IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Berenjian v. Primus,*
2013 BCSC 172

Date: 20130205
Docket: M072679
Registry: Vancouver

Between:

Adel Berenjian

Plaintiff

And

Andrew Primus and John Paul Primus

Defendants

Before: The Honourable Mr. Justice Williams

Reasons for Judgment

Counsel for the Plaintiff:	D.J. Sinnott
Counsel for the Defendants:	T.H. Pettit
Place and Date of Trial:	Vancouver, B.C. February 20-24, 2012
Place and Date of Judgment:	Vancouver, B.C. February 5, 2013

[1] The plaintiff Mr. Berenjian brings this action to recover damages from the driver of an automobile which struck him and, he says, injured him.

Background Circumstances

[2] At time of trial, Mr. Berenjian was 54 years of age; he was 48 years old when the accident occurred.

[3] At, or shortly after, 6:00 p.m. on April 5, 2006, the plaintiff was on foot and travelling northbound on the sidewalk adjacent to Taylor Way in West Vancouver. He arrived at the intersection where Keith Road intersects with Taylor Way. He began to cross Keith Road, walking in the marked crosswalk.

[4] An automobile owned by the defendant John Paul Primus and driven by his son Andrew Primus was at the corner. Andrew Primus was in the process of turning right from Keith Road onto Taylor Way, with the intention of heading southbound. The light was green for traffic travelling northbound and southbound on Taylor Way and was red for traffic on Keith Road. Nevertheless, Andrew Primus was lawfully permitted to turn right on the red light, so long as that turn could be made in safety. In fact, in the matter at bar, it is apparent that Andrew Primus moved his vehicle forward, into that right turn, at a time when the plaintiff was in front of the vehicle. Contact was made.

[5] Following the collision, Andrew Primus pulled his vehicle over and spoke with the plaintiff. The plaintiff pulled himself together and after some time had passed was transported to his nearby home by two persons who were witnesses to the event.

[6] The plaintiff claims that he sustained injuries to his left arm and left knee as well as to his neck and back.

[7] He brings this action to recover damages for the injuries and the effect they had upon him.

Positions of the Parties

[8] The plaintiff says that he was lawfully in the intersection, crossing on a light displaying a walk sign, when he was struck. He says that he sustained a number of injuries; some of those resolved quickly, others took some considerable time to resolve. He says that those injuries caused him pain and suffering, and interfered with a number of his ordinary activities.

[9] He seeks to recover damages accordingly.

[10] The defendants concede that the automobile struck the plaintiff in the course of negotiating the right turn. The defendants challenges the proposition that the plaintiff was in the intersection on a walk signal, and says as well that the plaintiff was careless in the manner in which he attempted to cross the street. The defendants also say that the extent of the injuries was minor, so minor as to amount to virtually nothing. He disputes the plaintiff's contention that the injuries were of any moment or that they actually caused him any pain and suffering or impacted upon his ordinary activities.

[11] In short, the defendants say that the plaintiff was contributorily negligent in the occurrence of the collision and that he has not established a basis that would entitle him to receive any damages other than a most minimal award.

Discussion

[12] There were three witnesses at trial able to testify with respect to the manner in which the collision occurred: the plaintiff, the defendant Andrew Primus, and a person who was in another automobile at the scene and who observed the events, Ms. Williams.

[13] The plaintiff has testified about his injuries; he also adduces in support the evidence of two medical professionals, a general practitioner and a chiropractor who treated him.

[14] In advancing their position, the defendants rely upon their own evidence as well as that of an ICBC adjuster who had dealings with the plaintiff after the event, and the testimony of Dr. Leith, an orthopaedic surgeon. The defendants have also tendered video evidence of certain activities of the plaintiff in the time period following the event.

[15] I propose to deal with the matter under three separate headings:

(a) collision and liability;

(b) injuries and consequences;

(c) damages.

(a) Collision and Liability

[16] The evidence establishes to my satisfaction that, at the time the automobile struck the plaintiff, he (the plaintiff) was in the crosswalk at the intersection. It is also beyond dispute that the light for northbound and southbound vehicular traffic on Taylor Way was green.

[17] There was controversy at trial as to whether the plaintiff stepped into the intersection when he had the benefit of a walk light for his crossing, or whether the light was stale and a “don’t walk” signal was being displayed.

