

CANADA / JUDGMENT

Lee v. Fisher

2020 BCSC 1121

COURT

Supreme Court of British Columbia

DECIDED

6 April 2020

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2020 BCSC 1121 Lee v. Fisher

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Lee v. Fisher,

2020 BCSC 1121

Date: 20200406

Docket: M170614

Registry: Vancouver

Between:

Cody Robert Lee

Plaintiff

And

Allan Scott Fisher

Defendant

Before: The Honourable Mr. Justice Groves

Oral Reasons for Judgment

Counsel for the Plaintiff appearing by teleconference:

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K. Armstrong

M. Faulkner, A/S

Place and Date of Trial:

Vancouver, B.C.

January 6-10 and 13-15, 2020

Place and Date of Judgment:

Vancouver, B.C.

April 6, 2020

- [1] THE COURT: These reasons after trial concern a motor vehicle collision which occurred in February 2015, when the plaintiff, Cody Lee, was 26 years of age and three years into his career as a welder.
- [2] Mr. Lee was a backseat passenger in a vehicle owned and operated by the defendant, Allan Fisher. The vehicle driven by Mr. Fisher struck a Jeep vehicle on the road in front of the Mr. Fisher's vehicle, a Jeep that had apparently braked on the road for the purpose of avoiding another vehicle. Despite the plaintiff being a backseat passenger, liability for this accident is surprisingly in dispute.
- [3] Before I begin the substance of my reasons, it is, upon reflection, clear that although the parties dispute the extent of the claim in virtually every head of damage, it is of note and perhaps reassuring that two experienced lead counsel who conducted this matter, in their final submissions, do not appear to be significantly far apart on the monetization of any head of damage, save and except for the loss of future capacity claim.
- [4] As I did at the end of submissions, I wish to again thank counsel for the effective way they managed the evidence in this case, the courteous and complimentary way they dealt with each other, and the courteous way in which they dealt with the numerous inquiries of the court throughout the conduct of the trial. All parties in this litigation were ably represented by their chosen counsel.
- [5] The evidence in this trial consisted of the lay evidence of Mr. Lee, his wife, Amanda Lee, his employer, Dwaine Zemenchik, and the defendant, Mr. Fisher.
- [6] Additionally, the court heard from Dr. Michael Gilbert, an orthopedic surgeon who assessed Mr. Lee and conducted unfortunately an unsuccessful surgery on his area of significant damage and the source of his ongoing pain, his right hip.
- [7] Dr. Alan Berkman, an anaesthesiologist and pain medicine practitioner, conducted an assessment of Mr. Lee. His assessment focused on his levels of pain and possible treatment.

- [8] Dr. Darrell Jessop testified. He is Mr. Lee's family physician. He gave evidence about his continuous care of Mr. Lee and the various referrals he made as both a doctor and an advocate for Mr. Lee.
- [9] Dr. William Craig is a physical medicine and rehabilitation specialist who treated Mr. Lee. In his report, he commented on Mr. Lee's ability to continue to do the work he does.
- [10] The court also heard from Dr. Soma Ganesan, a psychiatrist, who described that at the time of his assessment, Mr. Lee was experiencing extreme anxiety and suffered severe depressive symptoms as a result of the injuries he suffered and the effect those injuries have had on him.
- [11] Finally, the court heard from Paul Pakulak, an occupational therapist, who conducted a functional capacity evaluation of Mr. Lee over the course of one full day's testing.
- [12] The evidence of Mr. Lee, his wife, and to a limited degree his employer, paint the picture of a happy, hardworking, and successful 26-year-old prior to the accident. Mr. Lee appears to be a person who throughout his life has worked very hard. This started first working for his parents in their corner store as a pre-teen, and then during his high school years and after with his parents in their lawn mowing and landscaping business.
- [13] In 2009, through an introduction by a family member's friend, Mr. Lee began working as an employee of Mr. Zemenchik at a company which constructs large buildings made primarily of welded steel frames. This company, which subsequently became Concord Erectors, is Mr. Lee's current employer. He started as a labourer, but eventually upgraded his skills to become a welder. He completed his welding program successfully and quickly. It was a certificate program that he undertook at BCIT. By early 2012, he was employed full-time as a welder and worked, when it was available, a significant amount of overtime.
- [14] Mr. Lee's evidence and that of his wife is consistent that prior to the collision, he was a very involved husband and father with their then one child. He would work a long day and still come home and attend to the needs of his family, attend to his share of housekeeping responsibilities, including cleaning and cooking, and he would spend time with his wife and son, including activities both inside and outside their home, at the park and the like, playing soccer and various other activities. He was actively involved in a number of outdoor sports as well, activities which he enjoyed and excelled at.
- [15] He was a good, though not perfect, employee. He seemed bright and he was skilled at what he did, and he was prepared to work hard. He was being driven with his co-worker, Mr. Fisher, when the accident occurred.
- [16] Prior to the accident, as a result of the death of a close friend in a workplace accident, Mr. Lee suffered modestly from depression. The treatment for that was medication only. Mr. Lee's evidence was that he had a plan to get off his depression-related medication around the time of his accident. This may or may not have been the case as the evidence played out.

