future. This claim is based on the inability of Mr. Tomas to maximize his income through overtime opportunities which routinely arise at Westshore. I have no doubt, on all the evidence, that such opportunities are both plentiful and potentially lucrative. However, I am not persuaded that Mr. Tomas has made out his claim for damages under this heading.

[61] The evidence supports the basic premise that any full-time worker at Westshore would be offered overtime hours with great regularity. Those offers would include both opportunities to extend a regular shift and requests to work on regularly scheduled days off. All such hours would be paid at a minimum of double the regular rate of pay.

[62] David Honsberger, the director of human resources at Westshore, explained how the overtime system works. Opportunities arise based on scheduled maintenance or employee absences. Shifts are filled either by a call-out system to other regular employees from different shifts or through the occasional workers at the union hall. If the former method is used, the employee with the least accumulated overtime hours is called first. Mr. Tomas would be offered shifts as both a mechanic/welder (his previous position) and as a troubleshooter, which has been his job for the past several years.

[63] Mr. Honsberger gave a broad range for expected income of a Westshore employee, based almost entirely on an individual's desire to work overtime. He said one employee earned $300,000 in 2018, but gave a more general range of $140,000 to $250,000. He said the latter figure was a reasonable amount for someone "who wishes to work." By that, I infer he meant somebody who was determined to work as much overtime as possible.

[64] The basic annual earnings of a Westshore employee are $127,000. That was the figure given by Mr. Dusanjh, and it accords with Mr. Honsberger's evidence that the pay is $67 per hour, calculated on a 36 hour work week, 52 weeks per year.

[65] Thus, it is readily apparent that anybody actually earning $250,000 per year is almost doubling his or her annual salary through overtime hours.

[66] There is considerable flexibility offered to employees in relation to pay for overtime hours. They may choose to accept straight pay at the increased hourly rates for overtime, to take time off in lieu, or to bank the hours in an overtime bank. At the end of each year, employees must make a decision in regard to hours in that bank, either lump sum payout or transfer to a deferred overtime bank, what Mr. Tomas called the "superbank."

[67] Mr. Dusanjh testified that he took virtually all overtime shifts that he was offered. A summary of his total declared earnings from 2014-2017 shows a four year average of $206,500. In 2018, he earned over $240,000. Thus, his five year average earnings were slightly more than $213,000. Of note, he had nothing accumulated in his deferred bank. He said he took a cash payout each year, then invested in RRSP's and other investments of his choosing.

[68] Mr. Doiron had average earnings for the same five year period of just over $191,000. He had approximately $15,000 accumulated in his deferred bank. His evidence was that he often accepted overtime shifts at the premium rates, then called in sick on his regular shifts, thereby making more money for working fewer hours.

[69] For the same five year period, Mr. Tomas' average earnings were $162,400. However, excluding 2018, the average was $168,000. Mr. Tomas was off work on WCB the last four and a half months of 2018, and thus was unable to work any overtime at all. Mr. Tomas also had $343,000 accumulated in his deferred overtime bank at the end of 2017. Most of that likely accrued in the ten year period preceding 2018. That equates to an additional $30,000 in earnings per annum. In essence, Mr. Tomas' earnings were slightly less than $200,000 per year, more than Mr. Doiron, but less than Mr. Dusanjh.

[70] In this case, the entirety of the loss of capacity claim must be assessed on the basis of missed opportunities to work overtime shifts. For both past and future losses under this heading, the question is as follows: has the plaintiff established that there is a real and substantial possibility that, but for the injuries caused by the Accident, he would have worked more overtime hours?

[71] Plaintiff's counsel submitted that, based on Mr. Honsberger's evidence, I should conclude that there was a reasonable possibility that Mr. Tomas would have earned approximately $250,000 annually, and that I should use that figure as a starting point for any calculation of lost opportunity. I would, however, be inclined to use the mean of the earnings of Mr. Dusanjh in attempting to calculate an award under this heading. Mr. Dusanjh said that he accepted 99% of all overtime he was offered, and his job functions mirror those of Mr. Tomas. Thus, something in the range of $213,000 seems appropriate.

