No. 148/83
Prince George Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN: SLOBODAN MICHAEL PERRI POPOVIC PLAINTIFF AND: LESLIE JAMES EPTON and MACKAY LOGGING LTD. DEFENDANTS AND: INSURANCE CORPORATION OF BRITISH COLUMBIA THIRD PARTY	REASONS FOR JUDGMENT OF THE HONOURABLE MR. JUSTICE McKAY

D. E. Jenkins, Esq.
D. Byl, Esq. — for the plaintiff

R. C. Gibbs, Esq. — for the Defendant

T. V. Cole, Esq. — for the Third Party

Dates and place of trial: April 12 and 13, 1984 at Prince George, B.C.

The plaintiff, now aged 48 years, was injured on October 4, 1982, when he was crushed between two stationary vehicles parked on the side of a highway. The vehicles were pushed together when one of them was struck by a vehicle owned and driven by the defendant.

The action was discontinued as against MacKay Logging Ltd. Apparently it was thought that MacKay Logging Ltd. was the owner of the vehicle driven by the defendant Epton but this was cleared up prior to trial. Counsel for Epton conceded that he was not insured at the time in question and that the third party is entitled to recover as against Epton for any damages and costs paid to the plaintiff as a result of these proceedings.

On the day in question one Wayne Motts was driving his vehicle, a station wagon, in a westerly direction on Highway #16 towards Prince George. A water pump problem developed and he pulled off to the side and parked. He hitchhiked to Prince George with a view to getting a replacement pump and prevailing on one of his friends to drive him back to effect repairs. The vehicle was parked off the travelled portion and did not constitute a hazard. Motts arrived in Prince George and picked up a replacement pump. He prevailed upon one Bob Latto to drive him back to the station wagon — the plaintiff went along to help in the replacing of the pump. When they arrived at the scene Motts drove his pickup truck over the centre line — across the westbound lane and parked with his vehicle facing the front of the station wagon. A police officer, one Constable Wade, was present when the pickup arrived — he had been checking the parked station wagon. The officer testified that it was about 8:00 or 8:30 p.m. when the pickup arrived. He said the vehicles, when parked, were about five metres apart. That both were parked on the north shoulder although there may have been a slight protruding onto the travelled portion. In his opinion the vehicles did not constitute a hazard for westbound traffic. He said it was dark with a slight overcast but that visibility was good. He said that a driver travelling in a westerly direction, as the defendant

eventually did, would be on a straight and level road for about 1-1/2 kms prior to the accident scene. The westbound lane was 3.8 metres wide with a shoulder just slightly over two metres. The officer ascertained the intentions of the three men and then drove off. He said that as he drove off there were no lights on the station wagon and the pickup headlights were on.

The three men started to work on the water pump with the plaintiff at the front of the station wagon and the other two at the sides. The hood was up and they had two flashlights for illumination. All three were firm in their evidence that at the time of the accident the pickup truck headlights were off and the 4-way flashers were operating. They were less clear as to the state of lighting on the station wagon. Motts, the owner of the station wagon, insisted that his 4-way flashers were operating and that the interior lights were on. Latto testified that he told Motts to activate his 4-way flashers but could not say whether he did so. The plaintiff testified that there was some lighting on the station wagon but he could not say whether it was the parking lights, the 4-way flashers, or the interior lights.

There was evidence that as they worked there was traffic, including large trucks, passing in both directions without any trouble and without reducing speed. Suddenly, without warning, the station wagon was struck from behind forcing it up against the front of the pickup. The plaintiff's legs were crushed between the two vehicles. Motts got into the pickup, turned on the headlights and backed the vehicle up to free the plaintiff. The station wagon and the defendant's vehicle were not moved until the police arrived. It is apparent from the

photographs that the extreme left front of the defendant's vehicle struck the right rear of the station wagon.

