

2006 Update on General Damages in Brain Injury Cases

TBI Quantum Assessments – An Overview of the cases in 2006. Analysis of the trends that can be identified in terms of the way damages are assessed, the evidence that has been persuasive and the application of the law in those cases.

This paper will update you on the decisions of the British Columbia Courts in the 2006 year regarding brain injury. This will include both an analysis of the factors which led to quantum decisions as it concerns general damages as well as identification of any trends in the awards. This paper will also provide an overview of the approach that the Court of Appeal has taken in 2006 on appellate review in brain injury cases.

In 2006 the Supreme Court of Canada

Malett v. Rosenau et al

- Dec. 1998 rear end type mva
- Plaintiff was a passenger in a flat bed truck that was not equipped with head rests. She was wearing her seat belt at the time of the impact. Although she does not recall this, her head apparently impacted the rear window, breaking it.
- Her recollection of events after the mva was hearing a bang, blackness, seeing stars and feeling pain. She recalls being in the ambulance but does not recall arriving at the hospital or how she got home from the hospital.
- Plaintiff's recollection of the collision itself varied from time to time
- Plaintiff was 38 at the time of the accident with no pre existing conditions which were relevant or of significance to this collision. Had a history of a brief period of depression related to a particular circumstance which resolved when the problem was rectified.
- Injuries included chronic pain syndrome to her head, neck and shoulder areas.
- An issue at trial was whether she sustained a mild tbi and whether she continues to suffer the effects of that injury, and if so, to what extent.
- Post mva also had complaints of problems with her speech, ringing in her ears, headaches, difficulty sleeping, poor energy, lack of motivation regarding appetite and sex drive, complaints of decreased concentration and memory deficits.
- In Feb. 2000 diagnosed as clinically depressed.

- Opinion of Dr. Travlos – difficult to determine whether she had suffered a closed head injury noting that she had recollections of the events around the accident, but the recollection was not continuous. He felt it was possible that she had sustained a mild head injury. He felt her difficulties with cognition may be caused by her chronic pain, depression, fatigue and stress, however he could not exclude the presence of an underlying closed head injury.

Roussin v. Bouzenad [2005] B.C.J. No. 2682

Plaintiff's Counsel – Tony Vecchio and James Richards

DC – Avon Mersey and Shadrin M. Brooks

Judge – Kelleher

Date of Decision – December 8, 2005

Date of MVA – July 20, 2001

The Plaintiff – 40 years old at the time of judgment, mother of two children, common law husband. Prior to the mva involved in broadcast journalism, active, enjoyed entertaining. Noted to be highly intelligent.

The injuries – complicated mild traumatic brain injury, fractured skull, facial lacerations and abrasions, a fracture to her left wrist and soft tissue injuries to her left hip, back and neck.

Recovery at the time of trial – recovered in large measure from the physical injuries. Continues to experience neck and back pain. Has scarring on her face, wrist and arms. Left wrist is a continuing problem with “mild residual pain”

The evidence of brain injury – GCS noted by ambulance attendants to be 15, went down to 14 in the ER. Approximately 5 minutes of loss of consciousness. Discharged from hospital the day following the mva.

Head injury complaints – nausea and dizziness, decreased concentration, speech slow and halting, poor balance and vestibular dysfunction, vertigo, impaired ability to read, emotional lability, poor concentration, change in sense of smell and taste, bad tastes, blurred vision, flashing lights in vision, ringing in the ears, problems with coordination and balance, tremors or shakiness, numbness, tingling skin, pins and needles, headaches, fainting spells and periods where she loses time. Forgetting meetings, memory problems, strange feelings, inability to think as quickly as before, difficulty with thinking clearly, distractability, inability to concentrate, trouble telling right from left, trouble remembering the right word when talking, trouble following conversation and trouble reading. Sadness or depression, stress, tension or anxiety anger or problems with containing her temper, worry or guilt, changes in attitude and loss of interest.

CT scan evidence – shear haemorrhaging on the frontal and parietal lobes.

MRI done on October 26, 2001

Opinion Evidence Referenced:

- Dr. Gary Stimac, neuroradiologist – reviewed the MRI and concluded that she had suffered a significant closed head injury
- Dr. Ursula Wild – subtle neurocognitive deficits: decreased ability to process information, reduced mental efficiency and vulnerability to distraction. She characterized the condition as executive dysfunction.
- Dr. Jeff Beckman (IME) agreed that it was executive dysfunction. Mild tbi.
- Dr. Neil Longridge, otolaryngologist – benign paroxysmal positional vertigo, a balance disorder. Persistent tinnitus, reduced sense of smell and visual vestibular mismatch
- Dr. Deryck Smith, psychiatrist – major depression which was in partial remission, as well as sleep disorder, sexual arousal disorder and related cognitive disorders. Moderate traumatic brain injury based on the fact that she was unconscious for five to ten minutes, had a GCS of 14 and the CT and MRI demonstrated shear haemorrhages in the frontal and parietal lobes.
- Dr. Duncan Anderson, neuro-ophthalmologist – convergence insufficiency (inability to focus the eyes), which can be treated with corrective lenses.
- Dr. Hugh Anton, Psychiatrist – GCS and brief period of amnesia indicate that this is a mild tbi. However, the objective evidence of abnormalities on the CT scan and MRI would lead some experts to call it a moderately severe brain injury. Anton called it a complicated mild brain injury, citing the following reasons: the shear haemorrhages indicate diffuse axonal injury, injury to axons resulting from acceleration-deceleration and rotational forces. Because much of the damage is microscopic and not apparent on the MRI, the MRI and CT underestimate the extent of brain injury. Prognosis for complicated mild brain injury and for moderate brain injury is the same. Likely that she will suffer permanent effects from her brain injury. **This was the opinion that the judge said they relied the most highly on

