“Plaintiff awarded more than double the amount in damages proposed by ICBC (See paragraphs 19 & 33)” [COMMENTS BY RICHARD NEARY]

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *S v. K,*

2012 BCSC 573

Date: 20120419

Docket: 10-2109

Registry: Victoria

Corrected Judgment: The trial/hearing dates on the first page of this judgment were corrected on April 24,2012

Before: The Honourable Mr. Justice Bracken

Reasons for Judgment

Counsel for the Plaintiff: R. L. Neary

Counsel for the Defendant:

Place and Date of TriaVHearing: Place and Date of Judgment:

C. M. Mercier

Victoria, B.C. October 31- November 2, 2011

Victoria, B.C. April19, 2012

[1] The plaintiff claims damages for injuries he received in a motor vehicle accident that occurred June 19, 2008 at Victoria, British Columbia. The plaintiff was operating a pick-up truck owned by the Municipality of Oak Bay and he was stopped waiting to make a left turn when his vehicle was struck from behind by a car driven by the defendant. Liability for the collision is admitted. At issue is the nature and extent of the plaintiff's injuries.

Background Facts

[2] The plaintiff is 46 years old and works for the Municipality of Oak Bay at the Oak Bay Recreation Centre where he is responsible for the operation and maintenance of the ice rink and the pool. His work involves some physical activity. He is married and has three children.

[3] Immediately following the collision, he felt back pain and stiffness in his neck. He left work early that day and saw a doctor at a walk-in medical clinic the following day, which was a Saturday. He saw his own family doctor, Dr. D. A. Smith, on the following Monday. The pain the plaintiff was experiencing was mainly on the right side of his back, neck and shoulder, with some pain on the left side. He also experienced some headache pain.

[4] Dr. Smith reported that he examined the plaintiff on June 23, 2008, and the plaintiff had pain in his trapezius muscles and some noticeable spasm in the medial and lower scapular muscles. He also had some pain on the right side of his lower back. The range of motion in the plaintiff's neck was reduced to 50 or 60 percent of normal and the range of motion in his lower back was about 75 percent of normal. Dr. Smith diagnosed an acute musculoligamentous strain of the lower back and he prescribed Ibuprophren and directed some physiotherapy treatments.

[5] Dr. Smith saw the plaintiff again on June 28, 2008. At that time the plaintiff told the doctor that his neck and shoulder pain had increased and he still had spasm, pain and reduced range of motion in his lower back. The plaintiff also saw Dr. Smith on July 4 and 18, 2008. The plaintiff had been off work since June 19,

2008, but by July 18, 2008, he felt he was improving and was gradually increasing his exercises and attending physiotherapy treatments on a regular basis.

[6] The plaintiff returned to work on July 30, 2008, but complained of increased pain and was again off work for a few days and he then commenced a previously scheduled vacation. He saw Dr. Smith on August 12, 2008 and advised that he was receiving physiotherapy treatments twice a week. He was still experiencing pain in his trapezius muscles, but that he had a much improved range of motion in his neck and back.

[7] Dr. Smith saw the plaintiff again on August 27, 2008. The plaintiff was on vacation at that time and was still attending physiotherapy each week and while he was still experiencing some muscle spasm, the range of motion in his neck and back was described by Dr. Smith as ..excellenf'.

[8] Over the next few weeks, the plaintiff's condition continued to improve. By mid-September of 2008, he was back at work, and doing some part-time construction work in his spare time. The plaintiff testified that he had performed construction work on a part-time basis for many years.. The work was in addition to his regular full-time employment. He testified that he worked sometimes for his brother, RS, and at other times did work that he had independently contracted for himself.

[9] The plaintiff gradually increased his tolerance for recreational activities such as golf and non-contact hockey. By November and December of 2008, he was still attending physiotherapy once each week, but he was able to perform his duties at work and play hockey as well as do his part-time construction work. Even so, he still complained of low back pain that he attributed to the accident.

[10] Throughout the following year, the plaintiff said that he experienced intermittent pain and spasm in his neck, back and shoulders. He was physically active, but experienced some pain. He missed occasional days from work due to back pain. While he was able to work extra hours doing construction and he played

golf, hockey and went sport fishing, he said that his level of participation in those activities was somewhat reduced as a result of his injuries.