[18] The only direct evidence on that point comes from the plaintiff. He says that when he stepped off the sidewalk, there was a walk signal displayed. Based upon some concerns I have of the complete accuracy of his description of events at the intersection, including the presence of other vehicles and pedestrians, I am not without some reservations as to the correctness of his description and particularly with respect to the signal. Nevertheless, the other witnesses are not in a position to dispute that there was a walk signal displayed; the most that can be said is that the state of the light at that intersection was probably somewhat stale at the time. I should note that there is no evidence before this Court that would indicate whether the walk signal at the intersection is triggered by the action of a pedestrian wishing

to cross the street, or whether the walk signal is displayed as part of the green light cycle for north-south traffic.

[19] In the circumstances, recognizing that the standard to be met is one of a balance of probabilities, I conclude it is more likely than not that a walk signal was displayed when the plaintiff stepped off the sidewalk and into the crosswalk.

[20] I conclude as well that the plaintiff was inside the marked crosswalk area at the time contact was made by the defendants' automobile.

[21] The defence also submits that there is reason to conclude that the plaintiff was not paying sufficient attention to other traffic at the time he was crossing Keith Road. That contention is based primarily upon video evidence which has been tendered, showing the plaintiff running from his place of work in downtown Vancouver to his residence in West Vancouver. The defendants note that he appears to ordinarily run with some sort of a jacket hood on his head and that compromises his ability to see all his surroundings, and, as well, that he appears in the videos to have a tendency to cross roads even though no walk signal is displayed.

[22] I have taken those factors into consideration, but cannot find a basis to extrapolate from those rather general suggestions to a conclusion that the plaintiff was not taking sufficient care as he crossed the street.

[23] The core submission advanced by the defendants with respect to liability, as set out in their submissions, is as follows:

> Mr. Berenjian breached the standard of care of a reasonable person and did not pay sufficient attention to see the danger and crossed without adequately looking. Certainly, he admits failing to look to his left but that appears as more as [sic] an example of general carelessness on the plaintiff's part than the relevant breach in the case at hand: here, the Primus vehicle was directly ahead of the plaintiff and bright yellow to boot. It was there to be seen but the plaintiff failed to see it.
>
> The plaintiff proceeded presumably at a fast walk or slow jog in front of the defendant's vehicle and, only too late, noticed it. He took some evasive steps, but, by this time, it was too late. He had already put himself in front of a vehicle that was moving forward with a driver not looking ahead.

[24] The plaintiff's position is that he was lawfully in an intersection and that the defendant driver was turning right in the face of a red light. He contends that a driver in such a situation has a clear statutory duty not to move into his turn until it can be done in safety.

[25] The defendants agree that the driver has a greater duty of care than the pedestrian, but urge the Court to find contributory negligence on the part of the plaintiff, something in the order of 40%.

[26] In my view, the defendants' position cannot succeed.

[27] The relevant statutory provisions from the *Motor Vehicle Act*, R.S.B.C. 1996, c. 318, are as follows:

> **Pedestrian controls**
>
> 132 (1) When the word "walk" or an outline of a walking person is exhibited at an intersection by a pedestrian traffic control signal, a pedestrian may proceed across the roadway in the direction of the signal in a marked or unmarked crosswalk and has the right of way over all vehicles in the intersection or any adjacent crosswalk.
>
> (2) When the word "walk" or an outline of a walking person is exhibited at a place other than an intersection by a pedestrian traffic control signal, a pedestrian may proceed across the roadway in the direction of the signal and has the right of way over all vehicles.
>
> (3) When the word "wait", the words "don't walk" or an outline of a raised hand are exhibited at an intersection or at a place other than an intersection by a pedestrian traffic control signal,
>
> (a) a pedestrian must not enter the roadway, and
>
> (b) a pedestrian proceeding across the roadway and facing the word "wait", the words "don't walk", or an outline of a raised hand exhibited after he or she entered the roadway
>
> (i) must proceed to the sidewalk as quickly as possible, and
>
> (ii) has the right of way for that purpose over all vehicles.
>
> ...
>
> **Red light**
>
> 129 (1) Subject to subsection (2), when a red light alone is exhibited at an intersection by a traffic control signal, the driver of a vehicle approaching the intersection and facing the red light must cause it to stop before entering the marked crosswalk on the near side of the intersection, or if there is no marked crosswalk, before entering the intersection, and subject to the