- [17] In 2014, he suffered a workplace accident involving some damage to his knee. As a result, his income was substantially reduced because for a four-month period of time he was on Workers' Compensation. The evidence is that he had fully recovered from this injury, was back to work full-time, apparently without significant workplace accommodation, at the time of the collision.
- [18] It is clear from the evidence as a whole that Mr. Lee very much enjoyed his work as a welder. He testified as to a potential desire to earn substantially more money by working up north on pipelines as a welder. He clearly had the intention to remain a welder for the balance of his working career.
- [19] Both Mr. Lee and his employer, Mr. Zemenchik, describe his work as being physically demanding. Mr. Lee estimated that the weight of his safety gear alone, that he is required to wear on the job, is in excess of 50 pounds. He described activities of lifting, reaching, climbing stairs or ladders, moving heavy equipment, and physically exerting oneself to hold large pieces of steel in place while the welding proceeded. At the beginning of projects, trucks of steel and other materials are unloaded at the project site and the entire crew, including Mr. Lee, is involved in the lifting, carrying, squatting, and sideways up-and-down motions to set out the supplies for the project. His employer has only been able to provide modest accommodation to Mr. Lee. His job was and is clearly a very physically demanding job.
- [20] Prior to the accident, absent the bout of depression, Mr. Lee appeared to be in excellent health. He enjoyed time with his young son, as noted, playing soccer. He was involved in his own recreational pursuits, including martial arts. He was able, with his son on his back, to hike a local hiking trail known as "The Chief", a mountain in Squamish. At one point in his life, he considered a career with the RCMP and testified that in the physical obstacle course that was a requirement for consideration in that job, he finished with the second fastest time in his group, second only to a former U.S. marine.
- [21] From his testimony and that of his wife, it was clear that prior to the accident, Mr. Lee saw himself and prided himself on being a good provider for his family. This included not only financially, but in terms of responsibilities in the home. He did his fair share of household tasks. He spent his fair share of time with his then child and now children, despite working hard with sometimes longer than normal days.
- [22] Much of this has now changed, and I find changed dramatically, as a result of the motor vehicle collision. In terms of the collision, Mr. Lee, as noted, was a backseat passenger in a vehicle driven by Mr. Fisher. His seatbelt was on. It is not disputed by either Mr. Lee or Mr. Fisher that a vehicle in front of the vehicle driven by Mr. Fisher braked suddenly, and perhaps started to slide. The plaintiff says he saw this and braced his right foot against the back base of the driver's seat. The vehicle driven by Mr. Fisher collided with the Jeep in front of it. The impact was at approximately 40 kilometres an hour.

- [23] After the accident, those in Mr. Fisher's vehicle, including Mr. Lee, were picked up by others and continued to the worksite. He worked a full day, but by the end of the day felt stiff and sore.
- [24] There were numerous injuries resulting from the accident. These include back and shoulder pain, most likely of a soft tissue nature, as well as headaches. Mr. Lee testified that with some massage therapy and chiropractic treatments those injuries resolved themselves within a few months and are currently not symptomatic.
- [25] His main injuries resulting from the collision are an injury to his right hip and an exasperation, I find, of previous depression and anxiety for which he was receiving medication at the time of the accident. On that point, Mr. Lee testified and seemed sincere in his belief that he was close to recovering from depression and that he hoped to wean himself off medication. I do not doubt that in his own mind he had hoped for that and planned to get off the medication prescribed for his earlier depression.
- [26] As a result of the accident, as a result of ongoing pain and discomfort, as a result of perhaps Mr. Lee no longer seeing himself as the invincible and capable breadwinner for his family, and it appears as a result of Mr. Lee not being able to fulfil his role as the provider he once was, but also as the partner to his wife and the active dad and playmate for his now children, Mr. Lee has continued to suffer from depression and has sought treatment for that.
- [27] The hip problem is clearly the most significant injury. He described the hip injury as being pain in the deep side of his right hip. He described his hip as giving way once a month or thereabouts since the injury. He describes a clicking and grinding sound when his legs are in certain positions. He described how the pain from his hip is always noticeable, and that to date he has been able to work through the pain as he was required to in order to meet his family's financial needs.
- [28] Mr. Lee has been fortunate to have a strong advocate in Dr. Jessop. Dr. Jessop referred him initially to Dr. Patel, then to Dr. Kim, and eventually to Dr. Gilbert. These are all orthopedic surgeons. Dr. Gilbert's treatment started with diagnostic injections and eventually, on May 20, 2016, Mr. Lee underwent surgery by Dr. Gilbert. The surgery was described as a right hip arthroscopy. The surgery initially appeared to be successful, but in August 2016, after a day at the PNE, Mr. Lee's hip gave out and the problematic pain and injury from the accident returned and to date has not abated.
- [29] Unfortunately, with this physical setback, there has also been an emotional setback when it became apparent to Mr. Lee, it seems, that there was not a surgical option for him that would fix the constant pain he had in his hip. He was seeing a counsellor and had his anti-depressive medications increased, which seemed to help. It is important to note that Mr. Lee has been vigorous in pursuing, with the assistance of Dr. Jessop, any and all options for relief and potential recovery. He has been told by various orthopedic surgeons that he has attended with that he is too young to be considered for the surgical option of a hip replacement, which appears to be the only surgical option available to him.

