IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: ***Chang v. Feng,***
2008 BCSC 49

Date: 20080114
Docket: M044789
Registry: Vancouver

Between:

Richard Chang

Plaintiff

And

Huawen Feng

Defendant

Before: The Honourable Mr. Justice Bauman

Reasons for Judgment

Counsel for the Plaintiff	J. J. Jung
Counsel for the Defendant	T. H. Pettit and A. L. Groves
Date and Place of Trial/Hearing:	30 April, 1 and 2 May and 4 October 2007 Vancouver, B.C.

I

[1] Richard Chang was struck by the defendant's car while riding his motorcycle at highway speed on 2 August 2003.

[2] He suffered various injuries which I will describe below and he seeks compensation by way of damages.

[3] Liability is admitted, as are the amounts for special damages and past loss of income.

[4] At issue are the awards for non-pecuniary damages and loss of future earning capacity.

II

[5] The plaintiff was transported by ambulance to Vancouver General Hospital. The Trauma Team noted these injuries:

1. Comminuted fracture of the left clavicle
2. Displaced fracture of the first distal phalanx of left foot
3. Neck pain
4. Deep abrasion encompassing left patellar region
5. Deep long abrasion along left shin from knee to dorsum of left foot
6. Brief loss of consciousness

[6] Mr. Chang was seen by Dr. Duncan Miller (his general practitioner's partner) on 21 August 2003.

[7] According to Dr. Chang, the plaintiff's long time general physician, Dr. Miller confirmed the above diagnosis and added "[c]ervical [w]hiplash with possible mild concussion" and "[m]ultiple minor abrasions and contusions involving upper and lower limbs".

[8] The defendant took no issue with the nature of the plaintiff's initial injuries or the fact that they arose directly out of the accident.

[9] At the time of the accident, the plaintiff was employed as a shipper/receiver by RST Instruments Ltd. ("RST"). He was 28 years old. He also did some part-time construction work on Saturdays.

[10] Mr. Chang was unable to continue his work at RST for a lengthy period after the accident. He attempted a graduated return to work in January and February 2004, but he could not sustain the effort.

[11] Mr. Chang went off work again only returning to full-time employment in late June 2004.

[12] His medical progress is helpfully charted in the reports of Dr. Alastair Younger, an orthopaedic surgeon who saw the plaintiff for an independent medical examination in March and October 2004.

[13] Under the heading "Current status", Dr. Younger writes in his first report:

> Mr. Chang has ongoing discomfort in his foot. He localizes the pain just in front of the ankle joint in the talonavicular joint region. The pain is moderate to severe in nature. It limits his walking tolerance to about 45 minutes or 8-10 blocks. He also has discomfort on standing for any period of time and he can stand for about 15 minutes. He has mild night pain. He has not noticed any color change. He has noticed the pain to deteriorate in time. He has not noticed any change in foot shape. He is able to get around and has used physiotherapy to date. He has also been restricted in his sporting activities. He has not been able to run on this foot.

[14] In his diagnosis Dr. Younger opines:

> 1. Mr. Chang has suffered a clavicle fracture on the left side.
>
> This, I think, is going on to heal without any untoward event.
>
> 2. He has a soft tissue injury to his neck and lower back.
>
> This seems to be gradually resolving in time.
>
> 3. He has gravel rash down the left side of his body, causing some problems with the scar.
>
> This also seems to be resolving in time.
>
> 4. He has some discomfort in his knee and I cannot identify any obvious ligament instability or any obvious underlying pathology.
>
> 5. Left ankle complaints.
>
> His left ankle has ongoing discomfort. There is no obvious instability present. However, he may well have some cartilage or soft tissue injury that is not visible on the CT.

> I would suggest that we obtain an MRI of his left foot and ankle to identify if there is any underlying problem.

[15] An MRI examination was performed in April 2004. Dr. Younger saw Mr. Chang again in October 2004 and his review of the MRI of Mr. Chang's left foot "shows no evidence of any injury in the ankle or talonavicular joint".