[72] I also note parenthetically that the hourly rate of pay has increased considerably since the Accident, from approximately $46 per hour to the current $67 per hour.

[73] However, the crux of the claim for loss of opportunity is that the plaintiff would have worked more overtime shifts than he did if he had not been injured in the Accident. Absent that fundamental finding, there is no need for any calculation of lost earnings.

[74] Mr. Tomas testified that, if not for the pain episodes, he likely would have worked "twice as much" overtime. I cannot accept that evidence. It is inconsistent with all the objective evidence as well as other parts of Mr. Tomas' own evidence.

[75] Mr. Tomas testified more than once that, since the Accident, work has been an escape for him. He referred to living like a prisoner in his own home, and referred to work as a "getaway," where he can simply focus on his job. Twice he likened his work to "therapy." He said he would rather go to work than stay home.

[76] Mr. Tomas also testified that he turns down more overtime shifts now than before the Accident, especially graveyard shifts as a welder, because working outside in the cold exacerbates his condition. That evidence was, in a general way, confirmed by Ms. Tomas who testified that she hears her husband talking on the telephone and either accepting or refusing overtime work which is being offered. She said post-Accident, he turns down more shifts than pre-Accident.

[77] Mr. Tomas said that he often works overtime and does the best he can. Sometimes, when the pain is too bad, he declines overtime. Mr. Tomas' evidence was far from precise or detailed in this regard. He gave no actual examples of times when he turned down shifts, nor any evidence about ever needing to leave a shift because of pain. On that score, the evidence was that he is able to go to the first aid room until the pain subsides, then he resumes working.

[78] The first aid records for the past three years show four attendances related to face or jaw pain, and ten related to other complaints, wholly unrelated to the Accident.

[79] Mr. Tomas said that some overtime shifts he is offered are as a welder, others as a troubleshooter. He did not break down those numbers. If he is working as a troubleshooter, the work is primarily indoors and often quite sedentary, if there are no problems that require his attention.

[80] Perhaps most importantly, the work records show an increase in the average number of overtime shifts worked by Mr. Tomas post-Accident versus the two years prior to the Accident.

[81] Mr. Tomas' first full year as a full-time employee of Westshore was 2005. He worked 48 overtime shifts that year. In the ten plus months of 2006 prior to the Accident, he worked 45 overtime shifts.

[82] From 2007 through 2018, Mr. Tomas averaged over 55 overtime shifts per year. In 2007, despite being off work until February 20 due to the soft tissue injuries sustained in the Accident, Mr. Tomas worked 45 overtime shifts. His overall work pattern, including overtime, appears to be very similar for 2006 and 2007.

[83] I must nonetheless consider whether there is a real and substantial possibility that, but for the Accident, Mr. Tomas would have worked more overtime than he did. In my view, Mr. Tomas has not established such a reasonable possibility. At the end of the day, particularly after Mr. Tomas was taken through the annual records of his work shifts in cross examination, the prospect of additional overtime, absent the injuries caused by the Accident, does not rise above the speculative.

[84] Between 2007 and 2019, Mr. Tomas missed a total of approximately two full years of work because of various injuries or surgeries unrelated to the Accident. He agreed that for the periods of time he was off work as a result of those injuries, either regular sick time or WCB, he was unable to work overtime. For certain periods when he was returning to work, he agreed that he was turning down overtime because of the lingering effects of those injuries.

[85] The picture is also complicated by the vacation scheme in place at Westshore. Employees are entitled to seven weeks, or 35 days, of annual vacation. There is limited ability to carry such time into the ensuing years. For Mr. Tomas that has meant that in some calendar years, when he has missed significant time on WCB claims the previous year, he must take six weeks of the previous year's vacation time in January and February, then the current year's vacation time later in the year.

[86] For example, Mr. Tomas missed nine months of work in 2015 because of a shoulder injury and ensuing surgery. He then took his 2015 vacation weeks in January and February of 2016. Although he worked some overtime shifts in between vacation days, he was obviously unable to work overtime on the days scheduled as vacation.

