

CA014230

Vancouver Registry

Court of Appeal for British Columbia

BETWEEN:

WALTER PALLOS

PLAINTIFF

(APPELLANT)

AND:

INSURANCE COMPANY OF BRITISH COLUMBIA

DEFENDANT

(RESPONDENT)

Before: The Honourable Chief Justice McEachern

The Honourable Mr. Justice Goldie

The Honourable Mr. Justice Finch

Art E. Vertlieb Counsel for the Appellant

John P. Lauener Counsel for the Respondent

Place and Date of Hearing Vancouver, British Columbia

2 December 1994

Place and Date of Judgment Vancouver, British Columbia

3 January 1995

Written Reasons by:

The Honourable Mr. Justice Finch Pages 1-18, paras. 1-44

Concurred in by:

The Honourable Mr. Justice Goldie

Dissenting Reasons by:

The Honourable Chief Justice McEachern Pages 19-24, Paras. 45-62

Court of Appeal for British Columbia

Walter Pallos

- v. -

Insurance Company of British Columbia

Reasons for Judgment of the Honourable Mr. Justice Finch

1 The plaintiff appeals a trial judgment of 12 June 1991, holding him fifty percent contributorily negligent for injuries suffered when struck by an unidentified motor vehicle on 11 June 1988. The plaintiff also appeals the trial judge's failure to award him damages for future loss of income earning capacity.

2 On the evening of accident, the plaintiff was a guest at a house party on Lane Street in Burnaby, B.C. The party was invaded by gate-crashers who, when told to leave, attacked the guests physically, threw rocks, wielded baseball bats, and damaged the house and parked cars. The plaintiff and other guests followed the intruders on to Lane Street. The intruders departed in a truck. The plaintiff gave up the chase when he realized he could not catch them. It was at this point, he said, he was struck. He described the incident in these words:

We had a friend that was right out -- you could see him just about in the middle of the road -- and he was -- to me it sounded like he was choking to death on his own blood because he was hit by a bat. Before we went out on the road we checked this fellow out, made sure he was okay, turned him over so he could breathe properly. By that time there were -- you could see that they were pulling away a block or so away in their vehicles and stuff. So we ran down the road a little ways, maybe half a block or so, and then you could see we had no chance of catching up with these people. They even had a Budget Rent-A-Truck there that they were all jumping into. So to me it sounds like this thing was well planned. After going about a half a block me and John slowed down a bit because there was no chance of catching them. John was about, I'd say, thirty feet ahead of me and **I was already off to the side of the road in the gravel already. And I heard this noise in the gravel like a car coming towards me and I turned around and about four feet I could see this car coming at me.** So I tried to move out of the way, but it hit me anyways where I flew over the car, landed on my left shoulder. I tried to get up but I knew my leg was broke so I just sort of -- I seen this big diesel truck so I sort of crawled underneath this.

(emphasis added)

3 The plaintiff was not cross-examined on his version of the motor vehicle accident. At trial, the defendant contended that the plaintiff's broken leg was caused by a blow from a baseball bat wielded by one of the intruders. The trial judge rejected this theory, and accepted the plaintiff's evidence that he was struck by a vehicle. There is no cross-appeal against that finding.

4 Perhaps because of the defendant's position on liability at trial, the details surrounding the vehicle accident described by the plaintiff were not very fully explored. The learned trial judge commented on this lack of evidence, as follows:

I have therefore concluded partially by reason of the abrasion to the left chest that on the balance of probabilities the plaintiff was struck by a motor vehicle on Lane Street in Burnaby on the night of June 11th, 1988. However, the defendant while not calling evidence has pled the **Negligence Act**, R.S.B.C. 1979, c. 298.