[11] He said that he plays hockey less aggressively and with less energy since the accident. He has modified his fishing activities so that he avoids long walks to the various fishing locations. Nevertheless, he still participates in river and stream fishing.

[12] The plaintiff has always led a physically active life. While he is still very active, he says that he has reduced or modified his normal work activities since the accident to avoid heavy lifting and lifting above his shoulders. He says that he tires more easily and has Jess energy.

[13] The plaintiff has typically worked very long hours. In addition to his full time job at the Oak Bay Recreation Centre, he has worked in construction on a part-time basis for over 20 years, often in conjunction with his brother who operates a construction business. He has never disclosed the income that he has earned from this activity on his income tax returns. The plaintiff's brother, RS, said at times the plaintiff has worked for him up to as many as 80 hours per month, as well as doing other work that he has contracted on his own. RS said he has noticed a difference in the plaintiff's physical ability and said the plaintiff now finds it difficult to bend and lift, particularly lifting above his shoulders. He said this makes it difficult for the plaintiff to handle awkward or heavy pieces of construction material.

[14] The plaintiff's wife also testified. She and the plaintiff have lived together for more than 26 years. She said the plaintiff is not a chronic complainer, but she has noticed a change in him since the accident. She said he has less energy and tends to sit and watch television more frequently now rather than tend to jobs around the house and garden. She said that from time to time the plaintiff mentions that he has a "bad back" when he is engaged in some physical activities. She also noticed that he is more easily frustrated, and that he does not golf or perform volunteer work as frequently as he did prior to the accident.

[15] Similar evidence was given by Mr. GE, one of the plaintiff's friends. Mr. E and the plaintiff play hockey together and fish together. Mr. E said that while the plaintiff still plays hockey, he does so at a reduced level of energy and aggression. He also said that the plaintiff has difficulty walking to the river for fishing excursions and that he appears to tire more easily. On cross-examination, Mr. E acknowledged that some of their fishing trips typically begin at daybreak and normally end around mid-day. Occasionally the trips last all day if the weather

is good.

[16] The defendant gave evidence and testified that she was travelling at approximately 10 to 15 kilometres an hour immediately before her car collided with the plaintiff's truck. She said the truck's bumper was higher than the one on her car and as a result, the hood of her car was damaged. She testified that the repairs to her car cost approximately $800. She saw no damage to the plaintiff's truck.

[17] The plaintiff had one prior accident in which he received some back injury;

however, that injury was fully resolved by the time of this accident.

Position of the Plaintiff

[18] The plaintiff submits that an appropriate award of non-pecuniary damages is in the range of $40,000 to $60,000. He also seeks compensation for lost income from his part-time contracting work in the amount of $3,000. He claims that he usually earns $12,000 to $15,000 per year from his part time work and he believes

$3,000 fairly represents the work he has been unable to perform since the accident. Finally, the plaintiff seeks compensation for loss of future earning capacity.

Position of the Defendant

[19] The defendant submits the accident in this case was a minor one and the plaintiff was back to work full-time after approximately one month and was mostly symptom-free after six to eight months. The defendant argues the plaintiff is capable of participating in all of his former recreational activities and he continues to perform extensive part-time construction work in his off hours. The defendant

submits that there is no satisfactory evidence of any past income loss from part-time employment and no justification for concluding that the plaintiff has lost any future earning capacity. The defendant submits the plaintiff's non-pecuniary award should not exceed $18,000.

Non-Pecuniary Damages

[20] The plaintiff referred to several cases, beginning with *Mendoza-Fiores v. Haigh,* 2010 BCSC 740. In that case, a 25-year-old female plaintiff was injured in two separate collisions. Most of her injuries were found to come from the second collision which was more severe with more extensive damage to the vehicles involved.

[21] At trial, two functional capacity experts gave evidence. They agreed the plaintiff was not exaggerating her level of pain and that she gave maximum effort on the tests they each conducted. The defence expert found that the plaintiff had no functional impairment; her expert said that she would experience increased symptoms which would likely impair her ability to perform her job. She was awarded

$40,000 for non-pecuniary damages, $3,000 for past loss of opportunity, and

$15,000 for loss of future capacity to earn income.

