SUPREME COURT OF NOVA SCOTIA
Citation: Hynes v. Jones, 2014 NSSC 295

Date: 2014-08-07
Docket: *Halifax*, No. 374418
Registry: Halifax

Between:

Alphonsus Hynes

Plaintiff

v.

Henry Jones and Linda Hiscock

Defendants

DECISION

Judge:	The Honourable Justice Patrick Duncan
Heard:	March 11, 2014, in Halifax, Nova Scotia
Written Decision:	August 7, 2014
Counsel:	Ansley Simpson, for Matthew P. Napier, Q.C., for the Plaintiff Lisa Richards, for the Defendants

By the Court:

Background

[1] The plaintiff, Alphonsus Hynes, alleges that on December 10, 2011 he was a pedestrian crossing Highfield Park Drive within a crosswalk. Vehicles travelling from each direction stopped to permit his passage. The defendant, Henry Jones, while operating a car owned by the defendant Linda Hiscock, passed a vehicle that had stopped for the plaintiff and in doing so crossed the solid centre line and struck the plaintiff. The plaintiff was, at that point, said to be halfway across the street.

[2] In a Statement of Claim filed January 13, 2012, amended March 29, 2012, the plaintiff seeks:

1. General Damages for:
   - (i) Pain, suffering, inconvenience and loss of amenities;
   - (ii) Loss of future earnings or alternatively earning capacity;
   - (iii) Loss of capacity to perform valuable services;
   - (iv) Costs of future care;
   - (v) Extraordinary services rendered for the benefit of the plaintiff on a quantum meruit basis or otherwise;
2. Special Damages, including:
   - (i) Loss of income and employment benefits;
   - (ii) Out of pocket expenses.
3. Interest
4. Costs

[3] A Statement of Defence filed March 6, 2013 asserts, among other things, that the plaintiff caused or contributed to his losses by his own acts of negligence, and relies upon the provisions of the **Contributory Negligence Act** RSNS 1989, c. 95, as amended. The defence also asserts that any injuries the plaintiff may have suffered were caused by pre-existing conditions. It is also pleaded that the plaintiff failed to mitigate his damages.

[4] Subsequent to the initiation of the claim, the defendants admitted liability and have made three interim payments to the plaintiff that total $15,000.

[5] The defendants acknowledge that the plaintiff suffered injuries that required hospitalization, surgery, casts, walking aids and physiotherapy. The plaintiff's brief lists these injuries more specifically as:

1. Concussion
2. Fractured femur
3. Nasal bone fractures
4. Left posterior column acetabular fracture
5. Comminuted fracture of the superior pubis ramus on the left
6. Non-displaced transverse fracture of the inferior pubic ramus
7. Lacerated lip and right eyebrow
8. Subdural hematoma
9. Damage to and loss of teeth
10. Subcapsular cataract (right eye)
11. Labral tear in hip
12. Supraspinatis tendionopathy of the right shoulder
13. Muscle spasms
14. Loss of memory, dizziness, headaches and lapses in concentration
15. Psychological injuries

[6] Treatment of the plaintiff has included:

1. X-rays and CT scans of femur, chest, pelvis and left hip
2. Open reduction and internal fixation
3. Insertion and removal of traction pin in left femur
4. Right phacoemulsification with insertion of intraocular lens
5. Stitches to right eyebrow and right upper lip
6. Extraction of teeth and insertion of partial plate
7. Cortisone injections – right shoulder

8. Anti-inflammatories and muscle relaxants
9. Physiotherapy
10. Personal training
11. Neurological assessment
12. Occupational therapy assessment
13. Psychological assessment

[7] As at the time of hearing, the plaintiff was pending hip surgery and a neuropsychological assessment. An anticipated psychiatrist's report was unavailable at the hearing.

[8] The defendants generally acknowledge the first seven injuries listed above but challenge, in varying degrees, the relationship between the accident, the injuries alleged and the consequences arising therefrom. As such they have been unwilling to make further payments to the plaintiff without further medical particulars.

The Current Motion

[9] The plaintiff seeks an interim payment of $149,401.50 pursuant to **Nova Scotia Civil Procedure Rule 70.08**.

