
CANADA / JUDGMENT

Lewis v. Wang

2020 BCSC 16

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Supreme Court of British Columbia

DECIDED

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2020 BCSC 16 Lewis v. Wang

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Lewis v. Wang,

2020 BCSC 16

Date: 20200108

Docket: M167753

Registry: Vancouver

Between:

Kristen Lewis

Plaintiff

And

Na Wang

Topwin Auto Centre Inc.

Defendants

Before: The Honourable Mr. Justice Macintosh

Reasons for Judgment

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Place and Dates of Trial:

Vancouver, B.C.

December 2-6, 9-12, 2019

Place and Date of Judgment:

Vancouver, B.C.

January 8, 2020

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Introduction

[1] Kristen Lewis claims damages, under all the normal headings, from a small car accident in Vancouver on October 15, 2014. (The Defendants admitted liability shortly before trial.)

The Accident

- [2] Ms. Lewis was driving alone in her mother's Kia Spectra car, heading west on Broadway. It was still daylight, around suppertime, and the conditions were dry.
- [3] At the intersection with Pine Street, Ms. Lewis had a green light. The defendant SUV had been heading east on Broadway. It turned north at the intersection, onto Pine Street, in front of the Plaintiff's car.
- [4] Ms. Lewis started breaking when she saw the SUV. She estimates she had been going about 40kph when she started breaking. The right front bumper on her car hit the passenger side of the SUV just behind the right front wheel well.
- [5] The impact damaged the right front wrap-around fender, the right headlight and the chrome trim on the front of the hood on the Plaintiff's car. The repair costs for the Plaintiff's car were slightly under \$3,500.
- [6] Ms. Lewis described the accident as "low impact" when she reported it to her doctor. The airbags did not deploy. Emergency vehicles did not attend the scene.
- [7] Ms. Lewis proceeded after the accident to drive the car to the airport and catch the flight she had booked home to Calgary that evening.

Just after the Accident

- [8] The only pain from the accident Ms. Lewis recalls feeling on the day of the accident was a sore right foot. It was still sore the next morning, so she went to a medical clinic in Calgary to get it looked after. Her foot fully healed before the end of 2014. In the first week or two after the accident, Ms. Lewis had some trouble sleeping. Other injuries she suffered from the accident began to reveal themselves later on.

The Plaintiff's Background, and her Employment History from Before the Accident to the Present

- [9] Today, Ms. Lewis is 39. She is single. She does not have children.
- [10] Ms. Lewis was born in Edmonton, but moved with her family at age 6 to the Lower Mainland. She completed grade 12 here in 1998. She described herself as having been an average student academically, with a strong interest in athletics, particularly fast pitch, which she played well, beginning at age 8 and continuing until she was 24.
- [11] Ms. Lewis was intrigued by gemstones, even as a child. Immediately after high school, she took a job reflecting that interest, at Sirius Diamonds Ltd., in Vancouver. She was employed there from July 1998 until the company went into receivership in August 2004. In her last four years at Sirius Diamonds, Ms. Lewis worked as a sales assistant under Craig DeGruchy, who was vice president of sales.

