

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: ***Johnson v. Keats***,
2012 BCSC 751

Date: 20120223
Docket: M110748
Registry: Vancouver

Between:

Jordan Kyle Johnson

Plaintiff

And

James Michael Keats

Defendants

Corrected Judgment: The text of the judgment was corrected at
on the first page on June 19, 2012

Before: The Honourable Madam Justice Wedge

Oral Reasons for Judgment

Counsel for the Plaintiff:

C.J. Trueman

Counsel for the Defendant:

K. Powar

Place and Date of Trial:

Vancouver, B.C.
February 7-8, 2012

Place and Date of Judgment:

Vancouver, B.C.
February 23, 2012

[1] **THE COURT:** The plaintiff Jordan Kyle Johnson brings this personal injury claim pursuant to Rule 15-1 of the *Supreme Court Civil Rules*. Mr. Johnson was rear-ended in his 2006 Honda Civic on March 12, 2009, in the early evening during rush-hour traffic on Hastings Street in Burnaby, British Columbia. Mr. Johnson was in "stop and go" with "traffic" in a stretch of Hastings Street which had multiple traffic lanes.

[2] The defendant Mr. Keats was driving directly behind Mr. Johnson at the time. The speed limit in the zone was 50 km/h, but Mr. Keats estimated he was driving well under 30 km/h in the section of the road just before the accident occurred.

[3] Mr. Keats estimated that at the time of impact he was travelling about 5 km/h. His foot was on and off the brake. Mr. Johnson was braking at the time of impact. Mr. Keats described the impact as a bumping of the front of his car against the rear of Mr. Johnson's.

[4] Mr. Johnson recalled hearing someone's tires squealing. He could not be certain it was Mr. Keats' car making a noise, but he turned his head to the left in the direction of the sound when his car was struck. He put his right arm across the steering wheel and his head hit that arm. He said he did not suffer any bruising or bumps to the head. However, soon after the accident he began experiencing pain in his neck and upper back and shoulders.

[5] There was very little damage to either car; approximately \$30 of repairs were made to the defendant's car and approximately \$560 to the plaintiff's.

[6] Mr. Johnson was 24 years of age at the time of the accident. He was employed as a longshoreman and had been so employed for approximately four years as at the time of the accident.

[7] Mr. Johnson testified that he was experiencing considerable pain by the following day but could not obtain an appointment with his family doctor until March 16. He did attend on that day.

[8] Mr. Johnson's physician, Dr. Yen Lynette Lim, examined him on this initial visit and diagnosed him with "multiple soft tissue injuries, post-MVA; neck, upper, and lower back."

[9] Dr. Lim's clinical notes disclosed her findings of decreased range of motion in the neck and spine and significant tenderness in his neck and upper back. Dr. Lim advised Mr. Johnson to stay off work for a week after which she would reassess him. She prescribed him a muscle relaxant, Flexeril, for his muscle pain and told him to continue taking Advil, which he had been taking for pain since the accident.

[10] Many aspects of Mr. Johnson's work as a longshoreman involved significant physical labour. He does not yet have enough seniority to be a regular employee. He is an auxiliary employee who obtained shifts through the hiring hall system based on his seniority and training for particular work. Some of Mr. Johnson's shifts are in a position known as "head checker." Head checking involves directing the container traffic and directing employees to pick up and deliver particular loads. Head checking pays a slightly higher hourly wage than labouring work. Mr. Johnson performed in both positions as and when shifts were available in one or the other position.

[11] Mr. Johnson returned to see Dr. Lim on March 23, 2009. He reported loss of sleep due to the neck and upper back pain and increased pain when he tried to walk any distance. He was experiencing multiple adverse side effects from the Flexeril; and, accordingly, Dr. Lim prescribed an anti-inflammatory, Naproxen, to replace the Flexeril. Dr. Lim told him he could return to work but only to clerical duties. However, Mr. Johnson testified he continued to suffer from loss of sleep due to pain and problems with sitting. He was more comfortable standing due to neck tenderness.

[12] Dr. Lim ordered a C-spine X-ray to rule out any injury beyond the soft tissue injuries. The X-ray was negative. Because he continued to experience significant discomfort, Mr. Johnson did not return to work. He saw Dr. Lim again one week later, on March 30, for reassessment. He reported that the Naproxen was helpful; that he was experiencing soreness but not as much pain. His neck and back were

still tender to palpation. Dr. Lim refilled the Naproxen prescription and advised that he could return to work but only to perform clerical duties.

[13] Mr. Johnson did return to work the first week of April. He missed a total of three weeks of work in the interim. Upon his return he took only the available head checking shifts. Because of his soft tissue injuries, he did not accept any labouring shifts during April and May 2009.