[16] On physical examination, Dr. Younger writes in his October report:

> Reveals him to have a keloid scar on the anterior aspect of his ankle. I do not remember it being so marked the last time I saw him. However, he has a negative Tinel's sign for nerve irritation underneath this area. His range of motion is well-preserved. He has no pain on range of motion of the ankle, talonavicular or calcaneocuboid joint. He has intact sensation to the superficial branch of the peroneal nerve and the deep branch of the peroneal nerve.

[17] Dr. Younger recorded this self-report by the plaintiff:

> In summary, he reports ongoing discomfort in the front of his foot. It is not a problem when he is walking, but it is a problem when he is standing. He has a burning sensation in the front of the ankle. It throbs. He has a scar in this region and he feels that it has not changed significantly in size since I last saw him. He denies any numbness or tingling in the foot. It is not a problem if he is walking. It still remains a problem whether he wears shoes or not.

[18] Mr. Chang returned to work in June 2004. He continued at RST through all of 2005. He testified at trial that his left foot still gave him problems, but that it was slightly better than in 2004. Mr. Chang maintained that he sought assistance from other employees at times when he had "foot issues".

[19] Mr. Chang's ultimate supervisor, Robert Kobetich, gave evidence in the defendant's case. He testified that the plaintiff was an average employee who performed all aspects of his job through 2005.

[20] This evidence was somewhat contradicted by that of Peter Pichler, a co-worker of the plaintiff's at RST, who was called by the plaintiff. Mr. Pichler said that after his return to work the plaintiff's foot bothered him; that the plaintiff had to "stand on it gingerly after a while" and take a seat to do paperwork. Mr. Pichler said that the plaintiff was "noticeably uncomfortable" at times.

[21] On cross-examination, Mr. Pichler admitted that the plaintiff nevertheless did his job well, albeit "with some discomfort".

[22] In April 2006, the plaintiff left his job at RST. He testified that while his foot was a factor, it was not the cause of his leaving. In chief, the plaintiff said that in April 2006 "it was simply a good time to leave".

[23] At this time, Mr. Chang testified that at times he felt extremely tired and that he started experiencing numbness in his fingers in the early summer of 2006. The tingling was shortly diagnosed as subacute demyelinating neuropathy, in the plaintiff's case, that seen with Guillain-Barré Syndrome ("GBS").

[24] In the summer of 2006, the plaintiff testified that his numbness worsened; he became extremely weak and he could not walk up and down stairs. He said that the treatments he received for GBS helped significantly.

[25] At trial, in reference to his neurological health, he said that he was now "95% okay".

[26] The plaintiff does not take the position that his GBS was caused by the trauma of the accident and on the defence side, we have the expert report of Dr. A.J.E. Prout, a neurologist who emphatically states that "there is no likelihood whatsoever that the motor vehicle accident of August 2, 2003, led to the onset of Guillain-Barré Syndrome in Mr. Chang". I accept this opinion.

[27] In November 2006 the defendant began again looking for work. He accepted a ramp position with Pacific Coastal Airlines, but left after two days because he felt that he could not physically do the work, which involved working in a hunched position in the cargo area of airplanes. At trial he maintained that his GBS had no role in his inability to do the work.

[28] In December 2006, and continuing through the trial of this matter, Mr. Chang worked for a sports retailer "Authentix". He earns $12 per hour. He testified that he intended to leave this position at the end of the season;

that he never intended it to be a permanent career.

III

[29] I turn to discuss the evidence describing the plaintiff before and after the accident.

[30] Mr. Chang graduated from high school in 1993. He worked for Peoples Drug Mart until 1997. In 1995 and 1996, he took a diploma course in Asian studies at Langara College. He began working at RST in May 1998. At the time of the accident he was earning $14.36 per hour.

[31] While the plaintiff is fairly well educated and has been a steady worker, it is a fair assessment of the plaintiff to note that he is not overly ambitious and, that at 32, he still has no firm fix on his life's career.