- [12] Sirius Diamonds dealt primarily as a diamond wholesaler. Mr. DeGruchy testified that Ms. Lewis was a good worker, punctual and well-liked, her only shortcoming being that she spent too much unproductive time talking with customers. Mr. DeGruchy gave Ms. Lewis a good reference.
- [13] From 1999 to 2004, Ms. Lewis studied gemology, through various courses, at BCIT and elsewhere. She earned certificates from Canadian and American gemology institutes.
- [14] She moved to Calgary in 2005. She lives there still.
- [15] From September 2005 to June 2014, Ms. Lewis worked at J Vair Anderson, a high-end, retail, jewelry store in Calgary, in business for over 90 years. She was hired there for both her gemology training and her sales experience. In sales at J Vair, Ms. Lewis preformed in the top three or four of eight salespeople.
- [16] Ms. Lewis eventually resigned from J Vair. She told her boss that the workplace had deteriorated, that she was unhappy there, and that she felt compelled to resign. It appears from the evidence that Ms. Lewis probably experienced sexual harassment at J Vair, which motivated her departure. In the circumstances, she was not able to use J Vair as a job reference. However, before leaving that company, Ms. Lewis had lined up work as a sales person at another long-established, high-end, retail jeweller, Calgary Jewelry Ltd., where she started work on July 2, 2014. Calgary Jewelry terminated her employment less than four months later, on October 11, 2014, just four days before the accident. Ms. Lewis was let go for poor performance. Her sales were no more than adequate, and she often did not complete the detail work needed with each sale. She made errors in recording information for jewelry repairs. Repairs had to be redone as a result. Her employer found her to be pleasant, but she took far too long talking to suppliers and customers.
- [17] Ms. Lewis then was without a reference from her two most recent employers for her last nine years of work. Both employers were highly reputable in a small, specialized retail sector. That was bound to affect the Plaintiff's search for further employment down the road.
- [18] On October 12, 2014, the day after her dismissal from Calgary Jewelry, Ms. Lewis applied for employment insurance. She received insurance benefits from October 26, 2014 to July 4, 2015.
- [19] The accident happened three days after Ms. Lewis had applied for employment insurance.
- [20] She testified that she was only well enough, after the accident, to begin looking for new work in about the summer or fall of 2015. That is relevant because part of her claim is for delay in getting new work.

- [21] Ms. Lewis was hired at Michael Hill Jeweller, and began work there, as a manager-in-training on February 11, 2016. She was hired in sales based on her potential management ability rather than her knowledge in gemology, which Michael Hill teaches to its staff. Today, Ms. Lewis continues to work at Michael Hill.
- [22] Michael Hill is an Australian-based midmarket, retail jewelry business. It has 17 stores in Alberta and 87 in Canada.
- [23] Ms. Lewis called two witnesses from Michael Hill, who spoke highly of her work.
- [24] Matthew McAdams is a Michael Hill area manager, and the Plaintiff's store manager. Ms. Lewis serves as his assistant store manager and as a salesperson. She is very successful in sales ("Gold Star") at Michael Hill. Mr. McAdams described the Plaintiff as the best assistant store manager he has had. She keeps the sales team and herself positive, and generates good results. Sometimes, she cannot be 100% physically, but Mr. McAdams said that her 70 - 80% day is far better than a 100% day from any other assistant manager. Mr. McAdams spoke of seeing Ms. Lewis in pain frequently, but sees that she always hides that from customers and rises above it. She has postponed applying for a store manager position because of her post-accident condition, but Mr. McAdams is confident that she will get that position whenever she applies for it.
- [25] Ms. Lewis is the assistant store manager for Donna Barley, a part-time sales assistant working in the same Michael Hill store. Ms. Barley sees Ms. Lewis three to five days a week. She described Ms. Lewis as being a very good manager, doing her work very well, who is, "there for her staff 99.9% of the time an awesome, amazing, supportive cheerleader, always there to help." Ms. Lewis motivates and encourages her staff. She tries to arrange her medical appointments for her days off. She is obviously in pain at times during work, sometimes not moving well, and struggling, but she is stubborn and "pushes through."

Non-Pecuniary Damages

- [26] Ms. Lewis seeks in the range of \$110,000 - \$125,000, based on case law from 2016 - 2018, plus an allowance to adjust the award upward to 2019 dollars. The defence submits that the appropriate range for non-pecuniary damages is \$55,000 - \$60,000.
- [27] I find that the fact patterns in the three cases cited by Ms. Lewis, *Scelsa v. Taylor*, 2016 BCSC 1112; *Ross v. Dupuis*, 2017 BCSC 2159; and *Evans v. Keill*, 2018 BCSC 1651, are somewhat closer to the Plaintiff's facts before me than are the facts in the three cases the Defendants cited, *Hay v. Benzer*, 2014 BCSC 1522; *Lui v. Zhang*, 2019 BCSC 778; and *Young v. Shao*, 2018 BCSC 2017.
- [28] Ms. Lewis, from the accident, sustained a neck injury which has become chronic. The accident also aggravated pre-existing problems in her right shoulder and her back. Lesser complaints stemming from the accident are headaches, some anxiety and sleep disruption.

