IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: ***Garcha v. Gill,***
2008 BCSC 1756

Date: 20081219
Docket: M070249
Registry: Vancouver

Between:

Randhir Singh Garcha

Plaintiff

And

Mukhtiar Singh Gill

Defendant

Before: The Honourable Mr. Justice Cohen

Reasons for Judgment

Counsel for the Plaintiff	M.S. Randhawa
Counsel for the Defendant	T.H. Pettit D. Marshall
Date and Place of Trial:	May 28, 29; October 27 – 31, 2008 Vancouver, B.C.

I. The Plaintiff's claim

[1] The plaintiff is a Chiropractor and is 34 years of age. He was involved in a motor vehicle accident at approximately 9:40 a.m. on March 25, 2005 on 128th Street in Surrey, British Columbia, near the intersection of 77th Avenue (the "accident"). He alleges that the defendant was solely responsible for the accident and he is claiming general and special damages for personal injuries and past wage loss.

[2] The plaintiff claims that he was proceeding in a southbound direction on 128th Street driving a rented Ford F150 quad cab pickup truck (the "plaintiff's vehicle") when suddenly, and without warning, the defendant, who was driving a five-ton 1992 International flatbed truck (the "flatbed truck"), changed lanes and caused the collision with the plaintiff's vehicle. He asserts that the impact was severe and that while he has largely recovered from his soft tissue injuries he still suffers flare ups of pain and discomfort associated with the accident related injuries.

II. Liability

The Plaintiff's Position

[3] The plaintiff's position is that he was traveling in the right hand or curb lane in a southbound direction on 128th Street and that as he approached the scene of the accident the defendant, who was traveling in a southbound direction in the left hand lane, attempted a sudden right turn into a parking lot with an entrance located near the intersection of 128th Street and 77th Avenue.

[4] The plaintiff said that his vehicle became embedded underneath the defendant's vehicle and was dragged as a result of the collision.

The Defence Position

[5] The defendant insists that he was proceeding southbound on 128th Street and that after he passed by the intersection of 128th Street and 78th Avenue he slowed down in preparation for his right hand turn into the parking lot. He said that before making his turn he checked for any traffic and, as was his common practice, he then turned part of his truck into the left hand lane so as to be able to make his right hand turn into the parking lot. He claims that the first notice he had of the existence of the plaintiff's vehicle was when he heard the sound of the collision as he was making his turn.

[6] The defence position is that, given the plaintiff's description of the parties' relative road positions, the defendant's more slowly moving vehicle could never have been able to turn in front of the plaintiff so that most of the flatbed deck portion of the defendant's vehicle could have passed in front of the plaintiff before the plaintiff drove his vehicle into the right wheel area of the defendant's vehicle.

[7] The defendant seeks a finding that the plaintiff was well back from the defendant when the defendant began to make his slow turn. Thus, claims the defence, the accident was a rear-end collision: the plaintiff rear-ended the defendant while the defendant was in the course of making a wide right turn into the entrance of the parking lot.

Decision on Liability

[8] I disagree with the defence contention that the plaintiff was the author of his own misfortune in that he was late for an appointment, likely speeding, not paying proper attention, and wrongly assumed that the defendant was changing lanes when in fact he was making a wide right turn. In my opinion, the weight of the evidence supports the plaintiff's version of how the accident happened.

III. Reasons

The Plaintiff's Version

[9] The plaintiff was on his way to work at the time of the accident. He was proceeding southbound on 128th Street towards 72nd Avenue where he operates a clinic. He was traveling in the right hand or curb lane and at about 78th Avenue he noticed a flatbed truck traveling in the left hand lane. The flatbed truck was slowing down and the plaintiff was catching up. At about the intersection of 128th Street and 77th Avenue the flatbed truck all of a sudden turned into a driveway. The plaintiff had no time to react. He veered to the right but his vehicle had already collided with and gone underneath the flatbed truck.

[10] The plaintiff was traveling at 50 kph. As he veered right the front end driver's side of his vehicle caught under the flatbed truck and his vehicle was dragged. Following the collision the plaintiff's vehicle was pinned underneath the flatbed truck.

[11] The plaintiff had no warning or indication that the flatbed truck was going to make a right hand turn from the left lane into the right hand lane.

[12] In cross-examination, the plaintiff denied that he was in a hurry to get to his clinic. Defence counsel pointed out to him that he had a 9:30 a.m. appointment on the morning of the accident. The plaintiff testified that his clinic was about a two minute drive away from the accident scene and that he normally got to work about 15 minutes late so that he would not have to wait for his first patient. He denied that he was late for work and speeding.

[13] The plaintiff testified that just before the sudden turn of the defendant's vehicle he was in the right hand lane approximately one car length away from striking that part of the defendant's vehicle with which he was about to collide. He said that when he noticed the defendant's vehicle starting to turn their vehicles were side-by-side, with the defendant's vehicle a little bit ahead, and that when the defendant turned his vehicle into the right hand lane the plaintiff had nowhere to go.

[14] When asked by defence counsel what the distance was that he was behind the defendant's vehicle in the right hand lane, the plaintiff replied that there was overlap between their vehicles and that the rear of the defendant's vehicle was somewhat behind the nose of the plaintiff's vehicle when the defendant made his right turn.

[15] The plaintiff said that the hood of his vehicle went underneath the flatbed deck of the defendant's vehicle at some point in front of the right side rear wheel of the defendant's vehicle. The plaintiff could not estimate how fast the defendant was traveling. He agreed that he was driving 50 kph and that the defendant must have been driving at a slower speed.

[16] The plaintiff said that it is etched in his memory that it was a car length between where he collided with the defendant's vehicle and when he first noticed the defendant making a right turn into his lane. He said he was not sure but thought that his vehicle went under the defendant's vehicle at about where a photograph of the defendant's vehicle showed there to be a tool box. He said that the hood of his vehicle embedded itself under the flatbed deck of the defendant's vehicle.

[17] According to the plaintiff's recollection, at the time of the collision the front wheels of the defendant's vehicle were in the right hand lane and not on the sidewalk. He agreed that he was passing the defendant's vehicle on the right hand side. He said that the defendant was traveling at a slower speed and that he did not collide with the front end of the defendant's vehicle because he swerved to try and avoid the collision. He agreed that the defendant's vehicle was at a right angle. The plaintiff said he could not say how slow or fast the defendant was traveling but when the defendant made his right turn the plaintiff had nowhere else to go.

[18] The plaintiff testified that the defence position was completely incorrect. He said that the defendant was not always traveling in the right hand lane; that the defendant did not move his vehicle into the left hand lane shortly before the driveway into the parking lot to negotiate his turn into the parking lot, driving at about 5 to 10 kph; that the front wheels of the defendant's vehicle were not inside the driveway to the parking lot when the plaintiff drove into the side of his vehicle.