[10] The defendants resist the motion arguing that there is "uncertainty and conflicting evidence surrounding the plaintiff's current medical status and his level of disability." They question the plaintiff's credibility, in particular as it relates to his loss of income claim. Specifically they argue that there are live issues to be litigated including:

a) The degree of disability suffered by the plaintiff as a result of his injuries;

b) The prognosis of the plaintiff's injuries;

c) The timeline for pending surgery;

d) The plaintiff's pre-accident earnings history;

e) The plaintiff's ability to work pending his surgery.

[11] For these reasons, the defendants argue that the available evidence does not provide, with the requisite degree of certainty, proof of the damages to which the plaintiff would be entitled.

[12] If the motion is granted, the defendants seek that the court reduce the amount payable by any amount that it is likely to be entitled to.

Issues

[13] Has the plaintiff adduced evidence sufficient to assess the amount of damages he is likely to recover?

[14] If so, what is a reasonable contribution to that amount?

Law

[15] **Civil Procedure Rule 70.08** states:

> **Interim payment**
>
> 70.08 (1) A party who claims damages may make a motion for an interim payment when the other party admits liability or the party who makes the motion is entitled to have the damages assessed in accordance with Rule 8 - Default Judgment, or in accordance with an order made under Rule 13 - Summary Judgment.
>
> (2) The order for an interim payment must grant judgment in the interim amount with the balance to be assessed.
>
> (3) The order for an interim payment must provide for a reasonable contribution towards damages that the person making the claim is likely to recover, less any deduction to which the other party is likely to be entitled.
>
> (4) The party who makes a motion for an interim payment must file the party's undertaking to repay the difference if the interim payment is greater than the amount allowed on assessment.

[16] This rule was considered in *Walji v. Boudreau* 2009 NSSC 349 where Wright J., held:

> 7 The wording of the new **Civil Procedure Rule 70.08** is a bit different from the old Rule 33.01(A) but in my view, the law essentially remains unchanged on such motions. The court continues to retain a discretion as to whether or not to grant an interim payment in any given case. There is nothing mandatory about it once liability is established, notwithstanding the use of the word "must" in **Rule 70.08(2),** as propounded by counsel for the plaintiffs.
>
> 8 Once satisfied that the plaintiff is entitled to judgment, as I have found here, the Court must then strive with the evidence before it to form an opinion of what damages are likely to be recovered by a plaintiff and the court may then order a reasonable contribution towards those damages as an interim payment. It must always be kept in mind that a motion for an interim payment is not a substitute for an assessment of damages, nor is it a mini-trial of any sort. Rather, the court has the discretionary power to order an interim payment to a plaintiff based on its opinion of the amount of damages the plaintiff is likely to recover, subject to the reasonable proportion limitation. Where the level of that limitation should be set in any given case is left to the discretion of the court.

[17] In response to a motion for interim payment brought under the 1972 Civil Procedure Rules, Bateman J.A. writing in *MacDonald v. MacPherson* 1999 NSCA 154 adopted the position taken at the motion hearing by Gruchy J. as correct:

> [6] Justice Gruchy was mindful that on such an application he should avoid making credibility findings which might be prejudicial on the trial. He was of the view that a determination of the likely damages, if any, could not be made without such findings. In the circumstances of this case Justice Gruchy found that "any estimate of damages . . . would amount to nothing more than a haphazard guess"…. We are satisfied that he did not err at law in dismissing the application.

Analysis

Injuries suffered by the plaintiff

[18] The EHS personnel responding to the accident on December 10, 2011 recorded that the plaintiff was suffering from pain in the left proximal femur, had a laceration above his right eyebrow that caused pain; and a loose front tooth. They noted that there was no loss of consciousness (LOC).

[19] Mr. Hynes was transported to the Queen Elizabeth Health Sciences Centre. The Registration Form records a "major trauma", identifies a femur injury and again reports "No LOC".

[20] A CT scan identified "…multiple pelvic fractures", some which were nondisplaced, but noted in particular a "complex left acetabular fracture involving the anterior and posterior columns."

[21] Other observations included forehead and lip lacerations and a "questionable small right-sided epidural hematoma".

Left Pelvis

[22] On December 15, 2011 Dr. Chad Coles operated on the plaintiff to repair the left posterior column acetabular fracture. The fracture was displaced. Two pelvic reconstruction plates were implanted. In a medical legal report dated December 20, 2012, Dr. Coles described this as a "significant fracture".