Plaintiff's complaints at time of trial:

- constant low grade headaches
- needs to nap or rest during the day
- sleeping poorly at night despite taking medication
- continues to take anti depressant meds
- no longer has an appetite and no sensation of feeling full so has gained weight
- has lost some of her smelling ability so food does not taste as good
- trouble concentrating on one person

- in a restaurant she hears all audible conversation and cannot stay focussed on one conversation
- irritable and angry
- visual impairments – can't tolerate fluorescent lighting etc.

- Non Pecuniary Damages \$200,000
 - Plaintiff suffered a mild tbi with complications. The effects have been significant – loss of executive function, dizziness and vertigo, tinnitus
 - Suffered significant soft tissue injuries.
 - The loss of executive function has prevented her from pursuing the career she chose
 - It has severely limited her employability
 - Independent in her daily living activities
 - Demonstrated that she is able to excel in university courses, to play golf and to enjoy attending sporting activities. She will be able to perform some kind of meaningful work.

- Past Wage loss – plaintiff chose to work towards her Bachelors degree. This was not for the purposes of retraining or preparing for a new career, so did not count as mitigation. So rather than simply an assessment of what she would have earned and what she did, there was an additional amount attributed to what she could have earned.

- Loss of earning capacity - \$850,000
 - Involved an assessment of what she would have earned to retirement, an assessment that she will be able to work but likely only in a self employed capacity, earning \$25,000 per year.
 - Assessment of the future loss taking into consideration non wage benefits etc – Evident that there was an economist's report to establish the numbers

- Cost of future care – Trial judge had two reports – Ruth Knight, a rehabilitation counsellor and Laura Smith an OT. The opinion of Laura Smith was preferred with reference to both her training and her practical approach. \$120,000
 - Types of expenses awarded included – medications, psychological assessment, psychological counselling, physio and massage, house cleaning and home maintenance, house and yard maintenances, education and training, kinesiologist/fitness training, speech and language pathology, bathroom safety equipment.

- In trust claim - \$5,000 for past services and \$5,000 for future services awarded to common law husband.

- Loss of marriageability claim dismissed – no real or substantial possibility that her current marriage will not last.
- Special damages – physio and massage, ambulance, miscellaneous, mileage, yard car and home maintenance.

Stevens v. Plachta [2005] B.C.J. No. 2775

Counsel for the Plaintiff – S. A. Besanger
 Counsel for the Defendant – R.L. Garner
 Judge – Burnyeat

MVA – March 6, 1999

Issue at trial was the extent to which this accident caused the injuries or whether an October 6, 2000 accident caused some or all of the injuries.

The Plaintiff – at the time of the mva 16 years old, high school student with part time employment, active in sports, active social life.

At time of trial – 22 years old, enrolled in a college program and continues to have part time employment.

Evidence re. head injury – loc as a result of injuries such that she is not generally aware of the details surrounding how the mva occurred, or what happened to her during or after the mva. Ambulance crew report gcs of 15. At hospital, ER indicates that she appears to have sustained a concussion.

Injuries sustained in first mva – fractures of L2, L3, L4 and L5, broken nose which required surgery and splinting and then further surgery involving a complete rhinoplasty to correct external deviation and deformities and breathing obstruction. Multiple facial injuries, multiple soft tissue injuries and multiple abrasions, contusions and bruising.

Opinion Evidence:

- Dr. Schweigel (IME) – Fracture sites of lumbar spine will give her a type of arthritis that gives slight discomfort requiring perhaps the odd anti inflammatory for 2 – 3 weeks at a time. *Evidence given at trial by deposition.*
- Dr. Caines (IME) – for pain management she would benefit from manipulative therapy to mobilize her left sacroiliac joint, continuation of an exercise program to keep her back as strong as possible, modification of activity to avoid any medium, heavy or very heavy physical activity and excessive sitting. More vulnerable to degenerative changes.
- Munirahj Shivji (OT) – physical capacity evaluation. Difficulty performing high level balancing tasks. Array of occupations available has been narrowed.

Potential for work in the limited, light and medium strength categories, but with some restrictions such as frequent or sustained bending, crouching, crawling, frequent lifting from floor.

