SC No. 329/80
Prince George Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA



BETWEEN:

RALPH EDGAR MORASH

PLAINTIFF

AND:

W. RUSHTON CONSTRUCTION LTD. and WILLIAM FRANK RUSHTON

DEFENDANTS

REASONS FOR JUDGMENT

OF

HIS HONOUR JUDGE LOW

W. Glen Parrett Esq., — Counsel for the plaintiff
D. Byl Esq., — Counsel for the defendants

Dates of trial: — January 24,25,27,28,31 and March 16 & 17, 1983

Place of trial: — Prince George, B.C.

The plaintiff, a chiropractor now 39 years of age, injured the long finger of his right hand in an unfortunate accident in the garage of his home on March 23, 1980. While he was inspecting the large overhead door mechanism inside the garage praparatory to installing an automatic opener with a friend, Myron Sambad, who had not yet arrived, a large bracket holding the door spring in place suddenly and violently came away from the header over the door causing the finger injury. The plaintiff claims damages in tort against the personal defendant for negligent installation of the door mechanism. He claims against the corporate defendant in both contract and tort.

The personal defendant is the principal shareholder of

the corporate defendant. He did the installation on behalf of the corporate defendant and if he is liable the corporate defendant is vicariously liable.

Together with a Mr. Ali the plaintiff purchased the completed house from the corporate defendant by a standard interim agreement of purchase and sale on October 17, 1978. There was no building contract between the parties. The plaintiff and Mr. Ali took possession on December 1, 1978. Mr. Ali subsequently got married and moved out and in April, 1979 a Mr. Ruttan purchased Ali's interest. In April, 1980 the plaintiff purchased Ruttan's interest and became the sole owner of the premises.

On the day of the accident Mr. Morash was living in the home with Rhonda Nolan. Two children from his former marriage were visiting. He went to the garage in the early afternoon to prepare for the arrival of Mr. Sambad. With him was his son, Brent, then 10 years of age.

The plaintiff testified that he took some of the parts out of the box containing the automatic opener and may have looked at the instructions. He was concerned about the necessary ceiling clearance for the automatic opener and went part way up a step-ladder to visibly check. As he stood on the ladder to the left of the bracket and facing the door he looked to his left and steadied himself with his right hand probably on the large spring. He heard a groaning sound from which he recoiled and almost immediately there was an explosion. He either jumped to the floor or was propelled there. His finger was badly injured. It was probably struck by the spring or the bracket.

A series of photographs was taken a few days after the accident and later following repair and installation of the

automatic opener. They clearly show the way the door operates and what must have happened at the time of the accident. The overhead door is opened and closed by metal rollers that run in rails on either side. The rollers are connected by metal bars to a large metal spring. The spring sits on the inside of the door's header parallel to the header. When the door is closed (as it was at the time of the accident) the spring is tense. The spring is held in place by a large flanged bracket through which it passes. The bracket, at the time of the accident, was affixed over the door in about its centre. It is apparent that the groaning the plaintiff heard was the bracket coming away from where it was affixed. The explosion was the release of tension and the implanting of pieces of a wooden shim (to which the bracket had been screwed) into the gyproc ceiling of the garage. After the accident the spring and bracket were left hanging loosely across the upper part of the door. The plaintiff pleads that the defendants were negligent in not installing the bracket in such a way as to properly and adequately secure it to the header over the door. It is apparent from all of the evidence that the bracket was screwed to the shim (which Mr. Rushton used to bring the spring into proper alignment with the railings in which the rollers moved) and to the gyproc over the header but hardly, if at all, into the header itself.

