

IN THE SUPREME COURT OF BRITISH COLUMBIA

Prince George, B.C.  
November 9, 1989

1 BETWEEN: )  
 2 )  
 3 DAVID ALLAN LOWRY )  
 4 )  
 5 PLAINTIFF )  
 6 )  
 7 AND: )  
 8 )  
 9 BENJAMIN DAVID KOT, )  
 10 REGINALD EDMOND KOT, )  
 11 and AILEEN JANICE HARCUS )  
 12 DEFENDANTS )

REASONS FOR JUDGMENT  
OF THE HONOURABLE  
MADAM JUSTICE HUDDART

13 D. BYL, Esq. appearing for the Plaintiff  
 14 P.M. PAKENHAM, Esq. appearing for the Defendants  
 15

16  
 17 THE COURT: (Oral) I am asked to assess the damages David Lowry  
 18 has suffered as a result of a motor vehicle accident that  
 19 occurred near Prince George on April the 25th, 1985. That  
 20 evening, Mr. Lowry's car struck another motor vehicle turning  
 21 in front of him, and the two struck a third stationary  
 22 vehicle. The parties come to court largely because they  
 23 cannot agree on whether the injuries suffered in the accident  
 24 have resulted in organic brain damage causing a decrease in  
 25 Mr. Lowry's psychomotor skills and magnifying emotional  
 26 problems which pre-existed the accident.

27 Mr. Lowry suffered a mild to moderate closed head

COPY

1 injury, as Dr. van Rijn described it, minimal nasal trauma,  
2 an undisplaced fracture of the pelvis and various cuts,  
3 bruises and scrapes. His concussion was considered to be  
4 severe immediately following the accident. He was in a coma  
5 after he was extracted from the collision scene. He  
6 recognized his family on the third day. He suffered cerebral  
7 edema, post-traumatic amnesia and a small amount of  
8 pre-traumatic amnesia. He was hospitalized for 11 days.  
9 Subsequently, he suffered low back pain and headaches.

10 He made a remarkable recovery. He was able to work at  
11 grinding a boiler during the mill shut-down during June and  
12 July of the same year. The pain from the pelvic fracture  
13 resolved within a month, and subsequently his nose has been  
14 repaired in day surgery. The new type of headache which  
15 developed after the accident and the low back pain have  
16 slowly been improving and will undoubtedly resolve in due  
17 course.

18 Dr. Johnson, his general physician who treated him until  
19 December the 17th, 1987, and Dr. Daly, who was the treating  
20 neurologist, consider that there will be no permanent  
21 consequences from any of the injuries. Dr. Daly says, and I  
22 quote from his report of August the 10th, 1987, which was  
23 based largely on a review of Mr. Lowry in his office on  
24 May the 28th:

25 "The effect of the head injury has steadily  
26 cleared. Other than a mild degree of  
27 imbalance I find no motor deficit. As  
reported by the family there is slight  
personality change and persistant memory

1 problems. I find very little problem  
2 myself. His recent memory seemed to be  
3 intact, as measured by his ability to give  
4 back the names of three dissimilar items at  
5 5 min. He also had no difficulty re-  
6 producing designs. The greater difficulty  
7 he had giving back the gist of a story I  
8 think reflects his pre-morbid abilities. I  
9 had the impression David's intelligence is  
10 border line normal and that he has always  
11 functioned at a fairly concrete level."

12 As a prognosis, he said:

13 "Further improvement is to be expected,  
14 and in view of the dramatic change already  
15 seen, it is likely that David will not be  
16 left with any significant residual deficit."

17 Dr. Kingston concluded his report of March the 9th,  
18 1988, this way:

19 "In summary, this 21 year old gentleman was  
20 involved in an MVA on the 25 of April 1987  
21 in which he sustained a moderately severe  
22 head injury. CT-scan showing cerebral  
23 edema. He made a good recovery from the  
24 accident. However, a number of stigmata  
25 remain, including frequent headaches, poor  
26 memory, difficulty in comprehending some  
27 conversations and recurrent low back pain."

