

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: ***Easton v. Chrunka et al.***,
2006 BCSC 1396

Date: 20060919
Docket: M014389
Registry: Vancouver

Between:

Sheila Easton

Plaintiff

And

Gordon Chrunka, Avis Rent A Car and Aviscar Inc.

Defendants

Before: The Honourable Mr. Justice Davies

Reasons for Judgment

Counsel for the Plaintiff:	T.J. Delaney
Counsel for the Defendants:	T.G. Lewis
Dates and Place of Trial/Hearing:	April 24–27, 2006 Vancouver, B.C.
Written submissions:	May 5, 2006

INTRODUCTION

[1] The plaintiff, Sheila Easton, was badly injured in a motor vehicle collision on October 5, 1999 when she was visiting British Columbia from her home in St. Catharines, Ontario. She was the only passenger in a car driven by her sister on Highway 99 near Squamish, British Columbia when her sister's vehicle was involved in a head on collision with a rental car driven by the defendant, Gordon Chrunka.

ISSUES

[2] Liability has been admitted by the defendants. This judgment is therefore concerned with an assessment of the damages suffered by Ms. Easton in the motor vehicle accident. At issue are damages for Ms. Easton's:

- (1) Non-pecuniary loss;
- (2) Past income loss;
- (3) Loss of future earning capacity;
- (4) Loss of housekeeping capacity;
- (5) Cost of future care; and
- (6) Special damages.

BACKGROUND

[3] Ms. Easton was 47 years old and in good health at the time of the collision.

[4] In the collision Ms. Easton suffered: a fracture of her spine at the T12-L1 level; internal injuries to her kidney, spleen, lungs and heart; eleven fractured ribs; a fractured left arm; soft tissue injuries; scarring; and, several fractures of her left foot.

[5] Ms. Easton is now 55 and continues to suffer from some of those injuries including, most significantly, the lingering effects of the left foot fractures.

[6] At the time of the collision, Ms. Easton was actively involved in the management and some of the operations of 706380 Ontario Ltd., a company operating as “Brian Easton Heating and Air Conditioning” that is owned by Ms. Easton and her husband, Brian Easton. She is still a shareholder and continues to work for the company but her role as an active partner in the business is much reduced.

[7] Immediately following the accident, Ms. Easton was taken to a clinic in Whistler and from there by ambulance to the Vancouver General Hospital. The injuries to her spine required surgery consisting of an open reduction with internal fixation with a plate and screws. Her left arm also required surgery that also involved an open reduction and internal fixation with a plate and screws.

[8] Ms. Easton remained in the Vancouver General Hospital for almost five weeks until she was discharged on November 8, 1999. Upon discharge she returned home to St. Catharines in a wheelchair.

[9] When she left the Vancouver General Hospital, Ms. Easton’s internal injuries had largely resolved and have not had a lasting impact upon her overall health.

[10] She did, however, continue to suffer pain and discomfort from her rib fractures for many months and still suffers from some chest deformity on the right side as a consequence of the rib fractures. She also has scarring on her chest from tubes placed in her lungs and significant scarring on her left arm from the surgery to that arm. In addition, Ms. Easton developed a “frozen” left shoulder as a consequence of the fractures to her arm which caused her significant discomfort for some months but have now largely been resolved leaving only some weakness in her left arm.

[11] The chest deformity and the scarring of both her arm and chest do not cause Ms. Easton serious discomfort but she is conscious of other’s reactions to them and generally wears clothing that will cover the scars to avoid discussion and embarrassment.

[12] Ms. Easton suffered serious pain as a consequence of her spinal injuries and surgery from the time of that initial surgery until at least January of 2002 when she underwent a second surgery to remove “prominent metal implants causing pain”. She still suffers from low back pain including stiffness and swelling which makes sitting for prolonged periods difficult. Together with the continued effects of her foot injuries, the low back pain makes sleeping difficult so that she is often fatigued.

[13] Due to the extent of the foot injuries suffered by Ms. Easton, the extensive surgical repairs and the prolonged and intensive rehabilitation programs associated with those injuries, no operations were performed on Ms. Easton’s left foot while she was hospitalized in Vancouver.

[14] Accordingly, when she returned to Ontario Ms. Easton underwent an extensive physiotherapy program and eventually had an air cast that was placed on her left leg while in hospital in Vancouver removed. By January of

2000, she had progressed to walking with the aid of a walker and was ready to progress to the use of a single point cane.

