IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: ***Miller v. Kamloops (City),***
2003 BCSC 908

Date: 20030611
Docket: 31622
Registry: Kamloops

Between:

William Scott Miller

Plaintiff

And

The City of Kamloops, Stockmen's Hotel Corporation, Executive Inn Group Corporation, Executive Inn Inc., Imperial Parking Corporation, Imperial Parking Canada Corporation and Lyons Landscaping Ltd.

Defendants

Before: The Honourable Mr. Justice Blair

Reasons for Judgment

Counsel for the Plaintiff	J.M. Hogg, Q.C.
Counsel for the Defendant, City of Kamloops	D.K. Hori
Counsel for the Defendants, Imperial Parking Canada Corporation and Lyons Landscaping Ltd.	S.R. Lerner
Date and Place of Trial/Hearing:	April 1, 2, 3 and 23, 2003 Kamloops, B.C.

[1] The plaintiff, William Scott Miller, seeks damages for injuries suffered February 8, 2001 when he slipped and fell on a downtown Kamloops sidewalk.

[2] Mr. Miller claims against the defendants, the City of Kamloops ("the City") which owned the sidewalk, Imperial Parking Canada Corporation ("Imperial") which occupied the parking lot adjacent to the sidewalk, and Lyon's Landscaping Ltd. ("Lyons") which contracted with Imperial to remove ice and snow from the parking lot and adjacent sidewalks.

[3] Mr. Miller, who is now 29 years old, alleges he slipped and fell as a result of negligence by the three defendants and, further, or in the alternative, from a nuisance created by Imperial and Lyons. The plaintiff earlier resolved his claims against the defendants Stockmen's Hotel Corp., Executive Inn Group Corp., Executive Inn Inc., and Imperial Parking Corp.

[4] Mr. Miller fell about 1:45 p.m. as he walked north on the west sidewalk of Sixth Avenue enroute to Lansdowne Street where he intended to board a bus to take him to the service station where he worked. He testified that he had walked the same route over the same sidewalk five days a week for approximately two years prior to his fall. On the day he fell the Kamloops' weather records confirm that it snowed from the

early morning hours until approximately 10 p.m. and snow had accumulated on the sidewalk when Mr. Miller walked to the bus stop. Mr. Miller testified that before leaving for work he had twice shovelled the snow from his walk at home. He testified that at a point just north of Victoria Street and adjacent to the parking lot he slipped and fell to the ground. When he got up he saw a patch of ice on the sidewalk which he said became visible only after his act of falling cleared the snow from that point on the sidewalk.

[5] Although Mr. Miller continued his journey, he later experienced difficulties at work and subsequently sought medical attention. He says that as a result of the fall he has lost the hearing in his left ear, a partial loss of hearing in his right ear, tinnitus which results in a ringing in his ears, dizziness or vertigo, and headaches. His claim includes damages for pain, suffering and loss of enjoyment of life, loss of wages, medication costs and a loss of future earning capacity.

[6] The plaintiff claims that he slipped on ice which formed from water flowing onto the sidewalk from the adjacent parking lot, which I will refer to as the casino parking lot as it was used principally by customers attending the nearby casino. Mr. Miller says the source of the water was a large pile of

snow stored on the casino parking lot beside the sidewalk. When the snow melted, rather than flowing into a drainage facility the water flowed across the sidewalk where it froze. The sidewalk, at the location where Mr. Miller fell, angled down to the street, having formed part of the east access to a service station located until 1986 on the casino parking lot.

[7] Mr. Miller contends that the defendants Imperial, Lyons and the City were negligent in creating or permitting the physical conditions under which water drained from the casino parking lot across the sidewalk and forming the ice upon which he slipped. Mr. Miller further contends that the water flowing from the casino parking lot across the sidewalk constituted a nuisance created by Imperial and Lyons.

