

CANADA / JUDGMENT

Grise v. Jones

2017 BCSC 1337

COURT

Supreme Court of British Columbia

DECIDED

31 July 2017

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2017 BCSC 1337 Grise v. Jones IN THE SUPREME COURT OF BRITISH COLUMBIA Citation: Grise v. Jones, 2017 BCSC 1337 Date: 20170731 Docket: M71066 Registry: Nanaimo Between: Jamie Grise Plaintiff And Timothy Jones and Anthony Jones Defendants Before: The Honourable Mr. Justice Leask Reasons for Judgment Counsel for the Plaintiff: T. Boe Counsel for the Defendants: P. Field Place and Date of Trial: Nanaimo, B.C. March 28-30, 2017 Place and Date of Judgment: Nanaimo, B.C. July 31, 2017

INTRODUCTION

[1] The plaintiff was involved in two motor vehicle accidents. The first accident took place on April 6, 2012 in Nanaimo, British Columbia. The plaintiff was driving a pickup truck through and intersection with a green light when his vehicle was struck on the driver's side by a larger truck. The second accident occurred on August 8, 2013 in Cochrane, Alberta. The plaintiff was a passenger in a small truck stopped at a red light when the vehicle was struck from behind. Only the first accident was the subject of this trial but both counsel agreed at the outset that the most significant dispute between the parties was whether or not the injuries were indivisible. Liability was admitted for the British Columbia accident but not in the Alberta case. The plaintiff was a 50-year-old in good physical health at the time of the first accident. He worked as a drywaller for the twenty years before the accident. His principal injuries in the first accident involved his left shoulder, neck, and back. In the second accident, he injured his right arm and described increased pain in his left shoulder, neck, and lower back. Since the first accident, he has been unable to return to work except for some light duties in construction working for his cousin in the summer of 2016. At the conclusion of the evidence, counsel for the defendants conceded that the injuries to the plaintiff's left shoulder and neck were indivisible. This concession significantly reduced the complexity of the task before the Court. LAY EVIDENCE

- [2] The plaintiff testified. He told the Court he was 50 years old; had left high school without graduating; had no knowledge of computers; and did not own a cell phone. He lived in a trailer parked on his father's property at Nanoose Bay. He had learned his drywalling skills working with his father when he was a teenager. After seeking work off Vancouver Island in the oil fields and in Richmond, he returned to Vancouver Island and began his career as a drywaller by using an old company of his father's.
- [3] He testified to his earning between 1999 and 2014 SUMMARY OF EARNINGS Jamie Grise
- | Year | Total Business Income | Taxable Income |
|------|-----------------------|----------------|
| 1999 | \$107,420.58 | -\$14,016.00 |
| 2000 | \$85,057.14 | -\$142.00 |
| 2001 | \$82,525.49 | \$48.00 |
| 2002 | \$145,497.84 | \$35,714.00 |
| 2003 | \$199,848.00 | \$32,385.83 |
| 2004 | \$191,514.60 | \$49,453.66 |
| 2005 | \$168,026.75 | \$30,007.81 |
| 2006 | \$131,547.30 | \$30,064.71 |
| 2007 | \$119,582.80 | \$26,432.55 |
| 2008 | \$62,673.00 | \$31,266.12 |
| 2009 | \$35,674.00 | \$24,336.39 |
| 2010 | \$26,714.74 | \$19,961.17 |
| 2011 | \$38,753.28 | \$28,848.82 |
| 2012 | \$11,062.55 | \$10,138.11 |
| 2013 | \$0 | \$0 |
| 2014 | \$0 | \$0 |
- [4] Prior to the first accident, his leisure time was spent on various outdoor activities - sport fishing, hiking, camping and kayaking. He owned an 18½ foot boat that he used for both ocean and fresh water fishing. Since the first accident he has done very little of his previous outdoor activities.
- [5] He has made a number of efforts to find new employment, so far without success. At least part of his problem has been the new digital world of job-seeking and government employment counselling.
- [6] Another witness was the plaintiff's cousin, Gerry Grise, who was his employer for the last two years before the first accident and also gave him work in the Summer of 2016. His cousin testified that, before the first accident, he was hard-working, efficient, and a man "who could get the job done." In the Summer of 2016, he was simply not capable of working at his previous level. He also testified that he did not have the same temperament. He lacked his previous energy and drive. MEDICAL EVIDENCE
- [7] Dr. Colborne was the plaintiff's general practitioner. He saw the plaintiff regularly.
- [8] In his opinion, there were no pre-existing conditions, physical or mental, prior to the first accident, that would have had any bearing on his symptoms sustained in either accident or on his recovery therefrom.
- [9] In his report, he stated: On April 13, 2012, he was examined in our clinic by a physician. He stated that the pain in his shoulder was less and he was examined and documented to have reduced neck rotation to the left side by about 45 degrees, and swelling and tenderness in the suprascapular region of the left shoulder. He was wearing a sling over his left shoulder and left arm. He was then seen by myself, initially, on May 1, 2012, when he complained of pain in the neck, left shoulder, and lower back regions. Examination showed that he could not elevate his left arm above the level of his chest, and that he had tenderness over the cervical, thoracic, and lumbar spines and paraspinal muscles....He was advised at this point to begin physiotherapy, and was to continue on his ibuprofen, and Tylenol 3 if needed. At