[23] Following the surgery, the plaintiff was discharged to home on December 20, 2011. He was next seen by Dr. Coles on January 4, 2012 and the staples were removed. He was given directions to limit hip flexion. On February 1, 2012 he was permitted progressive weight bearing and encouraged to wean off his crutches.

[24] On March 21, 2012 Mr. Hynes was seen by Dr. Coles and observed to be using a single crutch. He was encouraged to try a single cane. By June 12, 2012 Dr. Coles concluded that Mr. Hynes was still not back to baseline strength. At a September 19, 2012 examination the plaintiff reported that he was walking about 1.5 kilometers per day. X rays were consistent with a healed fracture.

[25] Dr. Coles last saw Mr. Hynes on December 19, 2012, being one year post accident. In relation to the pelvic injury, he observed that it was healed and that the plaintiff's range of motion was "quite good".

[26] Summarizing the previous year of treatment Dr. Coles states:

> Mr. Hynes would have had significantly impaired mobility following his injury and surgery. He was on crutches for approximately three months. He underwent a prolonged course of physical therapy and strengthening. <u>As of my most recent assessment, he remains unable to go back to work as a carpenter. Hopefully following hip arthroscopy he will be able to return to gainful employment</u>. In the future if his symptoms progress, I would anticipate that he would have difficulty

> with heavier activities. In the long term he may need to find more sedentary employment. I would anticipate that he should be able to remain gainfully employed for the remainder of his anticipated working years. Similarly, during the period of recovery I would have anticipated a significant impairment in his ability to perform daily activities and household repairs. At this point I would still anticipate some difficulty with heavier tasks. In the long run I would anticipate that he should be capable of continuing to perform these duties. ….
>
> In the long-term he does remain at risk of post-traumatic arthritis… If his post-traumatic arthritis progresses he would be at risk of requiring a total hip arthoplasty. It is difficult to predict the time course or likelihood of this eventuality.

[27] Physical therapy was provided by Jodie Terrio. Her reports are in evidence. It shows Mr. Hynes to be improving through 2012 but only operating with 75% function as of August 17, 2012.

Labral Tears in Left Groin

[28] On March 13, 2012 Mr. Hynes reported to his physiotherapist that he fell when getting out of the tub on the previous day. The record states: "*L leg went quickly into abd and fell onto R side. Sore today – mostly in groin. Objective 'pull' with abd*…"

[29] An Occupational Therapy assessment was conducted by Alana Betts on March 19, 2012. She records that:

> Mr. Hynes told the writer he experienced intermittent pain in his groin and pelvis. He estimated the pain in his groin to be 4/10… at the time of the meeting. He did not know what contributed to the pain in his groin and he could not identify and [sic] triggers. He advised he had temporary relief by changing his position.

[30] In assessing Functional Mobility she described Mr. Hynes' ability to make "Shower transfers" as "independent with difficulty." The report continues:

> At risk for falls. The client was observed to step into the tub using the curtain rod for support. He had just started getting into the tub at the first of March 2012. Prior to that he had been sponge bathing. When the writer expressed concern about his shower transfer technique he advised he had sustained a fall in the shower approximately two weeks prior to the writer's assessment.

[31] Ms. Betts recommended installation of a tub transfer bench in the bathtub and a clamp on grab bar on the edge of the tub.

[32] Dr. Coles notes in his December 2012 report that the plaintiff complained of this ongoing pain and described it as "quite sharp and catching in nature". The doctor suspected a labral tear and referred Mr. Hynes to Dr. Ivan Wong for consideration of a hip arthroscopy. Because of the surgical hardware in the pelvis, an MRI was not feasible.

[33] Dr. Wong saw Mr. Hynes on February 4, 2013 and a CT scan was ordered. It was performed in June 2013 and the findings were compatible with an in-substance tear involving the anterosuperior aspect of the acetabular labrum and a second tear at the labral-cartilaginous junction of the superior acetabulum.

[34] This led to a further consultation in August 2013 during which the plaintiff agreed to undergo a hip arthroscopy to repair the labral tear, an acetabuloplasty (surgical repair of the acetabulum), a femoraloplasty (re-shaping of the femoral head to restore its spherical contour), and a synovectomy.