The City's obligation under the *Occupiers Liability Act*:

[8] The City, being in possession of the sidewalk, is an occupier within the meaning of the ***Occupier's Liability Act***, R.S.B.C. 1996, c. 337, s. 3 placing upon the City a duty to take that care that in all the circumstances of the case is reasonable to see that a person will be reasonably safe in using the sidewalk. The City submits it met that duty by establishing and implementing a policy and inspection system with respect to the removal of snow and ice from the City's sidewalks, particularly in the downtown core known as the

Central Business District which includes the casino parking lot.

[9] The City expressed its policy in bylaw 24-23, division 11, s. 1100 which requires every owner or occupier of real property excluding single family dwellings to remove any accumulation of snow or ice upon any sidewalk abutting the land or premises so owned or occupied not later than 10:00 hours of any day, except Sunday. Section 1104 establishes an enforcement policy to ensure owners and occupiers comply with the removal of snow and ice.

[10] The City by resolution dated December 17, 1985 established an inspection procedure for sidewalks within the downtown core which divided the core into four sections with sidewalks in each section to be inspected every seven to ten days. The City suspends inspections on days when it snows, as inspection and enforcement become impractical when snow is falling. Mary Pasacreta, a city bylaw enforcement officer, inspected the sidewalk beside the casino parking lot on February 7, 2001 and observed no violations of the snow and ice clearing bylaw, an observation similar to that made on that day by Mr. Miller who noticed no moisture or ice on the sidewalk as he walked to the bus stop.

[11] Carrothers J.A. in ***Lysack v. Burrard Motor Inn***, [1991] B.C.J. No. 2408, after noting Vancouver City was an occupier of the sidewalk upon which Mr. Lysack fell stated at p. 4:

> However, the provisions of the ***Act*** must be read in the light of cases setting standards of negligence for municipalities. As the City's policy and program of inspection and repair is reasonable, there is no liability under the ***Act***. Should the manner and quality of the City's inspection system have been found unreasonable then a finding of negligence on the City's part might have resulted.

[12] In ***Nabholtz v. Kimberley (City)***, [2002] B.C.J. No. 261, 2002 BCSC 174, Brooke J. wrote at ¶11:

> The law is clear that an occupier is not an insurer of the plaintiff's safety. Its duty is to take that care that in all the circumstances of the case is reasonable to see that a person will be reasonably safe in using the premises. The standard of care is reasonableness and not perfection.

[13] Brooke J. at ¶s 12 and 13 referred to Mr. Justice Cory's statement found at p. 13 of the Supreme Court of Canada's decision in ***Brown v. British Columbia (Minister of Transportation and Highways)*** (1994), 89 B.C.L.R. (2d) 1:

> Ice is a natural hazard of Canadian winters. It can form quickly and unexpectedly. Although it is an expected hazard it is one that can never be completely prevented. Any attempt to do so would be prohibitively expensive.

> 13. I find this observation apt in all the circumstances of this case. The presence of snow implies the risk of ice. A blanket of virgin snow must be seen as requiring particular care, mindful of the risk of ice beneath it. A walk in the snow is an activity which assumes some risk of a slip and a lesser risk of a fall. An occupier has a duty not to act with reckless disregard to the safety of a user of the premises. The duty of care at common law is to take reasonable steps to protect the plaintiff against a known or foreseeable risk of harm.

[14] I am satisfied that the City's policy relating to snow and ice removal from its downtown sidewalks, together with its inspection and enforcement procedure, is reasonable under the circumstances. I further conclude that the City's policy and procedures including its inspections were carried out in a reasonable and realistic manner and that no liability attaches to the City under the ***Occupiers Liability Act***.

Did Lyons and Imperial Owe a Duty of Care?

[15] Mr. Miller contends that Lyons and Imperial were negligent in not ensuring that the sidewalk upon which he slipped was clear of ice. In ***Cullinane v. Prince George (City)***, 2000 B.C.J. No. 1488, 2000 BCSC 1089, Coultas J. dealt with a situation where the plaintiff slipped on a sidewalk adjacent to the defendant hotel. At ¶53, Mr. Justice Coultas described the issue as being whether the failure to comply with a bylaw requiring a property owner to keep a sidewalk

adjacent to the property free of ice and snow translates into civil liability when an injury occurs due to ice and snow on that sidewalk. He concluded that case authority held that such a failure did not lead to liability.