The plaintiff called a Mr. Ramsay whose company is in the business of supply and installation of overhead doors. He has had considerable experience in this field including the repair of overhead doors that have failed. I found him to be a most careful and helpful witness and I accept the opinions he gave. It was Mr. Ramsay's opinion that the two bolts holding the bracket above the door should have been longer in order to affix the

bracket to the solid material of the header (which would have been a large solid or laminated beam) bearing in mind the fact that the weight of the heavy door was being totally supported by the bracket upon lifting of the door. In Mr. Ramsay's experience, if the bracket is not adequately secured to the header the bottom lag bolt will eventually come out with the pressure possibly bending the upper bolt slightly thereby holding the mechanism loosely in place and creating a dangerous situation. Once the bottom bolt is pulled off it is only a matter of time until the top one releases. The plaintiff's case in negligence is, therefore, that the bracket was not properly affixed to the header; that during 16 months of regular use of the garage door the bottom bolt came free and the bracket was insecurely held by the top bolt; that it was only a matter of time before the bracket came off completely; and that the plaintiff, being unaware of the danger, inadvertantly administered the coup de grace when he put slight pressure on the spring with his right hand in order to steady himself.

Mr. Rushton did not testify and the opinions of Mr. Ramsay were not seriously challenged or disputed. In addition, the plaintiff relies upon the examination for discovery evidence of Mr. Rushton which was read in. From that evidence the plaintiff proved that the door was purchased by the corporate defendant as a package and that in the manufacturer's instructions "you are ... to anchor them (the bolts) into the header". It is apparent that that instruction could not be complied with in this particular installation other than by using bolts longer than those included in the package, because of the thickness of the shim and the gyproc.

The position of the defendants is that the plaintiff must have done something himself to the mechanism to cause the

bracket to come away from the wall. The plaintiff testified that the accident happened almost immediately after he got up the ladder and that he had done nothing to the spring or bracket other than to put his right hand out to steady himself. He was challenged at length in cross examination but, in my opinion, to no avail. He denied that he had commenced to dismantle the apparatus preparatory to installing the automatic opener and he denied that he had any tools with him when he got on the ladder except for possibly a tape measure. Miss Nolan looked in the garage but did not clean it up after the accident. On the day of the accident or the following day Mr. Sambad inspected the garage and described the condition of the door mechanism. He saw no tools or tool box.

The defendants relied extensively on statements attributed to the plaintiff by medical witnesses who attended on him at the hospital. Dr. Dabbs saw the plaintiff in the emergency department and recorded him as saying that he was "busily attempting to repair the spring loaded mechanism on the garage door". At admission and three days later two different nurses recorded the plaintiff as saying that he caught his hand in the spring of the garage door. Similar statements appear in medical reports from two orthopedic surgeons. In my view, none of this evidence seriously calls into question the credibility of the plaintiff as to how the accident happened. The plaintiff doesn't recall specifically what he did say to the medical professionals he dealt with. What he told the nurses is really not inconsistent with his evidence. He is not in a position to say whether his finger was injured by the spring or by the bracket. Nothing really turns on that fact in any event. The statement recorded by Dr. Dabbs is difficult to explain but I would not base a credibility finding adverse to the plaintiff on it.

It is likely a summary of what was said by the plaintiff at the time and it must be remembered that while at the hospital the plaintiff was in considerable pain and was often subject to the effects of strong medication.

It is inconceivable that anything the plaintiff did in making his visual inspection could have caused the bracket to come off if it was still fixed flat against the header. The only reasonable inference to draw on the evidence is that, because the bracket was not afixed to the header securely enough, it worked its way loose over a long period of time and was hanging precariously, probably by the top bolt only, and only needed the light pressure applied by the plaintiff when he put his hand on the spring to fly apart completely. No other explanation for the accident emerges from the evidence.

I find as a fact that if the bolts penetrated the header they did so only minimally. On the basis of the admission by Mr. Rushton that the manufacturer specified that the bolts should anchor the bracket to the header and the opinion of Mr. Ramsay to a similar effect, I find that the defendants were negligent in not so affixing the bracket and that such negligence caused the accident. The bracket was not affixed in a way that a reasonably cautious and prudent builder would affix it.