[15] On April 25, 2000, Ms. Easton's left foot was operated on for the first time by Dr. Hugh Cameron, her treating orthopaedic surgeon. In his words, that surgery still left Ms. Easton with "a very deformed foot".

[16] Following another prolonged period of physiotherapy and rehabilitation, Ms. Easton underwent foot surgery for the second time on July 12, 2001. That surgery was performed by Dr. Edward English, the doctor to whom Dr. Cameron had referred Ms. Easton for further attention. Further protracted and intensive therapy and rehabilitation followed that second surgery.

[17] The evidence establishes that from the date of the collision, Ms. Easton attended extensive and largely uninterrupted (except for the various necessary surgeries) physiotherapy and rehabilitative sessions for approximately two and one-half years.

[18] On December 2, 2003, Dr. Cameron offered the following opinion which I accept as accurately describing the state of Ms. Easton's injuries slightly more than three years after the collision:

In my opinion, this lady has done remarkably well considering the extent of her injuries. Her back pain has improved. However, she continues to have back symptoms. Given this lady's emotional stability and the fact that there is no symptom magnification at all, her complaints have to be taken at face value. Inevitably, therefore, she will continue to have symptoms from her back on a permanent basis.

As I pointed out in my previous report, a fusion throws increased strain on the discs above and below the level of the fusion and in time, therefore, she may develop disc degeneration in the adjacent disc.

With respect to her left shoulder her range of movement has come back to normal. She has done well with this. However, I'm sure that she will continue to have aching in the shoulder on a permanent basis.

She has now developed problems with her right shoulder. This is doubtless an overuse phenomenon. Hopefully this will improve as the range of movement in the left shoulder has come back to essentially normal.

She had rib fractures which have left her with a very obvious cosmetic deformity in her chest. This will be permanent.

As I pointed out previously, this lady had a devastating injury to her hind foot. She has now had multiple surgeries. I was able to place her calcaneus square to the floor. Dr. English has derotated her mid foot. However, she still continues with deformity in the forefoot. This means when she pushes off, she pushes off from the fifth metatarsal. She has a callus underneath this. This will continue to bother her and inevitably she will require further surgery. Quite what form this surgery should take is unclear at the present time. One could try either to elevate the fifth metatarsal or depress the first. Given the multiplicity of operations which this lady has had in the last few years, she has no wish to submit herself to further surgical intervention at this time. This makes complete sense to me.

This lady's foot is stiff and painful and she will always be considerably limited in what she can do in terms of standing and walking. The back pain limits her in terms of sitting.

This lady is therefore extremely disadvantaged with respect to the workforce. She has obviously has [sic] had a serious and permanent injury of a physical nature.

[My emphasis]

ANALYSIS AND DISCUSSION

[19] The defendants do not dispute that Ms. Easton was seriously injured in the collision and that she suffered a permanently disabling injury to her left foot. They do, however, submit that Ms. Easton's claims for compensation

for her injuries are excessive.

Non-pecuniary Loss

[20] There is no doubt that Ms. Easton's life has been radically altered by the collision and its consequences. I was impressed by Ms. Easton's fortitude in dealing with the many problems she has faced and her efforts to overcome her injuries and their impact upon her and her life.

[21] Ms. Easton is neither a complainer nor a malingerer and, in my opinion, tended to downplay rather than exaggerate the suffering that she has endured and continues to endure.

[22] I reach that conclusion notwithstanding the observations of Mr. Padvaiskas, an occupational therapist called by the defendants, concerning Ms. Easton's functional capacity being objectively greater than Ms. Easton's self assessment of her ability to perform various repetitive tasks. I am satisfied that Ms. Easton over-extended herself in testing by Mr. Padvaiskas not only because she genuinely wished to know how she could perform when tested but because she is the kind of person who "toughs it out" when faced with a task and suffers the consequences later because of the lasting effects of pain and fatigue.

[23] Before the collision Ms. Easton led a full and complete life both at work and at play. Her ability to work is now restricted as I will later discuss and her ability to enjoy her leisure time has also been significantly altered.

[24] Ms. Easton can no longer dance. Before the collision dancing was a lifelong avocation and at times a vocation. She also can no longer ski, water ski or snorkel, all activities that she used to regularly enjoy with her husband. She can also no longer ride in a boat.