[14] Mr. Johnson returned to Dr. Lim on April 14, 2009. By then he was back at work performing the lighter duties of the head checker. On examination, Dr. Lim noted his upper back and neck were still tender. She advised him to start physiotherapy as soon as possible, and she told him to remain on clerical duties for another couple of weeks.

[15] Mr. Johnson did begin taking physiotherapy treatments as instructed. He returned to Dr. Lim's office on April 27. He told Dr. Lim he was doing quite well with the clerical work but did not feel ready to perform labouring work. Dr. Lim felt his condition was about the same as it had been on the visit two weeks earlier. She advised him to continue with clerical duties until May 15, 2009.

[16] Mr. Johnson returned to the doctor's office on May 12. At that time he saw Dr. Lim's locum physician, Dr. Gruywal. He reported to her that the physiotherapy was helpful, and his back pain was in a range of 6 or 7 out of 10, and it was worse with prolonged sitting.

[17] Dr. Gruywal's opinion was Mr. Johnson continued to suffer from his soft tissue injuries and was experiencing tenderness to palpation in his neck and back. Dr. Gruywal advised him to continue with physiotherapy and to continue performing light duties at work.

[18] Mr. Johnson saw Dr. Gruywal again on May 26, 2009. He reported he was feeling a bit better and thought he was ready to increase his work duties. He said his back pain was worse first thing in the morning, about a 6 out of 10 on the pain scale, but on average it was now about 4 out of 10. He was attending physiotherapy two to

three times a week per week and was able to walk and stand for more than two hours but still had to limit sitting to a maximum of two hours.

[19] Dr. Gruywal noted that his range of motion was improved to 80 to 90% of normal but still tender with extremes of lateral bending. At this point, the doctor agreed Mr. Johnson could increase his work duties.

[20] Mr. Johnson testified that he felt capable of returning to his regular work duties at the end of May 2009 and so advised his employer. The gist of his evidence was that he could do very little for the first three weeks after the accident in terms of physical activity but gradually improved thereafter.

[21] Dr. Lim testified at the trial. She said that while she was not aware of what was entailed in the head checking position, she would still have recommended that Mr. Johnson take time off work due to the soft tissue injuries Mr. Johnson suffered in the accident. She confirmed that as late as April 27 when she saw Mr. Johnson he was still in pain from his injuries. She agreed that while his condition had improved, she did not believe they had resolved completely even by the end of May 2009.

[22] Dr. Lim observed in her evidence that Dr. Gruywal did not recommend that Mr. Johnson take on full duties until June 2009 according to Dr. Lim. It was likely June 2009 that Mr. Johnson was in fact ready to assume his regular labour and duties.

[23] Mr. Johnson attended approximately a dozen physiotherapy sessions in April and May 2009 which he said he found helpful. He agreed that within a period of about three months he had substantially recovered from his injuries. He said the only lingering effects were occasional stiffness or soreness in his shoulders and neck after prolonged sitting or sleeping, which persists to this day.

[24] The defendant argued that the plaintiff had not established causation between the accident and his alleged injuries. The gist of the defendant's position on causation was that it did not follow that the plaintiff, a strapping young man in

reasonable physical shape, could suffer the alleged soft tissue injuries from such a low velocity impact.

[25] The difficulty with this argument is that there is simply no evidence to support it. The defendant did not have the plaintiff examined by a physician or call any evidence to suggest that low velocity impacts could not cause the kind of soft tissue injuries that the plaintiff claimed to suffer as a result of the accident.

[26] Moreover, the defendant did not put that theory to Dr. Lim when she testified. It was not suggested in cross-examination of Dr. Lim that Mr. Johnson was malingering or exaggerating his injuries.

[27] The defendant attempted to attack the plaintiff's credibility by pointing to what I can only describe as minuscule discrepancies in his evidence.

[28] The plaintiff was a credible and even a quite remarkably low-key witness. He did not attempt to exaggerate his symptoms. His evidence was straightforward and matter of fact. He readily acknowledged he was sufficiently recovered after three weeks to return to light duties and in slightly less than three months was fit to take on the more strenuous labouring tasks of a longshoreman.

[29] Dr. Lim, too, gave forthright and factual evidence. She did not attempt to advocate on her patient's behalf.

[30] In summary, I am satisfied the accident of March 12, 2009, caused the soft tissue injuries described by the plaintiff and his physician Dr. Lim.

[31] I turn then to the issue of damages. The plaintiff's claim is for non-pecuniary damages in the range of \$35,000; past wage loss at \$7,322; cost of future care in the amount of \$1,000, with special damages in the amount of \$396.75.