[32] Before the accident, the plaintiff enjoyed snowboarding, volleyball, motorcycle riding and camping and hiking with his friends and, in particular, with his long time girlfriend, who gave evidence at trial. The plaintiff regularly exercised at a local community centre.

[33] The plaintiff testified that he no longer snowboards; that he has hiked only once; that his ankle remains weak and he has not tried volleyball or returned to his workouts in the gym. He maintains that he can manage only short walks. The plaintiff says that he still has trouble standing for long periods of time; that the scar tissue on his left foot bothers him every day; that he experiences sharp pain in this area and has to sit down with his foot elevated.

[34] Mr. Chang testified that today his neck pain has resolved; that his knee is fine, but scared, although it remains sensitive to kneeling on the ground. Mr. Chang says that his most serious problem is with prolonged standing on his left foot.

[35] Mr. Chang allowed on cross-examination that he has always experienced some discomfort standing for long periods before the accident.

[36] The plaintiff's evidence on his status after the accident was supported by that of his girlfriend, Annie Young, and his friend, Benjamin Tam.

IV

[37] I turn to review aspects of the expert evidence in more detail.

[38] The plaintiff's family doctor reached this opinion in his report of 10 February 2007:

> Reviewing his initial diagnoses following his MVA, Mr. Chang's injuries have all resolved, except his ongoing pain in his left dorsal foot area. It appears to be related to the scar tissue that formed over the abrasion following his fall from the motorcycle. Despite his diligent adherence to physiotherapy, medications and orthotics, he remains symptomatic. This pain on static standing continues to persist and limits his ability to perform specific activities or employment that requires prolonged bending or crouching or standing. This does limit his ability to perform many jobs that have a physical requirement of persistent or prolonged standing, crouching or bending over. I have reviewed and agree with the conclusions and recommendations of the functional capacity evaluation that was done July 13, 2006 by Mr. Ralph Cheesman O.T.
>
> I conclude that Mr. Chang will require some significant retraining to acquire the skills to be gainfully employed in the future acknowledging his functional limitations.

[39] The defendant submits that Dr. Chang's evidence should be discounted, as he appeared to be an advocate in the plaintiff's cause.

[40] In my view, Dr. Chang's somewhat pessimistic opinion must be viewed with some scepticism.

[41] It is important to note that Dr. Chang stated in his report that the plaintiff "finally quit his job due to his physical limitations from the motor vehicle accident injuries as well as the additional tingling in his fingers and toes".

[42] Dr. Chang was definite on cross-examination that the plaintiff so advised him. The plaintiff denied that he told Dr. Chang that he quit his job at RST because of the accident and the injuries he sustained in it.

[43] In my view, this important inaccuracy in Dr. Chang's report was bound to colour his opinion of the plaintiff's status and prospects.

[44] A central part of the plaintiff's case is the substantial claim for loss of future earning capacity. In this regard the report of Ralph Cheesman, an occupational therapist, is important.

[45] In mid July 2006, Mr. Cheesman conducted a functional capacity evaluation of the plaintiff.

[46] Mr. Cheesman's final opinion is stated so:

> Mr. Chang presents with core functional capabilities that will enable him to return full time to the competitive workforce. He may continue to experience improved neuromuscular functions, such as dynamic balance, with further resolution of his Guillain Barre Syndrome and final plateau of this syndrome can be eventually identified by his treating neurologist.
>
> At this juncture Mr. Chang presents with some limitation for work functions. He has difficulty placing contact pressure through his left knee and this will limit his postural choices when performing sustained low level activities. Mr. Chang will be able to perform low level activities using a combination of full depth crouching, 1 point kneeling on the right knee, or severe stooping. Consequently, he will be able to perform sporadic low level functions that do not require a great deal of mobility while on the ground. Where Mr. Chang will have difficulty is activities that require primary low level postures requiring mobility. Examples of this are found in carpet laying, floor laying, cement finishing, and carpentry jobs. As well, Mr. Chang will not be well suited for a job that requires extensive crawling function, such as potentially removing asbestos or cleaning ducts.
>
> Mr. Chang also presents with difficulty for static standing posture as evidenced by emergence of pain mannerisms and weight shifting compensations. He is able to manage his symptoms provided activities allow flexibility to sit or move about (walking or dynamic standing). Consequently, Mr. Chang would not be ideally suited to durably manage work functions that emphasize static standing posture. Examples of this are found in supermarket cashier work or road traffic control sign operation. At this juncture he is advised to refrain from activities requiring dynamic balance on narrow bases of support if working at heights.