The plaintiff's counsel in advancing the evidence of the plaintiff asked no questions about the lighting conditions of the street, the width of the street or where on the street his client was when struck or other matters that one might have thought might be canvassed upon direct examination in order to give the trial judge a good understanding of the area in which the accident occurred. **The only reasonable conclusion is that the plaintiff was in fact on the travelled portion of the street, otherwise he would not have been hit.** The plaintiff did not say the car swerved to hit him or did so intentionally. There is no evidence to conclude that the driver of the vehicle was part of the group that had caused the difficulty at the party. It appears that this was coincidental to the plaintiff going out onto the street to search out these hooligans. One could be suspicious, if the plaintiff's evidence is to be accepted, that the vehicle that struck him did not have its headlights on, that the unidentified motorist was involved with the "gate crashers."

(emphasis added)

5 The plaintiff challenges the finding that he was "on the travelled portion of the street" when struck.

6 The only direct evidence as to the plaintiff's position, relative to the road surface, when struck, is contained in the passage quoted above from the plaintiff's evidence where he says:

I was already off to the side of the road in the gravel ... [a]nd I heard this noise in the gravel like a car coming towards me

7 The trial judge believed the plaintiff as to how he came to be injured. He said:

While I must confess to being somewhat sceptical, upon all the evidence I am persuaded that the plaintiff has satisfied the balance of probabilities on the issue as to how he was injured.

8 The trial judge does not explain why "the only reasonable conclusion" was that the plaintiff was on the travelled surface of the road. One possible explanation for this finding is that the trial judge misquotes the plaintiff's evidence on this point. He says in his reasons:

They had a Budget rental truck. John was 30' ahead of me. **He** was on the side of the road. I heard a car ...

9 In fact, the plaintiff said "... **I** was already off to the side of the road in the gravel" The appellant says clearly the learned trial judge misapprehended the plaintiff's evidence.

10 No one testified that the accident occurred on the travelled portion of the road. As noted above, the plaintiff was not challenged on his evidence that the accident occurred while he was "on the gravel". In these circumstances, I think the conclusion that the accident occurred on the travelled portion of the road was plainly wrong. There was no evidence to support it. The plaintiff's evidence appears to have been misconstrued on an essential point.

11 In finding the plaintiff contributorily at fault for his injuries the learned trial judge said this:

I have concluded, having regard to all the circumstances of the case, it is not possible for me to establish the different degrees of fault and therefore I am apportioning liability equally as between the unidentified motorist and the plaintiff.

12 The issue is whether this finding can stand in the face of the evidence. The reasons of the trial judge do not specify any particular of negligence as to how the plaintiff contributed to the accident or his injuries. When counsel for the respondent was asked as to how the plaintiff was contributorily negligent, his answer, as I understood him, was that the plaintiff: (a) was on the travelled portion of the roadway, while there was a "ruckus" on the street, with numerous people milling about; and (b) failed to keep a proper lookout having regard for the circumstances.

13 The defendant has the onus of proving the plaintiff's lack of care contributed to his injuries. In finding that the plaintiff was struck while on the travelled portion of the roadway, the trial judge appears to have overlooked or misapprehended the only material

evidence. The only conclusion open, on the evidence, is that the plaintiff was on the shoulder of the road when he was struck. There is no evidence to support counsel's suggestion that the plaintiff's lookout was inadequate. When he heard the car approaching on the gravel, he turned, and saw it "about four feet away". In my respectful view, there is no evidence to support the finding that the plaintiff was contributorily negligent.

14 I would allow the appeal against the finding of contributory negligence.

15 The appeal on the damages issue is directed at the trial judge's refusal to make an award for loss of opportunity, or perhaps more correctly stated, loss of capacity, to earn income in the future. The only award for future loss was the sum of \$6,000.00 to compensate the plaintiff for the likelihood of future surgery, and a subsequent six week period of convalescence. No issue arises as to this award.

16 On the issue of damages for loss of earning capacity the learned trial judge said this:

Counsel for the plaintiff in his opening to the court submitted that the main issue to be dealt with in the case was "loss of future income or loss of opportunity." The submission was that at some time in the future Mr. Pallos would not be able to work at the job he is doing regularly now and has done for over 12 years at ABC Recycling.

