COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Wahl v. Sidhu,*
2012 BCCA 111

Date: 20120308
Docket: CA038540

Between:

Donald Martin Wahl

Appellant
(Plaintiff)

And

Hardeep K. Sidhu

Respondent
(Defendant)

Before: The Honourable Chief Justice Finch
The Honourable Madam Justice D. Smith
The Honourable Madam Justice MacKenzie

On appeal from: Supreme Court of British Columbia, October 20, 2010
(*Wahl v. Sidhu*, 2010 BCSC 1466, Vancouver Docket M072939)

Counsel for the Appellant:	W. D. Mussio
Counsel for the Respondent:	S. B. Stewart and M. D. Wilhelmson
Place and Date of Hearing:	Vancouver, British Columbia February 3, 2012
Place and Date of Judgment:	Vancouver, British Columbia March 8, 2012

Written Reasons by:
The Honourable Madam Justice MacKenzie

Concurred in by:
The Honourable Chief Justice Finch
The Honourable Madam Justice D. Smith

Reasons for Judgment of the Honourable Madam Justice MacKenzie:

[1] Mr. Wahl appeals from an order awarding damages for injuries sustained in a motor vehicle accident on June 22, 2006 ("the accident"). The respondent, Mr. Sidhu, admitted liability, so the issue at trial was the quantum of damages. The trial lasted nine days in January 2010. Judgment was pronounced on October 20, 2010 and is indexed at 2010 BCSC 1466.

[2] At the time of the accident, the appellant was heading west on 72nd Avenue in Surrey, B.C. He was driving a pickup truck owned by his employer, Midway Tire Ltd., and was transporting two large tires weighing approximately 1,200 pounds each. The respondent, who was heading north on 126th Street, failed to stop at a red light. Due to the force of the resulting collision, one of the tires broke through the back of the pickup cab, likely hitting the appellant in the head.

[3] The trial judge found that the accident caused the appellant both physical and psychological injuries, including "medium tissue" injuries, depression, post-traumatic stress, and anxiety. He also found that it aggravated the appellant's pre-existing shoulder injury. However, he cut off damages at June 2009, finding that the appellant would have been completely recovered by that time had he mitigated his damages by attending a pain clinic and undergoing a needle test on his right shoulder. The judge also held that the symptoms that continued after this date should have been overcome by the appellant through his own motivation, and therefore were not causally connected to the accident.

[4] The judge awarded the appellant total damages of $165,233.27, consisting of:

$65,000 for non-pecuniary damages;
$78,000 for past wage loss;
$12,233.27 for special damages; and
$10,000 for the cost of future care.

[5] The judge dismissed the appellant's claim for loss of future earning capacity (referred to by the judge as "future loss of capacity"), as well as the "in-trust" claim made on behalf of the appellant's long time roommates who, it is asserted, assumed significant household duties in providing support for the appellant post-accident.

Issues

[6] The appellant raises three grounds of appeal:

1. the trial judge erred in finding that the appellant would have been completely recovered by June 2009;
2. the trial judge erred in dismissing the in-trust claim; and
3. the trial judge erred in failing to consider the mileage claim advanced by the appellant for transportation to and from medical appointments.

[7] The appellant is not challenging the award for non-pecuniary damages, conceding that it is within the appropriate range for chronic pain cases, notwithstanding that the trial judge limited damages to a three-year period post-accident.

[8] In my opinion, the trial judge erred in limiting damages to June 2009 on the basis that the appellant failed to mitigate his damages by not attending a pain clinic or undergoing a needle test. Implicit in that finding is that the injuries sustained by the appellant in the accident were ongoing to the date of trial. Otherwise, if the appellant's symptoms after June 2009 were not causally connected to the accident, it would have been unnecessary for the trial judge to consider the respondent's defence of failure to mitigate. However, the judge's reasons in certain passages suggest that causation was not in fact established for symptoms experienced by the appellant post-June 2009; his reasons thus contain irreconcilable findings on the issue of causation and demonstrate a confusion of the issues of causation and mitigation.