> provisions of subsection (3), must not cause the vehicle to proceed until a traffic control signal instructs the driver that he or she is permitted to do so.
>
> (2) The driver of a bus approaching an intersection and facing a red light and a prescribed white rectangular indicator may cause the bus to proceed through the intersection.
>
> (3) Despite subsection (1), and except when a right turn permitted by this subsection is prohibited by a sign at an intersection, the driver of a vehicle facing the red light, and which in obedience to it is stopped as closely as practicable to a marked crosswalk on the near side of the intersection, or if there is no marked crosswalk, as closely as practicable to the intersection, may cause the vehicle to make a right turn, but the driver must yield the right of way to all pedestrians and vehicles lawfully proceeding as directed by the signal at the intersection.
>
> ...
>
> **Careless driving prohibited**
>
> 144 (1) A person must not drive a motor vehicle on a highway
>
> (a) without due care and attention,
>
> (b) without reasonable consideration for other persons using the highway, ...

[28] I have found on the appropriate standard of proof that the plaintiff was lawfully in the intersection, crossing as a pedestrian. I am also quite satisfied that the defendant Andrew Primus was principally concerned with being able to turn from Keith Road onto Taylor Way in safety, and that the focus of his attention was the state of the traffic travelling southbound on Taylor Way. As a result, he was not sufficiently aware of what was happening immediately in front of his car and to his right.

[29] While it is understandable that he would be concerned with the state of the traffic coming from the left, the fact remains that he was obliged to ensure that there was no pedestrian in the crosswalk, and he failed to do so.

[30] I have been referred to the decision of Grist J. in *MacKnight v. Nast*, 2005 BCSC 469. That case which involved the plaintiff, a pedestrian, being struck by a bicycl, while she was in a crosswalk, is factually dissimilar.

[31] There, the plaintiff was in a marked crosswalk and had actuated the traffic signals. The automobile traffic had come to a stop. The defendant was riding his

bicycle on the right-hand side of the road; he passed the stopped cars and rode into the crosswalk at speed. He saw the plaintiff at the last minute, but was unable to stop and struck her.

[32] The Court was invited to find contributory negligence on the basis that, even though the plaintiff was lawfully crossing the street, she was under an obligation to take reasonable care for her own safety, notwithstanding the right of way, and so some measure of responsibility should be allocated to her.

[33] Grist J. proceeded from the proposition that contributory negligence, which is based on an obligation to take reasonable care for one's own safety, depends on the forseeability of the risk presented by the defendant's negligence. In those circumstances, where the plaintiff was in a marked crosswalk, with the traffic control signals functioning and the automobiles having stopped, he concluded it was not reasonably foreseeable that the defendant would disregard the signal and proceed at a significant rate of speed in the space between three stopped vehicles and the curb. To find contributory negligence would "stretch the obligation of reasonable foresight too far".

[34] In the present case, it is my view that the principle applies in a similar way. The plaintiff was crossing the street, in a crosswalk and with a walk signal being displayed. The defendants' vehicle was stopped and facing a red light. In those circumstances, the plaintiff was properly entitled to cross in front of the car. I do not accept that a pedestrian in such a situation should be expected to reasonably foresee that the driver of the vehicle will make his turn without taking proper care to ensure he can do so in safety.

[35] In the result, I conclude that the defendant Andrew Primus is liable for the collision and that there is no basis to find contributory negligence on the part of the plaintiff.

(b) The Plaintiff's Injuries and Consequences

[36] The plaintiff says that as the defendants' automobile moved forward and toward him, he held out his arm to catch the driver's attention. Nevertheless, the automobile struck him on the left side.

[37] I am satisfied that the vehicle was not moving at a high rate of speed when the contact occurred. It would appear that Andrew Primus had been inching forward as he waited for his opportunity to turn right. He evidently identified what he thought to be an appropriate break in the traffic and began to move into his right-hand turn. He testified that he was just in the process of releasing the clutch at about the time the contact was made.

[38] The plaintiff describes the point of contact as his left knee and leg and his left hand. He says that he was knocked partially off of his feet but managed to scramble up. He also says that he subsequently experienced substantial pain in his neck, accompanied by headache, and in his low back area.

[39] He attended upon his family doctor the day following and then saw the doctor again for the injuries on one further occasion, that is, on April 10, 2006. On the occasion of the first visit, the doctor prescribed a semi-narcotic analgesic for pain relief. He also recommended that the plaintiff attend physiotherapy and suggested that an over-the-counter pain medication as well as icing would be appropriate for the treatment of ongoing pain.