that time he was not able to return to his work in the drywall installation industry, as he was not able to lift objects with his left arm. By this time, it was evidence that he had sustained not only a contusion to his left shoulder, but also whiplash associated injuries to his spinal muscles in his cervical, thoracic and lumbar area...

- [10] No reported gradual improvement to the plaintiff's condition between the first accident and the second accident. In his opinion: The symptoms from his first accident which had persisted to the time of his second accident had been weakness of his left shoulder muscles and left arm... .. He had arrived at a plateau in the recovery in regard to the strength in his left shoulder muscles by the time of the second accident, and it was evident that he would not be able to do repetitive work using his left arm, nor carry sizable objects, such as sheets of wallboard, that he would use in the drywall and drywall finishing occupation, above his head using his left arm.
- [11] As to the second accident, Dr. Colborne reported: In the second accident, he initially injured his left shoulder and left scapular muscles, as well as his cervical, thoracic, and lumbar paraspinal muscles. Additional injuries included what appeared to be traction injuries to the nerves supplying both arms, either at the cervical or brachial plexus level, which caused the above-mentioned tingling, sensory loss and weakness in his arms, as well traction injuries to the nerves in his legs at the lumbar spine level, which caused the numbness in the lower lumbar areas and both feet, and tingling and weakness in his left leg. Headaches were also a feature of that accident, likely from injury to his cervical muscles. The weakness in his left arm continued, as did the pain in his lumbar muscles and left leg. He also continued to have tingling in his left arm and left leg, likely from the above mentioned nerve irritation from traction injuries. In addition, he continues to experience weakness of his left leg, on walking more than a short distance. This is also consistent with some traction injuries to his lumbar nerve roots. The pain in his neck region has also continued. He has also persisted in having weakness of his left arm due to weakness of his shoulder muscles, with inability to do repetitive movements or to carry object of any size above his head.
- [12] Dr. MacKean is a specialist in physical medicine and rehabilitation who saw the plaintiff on December 13, 2016 for an independent medical evaluation ("IME"). His diagnosis was:
1. Grade 2 whiplash associated disorder, neck, and upper back left greater than right side.
 2. Left shoulder contusion with some residual pain and weakness.
 3. Mild mechanical low back pain.
- [13] His opinion was that those conditions were due to injuries suffered in the two motor vehicle accidents: In my opinion, he will have some physical limitation in terms of the type of work that he can do. I do not think he will be able to work sustainably in the construction industry or as a drywaller as he would have difficulty with the heavier physical aspects of that work particularly reaching and lifting above shoulder level or working with his arms above shoulder level or looking up for long periods of time. ... However, I do think he would be

able to work in a less physically demanding job with sedentary to light physical activity where he is able to get up, move around and change position so that he is not sitting for long periods of time or standing for long periods of time.