[9] The finding that causation was not established for symptoms experienced after this date demonstrates a confusion of the issues of causation and mitigation that makes it impossible to engage in meaningful appellate review. In light of the impact of this error on the awards for loss of future earning capacity and past wage loss, I would allow the appeal and order a new trial. Given this outcome on the first issue, it is unnecessary to address the remaining grounds of appeal.

Background

[10] It is unnecessary to discuss the factual background of the case in detail because of the discrete nature of the error in the trial judge's reasoning.

[11] The appellant was 39 at the time of trial and living on an acreage with his two roommates, Tammy Massender and her ex-husband Gregory Massender, with whom he had lived for 13 years. He had a grade 10 education and preferred employment in very physical areas of work.

[12] At the time of the accident, the appellant was a tire technician at Midway Tire Ltd. His duties in this role were much the same as those he performed in his previous employment at Country Tire. The appellant was described as a diligent worker who was in very good physical condition. He had received Workers' Compensation Benefits for a year or so following an accident that occurred in August 2001 in the course of his employment at Kevin's Auto Clinic. A cube van landed on him while he was performing a rear brake job, resulting in injuries to his right shoulder and left hip. However, the appellant exhibited no physical limitations leading up to the accident in June 2006 and was very active.

[13] This shoulder injury was the only pre-existing physical condition relevant to the injuries at issue at trial. Aside from a fear of needles, the appellant had no pre-existing psychological problems.

[14] The appellant alleged that he suffered chronic pain syndrome, clinical depression, post-traumatic stress disorder, cognitive deficits and headaches as a

result of the accident. At trial, he maintained that his injuries, with the exception of the direct effects of a concussion, were ongoing and continued to implicate all heads of damages. His claim for damages totalled $1,141,000 with $600,000 for future loss of earning capacity.

[15] At the time of trial, the appellant had not returned to his former job, nor had he actively sought other employment.

Reasons for Judgment at Trial

[16] The trial judge referred to the respondent's position that the appellant had sustained, at most, grade two soft tissue injuries that warranted some compensation for income loss up to three months and likely special damages for physiotherapy visits for a short period of time following the accident. The respondent took the position that there was no objective evidence to support the appellant's alleged levels of pain and disability over the three and one-half years since the accident. It was the respondent's submission that the fact the appellant had made no effort to return to work, to enrol in school to upgrade or retrain, or to find more sedentary work suggested the appellant's real problem was motivation, rather than legitimate disability.

[17] The trial judge thoroughly reviewed all of the evidence, including the medical reports and assessments tendered by both parties, and made important findings of credibility. He said:

> ...I generally found much of [the appellant's] evidence about the accident and many of his post-accident complaints to be reliable and corroborated by medical evidence and those lay witnesses who testified as to his pre-accident and post-accident conditions" (para. 20).

[18] Based on the evidence of eight lay witnesses, whose testimony was found to be generally consistent, the trial judge concluded:

> I am of the view that there can be no doubt whatsoever that physically and psychologically there had been a noted change, in the observations of lay witnesses called who gave evidence, as to the pre-accident condition of the

> plaintiff and the post-accident condition of the plaintiff that has existed for, now, 3 ½ years post-accident. (paras. 27 and 204)

[19] The trial judge largely rejected the respondent's challenges to the appellant's credibility (paras. 214-226). With regard to the respondent's argument that the appellant's presentation before the various medical assessors had been unreliable, the judge noted that the assessors' opinion evidence describing poor levels of effort in testing had not been put to the appellant on the stand: "I accept that in a chronic pain case the plaintiff's credibility must be the cornerstone of the claim but surely he must be given the opportunity to answer to the assertion that he is not credible when he is in the witness box" (para. 216).

[20] Significantly, the trial judge said the following:

> [221] It is noteworthy that the recommendations of Dr. Bishop for the plaintiff to attend an anxiety disorder clinic, the UBC sleep disorder clinic and a pain management program do not appear to have been followed up but those recommendations made by Dr. Bishop were not dealt with by the defence in any confrontational way to ascertain why. It appears those recommendations were not followed. That, of course, is a mitigation defence which the defendant must establish on a balance of probabilities. In any event, when dealing with causation that is not a matter to be dealt with by the court.