Since this is not a case where damages are claimed for repair to the house itself arising out of unworkmanlike construction I do not think it is necessary to consider the breach of contract claim against the corporate defendant. The courts in this country and in England have wrestled for many years with the problem of the liability of builders arising out of unworkmanlike construction for damages for personal injury to initial purchasers, subsequent

purchasers, and visitors to the premises. The law appears to me to be well settled that builders are liable for such damage where it is caused by a construction defect not readily apparent to the occupier or temporary user of the premises. The principles enunciated in Donoghue v. Stevenson (1932) A.C. 562; (1932) All E.R. Rep. 1, relating to liability for hidden defects with respect to chattels have been extended to real property. The history of the issue is set out in the judgment of Lord Denning, M.R. in Dutton v. Bognor Regis United Building Co. Ltd. and another [1972] 1 All E.R. 464 starting at page 471:

> Counsel for the council submitted that the inspector owed no duty to a purchaser of the house. He said that on the authorities the builder, Mr. Holroyd, owed no duty to a purchaser of the house. The builder was not liable for his negligence in the construction of the house. So also the council's inspector should not be liable for passing the bad work. I would agree, that, if the builder is not liable for the bad work, the council ought not to be liable for passing it. So, I will consider whether or not the builder is liable. Counsel for the council relied on the case of Bottomley v. Bannister [1932]1 KB 458. That certainly supports his submission. But I do not think it is good law today.
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> In the 19th century, and the first part of this century, most lawyers believed that no one who was not a party to a contract could sue on it or anything arising out of it. They held that, if one of the parties to a contract was negligent in carrying it out, no third person who was injured by that negligence could sue for damages on that account. The reason given was that the only duty of care was that imposed by the contract. It was owed to the other contracting party, and to no one else. Time after time counsel for injured plaintiffs sought to escape from the rigour of this rule. But they were met invariably with the answer given by Alderson B in Winterbottom v. Wright (1842) 10 M & W 109 at 115.
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> > 'If we were to hold that the plaintiff could sue in such a case, there is no point at which such actions would stop. The only safe rule is to confine the right to recover to those who enter into the contract: if we go one step beyond that, there is no reason why we should not go fifty.'
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> So the courts confined the right to recover to those who entered into the contract. If the manufacturer or

repairer of an article did it negligently, and someone was injured, the injured person could not recover: see Earl v. Lubbock [1905] 1 KB 253, and Blacker v. Lake & Elliott Ltd. (1912) 106 LT 533. If the landlord of a house contracted with the tenant to repair it and failed to do it--or did it negligently--with the result that someone was injured, the injured person could not recover: see Cavalier v. Pope [1906] AC 428. If the owner of land built a house on it and sold it to a purchaser, but he did his work so negligently that someone was injured, the injured person could not recover: see Bottomley v. Bannister. Unless in each case he was a party to the contract.

That 19th century doctrine may have been appropriate in the conditions then prevailing. But it was not suited to the 20th century. Accordingly, it was done away with in Donoghue v. Stevenson [1932] AC 562, [1932] All ER Rep. 1. But that case only dealt with the manufacturer of an article. The cases of Cavalier v. Pope (on landlords) and Bottomley v. Bannister (on builders) were considered by the House in Donoghue v. Stevenson, but they were not overruled. It was suggested that they were distinguishable on the ground that they did not deal with chattels but with real property: see per Lord Atkin [1932] AC at 598, [1932] All ER Rep. at 19, and Lord Macmillan [1932] AC at 609, [1932] All ER Rep. at 25. Hence they were treated by the courts as being still cases of authority. So much so that in 1936 a judge at first instance held that a builder who builds a house for sale is under no duty to build it carefully. If a person was injured by his negligence he could not recover: see Otto v. Bolton & Norris [1936] 1 All ER 960, [1936] 2 KB 46.

