

CANADA / JUDGMENT

Jacobi v. Monteith

2020 BCSC 218

COURT

Supreme Court of British Columbia

DECIDED

19 February 2020

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2020 BCSC 218 Jacobi v. Monteith

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Jacobi v. Monteith,

2020 BCSC 218

Date: 20200219

Docket: M112841

Registry: Kelowna

Between:

Christopher Brian Jacobi

Plaintiff

And

Elizabeth Monteith, Brian Monteith, Andrew Monteith and Justin Bowman

Defendants

Before: The Honourable Mr. Justice Wilson

Reasons for Judgment

Counsel for the Plaintiff:

M. Van Nostrand

S. Turner

Counsel for the Defendants:

D. Graves

Place and Date of Trial/Hearing:

Kelowna, B.C.

February 10 - 12, 2020

Place and Date of Judgment:

Kelowna, B.C.

February 19, 2020

[1] This is an assessment of the plaintiff's damages following a motor vehicle accident of May 1, 2014. The plaintiff seeks non-pecuniary damages, compensation for loss of future earning capacity, and costs of future care.

Facts

- [2] The plaintiff was driving home from a trades program that he was taking through Okanagan College at the time of the accident. He was in the right rear seat of his friend's truck when the driver slammed on the brakes. The vehicle behind did not stop and slammed into the back of the truck in which the plaintiff was a passenger. At the time of the accident, he was 17 years of age. Liability has been admitted for the accident.
- [3] Shortly after the accident, he was taken by his father to the emergency room at the Vernon Jubilee Hospital. Approximately one hour post-accident, he reported no pain, but some half-hour later noted some pain on the right side of his neck. While he initially had upper back and neck pain, those matters resolved in relatively short order. What persists is pain in his lower back.
- [4] The plaintiff went to his family doctor's office on May 7, some six days after the accident. He had returned to his school program but was encountering some difficulty. He was referred to physiotherapy which commenced a couple of days later.
- [5] He returned to see his family doctor and complained of persistent low back pain. The locum who was covering the practice ordered x-rays but those were inconclusive.
- [6] A few days later he went back to see his doctor, this time accompanied by his father Mr. Jeff Jacobi. Jeff Jacobi testified. He was quite emotional in giving his evidence. He wanted to assist the plaintiff with his claim. He recounted the plaintiff's adolescence and the fact that he was bullied as a child starting in approximately grade 6. He is very protective and this is why he was very involved in the circumstances surrounding this case. He testified that he went to one of the appointments with Dr. Pritchett because he was not getting information from his son. The plaintiff is more open and communicative than he was previously, something that is corroborated by both the plaintiff's mother and his fiancée.

- [7] The plaintiff was referred to physiotherapy shortly after the accident and he attended for a number of treatments. He did not find the treatments helpful and discontinued them. On his last visit, the clinical notes indicate he advised that he was "feeling good today".
- [8] The plaintiff had not seen any medical practitioners for almost two years when he went back to see his general practitioner Dr. Pritchett in March 2016. This visit was occasioned by a call from Dr. Pritchett's office because Dr. Pritchett had been asked to complete a form for ICBC.
- [9] A pain assessment form was provided by Dr. Pritchett in March 2016. The form was not completed for two months and even then it was done by the plaintiff's father not by the plaintiff.
- [10] Since November 2018, the plaintiff has been employed with a business referred to as VegPro. VegPro is in the business of packaging salads and the plaintiff's primary job is on the packaging production line. His tasks include dumping containers of lettuce onto a conveyor belt. At other times, he is responsible for putting inserts into boxes and also for stacking boxes on pallets. Sometimes when his back is bothering him after three hours or so of dumping lettuce, he advises his line supervisor who then switches him with another employee. He has been in this position for approximately 14 months and plans to remain with VegPro, hopefully moving into other and presumably better paying positions.
- [11] The plaintiff had an unimpressive work history in the years following the accident. He obtained but subsequently was terminated from a number of different jobs. The jobs could generally be described as entry-level and manual in nature.
- [12] The plaintiff was quite candid about his previous jobs and the fact that he was terminated from the majority of those he obtained before 2018. He did not try to blame his injuries or his former employers. His evidence regarding the various positions he held can be summarized as follows:
- a) he has never missed any time from work on account of his injuries;
 - b) he did not tell his employers of any functional restrictions; and
 - c) he has never quit a job on account of his injuries.
- [13] Prior to his current employment with VegPro, he worked for a summer at Swan Lake Holdings doing what was manual work at a retail store that sold fruits and vegetables and also plants, shrubs and trees. He started the position in March 2018 and left at the end of September as the job was seasonal and was for the summer only.