[40] The plaintiff made two attendances on a physiotherapist; there are no records of that treatment or outcome in evidence.

[41] In addition, the plaintiff began a course of treatment with a chiropractor, Dr. Wright. He first saw her on May 27, 2006 and then subsequently on 17 separate subsequent occasions. Initially, the visits were quite frequent; in the first two months, he saw Dr. Wright nine different times. The frequency of the visits diminished over time. His last attendance was January 13 of 2007.

[42] The plaintiff's description of the injuries and their duration and effect is as follows:

(a) Left knee: he says the knee was bruised; he treated the injury with ice and the pain was resolved within one week.

(b) His left arm: he says for the first five to seven days, he was unable to lift his hand over his shoulder. That situation improved with the chiropractic treatment and by June of 2007, it was substantially resolved. There was lingering discomfort through the end of the year.

(c) Neck: the plaintiff says that he had significant neck discomfort for the first six months; it largely resolved within 12 months of the incident, and was completely cleared up 18 months after the accident. His headaches had resolved within six to eight months.

(d) Low back: the plaintiff says that his back was 75-80% recovered by the summer of 2007. He also says that recovery was virtually complete following that, so long as he maintained an exercise program. He described lingering discomfort when he failed to be active.

[43] In terms of the effect upon his everyday life, the plaintiff missed one day of work as a consequence of the injury. He said that he experienced substantial difficulty in performing his work (tailoring of clothing) for a period of approximately three weeks, and that his ability to do household chores was adversely impacted for a considerable time. He says it took a year for him to get back to normal in that regard - cooking, cleaning, and yard work.

[44] He also claims that the injury caused him considerable difficulty because it interfered with his exercise activities.

[45] That has turned out to be a matter of some real contention in this case.

[46] It is clear that the plaintiff is substantially dedicated to exercise and fitness. Indeed, at the time of the accident, he was in the course of jogging from his place of

work in downtown Vancouver to his residence in West Vancouver. His usual practice was to run home from work four or five days per week.

[47] The plaintiff says that one of the ways the injuries from the accident have impacted his routine is that, because of them, he was not able to run in the usual fashion, and it was in fact some time later that he was able to get back to his pre-accident routine. His Statement of Claim also contains the assertion that he suffered from anxiety as a result of the accident - presumably that it caused him to be afraid and traumatized by jogging in traffic. In fact, that complaint was not maintained at trial, and, at any rate, the video evidence would tend to refute such a claim.

[48] The claim with respect to his jogging activities having been seriously impacted is quite robustly disputed by the defendants. They say that in fact, the plaintiff had resumed his practice of running home from work within a short time of the accident. Specifically, both Andrew Primus and his father John Paul Primus describe seeing the plaintiff, dressed similarly to how he had been attired at the time of the accident, at the intersection of Marine Drive and Taylor Way. They described him as “apparently jogging”; at the specific point they saw him, he was awaiting a light to change in order to cross the street, and was jogging on the spot. Additionally, both of these witnesses describe observing the plaintiff running, apparently as he had been prior to the accident, within two or three weeks of the accident.

[49] There is also the evidence of the ICBC adjuster. She testified about having two meetings with the plaintiff. The first was on April 11, 2006, just eight days after the accident, when she observed that he was moving slowly and with apparent great difficulty, grimacing and mincing. She also met with him about a month later, on May 12. At that time, he told her that he was trying to walk as much as possible, that he was taking painkillers but that he was not running. He said to her: “I don’t jog - I power-walk”.

[50] As part of its examination of the circumstances, the defence retained an investigator to observe the activities of the plaintiff. That resulted in video recordings being made; those were tendered in evidence at this trial. Those recordings show

the plaintiff, on three separate occasions, leaving his downtown place of business and travelling on foot to the area of his residence in West Vancouver.

[51] The first of those recordings was made on May 4. It shows the plaintiff as he slowly jogged from his place of business to his residence. On the way, he stopped and did some moderate physical exercise including push-ups. The elapsed time from his departure from his place of work to his arrival at his home was approximately 70 minutes.

[52] Another recording was made the day following, May 5. Again, it shows similar activity; the elapsed time was 70 minutes.

[53] The third observation was conducted on May 11. Again, the plaintiff is shown essentially jogging from his place of work to his home. The additional exercise was done along the way in the same fashion.