- [14] Ms. Beverley Wilson, the functional capacity assessor expressed the opinion that: Based on discussions with Mr. Grise regarding his pre-accident employment, which is classed as "Very Heavy" in the Dictionary of Occupational Titles (DOT) it is the opinion of this therapist that Mr. Grise does not demonstrate the functional strength or tolerance to carry out several tasks related to his position as a drywall installer."
- [15] Counsel for the defendants had an IME prepared by Dr. Arneja, an orthopaedic surgeon. His opinion of the effects of the first accident was: After the first motor vehicle collision, it appears Mr. Grise sustained soft tissue injuries to his neck and shoulder and lower back. The diagnoses, in my opinion, after the initial motor vehicle collision, were
- 1) Post-traumatic impingement syndrome left shoulder;
 - 2) Exacerbation of cervical spine aggravation of cervical spondylosis; and
 - 3) Cervical Spine whiplash associated disorder type II.
 - 4) Soft tissue injury and pain to low back, SI joint.
- [16] His overall assessment of the effect of both accidents is best captured by his response to one of the questions posed by defence counsel:
5. Can you please describe any restrictions (or limitations) that you would put on the use by Mr. Grise of his left shoulder in terms of his employment as a construction labourer, his recreational activities (he enjoys hiking, camping and fishing) and any aspects of housekeeping or homemaking, whether interior or exterior? He does not own his own home but lives in a travel-trailer at his father's home in Nanaimo. Mr. Grise seems to be significantly limited with his functional abilities, I think mainly related to his SI joint pain on the right side and the cervical spine pain. I believe these symptoms quite significant for him at this point and it is unlikely that he will have a complete resolution of his symptoms. I believe he has made the maximum medical recovery with respect to his cervical spine symptoms. His lower back symptoms may improve with ongoing treatment such as an SI joint injection, as outlined above, which should be done fluoroscopically-guided. There are no medical restrictions, in my opinion, with respect to his ability to use his arms and legs both recreationally and occupationally. He certainly will be limited by pain, however, given his pain symptoms that he is experiencing, and it is unlikely that he will be able to fully participate in recreational, household or occupational activities that require repetitive bending, lifting, kneeling, carrying heavy objects and repetitive motions due to his current neck and right SI joint symptoms. It is unlikely he will be able to return to his occupation as a construction labourer due to his current neck symptoms. ECONOMIC EVIDENCE

- [17] The plaintiff introduced the report of an economist, Robert Carson, to assist the Court in calculating past and future income loss. This evidence was not challenged by the defendants and I accept it as factual. For the purpose of calculating past wage loss, the economist prepared Table 1: REVIEW OF REPORTED GROSS AND NET EARNINGS, 2009 TO 2011 AND MOTOR VEHICLE EXPENSES, CALCULATIONS OF WAGE INDEX AND RE-STATEMENT OF PAST INCOME AS 2017 DOLLAR EQUIVALENTS
- | Year | Gross Business Income | Net Business Income | Motor Vehicle Expense | Wage Index | 2017=1.000 | Net Income in 2017 | \$ Net Income |
|-----------------------------|-----------------------|---------------------|-----------------------|------------|------------|--------------------|---------------|
| +50% of Vehicle Exp in 2017 | \$ (1) | (2) | (3) | (4) | (5) | (6) | (7) |
| 2009 | \$35,674 | \$25,422 | \$3,051 | 0.860 | | | |
| \$29,547 | \$31,320 | 2010 | \$26,715 | \$20,818 | \$3,696 | 0.885 | \$23,519 |
| \$25,607 | 2011 | \$38,753 | \$30,169 | \$5,896 | 0.909 | \$33,175 | \$36,416 |
| Average, 2009 to 2011: | \$28,747 | \$31,115 | | | | | |
- [18] For the purpose of calculating future wage loss, the economist calculated that for each \$1,000 of lost income to age 65, the present value would be \$12,323; to age 67 it would be \$13,778; and to age 70, \$15,814.

ANALYSIS

Non-Pecuniary Loss

- [19] The parties do not have a substantial disagreement on this head of damages. The plaintiff's claim is for \$80,000 and he refers me to ten cases with non-pecuniary awards ranging from \$70,000 to \$110,000. His cases are:
1. Beagle v. Cornelson, 2012 BCSC 1934
 2. Peers v. Bodkin Leasing Corporation, 2012 BCSC 271
 3. Andrusko v. Alexander, 2013 BCSC 985
 4. Dzumhur v. Davoody, 2015 BCSC 2316
 5. Pilfold v. Jaswal, 2014 BCSC 719
 6. Smith v. Neil, 2015 BCSC 9
 7. Catling v. Poteryko, 2017 BCSC 311
 8. Sediqi v. Simpson, 2015 BCSC 214
 9. Larsen v. Moffett, 2015 BCSC 222
 10. Sunner v. Rana, 2014 BCSC 1379
- [20] The defendants submit that the award for non-pecuniary damages should be \$65,000 and rely on Kasic v. Leyh, 2009 BCSC 649 where Morrison J. awarded the plaintiff \$70,000 and Farbatuk v. Lagrimas, 2014 BCSC 1879 where Kloegman J. awarded \$60,000.