- [14] The plaintiff described his ongoing back pain. He has pain on most days when he is working. He has difficulty with some of the tasks at work, which include dumping lettuce onto a conveyor belt along with other tasks that involve reaching either high or low. He periodically experiences pain at night which affects his sleep. He can only play on the floor with his daughter and hold her and throw her up in the air for short periods when he has to stop.
- [15] He describes being unable to drive for long periods and recounted a driving trip to Alberta when he had to stop on two occasions on account of his back and that his fiancée had to drive the rest of the way.
- [16] His primary form of relief is what he described as a CBD cream, which is a cannabinoid derivative. He uses this on a regular basis.
- [17] Although the plaintiff was terminated from a number of jobs, he had not been terminated from any position within the last two years. He is a young man, still only 23 years of age. He is engaged to be married next year and has a young daughter. I am satisfied that with age and responsibility has come maturity. He now has a much better sense of how important it is to hold a job and what is required to accomplish some longevity and success in the workforce.
- [18] The plaintiff had one expert witness, a physiatrist, Dr. Tony Giantomaso. Dr. Giantomaso concluded, "However, based on his history as well as the available documentation, it's clear that he has continued to experience significant low back pain that has persisted post trauma".
- [19] Dr. Giantomaso was cross-examined about his use of the word 'significant'. Ultimately, this cross-examination was a largely semantic exercise. From Dr. Giantomaso's perspective, the term 'significant' means that it bothers a person regularly and changes the way they do things. Significant is not a synonym for serious from his perspective. He said that he does not believe that the injury is serious in that the plaintiff continues to perform his usual functions of life, including the fact that he has not missed any work. However, it is significant to the extent that it impacts him regularly.
- [20] I found the plaintiff to be a credible witness and I accept that he has back pain as he describes it.
- [21] I accept that he continues to have what he described as a sharp, tingly, stabbing feeling in his low back on multiple occasions per week, generally on days when he is at work. It affects his sleep, and also impacts on his time with his daughter.

The heads of damages claimed

[22] The plaintiff seeks damages for his pain and suffering, cost of future care and a loss of future earning capacity. The defendant does not deny that the back pain was caused by the accident, but questions its severity and says the plaintiff has failed to mitigate his losses. I will address the various heads of damage below.

Loss of future earning capacity

[23] The plaintiff should be put in the position he would have been in but for the injuries caused by the negligence of the defendant. The primary task of the court is to compare the likely future of the plaintiff's working life had the accident not occurred with the plaintiff's working life after the accident. There are generally two ways of assessing loss of earning capacity:

- a) earnings approach; or
- b) capital asset approach.

[24] The plaintiff concedes the earnings approach does not apply.

[25] The capital asset approach requires the court to consider the factors from *Brown v. Golaiy*, (unreported, Vancouver Registry No. B831458, December 13, 1985):

- a) the plaintiff has been rendered less capable overall from earning income from all types of employment;
- b) the plaintiff is less marketable or attractive as an employee to potential employers;
- c) the plaintiff has lost the ability to take advantage of all job opportunities which might otherwise have been open to him but for his injuries; and
- d) the plaintiff is less valuable to himself as a person capable of earning income in a competitive labour market.

The court's decision must be made based upon what is fair and reasonable in the circumstances and does not require a mathematical calculation: *Pololos v. Cinnamon-Lopez*, 2016 BCSC 81 at para. 133.

[26] In *Parker v. Lemmon*, 2012 BCSC 27 at para. 44, Justice Savage summarized the principles set out in *Perren v. Lalari*, 2010 BCCA 140:

- (1) A plaintiff must first prove there is a real and substantial possibility of a future event leading to an income loss before the Court will embark on an assessment of the loss;
- (2) A future or hypothetical possibility will be taken into consideration as long as it is a real and substantial possibility and not mere speculation;