[54] At trial, the plaintiff was confronted with this evidence, as well as testimony he had provided in the course of an examination for discovery, at a time when he was unaware of the recordings having been made. At the examination, he stated under oath that he had eased into his running gradually following the motor vehicle accident and had started running the entire distance from his place of work to his home approximately five to six months after the motor vehicle accident. He said that, post-accident, the trip would take him in the order of two hours, which he said was about 45-60 minutes longer than it had taken prior to the injury. His evidence at the examination for discovery was that his time to make the trip, prior to the motor vehicle accident, was in the order of 60-70 minutes.

[55] At trial his testimony was different. He said that before the motor vehicle accident, he had been able to do the run and the en route workout in 40 minutes.

[56] Quite predictably, the apparent discrepancy between these activities and the manner in which the plaintiff had represented his injuries and their effects was the basis of some real dispute at trial.

[57] As I understand the position of the plaintiff, he says that he forced himself to run these distances, even though he was in considerable pain, and even though it required him to use substantial amounts of painkilling medication, because he has a deep-seated commitment to physical exercise.

[58] The plaintiff also attempts to address the concern by way of what seems to me to be something of a semantic distinction. He takes the position that he was not jogging but walking quickly.

[59] The defendants adduced the evidence of an orthopaedic surgeon, Dr. Leith. His testimony was taken on a video deposition and that was tendered at trial. He had rendered three separate opinions, set out in report letters. The first was dated August 28, 2008. To prepare that opinion, Dr. Leith had examined the relevant medical records and performed an in-person assessment of the plaintiff on April 14, 2008. At that time, he was not aware of the video recordings. His conclusion, assuming that the plaintiff was asymptomatic prior to the accident and that, following the accident, he had pain affecting his left knee, left upper extremity and entire back, was as follows:

> There is nothing to indicate any structural injury to the lumbosacral spine or the vertebra of this area. The ongoing symptoms are primarily musculoligamentous in nature and should resolve with appropriate conservative treatment. Prognosis for recovery is good based on the minor nature of the injuries sustained and the minor nature of the ongoing symptoms. There is no indication that there will be any long-term sequelae from this or requirement for any surgery. From a functional standpoint, Mr. Berenjian continues to work although with some low back symptoms, but this is not a significant problem based on the evaluation. The overall prognosis is good.

[60] Dr. Leith was subsequently provided with copies of the video recordings of the plaintiff jogging on the three occasions described above. In light of that information, he provided a revised opinion, dated July 8, 2008, quite at variance with his original. Specifically, he said there:

> The observation of this video is quite compelling after re-reviewing my assessment of April 14. 2008 and the opinion of that report. My Medical Legal Report to you opined that Mr. Berenjian had injuries to his left knee, left upper

> extremity and his entire back and the ongoing issue at the time of my evaluation was with respect to chronic low back pain.
>
> As a result of my review of the surveillance video, my original opinion now becomes irrelevant. Being able to jog along the route that Mr. Berenjian was observed jogging without any sign of any pain or discomfort is not consistent with having any low back disability or problems. In particular, running for the length of time that he was running on a regular basis indicates that he did not have any injuries or disability. There is a large proportion of the population that would not be able to perform this length of run over the grades encountered even 100% healthy. Mr. Berenjian reported being injured during my evaluation and not being able to do this sort of activity without difficulty yet it is clear that he was very capable of this type of activity.
>
> I would therefore conclude that Mr. Berenjian does not have any low back pain or disability as of the dates that he was jogging, which was within one month after the subject motor vehicle accident and at the present time, whatever symptoms he is complaining of are unrelated to the subject motor vehicle accident.

[61] That opinion was further refined by way of a further supplemental opinion rendered on July 28, 2008. In that opinion, Dr. Leith assumed that the plaintiff's running activities had actually commenced on April 7, 2006, not May 4.

[62] That refinement was premised on the proposition that the two defendants had observed the plaintiff running on April 7, in a manner similar to that depicted in the video recordings.

[63] Operating from that assumption, Dr. Leith opined that the plaintiff would not have sustained any formidable injuries as a result of the motor vehicle accident on April 5, 2006, because if he had, he would not have been able to participate in the type of physical activity depicted.

[64] The response of the plaintiff, as indicated, is that he was not running in the days immediately following the event. While he accepts that the activities depicted in the video recordings are accurate, he insists that he was doing so only in the face of great pain and with the assistance of pain suppression medication.

