IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Tait v. Dumansky,*
2012 BCSC 332

Date: 20120306
Docket: M094095
Registry: Vancouver

Between:

Anthony Tait

Plaintiff

And

Gloria Dumansky and Harvey Dumansky

Defendants

- and -

Docket: M112079
Registry: Vancouver

Between:

Anthony Tait

Plaintiff

And

Asacia Naomi Biln-Armstrong

Defendant

- and -

Docket: M112080
Registry: Vancouver

Between:

Anthony Tait

Plaintiff

And

Gordon William Henry

Defendant

Before: The Honourable Madam Justice Gerow

Corrected Judgment: The text of the judgment was corrected at paragraph 1 on March 14, 2012

Reasons for Judgment

Counsel for the Plaintiff:	K.L. Simon
Counsel for the Defendants in all three actions:	A. Leoni
Place and Date of Trial:	Vancouver, B.C. October 17-21; December 7, 2011
Place and Date of Judgment:	Vancouver, B.C. March 6, 2012

[1] Anthony Tait has commenced three actions claiming damages for the injuries he sustained in motor vehicle accidents in 2007, 2009 and 2010. The actions are being heard together. Liability is in issue in the first accident which occurred in October 2007. At issue in all three actions is the nature, extent and duration of Mr. Tait's injuries.

Background

[2] The defendants concede that Mr. Tait suffered injuries in all three accidents. They say that Mr. Tait suffered the most significant injuries in the 2007 accident, and that the 2009 and 2010 accidents just caused a minor exacerbation of those injuries. The defendants say that the injuries caused by the accidents were mild to moderate diffuse soft tissue injuries to the neck, shoulder and back.

[3] The accidents occurred on October 9, 2007, October 23, 2009, and May 15, 2010. The 2007 accident occurred at No. 4 Road and Blundell in Richmond; the 2009 accident occurred on Quebec Street in Vancouver; and the 2010 accident occurred on 72nd Avenue in Surrey.

[4] The 2007 accident was an intersection accident. Mr. Tait's vehicle was proceeding through the intersection and was struck on the side by a left-turning vehicle. The accident caused significant damage to both vehicles involved in the collision. In each of the 2009 and 2010 accidents Mr. Tait's vehicle was rear ended. The rear end accidents caused minor damage to the vehicles involved.

[5] Mr. Tait is 42 years old. He was born in Jamaica and immigrated to Canada as a teenager. He completed grade 10 in Jamaica, and started working as an automobile mechanic. After he came to Canada, Mr. Tait attended Richmond Secondary School and did some upgrading at Kwantlen College, but he has no degree or diploma. Since leaving school, he has worked as an automobile mechanic.

[6] At the time of the 2007 accident, Mr. Tait worked at Autowizard. He had been working at Autowizard on a permanent basis since 2005. He continues to work at Autowizard, but says as a result of the ongoing symptoms in his neck and back, he has reduced the number of hours he works.

[7] Mr. Tait was in three earlier motor vehicle accidents in 2000, 2001, and 2002 which caused injuries to his neck and back, as well as headaches and mood disorder. Medical reports were filed from Dr. Birch and Dr. Herschler for prior actions which summarize his health complaints as a result of those accidents.

[8] The evidence is that Mr. Tait had fully recovered from the injuries he sustained in the prior accidents before the 2007 accident, and was working without problems, and without assistance.

Credibility and Reliability of Evidence

[9] The defendants submit that Mr. Tait's evidence regarding the way the 2007 motor vehicle accident occurred and the extent and ongoing nature of his injuries should not be accepted because he was not a forthright witness.

[10] The defendants assert that Mr. Tait's evidence should not be accepted because he was not consistent in reporting his symptoms to the doctors involved in his care and who conducted independent medical examinations. They submit that the way Mr. Tait described his limitations to the doctors, compared to the findings of those doctors on objective and distraction based testing, is a good indicator of the inherent unreliability of his evidence. As a result, the defendants say that Mr. Tait's evidence that he has suffers ongoing soft tissue injuries long past a reasonable time for healing of those injuries should be viewed very cautiously. However, in my view Mr. Tait was fairly consistent in reporting his symptoms. In my view, the evidence the defendants referred to does not support their contention that Mr. Tait is unreliable in his reporting to various doctors he has seen.