- (3) A plaintiff may be able to prove that there is a substantial possibility of a future income loss despite having returned to his or her employment;
- (4) An inability to perform an occupation that is not a realistic alternative occupation is not proof of a future loss;
- (5) It is not the loss of earnings but rather the loss of earning capacity for which compensation must be made;
- (6) If the plaintiff discharges the burden of proof, then there must be quantification of that loss;
- (7) Two available methods of quantifying the loss are (a) an earnings approach or (b) a capital asset approach;
- (8) An earnings approach will be more useful when the loss is more easily measurable;
- (9) The capital asset approach will be more useful when the loss is not easily measurable.
- [27] The plaintiff has the burden of establishing a substantial possibility of a future loss, and a hypothetical possibility will not suffice.
- [28] The plaintiff says that his injuries affect his work and that he is limited in his ability to perform tasks that involve bending forward with weight in his hands, or bending down low. He also says that the evidence establishes physical limitations and there can be no question that he is less competitively employable when compared with candidates with full function.

Discussion

- [29] For the reasons that follow, I conclude that the plaintiff has not established a claim for loss of future income capacity because the plaintiff has not proven that there is a real and substantial possibility of a future income loss.
- [30] The plaintiff is now almost six years post-accident and he has not missed a day of work. He has not lost any employment as a result of his injuries. While the evidence establishes that the plaintiff suffers some back pain from time to time during the functions of his job, pain during work is compensated through a nonpecuniary damages claim but does not, without more, establish that there will be future economic consequences to the plaintiff as a result of his injury.
- [31] Further, the evidence of Dr. Giantomaso was that while an exercise program would not render the plaintiff free of symptoms, his function could greatly improve. The defendant in its submission on the issue of the cost of future care has offered to pay for an exercise program.

[32] Given the plaintiff's increased evolution from adolescence to a young man with a good work ethic and appreciation of his responsibilities, it is more likely than not that the plaintiff will derive some improved function if he pursues this option. I am not prepared to simply infer that the plaintiff will suffer a future loss of income when he has not had any loss over almost six years post-accident. This claim is dismissed.

Cost of future care

[33] This court in *Milina v. Bartsch*, [1985] BCJ No. 2762, outlined the often cited test to establish a claim for cost of future care at paras. 198-199:

[198] . . . The test for determining the appropriate award under the heading of cost of future care, it may be inferred, is an objective one based on medical evidence.

[199] These authorities establish (1) that there must be a medical justification for claims for cost of future care; and (2) that the claims must be reasonable. On the latter point, Dickson J. stated in *Andrews* at p. 586:

An award must be moderate, and fair to both parties . . . But, in a case like the present, where both courts have favoured a home environment, "reasonable" means reasonableness in what is to be provided in that home environment.

[34] The courts have held an opinion of a medical doctor is not required to constitute adequate medical justification, which may be provided through another treatment provider such as a physiotherapist or occupational therapist.

Discussion

[35] The defendant offered during closing submissions to pay for 16 to 24 chaperoned visits with a kinesiologist in accordance with the recommendations of Dr. Giantomaso. Pursuant to the ICBC rates under Part VII, the initial assessment session is funded in the amount of \$135, with all subsequent visits at \$75 per session.

[36] The primary area of contention with regard to the cost of future care is the plaintiff's claim for CBD cream. CBD cream is a cannabinoid derivative the plaintiff has been using and which he says provides him with some relief. The cost of the CBD cream is approximately \$40 per container; a container lasts approximately two or three weeks.

[37] There is no medical evidence before the court to confirm either the medical efficacy of cannabinoid cream, nor that it is medically necessary in this case. While the court may be able to take judicial notice of the likely benefits of certain traditional medications (e.g. ibuprofen), it would not be appropriate to take judicial notice of the medical benefits of a cannabinoid cream.

- [38] It is noteworthy that the plaintiff has been using the cannabinoid cream since before he met with Dr. Giantomaso; there is no mention of the CBD cream in Dr. Giantomaso's report and he was not asked to comment on its value, either in his report or during his evidence. I make no award for the cost of cannabinoid creams.
- [39] However, I accept that some future rehabilitation would be of benefit to the plaintiff. In his report, Dr. Giantomaso recommended 16 to 24 chaperoned core strengthening sessions followed by working out in a community gym, and the offer by the defendant accords with the recommendation. There would thus seem to be no dispute that this would be a good idea.
- [40] Because the plaintiff is seemingly reluctant to participate in an exercise program, even though it would also seem likely that he will enjoy some benefit, it is prudent to assume more sessions rather than less would be required. It is also likely that he will need to follow-up with regular exercise thereafter.
- [41] I assess cost of future care in the amount of \$5,000, which incorporates the ongoing need for some physical activity after completion of the strengthening program.