[19] The plaintiff also disagreed with the defendant's assertion that he was not paying attention to his driving. He insisted that the defendant was traveling in the left hand lane the whole time. He said that the defendant was in his field of view for some time. He said there was no indication that the defendant's vehicle was going to turn. He agreed that he has passed by the location of the parking lot many times, but insisted that he has never seen a truck make a wide turn into the parking lot. He also testified that he has never seen the type of truck being driven by the defendant make a wide turn into the parking lot driveway.

The Defendant's Version

[20] The defendant testified that of the two southbound lanes on 128th Street he was traveling in the right hand lane. He said that he did not leave the right hand lane. After he crossed through the intersection of 78th Avenue and 128th Street he slowed down. He looked around him. He did not see any vehicles. When he came close to the driveway into the parking lot he moved his truck into the left hand lane. The front portion of his vehicle went inside the driveway a little bit away from the sidewalk and the rear portion of his vehicle was in the right lane. At that time he heard a "bang" sound and he then knew that he had been struck.

[21] The defendant said that after he crossed over 78th Avenue he slowed to between 25 and 28 kph. He

looked around him but did not see any vehicles. When he made his turn into the parking lot driveway his speed was 8 to 10 kph. He said that he could not make the turn if he was driving in excess of that speed. As he made his turn he moved a little bit into the left hand lane because he cannot make the turn from the right hand lane. He said that he has been parking at the same lot since 2003, and he negotiated the turn on the day of the accident in the same way he had always done prior to the collision.

[22] The defendant said that he had to move half of his vehicle into the left lane in order to make the right turn into the parking lot. He could not remember if he signalled his right hand turn. He said that at the time of the impact the front wheels of his vehicle had already crossed over the sidewalk. He said the plaintiff's vehicle struck his vehicle in the right rear wheel area. He said that the length of his vehicle, bumper to bumper, is twenty-nine feet.

[23] The defendant said that the plaintiff's vehicle struck his vehicle in three places: on the rim of his right rear tire; on a small portion of the tool box on the right hand side of the flatbed deck; and on the right hand flatbed deck frame.

[24] The defendant said his description of how he made the right hand turn into the parking lot described his practice. He said if he did not follow this practice he would not be able to make the turn.

[25] In cross-examination, the defendant said that his vehicle is double axel with hydraulic brakes. He confirmed that the length of his vehicle, bumper to bumper, is 29 feet, and the width is eight feet three inches. He agreed that the entrance to the lot might be 38 feet, although at the time of the accident he said that there may have been some soil reducing this by five or six feet. Plaintiff's counsel suggested to the defendant that given the length of his vehicle and the dimensions of the entrance to the lot he had more than enough room to turn into the driveway without having to first move his vehicle into the left hand lane. The defendant disagreed.

[26] The defendant said he did not know exactly how far he moved into the left hand lane but insisted that he had to move part way into the left hand lane to be able to make his right hand turn into the parking lot. He testified that the nose of his vehicle when he first felt the impact of the collision was across the sidewalk. He made a mark on a photograph exhibit to indicate the location of his vehicle's front wheels when he felt the impact. He disagreed that he had almost completed his right hand turn into the parking lot. He said that at the time of the collision his vehicle was turned at a 40 to 45 degree angle.

The Defence Argument on Liability

[27] Counsel argued that the defendant's failure to see the plaintiff's vehicle may be explained by the fact that during the defendant's manoeuvre into the parking lot his vehicle would have been on an angle and a check in a side mirror would not have revealed any traffic immediately behind the defendant's vehicle.

[28] Counsel said that the front of the defendant's vehicle had already proceeded into the entrance to the parking lot and that it was at this point that the plaintiff ran his vehicle into the right rear wheel of the defendant's vehicle. The defendant's vehicle was on an angle when struck by the plaintiff's vehicle, with the right rear wheel of the defendant's vehicle in the right southbound curb lane when it was struck by the plaintiff's vehicle.

[29] Counsel submitted that the Court should not accept the plaintiff's version of the collision for a number of reasons. First, his version did not make sense. It defies the law of physics. If the plaintiff was overtaking the defendant's vehicle and traveling faster than the defendant, and if the front of the plaintiff's vehicle was in fact ahead of the rear of the defendant's vehicle, then how could a more slowly moving vehicle negotiate a sharp turn in front of the plaintiff without the plaintiff hitting the front of the defendant's vehicle? But, noted counsel, that is not where the impact occurred. The point of impact was in the vicinity of the rear right wheel, which would mean that the defendant's vehicle had to travel across essentially the entire right lane before the impact happened. Counsel argued that it would be physically impossible for the impact to occur in the manner described by the plaintiff if the front of the plaintiff's vehicle was just past the rear of the defendant's vehicle.

[30] Counsel said that the Court should accept the defendant's evidence that he was slowing down to make his right turn and negotiating his turn at a relatively low speed, which meant that the plaintiff had enough time to avoid the collision.

[31] Secondly, the evidence is that the front of the defendant's vehicle was well within the entrance to the parking lot and that this evidence was consistent with the defendant's vehicle being on an angle with its right rear wheel being in the left portion of the right hand southbound lane. Defence counsel said that this evidence supports the conclusion that the defendant's vehicle was almost halfway through its turn or more before it was struck.

[32] Thirdly, defence counsel noted that the plaintiff was late for his first appointment of the day and therefore he was distracted and traveling at a moderately excessive rate of speed.

[33] In summary, the defence contended that the plaintiff was in the right hand southbound lane quite some distance back from the defendant, speeding somewhat, not paying proper attention to the presence of the defendant's vehicle, and likely assumed that when the defendant began to move into the left lane to do a wide turn the defendant was switching lanes when in fact he was not.

Conclusion

[34] With respect, I do not accept the defence contention because in my view it does not accord with the weight of the overall evidence surrounding the circumstances of the accident.

[35] First, I do not find the defendant's recollection about the details of the collision to be reliable. For example, in chief he testified that when he came close to the parking lot he "took my truck to the other lane" and that the front portion of his truck "went inside", "a little bit away from the sidewalk" with his back portion in the right lane. He said that as he made his turn, "I went a little bit into the other lane" and that "a little bit I have to go in that other lane". He then said "half of the truck you have to take to that side" and that the "whole truck did not go into left lane, one-half went".