[11] As well, the defendants point to inconsistencies in Mr. Tait's evidence between direct and cross-examination in the trial, and between his examination for

discovery evidence and his evidence at trial. They also point to the fact that his evidence was that his sound system he used for his disc jockey hobby was worth $70,000 and say that the photographs of the system do not support that value. They say Mr. Tait's statement to ICBC that he was working more than eight hours a day and sometimes 16 when he was healthy, and his evidence at his examination for discovery that he was working five days a week, eight hours a day was not borne out by the employment records produced by Autowizard. They submit that the records indicate Mr. Tait was working less than that – an average of 32.75 hours per week – in the year prior to the 2007 accident.

[12] In my view, the inconsistencies the defendants point to are minor in nature and do not support the defendants' contention that Mr. Tait's evidence should be viewed with suspicion. There is no valuation of his sound system, and his evidence is that the pictures did not show all of the components, including speakers and wiring.

[13] The defendants' main argument regarding Mr. Tait's credibility is that he advanced claims arising from prior motor vehicle accidents which occurred in 2000, 2001, and 2002 and made a spontaneous and unexpected recovery following the accidents. They say this was in spite of opinions from his doctors that he would suffer from some long term partial disability. The defendants argue that it is reasonable to infer that the same type of recovery will occur from the injuries he sustained in these three accidents, particularly since Mr. Tait's complaints were more severe and the prognosis was more pessimistic following the prior accidents.

[14] However, the medical evidence does not support the defendants' contention that Mr. Tait made a spontaneous and unexpected recovery. Rather, the evidence is that Mr. Tait made a gradual recovery from his injuries after the prior accidents. The fact that there was concern at one point that he may not fully recover, and subsequently he did recover fully, does not in my view impact Mr. Tait's credibility.

[15] Overall I found Mr. Tait to be a credible witness who gave his evidence in a forthright manner.

Liability

[16] The only accident in which liability is in issue is the 2007 accident. For the following reasons, I find that accident was caused by the negligence of the defendant, Gloria Dumansky, in turning left when it was unsafe to do so.

[17] The relevant statutory provisions in the *Motor Vehicle Act*, R.S.B.C. 1996, c. 318 are:

> 128 (1) When a yellow light alone is exhibited at an intersection by a traffic control signal, following the exhibition of a green light,
>
> > (a) the driver of a vehicle approaching the intersection and facing the yellow light must cause it to stop before entering the marked crosswalk on the near side of the intersection, or if there is no marked crosswalk, before entering the intersection, unless the stop cannot be made in safety'
> >
> > ...
>
> 170 (1) If traffic may be affected by turning a vehicle, a person must not turn it without giving the appropriate signal under sections 171 and 172.
>
> (2) If a signal of intention to turn right or left is required, a driver must give it continuously for sufficient distance before making the turn to warn traffic.
>
> ...
>
> 171 (1) Subject to subsection (2), if a signal is required a driver must give it by means of
>
> > (a) his or her hand and arm,
> >
> > (b) a signal lamp of a type approved by the director, or
> >
> > (c) a mechanical device of a type approved by the director.
>
> ...
>
> 174 When a vehicle is in an intersection and its driver intends to turn left, the driver must yield the right of way to traffic approaching from the opposite direction that is in the intersection or so close as to constitute an immediate hazard, but having yielded and given a signal as required by sections 171 and 172, the driver may turn the vehicle to the left, and traffic approaching the intersection from the opposite direction must yield the right of way to the vehicle making the left turn.

[18] In *Pacheco (Guardian of) v. Robinson* (1992), 75 B.C.L.R. (2d) 273 (C.A.) at para. 15, the court noted that a left turning driver has a duty to yield to oncoming traffic and to ensure that she can make the turn safely: At para 18, the court stated:

> In my opinion, when a driver in a servient position disregards his statutory duty to yield the right of way and a collision results, then to fix any blame on the dominant driver, the servient driver must establish that after the dominant driver became aware, or by the exercise of reasonable care should have become aware, of the servient driver's own disregard of the law, the dominant driver had a sufficient opportunity to avoid the accident of which a reasonably careful and skilful driver would have availed himself. In such circumstance any doubt should be resolved in favour of the dominant driver.

[19] In determining whether the dominant driver was or should have been aware, the time that is relevant is the time immediately preceding the collision: *Raie v. Thorpe* (1963), 43 W.W.R. 45 (B.C.C.A.).

[20] Ms. Dumansky submits that the evidence establishes that the accident was caused by Mr. Tait, who entered into the intersection on an amber light as she was attempting to make a left hand turn to clear the intersection.