[47] Of interest is the plaintiff's performance in the Valpar 204 Fine Finger Dexterity test and the Valpar 8 Simulated Assembly test. In both, the plaintiff was able to endure static standing for extended periods (48 minutes and one hour and 20 minutes) with brief episodes of off loading of weight bearing force through his left foot.

[48] At page 14 of his report, Mr. Cheesman writes:

> Test results and observations of behaviour in functional settings indicate Mr. Chang possesses the ability to approach prolonged standing demands that are required of some competitive employment positions (primary posture for up to 2 hours at a time). He likely can stand for 2 hour periods provided there is variety of both static and dynamic positioning. Mr. Chang reports elevations of left foot pain with prolonged exposure to standing which are accompanied by emergence of pain mannerisms. He also demonstrates scheduled sitting, breaks serve to reduce such pain reactivity, allowing him to recalibrate his tolerance for standing functions.

[49] And under the heading "Sustained Work Tolerance" we find:

> In terms of his overall tolerance, Mr. Chang participated in approximately 8 hours of assessment activity. He demonstrated adequate energy, enthusiasm, and selective productivity to be gainfully employable in regular work hour shifts (8 hour day). Mr. Chang was observed to leave the evaluation without evident difficulty or distress.

[50] On the whole this assessment appears quite positive, the more so as it was made at a time when Mr. Chang was suffering from the symptoms of GBS, although Mr. Cheesman maintains that he was able to filter out its effects in his analysis.

[51] Dr. Andrew Hepburn, an orthopaedic surgeon, gave evidence in the defendant's case through his reports of 4 August 2006 and 13 March 2007. Dr. Hepburn was not cross-examined at trial.

[52] In his first report, Dr. Hepburn stated his opinion on whether Mr. Chang suffers from a permanent disability:

> As regards permanent disability, at this time Mr. Chang is disabled to some extent by his Guillain-Barre syndrome. As far as I can determine as regards the orthopedic injuries, i.e. the fractured left clavicle, the soft tissue injuries to the left shoulder, left lower extremity, elbows, etc should not cause problems and it doesn't appear that he has had serious internal derangement of his left knee or left ankle. Once again I wouldn't expect that he will have permanent disability relating to those. It appears that he was disabled for a number of months and that would seem reasonable given the fact that his work is fairly physical, he had significant scarring in his left lower extremity and no doubt it would take six months for the fractured clavicle to heal to a point where he could return to physical work.
>
> As regards future treatment, at this time he is undergoing some further treatment for his Guillain-Barre syndrome. As regards the musculoskeletal problems I think he should be encouraged once he has recovered from the Guillain-Barre to gradually reinstitute his healthy exercise program that he did through the gym. I would encourage him to be involved in aerobic exercise also on a long term basis. I can see no reason why ultimately he shouldn't be able to attempt the sporting activities that he did previously.

[53] In his second report, Dr. Hepburn concluded that the source of Mr. Chang's throbbing sensation in his left leg is "… conjectural. As to whether scar tissue could lead to such complaints of pain and disability, as I stated previously, I think this is quite unlikely".

[54] Dr. Hepburn was referred to Mr. Cheesman's report (in Dr. Hepburn's report of 13 March 2007):

> As regards Mr. Cheesman's report, I wouldn't expect that a contusion to the ankle and contusions and abrasions to the shin would normally prevent individuals from recovering to be able to perform most normal functions, and I certainly would not expect scarring in the anterior aspect of the leg to cause significant disability preventing Mr. Chang from accessing some types of work. However, I have no expertise in terms of functional capacity evaluations.
>
> [Emphasis added]

[55] This is a significant concession properly made by Dr. Hepburn.