- [30] In addition to this chronic and continuous pain, it appears that the depressive symptoms have been made substantially worse by the collision and the consequences of it. They have had a profound effect on Mr. Lee. One cannot help but be concerned about his plight and his ability to cope with the pain and the impact the accident has had on his life. He admitted in his evidence that at one point he resorted to putting Bailey's liqueur in his coffee in the morning to assist with the pain. He soon realized that this was inappropriate.
- [31] He drives to work much earlier than is required to avoid traffic and the associated driving anxiety that comes with heavy traffic. While doing so, he reported in his evidence that he smokes with a high level of gusto, so to speak, to try to calm himself down.
- [32] Additional stressors in his life include his almost 1950s obsession with being the man of the house, the financial provider. Additionally, and in this regard in a very non-1950s way, he also feels a loss by not being able to be active with his kids, to help around the house with his share of domestic chores. His inability to do any of these things and his concern about finances appears to weigh heavily on Mr. Lee. Although he has been able to contribute, while working through pain, to the financial benefit of his family, he clearly sees, and it is no doubt the case, in my view, that his ability to continue at this pace is not something that will happen as he ages.
- [33] He very much enjoys working as a welder and does not see himself fit for anything other than a physical trade. He commented in his evidence that there are less physically demanding jobs as a welder, but rather than the \$32 an hour he is able to earn in his current job, those pay in the range of \$18 an hour.
- [34] Dr. Berkman confirmed persistent hip pain and that Mr. Lee presented in October of 2018, when he was assessed, with moderately severe depressive symptoms. Dr. Berkman provided a number of pain alleviation or modification treatments which will later be discussed in the area of future cost of care.
- [35] Dr. Craig, the physical medicine and rehabilitation specialist, commented that he expected Mr. Lee to have the physical capacity to work in his current occupation only over the next three to five years because of both his physical condition and his mood. If treatment did not improve both, then Dr. Craig was of the opinion that welding jobs that were less physically demanding, without lifting and carrying, might be more appropriate for Mr. Lee.
- [36] Dr. Ganesan conducted an assessment of Mr. Lee on February 21, 2018. He described his then condition around the time of Mr. Lee facing the reality that there was likely nothing further to be done for him to repair his hip as showing extreme symptoms of anxiety and severe depression. He recommended several years to life on depression modification medication. Thankfully, since this diagnosis in February 2018, and as noted earlier, Mr. Lee saw Dr. Berkman in October 2018. Dr. Berkman's report, on any reading of it, noted improvement. He noted only moderate anxiety and moderately severe state of depression which, as noted, is an improvement over his condition when he saw Dr. Ganesan. There was a recommendation from Dr. Ganesan of 20 to 25 sessions of cognitive behaviour therapy.

[37] Having summarized that evidence, I now turn to the issues, starting with liability.

Liability

[38] As noted earlier, the issue of liability I find surprisingly needs to be resolved. The plaintiff was a backseat passenger in a vehicle driven by the defendant. The defendant was a driver who struck a vehicle in front of him when he was unable to safely brake in time as a result of the braking of that first vehicle. Absent the rare circumstances of a plaintiff interfering directly with the defendant's ability to drive, or even the more rare circumstances I noted during the trial of the potential of a backseat passenger distracting the driver, the example used of "releasing a jar of bees", there is virtually no circumstances where a driver of a motor vehicle is not responsible for the injuries suffered by a passenger when he drives and causes an accident.

[39] The position advanced in the defendant's closing submissions is interesting on the issue of liability. They have said, "the defendant has denied he is negligent for the collision", "the defendant is not denying causation for the injuries suffered by the plaintiff", "the defendant holds the plaintiff to strict proof of the defendant's negligence in this matter."

[40] I find on the evidence that Mr. Fisher is 100% responsible for the collision. Mr. Mr. Fisher admitted that he was driving a vehicle and, in driving a vehicle, following a Jeep. The Jeep stopped in front of him and he collided with the Jeep. When asked at discovery if he had simply not left enough space to stop while following the Jeep, he was somewhat equivocal but eventually said yes. I am satisfied that Mr. Fisher was following too close to maintain a safe stopping distance when he collided with the Jeep vehicle in front of him on February 5, 2015. He caused the accident. He is liable for the injuries suffered by the plaintiff.

Non-Pecuniary Loss

[41] Counsel for the plaintiff and defendant in this action are not all that far apart in the range of damage they encourage the court to award for non-pecuniary loss. The plaintiff suggests damages in the range of \$100,000 to \$140,000, and the defendant, in their submission, suggests non-pecuniary damages between \$85,000 and \$95,000.

[42] The law in regard to non-pecuniary damages is one of the most explained areas of the law in judgments of this court. That being said, a summary of the law for the purpose of these reasons is important. I am drawn to the decision cited by the plaintiff, not argued as inappropriate by the defendant, of my sister justice, Madam Justice Forth in *Slater v. Gorden*, 2017 BCSC 2265, specifically paras. 69-73:

[69] A plaintiff is entitled to reasonable damages for her pain and suffering. The plaintiff should be placed in the same position she would have been if the accident had not occurred, but not in a better position: *Parypa v. Wickware*, 1999 BCCA 88 at para. 29.