[16] Mr. Justice Lamperson in ***Reidy v. Kamloops Hotel Ltd.*** (1997), 41 B.C.L.R.(3d) 338, dealt with a liability issue after the plaintiff police officer slipped on ice he encountered on the public sidewalk as he exited the defendant hotel. Lamperson J. at ¶6 noted that because the accident occurred on a public sidewalk and not on the defendant's premises, the plaintiff's claim fell within the common law, not the ***Occupiers Liability Act***. However, he added at ¶9 that although the breach of a bylaw does not create a cause of action, it is indicative of the standard of care that can be expected. In ¶11, he stated:

> In deciding whether the defendants are liable, this accident must be considered in the context that during the Kamloops winter, snowy and icy patches on sidewalks and driveways are a common occurrence.

[17] I find foregoing comment equally applicable in Mr. Miller's case. Although Mr. Justice Lamperson found the hotel liable, he noted at ¶12:

> My finding (of liability) would probably be different if the accident had occurred in any other

> place other than almost at the threshold of the doorway used by people as they leave.

[18] In ***Cullinane***, Coultas J., after an extensive survey of slip and fall cases, found that the defendant hotel was not liable at common law for the plaintiff's slip and fall on the sidewalk adjacent to the hotel, a situation in which the plaintiff was neither exiting nor entering the hotel.

[19] Similarly, I conclude that neither Lyons nor Imperial owed a duty of care to Mr. Miller in the context of this case.

[20] However, had I found Lyons and Imperial owed a common law duty of care to the plaintiff I would refer to the City's snow and ice clearing bylaw to assist in determining the standard of care to be imposed on Imperial and Lyons, the latter in its capacity of having contracted to clear the ice and snow from the sidewalks adjacent to the casino parking lot.

[21] The contract between Imperial and Lyons required Lyons to clear Imperial's various parking lots and adjacent sidewalks each time there was a snowfall. The sidewalks included that adjacent to the casino parking lot which, in turn, was part of the sidewalk around an entire city block for which Imperial had assumed responsibility with Lyons contracted to do the clearing. Colin Lyons, the principal of Lyons, testified that when a snowfall occurred his company's practice involved hand

shovelling the sidewalks including that where Mr. Miller fell, followed by the application of magnesium chloride which is used pre-emptively to stop snow from sticking and also to melt and evaporate snow and ice.

[22] Lyons' maintenance records show that during the snowfall on February 8, 2001, its employee Jamies Jones hand shovelled the sidewalk in question twice during his 10-hour shift followed after each shovelling by the application of magnesium chloride to any slippery sections which he observed. Mr. Jones testified that his practice was that after hand shovelling the entire sidewalk he would then apply magnesium chloride where necessary.

[23] Plaintiff's counsel submits that Lyons was negligent in using magnesium chloride rather than a grit or abrasive for ice and that their hand application of the magnesium chloride resulted in their missing the ice on the sidewalk where Mr. Miller fell. Although counsel described this location as a "known bad spot", I do not accept that description on the evidence. I heard Mr. Lyons describe both the advantages of the magnesium chloride and the hand application of that material. I have no evidence to establish that Lyons' use and application of magnesium chloride was negligent.

[24] The test applicable to the actions of Imperial and Lyons to keep the sidewalk clear of ice and snow would be that of reasonableness: see ***Carlson v. Canada Safeway Ltd.*** (1983), 47 B.C.L.R. 252 (B.C.C.A.). I am satisfied that the procedure followed by Imperial and Lyons was both reasonable and practical in the circumstances. It is not reasonable to anticipate that the defendants would be able to keep the sidewalks completely clear when the snowfall was continuing throughout the day as it did on February 8, 2001, but the arrangement providing for the clearing of the snow both during and after it fell was a reasonable accommodation in the circumstances. The arrangement while ensuring the removal of most of the hazard created by the ice and snow, could not be expected in the course of an ongoing snowfall to remove all the ice and snow and users of the sidewalk must expect some hazards.