17 The learned trial judge referred to some of the evidence on the plaintiff's ability to work, and referred to the plaintiff's reliance upon **Steenblok v. Funk** (1990), 46 B.C.L.R. (2d) 133 (C.A.).

18 Then the learned trial judge said this:

Mr. Spraggs submits that **Steenblok v. Funk**, 46 B.C.L.R. (2d) 133 (B.C.C.A.) supports his proposition. With the greatest respect, the medical evidence is completely contrary to what Mr. Spraggs seeks in the case at bar. What the plaintiff in this case was required to do was to establish that his future loss was a real possibility and that there was a reasonable chance it might occur. I find as a fact there is no real possibility based upon the medical evidence and upon the plaintiff's own testimony. As I have stated this head of damages was never pleaded, I have dealt with it because it is necessary to dispose of it. It is without merit in this instance. There will be no award under this head.

19 It is apparent from this passage, and from counsel's submissions before us, that the plaintiff's claim for an award for future loss of income earning capacity, at trial, was based on the proposition that there was a "real possibility" of his being unable to

work at his present job at some future date. The learned trial judge found that the evidence fell short of establishing this to be a "real possibility", and therefore rejected the claim under this head of damages.

20 On this appeal, the plaintiff referred to and relied upon the evidence of Dr. Paul H. Wright, orthopaedic surgeon. Two of Dr. Wright's reports dated March 16, 1989 and February 22, 1991, were filed. Dr. Wright was not called to testify orally, so he was not cross-examined upon his reports. The second report was written one month before trial.

21 The second letter contains the following:

INTERVIEW FEBRUARY 20, 1991: His pain at this time is mostly felt when he is doing activities which require manual labour or intensive work. He finds that he is quite frightened of heights. Going up and down a ladder gives him discomfort and he feels apprehensive with it. Most of the pain he feels in the right knee in the retropatellar region. He has no longer any pain in the leg when he is sleeping at night. It does not awaken him. He walked 2 miles this week and found that it was no bother to him. He does however, have difficulty when he goes up and down hills or up and down stairs. He has not had pain in the tibia itself at rest. He does however, have discomfort along the medial aspect of the tibia where his bone spur is still present. If he bumps or hits it he has discomfort with it.

.....

FUNCTIONAL PROBLEMS: He finds that he tends to get right hip discomfort if he does not put the shoe lift in his right shoe. He is able to work but stays away from any heavy labouring situations.

.....

PHYSICAL EXAMINATION:

.....

His right knee examination showed that the knee is stable in the AP, lateral, and medial directions (the knee has no instability to it). His joint lines were not tender (no indication of meniscal disruption). He does, however, have pain behind the kneecap with compression. This would indicate that he has patellofemoral compression pain. This is a complication which is seen after fractures of long bones and the rehabilitation associated with this. It is associated with the length of time that he spent in his patellar bearing cast. Pressure behind the kneecap gave him discomfort. This would correlate with the pain that he gets when he kneels down or sits for too long.

.....

I have no doubt, however, that he does have pain in his left wrist. He has repeatedly told me different activities that bring on the discomfort and the feeling of weakness.

.....

PROGNOSIS: As far as the tibia is concerned, I think he has gone on to have good union. He has had shortening on that side in the order of 1 cm. This will be discussed under arthritis below. I feel that he will continue to have some discomfort in the right knee in the patellofemoral joint. I think that this is a chronic situation with him. It will certainly negate his ability to do activities that require a lot of cutting and pivoting or climbing of stairs or ladders. This means that he is not suited to work in a situation off the ground, especially if it requires the use of ladders or an excessive number of stairs.

At present he is doing well driving the bobcat in his present profession and I think that he can continue to do this.

The pain that he feels in his leg as the weather changes has never been explained on a scientific basis. A sufficient number of patients tell you about this in a broken leg to certainly believe it fully however. I feel that he will continue to experience pain in the right tibia with weather changes.