[25] Ms. Easton has suffered pain and the loss of the full enjoyment of her previous life for almost seven years and will continue to suffer that pain on a permanent basis. Most significantly, in my view, the daily pain which she still suffers leads to loss of sleep and continual fatigue so that she has little stamina. This has had a lasting effect on her work as well as an adverse impact on her social life. Further, the extent to which she can enjoy time with her grandchildren has been and will always be diminished by the fact that she is relegated to the role of a watcher of their various activities because she cannot participate in them. Because of the collision, Ms. Easton will now not be able to teach her granddaughter to dance.

[26] Ms. Easton also now feels less valuable as a business partner and life partner because her husband must do so many things for her. She works far less and tires far more easily. She is also now a nervous passenger, which puts additional strain on her relationship with her husband

[27] Counsel for Ms. Easton suggested, based upon the consideration by our Court of Appeal of a number of recent jury awards, that Ms. Easton is entitled to an award of from \$200,000 to \$225,000 for her pain, suffering and loss of enjoyment of life. See: ***Alden v. Spooner*** (2002), 6 B.C.L.R. (4th) 308, 2002 BCCA 592; ***Bob v. Bellerose*** (2003), 16 B.C.L.R. (4th) 56, 2003 BCCA 371; ***Courdin v. Meyers*** (2005), 37 B.C.L.R. (4th) 222, 2005 BCCA 91; ***Dilello v. Montgomery*** (2005), 37 B.C.L.R. (4th) 72, 2005 BCCA 56 and ***Boyd v. Harris*** (2004), 24 B.C.L.R. (4th) 155, 2004 BCCA 146.

[28] Mr. Delaney also relied upon ***Kreller (Guardian ad litem of) v. Scholten***, [2000] B.C.J. 1485 (S.C.) (QL) in which Wong J. awarded \$200,000 in non-pecuniary damages to a 17 year old high school student who suffered an extremely serious leg injury involving soft tissue damage, nerve damage and severely comminuted fractures in a boating accident and who, at the time of trial, faced "a good likelihood of future amputation above the knee".

[29] On the other hand, counsel for the defendants provided authorities with a much lower range of awards including: ***Cole v. Smith*** (2002), 115 A.C.W.S. (3d) 790, 2002 BCSC 1235 in which Neilson J. awarded \$125,000 in non-pecuniary damages to a 53 year old woman who suffered serious knee, elbow and foot injuries.

[30] Mr Lewis also referred me to ***Krell v. Saari*** (2003), 122 A.C.W.S. (3d) 66, 2003 BCSC 699; ***Chu v. Jacobs*** (29 March 1996), Vancouver B935481 & B950915 (B.C.S.C.) and ***Bertrand v. Bertrand*** (1999), A.C.W.S. (3d) 882, [1999] B.C.J. No. 2040 (S.C.) (QL) in suggesting that an award in the range of \$100,000 to \$125,000 would appropriately compensate Ms. Easton for her suffering.

[31] After considering the totality of the evidence, including the seriousness of her injuries and the devastating

impact they have had upon her enjoyment of her life to date and will continue to have in the future, her prolonged and painful rehabilitation, the surgeries which she has had to endure and will continue to have to endure, and also the continuing pain and mobility restrictions which she suffers, I have concluded that an award of \$160,000 will suitably compensate Ms. Easton for her pain, suffering and loss of enjoyment of life.

Past Income Loss

[32] Determination of the extent of Ms. Easton's past loss of income arising as a consequence of the injuries suffered by her is made difficult by the fact that prior to and after the collision she worked with her husband in the family business, 706380 Ontario Ltd., and was paid for her services based upon corporate profitability and tax splitting arrangements rather than by way of an established salary based upon the value of her services to the company.

[33] Counsel for Ms. Easton filed and relied upon opinion evidence adduced from Paul Mandel, a Chartered Business Valuator, that attempted to rationalize the extent of her earnings from 706380 Ontario Ltd. prior to the accident with its performance thereafter to calculate both her loss of income from the date of the collision to the time of the trial and also her future loss of income capacity.