Negligent Draining of Casino Parking Lot

[25] The plaintiff contends, as I understand his submission, that the City, Imperial and Lyons are further negligent in common law for allowing water to drain from the casino parking lot across the sidewalk where it could freeze creating a hazard for sidewalk users such as Mr. Miller. Plaintiff's counsel in his argument writes:

> All three of the parties knew or ought to have known that this parking lot by the way it is set up, designed, and constructed drains surface run off or water off the lot out the old blocked off east exit onto and across the sidewalk and thus **they are taken to know turns into ice creating a hazardous situation.** There is really no protection or no measures that can be taken because of the design of the parking lot which is easy to see at the quickest glance or the most untrained eye (see the pictures). (counsel's emphasis)

[26] The plaintiff submits that moisture or water flows from the casino parking lot and out of what used to be the lot's eastern access across the sidewalk. He contends that a review of the pictures clearly reflects his position that the lot angles down to the east access and the sidewalk where Mr. Miller fell. Counsel says that the snow stored by Lyons and Imperial on the casino parking lot from ongoing snow clearing operations melted and flowed towards the lot's east access. He submits that the three defendants knew or ought to have known that the storage of the snow and its inevitable melting and subsequent freezing on the sidewalk posed a risk for sidewalk users such as Mr. Miller.

[27] I do not disagree that the pictures suggest that the parking lot slopes to the south and east from which plaintiff's counsel submits I can infer that water and run off would flow in a south-easterly direction to the east access.

However, there are evidentiary difficulties in reaching the conclusion suggested by the plaintiff.

[28] Mr. Miller says that sometime after his slip and fall he attended the casino parking lot and poured a half litre of water onto the ground which he said then flowed towards the east access. Mr. Lyons testified that he poured one litre of water onto the ground from a high point on the lot, but the water merely pooled at an oil stain and did not flow out the lot's east access onto the sidewalk. Mr. Lyons also testified that he had not observed the snow pile on the casino parking lot melting and flowing onto the sidewalk nor had he been advised of such a problem. He further testified that he had never observed a patch of what appears to be moisture on the sidewalk near where Mr. Miller slipped as reflected in the pictures found in exhibit 1, those pictures being taken subsequent to February 8, 2001.

[29] Mr. Miller testified that he did not see any ice on the sidewalk the day before he slipped, but there was ice at the location when he slipped on February 8, the inference being that between February 7 and 8, 2001, the snow pile or the snow on the parking lot thawed and moisture flowed out through the east access and onto the sidewalk where it froze.

[30] Ms. Pasacreta on February 7, 2001 inspected the sidewalk where the plaintiff fell and observed no hazard or ice on the sidewalk nor did she note any problems in her inspection record. She had no recollection of seeing problems previously at the point in the sidewalk where Mr. Miller slipped. A fellow bylaw inspector, Jody Tyrell, recalled taking action to have snow removed from the sidewalks around the then Stockman's Hotel, but had no recollection of ice on the Sixth Avenue sidewalk where the fall apparently occurred.

[31] Mr. Miller, who walked the sidewalk five days out of seven had not noticed in the months prior to February 8, 2001 either water or ice on the sidewalk in the area in which he fell. If the plaintiff's contention is correct that the casino parking lot was sloped in such a fashion as to direct water, be it rain or water from melting snow, across the sidewalk I anticipate that at some point in the months before the fall he would have seen moisture on the sidewalk.