[22] In *Driscoll v. Desharnais,* 2009 BCSC 306, a 46-year-old male plaintiff, who operated a lawn maintenance service, received $55,000 in non-pecuniary damages,

$30,000 for past wage loss, and $60,000 for loss of future earning capacity. He was unable to work effectively for two summers post-accident and his income records from his business showed a reduced income. He was still experiencing pain five years post-accident, as well as significant restriction in his recreational and family activities. He presented evidence from his family doctor, a physical medicine and rehabilitation specialist and an occupational therapist to support his claim for non pecuniary and loss of future earning capacity awards.

[23] In *Cabral v. Brice,* 2010 BCSC 197, a 32-year-old male plaintiff received

$50,000 in non-pecuniary damages and $25,000 for loss of future earning capacity.

He missed three days of work and was on light duties for one additional month. He was able to return to recreational soccer and other sports after two months. He had received a similar injury approximately five years earlier and was thus more vulnerable to re-injury. He presented considerable medical evidence to support his claim that he would have continued problems with his cervical spine and that his condition would likely worsen over time.

[24] In *Brock v. King,* 2009 BCSC 1179, the court awarded $50,000 for non pecuniary damages and $20,000 for loss of future earning capacity to a 53-year-old female plaintiff. The plaintiff experienced pain to her cervical spine three years post accident and a physical medicine and rehabilitation specialist diagnosed "right sacroiliac joint dysfunction" and "right C6-C7 facet joint arthropathy". The plaintiff's future prognosis was stated to be guarded as to a full recovery.

[25] In this case, the defendant concedes that the plaintiff received some minor injuries in the accident, but submits that he was able to return to his regular full-time duties and other activities after only a few months. He had no physiotherapy treatments after approximately six to eight months and no chiropractic treatment or massage therapy. There were no x-rays, MAI or CT scans ordered by his doctor. The defendant submits that the plaintiff was fully recovered within approximately six to twelve months.

[26] The defendant says *Reyes v. Pascual,* 2008 BCSC 1324 is a comparable case. In that case, the court found the plaintiff had recovered functionally within a relatively short period of time, although she complained of neck, low back and shoulder pain and headaches for more than a year. She was awarded $20,000 for non-pecuniary damages and $15,000 for loss of future earning capacity. A similar award was made in the case of *Garcha v. Gill,* 2008 BCSC 1756, where a 34-year old male plaintiff was awarded $25,000 for non-pecuniary damages. The court

found the plaintiff had suffered mild to moderate soft tissue injuries that had resolved after 18 months, except for minor "flare-ups". He was able to return to normal

athletic activities, but not at the same level.

[27] In *Schulmeister v. Furmanak,* 2004 BCSC 1484, a plaintiff who was 19 years old at the time of the accident and 23 years old at the time of the trial, was injured when the driver of the vehicle in which he was a passenger lost control, causing the vehicle to leave the road and roll over several times. Prior to the accident, the

plaintiff had no health problems. Post-accident the plaintiff had back pain more than five years later. While he was able to work and participate in recreational activities, he could only do so at a reduced level and with pain. He received an award of

$30,000.

[28] The defendant also referred to *Lubke (Litigation guardian of) v. Mattin,* 2009

BCSC 709, *Bray v. Gaete,* 2004 BCSC 335, *Lubick v. Mei,* 2008 BCSC 555, and

Lopez v. VW Credit Canada Inc., 2008 BCSC 320.

[29] In this case, the plaintiff missed only a few weeks from his full-time job and returned to full participation in most of his usual recreation activities within a few months, although at a reduced intensity. He still experiences some pain on occasion more than three years later.

[30] He has also continued to work at construction jobs in addition to his full-time work at the Oak Bay Recreation Centre. While the evidence is that he avoids heavy lifting, he is still able to function well enough to perform his full-time work and then find time to perform part-time construction work as well as participate in recreational activities such as hockey and fishing.

[31] The only medical evidence is contained in the report of Dr. Smith. His report of July 28, 2011 states:

In summary, it is my opinion that Mr. S suffered injuries as a result of the motor vehicle accident of June 19, 2008. It is my opinion that he suffered a musculoligamentous strain of the neck, scapular area and low back. The strain of the scapular area and low back were mainly on the right hand side. After the accident he was not fit to work until July 30, 2008 and he was then on light duty for the next several weeks. Mr. St was treated with physiotherapy. He was treated with anti-inflammatory drugs and occasionally a muscle relaxant. He was shown a stretching program for his neck and

lower back and has been able to control his symptoms with these stretching

exercises since stopping physiotherapy in late 2008. Mr. S still gets flares

of scapular area pain and low back pain if he is overly active. He is able to participate in his work on a regular basis and does virtually all the work he did before although he tries to avoid heavy lifting. He is fit to participate in hockey, golf and other sports although he does these less frequently than in the past. Any overuse causes him to have some flare up of pain in the scapular area or the lower back which usually settles within a few days. He has intermittent spasm in the neck and lower back on examinations depending on his activities in the previous few days.