The distinction between chattels and real property is quite unsustainable. If the manufacturer of an article is liable to a person injured by his negligence, so should the builder of a house be liable. After the lapse of 30 years, this was recognised. In Gallagher v. McDowell Ltd., [1961] NI 26, Lord MacDermott C.J. and his colleagues in the Northern Ireland Court of Appeal held that a contractor who built a house negligently was liable to a person injured by his negligence. This was followed by Nield J in Sharpe v. E.T. Sweeting & Son Ltd. [1963] 2 All ER 455, [1963] 1 WLR 665. But the judges in those cases confined themselves to cases in which the builder was only a contractor and was not the owner of the house itself. When the builder is himself the owner, they assumed that Bottomley v. Bannister was still authority for exempting him from liability for negligence.

There is no sense in maintaining this distinction. It would mean that a contractor who builds a house on another's land is liable for negligence in constructing it; but that a speculative builder, who buys land and himself builds houses on it for sale-- and is just as negligent as the contractor---is not liable. That cannot be right. Each must be under the same duty of care and to the same persons. If a visitor is injured

> by the negligent construction, the injured person is entitled to sue the builder, alleging that he built the house negligently. The builder cannot defend himself by saying: 'True I was the builder; but I was the owner as well. So I am not liable.' The injured person can reply: '1 do not care whether you were the owner or not. I am suing you in your capacity as builder and that is enough to make you liable.'
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> We had a similar problem some years ago. The liability of a contractor doing work on land was said to be different from the liability of an occupier doing the selfsame work. We held that each was liable for negligence: see AC Billings & Son Ltd. v. Riden, [1956] 3 All ER 357, [1957] 1 QB 46, and our decision was upheld by the House of Lords [1957] 3 All ER 1, [1958] AC 240; see also Miller v. South of Scotland Electricity Board, 1958 SC (HL) 20 at 37-38. I hold, therefore, that a builder is liable for negligence in constructing a house---whereby a visitor is injured---and it is no excuse for him to say that he was the owner of it. In my opinion Bottomley v. Bannister is no longer authority. Nor is Otto v. Bolton & Norris, [1936] 1 All ER 960, [1936] 2 KB 46. They are both overruled. Cavalier v. Pope has gone too. It was reversed by the Occupiers' Liability Act 1957, S 4 (f).

Although that case dealt with the right of a subsequent purchaser to recover for structural damage to the house itself, the above passage was clearly designed to deal as well with personal injury claims.

The Dutton case was anticipated by Richardson, J. in Lock & Lock v. Stibor et al (1962) 34 D.L.R. (2d) 704. In that case the female plaintiff was injured while visiting a new home recently purchased by friends from the builder when a kitchen cabinet fell from the wall and hit her on the neck. It was proved that the cabinet had been negligently installed creating a hidden danger. Donoghue v. Stevenson was referred to and the principle in that case applied. The judgment went on as follows at page 710:

> It is my view that, having considered the facts and the cases and the principles therein set out, in this particular case there was a duty upon the workman to take such reasonable care in doing the work that no injury or damage would be suffered by persons who might reasonably have been foreseen by such workman to be upon the premises as in fact the plaintiffs in this case were on the premises.

The Dutton case has been applied in British Columbia by Ruttan, J. in Smith & Smith v. Melacon (1976) W.W.R. 10 and by Esson, J. (now J.A.) in Windsor Building Supplies Ltd. et al v. Art Harrison Ltd. et al; (1980) 14 C.C.L.T. 129. In the latter case the following was said at page 150:

> It is now generally accepted in our law that builders can be held liable in negligence for loss suffered by subsequent owners and occupiers as a result of structural defects which cause personal injury or damage.