- Niall Trainor (Vocational Consultant) – presents a number of employment barriers including chronic pain, reduced physical capacity to the light to medium strength level with limitations for dynamic activities and subtle cognitive deficits including some difficulty with memory and concentration.
- Richard Carlin (Vocational Consultant – IME) – questions whether plaintiff would have had the ability to manage heavy or very heavy lifting and carrying prior to the mva. Do not think she will require employer accommodation or sympathy in pursuing her current career plan. Has chosen a career path that should allow her to maximize her future employability without much interference from any ongoing physical limitations.
- Dr. Brian Hunt (Plaintiff IME), Neurologist – TBI in both mvas. The first mva was considerably more damaging. The description of the haematoma around her eyes is suggestive of a skull fracture. Presence of raccoon eyes is usually from bleeding from fractures of the basal frontal bones of the skull. Encloses two articles on concussion and post concussion syndrome. Brain injuries are cumulative.
- Dr. Krywaniuk (Psychologist) – pain and discomfort which probably results in distractions and fatigue that affect her ability to pursue her education as effectively as she otherwise might. Substantial amount of variability in the cognitive and neuropsychological profile and that this variability indicates that she is likely to have difficulty in specific areas and doing specific tasks even though other skills or abilities may be substantially better. Continues to experience effects of a mild tbi affecting her attention, concentration and memory, difficulty with organization, self monitoring, verbal fluency and cognitive flexibility. Difficulty setting goals and priorities. Difficulties with cognitive and emotional adjustment have resulted in inefficient and inconsistent learning approaches. She would be able to overcome some of these difficulties with extra work, this generally puts more demands on the time she has available.
- Dr. Hanna Lysak,(IME – Clinical Psychologist and Neuropsychologist) – Mild TBI in the first mva and the second. Recovered from the first MTBI within the first few months of the mva. No neuropsychological consequences of an MTBI detectable at present.

Trial Judge's conclusions:

- Hospitalized for six days, then confined to bed for two weeks with limited mobility for the remainder of the school term.
- Nasal bone fracture which stabilized with two surgeries

- Facial scarring which may require further surgery
- Permanent numbness to her forehead
- Spinal fractures in four of her lumbar vertebrae which has produced chronic back pain, the possibility of surgery in the future, early arthritis, the requirement of anti-inflammatories and analgesics, ongoing exercise with occasional physiotherapy, decreased recreational opportunities, decreased sitting tolerance, pain aggravated by lifting, bending, twisting certain ways and excess sitting, and more likelihood to suffer from depressed mood and moments of irritability.
- Numerous restrictions on her potential employment. No heavy lifting. Accepts report of Shivji and Schweigel, and Trainor.
- Adverse affect on her academic performance.
- Accepts opinion of Krywaniuk, Lysak and Hunt that she sustained MTBI in both mv's but the second mva problems only lasted a week or two. Accept evidence of Krywaniuk and Hunt that primarily problems are due to first mva. Attribute 15% of neuropsych problems to the second mva. Rejects Lysak opinion that she has recovered from the MTBI or that she had pre mva problems with attention etc.
- Ability to recognize or interpret abstract concepts or form generalizations at high levels has been substantially weakened as a result of the first mva.
- Find that she has significant weaknesses in visual sequencing, significantly lower score in her ability to do mental arithmetic, receptive vocabulary which is much lower than her reading vocabulary, relative difficulty with attention, concentration and short term recall. These difficulties relate to frontal lobe problems.
- Neurological damage to the left side of the brain which accounts for lower than expected motor speed in her right (dominant) hand.
- Neurological damage to the side of the brain that controls verbal functions and that this has resulted in her having difficulty in verbal fluency.

Non Pecuniary damages – 178,500 – Broken down to award for the physical injuries including anticipating difficulties around and during pregnancy, the possibility of depression, and increased pain caused by arthritis and low back problems - \$85,000. Neurological damage at \$110,000 – discounted by 15% to account for the second mva. **However also says that in assessing the 110,000, does not take into account the injuries caused by the second mva.

In trust claim for mom of \$15,000

Cost of future care – psychological counselling, total of \$15,000

Loss of capacity – capacity to earn income impaired by the back injury and the neurological injuries. Occupations no longer open to her. Absent the mva would have been very successful in any career of her choice. Has taken longer than usual to advance through college. Physical limitations. Highly motivated. Number of occupations that will not be available to her and in any occupation there will definitely be physical limitations and medical limitations which will adversely affect her productivity and attendance. Delay into work force due to interruption of an reduced ability to undertake her education. Assessed at \$275,000.

Stevens v. Plachta – Court of Appeal

The defense appealed the trial level decision and the court of appeal ordered a new trial. The bench was justices Low, Levine and Kirkpatrick. The basis for the appeal was the manner in which causation for the injuries taking into consideration the second mva was dealt with. The events which were important to this decision were:

- The plaintiff did not originally plead brain injury. This first arose in the assessment of Krywaniuk
- The DC raised causation issues relating to the second accident in their opening statement
- The plaintiff's experts offered no opinion on the effect of the second accident as they were not told about it.
- After all the evidence was in, defence counsel at the urging of TJ brought an application to amend their pleadings to claim to add a specific reference to the second mva. This application was granted while giving liberty to the plaintiff to reopen her case and produce new experts reports at the defence's expense. Leave to the defendant's to produce new rebuttal evidence was later granted.
- New expert's reports were produced including one by Dr. Rees for the defense
- TJ on his own motion ruled Dr. Rees' report to be inadmissible for not complying with Rule 40A

Court of Appeal found that the trial judge was in error in the following:

1. Requiring an amendment to the Statement of Defence – the statement of defence referred to subsequent accidents which the CA held to be sufficient. As well, the plaintiff had notice and no possibility of prejudice;
2. Erred in allowing te plaintiff to reopen her case – this in effect allowed her to put her case in twice;
3. Ruling that the report of Dr. Rees was inadmissible. If the underlying facts were not proven then this goes to weight not to admissibility. Also, a TJ can revisit a ruling during a trial when circumstances change.