- [70] 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. Each case depends on its own unique facts: *Trites v. Penner*, 2010 BCSC 882 at paras. 188-189.
- [71] 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).
- [72] The assessment of non-pecuniary damages is necessarily influenced by the individual plaintiff's personal experiences in dealing with his or her injuries and their consequences, and the plaintiff's ability to articulate those experiences: *Dilello v. Montgomery*, 2005 BCCA 56 at para. 25.
- [73] The correct approach to assessing injuries that depend on subjective reports of pain was discussed in *Price v. Kostyba* (1982), 70 B.C.L.R. 397 (S.C.) by McEachern C.J.S.C. (recently quoted with approval in *Edmondson v. Payer*, 2012 BCCA 114 at para. 2). In referring to an earlier decision, his Lordship said:

In *Butler v. Blaylock*, [[1981] B.C.J. No. 31] decided 7th October 1981, Vancouver No. B781505, I referred to counsel's argument that a defendant is often at the mercy of a plaintiff in actions for damages for personal injuries because complaints of pain cannot easily be disproved. I then said:

I am not stating any new principle when I say that the court should be exceedingly careful when there is little or no objective evidence of continuing injury and when complaints of pain persist for long periods extending beyond the normal or usual recovery.

An injured person is entitled to be fully and properly compensated for any injury or disability caused by a wrongdoer. But no one can expect his fellow citizen or citizens to compensate him in absence of convincing evidence - which could be just his own evidence if the surrounding circumstances are consistent - that his complaints of pain are true reflections of a continuing injury.

[43] A number of authorities provided by both sets of counsel are helpful in informing the court of the correct amount to award in the area of non-pecuniary loss.

Flores v. Burrows, 2018 BCSC 334

[44] This case involves a plaintiff who was slightly older than Mr. Lee; 36 not 31. He suffered soft-tissue injuries in his neck and back, as well as a labral tear, similar injuries to Mr. Lee. In Flores, the plaintiff did not miss time from work, but adjusted his work schedule and his recreational activities to avoid tasks such as lifting and heavier household tasks. Like Mr. Lee, this plaintiff worked through his pain with modifications. Like Mr. Lee, the injuries affected his role as a father and had an emotional impact on him because of his inability to be the father he wanted to be to his children. Unlike Mr. Lee, he had not had an unsuccessful surgery, but faced the prospect of surgery in the future.

[45] The case, on balance, suggests to me less impact on work, on my reading, than there was on Mr. Lee and less stress associated with continuing to work. The award of damages was \$115,000.

Raptis v. Chalabiani, 2017 BCSC 1548

[46] This case involved a 37-year-old teacher and mother of two who suffered soft-tissue injuries, lower back pain, groin pain, and a lateral hip pain as a result of the motor vehicle accident. She underwent arthroscopy surgery, as did Mr. Lee, but it failed to improve her pain; similar circumstances to Mr. Lee. She also had a relapse of pre-existing depression and anxiety, a circumstance somewhat similar to Mr. Lee. Like Mr. Lee, she lost her ability to be pain-free. Non-pecuniary damages adjusted for inflation were awarded at \$99,000.

[47] Again, in this case, in my view, there is not as much impact on this plaintiff, a teacher, as it relates to her work and the struggles associated with work and the pain levels while doing her job.

McCann v. Anderson, 2019 BCSC 245

- [48] This case involved a 58-year-old journeyman steel fabricator, an occupation similar to that of Mr. Lee. Like Mr. Lee, he suffered soft-tissue injuries which resolved relatively quickly, but was left with a significant hip impairment. He was off work for a year and a half. He went through several levels of investigation and different modalities for treatment. For a period of time, he worked but regularly took time off work to deal with the symptoms of his pain. Eventually he returned to work full-time but did so in a lower paying fabricator's position. General damages were awarded at \$95,000.
- [49] Mr. Lee is substantially younger than the plaintiff in the McCann case, though it is the case that perhaps is the closest comparator in terms of job occupations. Mr. Lee appears to be more stoic than Mr. McCann, but then again Mr. Lee is a much younger man and stoicism can be related to that. Simply put, when you are younger and stronger, you are more able to deal with the pain associated with exertion, but equally true, and again simply put, younger persons will have to endure substantially more pain during their lifetime as a result of injury than would an older gentleman.
- [50] In terms of age and effect on daily life, Flores is most closely related in terms of injury and age, and with no disrespect intended to accountants, the pain suffered by Mr. Lee and his stoic efforts to remain employed and support his family are more pronounced because of the physical nature of Mr. Lee's work than would be the pain associated with work experienced by Mr. Flores. Mr. Flores additionally was able to extend his work days and take numerous breaks for stretching to limit his pain, a circumstance that is not open to Mr. Lee.
- [51] Having noted earlier in my reasons the facts that I do and the significant impact that this injury has had on Mr. Lee, noting his age, 31, and noting that there is no prospect for pain relief for Mr. Lee, that was apparent on the evidence, Mr. Lee will no doubt have to spend the rest of his life with pain associated with this accident. Considering that and the cases that I have noted, I assess non-pecuniary loss for Mr. Lee at \$120,000.

Loss of housekeeping

- [52] Noting that this is a separate head of damage, counsel for Mr. Lee has directed the court to the evidence of Mr. Pakulak and the evidence of the plaintiff to support his claim. After conducting the functional capacity testing, Mr. Pakulak opines in part that the plaintiff has limitations on the more physical demands of household chores. This difficulty is associated primarily with increased symptoms of pain related to his exertion at work. He says further:

If he were to own a [home] or have the demands of yardwork or home maintenance as his primary responsibilities, I would anticipate that he would experience increased difficulties with heavier tasks.