The defendant, aged 41 years, a cat operator, had worked on the day in question and was on his way to Prince George for the evening. He said that he had a beer or two at the camp and stopped at a restaurant on the way at about 7:00 or 7:30 p.m. He drank another 2 or 3 beer with friends and left about 8:45 p.m. He drove for another 10 or 15 minutes. He said he saw a set of headlights coming at him in his lane of travel. He did not know what to do. He considered turning to the left into the other lane but was concerned that the oncoming driver would return to his proper lane. He said that he was slowing down when suddenly he saw the back end of the station wagon. He swung to the right and towards the ditch but the left front of his vehicle hit the right rear of the station wagon. He was firm in his evidence that the headlights of the pickup were on and his recollection is that the interior lights of the station wagon were illuminated. Constable Wade returned to the scene after being advised of an accident. He said that he quickly concluded that Epton was impaired from his mannerisms, slow slurred speech, odor of liquor and his general lack of concern about the accident. He told the officer that as he came over a rise (this would be 1-1/2 kms distance from the accident scene) he saw an oncoming vehicle swerving back and forth and that as he was trying to dodge the oncoming vehicle he struck the station wagon. About two hours later the defendant was required to provide breath samples for analysis — the readings were .07 and .08. On cross-examination the defendant admitted to about 19 convictions for impaired driving — he seemed rather proud of his accomplishment which he concluded must be near the Guinness Book of Records for such convictions. He was

a glib but unbelievable witness. I do not accept that the headlights were illuminated on the pick-up. He obviously had consumed more alcohol than he admitted to and failed to react properly to that which was in front of him until it was too late. I have had some difficulty in determining just what lights were illuminated on the two stationary vehicles. I accept that the headlights of the pickup were not illuminated and that the 4-way flasher lights were activated. As to the station wagon I am not satisfied that the 4-way flashers were activated but accept that there was some lighting — probably the interior lights. In any event the two vehicles did not create a hazard for any westbound driver with his wits about him. I hold the defendant fully responsible for the accident.

Dealing then with damages. The plaintiff is, as mentioned, 48 years of age, married with two children, aged 9 and 10 years. He came to Canada in 1958 from Yugoslavia. He worked at various jobs across the country — doing any work that was available. He came to Prince George in 1976 and again was employed at various jobs. He went into business as a cabinet-maker but the business went into bankruptcy. In 1979 a neighbor, Mr. Shelke, a principal of Shelby Logging, suggested that he purchase a skidder from Shelby Logging and operate it under contract with Shelby Logging. He did so and was so employed at the time of the accident. He sustained a fractured ankle in November of 1981 which laid him up for awhile but was fully recovered from that injury at the time of the injuries here under review.

The plaintiff underwent a great deal of pain when he was crushed between the two vehicles. He did not lose consciousness and there was a

considerable delay in getting him to the hospital. X-rays disclosed a fracture of the lower third of the left tibia and fibula and of the upper third of the left fibula. There was also an avulsion fracture of the right medial malleolus. An open reduction of the right ankle fracture and a closed reduction of the left tibial fracture were carried out. Two or three weeks later a remanipulation of the tibial fracture was carried out with pins being used above and below the fracture site. He remained in hospital for about four weeks and was discharged with casts on both legs. His discharge from hospital, at his insistence, was somewhat premature due to a serious weight loss of 60 pounds in 30 days. The right cast was removed in late December 1982 and the left cast was removed in February 1983. He received extensive physiotherapy. In May of 1983 he returned to the hospital to have the screw removed from his right ankle. Sometime in the fall of 1983 he returned to some light work but has never returned to his work as a skidder operator.