[35] As at the date of the motion hearing, no appointment had been given to the plaintiff for the surgery. The option of having the surgery done for a fee exists. It was estimated to cost $9,401.50, but the plaintiff has no means to pay for it, so he must wait for the surgery to be conducted in a public health care facility. In his August report, Dr. Wong notes that the proposed surgery will not address any pre-existing arthritic changes in the hip that was operated on, but hopefully will minimize the need for a future arthroplasty.

[36] It is clear from Dr. Coles' report and from Dr. Wong's report dated December 5, 2013, that it is this condition that is severely limiting the ability of Mr. Hynes to return to work.

[37] The defendants submit that "The plaintiff's main injury at this point appears to be a tear in the connective tissue in his hip/groin area". They say that the lack of clear evidence of causation is fatal to the plaintiff's motion for interim payment and argue that "…it is possible the injury and resulting surgery were caused by the subsequent fall, and not the accident itself". They do not address, in their arguments, the potentially causative relationship between the fall and the plaintiff's risk of falling incidental to the injury treated by Dr. Coles.

[38] The evidence that might support a causative link is found in the report of Ms. Betts taken with Mr. Hynes' reporting of his fall. However there is no medical opinion evidence before the court that links the groin injury to the accident, nor to the bathtub fall. In addition, Dr. Coles and Dr. Wong have not provided an

opinion that assesses what Mr. Hynes' abilities would have been, but for the bathtub fall.

[39] If the plaintiff fails to establish a sufficient causal link between the accident and the groin tears then the court may find itself trying to assess damages arising from the accident without consideration of the intervening event.

Damage to and loss of teeth

[40] There is evidence that could support a conclusion that damage to his teeth caused the plaintiff to require the extraction of teeth and insertion of a partial plate.

Subcapsular cataract (right eye)

[41] On January 18, 2013 Dr. Hesham Lakosha, ophthalmologist, operated successfully to repair a right posterior subcapsular cataract which he diagnosed when examining the plaintiff on December 4, 2012. In a report dated March 10, 2013 Dr. Lakosha reported that "… although it is difficult to determine the cause of his cataract with certainty…. it is more likely that his cataract was traumatic in origin and possibly caused by the accident."

[42] The defendants point to evidence that Mr. Hynes reported a "fog" over his right eye to his family doctor one month prior to the accident. Notwithstanding the evidence of Dr. Lakosha that links the cause of this condition to the accident, it is not possible on this type of hearing to make the necessary findings of fact to reasonably assess the likely damages associated with this condition. The evidence will need to be assessed in its totality by a trial judge.

Nasal bone fractures and lacerated lip and right eyebrow

[43] These are admitted by the defendants and would have pain associated with them, but the evidence does not suggest that the injuries triggered ongoing impairment of the plaintiff's abilities to carry out his normal activities.

Supraspinatis tendionopathy of the right shoulder

[44] This was diagnosed and treated with a cortisone shot in December 2012 by Dr. Coles.

Muscle spasms

[45] These have been reported by the plaintiff.

Concussion and Post-concussion Syndrome

Subdural hematoma

Loss of memory, dizziness, headaches and lapses in concentration

Psychological injuries

[46] The defendants take strong objection to the available proof of these allegations which are based on the plaintiff's self-reporting and medical evaluations.

[47] The EHS report demonstrates that Mr. Hynes suffered injuries to the head. They recorded that Mr. Hynes reported that he did not suffer a loss of consciousness. Similarly, the Registration Form at the hospital notes that there was no LOC.

[48] In August 2012 the plaintiff was seen by Dr. Alex MacDougall, adult neurologist, who concluded that the plaintiff had suffered a concussion. This was based in part on the plaintiff reporting to the doctor that he had lost consciousness "for several minutes" after being struck by the defendant's car. Dr. MacDougall concluded that the plaintiff had "made a very good recovery" from the concussion.

[49] On December 2, 2013 (2 years post-accident) Dr. Mark Fletcher, a Sports Medicine physician, diagnosed the plaintiff with post-concussion syndrome and a potential small post traumatic hematoma. In reviewing his report, it is evident that the assessment is influenced by the objectively noted injuries from the accident report, but also relies heavily on the plaintiff's reporting of his symptoms as he completed the Sport Concussion Assessment Tool.