CA held that as a whole the rulings requiring an amendment to the statement of defence, allowing the plaintiff to reopen their case, and excluding the defendants' expert report resulted in a trial that was fundamentally flawed. It cannot be said that the result of the trial would have been the same had the procedural errors not been made.

Maillet v. Rosenau [2006] B.C.J. No. 18

Plaintiff's Counsel – David Osborne and Jacqueline Cane
Defense Counsel – J.A. Hemmerling, B. Bugabuyo

MVA – December 8, 1998

Evidence of head injury – Plaintiff's evidence is that she recalls hearing a bang, blackness, seeing stars and feeling pain. The window behind her head was broken. Her recollection of events between the time of the collision and leaving the hospital is spotty.

Pre accident health – 38 years old at the time of the mva. Healthy. Two incidents of low back pain but she recovered from them. One episode of depression related to a health issue.

Opinion evidence:

- Dr. Filbey, treating physiatrist – chronic pain syndrome of the cervical and scapular regions, headaches related to occipital nerve irritation, carpal tunnel syndrome and post concussive syndrome.
- Dr. Travlos, Plaintiff Physiatrist – Difficult to determine whether she had a closed head injury. Possible that she had an MTBI. Difficulties with cognition may be caused by chronic pain, depression, fatigue and stress, but could not preclude the existence of a closed head injury as the cause.
- Dr. O'Breasil – treating Psychiatrist – MTBI and developed a chronic pain syndrome secondary to the injury suffered in the mva. Suffering a major depressive disorder precipitated by the mva and its effects. Depression was part of the result of the MTBI and part of the physical injuries.
- Dr. Parhar, Treating GP – MTBI, headaches secondary to head contusion and neck injury, chronic pain syndrome, major depression, cervical muscle strain, lumbar strain, questionable C6-7 disc herniation.
- Dr. Shuckett, plaintiff hired rheumatologist and internal medicine – Disc herniation likely due to the mva, post traumatic headaches, pain syndrome,
- Dr. Hunt – Neurologist. Qualified as an expert in neurosurgery and the diagnosis of MTBI. Minor TBI as well as significant muscle and ligament injuries. Most of the brain injury was to the frontal lobe. Depression, sleep disturbance, ringing in the ears, memory disturbance, headaches and problems with words as indicators of the brain injury. Brain injury would also contribute to the problems she had with coping with her other injuries.
- Dr. Vallance, defence psychiatrist – Pain disorder and depression that had been treated and was now in full remission. Long standing issues of dependency which affected her perception of pain. Good possibility that she had a concussion but it was a minor concussion.
- Ms. Hilliard – vocational rehabilitation
- Ms. Scott-Kerr – Functional capacity evaluation

- Mr. Pakaluk – cost of care report

Non pecs \$110,000

Loss of earning capacity – Taunton provided multiplier for plaintiff. Gosling of Columbia Pacific Consulting provided the multiplier for the defendants. Assess loss at \$260,000 – find that she had the capacity to earn between 20,000 – 25,000 and would work until age 65.

Future care – included transportation, counselling, physiotherapy, homemaking assistance and medications.

Izony v. Weidlich [2006] B.C.J. No. 1986

Judge: Masuhara

Plaintiff's Counsel – D. Byl and R.S. Tindale

DC – S. D. Dley

MVA – April 3, 2002 – head on high speed collision with plaintiff's vehicle rolling down an embankment, plaintiff thrown from vehicle (not wearing seatbelt) and then pinned under vehicle.

Extensive physical injuries including many broken bones, development of bad infections while in the hospital. Numerous hospitalizations and surgeries and was left with extensive scarring. Multiple system organ failure.

Evidence of head injury at the scene of the mva – Conscious when people arrived at scene. Ambulance arrived a short time later and rated him 14 out of 15. Has little recall of the mva, but was alert and oriented at the time that he was admitted to hospital.

Plaintiff Pre MVA – attended native residential school and was abused. Had drug and alcohol problems for a number of years but had recovered from them. Married with two children. Prior to the mva very active person who spent a good deal of time in the woods and the mountains.

Most serious of the injuries are the physical ones but also cognitive problems.

Reported cognitive problems – difficulty remembering, concentrating, planning and organizing, unable to multi task.

Opinion Evidence:

- Dr. Joy (Plaintiff IME) – no psychological condition as defined in the DSM-IV. Some problems with cognitive function.