[36] In cross-examination, when plaintiff's counsel suggested to the defendant that he did not know which lane he was traveling in when the accident happened, he said he was in the right hand lane and that when he turned into the driveway he "went to the other side…a little bit half…less than half". He said his vehicle went into the left hand lane about two feet. It was brought to his attention that he told ICBC in his statement that the left side of his vehicle was on the dotted lines and he responded that he did not have a tape to measure. When asked by counsel whether his vehicle traveled two feet into the left lane the defendant replied that he did not know, "maybe it was one or maybe two feet". However, he agreed that part of his vehicle went into the left hand lane.

[37] On the other hand, I found the plaintiff to be straight forward and convincing in his recollection of the accident details. I find that the evidence supports his version to the effect that he was traveling in the right hand lane and collided with the defendant's vehicle when it made a sudden right hand turn into the path of the plaintiff's vehicle. I also find that the defendant was traveling southbound on 128th in the left hand lane just before he made his right turn into the path of the plaintiff's vehicle. I turn to the evidence which I think supports these findings of fact.

[38] First, photographs taken after the collision make it plain that all of the damage from the accident was sustained to the driver's side door, the front fender, and the bumper areas of the plaintiff's vehicle. In my view, common sense dictates that if the defendant's vehicle had crossed over the sidewalk and had only its rear wheels in the southbound right hand lane with the vehicle sitting at a 40 to 45 degree angle, then there would have been damage to at least the front area of the plaintiff's vehicle, if not the passenger side of the bumper and hood areas, if this had been a rear-end accident as the defence contends.

[39] Secondly, there is the evidence of Mr. Tejwant Singh Rupal. He owns a company called Able Woodworking Ltd. The accident took place near his business premises.

[40] On March 25, 2005, Mr. Rupal testified that he was on his cell phone outside of his business premises, which is located just to the south of the parking lot. Between Mr. Rupal's business premises and the parking lot there is a fence. Mr. Rupal said that as he was talking on his cell phone he walked towards the gate to his premises on the eastern edge of the parking lot, which is situated on 128th Street. He was standing close to the gate. He observed a flatbed truck driving in the left hand southbound lane and another truck traveling in the right hand southbound lane. He observed that the flatbed truck quickly turned right from the left hand lane towards the parking lot. He did not observe the flatbed truck signalling a right turn.

[41] Mr. Rupal said that when the flatbed truck turned right he was almost parallel with the truck in the right hand lane with the truck slightly behind the flatbed truck, but not by much. He said that as the flatbed truck turned right there was a collision with the truck in the right hand lane. He heard a loud noise. He said that the flatbed truck pulled his vehicle with it. They came to rest on 128th Street at the entrance to the parking lot.

[42] Mr. Rupal said that from the location where he was standing to the area where the collision took place was a very short distance. After the accident Mr. Rupal went over to the truck and opened the door. He recognized the plaintiff. He said that he asked the plaintiff if he was okay to which the plaintiff replied he was fine. He gave the plaintiff his card and returned to his business premises. He did not discuss the details of the accident with the plaintiff.

[43] He repeated in his testimony that the plaintiff's vehicle was in the right hand lane and the defendant's vehicle was in the left hand lane before the collision took place.

[44] In cross-examination, Mr. Rupal said that he had been treated by the plaintiff prior to the accident once or twice. Mr. Rupal's father and possibly his mother had been treated by the plaintiff as well.

[45] Mr. Rupal made a mark on an overhead photograph of the area of the accident scene to indicate where he was standing when he observed the accident. The mark indicates that he was standing on the parking area to his business premises close to the fence on the south side of the parking lot which separates his business premises from the parking lot. His vantage point was standing outside at the front of his business premises close to 128th Street near the fence.

[46] Mr. Rupal testified that at the point of the collision the front tires of the flatbed truck were in the right hand southbound lane close to the curb, meaning close to the sidewalk. When asked whether the bushes growing along the fence line had been chopped down he replied that at the time it was all clear. He said that the objects between him and the collision were the metal chain link fence and the gate. He said that his business premises are elevated from the gate so that he could see over. He said that there was nothing obstructing his view. He was looking at 128th Street in a northbound direction. He said that he could see the plaintiff's and defendant's vehicles traveling southbound on 128th Street. They were traveling at the same speed, approximately 50 or 60 kph, and were parallel to each other. He said that it took a very short time for the flatbed truck to make a right turn – just seconds. He repeated that when he observed the two vehicles before the collision they were traveling at a speed between 50 and 60 kph. He testified, "I don't know … at what speed [the defendant] was traveling at … and at what speed [the defendant] made the turn, but right away … immediately he made the turn." He said the flatbed truck turned and then he heard the collision.

[47] When defence counsel suggested to the witness that he could not have seen the collision because the flatbed truck would have blocked his vision he said "No, No, I am standing at the elevated location. I could see when the flatdeck truck made turn, and its box … the front box … the front area where driver sits and the back of that was a flatdeck I could see the truck from the top of it, but the portion that had gone underneath the flatdeck, I could not see." He said that he actually saw the collision. He also said that the plaintiff's vehicle did not collide with the rear of the defendant's vehicle but that it went underneath "prior to the rear wheel – it was in between rear tires." He did not see the plaintiff's vehicle collide against the rear wheel. He saw it go under the defendant's vehicle. He said that the plaintiff's vehicle got stuck in there and the defendant's vehicle pulled the plaintiff's vehicle along.

[48] Mr. Rupal said that after the accident he gave the plaintiff his card and told him that if the plaintiff needed him he could ask him at any time as to how the accident happened. He disagreed with defence counsel that large trucks need to make a wide turn to get into the parking lot driveway because they can negotiate a turn from the right hand lane. He disagreed as well that since the accident the gate has been widened. When asked if five-ton trucks make a wide turn to get into the parking lot, Mr. Rupal replied that the gate is wide enough for trucks to make a right turn from the right lane. He disagreed that they need to drive partially into the left lane.

[49] Mr. Rupal denied that he told the plaintiff anything about the details of the accident when he spoke with him following the collision. He did not explain what he had seen, he just told the plaintiff that if he needed him he should call. He did not say that he felt the defendant was at fault. He said that he did not discuss the accident with the plaintiff after the collision. He did attend at the plaintiff's clinic for treatments following the accident.

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[50] Mr. Rupal said that from his observation point he could see as far away as 78 Avenue.

[51] The defence submits that no weight should be given to Mr. Rupal's testimony. Counsel submitted that he may have heard the collision or perhaps observed the very last moment of the collision, but he did not see enough of the accident to be an authoritative witness.

[52] The grounds for the defence objection to the acceptance of Mr. Rupal's testimony is many fold: he and his family members have been patients of the plaintiff; there is evidence to challenge Mr. Rupal's testimony about having a clear and long distance view of 128th Street from his point of observation; that the presence of vegetation on the eastern edge of the parking lot reduced Mr. Rupal's site line and that even if he were looking and could see through the vegetation, he would only get a quick glimpse of a southbound vehicle and not any of the lead up to the collision or the accident per se; that given the fact that Mr. Rupal had attended at the plaintiff's clinic before and after the accident it was unbelievable that he would not have talked to the plaintiff about what he knew about the details of the accident.