[65] In support of that position, he relies upon subsequent follow-up medical opinions prepared by the family doctor, Dr. Mamacos, and the chiropractor,

Dr. Wright. Both of those persons authored opinions in response to the revised subsequent opinion of Dr. Leith.

[66] Dr. Mamacos essentially stands by his original report. He says as follows:

> In the video he is seen to be exercising actively - does that mean he was never injured? A lot of healing can evolve in a month. A high pain threshold can motivate someone who loves to exercise to be active. He was seen "jogging" not sprinting.
>
> My initial report showed bruising of his knee from the accident. He also had para-vertabral muscle spasm, etc-objective findings.
>
> ... I continue to support my findings that [he] sustained injuries after an MVA on April 16, 2006.

[67] Similarly, Dr. Wright stands by her conclusion that the plaintiff sustained real injuries. She notes that it is her practice to advise patients who have been injured in accidents to continue to exercise to control symptoms and facilitate recovery. She says the ability to continue in a regular exercise routine does not preclude the existence of injury. She observes as well that she had the opportunity to examine and treat the plaintiff over the course of seven months, and that she observed objective evidence of injury and concluded his symptoms are the result of the accident.

[68] I am concerned with the veracity of the plaintiff's claims regarding the extent, severity and effects of the injuries he suffered. The principal basis upon which the claim rests is his testimony, his description. There is not any notable objective evidence to support his assertions of the quite extensive nature of the consequences.

[69] On the other side of the ledger are three significant factors:

(a) Firstly, the evidence of the plaintiff's physical activities in the time following the accident is troubling. The jogging activities in which he was observed to be engaged and which have been proven by the video recordings, within a month of the event, are, in my view, quite

strikingly at odds with the description he has provided of the extent of the effects of the injuries.

There are as well the observations made by the defendants, even before the video recorded activities. While they are not conclusively proven by photographic evidence, in view of the videos and, noting that both defendants have testified as to observations of the plaintiff having resumed some sort of jogging routine within weeks of the event, I must attribute some credence to their testimony on that matter.

In the result, I am driven to conclude that the plaintiff was able to engage in significant physical activity within a month of the accident.

(b) Secondly, I find his evidence with respect to the issue problematic. His testimony at trial is not consistent with what he said at his examination for discovery. Those discrepancies are set out at para. 54 above.

I also find that the representations he made to the insurance adjuster are difficult to accept as truthful in light of the video evidence. His explanation at trial, that the discrepancies are more semantic than real, and that he was forcing himself to run, taking medication to be able to keep the pain within the limits of tolerability, is, in the totality of the circumstances, of some dubious believability.

(c) The third factor is the nature of the event: the impact was quite minor. While that is not determinative - I accept that low-speed contact can, in some circumstances, result in injuries of real gravity - it is a factor that is entitled to some consideration.

[70] In the final analysis, I have very serious doubts as to the truth and reliability of the plaintiff's description of the extent of the injuries and their impact upon him. My conclusion is that there was some soft tissue injury - bruising and discomfort - but it was fairly minor in that he was able to resume his running within a month. In view of

that finding, while I accept there may have been some lingering residual discomfort, it would be of a fairly modest magnitude.

[71] Similarly, as for his claims that his neck pain continued for 12 to 18 months, that the headaches persisted for six to eight months, and his complaint of low back pain, I find that he has not proven on a balance of probabilities that such injuries resulted in discomfort such as he describes. On the evidence, it was substantially less.

(c) Damages

[72] The plaintiff says that he suffered soft tissue injury to his neck and back which negatively impacted his life. He says the primary symptoms resolved over 18 months, and there was reducing intermittent low back discomfort since that time. In his submission, an appropriate award for non-pecuniary damages is $30,000.

[73] In support of that submission, he cites four trial decisions of this Court:

1. In *Parihar v. Allan,* [2006] BCSC 1505*,* the plaintiff suffered soft tissue injury to neck and back following two minor collisions; substantial recovery in the first nine months, with intermittent symptoms for an additional six months. At trial, three years post-accident, the plaintiff reported only occasional discomfort with activity. Non-pecuniary damages: $25,000.

2. In *Kahlon v. Prasad*, 2006 BCSC 2039, the plaintiff sustained soft tissue injuries after a minor collision; no time missed from employment and the symptoms had fully resolved within 14 months. Non-pecuniary damages: $25,000.