[87] The work records for 2016 show Mr. Tomas taking 30 days of prior year vacation time and 42 days for current year. He was also off work with injuries, including a serious back injury requiring surgery, for 42 days. Nonetheless, he managed to work a total of 60 overtime shifts. His inability to work overtime shifts, for almost half the calendar year, was wholly unrelated to the Accident.

[88] There were also specific examples in Mr. Tomas' evidence, supported by the work records, of instances where he was required to take time off work in the midst of some scheduled overtime project because of injury he sustained during those shifts. He gave no evidence of any similar lost opportunities directly related to the Accident injuries.

[89] Mr. Tomas underwent surgery on his left shoulder in February 2015 and his back in July 2016. He injured his right shoulder on August 16, 2018 and has not returned to work since that time. That shoulder was surgically repaired in December 2018. While he was off work in September 2018, Mr. Tomas also had hip replacement surgery. He had been experiencing pain in that part of his body for at least three years prior to the operation.

[90] In sum, there are many reasons unrelated to the Accident for Mr. Tomas' inability to maximize his overtime hours at Westshore. I am not satisfied that there is a real and substantial possibility that Mr. Tomas would have worked more overtime in 2007 through 2018 if not for the injuries suffered in the Accident.

[91] Likewise, I cannot find that there is a real and substantial possibility that Mr. Tomas' ability to work overtime in the future is adversely impacted by the Accident-related injuries. Given his two recent surgeries, long convalescence and advancing years, it is likely that Mr. Tomas will be unable to maximize the overtime opportunities for whatever work years remain for him.

Past Wage Loss/Subrogation

[92] The parties agree that Mr. Tomas missed considerable time from work because of Accident-related injuries and associated medical appointments. Mr. Tomas is not out of pocket for this missed time, since Westshore paid him throughout. The issue for determination is whether an award should be made for past wage loss, based on the subrogation claim of Westshore, and if so, how much.

[93] On the latter point, there are two amounts at issue, $24,016.10 for time Mr. Tomas took off work immediately following the Accident, and $19,159.10 for subsequent absences from work for medical appointments related to the TMJ and trigeminal neuralgia. In correspondence dated September 5, 2008, Westshore advised ICBC of the amount of its claim to date, which was $24,016.10.

[94] Mr. Tomas advances his claim for lost wages, and acknowledges his obligation to repay any amount awarded under this heading to his employer, Westshore.

[95] The defendant makes the following arguments in opposition to this claim:

1) There should be no award for past wage loss, since Mr. Tomas has not suffered any actual loss;

2) Westshore is not entitled to any subrogated interest for the amount it has paid to Mr. Tomas, since its obligation to pay did not arise directly from a collective bargaining agreement;

3) In essence, there is no evidence that Mr. Tomas has an obligation to repay Westshore, nor any evidence that Westshore has a legal right to subrogation;

4) If there a right to subrogation, it is confined to the amount contained in the September 2008 letter, $24,016.10;

5) Pursuant to s. 98 of the Insurance (Vehicle) Act, R.S.B.C 1996, c. 231, Westshore is only entitled to recover the net income loss, and any award must be reduced by 25%.

[96] The starting point for a resolution of these arguments is the case of Ratych v. Bloomer, [1990] 1 S.C.R. 940. In that case, McLachlin J. (as she then was) addressed the legal and policy reasons for the equitable principle of subrogation in the context of tort damage awards. She noted that the overarching purpose of damages in tort law is to place the plaintiff back in the position he or she would have been in if not for the defendant's negligence. The principle holds that the plaintiff should be fully compensated for the loss suffered, but not receive a windfall in the form of double recovery.

[97] The corollary to that principle is that general damages are meant to be compensatory, not punitive. Thus, if the plaintiff has sustained no actual loss, because of payments from a third party, the courts should not require the tortfeasor to pay a second time. However, where the third party asserts a valid claim in subrogation, different considerations arise. In those circumstances, it is generally appropriate to apportion the loss to the tortfeasor as opposed to the third party.