- Dr. Van Rijn (Plaintiff IME), Psychiatrist – The injuries to his wrists, right hip, left knee and ankle will continue to affect him in the future and will result in further decreased ability to weight bear as he ages. Increased risk for developing more problems in the upper limbs. Unlikely that he would be competitively employable. Future care needs will increase over time. Unlikely that he would be competitively employable given his cognitive problems as well as his limited physical abilities.
- Dr. Spellacy (Plaintiff IME) – Psychologist who administered neuropsychological testing – evidence of impaired executive function, weak learning and memory, slowed information processing, and impaired attention greater than would be anticipated from his education, work history and measured intelligence which was found to be above average. Cognitive impairment was the result of TBI, which he classified as mild. Unlikely that there would be further improvement given the length of time since the injury. Loss of cerebral reserve capacity makes him more vulnerable to deterioration of function in times of illness, fatigue or stress. There will be a greater decline in his abilities as he ages than would otherwise have been the case.
- Dr. McKenzie, orthopaedic surgeon – has reached maximum medical improvement. Remains severely disabled from musculoskeletal problems. The only possibility for improvement would be if he had some relief of his shoulder discomfort. Permanent problems with reduced mobility and minimal ability to weight bear or mobilize without a wheel chair.
- Dr. Wallace – vocational rehabilitation specialist – physical limitations preclude the plaintiff from returning to his pre injury employment within the logging, sawmill and silviculture industry. Given the totality of his physical limitations, neuropsychological concerns, work history, education, aptitudes, vocational interests, as well as his age, these multiple challenges provide a significant barrier to any return to work. Unlikely that plaintiff will be able to return to the competitive work force.
- Lila Quastel – Registered Occupational Therapist - future care requirements.

Trial Judge's Findings:

- Mild TBI resulting in cognitive impairment.
- Cognitive impairment along with the physical impairments caused by the mva limits his ability to manage and operate his silviculture business
- MVA caused the emotional changes noted by the lay witnesses, but the medical evidence does not support a finding of depression.
- Injuries cause him pain which in turn causes difficulty and decrease in sexual activity

- Most serious limitations are physical ones, the greatest one being an inability to walk.

Non Pecuniary damages:

- Plaintiff argued that this was a limits case – although he has the limited use of his legs, he has bladder and bowel control and is able to have sex, but he still has many of the problems of a paraplegic. He is largely confined to a wheelchair, has difficulties with memory, attention, executive function, and information processing, and suffers from fatigue.
- The upper limit applies equally to a plaintiff with a serious brain injury but little physical impairment and to a plaintiff rendered quadriplegic with no cognitive impairment.
- Plaintiff has suffered a mild TBI and his cognitive abilities have been impaired. He has a clear appreciation of the loss he has suffered and will continue to suffer into the future.
- Purpose of non pecs is to provide the injured party with reasonable solace for their misfortune.
- \$275,000 awarded – the cap after taking into consideration inflation is \$307,000

Loss of Earning capacity

- Significant impairment to his future income earning capacity
- Does not have the capacity to carry on with his silviculture business
- Substantial likelihood that he would have continued to work past 65, possibly to 70, in the silviculture industry. However, his level of activity or involvement would likely have declined with age and likely his earnings would have continued to fall as the industry has become increasingly competitive. Consequently his earnings would likely have fallen as his age increased.
- Damages assessed at \$240,000

Cost of Future Care: \$491,667

In Trust claim for plaintiff's wife - \$25,000

Watt v. Meier [2006] B.C.J. No. 2046

Judge – Baker

PC – Joe Murphy Q.C., Brian Brooke and Andrew Pendray, Articled Student
DC – Michael Ragona, Q.C. and Jason Lattanzio

June 29, 1999 pedestrian mva. Plaintiff struck while running, suffering a closed head injury and soft tissue injuries to her neck, right arm and shoulder and knee. At the time of the mva she was 24 and at the time of trial she was 30.

Pre mva history – eating disorder, problem with knees, learning disability, psychological distress – depression, interpersonal difficulties, anxiety, repetitive thoughts and hostility.

Post mva – ambulance crew found her to be alert, no LOC, GCS was 15. She reported headache and that her neck and chest hurt to the ambulance.

Transported by ambulance to hospital. Fully alert but could not recall the actual impact. Minor abrasions on her forehead and a CT scan showed a small mid temporal hemorrhagic contusion with some swelling on the left side of the brain, but no significant mass effect. Kept in the hospital over night for observation. Left the hospital the next day and had a “complex partial seizure”. CT scan done at that time showed the area of bruising had markedly increased in size and the areas of hemorrhage within the contusion slightly increased in size. Three days later while still in hospital, she had a second seizure. CT scan showed that the area of edema surrounding the left temporal contusion had slightly increased in size. An EEG done a day after that was abnormal showing a severe non specific disturbance seen over fairly widespread area of the left temporal region, quite in keeping with an underlying destructive process.

By the time of trial, 6 years later, plaintiff had married, moved to Ontario, gone to teaching college and been teaching half time for more than a year.