[50] The defendants submit, with examples in the evidence, that Mr. Hynes is a sometimes unreliable and inconsistent historian when relaying his symptoms to different medical assessors. An example of the inconsistency is apparent in the different responses recorded as to whether the plaintiff suffered a loss of consciousness after being struck to the pavement. Dr. Fletcher's review of the

records causes him to record "Brief LOC" which appears to be a third description of this event from the two recited above.

[51] While it is not controversial to say that Mr. Hynes suffered a concussion for which he should receive some compensation, there is sufficient uncertainty in the motion evidence as to the extent of the consequences of that concussion to defeat the assessment of a likely recovery of damages for the concussion.

[52] As at the time of hearing there was a pending appointment for neuropsychological testing of the plaintiff. A report from a psychiatrist was outstanding and unavailable on the hearing. These may provide some further assistance to the parties in clarifying the extent to which the diagnosis of post-concussion syndrome and other psychological injuries may have been caused by this accident.

General Damages

[53] Counsel for the plaintiff candidly acknowledges that there are issues which render estimation of the upper range of general damages too uncertain, but says that the indisputable injuries and consequences arising therefrom give the court the ability to assess the lower end of the range against which a reasonable proportion could be set. Counsel further submits that such an approach satisfies the policy objectives of the rule. Those are, according to counsel, to ensure that plaintiffs who are able to show entitlement are not left waiting for monies that are certainly going to be awarded to them, while also ensuring that defendants are not disadvantaged by being required to pay monies that might not be justified at the end of the day. (The plaintiff's undertaking, as required in **Rule 78.03(4)**, to repay the difference if the interim payment is greater than the amount allowed on assessment, provides a further remedy for the defendants).

[54] I accept that this is a reasonable view. I add that any amount that should be paid and is not, may impact upon the plaintiff's ability to sustain the litigation. i.e., a plaintiff may be forced to accept settlement below what they might otherwise obtain, because they can no longer fund themselves during extended periods of disability. Conversely, a payment that is excessive and not properly justified might undermine the defendant's ability or willingness to continue its defence which it has every right to pursue.

[55] As previously stated, the language in the Rule is that the court must assess what the plaintiff "… is likely to recover less any deduction to which the [defendant] is likely to be entitled."

[56] I agree that this language leaves open to the court, while exercising its discretion judicially, to conclude that there is a minimum amount that the plaintiff is likely to recover and to order an amount payable that is a reasonable proportion of that amount. The question is whether it is possible to do so in this case?

[57] The plaintiff says yes. He says that on his worst day in court he will achieve an award of general damages that falls in the range set out in *Smith v. Stubbert* (1992), 117 N.S.R. (2d) 118 (C.A.), that is $28,000 to $58,000 (current day values), for "persistently troubling but not totally disabling" injuries. The cases presented to me could support a general damage award far greater than that if the plaintiff succeeds in establishing all of his claims. Indeed the plaintiff has signalled his intention to seek general damages of $175,000.

[58] Counsel for the defendants forcefully objects stating that there are too many uncertainties, and too many points of credibility in issue for a court to reach such a conclusion.

[59] There is no question that there are factual disputes that have the potential to impact on the calculation of general damages. The following conclusions are, nevertheless, warranted:

1. Accident related injuries suffered by the plaintiff included fractures to the nose and hip; a concussion; lacerations to the head; a loosened tooth; and associated pain and suffering to these injuries;
2. Treatments included surgery for a significant fracture injury to the acetabulum, and a stay of approximately 10 days in hospital; physiotherapy, personal training, various attendances with physicians for assessment and for treatment;
3. The evidence supports a conclusion that the plaintiff has generally complied with treatment advice.
4. These injuries alone would have restricted the plaintiff's abilities to carry out the normal demands of his employment as a finish carpenter or his normal household tasks for many months post-accident;
5. There is a risk of post-traumatic arthritis that exists independently of the labral tears and which is attributable to the fractures caused by this

> accident; however, the medical evidence is that it is difficult to predict the likelihood of this occurring.

[60] There are other injuries complained of about which the evidence is less definitive.

[61] I agree with defendants' counsel that general damages are calculated as much by the consequences to the plaintiff as by the injuries themselves. For example, a fractured leg may have a vastly different resolution and consequences for one plaintiff than for another. The totality of the injuries is similarly to be assessed.