[98] In conclusion, the majority judgment recognized the need for "a rule which will permit transference of benefits to third parties where appropriate, and at the same time avoid the double recovery of monies on account of lost earnings which general principle and the case law suggest is inappropriate": Ratych v. Bloomer at 982.

[99] The general rule thus requires a reduction in damages equivalent to the amount of wage benefits received by a plaintiff from their employer while that plaintiff is off work due to accident-related injuries. An exception to the general rule is engaged when the employer is entitled to be reimbursed for such wage benefits due to the right of subrogation.

[100] Much more recently, Butler J. considered these principles in Provost v. Bolton, 2018 BCSC 1090. There, the issue was entitlement to reimbursement by an employer, the RCMP, which had voluntarily paid wage benefits and then asserted a right of subrogation at trial. In that case, the RCMP was a party to the action, but had not pled a right to subrogation.

[101] After considering two recent decisions of the British Columbia Supreme Court which reached different conclusions on the right of subrogation, Butler J. concluded as follows at paras. 56-62:

[56] In Slater, there was no evidence before the court about subrogation or the right of the RCMP to reclaim the amount paid to the plaintiff. On this basis, the court distinguished X. v. Y. at para. 115:

[115] The evidence in this case does not support a finding that the amount paid was in the nature of insurance. Furthermore, unlike the evidence in X. v. Y., the evidence in this case does not support a finding that the RCMP has the right of subrogation to reclaim the amount paid to the plaintiff. There was no evidence whatsoever led on these issues. There remains an onus on the plaintiff to lead some evidence and she has failed to do so.

[57] With contradictory rulings on similar facts, I cannot resolve this issue on the basis of judicial comity. As noted by Justice Wilson in Re Hansard Spruce Mills Ltd., [1954] 4 D.L.R. 590 (B.C.S.C.), it is possible to go against the decision of a brother or sister judge if a subsequent decision has affected the validity of the impugned judgment. I must consider which of the two decisions to follow.

[58] While no evidence was presented about the RCMP's right of subrogation in the present case, this is of little consequence. The right of subrogation does not depend on the views of a senior officer as to its existence; it is an equitable right that arises in particular circumstances. The evidence about the employer's view of its right of subrogation (as in X. v. Y.) does not establish that right, just as the absence of that kind of evidence (as in Slater) does not disprove the existence of the right.

[59] In Falls Creek Falling Contractors Ltd. v. Pat Carson Bulldozing Ltd., 2001 BCCA 600 at paras. 45-47, the court explained the equitable doctrine of subrogation. It is an "empirical remedy" that prevents unjust enrichment in certain circumstances. The doctrine is flexible and does not depend on the existence of contractual rights; it depends on the payment of an indemnity:

[45] In basic terms, subrogation means "the substitution of one party for another whose debt the party pays, entitling the paying party to all of the rights, remedies or securities that would otherwise belong to the debtor." see Black's Law Dictionary, 7th ed. (St. Paul: West Group, 1999) at 1441. It has long been available as an "empirical remedy" to prevent unjust enrichment in a variety of circumstances where the doctrine of privity would otherwise prevent recovery for the party who suffered a loss [citations omitted].

[46] The right of subrogation does not depend on the existence of a contractual term, but arises independently upon payment of the indemnity: see Ryan v. MacGregor, [1926] 1 D.L.R. 476 (Ont. C.A.) at 482. Although the doctrine of subrogation is most commonly associated with insurance cases, it has a more general application: see Morrison, supra. I think that it is equally applicable to private indemnity agreements, which are similar to insurance contracts.

[47] The courts have also found a right of subrogation to exist in situations where the insurer was not legally obligated to pay its insured: see Manitoba Public Insurance Corp. v. Digerness (1994), 121 D.L.R. (4th) 331, following King v. Victoria Insurance Co., [1896] A.C. 250 (P.C.). In King, the Privy Council set out the policy justification for allowing an insurer to be subrogated to the rights of the insured without proof that the loss sued on was within the terms of the insurance (at 254-5):

. . . it is claimed as a matter of positive law that, in order to sue for damage done to insured goods, insurers must shew that if they had disputed their liability the claim of the insured must have been made good against them. If that be good law, the consequence would be that insurers could never admit a claim on which dispute might be raised except at the risk of finding themselves involved in the very dispute they have tried to avoid, by persons who have no interest in that dispute, but who are sued as being the authors of the loss. The proposition is, as their Lordships believe, as novel as it is startling.