- [21] None of the authorities cited by counsel seemed closely parallel to this plaintiff's situation. After reviewing all of the cases, I am satisfied that an appropriate award for non-pecuniary damages is \$75,000. Past Wage Loss
- [22] The parties agree that in the five years between the first accident and the commencement of trial, the plaintiff had only one relatively brief period of employment during which he earned \$7,700. The plaintiff submits that his annual income in that period would have been \$35,000 and that his total income for that period would have been \$173,950. Subtracting his actual income of \$7,700, the plaintiff claims \$166,250.
- [23] Counsel for the defendants submits that the plaintiff's average gross income after deduction of business expenses for the years 2009 through 2011 was \$24,382. Therefore, his gross wage loss would be \$121,910. Generously, only deducting \$7,000 for his earnings, the defendants' position is that the plaintiff's gross past wage loss is approximately \$115,000.
- [24] Defendants' counsel, however, makes a further submission that the plaintiff's failure to find other employment after discharge from the CBI Vocational Assistance Program amounts to a failure to mitigate which counsel submits should result in a 20% reduction in the claim from \$115,000 to \$92,000.
- [25] I am not in agreement with either party's position on this head of damages. I disagree with the plaintiff's wage figures because they fail to take into account business expenses. I disagree with the defendants' wage figure because they don't allow for either cost of living changes or the economist's add back of 50% of vehicle expenses to represent personal gain from vehicle use for travel to and from work. The economist, after converting the income to its equivalent in 2017 dollars and adding back 50% of vehicle expenses, calculates the average for 2009-2011 to be \$31,115. For a five year period, this produces a total of \$155,575. After subtracting the \$7,700 the plaintiff earned in 2016, it leaves a claim of \$147,875. I was unpersuaded by the defendants' failure to mitigate argument so that my award for this head of damages is \$147,875. Future Wage Loss
- [26] The plaintiff submits that his future wage loss claim amounts to \$395,350. This number is based upon the proposition that the plaintiff's pre-accident earning capacity was \$35,000; that in the future he would only be able to work part-time for a sympathetic employer such as his cousin and earn approximately \$10,000 per year; therefore his annual loss of income would be \$25,000. Assuming he could work to age 70, Robert Carson, the economic expert, calculates that the present value of each \$1,000 is \$15,814. The claim for \$395,350 is based upon multiplying \$25,000 by \$15,814.
- [27] The defendants characterize this issue as loss of earning capacity and make the following submission: The Defendants respectfully submit that the Plaintiff is employable with some retraining as he has described - e.g. security guard - and employable for jobs which will pay as much or more than his average income from working as a construction renovation subcontractor. The minimum wage in British Columbia is \$10.75 per hour. Full-time full-year earnings at this rate generate an annual income of \$22,360 which is not very different

from what he was earning with his cousin. This is a situation where a lump sum is appropriate. The measure of the lump sum could, in this case, be three times preaccident annual earnings of \$75,000. This would be a reasonable assessment in all of the circumstances.

- [28] I find that the plaintiff's pre-accident net income after deducting reasonable business expenses would be \$30,000. I am more optimistic than the plaintiff (but less than the defendants) and estimate his future income at \$15,000 per year. I also believe that he is unlikely to be able to work past 65. Mr. Cameron's multiplier for \$1,000 loss of income to age 65 is \$12,323. Hence, my finding for future income loss is $\$15,000 \times \$12,323 = \$184,845$. Cost of Future Care
- [29] The plaintiff asked for \$5,000. The defendants suggest half that much. I am prepared to award the plaintiff \$5,000. Special Damages
- [30] Counsel have agreed that the amount of special damages is \$3,593.80.

CONCLUSION

- [31] I have awarded damages to the plaintiff as follows: Non-Pecuniary Loss \$75,000 Past Wage Loss \$147,875 Future Wage Loss \$184,845 Cost of Future Care \$5,000 Special Damages \$3,593.80 TOTAL \$416,313.80 "Leask J."

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