[32] I conclude that the sidewalk was free of ice and snow on February 7, 2001. The plaintiff submits that at some time between approximately 2 p.m. on February 7 and 2 p.m. on February 8 snow thawed and flowed down across the parking lot and onto the sidewalk where it froze. However, the Kamloops weather records do not reflect temperatures above freezing on

either February 7 or 8, 2001. On February 7 the maximum temperature was -5 C and the minimum was -13.2 C with a mean of -5.2 Celsius. On February 8 the maximum was -3.4 C, the minimum was -7 and the mean was -5.2 C, with snowfall of 3.6 centimetres measured. To thaw, snow usually requires the temperature to be above the freezing mark. Given that the maximum temperature was below freezing during the relevant period it is difficult to comprehend how the snow on the casino parking lot could have melted as suggested by Mr. Miller given the meteorological conditions found on February 7 and 8, 2001.

[33] The onus lies with the plaintiff to establish on a balance of probabilities that the ice on the sidewalk originated with the snow or the snow pile on the casino parking lot. Given the above considerations I conclude that Mr. Miller has failed to meet the test on a balance of probabilities. I am not prepared to find on the differing evidence that the "set up, design or construction" of the casino parking lot was such that it caused water to flow onto the sidewalk resulting in a hazard to Mr. Miller on February 8, 2001. Nor am I prepared to conclude that the defendants, or any of them, given the absence of any previous problems in that area of the sidewalk, knew or could have anticipated the

problem apparently encountered by Mr. Miller on February 8, 2001. The last finding is of course subject to the knowledge possessed by Kamloops' residents that in winter snow and ice are common hazards demanding extra caution by pedestrians.

The City's By-law Negligence

[34] Mr. Miller says the City was also negligent in failing to enforce its bylaws relating to the design and construction of the casino parking lot. The plaintiff contends the design allowed water to flow from the casino parking lot onto the adjacent sidewalk which then froze, creating the hazard which led to his accident. I have found that the plaintiff has failed to establish on a balance of probabilities that the ice upon which he apparently slipped came from the snow or the snow pile located on the casino parking lot. Notwithstanding that conclusion, I will briefly address the City's bylaws relating to the design and construction of the casino parking lot.

[35] In 1986 the City issued a demolition permit to allow the removal of the service station, but has received no further applications for construction on the site. The City's issuance of a building permit initiates the inspection process to ensure compliance with the existing building rules, but the

City does not do independent inspections of properties located in the City.

[36] The plaintiff submits that Imperial's application dated November 1, 1999 for a City permit to repave its parking lot at 551 Lansdowne Street, Kamloops, included the nearby casino parking lot which was depicted in one of the sketches attached to Imperial's application and filed as exhibit 9. City building inspector, William Johnson, testified that he accepted the application on behalf of the City and noted the site address was for 551 Lansdowne, the parking lot lying to the north and on the other side of a lane from the casino parking lot. The building permit he issued on December 3, 1999, addressed only the Lansdowne property, not the casino parking lot and his inspection of the project was restricted to the Lansdowne property.

[37] If the permit issued had included the casino parking lot, the City would then have become involved in the design and construction of the parking lot during the inspection process. I conclude that the City issued in 1999 a permit to repave the parking lot at 551 Lansdowne, but that permit did not include the casino parking lot. I conclude that in the absence of any building permits for the casino parking lot the City has had no involvement in the design or construction of the casino

parking lot. Until the owner of the casino parking lot seeks a building permit the City in the usual course will not be involved in determining the applicability, if any, of the City's various bylaws to the casino parking lot property.

[38] I find there is no claim available to the plaintiff against the City on the basis of an alleged failure on its part to enforce the provisions of its bylaws relating to the design and construction of the casino parking lot.

Nuisance

[39] The plaintiff advances a claim in nuisance against both Imperial and Lyons for allowing water to escape from the casino parking lot and onto the sidewalk where it froze creating a dangerous situation and leading to his slip and fall. The House of Lords in ***Sedleigh-Denfield v. O'Callagan et al.***, [1940] A.C. 880, applied in ***Ross v. Wall*** (1980), 114 D.L.R. (3d) 758, a decision of the B.C. Court of Appeal, held that nuisance is established where the defendant creates a dangerous condition or fails to take reasonable steps to abate it when the defendant knew or ought to have known of its existence.