[62] Defendants' counsel seeks to discourage me from looking at a general damages calculation that only accounts for the injuries which are indisputable. In a sense what the defendants ask is that I reject a request to pay that amount which represents the defendants likely best possible outcome.

[63] There is no question that Mr. Hynes was seriously injured in the accident. However, the undisputed injuries appear to have healed well. There is evidence in Dr. Coles' notes that suggest that Mr. Hynes might have been able to consider a return to work in 2012 if it were solely an issue of the pelvic/femoral fractures. However, the labral groin tears in March 2012 intervened, and by the time of Dr. Coles' December 2012 report the focus of Mr. Hynes' condition was on the disabling effects of the labral groin tears that Dr. Wong was engaged to treat.

[64] It seems that the ongoing delay in recovery may be contributing to Mr. Hynes experiencing psychological injuries, a matter that is under investigation but evidence of which was not available in the motion hearing.

[65] The range of general damages that may be available to the plaintiff vary widely and hinge to a significant extent on proof that the labral tears were "caused" by the accident, within the meaning of *Athey v. Leonati*, [1996] 3 S.C.R. 458. There is certainly some evidence at this stage that would suggest that they were causally linked, however, the degree of the plaintiff's impairment and the time required for the plaintiff's injuries to resolve will depend on the findings of a court in possession of medical evidence that speaks clearly to those questions and which is not before the court in this motion.

[66] In their brief, and confirmed in oral argument, the defendants offered to consider further interim payments upon receipt of a report from Dr. Wong that

speaks directly to the plaintiff's status for surgery, functional abilities and the prognosis. This is not an unreasonable position, having regard to my assessment that further medical evidence from Dr. Coles and/or Dr. Wong would be of great assistance in establishing that the labral tears have been "caused" by the accident and the impact on the likely quantum of damages. Certainly it is evident that Mr. Hynes will succeed in obtaining something more than $15,000 already advanced so further advances would be warranted.

[67] The case law cautions against a court granting a motion for interim payment where to do so requires making assessments of credibility. It is also clear that the court must refrain from engaging in what amounts to a mini-trial or an assessment of damages hearing. It does not matter whether I might have concluded that the plaintiff would succeed in establishing the labral tears were "caused" by the defendants' negligence. It is a point in dispute that has potentially significant consequences to the calculation of general damages.

[68] In *Bogaczewicz v. Faulkner* 181 NSR (2d) 163 Goodfellow J. addressed the threshold of evidence necessary to the success of a motion for interim payment of general damages. He states:

> 40 The Court must establish an opinion of what is likely to be recovered by the Plaintiff and then it may order an interim payment not exceeding a reasonable portion of the determination. In many cases, the Court has available all of the medical evidence or evidence that is going to be presented to the Court when it is called upon to make its final determination. Often the medical reports from both sides provide a consensus that specific injuries in all probability resulted from the accident with general agreement that the consequences of the injuries are to a certain level with the only area of disagreement being the full extent of the consequences that flow from the injuries.
>
> 41 Unfortunately, that is not the case here. I am not confident that I have all existing medical reports, and in any event, discoveries of the various doctors have not yet taken place nor has the defendant yet exercised its entitlement to have the plaintiff examined by doctors of its choice who would then be subject to discovery by the plaintiff. In other words, the exploration of medical evidence and its assessment is, in this case, far from complete and this requires the Court to exercise a considerable degree of caution.…
>
> 42 I make it clear that in stating the degree of uncertainty, that this reflects only the lack of full medical evidence being available to me at this time and is not meant to be a comment on the probability or otherwise of the relative positions of the parties being successful in the final event. The difficulty is that in this case considerable uncertainty exists as to what is likely to be recovered by the plaintiff.

> I conclude that the proper approach is that where the Court is faced with such a degree of uncertainty that it should conclude it is unable to make a determination of reaching an opinion as to what is likely to be recovered in those damage areas of uncertainty…

[69] Many of Justice Goodfellow's concerns are present in this case. At this point the evidence is insufficient for me to properly assess what general damages are likely to be. I am not persuaded that it would be appropriate to exercise my discretion to assess a minimal amount of damages that might be recovered by the plaintiff.

[70] This request is denied.

Loss of Income Claim

[71] Mr. Hynes has a consistent work history as a skilled labourer; however he has not been employed since the accident and so claims for loss of past income.