[53] Much of the defence criticism of Mr. Rupal's testimony is based on the testimony given by Mr. Karan Singh Gill. Mr. Gill is the owner of the parking lot. The defendant parks in his lot. He explained that there is a chain link fence around the perimeter of the entire lot. He said it is clear in spots and at times it is covered in vegetation.

[54] He was asked about trucks proceeding southbound on 128th Street making a right turn into the lot and how they make a turn. He said that "it's an easy turn". He said it is only hard for tractor trailers and some of the conventional trucks 50 feet long. He said that tractor trailers pretty much cover the whole lane when making a turn including the left hand lane but that five ton trucks do not need to go all the way into the left lane, "maybe a couple of inches". He said it was common to pull over by a little bit and that not all but some pull over into the left hand lane a little bit. He said you could say it is common depending on who is driving. He said that trucks negotiating the turn will do so at 15 or 20 kph or less. He said he has never seen a flatbed truck negotiate the turn at 50 or 60 kph.

[55] Mr. Gill explained that there are cedar hedges planted on the eastern edge of the lot which were planted in 2004. In addition there is some wild growth, raspberry bushes, and tree saplings. In the winter time there is less green growth. The cedar hedge is on his property but planted a couple inches outside of the fence area. His property is about two to three feet lower than the property to the south which houses Mr. Rupal's business premises. He said that in the winter there is dried vegetation on the fence. He said that the cedar hedge is roughly four and one-half to five feet. He said that in March, 2005 it would have been about 14 to 15 feet high. He was asked whether, based on where Mr. Rupal noted his observation point on the overhead photograph, his view in 2005 would have been impaired by vegetation. Mr. Gill said, "it would be slightly." He also said that from the point where Rupal claimed he was standing he would not be able to see as far north as 78th Avenue.

[56] In cross-examination, Mr. Gill agreed that the right hand southbound lane is much wider than the left hand southbound lane. When asked if a five ton truck could turn into the lot from the right hand southbound lane Mr. Gill said that it depended on who was driving. He agreed that the defendant's vehicle could turn right into the parking lot without straddling the left lane, depending on the driving habits of the driver.

[57] Based on this testimony, defence counsel submitted that there was some level of vegetation that would have impeded Mr. Rupal's view. Further, Mr. Rupal's evidence about the speed at which the defendant was traveling was in conflict with Mr. Gill's testimony that he had not seen a flatbed truck negotiate a turn into the parking lot at a speed of 50 to 60 kph. His estimate was 15 to 20 kph. Finally, contrary to Mr. Rupal's testimony, Mr. Gill mentioned that it is not uncommon for trucks of all sizes to make a wide turn into the lot, some because of their size, and others because of the driver's habit to pull over into the left hand southbound lane while making the right turn into the lot.

[58] While I accept and am mindful of some discrepancies between the evidence of Mr. Rupal and Mr. Gill, I am satisfied that Mr. Rupal gave his answers in an honest and forthright manner and that his evidence was unbiased. I find that he was standing in a location where he could quite clearly observe the lead up to and the collision itself. His evidence of what he observed regarding the position of the respective vehicles just prior to the collision and of how the collision happened should be accepted.

[59] What I take out of the evidence of Mr. Gill is that at the time of the accident there were some possible

circumstances that may have limited Mr. Rupal's sightline from where he claims that he was standing while observing the collision, but that his view would have been only "slightly" impeded. There is certainly nothing in Mr. Gill's evidence that would lead me to conclude that Mr. Rupal would not have been able to observe the lead up to the collision or the collision itself. Moreover, Mr. Gill conceded that trucks the size of the defendant's vehicle can easily make the turn from the right hand southbound lane into the parking lot, but that based on driving habits some truck driver's may pull over into the left hand lane by a couple of inches, certainly not by half the width of the truck as the defendant insisted he had to do in order to make the turn into the lot.

[60] When I consider the whole of the evidence before me I am satisfied, and find that:

1. The plaintiff was driving at the speed limit in the right hand southbound lane just prior to the collision;
2. The defendant was driving in the left hand southbound lane at a speed lower than the speed limit just prior to the collision;
3. Just prior to the collision the plaintiff's vehicle had caught up to the defendant's vehicle so that the nose of the plaintiff's vehicle was just ahead of the right hand rear wheel of the defendant's vehicle;
4. Without signalling his intention to make a right turn into the parking lot the defendant made a sudden right turn into the path of the plaintiff's vehicle causing the plaintiff's vehicle to collide with the right side flatbed deck portion of the defendant's vehicle;
5. As a result of the collision the plaintiff's vehicle went underneath the right side flatbed deck portion of the defendant's vehicle and the plaintiff's vehicle was dragged by the defendant's vehicle causing significant physical damage to the driver's side door, the fender and the bumper of the plaintiff's vehicle;

[61] In the result, I find that the plaintiff has proven on the balance of probabilities that the defendant was solely responsible for the accident and should be held 100% liable for the plaintiff's personal injuries.

IV. Damages

General Damages

The Plaintiff's claim

[62] The plaintiff testified that on the day following the accident he experienced mid and low back pain, headaches, left shoulder and left arm pain, and sore wrists. He claims that as a result of the accident he suffered headaches; injury to his shoulder; musculo-ligamentous injury to the cervical, thoracic and lumbar regions of his spine; injury to his left arm and wrists; and, numbness and tingling in his left hand. He says that he continues to use medication on an as-needed basis, he exercises, he attends chiropractic treatments on an as-needed basis, and he uses various coping mechanisms to manage his ongoing symptoms of neck, upper and mid-back pain. He also claims that despite extensive efforts of rehabilitation, including chiropractic and massage therapy, he continues to experience persistent ongoing chronic pain in his neck, upper back and mid back. He says that these ongoing symptoms have had and continue to have an impact on his ability to enjoy and perform certain activities of daily living, including recreational pursuits and household duties.

[63] The plaintiff seeks non-pecuniary damages in the range of $35,000 to $50,000, and special damages in the amount of $1,712.98.

The Plaintiff's Medical Evidence

[64] Dr. Cecil Hershler, a Physical Medicine and Rehabilitation specialist, in his report dated March 20, 2007,

under the heading “Prognosis”, states that “The prognosis for full recovery with resolution of the soft tissue injury is guarded…It is over two years since the accident and he still has not had resolution of the injury in spite of the fact that he is very diligent with respect to exercising and has returned to his normal work.” Dr. Hershler recommended intensive massage therapy once a week for six months focused on the neck and shoulder muscles. The plaintiff has followed this recommendation. He could not be sure that the plaintiff would reach full recovery, but expected further improvement to occur over the next 12 months. He has not examined the plaintiff since March of 2007.