[40] Mr. Miller submits that the defendants created a dangerous condition by placing a snow pile on the casino

parking lot which, when it melted, allowed moisture to flow onto the sidewalk where it froze and created the ice which he encountered. I have earlier concluded that the plaintiff has failed to establish that the ice which he encountered on the sidewalk originated with the snow pile. I have also found that the defendants Imperial and Lyons neither knew nor ought to have known of the existence of what the plaintiff describes as a dangerous condition.

[41] The plaintiff fails in his nuisance claim against Lyons and Imperial.

[42] Plaintiff's counsel contended in closing submissions that the City could also be found liable in nuisance, however, the City's counsel submitted that no claim in nuisance had been pleaded against the City. The writ and the amended statement of claim describe Mr. Miller's claim against the City as based on negligence and make no reference to any claim in nuisance being advanced by him against the City. The claims against Imperial and Lyons are based in both negligence and nuisance as found in both the writ and at ¶s 17 to 20 of the statement of claim. The language specifically relates the nuisance claim to Imperial and Lyons, but not to the City. If the plaintiff intended to advance a nuisance claim against the City it should be found in the pleadings. I conclude that to

allow the plaintiff to initiate such a claim in closing submissions would be unfair and highly prejudicial to the City. The plaintiff's claim against the City will be restricted to his claim in negligence and I decline to amend the pleadings to permit the plaintiff to advance a nuisance claim against the City.

[43] However, I have considered whether the plaintiff could make a claim in nuisance against the City and concluded that he could not on the basis of Mr. Justice Owen-Flood's decision in ***Ryan v. Victoria (City) et al*** (1994), B.C.J. No. 1202. In ***Ryan***, the plaintiff motorcyclist fell on railway tracks owned by the defendant railway company located on a Victoria street and claimed in nuisance and negligence against the defendant city. Owen-Flood J. stated at ¶181:

> The principle of liability (in nuisance) only applies when the municipality holds the property in the tracks. In ***Simon v. Islington Borough Council,*** [1943] 1. K.B. 188 (C.A.), the tramway tracks had been abandoned and the municipal authority had taken over the right of way for the purpose of removing the tracks. In the case at bar the property in the railway tracks on Store Street remains with the defendant Railways. Therefore, the claim in nuisance against the defendant City must be and is dismissed.

[44] In the instant case, the pile of snow about which Mr. Miller complains is located on the casino parking lot in which

the City has no interest. Absent a property interest, the City cannot be liable in nuisance.

Conclusion on Liability:

[45] I find the plaintiff has failed to establish that the defendants or any of them liable either in negligence or nuisance for the injuries suffered in the slip and fall on February 8, 2001. This was an unfortunate mishap for which no blame attaches even though the consequences were relatively serious for Mr. Miller.

Quantum

[46] Having denied liability, it is not necessary for me to reach a conclusion on quantum, however, if this matter proceeds further my views on damages might be of assistance. Mr. Miller says that as a result of the slip and fall he suffered a hearing loss for which he was treated by Dr. William J.D. Cleland, a specialist in otolaryngology and more commonly known as an ear, nose and throat specialist. The doctor determined that the plaintiff's left ear drum and its various structures were intact but followed with a surgical procedure to find the cause of the injury and concluded that there had been a loss of liquid from the ear. Dr. Cleland concluded that the plaintiff suffered a mild hearing loss in

his right ear and a moderate to severe hearing loss in his left ear. Dr. Cleland acknowledged there is a possibility that Mr. Miller's hearing might improve spontaneously in the future, noting that testing in February 2002 indicated there had been an improvement in Mr. Miller's hearing in his left ear.