His right ankle has become slightly more susceptible to inversions as a result of the injury to the right leg. This occurs because the leg is shorter and there is weakness about the leg for an extended time period. He is more susceptible to inversion injuries to the right ankle.

The left wrist has soft tissue injury to it which has not been diagnosed by x-rays or physical examination. I feel that this should have gone by this stage and if it is still present, will continue to be problem in the future. This is a slight problem for him in that he tends to drop heavy objects such as coffee cups. The shoulder is painful for him with quick movements and I would not predict further problems aside from the pain experienced with quick movements.

.....

RIGHT KNEE DYSFUNCTION: The right knee pain which he is experiencing as a direct result of the MVA of 1988. He has had a fracture on the right leg which has defunctioned the right leg. This resulted in increased pressure across the knee cap femoral joint. The resultant patellofemoral pain which we see commonly in teenagers has been left with him. Further physiotherapy will help to settle him to

some extent. Time itself will also help it to some extent. I would feel, however, the pain he is going through now leaves him in a plateaued situation. No surgery is indicated for that.

.....

In response to your question about how long this patient will be able to work, I am unable to answer this question. I have no way of prognosticating whether or not he will be able to continue his present job until age 45, 55, or 65. There is no direct medical reason to negate life-time employment. I must say that patients vary greatly and the individual difference between patients is great.

I have put this same question with the same scenario to several of my colleagues and they also felt they were unable to reasonably answer this question.

22 The plaintiff on this appeal contends that the trial judge overlooked this medical evidence, and also overlooked the evidence of the plaintiff's employer. I do not think it to be a ground of appeal that the trial judge did not accept, or did not refer to, the evidence of the employer, Ms. Alko. It may well be that he did not find her evidence to be worthy of credit, or weight. The medical evidence, however, was unchallenged and uncontradicted.

23 The plaintiff also contends, that in limiting his consideration to the test set out in **Steenblok v. Funk** (*supra*), the trial judge overlooked another, and more appropriate, test in claims of this sort. Counsel referred us to **Brown v. Golaiy** (3 December 1985), Vancouver Reg. No. B831458 (S.C.); **Andrews et al. v. Grand & Toy (Alta.) Ltd. et al.**, [1978] 2 S.C.R. 299, 83 D.L.R. (3d) 452, [1978] 1 W.W.R. 577, 8 A.R. 182, 3 C.C.L.T. 225, 19 N.R. 50; **Earnshaw v. Despins** (1990), 45 B.C.L.R. (2d) 380 (C.A.); and **Palmer v. Goodall** (1991), 53 B.C.L.R. (2d) 44 (C.A.).

24 In addition to those cases cited by counsel, I would also refer to **Kwei v. Boisclair** (1991), 60 B.C.L.R. (2d) 393 (C.A.). There Mr. Justice Taggart quoted with approval from **Brown v. Golaiy** (*supra*) as follows (at p. 399):

The means by which the value of the lost, or impaired, asset is to be assessed varies of course from case to case. Some of the considerations to take into account in making that assessment include whether:

1. The plaintiff has been rendered less capable overall from earning income from all types of employment;

2. The plaintiff is less marketable or attractive as an employee to potential employers;

3. The plaintiff has lost the ability to take advantage of all job opportunities which might otherwise have been open to him, had he not been injured; and

4. The plaintiff is less valuable to himself as a person capable of earning income in a competitive labour market.

25 In **Palmer v. Goodall** (*supra*) Madam Justice Southin said at p. 59:

Because it is impairment that is being redressed, even a plaintiff who is apparently going to be able to earn as much as he could have earned if not injured or who, with retraining, on the balance of probabilities will be able to do so, is entitled to some compensation for the impairment. He is entitled to it because for the rest of his life some occupations will be closed to him and it is impossible to say that over his working life the impairment will not harm his income earning ability.