[34] In my opinion, while it may be possible to approach issues of past and future income loss in a closely held corporation in the manner suggested by Mr. Mandel, I am not satisfied that the approach is a valid one in this case given the many vagaries of the heating and air conditioning marketplace described by Ms. Easton; the questionable evidentiary validity of the assumptions and projections made by Mr. Mandel; the efforts made by the whole of the Easton family to cope with Ms. Easton's disabilities; and the effect that those efforts had upon her ability to continue to contribute to the well-being of the company after the collision.

[35] Having considered the totality of the evidence, I have concluded that Ms. Easton's past income loss should be assessed on the basis of the amount that 706380 Ontario Ltd. would have had to pay a competent office manager to perform the tasks which she had performed for the company prior to the collision. I assess that value to be \$40,000 per year which is at the high end of Mr. Mandel's attribution of salary for comparable work. I use that high end amount to recognize that Ms. Easton contributed at a level beyond that of a regular employee but also recognizing that her work hours were flexible to allow her to undertake many household tasks in addition to working for the company.

[36] From that base amount of \$40,000 per year (totalling approximately \$260,000 in the approximately six and one half years from the time of the accident to the commencement of trial), it is necessary to deduct the residual value of the work that Ms. Easton was able to perform at her reduced capacity after the accident.

[37] While Ms. Easton suggested that she is now able to perform only approximately 20% of the work that she previously performed, I am satisfied that she is significantly underestimating her present contribution. While I do not doubt that she honestly believes that her efforts are worth 80% less when compared to those prior to the collision, the totality of the evidence leads me to conclude that I must reject her own subjective analysis.

[38] Having considered the totality of the evidence, I have assessed the necessary residual value of the work performed by Ms. Easton between the date of the collision and the commencement of trial as being \$101,000 calculated as follows:

- (a) from October 5, 1999 to June 2000 - \$4,500 to allow for year end bookkeeping work and other relatively sedentary work done after her return to St. Catharines before her first foot surgery and initial rehabilitation period;
- (b) from July 2000 to June 2002 - \$20,000 for office management and bookkeeping work accomplished before her second foot operation and subsequent rehabilitation period and thereafter until her second spinal operation and rehabilitation based upon approximately 25% of the pre-accident value of her work for the company; and
- (c) from July 2002 to April 27, 2006 - \$76,500 for office management and bookkeeping work carried out before trial after the completion of her intensive rehabilitation and physiotherapy arising from the second foot and spinal operation based upon approximately 50% of the pre-

accident value of her work done for the company.

[39] Accordingly, after deducting \$101,000 from the sum of \$260,000 referred to in ¶ 36, I assess Ms. Easton's gross past loss of employment income at \$159,000. I leave it to counsel to determine the net amount of that loss after necessary statutory deductions with liberty to apply for further directions. Court order interest on the whole of the net amount payable shall be calculated from and after July 2003 to account for the periodic nature of past wage losses and the varying residual work values I have assessed.

Future Income Loss

[40] I have determined that Ms. Easton will continue to suffer a loss of approximately \$20,000 per year as a consequence of her loss of earning capacity. I reach that conclusion based upon my assessment of the value of her work for 706380 Ontario Ltd. prior to the collision as compared to its present and future anticipated value. I use the same analysis that I applied in assessing her past loss of income earning capacity which I conclude has stabilized at approximately 50% of the value of her work for the company prior to the collision.

[41] Based upon that likely annual loss of earning capacity and given that Ms. Easton will continue to work until both she and Mr. Easton retire (which I have determined will be within the next 10 years), I have determined that her maximum potential loss of future earning capacity is approximately \$200,000. That amount must, however, be adjusted to account for negative and positive contingencies including, among other things, the possibility of earlier or later retirement and the potential for loss of income capacity due to matters unrelated to the accident. The award must also be expressed in terms of the present value of money.

[42] Having considered the totality of the evidence, I have determined that in all of the circumstances an award of \$125,000 will appropriately compensate Ms. Easton for her loss of future earning capacity arising from the collision.

Loss of Housekeeping Capacity

[43] The evidence establishes that Ms. Easton is still able to perform most of the housekeeping tasks that she performed prior to the collision except for the heavier cleaning tasks that are now undertaken by her husband. She now is also largely unable to do heavier outside tasks such as snow removal. The evidence, however, establishes that the time that it takes her to do the tasks which she is able to undertake is much longer than before the accident and that the "end product" does not conform to the standard that Ms. Easton prided herself upon prior to the collision.