V

[56] I will begin my discussion of damages with the claim for loss of future earning capacity.

[57] The plaintiff seeks a very significant award under this head, putting it between $100,000 and $250,000 in final submissions and drawing on the reports of Mr. Cheesman and John Lawless, who conducted a vocational assessment of Mr. Chang.

[58] At page 11 of his report, Mr. Lawless states:

> Regarding Mr. Chang's post-injury vocational options, the information I reviewed indicates that his injuries affect his strength and capacity for standing, balancing, and assuming low-level postures. These will have a significant effect on his career to this point, which has consisted of physically demanding occupations. Fortunately he's young and has a good potential for retraining, so he still has a fair range of occupational choices. He will need to take some time out of the workforce to pursue those options, however.
>
> [Emphasis in original]

[59] I conclude that this is a very pessimistic view of the plaintiff's status today and of his prognosis.

[60] The fact is that the plaintiff returned to his duties at RST and was able to properly carry them out for an extended period. He more recently has worked successfully at the sports retail outlet. It is true that the plaintiff had difficulties with the crouching required with the airline cargo position.

[61] Further, to the extent that there are concerns with the plaintiff's "strength" and "balancing", these are likely attributable to the GBS, not the accident.

[62] To say that the injuries arising out of the accident "will have a significant effect on his career to this point" overstates the facts.

[63] So too does the report of John Struthers. He bases his report on the mistaken belief that "… Mr. Chang is no longer suited to the kind of work he did prior to the accident", and that Mr. Chang would require retraining before re-entering the workforce. Mr. Chang has abandoned any claim based on the alleged need for retraining.

[64] Still, based on the report of Mr. Cheesman and the plaintiff's current physical complaints, in particular those associated with his left foot, the plaintiff has lost something of his future earning capacity. In this regard, I accept that the plaintiff does suffer discomfort in the foot and left knee and that this impacts his functional capacity to the extent noted by Mr. Cheesman in his report.

[65] In final submissions, the defendant makes much of the allegedly trivial nature of the scaring on the plaintiff's foot. Counsel writes:

> *Again, it is important to note that not only is the scar small, but it is also superficial: can such a small, superficial scar truly support the immodest claims of disability and loss of function that are eventually built around it?*
>
> [Emphasis in original]

[66] The defendant is simply inviting the court to apply the scepticism of a lay person to the situation of the plaintiff. The fact is that I accept the evidence of the plaintiff to the extent that he says he still experiences some discomfort when standing for lengthy periods on his left foot; that he still experiences some difficulty with his knee in a kneeling and crouching position.

[67] Whether this is permanent or may resolve, in whole, or in part, in the future, is unclear on the evidence and that is a contingency which I must take into account.

[68] That takes me to the law on this head of damages.

[69] Here, the plaintiff has demonstrated an ability to at least carry on his pre-accident vocation as a shipper/receiver, in the context of the workplace at RST. But his present physical status does preclude his full participation in some types of work at this time, as Mr. Cheesman has noted.

[70] The plaintiff accordingly advances his claim on the basis of the so-called "capital asset" approach often identified with Justice Dickson's observation in ***Andrews v. Grand & Toy Alberta) Ltd.***, [1978] 2 S.C.R. 229 at 251:

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

[71] Justice Finch (as he then was) described this approach more fully in ***Pallos v. Insurance Corp. of British Columbia*** (1995), 100 B.C.L.R. (2d) 260 (C.A.) (at pp. 269-70):