[21] The trial judge made clear findings of causation with regard to the appellant's physical and psychological injuries. He said:

> [226] On a preponderance of all of the evidence I have concluded that Mr. Wahl, after the accident, was experiencing pain and emotional distress including depression and anxiety that are associated either directly or indirectly with the motor vehicle accident of June 22, 2006...

[22] However, based on a very negative assessment of the appellant's credibility regarding his symptoms as they existed at trial, the judge proceeded to cut off damages at June 2009:

> [253] While causally I am of the opinion that Mr. Wahl's early physical and psychological problems have their cause in the defendant's wrongful act and that his pain and discomfort was real, I simply find that his pain and discomfort could have been resolved earlier by his own motivation on or about the third anniversary of the accident, being June 2009.

> [254] In coming to this conclusion I have reluctantly come to the conclusion that Mr. Wahl's evidence at trial regarding his present symptomology cannot be accepted, but I have picked the third anniversary of the accident as a date that must come close to the opinions of Doctors Solomons and Teal, who assessed and observed him in the latter months of 2009.

[23] Specifically, the trial judge held the appellant's symptoms would have resolved by June 2009 had he attended a pain clinic and undergone a needle test for his right shoulder as recommended by medical assessors engaged by the appellant's counsel. The appellant's failure to do so was described as a failure to mitigate.

[24] With respect to the appellant's failure to attend a pain clinic, the trial judge said:

> [247] The duty at law on Mr. Wahl to take reasonable steps to minimize his loss was not met by the plaintiff when such early treators such as Dr. Bishop and Dr. Zoffmann either made the recommendation or were cognizant of the fact that Mr. Wahl's psyche had taken over his physical recovery to such an extent that the attendance at a pain clinic was absolutely necessary.

[25] Regarding the needle test, the judge said:

> [249] ...I have concluded, based on Dr. Shuckett's initial conclusions and Dr. Chin's conclusions, that there was an impingement problem in the right shoulder which has not been properly addressed due to the plaintiff's own reluctance to have further testing done by way of the needle therapy designed to be undertaken by Dr. Chin.
>
> [250] A plaintiff shares the same responsibilities as a person who is first diagnosed with diabetes. He must be willing to take needles notwithstanding any phobia with respect to needles if he truly desires to maintain his health. ...

[26] Paragraph 250 continues with the judge's conclusions on mitigation, which are merged with a discussion of causation and ultimately employed to limit damages to a three-year period post-accident:

> ...In this case the only rational conclusion I have been able to come to is that the plaintiff has failed to mitigate his losses because of lack of motivation and his pre-existing psychological state. This state includes his needle phobia which should have been overcome by him by his own motivation to improve following the accident. This is in part a thin skull finding but I am of the opinion that, in keeping with the dicta I have reproduced from *Yoshikawa v. Yu*, *supra*, which I have set out at paragraphs 209-212 of these reasons, that there was ample time by the third anniversary of the motor vehicle accident to

> have motivated the plaintiff to attend a pain clinic, which was recommended some twenty months post-accident, and the needle test which Dr. Chin wanted to administer in late 2008.

[27] However, in reasons that appear contradictory to those set out above, the trial judge subsequently declined to reduce the appellant's non-pecuniary damages on the basis of failure to mitigate:

> [257] I find that the plaintiff suffered medium tissue injuries to his neck and back. Dr. Hay's clinical records and the records of his physiotherapist both indicate that his symptoms were improving consistently up to six months post-accident when they appeared to plateau due to psychological symptoms which were first indicated approximately one year post-accident, and which were confirmed on assessment by Doctors Bishop and Zoffmann. I find that the psychological overlay prolonged the plaintiff's recovery, in part due to his failing to attend a pain clinic as first recommended by Dr. Bishop in February 2008, some 18 months post-accident. In short, the plaintiff did not prioritize his recovery over the three years that I have indicated. I am satisfied that on a balance of probabilities there is more than modest improvement to reasonably be expected in the plaintiff's recovery, and I find that by June 2009 he should have made a full recovery had he followed his treators' advice, especially that of Dr. Bishop.
>
> [258] The defence has pled that the plaintiff has failed to mitigate his damages. At first blush the failure of the plaintiff to follow Dr. Bishop's recommendation regarding future steps related to his recovery might be some evidence of his failure in this regard. I have considered this but given the psychological overlay which I have found directly related to the accident I would not reduce the amount of damages under this head. I award the plaintiff $65,000 non-pecuniary damages.