[21] However, Ms. Dumansky's evidence as to how the accident occurred did not make sense. Just prior to the accident, Mr. Tait's vehicle was travelling southbound on No. 4 Road in Richmond in the lane closest to the center. Ms. Dumansky's evidence is that she was waiting in the intersection to turn left. She observed a vehicle slowing in the centre lane and decided to turn left. Her evidence is that the vehicle she saw slowing was not Mr. Tait's vehicle and that she never saw his vehicle prior to the collision.

[22] Ms. Dumansky had no recollection of how the accident occurred, although she recalls she was turning left. She did not know where her vehicle ended up after impact. There is no evidence of any other cars being in the centre lane or at the intersection at the time of the accident.

[23] Ms. Dumansky speculated that Mr. Tait's vehicle might have been in the curb lane before the collision. However, the resting positions of the vehicles after the accident are not consistent with that submission. The only recollection Ms. Dumansky has of the accident is that just prior to the accident she increased her speed and turned left because the light had turned amber and she wanted to clear the intersection.

[24] Ms. Dumansky did not give a statement to the police or to ICBC following the accident. The first time gave her version of how the accident occurred was after Mr. Tait's action against her was commenced. As stated earlier, her version of events does not make sense, and is based entirely on speculation. In my view, no weight can be given to her evidence of how the accident occurred.

[25] I accept Mr. Tait's evidence that he was in the centre lane, he entered the intersection when the light was green, and that the accident happened when he was in the intersection as it is consistent with the positions of the vehicles after the collision and the damage to the vehicles.

[26] Mr. Tait's uncontradicted evidence is that Ms. Dumansky's left hand signal light was not on. His evidence is that Ms. Dumansky's vehicle was approaching the intersection with no signal on and she unexpectedly turned left in front of him. Ms. Dumansky's evidence is that the collision happened immediately upon her turning left. The timing of the accident is consistent with Mr. Tait's evidence that the accident occurred when he was in the intersection.

[27] Although Ms. Dumansky relied on a police note from the scene of the accident that Mr. Tait's son had said his father entered the intersection on an amber light, it is apparent from reviewing the note and the son's evidence that the son was not in a position to observe the colour of the light or where the cars were. The son was 10 years old at the time and sitting in the back seat of the vehicle. The police note shows that the son thought Ms. Dumansky's vehicle came from the curb lane on his side of the street prior to the accident. It was clear from the son's evidence that he has no recollection of the accident, and was scared by the accident. In my view, no weight can be placed on his evidence or what he told the police at the scene.

[28] In my opinion, the evidence establishes that the accident was caused by Ms. Dumansky's negligence in turning left when it was unsafe to do so. Ms. Dumansky has not satisfied the onus of establishing that Mr. Tait was contributorily at fault for the accident.

Non-Pecuniary Damages

[29] Mr. Tait asserts that he suffered injuries to the muscles and ligaments of his neck and back in the motor vehicle accidents, and that he is suffering from ongoing pain and limitations as a result of those injuries. Mr. Tait submits that the consensus from the medical experts, who have considered all of the accidents and the resulting injuries, is that he will suffer from pain and continued dysfunction into the future.

[30] Mr. Tait says he continues to suffer from headaches, neck pain, shoulder pain and leg pain which is aggravated by his participation in physical activities, including the physical aspects of his job. Mr. Tait takes the position that the appropriate award for non-pecuniary damages is between $75,000 to $90,000.

[31] The defendants concede that Mr. Tait sustained soft tissue injuries in the accidents. However, they say that Mr. Tait has not met the onus of establishing anything but mild to moderate soft tissue injuries to his neck and back. The defendants assert that the appropriate award for non-pecuniary damages is between $30,000 to $50,000.

[32] The defendants rely on *Price v. Kostryba* (1982), 70 B.C.L.R. 397 (S.C.) for the proposition that where there is little or no objective evidence of continuing injury, the court should be careful in weighing the evidence.

[33] The defendants submit that Mr. Tait's claim that he suffers from ongoing and debilitating pain must be viewed with great scepticism due to the inconsistency of Mr. Tait's reporting, and his history of rapid and spontaneous recovery after the prior accidents.

[34] The defendants assert that the evidence shows that since the accidents, Mr. Tait has been able to engage in a significant number of activities. He returned to work 10 months after the 2007 accident and had his best earning month ever in April 2009. He is presently working only slightly less than he did before the 2007 accident. He has performed as a disc jockey, and attends night clubs on a regular basis.