Plaintiff experts:

1. Dr. Teal – Neurologist – Plaintiff suffered a closed head injury which resulted on seizures. Compared to a person who has never had seizures, she is at increased risk for future seizures – in the range of 25 – 30%. As a result of her injuries she has developed Benign Positional Vertigo and she is likely to experience episodes of dizziness in the future, although the symptoms will wax and wane. The plaintiff has ongoing problems with sustained concentration and attention, distractibility, forgetfulness and easy mental fatigue that he attributes to the temporal lobe injury and he believes these symptoms will persist. As a result of the injuries she will be unable to increase her working hours beyond those of a half time position.
2. Dr. Schmidt – Neuro-Psychologist. In his initial report from 2002 he indicates that the Plaintiff showed signs of “some cognitive disruption”, in particular, mental slowing, problems with sustained attention, disruption of verbal learning and memory, and disruptions in higher order language functioning. He found plaintiff to be moderately depressed and suffering from elements of PTSD. By 2005 his opinion is that he is unable to determine whether the remaining deficits

- were any greater than her pre accident condition. Her depression had also improved. Cognitive and emotional problems had shown substantial improvement and her major problem appeared to be her reported ongoing difficulties with fatigue.
3. Dr. Longridge – Otolaryngology – regarding complaints of tinnitus and dizziness. Based on Plaintiff's report that the tinnitus occurred after the mva but not before, concludes that the tinnitus was probably caused by the mva. It is mild and not disabling. Episodes of dizziness are caused by Benign paroxysmal Positional Vertigo and were likely caused by the mva. Likely to have the dizziness on a permanent basis.
 4. Dr. Nairn Stewart – Psychiatrist and Rehab Medicine Specialist
 5. Dr. Bayley – Psychiatrist and Rehab Medicine Specialist. His evidence is found by TJ to be "troubling" and little weight is placed on it.
 6. Dr. Ford – Psychologist
 7. Ms. Zaraska – Occupational therapist
 8. Ms. Ibbitson – Counsellor
 9. Ms. Degenhardt – Life Care Planner. Reservations expressed by TJ regarding the weight to be placed on her evidence. Questioning expertise at a Certified Life Care Planner. On the basis of her holding Canadian Certification as a rehabilitation counsellor and her work experience she was allowed to provide opinion evidence.
 10. Neill Trainor – actuarial evidence

Defendant Experts:

1. Dr. Prout – Neurologist. Plaintiff suffered a mild brain injury. Plaintiff's current mild difficulties with attention, concentration and short term recall are not significantly different from the difficulties identified prior to the mva and some of the problems attributed to the mva are more likely related to pre mva emotional and psychological problems. By 2002 her injuries had ceased to be disabling and her prognosis for further improvement is good. Her risk for further seizures is about 10%. Feasible for her to increase her working hours. Does not require ongoing occupational therapy, massage therapy is unnecessary and she should continue with a self directed exercise program and regular attendance at the gym.
2. Dr. J. Smith – Psychiatrist
3. Dr. Freeman – Neuro-Psychologist. In 2003 opinion was that as a result of the mva Plaintiff continued to have mild difficulties with acquisition of new information and was more prone to fatigue than she otherwise may be able to. She was likely to be able to work full time in about a year. In 2005 he concludes that there had been no overall loss of intellectual ability resulting from the mva. Little evidence of ongoing effects of the head injury with the exception of reports of fatigue and his own observations that she looked fatigued. His opinion is that her current condition is caused both by a pre existing attention deficit disorder and the brain injury.
4. Dr. C. Cooke – work capacity evaluator

Trial Judge's Conclusions:

- Accepts the opinions of Longridge and Teal that the mva is the probable cause of the dizziness, but the dizziness is not disabling or incapacitating.
- Plaintiff has made a good recovery from her mild traumatic brain injury. Her level of cognitive functioning, which was initially impaired by the brain injury, has improved to the extent that she is functioning cognitively as well now as she did prior to the mva, but that as a result of the injury, she is more susceptible to fatigue, in particular, mental fatigue, but also physical fatigue.
- As a result of the brain injury the plaintiff suffers from and will probably continue to experience occasional momentary episodes of vertigo. These episodes are unpleasant but not disabling. Although she has been seizure free for about 5 years, she is at greater risk than average of future seizures, which could interfere with her ability to drive motor vehicles and that the risk that she will experience seizures in future is in the range of 10 – 15%
- The soft tissue injuries to her neck, right shoulder, arm and knee had resolved within a year after the mva and were not disabling for more than a few weeks after the mva. Although she continues to have occasional symptoms of muscle pain and stiffness in her neck, right arm and shoulder, aggravated by stress or fatigue, these symptoms are neither severe nor disabling.
- Has failed to prove on a balance of probabilities that the tinnitus is caused by the mva
- Fatigue resulting from the MTBI added to her pre existing learning disabilities and fragile emotional disposition resulted in a loss of employment income in the 11 months after the mva and that the fatigue has impaired her capacity to earn income by working on a full time basis.

Damages awarded:

- Special damages – Defendants took issue with the cost of massage therapy and pilates that were incurred when the plaintiff returned to Vancouver for her trial, based on the opinion of Dr. Prout that the plaintiff could not benefit further in her recovery from passive therapies. TJ awarded these costs indicating that events may arise that contribute to the stress and fatigue that exacerbates the soft tissue injuries and that massage therapy may provide temporary relief
- Past Income Loss – Compensated for the loss of income incurred as a result of working only half time in the 02/03, 03/04 and 04/05 school years. As well, inability to work part time from the date of the mva until 1 year later.