- [53] As for the evidence of the plaintiff, it is uncontradicted evidence that prior to the injuries suffered in the accident, he was able to assist significantly in the area of household activities, including regular preparation of meals, regular cleaning, and maintenance of his home. This evidence was confirmed by his wife. Additionally, the plaintiff commented that he ultimately would like to own his own home, rather than the townhouse which they currently reside in.
- [54] Since the accident and since his injuries, his contributions to his home, both to meal preparation and to maintenance of the home by cleaning and generally, have been modest to non-existent. I am satisfied that the plaintiff has proven a current loss of housekeeping. However, a loss of a future ability in the event an actual home with yard and maintenance requirements is purchased is at this point only speculative.
- [55] I would assess damages for traditional loss of housekeeping capacity at \$7,500.

Special Damages

- [56] Somewhat surprisingly, counsel were not able to agree on the extent of special damages. They have agreed on the sum of \$5,711.17 representing physiotherapy costs, chiropractic costs, mileage charges, prescription costs, and the cost of a cane. Counsel for the defence disputes the claim for counselling treatment at Pitt Meadows Wellness totalling \$1,365, Free To Be Counselling costs of \$504, prescription costs for antidepressants in the amount of \$1,428.26, and a consult with Dr. Duncan, an orthopedic surgeon of \$550.
- [57] In regards to those disputed items, it is of note to me, and I will deal with this later, that the defence has raised the issue of failure to mitigate damages, yet they appear to dispute the necessity of counselling which is recommended by many of the treating professionals. They dispute his private consult with the orthopedic surgeon, Dr. Duncan, in regards to trying to get a second or perhaps third opinion as to a possible remedy for his ongoing hip problems.
- [58] It is clear to me that the plaintiff continues to suffer some emotional trauma or damage as a result of the car accident and the lingering effects of his injuries. Seeking counselling is a responsible thing for him to do and it is a cost that he has incurred. Seeking a second opinion in regard to an orthopedic fix for his lingering hip problem is a reasonable option for him to explore. These claims are reasonable. They are claims related to injuries suffered in the accident. I would allow those claims.
- [59] In regards to the medication for his depression, I note that there was a pre-existing problem, but there is evidence of a desire and a personal plan to wean himself off depression-related medication. But for the accident, this may very well have happened, although the evidence is not clear. Mr. Lee says he has a plan and I believe him, but he had yet to have fully discussed with his doctor this plan.
- [60] I would allow one-half of the cost related to depression medication as being related to the injuries suffered in the collision, or a total of \$714.13.

- [61] Finally, the plaintiff gave evidence that he has been able to get by on managing his pain by using Robax Platinum, an over-the-counter drug product claiming to be of special benefit for this type of pain. He is using this, it appears, rather than a gabapentin-type of pain relief that has been recommended by some treating doctors. He estimates this cost as \$600 a year, but I note that is just an estimate. He has been taking this medication regularly for approximately five years from the date of the accident to the date of trial. I would allow as a special damage a claim of \$2,500 for Robax Platinum.
- [62] By my math, having reduced the claim to one-half of the cost of anti-depressants and having added in the cost allowed above for Robax Platinum, the total special damages are \$11,344.30. I would allow that claim.

Past Wage Loss

- [63] The parties in exhibit 1 of the agreed statement of facts agreed on the T4 income for Mr. Lee from 2012 through 2018, and for the partial year of 2019 to December 15 of that year. They also agreed on Mr. Lee's yearly applicable hourly rate of pay.
- [64] Before the court is the report of Darren Benning, an economist, of PETA Consultants in regards to past and future losses of employment income. Mr. Benning testified at trial about his assumptions and calculations and, for the most part, these were not significantly challenged. In closing submission, counsel for the plaintiff conducted a calculation based on the additions and concessions of Mr. Benning's report noted in his evidence at trial, and has estimated the net loss for Mr. Lee of \$18,857. Counsel for the defendant has suggested a net rounded figure of 18,000 for past wage loss. Again not a huge variation.
- [65] One of the principles associated with the calculation of past wage loss, which is a principle supported by the evidence at trial, is that because of the injuries suffered in this collision, Mr. Lee was not able to earn the overtime he had been able to earn prior to the collision because of the persistent pain in his hip and the fact that after a full day, he had nothing left to give.
- [66] In the three years leading up to the collision, Mr. Lee earned slightly over \$4,800 a year on average in overtime. From the collision to the trial, the average was less than \$1,000 a year. A consideration of that formed part of the calculation of Mr. Benning, as did his lost time of work recovering from the injury or treatment or surgery.
- [67] The evidence was that prior to trial, he took most, if not all, of the overtime offered. After the accident, he rarely did and he regularly turned it down. That was evidence of both Mr. Lee and Mr. Zemenchik.

- [68] I am satisfied that the best evidence available on past wage loss is the report of Mr. Benning. The calculations advanced by the plaintiff are consistent with his report and with his admission at trial that he has modestly under-estimated Mr. Lee's income for 2019 and has modestly over-estimated his income for the few days of 2020, the trial having commenced on January 6, 2020.
- [69] With those adjustments, the net loss is \$18,857. I accept that as a net loss for past wage loss and would award that to the plaintiff as a damage resulting from the collision.

