

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	)	
	)	
PETER MACFARLANE	)	
	)	M. Rotondo
	)	
Plaintiff	)	
	)	
– and –	)	
	)	
	)	
	)	
SCOTT BESSEY and SUSAN	)	
PENNINGTON	)	
	)	
	)	M. Elkin
Defendants	)	
	)	
	)	
	)	HEARD: January 21, 2020
	)	

RULING ON JURY QUESTIONS

L. SHAW J.

OVERVIEW

[1] The plaintiff seeks compensation in this action for injuries he sustained in a motor vehicle collision that occurred on December 3, 2014. The defendant, Mr. Bessey, was operating a motor vehicle that struck the plaintiff who was either

riding his bicycle through a cross-walk at the time of impact or was walking beside his bicycle at the time of impact.

[2] The trial was held before a jury commencing on January 10, 2020. On January 21, 2010, after all the evidence was completed but prior to closings, an issue was raised by the defendants regarding two of the jury questions which were to be put to the jury for their deliberations. Those questions related to the plaintiff's claim for loss of competitive advantage and future medical and rehabilitation expenses. After hearing submissions, I delivered an oral ruling, with reasons to follow. I found that the question of loss of competitive advantage could be left to the jury but the question regarding loss of future medical and rehabilitation expenses could not. These are my written reasons.

[3] The draft question was as follows:

Regardless of your answers to the previous questions, what amount, if any, do you assess the total damages to the Plaintiff, Peter MacFarlane, in the following categories:

- a) General damages;
- b) Loss of Competitive Advantage;
- c) Future Medical and Rehabilitation Expenses.

Legal Principles

[4] In *B. (M.) v. 2014052 Ontario Ltd.*, 2012 ONCA 135 (Ont. C.A.), the test of whether a question should be left to the jury is found stated at para. 51 as follows:

Whether a jury in a civil case should be asked to decide on a particular issue is a question of evidence. There must be “reasonable evidence” to allow a question to go to the jury. As Meredith J. A. stated in *Milligan v. Toronto Railway* (1908), 17 O.L.R. 530, [1908] O.J. No. 78 (C.A.) [at para 50]:

Although the jury are the sole judges of fact, they are such judges only in cases in which there is a reasonable question of fact to be determined. It is the duty of the Court to determine whether there is any reasonable evidence to go to the jury, upon any question of fact; and no such question can be rightly submitted to them until that question has been answered in the affirmative.

[5] Put another way, a question should not be put to the jury unless there is some evidence on which a jury, acting judicially in accordance with the judge’s instructions on the law, could reasonably make a choice in arriving at a finding; *Walker v. Delic*, 2001 CarswellOnt 1346 (Ont. S.C.J.).

Analysis

[6] The plaintiff is seeking damages for future physiotherapy treatment. The plaintiff’s position is that there is evidence from which the jury could answer the question regarding the cost of that treatment.

[7] The plaintiff relies on the expert opinion of Dr. West who testified that he recommended physiotherapy for the plaintiff. He did not, however, provide any evidence regarding the particulars of such treatment including the frequency or duration of such treatment.

[8] With respect to the cost of such treatment, the plaintiff relies on the cost of a prior treatment plan for physiotherapy which he asserts the jury can rely on to determine the cost of future treatment.

[9] In my view, without any evidence regarding the duration or frequency of the future treatment, the jury would be essentially asked to pull a number out of the air to assess this claim. While there was some evidence of the cost of past treatment, that is of limited assistance when the jury heard no evidence regarding any particulars of the recommended future treatment. Had Dr. West given that evidence or had there been any evidence regarding the frequency or duration of the treatment, the question could have been left to the jury; *Mundinger v. Ashton*, 2019 ONSC 7161 at para. 17.

[10] The question regarding future medical and rehabilitation expenses will therefore not be left with the jury.

[11] The plaintiff is also seeking damages for loss of competitive advantage. While the plaintiff has returned to work for placement agencies as a warehouse worker, his evidence is that he has had to turn down heavier work due to pain and limitations he has as a result of the injury to his knee. He is not seeking any damages for past income loss.

[12] The plaintiff also relies on the evidence of Dr. West who was called as a witness on his behalf. His evidence was that the plaintiff's prognosis is poor, and

he will never fully recover and that the arthritis in his knee will probably get worse. It was also Dr. West's opinion that the plaintiff could not do physically demanding work as it would put too much strain on his knee. According to Dr. West, Mr. Macfarlane would be capable of sedentary work.

[13] The defendants' position is that Dr. West was not qualified as an expert to give opinion evidence as a vocational rehabilitation expert. The defendants assert that such evidence is necessary when advancing a claim for loss of competitive advantage based on the claim that the plaintiff's injuries prevent him from doing all work that was formerly available to him. The defendants point out that in *Mudinger* there was an expert opinion from an accountant who relied on information from Statistics Canada Canadian Survey on Disability data in calculating the loss of competitive advantage. In that case, Charney J. found that the question could be left with the jury.

[14] Although the plaintiff did not present evidence from a vocational or occupational expert or from an economic loss expert, the failure to do so is not necessarily fatal; *Fiddler v. Chiavetti*, 2010 ONCA 210 (Ont. C.A.) at paras 63-65. According to the plaintiff, he is advancing a modest claim for loss of competitive advantage and the cost of such a report would be disproportionate to the claim he is asserting. I have some concern that access to justice may be impaired if expert opinion is mandated or required to leave questions to the jury when such

modest claims are being advanced. Accordingly, I agree that such reports do not preclude the plaintiff from advancing such a claim provided there is reasonable evidence for the jury to consider.

[15] It is also important to note that claims for future losses are based on the lower standard of proof of “real and substantial possibility of loss in the future” rather than the balance of probabilities. I have considered this lower standard of proof in determining if there is reasonable evidence to leave with the jury.

[16] In this case, while it was close, I find that there is some reasonable evidence that a jury could consider in determining if the plaintiff has suffered a loss of competitive advantage. The jury has evidence of the plaintiff’s earnings between 2011 and 2018 that it can consider. In *Johnston v. Walker*, 2017 ONSC 3370, Charney J., did not leave the question regarding loss of competitive advantage to the jury as the plaintiff, who was self-employed cleaning homes, led no evidence regarding her annual earnings either before or since the accident. In this case, such evidence is before the jury to consider, along with the plaintiff’s evidence that he has turned down jobs offered to him that are too physically demanding and Dr. West’s expert opinion regarding the physical limitations he faces as a result of the injury to his knee.

[17] The question regarding loss of competitive advantage can be therefore left to the jury.

"Original signed on file"
L. Shaw J.

Released: May 11, 2020

COURT FILE NO.: CV-16-1820
DATE: 2020 05 11

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SUPERIOR COURT OF JUSTICE

BETWEEN:

PETER MACFARLANE

Plaintiff

– and –

SCOTT BESSEY and SUSAN PENNINGTON

Defendants

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