- [29] Dr. Aaron McInnes was qualified before me as a specialist in pain management. He diagnosed in Ms. Lewis chronic whiplash-associated disorder, chronic mechanical spine pain, chronic myofascial pain syndrome, depression and anxiety symptoms, and sleep disruption. He opined that the accident is the most likely cause of the Plaintiff's symptoms. In his prognosis, he said that Ms. Lewis, "will most likely continue to suffer from daily ongoing chronic pain in some form from this point forward."
- [30] Dr. Gash testified as a family physician and specialist in the assessment and treatment of chronic musculoskeletal pain. Before the accident, Dr. Gash had treated the Plaintiff for injury primarily to her ribs. When he saw the Plaintiff after the accident, her main symptoms were right-sided neck pain, headaches, a burning sensation along the right side of her upper thoracic spine, and sleep disruption. He opined that she has chronic pain disorder as a result of the accident.
- [31] Andrew Hosking conducted a functional capacity evaluation of Ms. Lewis. He opined that as a retail store manager or sales associate, Ms. Lewis, "is more likely than not approaching the limits of her durable physical capacity in participating in her current work."
- [32] Dr. Todd Bentley testified for the defence as a specialist in physical medicine and rehabilitation. He diagnosed whiplash disorder, thoracic spine sprain/strain, lumbar spine strain/sprain, hyperalgesia in the right C5 and hypoanaesthesia in the right T1 dermatome. Although I found Dr. Bentley to be a reasonable witness, I do not accept his concluding opinion, that the accident was less than 50% likely to have caused a material worsening of the Plaintiff's condition. I find that the evidence on balance, including the testimony of the expert witnesses for the Plaintiff, referred to above, leads to the conclusion that the accident probably did lead to a material worsening of the Plaintiff's pre-existing conditions, in addition to causing new injury to her neck.
- [33] I am awarding Ms. Lewis \$90,000 in total as her non-pecuniary damages. Ms. Lewis endures ongoing pain from the accident. The evidence of the two Michael Hill witnesses, summarized above, demonstrated that she continues to suffer pain with some frequency, and it is a credit to her that she overcomes it, or rather endures it, so as to not let it detract from her work performance.

Past Income Loss

- [34] In assessing past lost earnings (as well as lost future earning capacity), it is useful to keep in mind that a plaintiff needs only to show a real and substantial possibility of the loss claimed rather than proving the loss on the balance of probabilities. See *Gao v. Dietrich*, 2018 BCCA 372, at paras. 34 - 40.

- [35] For past lost earnings, Ms. Lewis seeks compensation for delay, as a result of the accident, in applying for, and therefore delay in obtaining, a store manager position at Michael Hill, which loss she quantifies at \$7,500; and compensation for delay in her looking for work, and therefore obtaining work, as a result of the accident, which she quantifies at \$31,000.
- [36] The Defendants do not dispute those two quantifications for past lost earnings, but argue that the Plaintiff is not entitled to them because she cannot prove they were caused by the accident.
- [37] In my view, the Plaintiff's evidence, and that of her boss at Michael Hill, Mr. McAdams, support my finding that Ms. Lewis is entitled to the \$7,500 for delay in becoming a store manager. It is clear that she has the ability to be a manager, and that Michael Hill frequently has store manager positions coming available. Mr. McAdams' testimony corroborated the Plaintiff's position that she has delayed applying for store manager primarily because of her post-accident condition.
- [38] With respect to the past income loss claim of \$31,000, Ms. Lewis was let go at Calgary Jewelry on October 11, 2014, four days before the accident. She did not start looking for new work until the summer or fall of the following year. Her work at Michael Hill started on February 11, 2016.
- [39] The defence argues that Ms. Lewis having no job references for her last nine years of employment, as opposed to the accident, is an example of why she took as long as she did to get new work.
- [40] The main question is whether, despite the accident, Ms. Lewis should have started looking for work before the summer or fall of 2015. Her claim of \$31,000 under this heading assumes that she was entitled to postpone beginning her search for new work for nine months as a result of the accident. Based on all of the medical evidence, I cannot accept that Ms. Lewis was incapacitated to the extent that she was entitled to keep herself out of the job search for that length of time. In my view, the best that can be said for the Plaintiff is that she should have waited no more than half that time, or four and a half months, after her accident, to re-enter the job market. For this part of her claim, I award the Plaintiff \$15,500.
- [41] In total therefore, for the past lost income claim, the Plaintiff is entitled to \$23,000.

