

Date: 19970429
Docket: B940866
Registry: Vancouver

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

RANDALL BRENT MONAHAN

PLAINTIFF

AND:

**MERVIN JOHN NELSON and
KATHY LORRAINE NELSON**

DEFENDANTS

AND

Docket: B940867
Registry: Vancouver

BETWEEN:

RANDALL BRENT MONAHAN

PLAINTIFF

AND:

**DOUGLAS BROOKS OLDHAM, BURNABY METRO LIMO LTD.,
JOHN STEWARD MULDER, POT MU WONG, SHU CHUAN CHANG,
and WALLACE STANLEY HAROLD BRADLEY**

DEFENDANTS

SUPPLEMENTARY REASONS FOR JUDGMENT

OF THE

HONOURABLE MR. JUSTICE COULTAS

Counsel for the Plaintiff:

F.G. Potts
Timothy J. Delaney

Counsel for the Defendants:

Douglas A. Nuyts
E. Tutiah

Place and Dates of Hearing:

Vancouver, B.C.
May 6 - 10, 1996
September 30, 1996
October 1 - 4, 1996
November 8, 1996
December 13, 1996

[1] On April 11, 1997, I handed down Reasons for Judgment awarding non-pecuniary damages, past wage loss and past special damages. I said I would hand down Supplementary Reasons on the issue of future economic loss. These are they.

[2] The following awards of damages for future economic loss rest on these findings of fact and conclusions:

- 1) Had Mr. Monahan not been injured in the accidents, he would have continued to work as a long-haul truck driver until age 65.
- 2) But for brief periods, after March 1992 he has continued to drive, coping with constant back pain, assisted by analgesics taken with alcohol to relieve pain.
- 3) On many occasions he has felt too ill to drive but has done so because he needed the money.
- 4) He has not received back rehabilitation or physiotherapy.
- 5) He continues to drive an elderly cab/over tractor, providing but little protection for his back, along Interstate 5, a notoriously rough ride. He has been driving that route for many years.

6) He is a poor candidate for successful retraining. He does not wish it. He has a grade 10 education. He has never been academically inclined, doing poorly in school. He had then and still has a poor memory and he does not retain what he reads. In 1991, he enrolled in night courses to obtain his grade 12 equivalency, did poorly and gave it up without qualifying. By nature he is solitary; he prefers to work alone and for himself. He is physically disabled - he is restricted to medium, preferably light strength work. He is best suited for work that does not require sustained periods of sitting or standing. Ms. Borycki found that if he does retrain, the training should not exceed one year. If he left his employment, he would qualify for work obtainable by a 40 year old physically disabled man with a grade 10 education. He has had two occupations in his life; in his teenage years he was a labourer in a mill and since, he has driven large transport trucks.

7) He has no interest in doing anything else. His work has given him pleasure and provided a good income. Since the accident the pleasure has been diminished.

8) He will continue his present work until he is no longer physically capable of it. No medical person can predict if and when that will be, nor can he, nor can I.

9) He knows the longer he delays retraining, the more difficult it will be if he is ever compelled to it, and the delay will diminish his chances of obtaining work should he retrain.

10) It is possible, indeed probable, that in the future his condition will prevent him working with the same intensity he has all his life. It is possible that he will be compelled to reduce the number of trips he takes, and to change the character of the loads he carries, which will reduce his income. I expect he will lose work time when his pain exacerbates. He is now 40 years of age, still a young man engaged in physically demanding work. He has called upon his 'grit', determination and economic need to get through, but these may not be enough as he ages and his condition deteriorates.

Mr. Dorion, President of Five Star Trucking, the plaintiff's broker, spoke of the demands of the business.

Q Have there been longer trips available to him in the past when you haven't given them to him?

A I could say yes, I could say no. It's just -- it depends on what time of the day he's phoned, who's phoned and who's in town and what loads are up on the books and everything else. It's something that you can't just gauge, you know; but if there is, like, a load of lumber with tarps or something like that and Randy's in, and say one of my other drivers, Dennis is in and there's a container load, then Randy usually gets the container load and Dennis get the tarp loads.

Q Is there anything else that you can do to accommodate him with his employment?

A No. Like I said, it's trucking. You just go with the flow. Whatever's there, you got to sort of do it.

11) It is substantially possible that in the future he will have to give up his present work entirely. (When I speak of "possibilities" I have in mind the majority decision in **Steenblok v. Funk** (1990), 46 B.C.L.R. (2d) 133 (C.A.) at page 136.)

12) It is in his and the defendants' interests that he continue to drive so long as he can.

[3] What is the minimum necessary to enable him to continue driving and to derive more enjoyment from his life?