It is my opinion that Mr. RS's injuries are soft tissue in nature. His injuries have stabilized and have been quite static for the past year with only occasional flare-ups related to overuse. He may require some intermittent physiotherapy or massage therapy in the future if he has increased pain or spasm but generally he is managing this well with a home exercise program. It is now more than three years since the initial injury and it is my opinion that Mr. RS is likely to have some ongoing muscle tenderness and occasional flare-ups as he has been doing for the last several months. His injuries are not in any bone or joint and he is not going to be subject to an increased risk of osteoarthritis.

[32] In these circumstances, it is my view that the cases of *Reyes v. Pascual* and *Schulmeister v. Furmanak* are the most comparable. The cases referred to by the plaintiff are in my view cases where the injuries were more serious.

[33] Based on the evidence presented and a review of the applicable case law, I find an appropriate award for non-pecuniary damages in this case is $40,000. This award is perhaps somewhat generous given the evidence, but it reflects the fact that the plaintiff is still experiencing some pain more than three years post-accident. While he is able to continue with these activities, he has occasional limitations that are attributable to his injuries from the accident and he still experiences some

activity-induced pain.

Past Wage Loss

[34] The plaintiff and the defendant agree that the plaintiff lost the sum of

$3,949.12 in wages from his employment at the Oak Bay Recreation Centre as a result of the accident. However, the plaintiff also seeks compensation in the amount of $3,000 for income he claims he lost from his part-time employment as a contractor.

[35] The defendant submits that there is no evidence to support a claim for any lost income from the plaintiff's part-time employment. The defendant submits the plaintiff has never declared any income from part-time employment on his income tax returns for a period of more than 20 years. Thus, there is no evidence available from any official source of the quantum of income that the plaintiff would typically earn in any given year from that activity. The evidence of the plaintiff's brother was

that he does not treat the plaintiff as an employee, but rather as a casual worker who comes to work on an as needed basis. While the plaintiff's brother does keep some records of the amounts that he pays the plaintiff, and thus the hours worked, those records were not presented in court.

[36] The records that were presented by the plaintiff were in the form of annotated calendars commencing with the year 2007 to and including the year 2011, up to the date of the trial. While these notes appear to show hours worked at jobs the plaintiff said he performed, they are not helpful in determining the income that might have been earned or any loss as a result of jobs not taken as a result of the plaintiff's injuries.

[37] Finally, the defendant submits that based on the cases of *Iannone v. Hoogenraad,* [1990] B.C.J. No. 2311 (S.C.), aff'd [1992] B.C.J. No. 682 (C.A.), application for leave to appeal dismissed, [1992] S.C.C.A. No. 185, there is a strong inference against a plaintiff who makes a claim for lost wages in circumstances where he has not declared his income on income tax returns as required by law. In *Iannone,* Gibbs J.A. said at p. 2:

This plaintiff, like others in similar circumstances, had the burden of leading evidence of past accident wages losses. That will be a difficult burden to discharge where there is no corroborating evidence such as income tax returns, but it is not an impossible burden to discharge. Here the trial judge was satisfied on the evidence that the injuries sustained by the plaintiff prevented him from earning income which he would otherwise have earned. The burden of proof was therefore discharged. The loss was proven. It is not, in my opinion, open to the defendant to avoid compensating for that loss

on the ground that unreported income was taken into account in computing it.

[38] In this case, the plaintiff has never disclosed on his tax returns any of the income he earned from his part-time work. As a result there is no evidence of his pattern of earnings and no corroborating evidence that discloses any reduction in his past income.

[39] He also testified that he has continued to work as a part-time contractor although he says that he has now a somewhat limited ability to perform the work.