3. In *Krause v. Gill,* [2006] BCSC 1459, the plaintiff sustained soft tissue injuries to the neck and back; substantial recovery within the first six months and residual pain for an additional 12 months. At trial, three

years post-accident, plaintiff reported ongoing residual discomfort. Non-pecuniary damages: $30,000.

4. In *White v. Stonestreet,* [2006] BCSC 801, the plaintiff sustained soft tissue injuries to neck, shoulder and back; significant improvement noted in the first six months and all symptoms had largely resolved within an 18 month period, with some continuing residual pain. Non-pecuniary damages: $35,000.

[74] The submission of the defendants is that this plaintiff suffered minor soft tissue injuries of very limited duration. The defendants emphasize that the plaintiff is obliged to adduce “convincing evidence” “that his complaints of pain are true reflections of a continuing injury”. They say that when the evidence is considered carefully and critically, the plaintiff has not proven more than a mild, transient injury.

[75] The defendants make reference to a number of decisions which are characterized as addressing modest awards for modest injuries, with the submission that each of the cases in fact describe injuries more serious than those suffered by Mr. Berenjian:

1. In *Kosko v. Collie,* (19 September 1995), New Westminster C911774 (S.C.), the plaintiff sustained a neck injury, resolved in four months. Non-pecuniary damages: $4,000.

2. In *Cooper v. Torrance,* 2003 BCPC 271, the plaintiff sustained injuries that were described as being severe for three weeks, moderate discomfort for approximately two months thereafter and some residual symptoms. Non-pecuniary damages: $2,500.

3. In *Gill v. Mansour*, 2004 BCSC 1537, the plaintiff sustained mild soft tissue injuries which continued for a period of two months and resolved with only minor discomfort after. Non pecuniary damages: $3,000.

4. In *Laboucane v. Paine*, 2009 BCPC 0086, the plaintiff suffered a modest injury that was partially disabling for approximately one month. Non-pecuniary damages: $3,000.

5. In *Seto v. Ng*, 2009 BCPC 0218, the plaintiff suffered injury that was found to have lasted for four month duration. Non-pecuniary damages: $2,500.

6. In *Dolha v. Heft*, 2011 BCSC 737, the plaintiff sustained injuries that continued for a period of approximately six to nine months. Non-pecuniary damages: $7,000.

[76] The defendants have also made reference to a decision of the Court of Appeal, *Le v. Luz*, 2003 BCCA 640. In that case, the Court set aside a jury verdict of $200 for non-pecuniary damages and substituted a verdict of $2,000. In its decision, the Court noted that while there was no intention to set a floor or a benchmark for minor soft tissue injuries, an award of $2,000 seemed appropriate in the circumstances.

[77] It is obvious that the two very distinctly different submissions reflect quite different views of the magnitude and consequences of the injury. My conclusions are as set out in paragraphs 70 and 71 of these Reasons.

[78] In my view, the appropriate award of non-pecuniary damages in this case is $4,000.

[79] The plaintiff also seeks an award in respect of special damages. The amount sought is $940, which is the sum paid for therapy expenses. Although there was discussion as to interest costs incurred with respect to those fees, the plaintiff's submission does not seek recovery of any interest paid.

[80] Given my findings as to the extent of the injuries, I am not satisfied that all of the fees paid for chiropractic care are reflective of a genuine need for those services.

In the result, the plaintiff is entitled to recover $500 for those costs, representing a portion only.

[81] The defendants have advanced an argument with respect to a failure to mitigate. As I understand, that is put forward as an alternative, in the event the Court finds that the plaintiff suffered more than relatively minimal soft tissue injury that resolved quite straightforwardly. Given my finding, I see no purpose in addressing this submission.

Summary of Conclusions

[82] The accident of April 5, 2006 was caused by the negligence of the defendant driver. In that accident, the plaintiff sustained injuries which entitle him to recover damages as follows:

Non-pecuniary damages:	$4,000
Special damages:	$ 500
Total:	**$4,500**

[83] The plaintiff is also entitled to recover pre-judgment interest pursuant to the *Court Order Interest Act,* R.S.B.C. 1996, c. 79 in respect of the special damages.

[84] In the absence of there being considerations of which I am unaware, the plaintiff shall recover his costs of this action. If necessary, arrangements may be made through New Westminster Supreme Court Scheduling to provide further submissions on that issue.

"The Honourable Mr. Justice Williams"