As a prognosis, he said:

"During the time that I have known this  
gentleman as a patient, there has been  
further improvement in his overall condition  
and one may hope for further improvement  
still, over several months before he  
plateaus and no further improvement occurs."

The plaintiff's family were concerned that Mr. Lowry had  
suffered a personality change. They saw a very pleasant,  
willing worker, good father and husband, become  
temperamental, moody, impulsive, unable to make up his mind,  
having difficulty with his memory and the organization of his  
thoughts; that a person who was never violent, did not abuse

1 alcohol and only rarely found himself in trouble, had become  
2 a constant source of trouble for himself and others.

3 As a result of their concerns, he was thoroughly  
4 investigated by psychologists and a vocational consultant,  
5 with contradictory and largely inconclusive results. Most  
6 share Dr. Spellacy's "clinical hunch" that a person who has  
7 suffered a severe head injury must have some organic damage.  
8 Dr. Spellacy considers that the brain injury has left  
9 Mr. Lowry with sufficient permanent brain damage that a  
10 marginally employable young man is now less employable.

11 He suggested three consequences: the first, a decrease  
12 in intellectual functioning, that is a lower IQ from the  
13 low-normal range to borderline normal; secondly, a  
14 magnification of a pre-existing personality disorder which is  
15 probably the result of a deficiency of what Dr. Spellacy  
16 called intellect control, and what Dr. Crockett, who  
17 testified for the defendants, called executive control; and  
18 thirdly, mild motor dysfunction.

19 Dr. Crockett disagrees with Dr. Spellacy with regard to  
20 the decline in intellectual functioning, the only area in  
21 which he gave an opinion. He says that Mr. Lowry is  
22 performing intellectually consistently with his pre-accident  
23 level. He also considers that the variability in his test  
24 scores is inconsistent with organic brain damage.

25 Dr. Crockett did not give an opinion with regard to  
26 psychomotor skills, considering such a diagnosis to fall  
27 within the realm of a neurologist.

1           On the subject of cognitive or intellectual functioning,  
2 I prefer the opinion of Dr. Crockett. His analysis of the  
3 school records was more accurate than that of Dr. Spellacy.  
4 I am not persuaded that Mr. Lowry's cognitive functioning was  
5 affected by the brain injury on the whole of the evidence.

6           However, I prefer Dr. Spellacy's opinion to that of  
7 Dr. Crockett with regard to the exacerbation of a  
8 pre-existing personality disorder. In reaching that  
9 conclusion, I have considered Dr. Crockett's evidence, that I  
10 should be wary of the evidence of those emotionally attached  
11 to a person, for their evidence might be coloured by a  
12 changed perception of him. Certainly Mr. Lowry is not a  
13 person today who is easy to live with.

14           Drs. Spellacy and Crockett are clinical psychologists,  
15 particularly well qualified to administer and interpret tests  
16 designed to permit the diagnosis of organic brain damage.  
17 They found Mr. Lowry difficult to assess. I share that  
18 difficulty. It is clear that Mr. Lowry's performance at  
19 school and at work was affected by his relationship with his  
20 teacher or employer. He co-operated with those he likes,  
21 those who do not, as he said, put him down. He refuses to  
22 co-operate with those whom he does not like. I accept that  
23 he co-operated with Dr. Spellacy, whom he liked. It is  
24 likely that he did not co-operate so well with Dr. Crockett,  
25 who was testing on behalf of the defendant and who has a very  
26 different personality from that of Dr. Spellacy.

27           Mr. Lowry appeared to me to be a sincere young man. He

1 is good looking with a pleasant personality. He performed  
2 extremely well under both examination and cross-examination  
3 in this courtroom. The person I saw in this courtroom bore  
4 absolutely no resemblance to the person described by his  
5 mother and his wife, his father and his girlfriend. But  
6 essentially, he is probably the "sweet and considerate"  
7 person his former girlfriend Jill Medema described. He is  
8 also a person who has and probably had prior to the motor  
9 vehicle accident the significant personality disorder  
10 Dr. Spellacy identified, which he described as the inability  
11 to function adequately with other people.