[28] The judge's decision to cut off damages affected the award for past wage loss, which the judge restricted to the period from the accident to June 2009. He dismissed the portion of the claim pertaining to the period from June 2009 to the time of trial in January 2010.

[29] Furthermore, having rejected the appellant's testimony regarding his current symptoms, the trial judge dismissed the claim for future loss of earning capacity in its entirety. He observed, "...as of June 2009 the plaintiff should have been capable of returning to work" (para. 262).

[30] However, the judge did award $10,000 for the cost of future care for the appellant's attendance at a pain clinic. This award appears to reflect the trial judge's

acceptance of the existence of ongoing symptoms from injuries caused by the respondent's negligence. The award for the cost of future care thus appears to contradict some of the earlier findings made by the trial judge regarding causation and is inconsistent with the decision to cut off damages at June 2009.

The Test for Mitigation

[31] The appellant submits the trial judge erred in finding that he would have been completely recovered by June 2009 had he mitigated his damages by attending a pain clinic and undergoing a needle test. As noted above, this is the key issue on appeal.

[32] The test for failure to mitigate by not pursuing a recommended course of medical treatment is set out at para. 57 of *Chiu v. Chiu*, 2002 BCCA 618, 8 B.C.L.R. (4th) 227:

> In a personal injury case in which the plaintiff has not pursued a course of medical treatment recommended to him by doctors, the defendant must prove two things: (1) that the plaintiff acted unreasonably in eschewing the recommended treatment, and (2) the extent, if any, to which the plaintiff's damages would have been reduced had he acted reasonably.

See also *Gregory v. Insurance Corporation of British Columbia*, 2011 BCCA 144, 17 B.C.L.R. (5th) 101.

The Respondent's Position

[33] The respondent contends that he satisfied the burden of proving the appellant failed to mitigate his damages, relying in large part on the appellant's failure to follow recommended treatment. The respondent asserts that the consequences of such failure to mitigate were fully accounted for in the judge's decision to cut off damages at June 2009, such that no further percentage reduction was required. It is therefore the respondent's position that the judge's decision to cut off damages at June 2009 was reasonable and justified on the evidence.

[34] The respondent maintains that the appellant knew, or must be taken to have known, about the recommendations made by the expert medical assessors to whom he was referred by his counsel, including Dr. Bishop. At p. 6 of her report of December 20, 2008, Dr. Bishop indicated that attendance at "an intensive, formal pain intervention program is strongly recommended". Since the appellant offered no explanation as to why he failed to follow Dr. Bishop's recommendation, the judge drew the permissible inference that the appellant's failure to attend at a pain clinic was unreasonable under the first step of the mitigation analysis set out in *Chiu*.

[35] As to the second step of the test, which requires the defendant to prove the extent to which the plaintiff's damages would have been reduced as a result of the recommended treatment, the respondent relies on Dr. Bishop's report where she goes on to say that the purpose of the recommended pain management program was to help the appellant "better manage his pain and re-engage in normal activity." The respondent says that "normal activity" includes getting back to work, which is tantamount to a reduction of the appellant's symptoms. He also refers to Dr. Zoffmann's report of January 9, 2009, where she opines that the appellant "could benefit significantly from further treatment", including treatment directed at pain management (pp. 15-16).

[36] Conceding that there is "an odd balance" between causation and mitigation in the judge's analysis, the respondent maintains the judge simply analyzed the facts in arriving at his conclusion. The respondent urges that in any event, the judge's reasoning can be interpreted and rationalized on the basis of causation alone, without regard to the finding on mitigation. He submits the trial judge's finding that the appellant's "pain and discomfort could have been resolved earlier by his own motivation on or about the third anniversary of the accident, being June 2009" (para. 253) indicates that causation was not established for symptoms experienced after June 2009. The respondent submits this finding was amply supported by the evidence and is consistent with the principles set out in *Yoshikawa v. Yu* (1996), 21 B.C.L.R. (3d) 318, 73 B.C.A.C. 253, which are applicable to cases where a plaintiff alleges soft tissue injuries and psychological symptoms that continue beyond

the normal range of resolution, in the absence of objective evidence of injury. The following passage from para. 12 of *Yoshikawa*, quoted at para. 209 of the trial judge's reasons, is highlighted as being particularly apt:

> 4. The plaintiff's psychological problems do not have their cause in the defendant's wrongful act if the plaintiff could be expected to overcome them by his or her own inherent resources, or will-power [citing *Maslen v. Rubenstein* (1993), 83 B.C.L.R. (2d) 131, 33 B.C.A.C. 182].

[37] The respondent further relies upon the following statement from para. 249 of the trial judge's reasons in support of the conclusion that causation was established only up to a point:

> The most rational conclusion I can come to in balancing all the psychiatric and psychological evidence presented to me is that over a period of time the plaintiff's post traumatic stress syndrome and other psychological problems had essentially resolved. ...

[38] The respondent submits the trial judge's decision to limit the period in which causation was established was based on findings of credibility that are entitled to deference in this Court, absent palpable and overriding error. The respondent relies on negative findings made by the trial judge regarding the appellant's credibility (paras. 254-255 and 263) and refers to significant passages in the evidence that the respondent submits justify these findings.

[39] The respondent further submits that limiting causation to June 2009 is consistent with the evidence of defence experts Doctors Solomons and Teal, who assessed the appellant on July 30 and September 18, 2009 respectively, and whose opinions the judge relied upon in determining the appropriate cut-off date (para. 254).

[40] Dr. Solomons, a psychiatrist, noted that exaggerated pain behaviour had been observed and documented by several of the appellant's medical assessors. With respect to the appellant's claimed psychiatric complications, he said in his report, at p. 10, "It is my opinion that he did not develop psychiatric complications or disorders as a result of this accident. This opinion is based on the absence of any record or documentation in his family doctor's records of psychiatric symptoms in the

17 months following the accident" (quoted at para. 196 of the judge's reasons). The judge also noted at para. 202 that Dr. Solomons "finally concluded that there was no psychiatric basis for any past, present or future loss of work as a result of the subject accident".

[41] With regard to Dr. Teal, a neurologist, the trial judge observed at para. 239 that his "overall opinion was simply that there was no organic basis for the pain claimed by the plaintiff but he did not rule out psychiatric/psychological issues", and would defer to a psychologist or psychiatrist as to any mood disturbance, including depression. As described by the trial judge, Dr. Teal noted that:

> ...although Mr. Wahl, on September 18, 2009, demonstrated pain behaviour and sighing, and some grimacing and the appearance of discomfort, this behaviour was not sustained throughout the course of the interview and noted that Mr. Wahl was able to get in and out of chairs without discomfort, and was able to take his shirt and shoes off and put them back on without any limitations or apparent restrictions (para. 236).

[42] In summary, the respondent submits that the trial judge simply found that at the time of trial, the appellant had no physical or psychiatric issues that could not have been overcome by his own motivation to get back to normal.

Discussion

Failure to Mitigate

[43] I agree with the appellant that the trial judge erred in his application of the test for failure to mitigate as articulated in *Chiu*, a case similar to this one. Here, as in *Chiu*, the plaintiff was never asked why he did not pursue the recommended treatment. In *Chiu*, Mr. Justice Low, writing for the Court, said:

> [65] The appellant pleaded a failure to mitigate. Therefore, the issue was live throughout the trial. However, counsel for the appellant did not raise the issue in opening argument and did not get to it until closing submissions. There was no cross examination of the respondent as to why he did not pursue recommended counselling with more persistence. The court was deprived of any explanation the respondent might offer and the ability to assess reasonableness from the respondent's point of view. In addition, although this Court solicited from counsel, and received, further written

> submissions on the mitigation issue, the appellant has not identified in the evidence any medical opinion as to the consequences of the failure of the respondent to obtain more counselling. ...