[32] The past wage loss claim of the plaintiff is based on three weeks of missed work entirely and, thereafter, missed labouring shifts during April and May 2009. The plaintiff provided evidence from a colleague with similar seniority and training who obtained head checking and labouring shifts during the relevant time periods for the

number of hours and the pay rate which would have resulted in remuneration for the amount claimed, which is \$7,322.

[33] The defendant's position was that in the event causation was established, the plaintiff was entitled to non-pecuniary damages in the amount of \$3,000 to \$5,000.

[34] With respect to wage loss, the defendant argued that the plaintiff was capable of working his lighter shifts as a head checker in March and was capable of returning to regular labouring shifts at the beginning of May 2009.

[35] In total, said the defendant, Mr. Johnson's wage losses should be in the amount of \$1,135. Alternatively, wage loss should be assessed at \$3,094 for missed labouring shifts during the relevant period; or, in the further alternative (and at most), damages should be assessed in the amount of \$5,276, reflecting one entire week of missed shifts in March and the missed labouring shifts until the end of May 2007.

[36] With respect to cost of future care, the plaintiff has claimed \$1,000 in damages. The defendant argued that there ought to be no recovery because there was no medical evidence to support it.

[37] The defendant accepted that the plaintiff was entitled to \$150 in special damages for physiotherapy user fees but not for the claimed prescription fees because actual receipts had not been produced. The plaintiff's claim for special damages was in the amount of \$396.75.

[38] I turn first to the issue of non-pecuniary damages. In the majority of the cases cited by the plaintiff, the individual plaintiffs were awarded in the range of \$25,000 to \$60,000 in non-pecuniary damages. In none of the cases involving awards in that range, however, were the soft tissue injuries such that they had substantially resolved within a three-month period with only minor lingering effects.

[39] Having said that, the cases cited by the defendant involved plaintiffs found to lack credibility or exaggerate their symptoms.

[40] I have concluded that the facts of the present case most closely resemble those found in the decision of Justice Macaulay in *Lubick v. Mei and another*, 2008 BCSC 555. In that case the plaintiff was involved in a low velocity impact. The plaintiff did not specifically seek medical assistance for his injuries after the accident but did report his symptoms to his family doctor on his first regular visit.

[41] In *Lubick*, the Court concluded that the plaintiff had suffered a minor soft tissue neck injury which resolved within a few months, and a moderate low back soft tissue injury, which took several more months to resolve, with some minor ongoing residual discomfort. Justice Macaulay, on the basis of decisions involving similar facts, awarded the plaintiff \$18,000.

[42] The plaintiff Lubick's injuries were comparable to the plaintiff's in this case, although slightly more severe. On the basis of *Lubick* and the cases cited therein, I am satisfied that a fair award for non-pecuniary loss in this case is \$16,000.

[43] I turn, then, to past wage loss. On the basis of the evidence of both the plaintiff and Dr. Lim, I conclude Mr. Johnson is entitled to the full amount claimed -- that is \$7,322.

[44] There will be no award for cost of future care as there was no evidence to support such an award.

[45] With respect to special costs, \$150 in physiotherapy user fees is conceded by the defendant. Although the plaintiff could not produce receipts for the Naproxen and Flexeril prescriptions, it is clear on the evidence of Dr. Lim that the prescriptions were given and the plaintiff's bank records confirm expenses of \$52.06.

[46] The clinical records of Dr. Lim disclosed two pages of \$25 for form fees, which are recoverable. Also recoverable are the plaintiff's claims for mileage for trips to attend physiotherapy and medical appointments at 40 cents per kilometre for a total of \$79.68. In total, then, in terms of special damages, Mr. Johnson is entitled to \$331.74.

[47] To recap, then, Mr. Johnson is entitled to the following:

non-pecuniary loss:	\$16,000.00
past wage loss:	7,322.00
special damages:	331.74
TOTAL:	\$23,653.74

[48] Unless there are any special features involving this case, the plaintiff is entitled to his costs pursuant to Rule 15-1.

[SUBMISSIONS BY DEFENDANT RE COSTS]

[49] THE COURT: I am cognizant that the amount of the award falls within the jurisdiction of the Provincial Court. However, the case law establishes that if there is sufficient basis for the plaintiff's proceeding in this Court, this Court has discretion to depart from the provisions of the Rules limiting costs.

[50] I have considered the issue of costs carefully given the range of non-pecuniary damages for injuries of the nature suffered by the plaintiff. It was reasonable for him to bring his claim in this Court. Accordingly, it is reasonable and fair that the plaintiff receive his costs pursuant to Rule 15-1.

The Honourable Madam Justice C.A. Wedge