According to Dr. Arthur, an expert in orthopaedic surgery retained by the defendants, Mr. Tait's musculature is indicative of a good level of fitness.

[35] Mr. Tait submits that he sustained injuries to his muscles and ligaments in the accidents which have had prolonged effects on him and have limited the activities he can do. Mr. Tait asserts that he is partially disabled as a result of the injuries he sustained in the accidents, and will suffer from pain and continued limitations into the future.

[36] It is a basic principle of tort law that the plaintiff must be placed in the position he or she would have been in if not for the defendant's negligence, no better or worse. The tortfeasor must take his or her victim as they find them, even if the plaintiff's injuries are more severe than they would be for a normal person (the thin skull rule). However, the defendant need not compensate the plaintiff for any debilitating effects of a pre-existing condition which the plaintiff would have experienced anyway (the crumbling skull rule): *Athey v. Leonati*, [1996] 3 S.C.R. 458 at paras. 32-35.

[37] In this case, all of the medical evidence is that Mr. Tait has suffered a moderate soft tissue injuries to his neck, shoulder and back. Although Mr. Tait's symptoms have not completely resolved, and he still experiences flare-ups when he overexerts himself physically, the consensus amongst the medical experts is that Mr. Tait will likely have further improvement.

[38] Dr. Arthur, the defendants' expert, opined on March 17, 2010, that Mr. Tait is partially disabled at this point, but should be able to get back to full duty and full hours. At trial, Dr. Arthur said he was of the opinion at that time that Mr. Tait should have been able to get back to full time duties in two to four months after he examined him if he carried out an active rehabilitation program. In cross-examination he explained that did not mean Mr. Tait would not have ongoing complaints after two to four months.

[39] Dr. Birch, Mr. Tait's family doctor, provided an expert report and testified. In his report of July 25, 2011, Dr. Birch diagnosed Mr. Tait with muscle tension headaches and neck, shoulder, upper, mid and low back sprain and strain with significant muscle spasm. The injuries were caused by the 2007 accident and aggravated by the accidents in 2009 and 2010. As of July 23, 2011, Mr. Tait was noted to be tender to palpation in both shoulders, upper, mid and low back bilaterally with some intermittent pain radiating down his right leg. The range of motion in Mr. Tait's neck and low back were both moderately restricted in all directions. Although Dr. Birch expected some further improvement of Mr. Tait's symptoms, his prognosis for full recovery is poor because of the number of injuries impacting the same area.

[40] Although Dr. Arthur testified that he found Mr. Tait's musculature evident of a good degree of fitness, Dr. Birch disagreed that his musculature indicated that. Dr. Birch described Mr. Tait as having a muscular physic regardless of whether he worked out. Dr. Birch testified that Mr. Tait did a physical job, and that he looked strong but had ongoing problems.

[41] Dr. Craig, an expert in physical medicine and rehabilitation, retained by Mr. Tait, provided a report and testified. Dr. Craig diagnosed Mr. Tait with moderate soft tissue injuries to his neck and shoulder girdle, and lower thoracic and upper lumbar regions of his back as a result of the 2007 accident. The symptoms were aggravated by the injuries from the 2009 and 2010 accidents. In Dr. Craig's opinion, Mr. Tait was more susceptible to a poorer outcome from the accidents because of the number of prior motor vehicle accidents and the prolonged period of recovery after those accidents. Dr. Craig opined that Mr. Tait could expect moderate improvement with further treatment. In his opinion, Mr. Tait had no limitations in his ability to participate in his activities of daily living or to do his household activities. Dr. Craig expected that with further treatment, Mr. Tait would be able to do all of his household activities without significant symptoms. However, given the number of injuries to his neck and back there is a reasonable probability that Mr. Tait will continue to have some long term symptoms in his neck and back that will limit him with heavier tasks or working full time as an automobile mechanic.

[42] Mr. Murray, Mr. Tait's massage therapist, testified that Mr. Tait had shown improvement following the accidents, and that he expected continued improvement based on Mr. Tait's response to the treatments.

[43] Two lay witnesses testified regarding their observations of Mr. Tait, both before and after the accidents. Their observations are consistent with the medical evidence.