[65] Dr. J. Sidhu is the plaintiff’s family doctor. In his report dated April 23, 2008 he states, in part, as follows:

> In summary Dr. Randy Garcha was involved in a motor vehicle accident on March 25, 2005. As a direct result of the MVA Dr. Garcha sustained musclo-ligamentous and myofascial injuries to his neck and upper mid-back (cervical and thoracic regions). In addition he sustained myofascial lower back (lumbar) and wrist injuries and muscle contraction headaches. Dr. Garcha works as a Chiropractor and was a very fit and active 31 year old man at the time of the accident. He had no pre-existing medical condition and regularly attended the gym 5 days a week as well as being active in a number of recreational sports. As a result of his injuries Dr. Garcha was totally disabled from work for a period of 2 – 3 days and subsequently was only able to work part-time for the following 5 weeks. Dr. Garcha’s lower back and wrist injuries improved and eventually resolved over a period of 4 months but unfortunately now 3 years post-MVA he continues to experience neck and upper mid-back pain. He attended chiropractor, massage therapy, active program and required anti-inflammatories and muscle relaxants. He experienced frequent reoccurring acute flare-ups of his neck and upper mid-back pain throughout 2005 and 2006 resulting in significant pain and impairment of his sleep and activities of daily living. As of his last visit on April 22, 2008 he reports an ongoing dull lower neck (cervical) and upper mid-back (thoracic) pain that he has “learned to live with”. He unfortunately remains restricted in a number of activities of daily living including certain house-hold and yard work as well as certain sports and activities that involve lifting of his arm coupled with neck movement. Working in front of the computer for more than 30 min aggravates his neck pain as does a busy day in the office. Due to his occupation as a Chiropractor, he is often required to be hunched over a patient to perform physical maneuvers and deep tissue treatment and this positioning often aggravates his neck pain. In view of his ongoing injuries now over 3 years post-MVA it is more likely than not that his injuries are chronic in nature and one does not anticipate any foreseeable change in the near future. His long range prognosis remains guarded.

The Defence Position

[66] The defence accepts that the plaintiff suffered soft tissue issue injuries as a result of the accident. However, the defence contends that the injuries were mild in nature and that to the extent that the plaintiff has suffered flare-ups of his symptoms since the accident or that his symptoms have been ongoing, they are not caused by the accident but rather by the fact that he has disc degeneration.

[67] The defence also submits that there is a pre-accident history of relevance to the plaintiff’s injuries. Counsel submitted that the plaintiff has a longstanding history of episodic neck and back pain in the years prior to the accident which raises the question of the extent to which, if any, the accident changed the plaintiff’s pre-accident symptoms.

[68] The plaintiff commenced chiropractic care in 2001 with Dr. D. Banwait, with whom he shared a clinical practice. He attended her for treatments pre and post-accident. Because they were colleagues, the treatments pre-accident were not documented and the plaintiff was only billed if the plaintiff had MSP coverage for the treatments. Moreover, Dr. Banwait did not keep clinical records for the pre-accident treatments.

[69] Dr. Banwait testified for the defence that she started treating the plaintiff in July, 2001. She treated him eight times in 2001. She did not make notes of the symptoms she treated, or the areas she worked on. She recalled that prior to the accident she treated the plaintiff for neck stiffness and back pain, including low back pain, but she could not recall if one area was more problematic than the other. She said that prior to the accident the plaintiff attended her for treatments on an as-needed basis. She also said that in 2008 the plaintiff complained about upper back and neck pain, as well as low back pain. She recalled that she treated the plaintiff about the

same number of times after the accident as she had before the accident. She also recalled that she treated the plaintiff prior to the accident for low and mid-back pain, and neck stiffness and pain. She said that prior to the accident she treated him more than once a year, but less than five times a year.

[70] In cross-examination, plaintiff's counsel asked Dr. Banwait if some of the pre-accident treatments were for demonstration treatments. She could not confirm this. She said that she would have treated the plaintiff at each of the sessions. She did say that during her treatment of the plaintiff prior to the accident he did not complain of ongoing pain in his neck or back. Nor did he complain of symptoms affecting his activities of daily living or symptoms which prevented him from playing sports or from treating his patients.

[71] In addition to the treatments from Dr. Banwait prior to the accident, the plaintiff also received chiropractic treatments from another Chiropractor as well as massage therapy.

[72] The defence expert was Dr. J.F. Schweigel. He examined the plaintiff. In his report dated March 27, 2008, he opined that the plaintiff's persisting neck pain is probably due to the fact that the plaintiff may have underlying degenerative disc disease of the cervical spine. He also states that the discomfort the plaintiff is having cannot be explained by any physical abnormality, although he opines that there is a possibility that the plaintiff has underlying degeneration of the cervical spine which accounts for some of his discomfort. This degeneration, he claims, if he does have it, would have been present prior to the accident and was not caused by the accident.

Decision on General Damages

[73] The ability of the Court to assess the plaintiff's non-pecuniary damages is somewhat hampered by the fact that the plaintiff's chiropractic and massage treatments prior to the accident were not considered by his treating doctors in their reports. Dr. Hershler states that prior to the accident the plaintiff was in good health and was not complaining of any neck or back pain and that he had no health or medical issues. Dr. Sidhu states that prior to the accident the plaintiff was healthy and active. In fact, the plaintiff advised Dr. Sidhu in July, 2006 that he had no injuries or symptoms prior to the accident. Most significantly on this point, Dr. Banwait did not keep any clinical records of the plaintiff's pre-accident treatments so it is unclear what she treated the plaintiff for or the extent, scope, or nature of the treatments. However, I think it is at least clear from her evidence and records that the symptoms she treated the plaintiff for pre-accident were not chronic or ongoing but rather episodic and, in any event, they did not have any impact on his activities of daily living or on his ability to perform his practice duties.

[74] According to the plaintiff, prior to the accident he experienced episodes of occasional stiffness or aches after a workout or physical activity, but nothing significant. He insists that the chiropractic and massage treatments he received prior to the accident where for ongoing "maintenance" only and not to treat the kinds of symptoms he experienced post-accident. He did concede in cross-examination that he experienced soreness and stiffness prior to the accident.

[75] On the issue of causation, I think it is significant to note that in his physical examination of the plaintiff on March 20, 2007, Dr. Hershler found, "Inspection of the muscles revealed swelling in the left trapezius muscle. This was further confirmed with palpation. Deep palpation of the swollen area caused pain."