[44] Ms. Easton adduced the evidence of Ms. Tanya Beatty, a rehabilitation consultant, who offered the opinion that Ms. Easton requires housekeeping assistance having an annual cost of approximately \$13,300. I compare and contrast that amount, however, with \$10,400 being the total actual housekeeping expenses incurred by Ms. Easton in the two years following the collision when she was far more disabled than is presently the case.

[45] I also, however, recognize that the actual expenditure of funds on housekeeping and related services to third party providers is not a prerequisite to compensation for the loss of housekeeping capacity. In that regard I must attribute value to the significant contribution that has been made and will continue to be made by Mr. Easton while "taking up the slack" in relation to housekeeping and related activities because Ms. Easton has been and is still unable to perform those tasks to the same extent that she did prior to the collision.

[46] Having considered the totality of the evidence, I have concluded that Ms. Beatty's analysis fails to sufficiently address Ms. Easton's present proven abilities and that the award of approximately \$250,000 for loss of housekeeping capacity suggested by Ms. Easton's counsel based upon Ms. Beatty's analysis is entirely unrealistic. I reach that conclusion because, in my view, Ms. Beatty's analysis is based upon both an exaggerated need for homemaking and other assistance and inappropriate levels of compensation for the type of services she suggests might be provided to accommodate Ms. Easton's disabilities.

[47] In all of the circumstances, I am satisfied that an award of \$75,000 will appropriately compensate Ms. Easton for both her past and future loss of housekeeping capacity and assess the past loss component of that

award as being \$30,000.

Costs of Future Care

[48] Ms. Easton also relies upon Ms. Beatty's report in support of her claim for future care costs.

[49] If accepted, Ms. Beatty's assumptions and analysis would result in a future care award of in excess of \$300,000.

[50] While the evidence establishes that Ms. Easton has been seriously disabled by the consequences of the collision, it also establishes that she has been able to significantly ameliorate the lasting effects of those disabilities by determination, her ability to adapt, her pursuit of an exercise regime within her limits and by availing herself of therapy and rehabilitation as recommended by her treating physicians and surgeons.

[51] Ms. Beatty's analysis fails to account for Ms. Easton's determined efforts and their impressive results in any significant way and while I must be careful not to under-compensate Ms. Easton concerning her potential future care needs and costs, I must also not award her payment for services that will likely never be incurred.

[52] Having considered the totality of the evidence, I have determined that Ms. Easton is entitled to payment for the following "one time" costs of future care:

(a) Occupational therapy	\$ 500.00
(b) Adjustable Ultramatic Sleep Bed	\$ 8,728.00
(c) Automobile passenger counselling	<u>\$ 2,500.00</u>
TOTAL	\$11,728.00

[53] I also am satisfied that Ms. Easton is entitled to payment on an annual basis for the following needs and services as a consequence of the injuries suffered by her in the collision:

(a) Painkillers	\$ 147.50
(b) Massage Therapy	\$ 2,900.00
(c) Orthotics and other footwear needed to accommodate her foot deformity	<u>\$ 750.00</u>
TOTAL	\$3,797.50

[54] I have determined that the present value of Ms. Easton's annual future care costs should be assessed on the basis of a life expectancy of 75 years. Application of the appropriate multipliers provided by Mr. Mandel results in a future care award of \$52,430 as the present value of Ms. Easton's annual future care needs in addition to the sum of \$11,728 to which she is entitled for one time future care costs.

[55] The total award to which Ms. Easton will be entitled for the cost of her future care is accordingly \$64,158.

Special Damages

[56] Counsel have agreed that the defendants are obligated to pay \$110,312.65 to Ms. Easton for special expenses and she will accordingly be entitled to judgment in that amount.

CONCLUSION

[57] In summary, Ms. Easton will be entitled to judgment against the defendants in the following amounts:

- (a) Non-pecuniary damages: \$160,000;

- (b) Past income loss: \$159,000 less statutory deductions;
- (c) Loss of future income earning capacity: \$125,000;
- (d) Loss of housekeeping capacity: \$75,000;
- (e) Cost of future care: \$64,158;
- (f) Special damages: \$110,312.65.

[58] Unless there are matters of which I am unaware, Ms. Easton shall also be entitled to costs on Scale 3.

“B.M. Davies, J.”
The Honourable Mr. Justice B.M. Davies