Various medical reports have been filed and all doctors seem to be in general agreement. I quote from the report of Dr. M.S. Piper, an orthopaedic surgeon:

> "As a result of my examinations of this gentleman, I have come to the following conclusions. There is no question that he sustained very significant injuries in the motor vehicle accident in which he was involved on the 4th of October 1982. I shall deal with these sequentially.
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> With regards to his left lower extremity, he sustained a really very significant comminuted fracture of the distal third of his tibia. This was treated conservatively. He did require remanipulation of this, however, the facture has gone on to heal in really very satisfactory position. Because of the comminuted nature of the fracture the limb has shortened approximately 1-1/2 cm.
>
> This very slight leg length discrepancy could, in the future, cause some slight increased susceptibility to back problems.

This could, if he became symptomatic, be resolved very well by the use of a shoe lift.

Because of the long period of immobilization in a long leg plaster of Paris cast, Mr. Popovic has developed some slight stiffness in his left knee. He has some very minor degenerative changes here which I think are attributable as much to his age as to the period of immobilization. These changes in themselves should in no major way limit his abilities to get about or to function.

He is left with some soft tissue scarring about the left lower extremity. These are only of a cosmetic significance.

With regards to his right lower extremity, there is no question that even prior to the November 1981 accident, he did have some mild degenerative changes in his ankle. These may very well have been asymptomatic. Subsequent to the fracture in November 1981 and the immobilization the undisplaced medial malleolar fracture did heal. There was no significant increase in the degenerative changes in the ankle joint noted on x-ray.

He sustained a displaced fracture of his medial malleolus in the accident of the 4th of October 1982. This was treated by an open reduction and internal fixation and immobilization in a cast. His fracture went on to heal and the screw was subsequently removed.

Radiologically the previously noted degenerative changes in the right ankle have progressed somewhat and I would attribute this progression to the latest injury. I do think that his presently limited range of motion in the ankle is probably due largely to the formation of the large anterior osteophyte. If he becomes progressively limited by this condition he might very well be benefited by a short surgical procedure to remove the anterior osteophyte. This "joint debridement" would probably disable him for no more than a month and he might very well be benefited by this.

I do not think he is going to have major progressive deterioration in the ankle joint in the future.

He is again left with soft tissue scarring in the right lower extremity which I believe is primarily of a cosmetic concern.

I do believe that in addition to the above mentioned injuries Mr. Popovic probably also sustained a tear of the posterior cruciate ligament of his right knee in the accident of the

> 4th of October 1982. He denies any major prior problems with the knee. In the accident of November 1981, he states that he had no real problems with the knee and in fact returned to his work in the spring of 1982, with no significant limitations.
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> He has clinical evidence of a posterior cruciate deficient knee. His complaints of occasional instability are in keeping with the physical findings. In addition, the early degenerative changes noted within the right knee are in keeping with significant ligamentous injury at the time of the accident in October.
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> I think that this particular condition is probably the most disabling of all of Mr. Popovic's injuries. Certainly with regards to his ability to climb over trees and stumps "in the bush" he will be limited. His knee is moderately unstable and he may have further problems with instability and giving way.
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> He might be benefited by a course of physiotherapy directed towards strengthening the muscles about his knee, however, he does have no significant muscle wasting on measurement today. He has early evidence of degenerative arthrosis within the knee and this may progress slightly in the future as well.
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> Were he considerably younger some consideration might be given to carrying out a ligamentous reconstruction on the right knee, however, I do not believe that this is indicated in a man of his age.
>
> I think he is certainly going to be fit to carry on his work as a carpenter-cabinet maker. I do think, as mentioned, that he may have problems in the future carrying on his work as a skidder in the woods."

Mr. Popovic says that because of his right knee he is unable to operate his skidder. That is consistent with the medical opinions and I accept it. His skidder is what is referred to as a line skidder which requires him to jump off and on the machine throughout the working day and as well to scramble over and around logs on rough terrain.

I am satisfied that he is now able to return to his work as a cabinet-maker and carpenter but he will, no doubt, suffer some discomfort from time to time. For non-pecuniary loss I allow the sum of $30,000.