[44] As in the present case, the recommendations at issue in *Chiu* advising psychological counselling were set out in reports made to the plaintiff's counsel. Also, the reasons for judgment in *Chiu* suggest that on at least one occasion, the plaintiff's counsel played an active role in referring the plaintiff for expert assessment, acting on recommendations made by other assessors. Given the strong factual similarity, *Chiu* is determinative of the mitigation issue on this appeal.

[45] Specifically, as in *Chiu*, the fact that the appellant was not cross-examined on his failure to follow recommended treatment impaired the judge's ability to assess the reasonableness of such conduct from the appellant's point of view. As the appellant submits, there were a number of possible explanations that would have made the appellant's failure to attend the pain clinic reasonable under the first step of the mitigation analysis as set out in *Chiu*.

[46] The respondent's argument that the appellant must be taken to have known about the recommendations in the expert assessments and bear the responsibility for addressing any non-compliance amounts to a reversal of the burden of proof on the issue of mitigation.

[47] Furthermore, with regard to the second step of the analysis in *Chiu* regarding the impact of the recommended treatment, there was no medical evidence that, by attending the pain clinic, the appellant would have made a full recovery by June 2009.

[48] Dr. Bishop, whose recommendations regarding attendance at a pain management program were given great weight by the trial judge, is a neuropsychologist to whom the appellant was referred by his counsel to determine whether he had any cognitive defects consequent to the accident. In the course of her assessment, she determined that there were barriers to testing that had to be

dealt with before an accurate determination could be made regarding cognition. She said at p. 2 of her February 25, 2008 report:

> Mr. Wahl needs treatment in a number of domains of psychological and emotional functioning. No comments about cognition are possible until adequate resolution of depression, anxiety and sleep, along with better pain management is realized.

[49] In this report, Dr. Bishop recommended treatment for depression, medication review, cognitive-behavioural therapy for anxiety and attendance at a pain management program so that she could determine afterward, with his psychological issues under control, whether the appellant had any cognitive issues. Thus, the purpose of the pain clinic was to help the appellant better manage his pain so as to make him a suitable subject for cognitive testing. Nowhere in her report does she state that the appellant's attendance at the pain clinic would result in the resolution of the injuries sustained in the accident. Her recommendations therefore cannot be relied upon as evidence of the extent, if any, to which the appellant's damages would have been reduced had he attended the pain clinic.

[50] Similarly, the needle test for the appellant's right shoulder advocated by Dr. Chin was intended only to help determine the origin of the appellant's shoulder pain. There was no evidence that it would have resolved the appellant's injuries or reduced his damages.

[51] The judge appears to have rejected the appellant's testimony regarding his current symptoms largely on the basis of the opinions of Doctors Solomons and Teal, and on the basis of the judge's own observations of the appellant while he testified over the course of almost three days. The judge described his observations as follows:

> ...during Mr. Wahl's attendance on the witness stand I did not note any grimacing or any noticeable attempts by the plaintiff to change his seating position, nor were there any requests by Mr. Wahl for a break from his providing evidence, which is so often the case in continuing physical complaints (para. 238).

[52] Notwithstanding these observations and the conclusions reached by Doctors Solomons and Teal regarding, respectively, the absence of psychiatric problems resulting from the accident and the lack of an organic basis for the appellant's claims of continuing pain, the basic problem here is that there is no evidence that the appellant's symptoms would have either been reduced or resolved had he undergone the needle test or attended at the pain clinic as recommended by his assessors. In addition, the Court was deprived of an explanation regarding his non-attendance at the pain clinic, and therefore we do not know whether his conduct in this regard was reasonable. Thus, neither step of the test for failure to mitigate was made out.

Causation

[53] On the issue of causation, there are several puzzling inconsistencies in the trial judge's reasoning regarding the existence of ongoing injuries attributable to the respondent's unlawful conduct. For example, at para. 243, the judge found the appellant had sustained physical and psychological injuries that were "directly attributable to the negligence of the defendant". He added, "but ... there has been improvement in the plaintiff's physical injuries over the time that has elapsed since the accident and ... at the present time, namely the time of trial, the plaintiff should have made far better recovery than he has made had he followed the recommendations of his treators" [emphasis added]. So, the trial judge found that the accident caused the appellant's injuries, but that he would have made a far better recovery by the time of trial had he mitigated his losses. The language in this paragraph reflects a finding confirming the existence of ongoing injury.