> 27 It does not appear that the trial judge had his attention drawn to any of these cases, or to the approach they suggest. These cases all treat a person's capacity to earn income as a capital asset, whose value may be lost or impaired by injury. It is a different approach from that taken in *Steenblok v. Funk* (supra), and similar cases, where the court is asked to determine the likelihood of some future event leading to loss of income. Those cases say, if there is a "real possibility" or a "substantial possibility" of such a future event, an award for future loss of earning may be made. There is nothing in the case law to suggest that the "capital asset" approach and the "real possibility" approach are in any way mutually exclusive. They are simply different ways of attempting to assess the same head of damages, future loss of income. It is to be regretted that plaintiff's counsel did not

> advance the case at trial using both approaches, in the alternative.
>
> …
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> 29 In my respectful view, a consideration of this issue should not have been limited to the test established in *Steenblok v. Funk* (supra). The plaintiff's claim in this case, properly considered, is that he has a permanent injury, and permanent pain, which limit him in his capacity to perform certain activities and which, therefore, impair his income earning capacity. The loss of capacity has been suffered even though he is still employed by his pre-accident employer, and may continue to be so employed indefinitely.

[72] I should note that this approach has been criticized by the New Brunswick Court of Appeal in ***Vincent v. Abu-Bakare***, 2003 NBCA 42, where Chief Justice Drapeau said (at ¶ 49 and 50):

> 49 That said, it must be acknowledged that Canadian courts have, on occasion, overlooked the absence of any evidence of a real and substantial possibility of lost earnings or profits and awarded pecuniary general damages for loss of earning capacity upon proof of an accident-related restriction in employability. They have done so on the theory that the plaintiff has been stripped of a valuable capital asset. Courts, particularly in British Columbia, have shown no hesitation in making awards of that nature even in cases where the injured party has returned to his previous work and is earning as much as he or she earned in the pre-accident period. See *Pallos v. Insurance Corp. of British Columbia* (1995), 100 B.C.L.R. (2d) 260 (B.C. C.A.) ($40,000) and *Nelson v. Kanusa Construction Ltd.*, [1995] B.C.J. No. 958 (B.C.S.C.), online: QL (BCJ) ($50,000). Moreover, there is some academic support for this approach. See J. Cassels, *Remedies: The Law of Damages* (Toronto: Irwin Law, 2000) at p. 125.
>
> 50 Despite these contrary opinions, I discern broad support in Canadian jurisprudence for the view that proof of a real and substantial possibility of lost earnings or profits is, generally, a condition precedent to any award of pecuniary general damages for loss of earning capacity. The following observations by Professors Cooper-Stephenson and Saunders in *Personal Injury Damages in Canada*, 2nd ed. (Toronto: Carswell, 1996) at pp. 213 and 217 accurately portray the situation in this country:
>
> > Despite frequent judicial use of the term "loss of earning capacity", the overwhelming weight of authority supports the view that the primary basis for assessment of *income* loss is an estimation of actual lost earnings, in the sense that the damages reflect what the plaintiff *would* have earned but for the accident, rather than what he or she had the capacity or ability to earn. Indeed, the actuarial method of calculation proceeds on the premise that the court is attempting to determine actual financial loss, rather than a diminution of a theoretical capacity. ...
> >
> > ...
> >
> > The scant judicial authority supporting the "earning capacity" thesis *in substance* has confined itself to cases where the plaintiff had chosen to work below maximum capacity, or chosen a lesser salary. ...
> >
> > [Emphasis in original]

[73] Whether, indeed, the law in British Columbia permits recovery under this head in the "absence of any evidence of a real and substantial possibility of lost earnings or profits", is complicated by the British Columbia Court of Appeal's decisions in ***Parypa v. Wickware***, 1999 BCCA 0088 and in ***Steward v. Berezan***, 2007 BCCA 150.

[74] In ***Steward***, the court was reviewing a trial judge's award for impairment of the plaintiff's earning capacity "in other occupations that may now be closed to him".