Loss of Future Capacity or Loss of Opportunity

- [70] As is often the case, the loss of future earning capacity or loss of future opportunity is the most contentious issue between parties in litigation. Any analysis of any loss of future opportunity is, by its nature, speculative and the court must grant an award after an assessment of an individual's prospects for the future and the employment opportunities for the injured plaintiff related to the injuries suffered in the accident and the effect those injuries may have on this plaintiff's future.
- [71] Mr. Lee's work future is a very long prospect. As noted earlier in these reasons, he is a hardworking individual who has always prided himself on working hard to provide for his family. He was 26 when he was injured and he is currently 31 years of age. The court is asked in the loss of future opportunity head of damage to look as best it can at the evidence as to what the future holds for Mr. Lee and compensate him fairly for what loss he will likely suffer economically. What do the injuries and the limitations he is left with after the accident mean for his future economic abilities?
- [72] Mr. Lee does not strike me as someone inclined or able to pursue an academic career. No disrespect is intended in that regards to Mr. Lee. He struck me as a hardworking person who has always relied on his physical strength and capacity to support himself, his family, and to earn income. He took a job as a welder, a job that involves physical exertion, and particularly as it relates to his employer, significant physical exertion in the welding work that he and his employer are engaged in.
- [73] As noted earlier, this involves climbing, heavy lifting, carrying personal safety equipment, as well as materials, up stairs and up ladders, and using one's physical acumen to move heavy pieces of steel into place and then weld them. The job, as described to the court, is seemingly no easy task and it is, in fact, physically exerting and demanding. I have been convinced by the medical evidence and by the evidence of Mr. Lee that this job is something that he can maybe do for another five years, but by that time when he is likely in his mid-30s, it is more likely than not that he will no longer be able to have the physical capacity to do the job he is doing in a successful manner. That was confirmed by Dr. Craig. That certainly was generally the consensus of the evidence before me.

- [74] Mr. Lee's current income as a welder is \$32 an hour. He testified as to his knowledge of the welding business and the fact that a welder involved in a less physically-exerting work environment, perhaps a welder who works on a line or one who is able to take breaks and who can stretch, one who does not have to climb or carry heavy materials but works in a more stationary position, perhaps in a shop somewhere, would be earning \$18 an hour. The description of that work is the description of work that Dr. Craig viewed Mr. Lee to be capable of when his ability to do his current job ends.
- [75] Eighteen dollars an hour is an approximate reduction of 44% of Mr. Lee's income. According to Mr. Benning's report, a 40% loss of future capacity monetized at trial to retirement, by my reading of the report, is \$603,343. The 44% would, of course, be slightly in excess of that, but I note that it is not likely required for three to five years.
- [76] That being said, Mr. Lee is a young man and one cannot adequately predict the next six months, never mind the next 30 years of employment. Contingencies have to be applied. Positive contingencies would be that if Mr. Lee had not been injured, he perhaps could have undertaken his dream job of working on a northern pipeline as some sort of independent contractor with his own welding truck and, in doing so, his evidence is that he could have earned in excess of what he is earning from his current employer. That is a positive contingency.
- [77] Negative contingencies are also there and numerous. One has to consider that Mr. Lee may find something he is capable of doing without pain associated with his current heavy work, thus leaving his current employment perhaps without a significant drop in income. He could lose his job when there is a significant economic downturn and, over the course of 30 years, there might be considerable periods of economic downturn. One simply does not know.
- [78] Notably, I may be pessimistic about his ability to struggle through pain and continue to earn the income he does. That notion is, however, contrary to the expert opinion before the court, but is still a possibility to which a contingency must be at play.
- [79] I note as well, while not punishing his stoicism, Mr. Lee has always been a hard worker. He seems intelligent, perhaps not academically, but intelligent nonetheless, driven, and these are all positive things for a person in his position.
- [80] All that being said, I conclude that it is more likely than not that at some point in the not too distant future, Mr. Lee will have to leave his current employment as a welder and his option appears to be to accept a lower-paying welding position earning him substantially less than what he is able to earn now. How much less is perhaps uncertain. I am satisfied, however, that his current employment circumstances will not likely continue past five years and that will be a major economic disruption for him for the rest of his life, and it is not unreasonable to assume that his income will drop substantially.

[81] Noting that this head of damage is an assessment and not a calculation, in all the circumstances, in my view, a fair assessment of the loss of future opportunity for Mr. Lee is \$450,000 and I make that award.

Cost of Future Care

[82] There are a number of requests in this litigation related to costs of future care. There is no extensive cost of future care actuarial or expert report, nor is it in the circumstances, in my view, necessary for this litigation, as the claims for cost of future care are modest.

[83] An award for future care must be based on the evidence and must be based on the principle that the care is not of medical necessity, but rather that the care is medically justified on the evidence.