26 In **Earnshaw v. Despins** (*supra*) Madam Justice Southin said (at p. 399):

In my opinion, the true questions the jury must address in a claim such as this are:

1. Has the plaintiff's earning capacity been impaired to any degree by his injuries?

2. If so, what amount in the light of all the evidence should be awarded for that impairment?

As Dickson J., as he then was, said in **Andrews v. Grand & Toy (Alta.) Ltd.**, [1978] 2 S.C.R. 229 at 251 ...

It is not loss of earnings but rather, loss of earning capacity for which compensation must be made ... A capital asset has been lost: what was its value?

In catastrophic injury cases, the whole of the capital asset is lost. But there may be much less serious injuries which cause permanent impairment although the loss cannot be determined with any degree of exactitude.

The learned judge ought to have addressed the question as one of impairment and pointed out that there was evidence of a limitation on earning ability. The jury might well have rejected the plaintiff's inordinate claim but appreciated that there are jobs now closed to the plaintiff which, as he grew older, he might have chosen and given him something more for that and future care than slightly under \$12,000.

As I have said, this difficulty with the charge was not raised by counsel for the plaintiff with the learned trial judge. Indeed, he did not raise it before us.

27 It does not appear that the trial judge had his attention drawn to any of these cases, or to the approach they suggest. These cases all treat a person's capacity to earn income as a capital asset, whose value may be lost or impaired by injury. It is a different approach from that taken in **Steenblok v. Funk** (*supra*), and similar cases, where the court is asked to determine the likelihood of some future event leading to loss of income. Those cases say, if there is a "real possibility" or a "substantial possibility" of such a future event, an award for future loss of earning may be made. There is nothing in the case law to suggest that the "capital asset" approach and the "real possibility" approach are in any way mutually exclusive. They are simply different ways of attempting to assess the same head of damages, future loss of income. It is to be regretted that plaintiff's counsel did not advance the case at trial using both approaches, in the alternative.

28 In answer to the plaintiff's argument on appeal, counsel for the respondent says that the learned trial judge did not err in concluding that the evidence did not support a finding of lost opportunity to earn income in the future. He relies particularly upon that passage in Dr. Wright's report, quoted by the learned trial judge, to the effect that no one could say for how long the plaintiff would continue to work.

29 In my respectful view, a consideration of this issue should not have been limited to the test established in **Steenblok v. Funk** (*supra*). The plaintiff's claim in this case, properly considered, is that he has a permanent injury, and permanent pain, which limit him in his capacity to perform certain activities and which, therefore, impair his income earning capacity. The loss of capacity has been suffered even though he is still employed by his pre-accident employer, and may continue to be so employed indefinitely.

30 The question then is, what award ought to have been made under this head of damages. And, there is the further question whether that is a proper task for this Court.

31 When the latter question was put to plaintiff's counsel, he said that he did not have a preference as to whether this Court made the assessment or whether this Court referred the matter back to the trial court for assessment. He said, however, that it would be inappropriate to refer the matter back to the trial judge who heard this case because he had already expressed his view that no future income loss had been suffered.

32 Counsel for the respondent, expressed his preference that

the issue be remitted to the trial judge for assessment.

33 The Court of Appeal has power, under s-s. 9(1) of the **Court of Appeal Act**, S.B.C. 1982, c. 7 (as amended), to "make or give any order that could have been made or given by the court or tribunal appealed from".

34 In my view, that is the preferable course in this case. The assessment is to be made on the record created at trial, and, despite the respondent's preference for the alternative course, I see no reason why this Court should not assess the damages, so as to avoid yet a further hearing.

35 The plaintiff was 34 years of age at trial. He has a grade 11 education and has been employed for the whole of his working life in the field of heavy labour. He has no special skills. No evidence was led as to his aptitude for any retraining, or as to the potential cost of such retraining.

36 The plaintiff's principal injury was a comminuted fracture of the right tibia and fibula. The leg was shortened on healing, and he requires a lift in his shoe. He was off work from the date of the accident in June 1988 until March 1989, when he returned prematurely to work, due to economic necessity.