The income loss to date of trial is difficult to quantify. During the 1982-83 winter logging season he was unable to work but did have his machine working with hired operators. In that period he paid out wages of $6,176.39 that he otherwise would not have paid. That amount is not in dispute. He claimed as well the sum of $5,000 for higher repair costs maintaining that hired operators do not look after the equipment as well as an owner operator does. That item is disputed.

In the summer season of 1983 he did not put the skidder out to work although work was available. He said the machine needed repairs but he could not afford to effect those repairs and as well he did not want to turn the machine over to incompetent operators. He claims the amount he says he could have earned by hiring on as an operator with Shelby Logging. Apparently Shelby Logging owns a number of skidders and hires people to operate them. That method of calculating his loss is totally unrealistic. He had never been hired in that capacity by Shelby Logging and Mr. Shelke indicated that the company had no difficulty in hiring operators as and when needed. Shelke said that the plaintiff as an operator was only of average competence. In my view a more realistic approach is to proceed from the known experience of the 1982-3 winter season when the plaintiff hired operators to run the machine.

In the winter 1983-84 season he could again have put the skidder to work by hiring operators but chose instead to rent the machine to Mr. Motts at a rental of $3,000 per month for a total of $11,500. I gather that Mr. Motts burned out the

transmission and the plainfiff is faced with repair costs of about $10,000. That, of course, is not to be attributed to the defendant's negligence. The rental return to the plaintiff would not be net to him but I have no figures to determine his net return.

It seems to me that I should proceed from the one known period — the 1982-3 winter season. The loss (putting aside the added repair costs) was $6,176.39. If the machine had been put out to work with hired operators during the 1983 summer season and the 1983-84 winter season then I would have expected somewhat the same loss — the cost of hiring operators. That amounts to $18,517. I accept that repair and maintenance costs would be higher with hired operators and have arbitrarily fixed those extra costs at $2,000 per working season for a total of $6,000. It is admitted that he lost $2,204.50 on an off-season carpentry job. He did do some carpentry work in 1983 for which he received between $7,000 and $10,000 — he cannot be more precise. Those earnings which I have arbitrarily fixed at $8,500 must be deducted.

In summary then:

Known extra wages in the 1982-3 winter season, and assumed extra wages in 1983 summer season and the 1983-4 winter season	$18,517.00
Added repair and maintenance costs of the skidder	6,000.00
Loss on off-season carpentry job	2,204.50
	$26,721.50
Less carpentry earnings in 1983	8,500.00
	$18,221.50

I allow the sum of $18,221.50 for loss of income to date of trial.

The plainiff claims as well for loss of future income or income earning capacity. There was evidence that the line skidder could be converted at a cost of $67,500 to a grapple skidder. The plaintiff claims that sum. The theory being that with a grapple skidder the plaintiff would not have to be jumping on and off the skidder and could activate the grapples from his seat at the controls — that with such a conversion he would, from a working point of view, be put back in the position that he was prior to the accident. It was apparent that this was a hastily conceived concept and of dubious validity. It seems to me that the plaintiff must adjust to the fact that he will no longer be able to work a skidder in the woods whether it be of a line type or a grapple type. I assume that he will continue to utilize his skidder by renting it out or by hiring operators. I assume as well that he will expand on his carpentry and cabinet making work. I accept that there is a loss of income earning capacity in that he must build up and expand on his carpentry work and that some types of carpentry work may be beyond his physical capacity. I allow the sum of $20,000 under this heading.

In summary there will be judgment for $68,221.50 made up as follows:

Non-pecuniary damages	$30,000.00
Loss of income to date	18,221.50
Loss of income earning capacity	20,000.00
	$68,221.50

interest - $3,300*

There will be pre-judgment interest on the sum of $48,221.50 from October 4, 1982 at the rate allowed from time to time by Registrars on default judgments. The plaintiff will have his costs. As already indicated the third party is entitled to the relief claimed against the defendant in the third party proceedings.

Vancouver, B.C.

May 9, 1984