The Lock v. Stibor, Donoghue v. Stevenson and the Dutton and Smith cases where then referred to. At page 151 the following appears:

> The dictum of the Court of Appeal in Dutton v. Bogner Regis Urban Dist. Council, supra, was approved by the House of Lords in Anns v. London Merton Borough Council, [1978] A.C. 728, [1977] 2 All E.R. 492, in which case the question arose in the same way as it had in Bogner Regis.
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> The dicta in Bogner Regis and Anns were applied to hold a builder liable in negligence at the suit of subsequent owner in Batty v. Metro. Property Realizations Ltd., [1978] Q.B. 554, [1978] 2 All E.R. 445 (C.A.). There, the loss arose because the house was built in a location which was dangerous for reasons very similar to those which brought about the destruction of the building in this case.
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> In Rivtow Marine Ltd. v. Washington Iron Works, [1974] S.C.R. 1189, [1973] 6 W.W.R. 692, 40 D.L.R. (3d) 530, Laskin J., speaking for himself and three other members of the court, said at pp. 1220-21 (S.C.R.) and p. 551 (D.L.R.)
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> > "In brief, given the case of a manufacturer who is under a duty not to expose consumers or users of its products to an unreasonable risk of harm, (and I would place builders of houses under the same duty), what are the limits on the kind or range of harm for which liability will be imposed if there is a breach of duty?" (The italics are mine.)
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> That was said in a dissenting judgment, but there is nothing in the majority judgment of Ritchie J. which is inconsistent with the statement that builders of houses are under the same duty of care as manufacturers of products. I, therefore, take that as an authoritative statement that builders are under a duty not to expose those who occupy the building to an unreasonable risk of harm.

The volenti argument advanced by the defendants is without merit. Similarly, I can find no contributory negligence on the part of the plaintiff.

It was not argued by the defendants that the dangerous condition the bracket must have been in was or should have been apparent to the plaintiff but I think I must, nevertheless, deal briefly with that matter. The plaintiff's evidence was that he was looking to his left as he got part way up the ladder with the bracket to his right. I conclude that he did not direct his attention to the bracket and was not specifically aware of it. Nor would it ever reasonably occur to him to check the condition of the bracket before inspecting the rest of the mechanism. Had he noticed the condition of the bracket I am sure that he would have had the good sense to take some steps to release the tension on the spring before touching any part of the mechanism at all. When the bracket was installed during construction of the house the danger was completely hidden. It would have been apparent later only if one happened by chance to look at it. In that sense, it was still hidden. I don't think that situation makes the principle in the cases I have referred to any less applicable.

Both defendants are liable in tort.

The plaintiff's finger was severely fractured and lacerated with a part of the lower knuckle missing. He was seen by orthopedic surgeons in Prince George and Vancouver. In Prince George Dr. Crous performed an operation involving reconstituting the joint surface, fixing it with wires, and suturing. The plaintiff was released from hospital after a few days. There is no doubt that he had considerable pain and discomfort during his time in the hospital and subsequently. About two weeks after the accident he attempted to continue with

his practice but didn't get back to work on a regular basis for another four to six weeks. Five weeks after the accident he saw Dr. Gropper, who specializes in hand surgery, in Vancouver on referral from Dr. Crous. He recommended removal of the wires and active physiotherapy. The wires were later removed by Dr. Crous and a physiotherapy program was followed. There was no evidence developed as to the extent or duration of the physiotherapy or whether it accomplished anything.

Dr. Gropper was consulted again on September 29, 1980 at which time he noted slight swelling around the joint with, I think, a slightly improved range of motion. In April Dr. Gropper had noted a limited range of motion in all the fingers but by September there was full range of motion in all fingers except the fractured one.

Dr. Gropper was not consulted again. His report dated January 6, 1981 gives the following prognosis;

> The problem related to the right long finger was fully discussed with the patient. The major disability was related to stiffness and pain related to activity. This was felt to be due to loss of the articular surface of the metacarpal head, with possible early degenerative change in the metacarpal phalangeal joint. I suggested to the patient at that time that any decision for future surgery should be based more on pain in the hand then loss of range of motion. Because the major complaint was stiffness it was felt that only further observation was required at this time.
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> It is likely that in the future the patient will require further surgery to the right long finger metacarpal phalangeal joint but the timing of this surgery cannot be predicted at the present time.

In December 1980 Mr. Morash reported to Dr. Crous that he was working 4 to 5 hours a day with minor discomfort. He had good strength in the hand but still had difficulty with closing it because of the decreased range of motion.