[75] Justice Donald, for the court, noted the trial judge's use of the phraseology from ***Palmer v. Goodall*** (1991), 53 B.C.L.R. (2d) 44 (C.A.) (at ¶ 17 and 18):

> [17] But the language in question there was used in the context of appellate review and, with respect, it cannot be transposed to an original analysis at the trial level. The claimant bears the onus to prove at trial a substantial possibility of a future event leading to an income loss, and the court must then award compensation on an estimation of the chance that the event will occur: ***Parypa*** ¶ 65.
>
> [18] When the record is examined according to that approach, I cannot see the basis for a substantial possibility giving rise to compensation for diminished earning capacity. There being no other realistic alternative occupation that would be impaired by the plaintiff's accident injuries, the claim for future loss must fail.

[76] This appears to be an express direction to first enquire into whether there is a substantial possibility of future income loss before one is to embark on assessing the loss under either approach to this head of loss, in particular, under the capital asset approach as well. (I note that Justice Russell arrived at a similar conclusion in ***Naidu v. Mann***, 2007 BCSC 1313 and see also ***Bedwell v. McGill***, 2008 BCCA 6, ¶ 53.)

[77] I have done so in the case at bar, and I have concluded that in the case of the plaintiff, there is such a possibility.

[78] But for reasons I have stated above, I have concluded that the impact on the plaintiff's future earning capacity is not likely to be extensive and there are strong negative contingencies involved.

[79] On the whole of the evidence, I award the plaintiff the sum of $20,000 under this head.

[80] I turn to consider damages for non-pecuniary loss. Here, the plaintiff seeks an award of between $90,000 and $125,000.

[81] The defendant counters at $35,000.

[82] The plaintiff relies primarily on two cases: ***Kahl v. Jakobsson***, 2006 BCSC 1163 and ***Foran v. Nguyen***, 2006 BCSC 605.

[83] ***Kahl***, at $125,000 under this head, is at the high end of the plaintiff's range. The facts are markedly different from the case at bar. This case offers no assistance in assessing Mr. Chang's loss.

[84] The same observations, to a lesser extent, may be made of the facts in ***Foran***.

[85] The defendant cites ***Yardy v. Peters***, [1996] B.C.J. No. 1239 (S.C.) and submits that while it is dated, it bears many similarities with the case here. I agree. In ***Yardy***, Coultas J. awarded the plaintiff $30,000 by way of damages for non-pecuniary loss.

[86] The defendant also notes ***Semmens v. Stewart***, 2001 BCSC 1816, a decision of Justice Humphries awarding $45,000 for non-pecuniary damages.

[87] Mr. Chang suffered some serious injuries in the accident. He was off work for a lengthy period. The activities which he enjoyed before the accident have been significantly curtailed since, although I note Dr. Hepburn's opinion in 2006 where he predicted that, ultimately, the plaintiff should be able to enjoy his previous sporting activities. I conclude that the plaintiff is being overly cautious in resuming a more active lifestyle.

[88] I have already noted Mr. Chang's status in March 2004 and beyond. In the fall of 2003, the plaintiff undertook and benefited from physiotherapy and an exercise program. By November 2003, the plaintiff had started to feel better in his neck, shoulder and ankle. He enjoyed more back mobility and strength. By March 2004, the plaintiff's most disabling complaint was with his left foot.

[89] At trial the plaintiff testified that he still experienced some discomfort with his left shoulder and collar bone. This was said to affect his ability to lift over his head. I do not accept that any actual discomfort in this area is attributable to the accident. As noted above, the plaintiff agreed on cross-examination that his left shoulder pain had largely resolved by March 2004 and Mr. Cheesman noted no such issues in his extensive testing of the plaintiff in the summer of 2006. Indeed, under the heading "Self Perception of Functional Status" in the Cheesman report, it is noted that the plaintiff reported no limitations with vertical reaching or "upper extremity push/pull".

[90] In all the circumstances, I award the plaintiff the sum of $45,000 by way of non-pecuniary damages.

[91] Accordingly, there will be judgment for the amounts I have noted, together with the amounts already settled on.

[92] The parties may wish to address the issue of costs by way of written submissions and leave to do so is granted.

"Bauman J."