[84] Counsel for the plaintiff in their closing submissions pointed to *Kallstrom v. Yip*, 2016 BCSC 829, where Mr. Justice Kent wrote:

[429] The principles applicable to the assessment of claims and awards for the cost of future care might be summarized as follows:

- the purpose of any award is to provide physical arrangement for assistance, equipment and facilities directly related to the injuries;
- the focus is on the injuries of the innocent party . . . Fairness to the other party is achieved by ensuring that the items claimed are legitimate and justifiable;
- the test for determining the appropriate award is an objective one based on medical evidence;
- there must be: (1) a medical justification for the items claimed; and (2) the claim must be reasonable;
- the concept of "medical justification" is not the same, or as narrow as, "medically necessary";

[85] I stop there to note that the last bullet point related to the decision of Mr. Justice Kent that is applicable in my analysis today is as follows:

- no award is appropriate for expenses that the plaintiff would have incurred in any event.

[86] Turning to the claim, there are a number of costs claimed, in my view medically justified, that are costs which will be ongoing for a substantial period of time, if not for life. Additionally, there are a number of one-time or short-term costs that can be costed in current dollars as they are more likely than not to be paid in the near future and not incurred long-term.

[87] In regards to all the costs I am awarding in the area of cost of future care and, as I will note below, there is medical justification in the evidence.

- [88] In summary, it is the position of the defendant that the sum of \$5,000 is an appropriate award for cost of future care. They advance this argument based on their belief that the treatment requirements in the future for the plaintiff will be pain management counselling or general counselling due to the accident-related pain, but not counselling for a generalized anxiety disorder which they felt and argued pre-existed the accident.
- [89] They agreed that there should be some amount of money for physiotherapy or kinesiology to assist the plaintiff in enhancing his core and providing a proper strengthening exercise regime, as well as other recommended treatments should the plaintiff decide to pursue them.
- [90] In regards to the various recommendations and the claims advanced by the plaintiff, I find that the plaintiff has established on the evidence the need for a cost of future care award in the following areas:
1. Viscosupplementation; this would be injections into his hip. They are recommended by Dr. Gilbert and Dr. Craig. The cost is apparently \$500 per session. A number of sessions would be required, which I estimate at six, for a total cost of \$3,000.
 2. Dr. Ganesan and Dr. Berkman have recommended psychological treatment. The cost is estimated at \$200 an hour, for 20 to 25 sessions is thought appropriate by Dr. Ganesan. I would allow this cognitive behavioural treatment as recommended at an expense of \$4,500.
 3. A pain management coach is recommended by Dr. Berkman. As I understand this recommendation, the point is to have the plaintiff meet with a professional to assist him in managing his pain and employing various techniques to work through pain and limit its effect. Dr. Berkman has recommended five sessions at \$500 per session, for a total of \$2,500. I find that to be a medically justified expense.
 4. Dr. Berkman recommended kinesiology at \$150 per session. Four sessions, in my view, would be appropriate for the plaintiff to learn the necessary skills to effectively exercise, strengthen, stretch, rather, and employ various techniques to reduce his pain or to assist him in managing his pain. That cost would be \$600 and I find that to be a medically justified expense.
- [91] Those four expenses which I am costing as immediate expenses, because they can be incurred in the short period, total \$10,600.
- [92] In addition to those expenses, I note the evidence before me that the plaintiff purchases anti-depressants at an annualized cost of \$188.76. The continuation of this anti-depression regime is recommended by Dr. Ganesan. Keeping in mind the words of Mr. Justice Kent that no award is appropriate for expenses the plaintiff would have incurred in any event, and noting as I did under special expenses that, in my view, approximately one-half of the cost of anti-depressants was related to the injuries suffered in the accident, I would allow half of the annual expense for anti-depressants, or a total of approximately \$95 annually.

- [93] Physiotherapy is recommended by Dr. Gilbert and Dr. Berkman. The cost is \$65 a session. Six sessions per year would have an annual cost of \$390. I would allow that as a reasonable cost of physiotherapy sessions and it would appear every two months might be sufficient to assist the plaintiff in dealing with his ongoing pain as a result of the collision.
- [94] As earlier noted, the plaintiff regularly purchased Robax Platinum for providing alleviation of his pain. This appears to be a substitute for perhaps stronger prescribed pain drugs, such as gabapentin, that Dr. Ganesan has recommended. The cost of Robax Platinum incurred by the plaintiff I have earlier determined to be about \$500 a year and that is a modest cost, medically justified in dealing with his pain symptoms resulting from the collision.
- [95] These three ongoing costs -- half the cost of anti-depressants, six physiotherapy sessions a year, and the purchase of Robax Platinum -- are all expenses which are not only medically justified, but are expenses which will be ongoing annually potentially for the rest of Mr. Lee's life. It is clear to me that this type of cost is going to be incurred for decades by this plaintiff. It may be the case that gabapentin is eventually substituted for Robax Platinum, or it may be the case that the physiotherapy is substituted by massage or chiropractic. Additionally, Mr. Lee may follow up with his doctor's recommendation as to an extensive vitamin regime that would assist him in conducting his activities of daily living. That would be an ongoing long-term expense as well.
- [96] With all those matters being considered, and noting that this is an assessment as opposed to a strict mathematical calculation, for yearly costs to maintain required items necessary for his physical and mental good health going into the future resulting from the accident, I would grant a further cost of future care award for all these areas discussed as ongoing expenses, expenses incurred annually, for in the foreseeable future, if not forever, at \$30,000.
- [97] As a result of those determinations then, the total cost of future care is \$40,600 and I make that award.