[76] In his report, Dr. Sidhu sets out, *inter alia*, the history of his examinations of the plaintiff following the accident. When the plaintiff was examined on March 28, 2005, he reported ongoing pain and headaches. Examination revealed tenderness over his bilateral neck, shoulder, and left arm. Range of motion ("ROM") was decreased by approximately 20%.

[77] When examined on April 1, 2005, there was tenderness over the plaintiff's paracervical muscles and the ROM of his cervical spine on rotation, lateral flexion, and forward flexion were approximately 80% of normal, and extension was painful on full ROM. He had significant periscapular pain as well as tenderness over the posterior capsule of his left shoulder. There was bilateral paralumbar tenderness with full painful ROM on extension and on forward and lateral flexion. He was diagnosed with myofascial, cervical, thoracic, and lumbar injuries as well as shoulder and wrist strain, and ongoing muscle contraction headaches.

[78] On April 14, 2005, examination revealed significant paracervical tenderness and tenderness over his paracervical muscles with approximately 90% full ROM, as well as posterior shoulder and paralumbar tenderness

and pain on full ROM.

[79] On May 2, 2005, examination revealed bilateral paracervical tenderness extending to mid-back. He remained tender over his left posterior shoulder, with pain at maximum limits on full abduction. On May 4th and 12th the plaintiff experienced flare-ups of his neck and wrist pain. Examination revealed spasm over his left paracervical muscles with marked pain, limitation of extension, and bilateral rotation of his cervical pain.

[80] The plaintiff was seen by the doctor again on June 6th, July 29th, September 9th, October 14th, and November 13th of 2005. He experienced a number of acute flare-ups of neck pain during this period. He was next seen by the doctor on May 1, 2006. Examination revealed tenderness and spasm over his left paracervical muscles extending to his mid-back. The ROM of his cervical spine was markedly limited on extension, and was limited by approximately 75% on rotation to the right.

[81] The plaintiff was seen by the doctor on July 13th, September 9th, 21st, and 27th of 2006. On the latter date the plaintiff's examination revealed pain and trigger points over his trapezius muscles, greater on the left than right, and over his levator scapulae muscles. When examined on November 8th, examination revealed palpable spasm over his left paracervical muscles with pain and limited left rotation to 70% of normal.

[82] The plaintiff was seen by the doctor on November 30, 2006, and again on March 16th and 20th of 2007. When he was examined on January 22, 2008, the plaintiff was still experiencing neck pain on full extension, and the examination revealed tenderness over his bilateral paracervical muscle and pain on full extension. Rotation of his cervical spine to the left was approximately 90% of normal and associated with pain at maximum limits.

[83] In chief, the plaintiff testified:

Q You talked about your headaches initially to May of '05 and then subsequently, including the flare-ups, until December of 2006. From January 2007 to the present, how have your headaches been?

A From January 2007?

Q To present.

A I have been – I haven't had headaches. I've been back to normal in terms of headaches.

…

Q You mentioned that initially the pain in your left arm and the numbness and tingling in the left hand was quite frequent. How long was that for? What period of time after the accident?

A I'm not quite sure.

Q In the previous – we're now talking about the time frame of January 2007 to present, the last 17 months or so. How has the pain in the left arm and the numbness and tingling in the left hand been?

A In the last 17 months, I've been fortunate. I haven't had a flare-up, so I haven't had those types of intense symptoms. However, if I do sit for a long period of time, for example, while doing medicolegals or paperwork or at the computer, those symptoms do come after about half an hour, though they're not as severe as the flare-up.

…

Q Moving forward then. Let's talk about the year 2006. This is not when you've had the flare-ups, but just otherwise during that year – during the year 2006, what type of pain were you having in your neck?

A The same dull achy pain in both sides, left side greater than right, extending from the base of the skull down to the upper back and then into the mid back – here.

Q And again, how frequent – how frequently did you experience the dull achy pain?

A That was every day.

Q And in that time frame when you had the flare-ups, what changed, if anything, during the flare-up with respect to the neck pain?

A During a flare-up I would have muscle spasm, I would have decreased range of movement, I would have headaches, the arm pain, the burning in the arm, the numbness and tingling down into the fourth and fifth digits and, of course, an increase in pain.

Q What was – describe the increase in pain during the flare-ups.

A An intense pain. I guess on a scale of 10, I would say maybe an 8 or 9 out of 10.

Q In the year 2006 on that same scale, when you had that dull achy pain, what level would that be at?

A I'd say about a 4.

…

Q Moving into sort of early 2007. How would you describe the nature of the pain in your neck at that time?

A In 2007 I had the continued dull achy pain both sides of the neck, left side more so, extending from the base of the skull into the upper back and the mid back.

Q How frequent was the pain in early 2007?

A It was still there every day, but it wasn't as bad as before, so it had decreased in intensity.

Q On the same scale you used earlier, zero to 10 – and maybe just let me define the pain. By "zero" you mean no pain, and "10" you mean maximal pain that you can imagine. Is that sort of the scale you're using when you say "zero to 10"?

A Yes.

Q How was the pain in early 2007 in your neck on that scale?

A Maybe a 3.

…

Q So you indicated Dr. Hershler obtained a history from you and that you provided Dr. Hershler a history about your medical condition and the symptoms you had experienced after the accident.

A That's right.

Q And what happened after that?

A Then he did an examination; he checked for where I was sore; he did some medical procedures, and he made recommendations as to what I should do for treatment based on his findings.

Q We'll get to the treatment recommendations. In terms of the physical examination, do you remember what areas of your body he performed a physical examination of?

A I remember which areas he did an examination on that produced pain. That area is the area that we're talking about, being the neck, upper back and mid back, primarily on the left side.

Q And following the physical examination, you indicated that he made treatment recommendations. What treatment recommendations did Dr. Hershler advise you to follow – or what treatment recommendations did he make?

A Dr. Hershler recommended that I receive deep tissue massage treatments once a week for six months – I believe it was once a week for six months.

Q And did you follow that treatment recommendation?

A I did receive massage therapy treatments once a week for, I believe it was, three months.

Q And where did you attend for massage therapy treatments after being assessed by Dr. Hershler?

A I went to Arminder Sidhu, the massage therapist that I had seen previously.

Q And do you know when you started the massage therapy treatments after you were assessed by Dr. Hershler?

A I believe it was June 2007.

Q And how long did you receive those treatments for?

A Until August 2007.

…

Q From August of 2007 to the present, what have you done with respect to treatment for the pain that you experience in your neck?

A I do my stretching, I exercise, I take medication if needed, and basically I – I'm not going to stop doing the things that I enjoy. I'm going to keep doing the things that I enjoy. I'm not going to let this pain bother me. That's what I tell my patients – and staying active.