[60] When I apply these principles to the circumstances here, I conclude that the AG Canada has a right of subrogation as it has fully indemnified Cpl. Provost for the loss of income suffered from the defendants' tortious actions. While it was not obligated to pay that loss based on a

collective agreement or other contractual arrangement, that does not prevent the AG Canada from being subrogated to Cpl. Provost's rights. It is able to rely on the equitable doctrine of subrogation, which prevents the tortfeasors from being unjustly enriched by the payment of Cpl. Provost's loss. As the AG Canada has fully indemnified Cpl. Provost, it is able to stand in his shoes for this claim.

[61] Having found that the AG Canada has a right of subrogation, pursuant to Cunningham, there should not be any deduction for the wage loss benefits. That is the case whether or not the AG Canada seeks to recover the amount it paid from Cpl. Provost. That is a matter that rests solely between Cpl. Provost and his employer.

[62] The second question is whether the right to subrogate has been waived. There is no basis on which I could conclude that the employer has waived its right of subrogation. Unlike in X. v. Y. and Slater, the AG Canada was before the court as a party in action M142533 seeking to recover its losses from the accidents involving the truck driven by Mr. Bolton. Counsel made submissions asserting the right of subrogation and supported the claim in Cpl. Provost's action on that basis. There is no doubt that the right has not been waived.

[102] I agree entirely with the analysis of Butler J. and reach a similar conclusion in this case. It matters not whether the employer paid the wage loss benefits voluntarily or pursuant to the collective bargaining agreement. The important questions are the existence in equity of a right to subrogation, and whether or not such right has been waived.

[103] Westshore clearly has an equitable right to subrogation for the wage benefits it paid to Mr. Tomas resulting from work absences caused by the Accident. Westshore has never waived its right to subrogation. Rather, it has consistently asserted that right, initially in correspondence to both parties in September 2008, and then through the testimony of Mr. Honsberger at trial.

[104] I also find that Westshore is entitled to recover the full amount it has paid in wage benefits, subject to s. 98 of the Insurance (Vehicle) Act, as opposed to only that amount that was at issue in September 2008. There is no principled basis to so restrict Westshore's recovery. I also note that the September correspondence clearly asserts an ongoing right, and refers to $24,016.10 as the amount paid "to date".

[105] I must, however, make a deduction pursuant to s. 98 of the Act. In Riley v. Ritsco, 2018 BCCA 366 at paras. 110-115, the British Columbia Court of Appeal held that a third party asserting a right of subrogation cannot recover more than the victim could recover from a tortfeasor, and that s. 98 applies to limit all such damages awards.

[106] Thus, I will make the 25% deduction sought by the defendant, based on the 2006 and 2007 income tax assessments of Mr. Tomas. The result is to reduce the total amount of the award for past wage loss from $43,174.20 to $32,380.65. That award is subject to the right of subrogation asserted by Westshore.

Failure to Mitigate

[107] The defendant submits that I should find that Mr. Tomas has failed to mitigate his damages by refusing to undergo surgery.

[108] The defendant concedes that she must prove on a balance of probabilities:

1) That the plaintiff acted unreasonably in eschewing the recommended treatment; and

2) The extent, if any, to which the plaintiff's damages would have been reduced had he acted reasonably: see Chiu v. Chiu, 2002 BCCA 618 at para. 57.