[44] Paul Thomas has been friends with Mr. Tait for a number of years and participated with him in his disc jockey hobby. Mr. Thomas helped Mr. Tait build the sound system he uses as a disc jockey and was going to act as his manager for when Mr. Tait started up a business doing shows. He describes Mr. Tait as being very energetic in 2007 prior to the accident. After the accident, Mr. Thomas has observed that Mr. Tait is much less energetic and does not participate in the same way in the activities they did together prior to the 2007 accident. In particular, they have not been able to start the disc jockey business they had hoped to start. In his view, Mr. Tait had shown some improvement following the 2007 accident, but the last accident in 2010 knocked Mr. Tait for a loop and has really slowed him down. As well, Mr. Thomas testified that Mr. Tait's mood was not as positive as before the 2007 accident.

[45] Mr. Iranshad is Mr. Tait's employer since 2004. He testified that prior to the 2007 accident, Mr. Tait was able to do the heavier work of being an automobile mechanic but since the accident he requires help with the heavier work. As well, since he returned to work following the 2007 accident, he has worked reduced hours.

[46] In my view, the evidence establishes that Mr. Tait is suffering from ongoing symptoms of headaches, neck, shoulder and back pain as a result of the motor vehicle accidents. The evidence is that there has been ongoing improvement, with occasional flare-ups due to physical exertion, and that there should be additional improvement.

[47] Mr. Tait and the defendants have provided me with a number of cases to assist in determining the appropriate award for pain and suffering. As stated earlier, Mr. Tait submits that an award for general damages of $75,000 is appropriate, and that the range is $75,000 to $90,000. The defendants submit that their authorities support an award for general damages in the range of $30,000 to $50,000. I have considered the authorities presented by the parties. As in most cases, there are aspects of the decisions which are helpful, but they also have features which distinguish them from this case.

[48] In *Stapley v. Hejslet*, 2006 BCCA 34, the court noted that a non-pecuniary award will vary from case to case to meet the specific circumstances of the case, stating at para. 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:
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> (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).

[49] Mr. Tait relies on *Gosal v. Singh*, 2009 BCSC 1471; *Neumann v. Eskoy*, 2010 BCSC 1275; *Grigor v. Johal*, 2008 BCSC 1823; *Schnare v. Roberts*, 2009 BCSC 397; *Kaleta v. MacDougall*, 2011 BCSC 1259; and *Bergman v. Standen*, 2010 BCSC 1692, to support his assertion that the appropriate range of damages is $75,000 to $90,000.

[50] The defendants rely on *Burton v. ICBC*, 2011 BCSC 653; *Hill v. Durham*, 2009 BCSC 1480; *Zrnoh v. Stauber*, 2009 BCSC 944; *Chan v. Lee*, 2008 BCSC 594; *Travis v. Kwon*, 2009 BCSC 594; *Willing v. Ayles*, 2009 BCSC 1035; and *Dewitt v. Takacs*, 2008 BCSC 314, to support their assertion that the appropriate range of damages is $30,000 to $50,000.

[51] Having considered the extent of the injuries, the fact that the symptoms are ongoing for four years with some improvement but with periods of exacerbation, the fact that the prognosis for full recovery is somewhat guarded, as well as the authorities I was provided, I am of the view that the appropriate award for non-pecuniary damages is $60,000.

Past Loss of Earning Capacity

[52] Compensation for past loss of earning capacity is to be based on what the plaintiff would have, not could have, earned but for the injury that was sustained: *Rowe v. Bobell Express Ltd.*, 2005 BCCA 141 at paras. 28-30; *M.B. v. British Columbia*, 2003 SCC 53 at para. 49.

[53] The burden of proof of actual past events is a balance of probabilities. An assessment of loss of both past and future earning capacity involves consideration of hypothetical events. The plaintiff is not required to prove these hypothetical events on a balance of probabilities. The future or hypothetical possibility will be taken into consideration as long as it is a real and substantial possibility and not mere speculation: *Athey v. Leonati* at para. 27.

[54] The defendants acknowledge that the following disability periods are reasonable: 10 months following the 2007 accident, four months following the 2009 accident, and two weeks after the 2010 accident. They say that any award for past wage loss should be confined to those periods, which amounts to $30,029.30.

[55] Mr. Tait points to the fact that not only was he unable to work at all for the periods of time identified by the defendants, but that he has missed considerable time from his employment since he has returned to work.

[56] The evidence is that as a result of the injuries he sustained in the accident, Mr. Tait has reduced his hours when working, including leaving early and calling in sick because he was unable to do the physical elements of his job. Mr. Tait submits that his loss of employment income (gross) from the date of the 2007 accident is $63,254.