12 The real problem is that a moody, temperamental,  
13 impulsive, easily distracted person who had difficulty  
14 getting along with unsympathetic teachers, employers and  
15 family before the accident, is now seen by his family as more  
16 moody and more temperamental; a young man who had difficulty  
17 making up his mind is now seen as having more difficulty  
18 doing so; a young man dependent on his physical abilities  
19 before the accident, not only for employment but also for  
20 self-esteem, now sees himself and is seen by his father as  
21 less capable.

22 I accept that while he will be able to obtain jobs, he  
23 will be less capable of keeping them. Remedial intervention,  
24 as seen by Dr. Crockett, is unlikely to help. Dr. Spellacy  
25 feels he may benefit from psychological counselling.  
26 Dr. van Rijn considers rehabilitation possible. Given the  
27 excellent performance of Mr. Lowry in the witness box, I

1 consider that with counselling for his psychological  
2 problems, he is likely to improve considerably.

3 Dr. Crockett agreed with Dr. Spellacy that Mr. Lowry is  
4 a distressed young man calling out for help. I saw him the  
5 same way. Thus he exaggerates his symptoms. He is anxious  
6 and depressed, perhaps severely so. His abuse of alcohol and  
7 his relationship problems with his wife and girlfriend  
8 complicate the picture.

9 His distressed emotional condition also complicates the  
10 assessment of his psychomotor performance. Richard Carlin, a  
11 vocational consultant, administered the General Aptitude Test  
12 Battery in November, 1988 and August, 1989. He considers  
13 that Mr. Lowry's below average psychomotor performance in  
14 those tests makes him not capable of working as a bucker or  
15 autobody helper, jobs I accept he performed to the  
16 satisfaction of his employer before the accident.

17 The test levels are consistent with tests Dr. Spellacy  
18 conducted. Although all of the testing may have been  
19 affected by fatigue and alcohol consumption, I accept that  
20 Mr. Lowry suffers a mild left-sided deficit.

21 The evidence of Mr. Lowry and his father persuade me  
22 that Mr. Lowry cannot work as efficiently as he did before  
23 the accident as a painter's helper. It is likely he would  
24 not be as efficient as a bucker or autobodyman's helper, two  
25 other jobs he did satisfactorily before the accident.  
26 However, he was able to work for Coast Testing and  
27 Stasuk Testing, grinding the boilers during the mill

1 shut-downs in June and July of 1987, in 1988 and again this  
2 spring. That is proof that he is capable of doing a  
3 labouring job sufficiently well to be rehired.

4 Can that decreased efficiency be attributed entirely or  
5 in part to the accident? Mr. Pakenham asks me to find that  
6 this reduced efficiency is the result of the marriage  
7 breakdown that preceded the accident by a few days and his  
8 continual difficulties in resolving that relationship and in  
9 carrying on a relationship with his son. Mr. Pakenham  
10 concedes that the brain injury has contributed to his  
11 decreased efficiency, but argues that because it is  
12 emotionally based, it is remediable.

13 Mr. Byl says that the evidence of Dr. Spellacy and  
14 Mr. Carlin establish on a balance of probabilities that  
15 Mr. Lowry's ability to hang on by his fingernails, as he put  
16 it, to reasonable employment as a bucker or painter or  
17 autobody worker has been lost because of the brain injury,  
18 that his potential income has been reduced from about \$25,000  
19 per year to about \$10,000 per year, and that he is entitled  
20 to be compensated for that loss.

21 The decline in Mr. Lowry's efficiency is probably the  
22 result of a combination of three factors: a mild decline in  
23 his psychomotor aptitudes, the low back pain, and his  
24 distressed emotional state. The latter two are likely to be  
25 resolved with time, and particularly, the end of this  
26 litigation and the resolution of his family problems. The  
27 psychomotor performance seems to have stabilized. I think it



1 probable that the brain injury contributed materially, if not  
2 greatly, to this decline. I also consider it probable that  
3 the accident caused the low back problem and exacerbated  
4 Mr. Lowry's emotional problems. For these effects on him, he  
5 must be compensated.