[109] The test I must apply is whether a reasonable person, placed in the shoes of Mr. Tomas, would have undergone the surgical procedure. The difficulty in applying that test is the extent to which I should consider subjective considerations in placing the mythical reasonable person in the plaintiff's shoes. For instance, there was evidence led from both a psychologist and from Ms. Tomas about the importance of physical strength and appearance to Mr. Tomas, which made any risk of partial facial paralysis unpalatable to him. I find this evidence amounts to no more than idiosyncrasy on the part of Mr. Tomas. It is not a pre-existing psychological condition that renders him incapable of making a rational choice concerning surgery.

[110] Similarly, the plaintiff's confusion about risk of adverse outcome cannot influence my decision. A reasonable person is one who properly understood and appreciated the risks explained by the surgeon. Mr. Tomas said he had learned from a doctor who he met on a trans-Atlantic flight that because of the length of time that had passed, his nerve was dead and surgery would not help. Dr. Honey said that Mr. Tomas communicated no such thing to him, and if he had, Dr. Honey would have told him it was not accurate.

[111] Dr. Honey clearly explained to Mr. Tomas that the surgery had a 90% chance of being fully successful, and removing all pain symptoms. There was a 10% chance that further surgery would be necessary in order to achieve success. There was a 1% chance of a catastrophic result, such as death or stroke. Mr. Tomas did not know that last percentage figure, but said he could not tolerate risk of paralysis. In essence, prior to the first scheduled surgery in 2013, he got proverbial "cold feet" and cancelled at a very late date.

[112] Dr. Honey then recommended that Mr. Tomas see a psychiatrist, to assist him in preparing mentally for the surgical risks. Dr. Honey made a referral, but for reasons that are unclear, Mr. Tomas never saw a psychiatrist. The surgery was then re-scheduled for 2014.

[113] The precipitating event for Mr. Tomas cancelling that procedure was his interaction with the anaesthetist the day prior to the scheduled surgery. The anaesthetist asked Mr. Tomas how long he had been HIV positive. Mr. Tomas was shocked at the comment but he saw that his medical chart had a notation that he was HIV positive. He lost faith in the medical system as a result of that major charting error and cancelled his surgery. It was a day or two later that he learned from Dr. Peace that the entry was a complete mistake and he had

nothing to fear about HIV.

[114] Not surprisingly, Dr. Honey will not see Mr. Tomas again, but is willing to refer him to another surgeon for consultation. Mr. Tomas remains ambivalent about surgery. He is neither actively pursuing this treatment option, nor has he totally foreclosed it.

[115] Deciding whether or not Mr. Tomas acted reasonably in deciding not to have surgery is an extremely difficult proposition. His initial cancellation was not prima facie unreasonable. It reflected considerable indecision on his part, and a desire to contemplate his options further. He then decided, after further reflection, to go through with the surgery and the second booking was made.

[116] In my view, a reasonable person in Mr. Tomas' position, after hearing the HIV comment and seeing the chart entry, might act exactly as Mr. Tomas did. The magnitude of such a mistake is massive. A mistake such as that would cause almost anybody to question the competence of those preparing for the surgical procedure. I cannot say that Mr. Tomas acted unreasonably in cancelling the surgery.

[117] The defendant has failed to satisfy me on the first prong, so I need not consider the second prong regarding the extent to which damages would have been reduced.

Cost of Future Care

[118] Mr. Tomas seeks a substantial award for future care, for the following treatments/ medications:

1) Botox injections for chronic pain;

2) Psychotherapy for both pain, mood management and anxiety reduction, pending possible surgery; and

3) Pain medication.

[119] The defendant submits that a fairly modest amount should be awarded for future care costs. Relying on Milina v. Bartsch (1985), 49 B.C.L.R. (2d) 33 (B.C.S.C.), the defendant says that any such costs must be shown to be medically justified and reasonable. I agree.

[120] I also agree that it is inappropriate to make an award for services that a plaintiff has not used in the past or is unlikely to use in the future. In this regard, see Izony v. Weidlich, 2006 BCSC 1315 at para. 74.

[121] With respect to the Botox injections, it appears that Dr. Peace made a referral to Dr. Nagaria to see if Botox injections would decrease the frequency of Mr. Tomas' pain attacks. However, the letter from Dr. Nagaria to Mr. Tomas' counsel states that the injections are used to treat chronic daily headache and neck pain, from which he says Mr. Tomas suffers. That is not consistent with Mr. Tomas' evidence. Dr. Nagaria's letter says nothing about treating TMJ disorder or trigeminal neuralgia.