[57] While it is apparent that Mr. Tait missed time from work, apart from the time when he could not work at all as a result of his injuries, his figures for income loss are based on a yearly income of approximately $31,000. The pre-accident employment figures presented by Mr. Tait do not support that as an annual income. His annual income from employment for 2006 was $24,285 and for 2005 was $18,643. While he may have made slightly more money in 2007 but for the accident, it is apparent that the available work at Autowizard fluctuated.

[58] In my view, a more appropriate figure to base his income loss on is $27,500. Based on a potential income of $27,500, Mr. Tait's past income loss is $45,754 gross. Section 98 of the *Insurance (Vehicle) Act*, R.S.B.C. 1996, c. 231, provides a person is only entitled to the net income loss. In the event the parties are not able to agree on the net amount, they may seek further directions from the court.

Future Loss of Income Earning Capacity

[59] Mr. Tait asserts that he has suffered a loss of future income earning capacity. He relies on a functional capacity evaluation which was performed by Mr. Worthington-White. Mr. Worthington-White concluded that Mr. Tait is capable of performing some of the demands required of work as a mechanic, but is not suited for all of the physical demands and postures required to do the work. Mr. Tait says as a result of the injuries, there is a substantial possibility he will suffer a future income loss in the range of $100,000 to $125,000.

[60] The defendants take the position that there is no merit to Mr. Tait's claim that he will be unable to work full time as an automobile mechanic at Autowizard in the future. They point to the fact that Mr. Iranshad testified that it was his intention to

keep Autowizard open for a long time and he plans to keep Mr. Tait as an employee, despite his absences following the accidents.

[61] In *Perren v. Lalari*, 2010 BCCA 140, Garson J.A. noted that a plaintiff must always prove that there is a real and substantial possibility of a future event leading to an income loss prior to an assessment of the loss being undertaken. She stated at para. 30:

> Having reviewed all of these cases, I conclude that none of them are inconsistent with the basic principles articulated in *Athey v. Leonati*, [1996] 3 S.C.R. 458, and *Andrews v. Grand & Toy Alberta Ltd.*, [1978] 2 S.C.R. 229. These principles are:
>
> > 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].

[62] In *Gregory v. Insurance Corporation of British Columbia*, 2011 BCCA 144, the court discussed the assessment of an award for a loss of future income as follows:

> [32] In my view comparator cases are of limited utility in the assessment of awards for future losses, generally. It is well settled that an individual's earning capacity is a capital asset: *Parypa v. Wickware*, 1999 BCCA 88 at para. 63. An award for future loss of earning capacity thus represents compensation for a pecuniary loss. It is true that the award is an assessment, not a mathematical calculation. Nevertheless, the award involves a comparison between the likely future of the plaintiff if the accident had not happened and the plaintiff's likely future after the accident has happened: *Rosvold v. Dunlop,* 2001 BCCA 1 at para. 11; *Ryder v. Paquette*, [1995] B.C.J. No. 644 (C.A.) at para. 8. The degree of impairment to the plaintiff's earning capacity depends upon the type and severity of the plaintiff's injuries and the nature of the anticipated employment at issue.
>
> [33] In valuing the award, the judge must consider the likely duration of the plaintiff's prospective working life and must account for negative and positive contingencies which are unique to each case. The final award must be fair and reasonable in all the circumstances. This assessment requires a very fact-intensive, case-specific inquiry. I am persuaded by what Macfarlane J.A. said in *Lawin v. Jones*, 98 B.C.L.R. (2d) 126, [1994] B.C.J. No. 2107 at para. 35, about the lack of utility in comparisons to other cases:
>
> > [G]iven the fact that we cannot foresee the future, it is impossible in a case like this to find any comfort in resort to other cases where the future may be more predictable. Judges will differ, perhaps widely, in making assessments in cases

> which have been said to depend on what may be seen in a crystal ball. What is certain is that a trial judge who hears and observes the witnesses is in a much better position than an appellate judge to come to a conclusion as to what is fair and reasonable in the circumstances. ...

[63] Mr. Tait asserts that he has demonstrated a substantial possibility that he has lost capacity to earn income in the future. As stated earlier, Mr. Tait relies on a functional capacity evaluation and vocational assessment report prepared by Mr. Worthington-White, which found that he did not meet all of the requirements for the physical demands of his job as an automobile mechanic.

[64] The defendants argued that no weight could be put on Mr. Worthington-White's report because Mr. Tait's subjective reports were questionable. However, as stated earlier, I found Mr. Tait to be a credible witness. Mr. Worthing-White stated in his report that Mr. Tait's self reports of the effect of pain on his functioning were consistent with clinical measures of functional abilities and limitations, and that overall test results were considered an accurate reflection of his current durable physical capacity.