[72] The defendants say that the evidence on this motion is insufficient to accurately predict what a court might conclude as to the length of time the plaintiff would be off work as a result of injuries attributable to the accident; whether work would have been available to him throughout; and what his income would have been. In particular the defendants submits that the plaintiff has failed to mitigate his loss because he has made no efforts to seek any form of work, and in particular that he has, in the past, carried out supervisory work which he has not explored as a possible way to earn income.

Calculation of Income

[73] The affidavit evidence of Chris Jollimore is that the plaintiff was employed as a finish carpenter with CJ's Custom Trim Specialist Incorporated, from July 14, 2008 to December 10, 2011. He was paid $20 per hour, and worked varying hours up to 60 hours per week. Mr. Hynes is described as a reliable worker whose tasks involved a mixture of duties "…ranging from light to very heavy tasks, including lifting and carrying tools and materials (including doors or other large and heavy items), as well as significant and repetitive bending, lifting, crouching and kneeling, at times for entire days such as when the particular job involved installation of baseboard trim".

[74] Mr. Jollimore says that he would "absolutely rehire Mr. Hynes should he be able to physically return to work as a finish carpenter."

[75] The defendants first point of objection is that the past history of income earned shows unexplained gaps and significant fluctuations making it unsafe to predict the plaintiff's income post-accident. They also question the accuracy and objectivity of Mr. Jollimore's affidavit on the basis of the ongoing personal and business relationships of Mr. Jollimore with the plaintiff.

[76] Mr. Hynes works in a boom and bust industry and his reported incomes demonstrate the volatility of his earnings. His "Total Income" as reported on Line 150 of his income tax returns for each of the seven years prior to the accident was:

2005	$10,466
2006	$33,687
2007	$25,822
2008	$ 6,487
2009	$ 9,139
2010	$24,050
2011	$39,000

[77] There is evidence that could easily cause a trial judge to question the validity of the amounts reported in 2008 and 2009. During 2008 the plaintiff's then business went into bankruptcy. His explanation for the low income in 2009 is vague. The defendants suggest there are significant credibility issues with the plaintiff's explanation for these years, and in the failure of Mr. Jollimore to explain Mr. Hynes' reduced income in 2008-2009 when he says that Mr. Hynes was working for him.

[78] In response the plaintiff urges that I rely upon the annual income average of 2010 and 2011, being the last two years of employment income prior to the accident. If I accept this submission then the loss of income would be calculated at $31,525 per year.

[79] There is no real evidentiary challenge to the income amounts claimed for these two years. At best, the defendants' complaints seek that a court draws an inference that Mr. Hynes was understating his income in some years. This, if shown to be true, artificially reduces the amount that Mr. Hynes might otherwise be able to use to support his income claim. It does no damage to the defendants' position.

[80] The fluctuations do make it more difficult to assess what income could have been earned in 2012 and thereafter. The plaintiff's submission has a simplistic appeal, that is, it assumes his income would not have gone below $31,000 after December 10, 2011. This approach lacks evidentiary rigor however. One might ask why not take the average over 2008-2011 (4 years) which would be an income of $19,669; or an average over 2009-2011 (3 years) which would be $24,063.

[81] I am satisfied that the plaintiff's work history demonstrates that he would have worked and earned income in 2012 and thereafter, had he been able and willing. However, the evidence as to the amount of income that would reasonably be available to Mr. Hynes post-accident is sparse. Mr. Jollimore's affidavit does not give particulars as to the expected income Mr. Hynes would have earned in 2012 or 2013. This should have been possible, since by the time this matter came on for hearing he would have completed the 2012 and 2013 income years.

[82] Mr. Hynes testified in discovery that there was work available to him at his former job. He could not assess the value of that work to him. In summary the court is asked to speculate as to income loss, when evidence from Mr. Jollimore should have been available to provide a reasonable basis upon which to estimate Mr. Hynes expected earnings post-accident.

Causation

[83] There is no question that Mr. Hynes was unable to work for a period of time due to the objective consequences of the accident, but the post-accident fall in his shower caused labral tears in his groin which is and has been for a long time his most debilitating physical condition. This event and its consequences have been outlined in detail above.