- Loss of Capacity to earn income – \$400,000\$Assessed as an impairment of a capital asset, being the capacity to earn income, with reference to the actuarial evidence regarding the income she might have earned if she was able to work full time as a teacher in the future. Finding that the mva has materially impaired the plaintiff’s capacity to work as much as she otherwise probably could have. Because of her age at the time of the mva, and the fact she was just embarking on a career, the effect of the impairment will be significant over the years during which she could be expected to participate in the labour market.
- Cost of Future Care – Based on Degenhardt recommendations but many of them were rejected. Costs awarded include counselling (personal and relationship) an occupational therapy assessment once every 5 years for the next 35 years, massage therapy three times a year for the next 35 years, ergonomic desk, grab bars, other occupational therapy devices, medications, housekeeping services, some child care,
- Non Pecuniary damages - \$115,000. TJ says that the authorities suggest that the range of non pecuniary damages in a mild TBI case is between \$75,000 - \$120,000.

Lines v. Gordon et al 2006 BCSC 1929

TJ: Mr. Justice Lander

Plaintiff’s Counsel: Jim Vanstone and Adam de Turberville

Defense Counsel: R. K. Hornquist

MVA December 9, 2001 – T bone impact. Liability not at issue. Plaintiff was 33 year old man at the time of trial.

Issue in the case is the effects of a MTBI and the impact that this will have upon Plaintiff’s employability in the future.

Plaintiff experts:

1. Dr. Diane Russell – Neuropsychologist – Fatigue is the greatest problems, chronic headaches, environmental distractions. Prognosis extremely guarded. Not competitively employable and probable that he will remain competitively unemployable given that it has been 3 ½ years since the mva.
2. Dr. Jonathon Bland – GP. Plaintiff still has problems with concentration, memory loss and headaches. Plaintiff consistently motivated to get better.
3. Dr. O’Breasil – Psychiatrist. Plaintiff suffered from a mild TBI – this is based on clear history of a contusion to the head, pain and discomfort in his head, regrogated amnesia, no clear memories of the mva itself, posttraumatic amenai. Not necessarily an LOC but some alteration of consciousness at the

time of the mva. By the time the ambulance was called and attended some minutes had passed and he had a GCS of 15 – this was 6 minutes after the mva and does not preclude a TBI. He went on to develop a post concussion syndrome. He has many characteristic features of this with cognitive changes including impairment in cognition with difficulties in memory and concentration, as well as abnormal executive functioning. He had physical changes including headaches, dizziness and altered balance as well as vision. He also developed emotional changes with periods of depression, anxiety, irritability and fatigue. Permanent partial disability secondary to the MTBI and post concussion syndrome. At the present is totally disabled and incapable of pursuing any occupation. Hopeful that in the future this will improve and he may be able to function in highly structured environments on a part time basis.

4. Dr. Hugh Anton – Psychiatrist – Continues to have impairment and disability severe enough to preclude return to gainful employment. He has the physical capacity to engage in household and home maintenance tasks but some of his memory difficulties raise questions about his capacity to safely manage task like cooking.
5. Dr. Donald Cameron – Neurologist. Disagrees with Wilkinson opinion. A portion 15 – 20% do not recover within a two year interval. Plaintiff sustained a MTBI and will continue to suffer with symptoms of post concussion syndrome. Will remain permanently partially disabled because of cognitive problems as it is now almost three years after the mva. In part the ongoing cognitive problems are due to chronic pain and discomfort. Plaintiff is completely disabled and non competitively employable.
6. Derek Nordin – Vocational Rehab Consultant – Given the constellation of difficulties experienced by the plaintiff he was unable to identify any occupation which might be available to him on a competitive basis. However says that in particular given his age he needs to be strongly encouraged to find some vocational activity in order to provide some purpose in his life. Do not anticipate that this will be paid employment. Plaintiff is competitively unemployed as a result of his residual impairments arising from the December 2001 mva.
7. Robert Carson – economist.
8. Ms. Dodson – Certified Work Capacity Evaluator. Rehabilitation Consultant. TJ found her evidence to be objective and of assistance to the court.

Defendant Experts:

1. Dr. Andrew Howard, Neuropsychiatrist – More likely than not that the plaintiff suffered an MTBI

2. Dr. Vernon Wilkinson – Neuropsychologist – TJ comments that her CV is very impressive. Plaintiff suffered MTBI in the mva but she attributes essentially all of his ongoing cognitive problems to the narcotic meds that he was taking after the mva for his chronic headaches. 100% of MTBI patients recover from MTBI in weeks. Plaintiff appears to be significantly depressed and has significant anxiety. Does not fulfill criteria for PTSD. Fluctuations in memory and attention are due to the use of narcotic meds. Will improve to normal levels once he is off the narcotics. Subjective impression of dizziness and imbalance will recover. Expect him to be able to return to work at his previous occupation. Normal capacity for employment once off the narcotic meds. The prognosis is excellent. Trial Judge finds that her conclusions are not supportable on the evidence and does not give any weight to her report.
3. Dr. Mark Crossman – Plaintiff suffered a MTBI in the mva and probably has some residual functional deficits as a result. However, his psychological reaction to his condition has probably had an even greater negative impact on his function. Due to his stamina at this time he is probably not competitively employable. It is still too early to determine whether he will be employable in the future.
4. Mary MacDonald Kemp – Physical and Occupational Therapist and Rehabilitation Coordinator – Her opinion is that the plaintiff is safe to work in the heavily physical demand category of work, his physical abilities matched the job demands of a deck hand and heavy duty mechanic. TJ notes that she did not consider his mental capacity in relation to the work demands of being a heavy duty mechanic or a tug boat deck hand who suffers from sea sickness. TJ does not give weight to her evidence.