[65] Dr. Craig stated in his report that there was a reasonable probability that Mr. Tait will continue to have some long term symptoms in his neck and back that will limit him with heavier tasks or working full time as an automobile mechanic.

[66] Mr. Iranshad testified that he saw Mr. Tait struggling with aspects of his job. Mr. Tait testified that he had to make accommodations such as having co-workers assist him with the heavier work. It is clear from the evidence of Mr. Tait and Mr. Iranshad that being an auto mechanic is physically demanding. Although Mr. Iranshad testified that he would keep Mr. Tait employed as long as he owned Autowizard, Mr. Iranshad has already taken time off for personal reasons. If Mr. Iranshad is not there, Autowizard does not open.

[67] In the event that Autowizard closes, there is a substantial possibility that Mr. Tait will have difficulties finding employment where his work requirements could be accommodated and he would suffer a loss of income.

[68] Given the somewhat guarded prognosis, I agree Mr. Tait has established there is a real and substantial possibility he may not be able to continue to work full time, or at all, in his job which would lead to an income loss.

[69] Turning next to the assessment of his loss, it is my view that since Mr. Tait is continuing to work in his position, the earnings approach is not appropriate, and the capital asset approach is more appropriate.

[70] In *Perren v. Lalari* at para. 11, the court confirmed that the approach to be taken for a future loss of earning capacity in situations where the loss, though proven, is not measurable in a pecuniary way, is the one set out in *Brown v. Golaiy* (1985), 26 B.C.L.R. (3d) 353 (S.C.) at p. 4:

> The means by which the value of the lost, or impaired, asset is to be assessed varies of course from case to case. Some of the considerations to take into account in making that assessment include whether:
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> 1. The plaintiff has been rendered less capable overall from earning income from all types of employment;
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> 2. The plaintiff is less marketable or attractive as an employee to potential employers;
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> 3. The plaintiff has lost the ability to take advantage of all job opportunities which might otherwise have been open to him, had he not been injured; and
>
> 4. The plaintiff is less valuable to himself as a person capable of earning income in a competitive labour market.

[71] In conducting the analysis under this head, the court then has to consider the contingences, both positive and negative, which are applicable in arriving at a final sum.

[72] In my view, Mr. Tait has established that there is the possibility he will not be able to work full time or at all doing the very physical job of being an automobile mechanic in the future, that he has been rendered less capable overall from earning income from all types of employment, less marketable and attractive as a employee, and may not be able to take advantage of all job opportunities. As well, it was evident from his testimony that Mr. Tait is less valuable to himself as a result of his diminished capacity.

[73] However, there are also positive contingencies to be factored in. The evidence is that Mr. Iranshad plans to continue to employ Mr. Tait. At this time, Mr. Tait is able to perform most of his job functions. There is the possibility, based on the medical evidence, that Mr. Tait will have some improvement of his symptoms, or at least pain control which will allow him to continue to function in his current position and increase his hours of work.

[74] Having taken the positive and negative conditions into account, as well as the evidence as a whole, it is my view that the appropriate award for future loss of earning capacity is $50,000.

Future Care Costs

[75] All of the doctors, including the defendants' expert, recommend that Mr. Tait receive further medical treatment and rehabilitation so that his symptoms will improve. Mr. Tait advances a claim for $32,500 for cost of future care.

[76] The defendants assert that the only cost of future care that should be allowed is the cost of a six week active exercise program as recommended by the physiotherapist for $2,700.

[77] Cost of future care is established if there is a medical justification for the claim, and the claim is reasonable: *Aberdeen v. Zanatta*, 2008 BCCA 420 at para. 42.

[78] In his claim, Mr. Tait advances items such as yard maintenance, vocational counselling, massage therapy, etc. While the doctors agree that further rehabilitation is required, they recommend active as opposed to passive rehabilitation. In my view, an award under this head of damages for active therapy and medication is appropriate. Having considered the amounts advanced, I have concluded that the appropriate award under this head of damages is $10,000.

Special Damages

[79] Mr. Tait is advancing a claim of $8,803.71 under this head of damages. The defendants do not agree that the cost of the massage therapy is reasonable or warranted in light of the conclusions of a number of the experts that passive treatment is ineffective past the acute stage of recovery. They say that $4,820.92 is a more reasonable amount to be awarded for special damages.