The plaintiff received no further medical attention until he was seen by Dr. Crous shortly before the trial commenced. At this time he told the doctor that he was working 4½ to 5 hours a day. There was no significant change in the range of motion of the finger. X-rays at that time disclosed further disruption of the bone underneath the joint surface indicating arthritic change in the joint. It is the opinion of Dr. Crous that there is a strong probability that this will require surgery in the future. It was his evidence that for the stiffness of the joint an operation can be performed involving a soft tissue release. For the arthritic change, if it causes pain and disability, the joint can be replaced with a silastic prosthesis.

The first operation would involve full work loss for a period of 6 to 8 weeks and the second for a period of 3 to 4 months. It is not at all clear from the doctor's evidence whether it is likely that both of these operations will be needed. I think I must conclude that they are alternatives. However, it would appear that the prosthetic operation is more likely in view of the arthritic changes and in view of the fact that it would restore the range of motion to 75% of normal or better. With normal use the prostnesis should last 10 to 20 years but no opinion was elicited as to how long it might last for Mr. Morash as he continues to function as a chiropractor.

Dr. Crous discussed the prosthetic operation with the plaintiff in December of 1980. At that time it was felt by the plaintiff and probably by the doctor that the operation was not then necessary because he was working 4 hours a day and had only minor discomfort with good strength. Dr. Crous does not recommend surgical procedure now because there is no significant amount of pain.

The plaintiff testified that the injury has interfered with his ability to play golf and his enjoyment of that game. Before the accident he tried to play golf 5 to 6 times a week and I take it was quite successful in his attempts. Since the accident he says he has golfed 6 to 12 times per year and can't play the game in cool weather. Moist or cool weather causes his hand to ache. Shortly before the accident he took up the sport of racquetball and played every day. He has played 3 times since the accident but it causes his hand to throb. He did not say when he last tried to play racquetball. He also complains of lack of grip strength in the hand and tiredness when writing.

The most dramatic part of the plaintiff's claim is for lost earnings both past and future. Each week he works Tuesday through Saturday. Before the accident he worked 3 six hour days and 2 four hour days. He said that he saw about 40 patients per day and as many as 90 to 100 on Saturdays. He claims that his current office hours involve two 5½ hour days and 3 days of perhaps 4 hours each. I don't think that his total work week is substantially reduced. Neither his associate nor any member of his staff was called to substantiate the plaintiff's claim that he sees fewer patients now than he did before the accident. The plaintiff claims that because of fatigue and discomfort in his right hand as a result of performing the vigorous chiropractic technique he employs he is able to see less patients than before the accident thereby substantially reducing his yearly income. The defendants seem to pretty well concede that there was an interference with the plaintiff's income during the year of the accident and the calender year following but have vigorously contested the plaintiff's claim for lost earnings beyond the end of 1981 and in the future.

I was most unimpressed with the plaintiff's inability to assess in any objective way, much less any helpful statistical way, the impact of his injury on his ability to earn income. Rather than attempt to be of any real help to the court in assessing that matter he has preferred to rely almost entirely upon the hypothetical opinions of an actuary. I find the actuary's report and evidence in this matter to be not at all helpful in assessing damages in this case. I am not critical of the mathematics of finance employed by the expert. Rather, it is my opinion that no proper basis was laid through the evidence of the plaintiff or his accountant for the employment of actuarial principles to the assessment of damages in this case.

The actuary used the plaintiff's financial statements for the years 1975 to 1981 in making his calculations. The following table sets out the gross income, expenses, net income and fee per patient visit for those years:

| Year | Gross Income | Expenses | Net Income | Fee Per Visit |
|---|---|---|---|---|
| 1975 | $ 53,630 | $ 28,062 | $ 25,568 | $ 6.20 |
| 1976 | 69,283 | 42,889 | 26,394 | 6.50 |
| 1977 | 88,764 | 42,891 | 45,873 | 6.90 |
| 1978 | 91,666 | 61,271 | 30,395 | 7.20 |
| 1979 | 80,891 | 48,125 | 32,766 | 8.92 |
| 1980 | 78,264 | 53,547 | 24,721 | 12.00 |
| 1981 | 87,586 | 60,180 | 27,406 | 12.00 |

The 1979 fee per visit is a weighted average reflecting a fee increase from $7.75 to $12.00 for the last four months of that year.