[4] First, he needs rehabilitation from a physiotherapist specializing in back disorders. It may help, then again it may not, but the doctors and vocational experts have recommended he have it. If it proves helpful, I expect he will have to exercise constantly the rest of his life.

Second, he must drive a tractor that provides him maximum comfort. Much time at trial was taken up with the issue of an "adaptive vehicle," in this case a replacement for his 1981 tractor, which is old but in excellent condition. His vehicle has been described in my earlier Reasons. Mr. Monahan has

searched for and been unable to find a conventional cab model the age of his.

[5] His tractor is deficient in three respects. First, being a cab/over vehicle, it is high off the ground making it difficult for a driver with back problems to get in and out of. Second, he has to crawl into and out of the sleeper and it has no standing room. Third, a cab/over tractor gives a much rougher ride than a conventional model does. The last problem could be alleviated by installation of adaptive air ride equipment, but the other two deficits cannot be overcome.

[6] Mr. Monahan has found newer, used conventional cab tractors that would be suitable if certain adaptive equipment were installed - an efficient but costly seat and a front air ride tractor suspension.

[7] I find that the cost of a used conventional air ride vehicle should be provided him. However, the cost of it will reduce the award of damages for future loss of income; the plaintiff concedes that is appropriate.

FUTURE LOSS OF INCOME

[8] Robert Sandy of Coopers Lybrand prepared a future loss of earnings calculation based on three scenarios given him by Mr.

Potts, plaintiff's counsel. These are his calculations based on the plaintiff's earnings in the years 1991 - 1994:

Scenario A

Assuming the plaintiff will be unemployable after the date of trial due to the injuries suffered in the accidents, the net present value of loss of earnings is:

\$810,610.00

Scenario B

Assuming the plaintiff will be unable to continue working as an independent trucker after the date of trial, but able to work as a part-time delivery driver earning \$10.00 per hour, the net present value of loss of earnings is:

\$593,050.00

Scenario C

Assuming the plaintiff will continue to work on a full-time basis until April 2001 (five years after the trial date) and for the subsequent five years, until May 2006, be able to work 50% of the time due to the deteriorating condition of his back and thereafter be unemployable, the present value of loss of earnings is:

\$510,531.00

[9] To arrive at these figures Mr. Sandy calculated Mr. Monahan's average net income for the years 1991 - 1994 to be

\$44,711.00. That income is considerably more than Mr. Monahan declared on his tax returns for those years. Mr. Sandy had access to Mr. Monahan's expense and earning records. To arrive at the plaintiff's average net income, Mr. Sandy added into income, personal and non-business expenses that had been deducted from Mr. Monahan's annual income statements. Those expenses include personal vehicle expense, home office and personal expenses.

[10] There is a difficulty with Mr. Sandy's calculations. He assumed that Mr. Monahan would continue to pay a monthly brokerage fee of \$700.00 indefinitely. That assumption cannot be made. The brokerage fee is the amount Mr. Monahan pays to Five Star Trucking for assigning him work. Before joining that firm in 1993, Mr. Monahan was paying 25% of his gross revenue by way of a brokerage fee. Mr. Dorion testified that the brokerage fee Five Star charges is the lowest in the industry - the customary fee ranges between 15 - 30%. Mr. Dorion is 49 years of age and does not plan to continue in the business "many more years"; he expects to retire early. If he does, it is unlikely that Mr. Monahan will find as fortunate an arrangement elsewhere.

[11] Mr. Sandy was asked to calculate Mr. Monahan's average net earnings in the years 1991 - 1994 assuming that he was paying a brokerage fee of 22.5%. He arrived at the figure of \$30,299.00 simple average and \$32,397.00 weighted average.

[12] The difficulty in using a 22.5% brokerage calculation is obvious - one cannot predict how long Mr. Dorion will continue in business and one cannot predict, either, what another, buying that business would charge, assuming there was a purchaser for it.

[13] The plaintiff does not seek to be compensated on the basis of any of the three income loss scenarios advanced by Mr. Sandy.

[14] In *Pallos v. Insurance Corporation of British Columbia* (1995), 100 B.C.L.R. (2d) 260 (C.A.), Finch, J.A. gave the majority judgment. He reviewed the governing principles emanating from earlier decisions with respect to loss of earning capacity. He said, at page 267:

The plaintiff also contends that in limiting his consideration to the test set out in *Steenblok v. Funk* (supra), the trial judge overlooked another, and more appropriate, test in claims of this sort. Counsel referred us to *Brown v. Golaiy* (13 December 1985), Vancouver Reg. No. B831458 (S.C.); *Andrews v. Grand & Toy Alberta Ltd.*, [1978] 2 S.C.R. 229, 83 D.L.R. (3d) 452, [1978] 1 W.W.R. 577, 8 A.R. 182, 3 C.C.L.T. 225, 19 N.R. 50; *Earnshaw v. Despins* (1990), 45 B.C.L.R. (2d) 380 (C.A.); and *Palmer v. Goodall* (1991), 53 B.C.L.R. (2d) 44 (C.A.).