37 At the time of his injury, the plaintiff was employed in a recycling business, as a manual labourer, sorting metals. This job involved heavy lifting. After his injury, he was unable to do the heavy lifting and the employer assigned him to lighter duties using loaders and other machinery. He will be able to continue this lighter work in the future. According to Dr. Wright, the plaintiff has chronic pain in the right knee which will not improve. It "negates" his ability to climb ladders and stairs, so he is "not suited to work in a situation off the ground" He tires more readily than previously.

38 It is not to be forgotten that the plaintiff has continued in full-time employment since his return to work in March 1989, and, as counsel for the defence points out, he has earned more per year since the accident than he did in any pre-accident year.

39 In 1988, the year of the accident, he had employment income of just over \$17,000.00. The accident occurred on 11 June 1988, so that sum was earned in something less than one-half year.

40 In 1989 he had employment income of about \$41,000.00. In 1990, the plaintiff's employment income was about \$49,000.00.

41 In sum, there is no clear medical evidence that the plaintiff has a diminished ability to earn income in the future, or, if so, the extent to which that ability is diminished. On the other

hand, there is uncontradicted medical evidence of partial permanent physical disability which could have an effect on his capacity to work, and on his employability. I would conclude that his earning capacity has been reduced, even though he presently earns more than he did before he was injured.

42 Applying the test referred to in **Kwei v. Boisclair** (*supra*) to the uncontradicted medical evidence and the plaintiff's work history, I think the only reasonable conclusion is that the plaintiff was rendered: less capable from earning income from all types of employment; less attractive as a potential employee to new employers; unable to take advantage of all job opportunities previously open to him; and less valuable to himself, as a person capable of earning income in a competitive labour market.

43 The cases to which we were referred suggest various means of assigning a dollar value to the loss of capacity to earn income. One method is to postulate a minimum annual income loss for the plaintiff's remaining years of work, to multiply the annual projected loss times the number of year remaining, and to calculate a present value of this sum. Another is to award the plaintiff's entire annual income for one or more years. Another is to award the present value of some nominal percentage loss per annum applied against the plaintiff's expected annual income. In the end, all of these methods seem equally arbitrary. It has, however, often been said that the difficulty of making a fair assessment of damages cannot relieve the court of its duty to do so. In all the circumstances, I would regard a fair award under this head to be the sum of \$40,000.00.

44 I would allow the appeal and order that the plaintiff have judgment for 100% of the damages assessed by the trial judge, and in addition damages for future lost income earning capacity, in the sum of \$40,000.00.

"The Honourable Mr. Justice Finch"

I AGREE: "The Honourable Mr. Justice Goldie"

Court of Appeal for British Columbia

Walter Pallos

v.

Insurance Company of British Columbia

Dissenting Reasons for Judgment of Chief Justice McEachern

45 I have had an opportunity to read the Reasons for Judgment

of Mr. Justice Finch on this appeal. He has set out the facts and I need not repeat them. I regret that I have reached different conclusions.

1. The Question of Liability

46 The principal liability issue at the trial was whether the Plaintiff received his injuries by being struck with a baseball bat during a fight or scuffle with a group of party crashers, or as a result of being struck by an unidentified motor vehicle. For this reason, I suspect that counsel at trial were distracted by that issue and did not attempt to establish precisely how the alleged accident with the motor vehicle occurred.

47 Mr. Justice Finch has quoted the evidence of the Plaintiff, which is sparse to say the least, and the defence, of course, had no witnesses on this issue. The only evidence the Plaintiff adduced was his own testimony that he was off to the side of the road on the gravel when he was struck by the left side of the unidentified vehicle. He adds, however, that this car must have stopped because he saw his friend John had "ahold of this driver." It is incomprehensible that this friend was not called to explain what he saw, if anything, and his dealings with the driver. There were also a number of other witnesses who could have been called by the Plaintiff to prove the important facts upon which the Plaintiff's case depended but none of them testified. It must be concluded that these witnesses, if called, would not have supported the Plaintiff's evidence.