[84] The relationship of the fall related injury to the accident is a point of debate between the parties. The plaintiff argues that the fall occurred because Mr. Hynes was unstable, which instability was caused by the injuries in the accident. The defendants challenge this suggesting that Mr. Hynes would have been able to

return to work much sooner but for the tear in the groin, and that it is a live issue for a trial judge to determine as to the role that the accident played in this subsequent fall.

[85] The fall undermines the clarity of the analysis as to what is interfering with Mr. Hynes' return to health and work. Many of the undisputed injuries would not, on the face of them, be sufficient to support a finding of total disability, which is effectively what Mr. Hynes is arguing pending the results of further surgery. It goes to the extent of the disability and the duration of his unemployability.

Mitigation

[86] The final problem in assessing lost income is in a consideration of the plaintiff's duty to mitigate. Mr. Hynes has made absolutely no effort to determine whether there might be work that he is capable of performing. The evidence shows that he has pain when carrying out certain activities, and that his endurance is limited but there is evidence that suggests he has some capabilities: limited lifting of heavy objects, climbing stairs, doing household chores.

[87] I have been urged to weigh the likelihood of Mr. Hynes finding work that he is capable of. He is 57, has limited education, has only worked in jobs that required physical labor that are currently beyond his abilities, and has demonstrated in the past that he cannot perform business functions. To a suggestion that he is capable of filling a supervisory role, he says that his past experience with such positions is that they have always required him to perform manual labor, that is, they were never strictly supervisory.

[88] The plaintiff also questions the logic of taking on a new job when he has been told that once the pending surgery is completed he will be 6-8 weeks recovering and will need physiotherapy treatments. Although he believes it will be one to two years before he is operated on, he does not know when he may get called and so it seems that he wants to wait until after the surgery to see whether and when he can work again.

[89] The defendants point to Mr. Hynes' discovery response to questions about the potential to earn some income as indicative of his attitude toward mitigating his damages:

> Q. … have you ever asked [Chris Jollimore] whether there is any possibility of coming back in… in some sort of other capacity?

A. No

Q. Less physically demanding. Okay.

A. Because I'd have to take a cut in pay.

[90] It is reasonable to think that this evidence will be subject of scrutiny in assessing whether Mr. Hynes' claim should be reduced for failing to mitigate.

Deductions from Income Loss Claim

[91] Mr. Hynes has received employment insurance benefits in 2012 of $7,020 gross. He has received $15,000 from the defendants which the plaintiff says would be applied to reduce the income claim amount. He has also received $140 per week in Section B weekly indemnity payments since December 10, 2011 which as at the date of hearing amounted to $15,960. In total he has received, by the plaintiff's assessment, the amount of $37,980.

Conclusion as to Loss of Income

[92] **Rule 78.03** permits an order for payment that is "….a reasonable contribution towards damages that the person making the claim is <u>likely</u> to recover…".

[93] While I have confidence that Mr. Hynes would likely have continued to work and would likely have earned income consistent with his earning history, I am unable to conclude, with the degree of certitude that the law requires for setting an interim payment, what amount the plaintiff is "likely to recover" in relation to this head of damages. It is dependent upon better evidence as to expected income calculation for the periods subsequent to the accident, a determination of the duration of the disability, establishment of a causal link between the accident and the labral tears which appear to be the most significant obstacle to a return to work, and an appraisal of the evidence that speaks to the plaintiff's attempts to mitigate his losses.

[94] This request is denied.

Costs of Care

[95] The plaintiff seeks that the defendants pay the sum of $9,401.50 to have the pending surgery completed privately as soon as possible, and thus enhance his opportunities to return to work at the earliest possible time.

[96] The basis for this claim relies upon proof that the labral tears were "caused" by the accident. This may one day be shown to the satisfaction of a trial court and if so the defendants may be called upon to answer for the consequential damages that might have been avoided by the delay in the plaintiff getting the necessary surgery.

[97] However, on a motion for interim payment, the evidence needs to satisfy a court as to what a likely amount of recovery for the injury would be. At this point, causation of the labral tears is still a live issue that eliminates the ability to reach such a conclusion.

[98] This request is denied.

Conclusion

[99] For the reasons set out herein the motion of the plaintiff for an order of interim payment is denied. If the parties are unable to agree as to costs, then I will receive their written submissions on a schedule to be proposed by them. If they are unable to agree on a schedule, I will convene for oral argument.

Duncan, J.