Q What exercises have you done? And we're talking about the period August '07 to the present.

A The scapular retraction exercises, the – stretching a few different muscles in my neck with specific movements, you know, the occasional hot steam or a hot tub or a hot shower to alleviate any stiffness and, if needed, then Robaxacet.

Q How often do you do the stretching exercises – and again we're talking August '07 to the present – in terms of frequency?

A I don't have the same three-times-a-day regimen anymore, but I do perform the exercises every day, but not – it's not as regimented. It's whenever you feel the stiffness, you stretch it out 10 times and you keep, you know – you go on.

Q In terms of frequency, how often would that be in terms of in a week or in a month in the last – let's say in the last five months?

A I stretch every day, even up till today.

Q How often since August '07 to present have you had to take medication to manage your – the pain in your neck?

A I would have to say on average probably – maybe once a week.

Q Other than the stretching exercises and the medication, I believe you mentioned the scapular retraction exercises. How frequently have you done those? Again in the same time frame, August of '07 to present.

A I do those probably three times a week.

…

Q So moving into 2006 – or the year 2006. Leaving aside the flare-ups, what was the type of pain that you experienced in your upper back?

A It was the same quality of pain, that being a dull achy pain in the upper back.

Q And how frequent was the pain?

A It was still there every day. The –

Q And – go ahead. Sorry.

A The intensity again was the same as the neck pain, and I believe that was around a 3 out of 10.

Q In that time frame, late 2005 into 2006, how was the upper back during an episode when you had a flare-up?

A It was again the same intensity as the neck pain. It's – to me they were not two separate entities. It was all one: the neck, the upper back and the mid back. It was all tied in together.

Q With respect to the upper back, in terms of treatment, was the treatment the same treatment that you received for your neck pain?

A Yes.

Q And has it been the same treatment through 2005, 2006, 2007 to the present?

A Yes, it has.

Q Any specific treatment just for the upper back which would not involve the neck or the mid back?

A No. The upper back, the neck and the mid back – the treatment regime was the same.

Q So massage therapy with Arminder Sidhu, chiropractic treatment with Dr. Banwait, chiropractic treatment with Drs. Wong and Johnson and then massage therapy with Arminder Sidhu?

A That's right.

…

Q And in terms of the upper back – maybe if you can tell us how you presently feel with respect to the pain in the upper back.

A Right now the pain in the upper back is a dull ache. However, similarly as with the neck pain, with prolonged sitting or if I'm on the computer, if my hands are in front of me as if I'm doing a medicolegal, even right now actually, as I'm sitting here, it's on the high level of what my plateau is right now.

Q And what is that high level?

A 1 to 2 out of 10. Right now it feels like more than a 2, but that's – that's my plateau right there.

…

Q And in terms of intensity, is it – how would you describe the intensity of the pain in your mid back? And this again May of '05 maybe to present. If you can just give us an overview.

A Okay. I would say that the mid back intensity is the same as the neck and the upper back. So a 4 up until December 2006, for example, and then maybe a 3 after that. And then after the massage therapy treatments that Dr. Hershler recommended, it's at its current level, which I would say is about a 1 or a 2 out of 10.

Q In terms of the treatment for your mid back – again, if you can provide us with an overview from the date of the accident to the present. What treatment or treatments have you had for your mid back?

A My Lord, the treatments for the mid back were the same as the neck and the upper back, consisting primarily of chiropractic treatment, massage therapy, medications, stretching and strengthening exercises, icing. That's primarily it.

Q Any specific treatment for the mid back area that applied only to the mid back and did not deal with the mid back [sic] – did not deal with the neck and upper back [indiscernible]?

A No. They all required the same exercises.

th

Q Before the accident of March 25 , 2005, were you experiencing any neck pain?

A No.

Q Before the accident of March 25th of 2005, were you experiencing any pain in your upper back?

A No.

Q Before the accident of March 25th of 2005, were you experiencing any pain in your mid back?

A No.

Q In addition to the treatments you've talked about, the massage therapy with Arminder Sidhu, the chiropractic treatment with the two different chiropractors at different clinics, then you saw Dr. Hershler and massage therapy, you have also seen your family physician, Dr. Sidhu?

A Yes.

Q How often would you see Dr. Sidhu after the subject accident?

A I don't know the exact frequency. That's information I'm sure you could have through his billings. But I do believe that I saw him quite regularly – at regular intervals.

…

Q Well, let's – we'll return to social activities later. Let's talk about the sporting activities. Let's talk about soccer first. In the two years before the accident, so 2003, 2004, how often would you play soccer?

A I would play soccer in the summers once or twice a week for – as part of a – not league play, but just recreational play – sort of a pick-up game.

Q So summer of 2003 – and when you say "summer", what months are we talking about?

A Well, weather permitting, June, July, August, maybe September, maybe not, maybe May, maybe not – depending on the weather.

Q And did you play soccer during the summer of 2003?

A Yes.

Q And with the same frequency you indicated earlier?

A Yes.

Q And did you play soccer in the summer of 2004?

A Yes.

Q Did you play soccer during the summer of 2005?

A No.

Q And why not?

A Well, because of the injuries that I had sustained.

Q Were you able to return to soccer after the accident?

A I did.

Q And when was that?

A It was approximately a year after the accident. I just got fed up. I didn't want to sit around anymore, so … It's something I enjoy, so I wanted to continue doing it.

Q So summer of 2006 you played soccer?

A Yes.

Q And how often did you play?

A At the same frequency.

Q Did you have any difficulty playing soccer in the summer of 2006?

A No, not so much. The – in 2006 – you know, when you've been off for a while, you're a little bit – what's the word here? – it takes a little bit of time to get back into the routine, but that's about it.

Q And did you play soccer in the summer of 2007? Last year?

A Yes.

Q And how frequently?

A Same frequency.

Q Any difficulty with playing soccer in the summer of 2007?

A No.

[84] In assessing the plaintiff's damages I accept that the plaintiff's treating doctors did not have an opportunity to assess whether the accident related injuries caused a change in any symptoms that the plaintiff may have experienced prior to the accident relating to his neck and back. However, I found the plaintiff to be forthright and honest in giving his evidence. I do not accept the defence position that the plaintiff has significantly downplayed his pre-accident status, or misled his treating doctors and the defence expert.

[85] With respect to the plaintiff's pre-accident chiropractic treatments, the plaintiff's position is that his treatments were for ongoing maintenance only, and not to treat the kind of symptoms he experienced post-accident. I accept the plaintiff's position and do not think much weight should be placed on Dr. Banwait's evidence given the absence of any pre-accident clinical records to clarify the treatments given by her to the plaintiff, and her inability to recall any of the details of the treatments.