[54] Such a finding is supported by the $10,000 award for the cost of future care, specifically attendance at a pain clinic. This award clearly reflects a finding that the appellant was still injured at the time of trial and that these ongoing injuries had been caused by the accident such that it was correct in law to hold the respondent responsible for the cost of care.

[55] A finding of ongoing injury is also consistent with the judge's acceptance of the lay witnesses' evidence and his conclusion that "...there can be no doubt whatsoever that physically and psychologically there had been a noted change, in the observations of lay witnesses called who gave evidence, as to the pre-accident condition of the plaintiff and the post-accident condition of the plaintiff that has existed for, now, 3 ½ years post-accident" (paras. 27 and 204).

[56] However, in contrast with these findings, the judge found that, "over a period of time", the appellant's psychological problems had "essentially resolved" (para. 249). He further concluded that "...Mr. Wahl's evidence at trial regarding his present symptomology cannot be accepted" (para. 254). This negative finding of credibility was repeated at para. 263 in the context of the claim for future loss of earning capacity. The judge said, "I am not in a position to prefer the plaintiff's evidence at trial regarding his current physical and psychological condition over the totality of the evidence which I accept regarding his current physical abilities". These findings reflect an overall conclusion that the appellant was no longer injured at the time of trial.

[57] The above findings regarding the continued existence, or non-existence, of the claimed symptoms at the time of trial are incompatible and cannot be reconciled.

[58] Further, the judge's reasons confuse the issues of causation and mitigation. As stated in *Yoshikawa*, "[a]ny question of mitigation, or failure to mitigate, arises only after causation has been established" (para. 12, subparagraph 7). By using failure to mitigate to limit the period in which causation was found to be established, the trial judge improperly merged the two issues. Such confusion of the issues is evident in para. 250, which deals with the appellant's failure to undergo the needle test. It is also manifest in the tension between the clear findings of failure to mitigate regarding the appellant's non-attendance at the pain clinic and his failure to undergo a needle test (paras. 247 and 250, respectively), and the judge's refusal to reduce non-pecuniary damages on the basis of failure to mitigate in paras. 257-258. Having cut off damages at June 2009 for failure to mitigate, the judge refused to further

reduce damages on this basis because he considered the delay in recovery to be attributable to the appellant's "psychological overlay", which he found was "directly related to the accident".

[59] The respondent's argument that the judge's analysis can be rationalized on the basis of causation alone, without reference to failure to mitigate, overlooks a major part of the judge's reasoning. It is not possible to simply isolate the findings of failure to mitigate and set them aside, given the judge's repeated references to the appellant's non-attendance at the pain clinic and his use of the language of mitigation. The judgment was essentially based on the appellant's failure to mitigate, and the errors in the judge's application of the mitigation test as set out in *Chiu* are clear.

[60] With respect, I cannot accept the respondent's creative submission that limiting damages to June 2009 for failure to mitigate had no effect on the assessment of damages for past wage loss and loss of future earning capacity. In my view, it is quite the opposite. The awards under both of these heads of damage were heavily affected by the failure to mitigate error and by the judge's conflation of causation and mitigation. In particular, the error was fatal to the award for loss of future earning capacity, which claim was dismissed in its entirety on the basis that the appellant's symptoms should have resolved by June 2009. Damages were cut off under both of these heads despite the conflicting findings discussed in paras. 52-54 above that suggested there was ongoing injury causally connected to the accident.

Disposition

[61] The appellant agreed that, in the event the appeal were successful, there would be no realistic alternative to a new trial. Given the nature of the errors with respect to mitigation and causation, the impact of the errors on the findings of credibility, and the dramatic effect of the errors on the damage award, the interests of justice plainly require a new trial. It is not possible to isolate the error on mitigation

from the damage assessments for loss of future earning capacity and past wage loss, and this Court cannot speculate as to the appropriate amount of such awards.

[62] I would allow the appeal and order a new trial.

"The Honourable Madam Justice MacKenzie"

I agree:

"The Honourable Chief Justice Finch"

I agree:

"The Honourable Madam Justice D. Smith"