The calendars that he submitted as evidence show continued and frequent activity in

his part-time employment. The difficulty in this aspect of the plaintiff's claim is that there is no clear evidence of any lost income. The plaintiff says that $3,000 is an appropriate amount of the loss, but that is simply a rough estimate without a clear evidentiary foundation. I find that the plaintiff has not satisfied the onus of proof upon him and his claim for past income loss from part-time work is therefore dismissed. His claim for the income loss from his full-time job at the Oak Bay Recreation Centre is allowed at $3,949.12 as agreed between counsel.

Loss of Future Earning Capacity

[40] The plaintiff's claim in this category of loss also relates to his part-time construction work. He is clearly able to perform all of the functions of his full-time work at the Oak Bay Recreation Centre, although he avoids heavy lifting and has occasional flare-ups of pain.

[41] He submits that his work life has not been limited to his full-time work. He says that this has been driven by the cost of maintaining his family, particularly the expensive sporting activities of his children. He claims the pain and physical limitations he now has as a result of the accident will result in a reduced ability to work as hard in the future and will therefore reduce his capacity to earn income.

[42] The law in this area is summarized in *Perren v. Lalari,* 2010 BCCA 140. In that case, Garson J.A. reviewed the existing case law as set out in cases such as *Kwei v. Boisclair* (1991), 60 B.C.L.R. (2d) 393 (S.C.), *Brown v. Golaiy* (1985), 26

B.C.L.A. (3d) 353 (S.C.) and *Steenblok v. Funk* (1990), 46 B.C.L.R. (2d) 133 (C.A.).

These cases reveal two existing lines of authority as illustrated in the cases of

Steenblok and *Brown.*

[43] In *Steenblok,* the court was able to quantify the anticipated loss by calculating the difference between pre-accident employment income and post-accident employment income from a less remunerative type of employment. In *Brown,* the court used an analysis of various considerations to determine if there was such a loss and to quantify the appropriate amount of damages. The court set out several

of the factors that are typically considered in the reasons for judgment.

[44] The court in *Perren* agreed with the comments of Bauman J. (as he then was)

in *Chang v. Feng,* 2008 BCSC 49, where he said at para. 76:

[76] This appears to be an express direction to first enquire into whether there is a substantial possibility of future income loss before one is to embark on assessing the loss under either approach to this head of loss, in particular, under the capital asset approach as well. (I note that Justice Russell arrived

at a similar conclusion in *Naidu v. Mann,* 2007 BCSC 1313 and see also

Bedwell v. McGill, 2008 BCCA 6, para. 53.)

[45] At para. 30 of *Perren,* the Court of Appeal summarized the basic principles to apply in this way:

1. A future or hypothetical possibility will be taken into consideration as long as it is a real and substantial possibility and not mere speculation *[Athey* at para. 27], and

2. It is not loss of earnings but, rather, loss of earning capacity for which compensation must be made *[Andrews* at 251].

[46] In her submissions, the defendant points out that there is no evidence of any possibility that the plaintiff will lose his full-time job at the Oak Bay Recreation Centre that he has held for over 23 years. Indeed, the plaintiff's own evidence is that he plans to remain in that job until he reaches retirement age. The defendant also submits that there is no evidence of a real and substantial possibility that the plaintiff will be unable to continue to perform additional contract work on a part-time basis as he has done since the accident albeit with some restrictions.

[47] As the defendant notes, the evidence is that the plaintiff has returned to his full-time job and pre-accident recreation activities. He has also continued to perform additional part-time work in construction. While he said he has modified his work

and recreation activities, there is no evidence to support a real and substantial possibility of future income loss arising from a loss of his capacity to earn income. He has continued to work long hours and to take on many jobs as illustrated by the various calendars that have been put in evidence.

[48] Likewise, there is nothing in the medical report of Dr. Smith to indicate that the plaintiff is likely to have anything more than occasional flare-ups or some ongoing muscle tenderness, likely due to over-exertion. In my view, there is no evidence to support a finding that there is a real and substantial possibility of any

future loss of earning capacity. Therefore, the plaintiff's claim for compensation for a loss of future earning capacity is dismissed.

Summary

[49] The plaintiff is entitled to the following:

Non-pecuniary damages	$40,000.00
Agreed Past Wage Loss	$ 3,949.12
Agreed Reimbursement for Physiotherapy Treatments	$ 1,355.00

The plaintiff is also entitled to Court Order interest and costs on Scale B.

"J. K. Bracken. J." The Honourable Mr. Justice Bracken.