Special damages

- [42] The parties agreed to special damages in the amount of \$378 for physiotherapy charges and mileage.

Non-Pecuniary Damages

- [43] Non-pecuniary damages are awarded to compensate the plaintiff for pain, suffering, loss of enjoyment of life and loss of amenities. The compensation awarded should be fair to all parties, and fairness is measured against awards made in comparable cases. Such cases, though helpful, serve only as a rough guide because each case depends on its facts.
- [44] In *Stapley v. Hejslet*, 2006 BCCA 34, the Court of Appeal outlined the factors to be considered when assessing non-pecuniary damages at para. 46:
- [46] The inexhaustive list of common factors cited in *Boyd [v. Harris]*, 2004 BCCA 146 that influence an award of non-pecuniary damages includes:
- (a) age of the plaintiff;
 - (b) nature of the injury;
 - (c) severity and duration of pain;
 - (d) disability;
 - (e) emotional suffering; and
 - (f) loss or impairment of life;

I would add the following factors, although they may arguably be subsumed in the above list:

- (g) impairment of family, marital and social relationships;
- (h) impairment of physical and mental abilities;
- (i) loss of lifestyle; and
- (j) the plaintiff's stoicism (as a factor that should not, generally speaking, penalize the plaintiff: *Giang v. Clayton*, 2005 BCCA 54).

Positions of the parties

- [45] Both parties referred me to authorities to support their respective positions regarding the quantum of damages. The plaintiff refers to *Bergman v. Standen*, 2010 BCSC 1692; *Andrusko v. Alexander*, 2013 BCSC 985; and *Pett v. Pett*, 2008 BCSC 602. The defendant refers to *Rosso v. Balubal*, 2014 BCSC 1786; *Saunders v. Rempel*, 2019 BCSC 2177; and *Schoffield v. Jentsch*, 2012 BCSC 1130.
- [46] The defendant's cases indicate a range of \$20,000 to \$30,000 whereas the plaintiff's argue that \$70,000 is appropriate compensation.

Discussion

- [47] I have found that the plaintiff has ongoing lower back pain that will persist into the future. His initial injuries of pain in the cervical and thoracic area resolved shortly following the accident. I accept Dr. Giantomaso's evidence that the absence of significant symptoms immediately following the accident is not unusual or surprising, and the defendant concedes that the plaintiff's ongoing back pain was caused by the accident. The issue is the severity of the injury.
- [48] It is important not to place too much emphasis on comments found in individual clinical records as they often reflect perceptions of the person preparing the note and in the absence of clear evidence it is not possible to know what was asked or how it was answered. An example of the frailty of relying on clinical notes is found in Dr. Pritchett's record of March 3, 2016, which represented the plaintiff's first visit to his general practitioner in almost two years. One of the notes reads "the pain is not interfering with his work or social activities". One inference would be that he had relatively little difficulty with work. However, the evidence is that the plaintiff was not employed at the time. As such, he had no work to be affected.
- [49] I am satisfied that the pain is not continuous and is not daily. I conclude that it is frequent, especially when he is working. He is employed in a manual labouring job and I accept that will continue to be the case as he is not academically inclined.

- [50] Having reviewed the authorities provided by counsel, I have concluded that Mr. Jacobi's injuries play a more significant role in his daily life than was found to be the case in Saunders or Rosso. However, the authorities provided by the plaintiff involved more significant complaints, albeit the court did not accept that all symptoms were caused by the accident, and the impact of the injury on this plaintiff's activities of daily life are less than was the case in those authorities.
- [51] Taking into account the effect of the plaintiff's low back pain on his day-to-day life, I conclude that \$50,000 would be fair compensation under this head.