Loss of Future Earning Capacity

- [42] Ms. Lewis seeks \$110,000 under this heading. (She claims two years of income at \$55,000 per year.)
- [43] The Defendants submit that the Plaintiff has failed to prove a real and substantial possibility of a future event leading to an income loss. Alternatively, they say that a reasonable award would be \$30,000, representing approximately half of the Plaintiff's annual income.

[44] The Plaintiff's position, and the Defendants' alternative position, reflect what the case law calls the "capital asset" approach for determining loss of earning capacity. That is the approach commonly employed when the anticipated loss is not easy to quantify. In *Brown v. Golai*, 1985 CanLii 149, (B.C.S.C.), Finch J., as he then was, wrote as follows:

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

- 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, had he not been injured; and
- d. The plaintiff is less valuable to himself as a person capable of earning income in a competitive labour market.

[45] The difficult element is determining whether the pain Ms. Lewis suffers will erode her capacity to work, and therefore diminish her future earning capacity. The irony is that since the accident, Ms. Lewis has shown herself to be a better jewelry salesman, and earned more, than at any other time in her life. She disciplines herself to work well when she is not feeling 100%.

[46] The underlying factual question is whether there is a real and substantial possibility that the pain will eventually impair the Plaintiff's earning capacity. That could arise from needing to take days off, selling less while working, or retiring early.

[47] I need to keep in mind in this part of the claim that I have already awarded Ms. Lewis compensation for her pain, and for her delay in becoming a store manager. There is a risk of "double counting" by also having the pain lead to an increase in the claim for lost earning capacity. However, with the right facts, there is no inconsistency in awarding compensation related to pain under all of these heads in the same case (non-pecuniary damages, damages for delay in becoming a manager, and damages for diminished earning capacity).

[48] The Plaintiff cited decisions of this Court in which plaintiffs were found entitled to damages for lost earning capacity even though, after the accident, they were capable of carrying on with their prior work without having lost income. See *De Groot v. Heller*, 2018 BCSC 14; *VanderVeen v. Amante*, 2019 BCSC 2079; *Clark v. Kouba*, 2012 BCSC 1607; *Munoz v. Singh*, 2014 BCSC 567; *Rahimi v. Ma*, 2014 BCSC 710; and *Preece v. Leonard*, 2014 BCSC 173. Each of those decisions of course turned on its own facts, from which the Court was able to find a real and substantial possibility of future lost earning capacity due to pain or other difficulties, notwithstanding that those plaintiffs were able to carry on with their work full-time.