In addition to those cases cited by counsel, I would also refer to *Kwei v. Boisclair* (1991), 60 B.C.L.R. (2d) 393 (C.A.). There Mr. Justice Taggart quoted with approval from *Brown v. Golaiy* (supra) as follows at pp. 399-400):

"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:

1. The plaintiff has been rendered less capable overall from earning income from all types of employment;
2. The plaintiff is less marketable or attractive as an employee to potential employers;
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."

In **Palmer v. Goodall** (supra) Madam Justice Southin said at p. 59:

Because it is impairment that is being redressed, even a plaintiff who is apparently going to be able to earn as much as he could have earned if not injured or who, with retraining, on the balance of probabilities will be able to do so, is entitled to some compensation for the impairment. He is entitled to it because for the rest of his life some occupations will be closed to him and it is impossible to say that over his working life the impairment will not harm his income earning ability.

In **Earnshaw v. Despins** (supra) Madam Justice Southin said (at p. 399):

In my opinion, the true questions the jury must address in a claim such as this are:

1. Has the plaintiff's earning capacity been impaired to any degree by his injuries?
2. If so, what amount in the light of all the evidence should be awarded for that impairment?

As Dickson J., as he then was, said in **Andrews v. Grand & Toy (Alta.) Ltd.**, [1978] 2 S.C.R. 229 at 251 ...

"It is not loss of earnings but rather, loss of earning capacity for which compensation must be made... A capital asset has been lost: what was its value?"

In catastrophic injury cases, the whole of the capital asset is lost. But there may be much less serious injuries which cause permanent impairment although the loss cannot be determined with any degree of exactitude.

The learned judge ought to have addressed the question as one of impairment and pointed out that there was evidence of a limitation on earning ability. The jury might well have rejected the plaintiff's inordinate claim but appreciated that there are jobs now closed to the plaintiff which, as he grew older, he might have chosen and given him something more for that and future care than slightly under \$12,000.

As I have said, this difficulty with the charge was not raised by counsel for the plaintiff with the learned trial judge. Indeed, he did not raise it before us.

It does not appear that the trial judge had his attention drawn to any of these cases, or to the approach they suggest. These cases all treat a person's capacity to earn income as a capital asset, whose value may be lost or impaired by injury. It is a different approach from that taken in *Steenblok v. Funk* (supra), and similar cases, where the court is asked to determine the likelihood of some future event leading to loss of income. Those cases say, if there is a "real possibility" or a "substantial possibility" of such a future event, an award for future loss of earning may be made. There is nothing in the case law to suggest that the "capital asset" approach and the "real possibility" approach are in any way mutually exclusive. They are simply different ways of attempting to assess the same head of damages, future loss of income. It is to be regretted that plaintiff's counsel did not advance the case at trial using both approaches, in the alternative.

[15] I rest my award of damages for future loss of income on these conclusions - as he ages it is probable Mr. Monahan will be compelled to work less and change the character of the loads he carries to accommodate his back condition. There is a real

possibility that he will have to give up his work entirely. If he does, he will be ill prepared for the marketplace - physically disabled, with a grade 10 education and no work experience save for long distance hauling.

[16] **AWARDS OF DAMAGES**

1. Cost of Future Care

a) Prescription and non-prescription

drugs, back supports \$2,500.00

b) Physiotherapy

- included is the cost of a one-on-one physiotherapy program and continuing

physiotherapy as needed \$2,500.00

- work loss due to physiotherapy program -

10 days at \$433.00 a day \$4,330.00

c) Adaptive Equipment \$50,000.00 (less

\$12,500.00 trade-in value of his tractor) \$37,500.00

I adhere to the view of Dr. Thompson that the plaintiff would be best served by a personal physiotherapist in preference to treatment at the Canadian Back Institute.

2. Future Loss of Income

\$175,000.00

The award for future loss of income takes into account the award under the heading of Cost of Future Care for the cost of an "adaptive vehicle." But for that, the award for future loss of income would have been that much greater.

[17] **IN SUMMARY**

For future economic loss, I award:

| | |
|---|---------------------|
| Cost of Future Care, including adaptive vehicle | \$46,830.00 |
| Future Loss of Income | <u>\$175,000.00</u> |
| TOTAL | |
| <u>\$221,830.00</u> | |

[18] **COSTS**

Costs follow the event.

"Coulter, J."