Trial Judge's Findings:

- The conclusion of Dr. Wilkinson that the results of her testing were due to narcotic meds cannot be sustained on all the medical evidence, therefore do not give any weight to the report
- Plaintiff suffered a mild traumatic brain injury in the mva
- Plaintiff's mother and father have spent about 35 hours per month assisting the plaintiff
- There has been what might be considered almost a 180 degree alteration in the plaintiff's behaviour patterns and his ability to function sufficiently well day to day in this society and to be competitively employed.
- Plaintiff unable to effectively carry out the mental and physical requirements of a heavy duty mechanic or as a marine engineer on board ship

- Plaintiff's MTBI is permanent.

Damages awarded:

Past Wage Loss – TJ characterized the assessment as being whether but for the mva the plaintiff would have become a heavy duty mechanic or marine engineer.

1. Non pecuniary damages - \$225,000 – MTBI and post concussive syndrome resulting in severe and constant headaches with vestibular dysfunction, visual difficulties, fatigue, sexual dysfunction, depression and higher cognitive function and capacity such as memory, concentration, organization and decision making. The ongoing effect of the brain injury is profound. He has also lost the future standing in the community as a skilled journeyman mechanic or marine engineer and has lost a great deal of control of his life now and in the future. He is able to carry out some of his pre accident activities but they are no longer enjoyable to him. His relationships have changed. The plaintiff's enjoyment of life has been virtually destroyed by the mva.
2. Income loss – \$400,00.00. TJ finds that the plaintiff has not be capable of working in any capacity since the mva of December 9, 2001.
3. Future Pecuniary Loss - \$1,800,000. TJ points out that the plaintiff must establish only that there is a real and substantial risk of pecuniary loss. References Carson's estimate of the range of future pecuniary loss being 1,880,600 to \$4,535,000.
4. Cost of Future Care – Standard of proof applied by TJ is that the award should be medically justified and reasonable. Conclusions based on the recommendations of Dodson and include awards for one on one worker, psychological counselling, prescription medication, exercise program, membership to the brain injury association, equipment, prescription glasses, investment counselling.
5. In Trust claim for the plaintiff's parents - \$40,000

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BCCA

Bench – Rowles, Donald and Braidwood

Appellants Counsel: Foy, Gunn and Parsons

Respondent's Counsel: Arvay and Maryn

Intervenor: Nate Smith and Derek Miura

Jury award of \$2,000,000 for non pecs – Plaintiff was found to have suffered a traumatic brain injury, dramatic personality changes, permanent psychological injury, major chronic depression, permanent facial scarring and other physical injuries causing permanent, constant and disabling pain. About one year after the mva, plaintiff underwent an operation on the left side of his face and eyelid. For almost two years following the surgery he had to wear a compression face mask. There was evidence that the plaintiff's serious facial disfigurement caused him to suffer shame, alienation, social isolation and psychological trauma and his cultural background exacerbated the impact of his injuries. There was also evidence that, given the jury award, the jury must have accepted – that in Korean cultures, mental illness and disability are viewed as shameful both to the individual and to his family and as a result, family members with disabilities are hidden away from society. There was also evidence to the effect that in Korean culture, a first born son is required to meet high expectations and an inability to meet those expectations is considered shameful. With the plaintiff's cultural backgrounds, his injuries had a profoundly negative impact on him. By the time of trial, the plaintiff was 23 years old. The evidence was that he would remain psychologically, at about the chronological age he was when the mva occurred and that in the competitive workplace, he would be permanently unemployable.

The non pecuniary damage award was reduced by the trial judge to the rough upper limit - \$294,600. Instructions were not sought or given to the jury regarding the rough upper limit. The Court of Appeal dismissed the defendants appeal from this award and also the cross appeal of the plaintiff regarding the award.

Chart of Non Pecuniary Damages Awarded

Stevens case not considered as overturned on Appeal. Lee v. Dawson decision not considered.

Non Pecuniary Award	Date of Judgment	Name of Case
\$200,000	December 8, 2005	Roussin
\$110,000		Maillet
\$275,000		Izony
\$115,000		Watt
\$225,000		Lines

Factors Considered in Award of Non Pecuniary Damages

Case	Non Pec Award	Description of Injury	Trial Judge's Findings
Roussin	\$200,000	Complicated mild traumatic brain injury, fractured skull, facial lacerations and abrasions, a fracture to her left wrist and soft	Plaintiff suffered a mild tbi with complications. The effects have been significant – loss of

		<p>tissue injuries to her left hip, back and neck. Recovery at the time of trial – recovered in large measure from the physical injuries. Continues to experience neck and back pain. Has scarring on her face, wrist and arms. Left wrist is a continuing problem with “mild residual pain”</p>	<p>executive function, dizziness and vertigo, tinnitus Suffered significant soft tissue injuries. The loss of executive function has prevented her from pursuing the career she chose It has severely limited her employability Independent in her daily living activities</p>
Maillet	\$110,000		
Izony	\$275,000		
Watt	\$115,000		
Lines	\$225,000		