[122] Mr. Tomas has had the first of four proposed injections, which would be one treatment cycle. His counsel argues that the future care award should cover a total of eight injections. Defendant's counsel says only one further injection should be covered. I am prepared to order an amount to complete the present cycle of treatment, but no more. That would be three further injections, at a cost of $1,150 each, for a total of $3,450.

[123] The claim for further psychological counselling fails both because it is not medically justified and because Mr. Tomas is unlikely to attend for such treatments.

[124] Dr. Stewart, the physiatrist, recommends 12 counselling sessions to treat Mr. Tomas' anxiety regarding surgery. Thus far, Mr. Tomas has not pursued this type of counselling. If he wishes to do so in the future, he can obtain a new referral to a psychiatrist.

[125] Mr. Tomas has seen Dr. Bannerman, a psychologist, largely on his own initiative. He has not been seeing her concerning surgery-related anxiety. He has attended sporadically, a total of six times over the two years from December 2016 through December 2018. Mr. Tomas seemed uncertain about the reason for his visits to Dr. Bannerman. He did say that they related to pain management, that he tried to do what she recommended, and that he planned to see her in the future.

[126] Dr. Peace noted that, to date, these counselling sessions had not been very effective.

[127] Dr. Bannerman stated that Mr. Tomas was not interested in counselling to treat anxiety related to surgery. She also noted that, because of the infrequency of the sessions, she and Mr. Tomas spent much of their time discussing "how he has been functioning in the large gaps between sessions and providing psychological support, rather than working directly on pain and mood management."

[128] Nonetheless, Dr. Bannerman recommended 12 to 14 biweekly sessions to address anxiety and depressed mood related to pain, and less frequent, but indefinite, sessions "to assist Mr. Tomas to cope with his medical condition and limitations arising from such." These sessions were said by Dr. Bannerman to be necessary because of Mr. Tomas' firm decision not to have surgery.

[129] I cannot assess the objective reasonableness of the proposed course of treatment. There is an absence of treatment goals. Dr. Bannerman's understanding of Mr. Tomas' views on possible surgery in the future seems different to the evidence of Mr. Tomas at trial. For his part, Mr. Tomas seems both unclear on the reasons for counselling and the efficacy of same. I think it is extremely unlikely that he would ever attend more frequently than he has in the past. He has thus far not shown any willingness to attend biweekly sessions with Dr. Bannerman.

[130] I agree with the submission of the defendant that, although it was reasonable for Mr. Tomas to try this mode of treatment, it has not been effective, and he is unlikely to carry on with it.

[131] I make no award for future psychological counselling.

[132] The remaining item sought under this heading is cost of medication for pain relief. Mr. Tomas has tried various opioid analgesics over the years and has found them to be ineffective. He takes Ibuprofen for pain as needed. There is no evidence of the amount Mr. Tomas spends on pain medication. The parties diverge dramatically as to how much money is needed to compensate for the future cost of the medication. I am left to simply attempt to come up with a figure that is reasonable. I make an award in the amount of $4,500 under this heading. That represents $300 per year for 15 years.

Special Damages

[133] The parties agreed that the amount to be paid for special damages is $8,898.23. That amount is the agreed upon loss suffered by the plaintiff, $9,177.91, less the amount already advanced by the defendant, $279.68. I make that award.

Conclusion

[134] To summarize, I make the following award of damages in favour of the plaintiff:

1)

Non-pecuniary damages of

$120,000

2)

Damages for past wage loss of

$32,380.40

3)

Damages for cost of future care of

$7,950

4)

Special damages of

$8,898.23

Total

$169,228.63

[135] Subject to any matters of which I am unaware, Mr. Tomas is entitled to his costs at Scale B. If the parties cannot agree, they may arrange through Supreme Court Scheduling to speak to the issue.

"Tammen J."

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