[80] Although a large portion is for massage therapy, that was recommended by Dr. Birch and Mr. Murray. A plaintiff is entitled to rely on the advice of his treatment providers: *Johnson v. Leasing Inc*., 1991 CanLII 220 (B.C.S.C.).

[81] In the circumstances, I am of the view that Mr. Tait is entitled to recover the full amount of his claim for special damages.

Mitigation

[82] The defendants submit that any award should be reduced because Mr. Tait has failed to mitigate his damages by attending Karp Rehabilitation. As well, they say Mr. Tait did not follow the recommendation of Dr. Arthur in January 2011 to attend physiotherapy. The defendants point to the fact that Dr. Arthur was of the opinion that Mr. Tait would be able to return to work full time in two to four months after the completion of an exercise program.

[83] There is no question that every plaintiff has an obligation to take reasonable steps to reduce the damages flowing from a tort. In order to be successful in discharging the burden of proving that Mr. Tait has failed to mitigate, the defendants must establish that Mr. Tait failed to undertake a recommended treatment, that by following the recommended treatment Mr. Tait would have overcome the problem, and that the refusal to take the treatment was unreasonable: *Janiak v. Ippolito*, [1985] 1 S.C.R. 146 at 162-163; *Maslen v. Rubenstein* (1993), 83 B.C.L.R. (2d) 131 at paras. 10-11 (C.A.).

[84] Mr. Tait said that he attended Karp but that the treatments were exacerbating his symptoms rather than improving them. Both Dr. Birch and Dr. Craig testified that

a patient has to have some pain relief before an active exercise program will assist them. Dr. Birch opined that the “no pain no gain” philosophy is not an appropriate one.

[85] When counsel suggested to Dr. Birch that Mr. Tait should have continued at Karp and that would have increased his chances of recovery, Dr. Birch did not agree. There is no evidence establishing that if Mr. Tait had attended Karp more often his injuries would have been completely resolved at an earlier date. Dr. Arthur’s evidence is that Mr. Tait would still have discomfort. Although the defendants rely on what Dr. Arthur advised Mr. Tait regarding ongoing exercise programs, Dr. Arthur could not recall specifically telling Mr. Tait he should do more exercise.

[86] As well, Mr. Tait’s explanation as to why he did not continue to attend Karp as often as recommended is reasonable. His evidence is that the treatments were causing more exacerbation of his symptoms. In the circumstances, the defendants have not established on the balance of probabilities that Mr. Tait has failed to mitigate his damages by not attending the full program at Karp.

Apportionment

[87] The defendants sought an apportionment among the accidents in the event that there was a finding of contributory negligence on Mr. Tait for the first accident. Given that I concluded the accident was caused by the negligence of Ms. Dumansky, there is no need to apportion cause of the injuries between the accidents.

Conclusion

[88] In summary, I find Ms. Dumansky at fault for the 2007 accident. I have awarded the following amounts to Mr. Tait:

- Non-pecuniary damages - $60,000
- Past loss of income - net taxable amount of $45,754

- Future loss of income earning capacity - $50,000
- Future cost of care - $10,000
- Special damages - $8,803.71
- Total: $174,557.71, less tax

[89] Mr. Tait is entitled to pre-judgment interest on both the past loss of income and the special damages. As well, he is entitled to his costs at Scale B, subject to submissions.

"Gerow J."

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Tait v. Dumansky,*
2012 BCSC 332

Date: 20120314
Docket: M094095
Registry: Vancouver

Between:

Anthony Tait

Plaintiff

And

Gloria Dumansky and Harvey Dumansky

Defendants

- and -

Docket: M112079
Registry: Vancouver

Between:

Anthony Tait

Plaintiff

And

Asacia Naomi Biln-Armstrong

Defendant

- and -

Docket: M112080
Registry: Vancouver

Between:

Anthony Tait

Plaintiff

And

Gordon William Henry

Defendant

Before: The Honourable Madam Justice Gerow

Corrigendum to Reasons for Judgment

Counsel for the Plaintiff:	K.L. Simon
Counsel for the Defendants in all three actions:	A. Leoni
Place and Date of Trial:	Vancouver, B.C. October 17-21; December 7, 2011
Place and Date of Judgment:	Vancouver, B.C. March 6, 2012
Date of Corrigendum:	March 14, 2012

[1] In the first sentence of paragraph 1 of my reasons for judgment released 6 March 2012 (2012 BCSC 332), the reference to Alexander Tait is corrected to read "Anthony Tait".

"Gerow J."