The actuary submitted his report on November 23, 1982. He recalculated the above table in December, 1982 dollars and then used two approaches in calculating the earnings loss arising out of a comparison between the earnings in the years 1975 to 1979 inclusive and the earnings in 1980 and 1981. In the first approach

a rounded figure of $22,000 per year was arrived at as an estimate of earnings loss per year in December, 1982 dollars. This is referred to as the "low estimate". The second approach produces a figure of $53,000 dollars per year and is referred to as the "high estimate". The "low estimate" gives rise to a calculation of loss to date of the report of $59,700 and a capitalized value of future loss of $386,900 making a total of $446,600. The "high estimate" gives rise to a calculation of a loss to date of the report of $143,800 and capitalized value of future loss of $932,000 making a total of $1,075,800. I find that both of these figures are out of all reasonable and realistic proportion to the plaintiff's historical earnings, the nature of the injury (notwithstanding the plaintiff's vocation), and the very limited evidence the plaintiff was able to give about the nature of his practice.

I am persuaded that the plaintiff has been content throughout the presentation of his case to ignore the need to explain his business affairs in such a way as to persuade the court that he has a continuing income impairment. He seems to be content to rely entirely upon the actuarial report which, if accepted to any degree, is to his very great financial advantage. An example of this is to be found in his answers to cross examination questions on the actuarial report. It was suggested to him (quite reasonably, I think) that the "high estimate" defied common sense. His reply was that he was "surprised" at the figures but he was not an accountant or an actuary. He went on to say that the chiropractic method he employs is efficient and as many as two to three hundred patients per day can be handled. He said that the $53,000 per year loss is not impossible but "whether I would have achieved that level or not, I can't say". These answers are not honest for two reasons.

Firstly, he later said that it was never his goal to see two hundred to three hundred patients per day because his leisure time is important to him and he doesn't want that kind of lifestyle. Secondly, of all persons connected with this case Mr. Morash would know best, even on a casual consideration of the matter, whether the actuarial figures, particularly the high ones, have any logical connection with his business.

The plaintiff's attitude was further exposed during cross examination of him by counsel for the defendants when he was attmepting to get the plaintiff to quantify the interference with his income in terms of the number of patients he was seeing before the accident and the number he is currently seeing on a daily basis. The plaintiff was unable to give any such estimate for any time period. He was only able to say that there was no doubt in his mind that he saw fewer patients in 1982 than in 1979 but he didn't know how many fewer. He said it was "significant enough to have made an impression on me". When pressed he said that the loss in patient volume was more then one per day on the average but he didn't know if it was as many as five per day. Later he said that he saw less patients in 1982 then in 1979 "to the best of my recollection".

It was the position of the defendants throughout that the proper approach for calculation of income interference begins with a determination of the number of patients actually seen by the plaintiff in the years before and since the accident. To that end, the defendants have repeatedly attempted to secure discovery of the plaintiff's appointment books. None were forthcoming until after the trial commenced and then only for 1982. Apparently those for earlier years were not preserved. The plaintiff's accountant,

Mr. Sweeney, testified that of the gross professional income in each year approximately one third could be attributed to x-ray fees. Patients are x-rayed at the time of their initial visits and perhaps subsequently if a need arises. Therefore, the yearly total of patient visits can be calculated for each year by dividing two thirds of the gross income by the per visit fee applicable for that year. There was no challenge to the accuracy of this exercise in the plaintiff's argument in reply. Applying it to the financial information in the table set out above the following yearly patient visits are calculated:

| | |
|---|---|
| 1975 | 5,766 |
| 1976 | 7,105 |
| 1977 | 8,576 |
| 1978 | 8,487 |
| 1979 | 6,045 |
| 1980 | 4,348 |
| 1981 | 4,866 |