[86] In the circumstances, I prefer the conclusions of the plaintiff's treating doctors and reject Dr. Schweigel's opinion on causation. Dr. Sidhu explained that the plaintiff has a soft tissue injury, not a bony injury. Moreover, Dr. Sidhu examined the plaintiff frequently post-accident and I accept his evidence at trial that while the acuteness of the plaintiff's symptoms has lessened, it has not changed regarding his ability to extend his neck and left arm. According to Dr. Sidhu, the plaintiff experiences ongoing pain when extending his arm above his head and when extending his neck. Although the doctor agrees that the plaintiff has improved, he said that the plaintiff's ongoing symptoms remain.

[87] In the result, I find on the whole of the evidence that the plaintiff has proven on a balance of probabilities that his ongoing symptoms are in fact related to the injuries he sustained in the accident. In my opinion, the evidence as a whole establishes that the plaintiff suffered mild to moderate soft tissue injuries as a result of the accident. He was able to return to his full practice duties by May 2, 2005. Since at least the end of 2006 he has returned to a nearly normal life-style, with the exception that he has and continues to experience some flare-up of his symptoms from time to time, and continues to experience some pain and discomfort associated with these symptoms. These symptoms appear to have had and continue to have a modest impact on his daily living activities. For example, he has returned to many of the athletic activities he enjoyed prior to the accident, but not to the same level or degree of participation. However, at the time of the accident, he was taking a Body for Life program workout regime, which he had to completely stop shortly after the accident, and he has not yet been able to resume this program.

[88] I find that the appropriate award for non-pecuniary damages is $25,000.

Past Income Loss

[89] On July 14, 2006, the plaintiff wrote to ICBC setting out his past income loss as follows:

My wage loss is based on my 2004 and 2005 income tax statement of earnings.

January 1, 2004 – September 2004 (not incorporated)		$ 98,851
October 2004 – December 31, 2004 (incorporated)		$ 23,526
Total wages for 2004		$122,377
January 1, 2005 – December 31, 2005		$100,969
(wage loss not included)		
$122,377 divided by 52 weeks is $2353 per week		
And is $470 per day based on a 5 day work week		
March 25, 2005	Unable to work	$ 470
March 26, 2005	Unable to work	$ 470
March 28, 2005 – April 25, 2005 (4 wks)	50% of work load	$ 4,706
April 25, 2005 – May 1, 2005	75% of work load	$ 588
May 2, 2005	Return to full duties	$ 0
5 “Flare ups” (October 14, 2005 – Present)		$ 1,227
Total wage loss		$ 7,461

[90] However, at trial, the plaintiff used two approaches to quantify his past income loss claim. The first approach is based on the difference in loss of revenue pre-accident and post-accident. In 2004, according to his financial records, the plaintiff’s total gross revenue was $122,378.03. His gross profit margin in that same year was 39.42%. Total gross revenue for 2005, the year of the accident, was $100,969. The plaintiff claims loss of revenue for 2005 in the amount of $21,409.03. For the year 2006 the plaintiff’s total gross revenue was $114,711 with a loss of revenue for that year of $7,667.03. Thus, for 2005/06 the plaintiff’s gross loss of revenue was $29,000. Applying the same gross profit margin of 40%, the plaintiff claims the net loss of revenue for 2005 and 2006 of $11,461.78 as his past income loss.

[91] The second approach is based on the loss of income due to the loss of 150 patient visits, at $30 per patient, with the result of a total past loss of income of $4,500. This figure does not account for any losses relating to repeat patient visits lost as a result of the initial visit. Under this approach the plaintiff claims past loss of income in the amount of $8,000.

[92] The plaintiff did not present accounting or business evaluation evidence to support his past loss of income claim and concedes that the claim is less than adequately supported by the evidence.

[93] In my view, the plaintiff’s claim for past income loss falls far short of satisfactorily assessing the actual or even approximate income loss he sustained as a result of the accident. In this regard, I turn to the defendant’s analysis which I think appropriately identifies the flaws under this head of the plaintiff’s claim for damages.

[94] As the evidence unfolded at trial it showed some important inconsistencies from the claim set out in the plaintiff’s letter of July 14, 2006. First, on March 25, 2005, the day of the accident, according to the evidence at trial and the exhibits the plaintiff treated six patients. The plaintiff was able to reschedule all of the other patients, save

one. Thus, the plaintiff's income loss for March 25th appears to be only one patient.

[95] Second, while I am satisfied that the plaintiff did not work on March 26th, a Saturday, his record for this date was modified after the fact by him and therefore any income loss for this day is inadequately supported by reliable record keeping. I do not conclude that the modification of the record should cast any negative credibility finding on the plaintiff. In this regard, I accept his explanation for the modification. However, the result of the modification renders the evidence in support of any actual loss of income for this day somewhat less than reliable.

[96] The plaintiff's claim that from March 28, 2005 until April 25, 2005, he worked 50% of his normal workload was clarified at trial. The plaintiff explained that that he did not actually reduce his patient visits by 50%, but rather he could not perform his practice at the same level as before the accident and had to substantially adjust his techniques for treatment of his patients. He said that he scheduled more frequent breaks, did not take walk-in patients, and let patients do the exercises on their own. This same explanation apparently applies to his claim that from April 25, 2005 to May 1, 2005, he practiced at 75% of his normal workload.

[97] However, the defence did a thorough analysis of the plaintiff's patient numbers and fees for different periods of time so as to make a comparison with the period during which income loss is being claimed by the plaintiff. The analysis shows quite a different picture than that put forward by the plaintiff and casts significant doubt on the reliability of the plaintiff's claim of income loss based on a reduced workload, and certainly does not support his assertion that he suffered a loss of 150 patient visits as he estimated. Rather the analysis indicates that the plaintiff was working at close to full patient capacity during the period he claims that he lost income due to his accident injuries.

[98] In the result, I find that the plaintiff has failed to prove on a balance of probabilities that he is entitled to the amounts he claims under either of the approaches he has submitted in support of his claim. What his claim amounts to is essentially his best guess of past income loss with no evidence that satisfactorily supports his estimate. In my opinion, while I think that the plaintiff is entitled to some past income loss, I find that the amount of his actual income loss is at best modest, and I fix his award for past income loss at $3,500.

Conclusion:

[99] The plaintiff is entitled to an award for damages, as follows:

Non-Pecuniary Damages:	$25,000.00
Special Damages:	$ 1,712.98
Past Income Loss:	$ 3,500.00
Total:	$30,212.98

"B.I. Cohen J."
The Honourable Mr. Justice B.I. Cohen