48 Mr. Vertlieb, who was not counsel at trial, argued that the trial judge accepted the Plaintiff's version of how the accident happened. With respect, the context of his reasons strongly suggests that the trial judge did not accept all of the Plaintiff's evidence. He did conclude, with considerable scepticism, "...that the Plaintiff had satisfied the balance of probabilities on the issue of how [the Plaintiff] was injured. I think this finding only relates to the baseball bat or unidentified motor vehicle issue.

49 The trial judge was not required to accept the Plaintiff's evidence that he was off the road on the gravel when he was struck. In fact, it is obvious the trial judge did not accept that evidence. After criticizing the paucity of evidence, he said:

The only reasonable conclusion is that the plaintiff was in fact on the travelled portion of the street, otherwise he would not have been hit. The Plaintiff did not say the car swerved to hit him or did so intentionally.

50 Mr. Vertlieb argued that the trial judge overlooked or misconceived the evidence of the Plaintiff when he said he was on the side of the road. With respect, the context of the reasons for

judgment do not lead me to that conclusion. It would certainly have been better if counsel at trial had adduced more detailed evidence. It would also have been better if the trial judge had made more specific findings. In my view, however, it was open to the trial judge not to accept the evidence of the Plaintiff (whose evidence was not accepted on other issues as well), when he said he was off the road, and to conclude, in the absence of other available testimony, that the Plaintiff was on the travelled portion of the road when he was struck.

51 While I think it was also open to the trial judge to dismiss the action as not being proven, he went on to say that he could not establish different degrees of fault so he apportioned liability equally. There is no cross appeal on the question of liability.

52 I am not persuaded the trial judge erred and I would dismiss the appeal against the finding of contributory negligence.

2. Loss of Future Income.

53 The Plaintiff gave evidence of serious disabilities. The trial judge saw the Plaintiff give his evidence in direct and cross-examination, an advantage that is not available to us. He specifically disbelieved the Plaintiff on some parts of his evidence and I think, with respect, that he reached a conclusion on future income loss that was open to him.

54 For example, the trial judge did not accept the evidence of the Plaintiff that his injuries were interfering in his enjoyment of life. He said:

As to the effect of this injury upon Mr. Pallos' life, I am not satisfied that it has been particularly great.

55 He also said about the Plaintiff:

it is apparent from both the reports of the plaintiff's orthopaedic surgeon that this injury, while a severe leg break, has healed well. The 1 cm shortage in his leg had been corrected by a lift and that he should be able to get on with life without much difficulty for a man approaching middle life.

56 One of the Plaintiff's physicians filed a report which stated:

...There is no direct medical reason to negate life-time employment. I must say that patients vary greatly and the individual difference between patients is great.

57 On the other hand, there was evidence in the medical

reports and from the Plaintiff's employer that the Plaintiff could not or would not be able to perform some of the work functions he had done in the past.

58 Mr. Vertlieb argued the medical evidence quoted above related to when the Plaintiff would retire, rather than to the impairment of his capacity to earn income, and he may be right in that respect. He also argued that the trial judge's reference to **Steenblok v. Funk** (1990), 46 B.C.L.R. (2d) 133 (B.C.C.A.) confused early retirement with diminished income earning capacity. However, that is how the Plaintiff's claim was advanced at trial.

59 At the end of the day, the trial judge concluded that the Plaintiff had failed to establish that a future loss was a real possibility and he added that there was no merit in this claim. He accordingly made no award on this head of damages.

60 While there are legalistic considerations that would have permitted an award for future income losses, I do not consider it necessary that there be such an award in every case where a person has been injured and someone says or predicts he will not be able to perform some functions. I am more impressed by the overall assessment of the evidence made by the trial judge and by the findings he made, particularly that he did not believe the Plaintiff's evidence about the effect of his injuries on his recreational life, and that he was not satisfied that there was going to be any future income loss.

61 In my view, there are no compelling reasons requiring us to interfere with those conclusions.

62 It follows, in my view, that this appeal should be dismissed.

"The Honourable Chief Justice McEachern"