Mitigation

- [98] It is the position of the defendant in this litigation that the plaintiff has failed to mitigate his damages by failing to follow recommendations of various doctors for various courses of treatment which may have alleviated his pain or enhanced his ability to work.
- [99] In any mitigation argument, the onus is on the defendant to prove that the plaintiff could have avoided some or all of his losses had he pursued medically recommended treatment. The medically recommended treatment includes the recommendations of Dr. Craig and Dr. Gilbert as to viscosupplementation injections. It is thought that this would assist in alleviating his hip pain. Dr. Craig, Dr. Berkman and Dr. Gilbert recommended various nuances in the area of exercise, including additional movement or aerobic exercise or wobble board exercise or structured home exercise or specific strengthening through exercising of his hip flexor. Additionally, as noted above, Dr. Berkman recommended

vitamins, perhaps a trial of gabapentin, pain management coaching and a nutrition program.

- [100] None of these recommendations are in any way curative of the plaintiff's condition. They are recommendations perhaps made with a sense of desperation to try to assist the plaintiff in managing his pain.
- [101] In regards to mitigation generally, I note the plaintiff's evidence that he was and is very concerned about working in order to support his family and that the work he does is physically demanding. He did not take much time off work as a result of these injuries. He seems driven in regards to performing his work activities to the best of his ability so as to financially support his family. He testified, believably, that the work, the strain and the physical exertion associated with his work takes its toll on him physically, such that after work he is not able to do much of anything.
- [102] I do not think it is fair to criticize this individual nor to punish him monetarily for striving to support his family. He was significantly injured in the collision. He stated, and I accept, that as a result of the injuries of the accident, he could maintain his level of work but that was all he could do. He was not able to take time off work for such things as recommended physiotherapy or various treatment programs, many of which were a considerable distance from his home. He was not able to exercise because at the end of the day he was physically exhausted from simply working. Finally, I note that his wage loss is modest and in fact reflects primarily the loss of overtime and the few days he did take off work, most notably for the failed surgery. In that sense, his failure to mitigate, if it could be established, did not cause a loss per se. He was able to work. There is no suggestion that if these activities had been undertaken by him, he would be pain free. They may at best only modify his pain slightly and make his pain more endurable. He would still have to endure, however, the pain.
- [103] Additionally, many of these activities have with them a substantial cost. It appears that it was a financial decision made by the plaintiff, in conjunction with his family, a decision that was rational, for which he should not be retroactively criticized. He was focused on his family and the needs of his family, rather than his own needs. There is a certain nobility associated with that.
- [104] As noted by the plaintiff, *Chiu v. Chiu*, 2002 BCCA 618 stands for the proposition that the onus is on the defendant to establish the plaintiff acted unreasonably and that acting reasonably would have reduced or eliminated loss. I find that not to be the case here. The plaintiff acted aggressively with various specialists he was referred to. He was proactive in trying to get his ultimate problem resolved, that being the damage to his hip and his hip pain. He saw numerous orthopedic surgeons seeking out numerous second opinions to see if there was anything that could be done to solve his problem. He worked closely with his aggressive family doctor, Dr. Jessop, to try to solve his problems.

- [105] There was no independent evidence before the court to suggest that if the plaintiff had pursued one or more courses of treatment suggested by his various doctors, that his pain would have been reduced and his losses would have been limited in some fashion. The argument by the defence in this regard is purely speculative.
- [106] In light of all that I have said and in light of the evidence of the plaintiff, which I accept, I find Mr. Lee was active in pursuing solutions to his physical injury. To support his family, he gave all he could at work and was not in a position to do anything outside of work in terms of exercise and the like. Nothing he did not do would have been curative, and there is no evidence it would have reduced his damages.
- [107] This all suggests to me that there is no basis for a reduced award for failure to mitigate and I reject that argument.
- [108] To conclude, as a result of what I have said, I assess damages against the defendant in favour of the plaintiff as follows:
- non-pecuniary loss - \$120,000;
 - loss of housekeeping - \$7,500;
 - special damages - \$11,344.30;
 - net past wage loss- \$18,857;
 - cost of future care- \$40,600;
 - loss of opportunity or loss of future capacity- \$450,000.
- [109] That, by my mathematics, totals \$648,301.30.
- [110] The plaintiff has been successful in this matter and is entitled to costs. Are there any issues in regards to costs, counsel for the plaintiff?
- [111] MR. BUCKLEY: No, My Lord, not that I am aware of.
- [112] THE COURT: Mr. Armstrong?
- [113] MR. ARMSTRONG: None, My Lord.
- [114] THE COURT: If, however, there are issues related to anything that cannot be resolved by the parties, they are at liberty to contact Supreme Court Scheduling within 30 days. Supreme Court Scheduling can, after that point, get in touch with me about a convenient time to resolve any other outstanding issues.
- [115] Gentlemen, it would have been likely the case that these would have been released as written reasons if we were not in the staffing situation that we currently are at the courthouse, so in light of that, I am going to order a copy of my reasons at the court cost and will provide them to you when they are transcribed.

[116] MR. ARMSTRONG: Thank you, My Lord.

[117] MR. BUCKLEY: Thank you, My Lord.

[118] THE COURT: Okay, thank you.

J.R. Groves J."

GROVES J.

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Prepared on 26 October 2026 · Esheria