- [49] The Defendants, in turn, cited decisions of this Court, wrestling with the same question, in which the Court concluded that the plaintiffs' residual problems did not support a finding of a real and substantial possibility of diminished earning capacity. See, *Erwin v. Buhler*, 2017 BCSC 362; and *Ju v. Morporgo*, 2019 BCSC 194. However, the Defendants cited another authority, *Olson v. Farran*, 2016 BCSC 1255, in which this Court awarded the plaintiff damages for loss of future earning capacity equivalent to six months of her current salary. The Court, in *Olson*, said this at paras. 196, 199 and 200:
- [196] I am satisfied the plaintiff has established there is a real and substantial possibility of a future event leading to income loss and that Ms. Olson has suffered some impairment of her future earning capacity. There is a real and substantial possibility that it will take her longer to find new employment when her present position terminates. Further, there is a real and substantial possibility that as the result of a variety of factors, including reorganization, downsizing or dissolution of the law firms that employ her, or the retirement or departure of the lawyer she works for, that Ms. Olson may find herself in the job market on a number of occasions between the date of trial and her likely retirement at age 65. It will likely take her longer to secure new positions than if she had not suffered her low back and hip injuries.
- [199] The plaintiff's loss is not readily measurable, and is best assessed on the capital asset approach. The plaintiff's injuries will not prevent her from working until her retirement, probably at age 65. I have found that over the remainder of her working years, there is a real and substantial possibility that Ms. Olson will face longer periods of unemployment between jobs than if she had not been injured, and that she will occasionally miss work as a result of her chronic pain.
- [200] I assess the plaintiff's loss of future earning capacity in the amount of \$25,000, which is roughly equivalent to six months' salary.
- [50] The Defendants acknowledge that the facts in *Olson* resemble the facts before me. To quote, in part, from para. 217 of the Defendants' written argument:

This case bears resemblance to the case at hand. Both plaintiffs have chronic pain, and have been described very positively by their current employer. While the physical injuries in the case at hand are somewhat more serious than *Olson* they appear to have similar functional effect.

- [51] It is impossible to know with certainty that Ms. Lewis will suffer diminished income in future from her chronic injuries. I do find, however, that she has established a real and substantial possibility of that. It is also difficult to quantify this head of the Plaintiff's claim. The capital asset approach is therefore the only realistic one to use. I am prepared to award Ms. Lewis one year's lost income under this head, which I accept as \$55,000.

Special Damages

- [52] Ms. Lewis submitted a revised schedule of special damages totalling \$10,438. (That number should be reduced by \$50 because one item claimed, Japanese mint oil, was priced at \$77.11, but should have been priced approximately \$50.00 lower, at \$27.00.) The resulting further revised schedule of special damages is therefore \$10,388.
- [53] All the items and amounts claimed as special damages are accepted by the Defendants except three items:
- (1) the Japanese mint oil, at \$27;
 - (2) tuition at Mount Royal University of \$5,410; and
 - (3) a cannabis product, CBD oil, at \$334.
- [54] Ms. Lewis did not provide any admissible medical evidence to justify the Defendants paying for the mint oil or the CBD oil, and I therefore cannot award those costs to her. See, *Gulbrandsen v. Mohr*, 2012 BCSC 1869, at para 26.
- [55] At Mount Royal University, Ms. Lewis studied, in 2017 and 2018, in what she called a supply chain management program. She obtained a certificate in that discipline. The tuition fees total \$5,410. Ms. Lewis took the courses outside of work hours while working at Michael Hill.
- [56] Ms. Lewis cited *Ferguson v. Watt*, 2018 BCSC 1587; and *Koshman v. Brodis*, 2013 BCSC 656, in support of her tuition claim. In *Ferguson*, a nurse, post accident, pursued her masters degree in nursing, and the Court allowed her tuition costs incurred to the time of trial. Her employment, post trial, called for a masters degree, and her employers considered it important that she pursue that degree. The Court treated Ms. Ferguson's tuition fees as retraining costs. In *Koshman*, the Court allowed Ms. Koshman's post accident tuition costs, having found that she incurred them in order to mitigate her income loss.
- [57] I am unable to conclude that the Plaintiff's tuition costs at Mount Royal are properly recoverable. The training Ms. Lewis received at Mount Royal was not required for her work, either before or after the accident, and was not requested or expected by her employers. The training she received may assist her in obtaining or performing future employment, but it was not needed in the field of jewelry sales which she has pursued for many years. I do not find that the tuition costs were expenses necessarily incurred as a result of the accident. See *Roussin v. Bouzenad*, 2005 BCSC 1719, at para. 134.
- [58] In summary respecting special damages, Ms. Lewis did not succeed in her claims for the three disputed items. I am advised that she has received payment already for the other special damages she claimed.