6 I look first to pecuniary damages and past wage loss.  
7 Mr. Lowry was not employed at the time of the accident, but  
8 he considered that he had a job to go to at eight dollars per  
9 hour. What he lost was the opportunity to take that job,  
10 which would have lasted at most eight months, and to seek and  
11 obtain other labouring jobs as he had in the years preceding  
12 the accident.

13 Given his emotional state immediately prior to the  
14 accident, the marginal grip he held on himself, the nature of  
15 his family problems and his previous work history, any award  
16 must contain a large element of speculation. It must be  
17 discounted for the significant possibility that separation  
18 would have interfered with his job-seeking.

19 The best base is his pre-accident annual earnings. In  
20 1985, including \$1,200 of Unemployment Insurance, he received  
21 \$4,500. In 1986, including \$3,800 of Unemployment Insurance,  
22 he earned \$9,700. In 1987, he earned \$1,300, following the  
23 accident. In 1988, he earned \$7,300, plus \$2,400 in U.I.C.,  
24 for a total of \$9,700. To date this year, he has earned what  
25 I estimate must be about \$1,000.

26 His sorry work history since October, 1988, is probably  
27 attributable to his psychological state generally, to his

1 abuse of alcohol and his relationship problems in particular,  
2 and to this ongoing litigation. Those reasons are  
3 inextricably interwoven, in my view.

4 For past wage loss, I consider that an appropriate award  
5 would be \$9,000, after taking account of what he has earned  
6 to date. That award should bear interest at the rates fixed  
7 by the Registrar for default judgments from time to time, and  
8 be allocated equally to the years 1987 and 1989, and for the  
9 purposes of the interest, on an average monthly basis during  
10 those years.

11 As to future wage loss, the loss of capacity to earn an  
12 income in the future is even more difficult to assess. I  
13 consider that there will be a significant lost capacity for  
14 one or two more years, and a permanent but smaller loss  
15 thereafter. Without the accident and the family break-up, my  
16 best estimate is that Mr. Lowry would have been irregularly  
17 employed at various labouring jobs totalling probably about  
18 eight months each year at a wage level about ten dollars an  
19 hour, to earn about \$14,000 per year.

20 After his family problems resolved and as he matured,  
21 his income might have increased to \$20,000 to \$22,000 per  
22 year. He would always have needed to work under the close  
23 supervision of an employer he liked and respected. The  
24 difference the accident has made is that for a couple of  
25 years, he is unlikely to attain \$15,000, but to be capable of  
26 making about \$10,000. As his emotional condition improves,  
27 he will likely achieve a higher level of income, but he is

1 unlikely to ever earn at a level much greater than \$20,000.

2 Mr. O'Grady says that the loss of \$1,000 equates to  
3 \$24,000 over his lifetime of work.

4 Taking all of those factors into account, I fix the  
5 appropriate compensation for his lost future earning capacity  
6 attributable to the injuries he suffered in the accident at  
7 \$50,000.

8 For general damages, I consider \$40,000 to be an  
9 appropriate award. That will take account of his loss of  
10 enjoyment of life, his pain and suffering, to date, and in  
11 the future. I base that on having read the cases that were  
12 given to me and considering that it was at the high end of  
13 the cases Mr. Pakenham presented and at considerably lower  
14 than the ones Mr. Byl presented, given the findings of fact,  
15 which are quite different from the ones in those cases.

16 The special damages have been agreed at \$5,717.25 to  
17 reimburse the Ministry of Health for hospital services, and  
18 \$4,716.94 to reimburse Mr. Lowry for the expenses he has  
19 incurred over the period of his recovery. In addition, of  
20 course, he is entitled to his costs.