[47] Mr. Miller also complained of tinnitus, or ringing, in his ear which Dr. Cleland indicated was not unusual given the plaintiff's hearing difficulties. Dr. Cleland indicated that Mr. Miller's complaints of occasional dizziness or vertigo were also consistent with his hearing difficulties.

[48] Mr. Miller testified that the dizziness or vertigo caused him some difficulties at work as does his hearing loss. He said the hearing loss had not caused him difficulties in his leisure activities, although he is forced to increase the volume when watching television.

[49] Plaintiff's counsel submits that non-pecuniary damages ought to be in the range of $50,000 whereas the defendants submit a range of between $10,000 and $20,000 is appropriate. I have reviewed the cases provided by counsel and I note that the three cases cited by the plaintiff, ***Chong v. Tran***, 2001 BCSC 1417, ***Barsant v. Kwok***, [1995] B.C.J. 1691, and ***Parker v. Wilson*** (1991), B.C.J. No. 3040 involved serious multiple

injuries, including a hearing loss. It is difficult to relate the damages awarded in these cases to Mr. Miller's injury which involved only his hearing. In ***Myre (Guardian ad litem of) v. Myre***, [1997] B.C.J. No. 272 the infant suffered a number of injuries including a concussion, a fractured rib, abrasions, soft tissue injuries and a hearing loss in the right ear. Wilson J. awarded non pecuniary damages of $12,500.

[50] I conclude Mr. Miller's injuries would have justified non-pecuniary damages of $18,000.

[51] Mr. Miller's past wage loss was $513 from missing nine days employment and I will assess his special damages for medication at $20.

[52] The plaintiff also advances a claim for future loss of earning capacity the assessment of which he submits should be approached on the basis that, but for the hearing loss, he would have become a welder. He says that his employment opportunities are limited now to work such as he is presently performing as an assistant manager at a service station. Plaintiff's counsel assesses this loss at $250,000.

[53] I find there are significant evidentiary problems in establishing that Mr. Miller would have become a welder.

Although Mr. Miller acknowledged that he might have to take upgrading courses before enrolling in the welding course offered by the University College of the Cariboo, the school records filed indicate Mr. Miller's upgrading would take some time and effort. Mr. Miller testified that he had completed grade 10, but his school records indicate he completed only grade 8. His last scholastic involvement occurred when he was 19 years old when he recalls completing a couple of courses towards his grade 11.

[54] As of February 8, 2001, Mr. Miller had taken no steps to enroll in any educational upgrading courses required to participate in a welding course nor had he attempted to enroll in a welding course. Further, Mr. Miller testified that because of his hearing loss, he was precluded from enrolling in the welding program at the University College of the Caribou. However, Tim Stainton, who chairs the university's mechanical welding department, testified that hearing impairment did not preclude a person from enrolling in the welding program, noting that one student presently in the program was completely deaf in one ear and had 40 percent hearing in his other ear. Mr. Stainton said a prospective student would be admitted as long as he could carry on a conversation without yelling. There is no suggestion that Mr.

Martin's hearing requires people to shout at him to carry on a conversation. I am not satisfied on the evidence that Mr. Miller had taken any steps which would have led him to a welding career, nor am I satisfied that the hearing loss suffered precludes him from enrolling in the welding program.

[55] I conclude the hearing loss ought not stop Mr. Miller from improving his education and skills either in the welding or some other field. I do acknowledge that the hearing loss has impaired his future earning capacity. The injury has rendered him less capable overall from earning income from all types of employment, he is less marketable or attractive as an employee to potential employers, he 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 he is less valuable to himself as a person capable of earning income in a competitive labour market. I would have awarded Mr. Miller $30,000 for this future loss, had I found the defendants liable.

Costs

[56] In the normal course the defendants would have their costs against Mr. Miller at scale 3. I am not privy to matters between the parties which might affect the issues of costs and therefore the parties can arrange with the trial

coordinator a mutually agreeable time at which to address the issue of costs.

"R.M.L. Blair, J."
The Honourable Mr. Justice R.M.L. Blair