Duty to Mitigate

- [52] The defendant argues that the plaintiff has failed to mitigate his damages. The defendant bears the onus of proof when asserting a failure to mitigate. The principles with respect to the defendant's onus were set out in *Preston v. Kontzamanis*, 2015 BCSC 2219 at para. 106:
- [106] In *Power v. Carsell*, 2011 B.C.S.C. 1672 at para. 220, Gray, J. had occasion to expand on the principle expressed earlier by our Court of Appeal:
- The defence bears a heavy burden in establishing a reduction in damages on the basis of failure to mitigate. The applicable law is well-summarized in *Fox v. Danis*, 2005 BCSC 102 (CanLII), 2005 BCSC 102 at paras. 35-37, *aff'd* 2006 BCCA 324 (CanLII), 2006 BCCA 324.
- [35] There is no dispute that every plaintiff has a duty to mitigate his/her damages, and that the burden of proving a failure to fulfil that duty rests with the defendant, the standard of proof being the balance of probabilities: *Janiak v. Ippolito*, 1985 CanLII 62 (SCC), [1985] 1 S.C.R. 146.
- [36] In this case, the Defendant submits that the Plaintiff failed to mitigate her loss in that she failed to exercise as recommended by her family doctor.
- [37] To succeed in proving these submissions, the Defendants must establish, on the balance of probabilities, that the Plaintiff failed to undertake this recommended treatment; that by following the recommended treatment she could have overcome or could in the future overcome the problems; and that her refusal to take that treatment was unreasonable: *Janiak v. Ippolito*, *supra* and *Maslen v. Rubenstein* 1993 CanLII 2465 (BCCA), (1993), 83 B.C.L.R. (2d) 131 (C.A.).
- [53] I am satisfied that the defendant has established that the plaintiff has failed to mitigate his damages in this case because he has failed to follow advice from his doctors. The plaintiff received recommendations, both from Dr. Pritchett and from Dr. Giantomaso to engage in a strengthening program, but he has not done so. While he went to physiotherapy, he discontinued treatment.
- [54] Dr. Giantomaso made three recommendations, none of which were pursued:

- a) the active rehabilitation program;
- b) a vocational assessment; and
- c) medications for chronic back pain.

[55] The recommendation for an exercise program from Dr. Pritchett was in late 2016 and Dr. Giantomaso's report containing the same recommendation was made on May 4, 2018.

[56] While the plaintiff argues that he did not receive the advice to pursue an active rehabilitation program for some two and a half years at which point his condition had become chronic, there are a couple of flaws with that argument.

[57] First, even though Dr. Giantomaso did not see the plaintiff until almost four years after the accident, he was nonetheless of the opinion that a rehabilitation program would improve his function even if it would not be curative. In other words, it was the opinion of the plaintiff's only expert that he would derive a benefit from an exercise program even if he were to undertake it four years post-accident.

[58] Second, albeit less significantly, I infer that the only reason he did not receive advice earlier was because he elected to terminate his physiotherapy treatments and did not pursue any medical advice or treatment for almost two years. That was his choice.

[59] Because both of the medical practitioners, his family doctor and Dr. Giantomaso, were of the opinion that an active rehabilitation program would have provided some relief, the only conclusion is that it would have been of some benefit.

[60] The plaintiff's fiancée Ms. Brayforth testified that they do not have the money to pursue an aggressive active rehab program by way of a gym membership. She understands a family membership would cost approximately \$50 per month. However, they only pay \$300 per month in rent to the plaintiff's parents and although his income is not huge, it is likely sufficient to cover this cost if it were a priority. I observe the monthly cost of the CBD cream exceeds the cost of a family gym pass. Ultimately, I conclude that he has not pursued an exercise program because he simply has not wanted to do it.

[61] The question is whether the plaintiff is obligated to do so as a person with little or no interest in working out at a gym. However, in *Salzman (Guardian ad litem of) v. Bohmer*, 2009 BCSC 1586, Justice Melnick said:

[22] . . . That said, I note that no defendant should be required to pay for anyone's lack of interest in pursuing his or her own recovery. Ultimately we all bear a responsibility to do what we can to attain and maintain good health. In the legal realm, this constitutes mitigation, and a plaintiff bears a legal duty to mitigate.

[62] I accept Dr. Giantomaso's evidence that the plaintiff's function will improve but his symptoms will not be completely alleviated. I find that a ten percent deduction from the non-pecuniary damages award on account of the plaintiff's failure to mitigate his damages is appropriate.

Summary

[63] In summary, damages are awarded as follows:

Non-pecuniary damages:

\$50,000

Less 10% for failure to mitigate:

(5,000)

Special damages as agreed:

378

Cost of Future Care:

5,000

TOTAL:

\$50,378

Costs

[64] If the parties are unable to agree on costs, they may contact Supreme Court Scheduling within 14 days to arrange to speak to the issue.

"Wilson J."

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