Cost of Future Care

- [59] Ms. Lewis claims between \$25,000 and \$38,000 under this heading. The defence submits that \$10,000 would be a suitable award, to cover the costs of trigger point injections, 13 Pilates classes, and 50 physiotherapy sessions.
- [60] A plaintiff is entitled to compensation for the cost of what is reasonably necessary to restore her to her pre-accident condition in so far as that is possible. The award is to be based on what is reasonably necessary, in accordance with the medical evidence, to preserve and promote the plaintiff's mental and physical health. See *Peters v. Ortner*, 2013 BCSC 1861, at paras. 141 - 145. Kelleher J, in *Maltese v. Pratap*, 2014 BCSC 18, observed, at para. 78, that there must be a likelihood that a plaintiff will incur costs before an award can be made for them under this head of damages. The Plaintiff in this trial claims future care costs for an active rehabilitation program. However, doctors have recommended active rehabilitation to the Plaintiff several times and she has not pursued it.
- [61] On the last day of trial, the Plaintiff handed up her claim for future care costs, reduced to a single page. She seeks coverage for an active rehabilitation program, a gym membership for one year, psychological counselling, prolotherapy, and physiotherapy.
- [62] Difficulties Ms. Lewis faces in advancing her cost of future care claim include that there is no, or very little, evidence of the costs for the items claimed, the required duration for claims of an ongoing nature, or the present value of the expenditures to be incurred over time. To address the last of those concerns, the Plaintiff attached a present-value table, used for civil jury instructions in this province.
- [63] I am performing rough justice, in the Plaintiff's favour, in allowing her \$15,000 under this heading.

Reduction in the Award for the Plaintiff's Pre-Accident Medical Conditions

- [64] The parties are in agreement that the total for three heads of the Plaintiff's claims (nonpecuniary damages of \$90,000, loss of future earning of \$55,000, and cost of future care in the amount of \$15,000, for a total of \$160,000) will be reduced by 10% to take into account the losses under these three heads attributable to the Plaintiff's pre-accident medical conditions, which included some residual problems from past sports injuries. \$160,000 less 10%, or \$16,000, equals \$144,000 as the resulting award under these three heads.

Mitigation

- [65] The defence argues that Ms. Lewis failed to mitigate her losses by not pursuing a course of recommended treatment called active rehabilitation.

[66] A plaintiff in a personal injury action has a positive duty to mitigate. See, *Graham v. Rogers*, 2001 BCCA 432. In the mitigation analysis, it is a defendant who must prove that the plaintiff acted unreasonably, and that reasonable conduct on the plaintiff's part would have reduced or eliminated the loss. See, *Hinagpis v. Adaza III*, 2019 BCSC 880, at para. 124. Whether a plaintiff acted unreasonably is a factual question, involving a consideration of all the circumstances. See, *Gilbert v. Bottle*, 2011 BCSC 1389, at para. 202.

[67] Although Ms. Lewis did not pursue active rehabilitation when at least one of her medical advisors urged her to do so, I am not satisfied the Defendants have proved that active rehabilitation would have reduced her loss. The defence cited *Lampkin v. Walls*, 2016 BCSC 1003, where the Court found that a plaintiff had failed in his duty to mitigate by not embarking on active rehabilitation recommended by two medical experts, and accordingly reduced certain damages by 10%. However, as the Defendants correctly acknowledged, the evidence supporting the failure to mitigate was stronger in *Lampkin* than it is in the case before me.

Summary

[68] In the result, I find that Ms. Lewis is entitled to damages as follows:

Non-pecuniary damages

\$90,000

Loss of future earning capacity

\$55,000

Cost of future care

\$15,000

= Subtotal

\$160,000

Reduced by 10%

\$144,000

Loss of past earnings

\$23,000

(Special costs as previously paid)

TOTAL

\$167,000

[69] Costs were not spoken to, and can be addressed.

"Macintosh J."

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