The plaintiff agreed in cross examination that the 1982 appointment books would accurately reflect the number of patients he saw in that year. Of course, I have not done a count but both sides were satisfied that the total number of appointments for 1982 was 6000. That is a significant increase over 1980 and 1981. It is equivalent to the number of patient visits in 1979 and greater than the number in 1975. It was fairly suggested to the plaintiff in cross examination that perhaps 1979 was lower in volume because it was the year of his divorce. The plaintiff was unable to say whether or not that was so to any extent and there is really no evidence as to why the volume was lower in 1979 or, for that matter, in 1975. Similarly, there is no evidence as to why it was higher in the years 1976 to 1978 inclusive. At no time did the plaintiff testify about any improvement in his ability to perform his work during 1982 over 1981, yet the statistics clearly

show a significant improvement. Furthermore, at the time of trial, evidence as to the plaintiff's gross and net earnings for 1982 was available and was not presented even though the plaintiff's accountant gave evidence. When asked in cross examination what his 1982 income was the plaintiff said he had no idea. I feel that I must draw a very strong inference against the plaintiff's contention that he has a continuing income interference as a result of the injury from the failure to produce evidence as to his 1982 income.

Before the accident the plaintiff and Miss Nolan (with whom he is no longer involved) gave serious consideration to moving away from Prince George. Of course,that would have involved a relocation of the plaintiff's chiropractic business. Recently the plaintiff has been making serious plans to move to the Island of Maui in the State of Hawaii. He has gone there to make arrangements and his home and business are for sale. Three or four days before the trial commenced the defendants applied for and were refused an adjournment. One of the principal reasons that counsel for the plaintiff opposed the adjournment was that it would delay and interfere with the plans of the plaintiff to move to Maui. It is probable that the plaintiff will not be practising chiropractory in Prince George much longer. No evidence was given as to his prospects of income in Maui. It was suggested that he would practise there but that he might teach chiropractory as well. These plans further demonstrate the lack of applicability of the actuarial evidence and tend to make the claim for future income loss somewhat speculative.

Except for the likelihood of a period of income loss as a result of future surgery, I find that the plaintiff has proved

no income loss after the end of 1981.

In September of 1979 the plaintiff opted out of the contract for fees between the B.C Chiropractic Association and the Medical Plan of B.C. in favour of fixing his own higher fees. Patients still recover from the medical plan but, in effect, have to pay a surcharge to the plaintiff. In 1980 the difference was $3.50 per visit and in 1981 it was $2.30 per visit. Those figures are for repeat visits. For initial visits the surcharge was $6.50 and $5.30. Other chiropractors in Prince George have not made the same election as the plaintiff. Patients can see them without suffering a surcharge. It is not possible to determine what effect this situation has had on the plaintiff's volume but I think it is reasonable to conclude that some patients would elect to go elsewhere.

It is apparent that the plaintiff's volume was lower during 1980 and 1981 as a result of the functional difficulties he had with his finger. His net income was reduced several thousand dollars in each of those years from the 1979 level. His gross income was not substantially reduced in 1980 and was higher in 1981 but that is attributable to the higher fees being charged in those years. Doing the best I can with the figures presented, notwithstanding the paucity of the plaintiff's explanatory evidence, I assess damages for lost income during 1980 and 1981 at $14,000. I assess damages for anticipated future wage loss arising out of the probable surgery at $7,000.

Having regard to the pain and discomfort associated with the injury and with recovery from it, the interference with the enjoyment of some athletic pursuits, and the extent of the permanent disability I assess general damages apart from loss of

earnings at $12,000.

Damages, therefore, total $33,000. Court order interest on all but the future wage loss of $7,000 is awarded from the date of the accident at 13%.

R.T. Low C.C.J.

May 17, 1983
Prince George, B.C.