

*Case Name:*

**Lee (Guardian ad litem of) v. Richmond Hospital  
Society (c.o.b. The Richmond Hospital)**

**Between**

**Allen Lee by his Guardian Ad Litem,  
Winnie Lee, plaintiff, and  
Richmond Hospital Society as operators of  
The Richmond Hospital, defendant**

[2002] B.C.J. No. 644

2002 BCSC 469

Vancouver Registry No. C973656

**British Columbia Supreme Court  
Vancouver, British Columbia**

**Wong J.**

Heard: November 19 - 23, 27 - 30, December 3 - 7,  
10, 12 - 14 and 17, 2001.  
Judgment: April 2, 2002.

(106 paras.)

*Damage awards -- Injury and death -- Head injuries -- Brain damage -- Special damage awards --  
Cost of future care -- General damage awards -- Loss of prospective earnings.*

Action by Lee for damages sustained as a result of medical negligence by the defendant, Richmond Hospital. The Hospital admitted liability and the trial became an assessment of damages. Lee was a healthy, active 27-year-old student who went into the Hospital for a simple elective surgery. As a result of being given certain drugs, Lee suffered respiratory depression, a well-known side effect of the drug. Nurses on duty failed to monitor Lee and the respiratory depression resulted in severe and permanent brain damage. Lee had graduated from University in 1992 and was working full time as a billing clerk at a law firm. He was a part-time student, taking the prerequisite courses for admission into the Chartered Accountancy program. As a result of his brain injury, he lost physical control over his body, became dependant on others for almost every aspect of his daily living and required 24-hour care. He became immediately and permanently unemployable. He lost his fiance and

the ability to participate in any of his former activities. The Hospital conceded that Lee was entitled to both the general and special damages requested. It argued, however, that Lee was not entitled to the future loss of income claimed, as he likely would not have become an accountant. The Hospital also disputed many of the costs claimed for Lee's future care.

HELD: Action allowed. The Hospital was liable for the damages suffered by Lee and Lee was awarded the general and special damages agreed to. The future care costs were to be recalculated by counsel, subject to the directions received regarding certain particulars of the claim and subject to the court's approval. Lee was awarded past wage loss based on the income he would have earned until he completed his education. There was a real possibility that Lee would have become a chartered accountant with a moderately successful career. It was likely he would have worked until age 70. Lee was awarded damages for future wage loss in the amount of \$1,335,000.

### **Statutes, Regulations and Rules Cited:**

Law and Equity Act, s. 56.

### **Counsel:**

J.N. Laxton, Q.C., R.D. **Gibbens** and E. Lyszkiewicz, for the plaintiff.  
J.D. Truscott, Q.C. and M.E. Stickland, for the defendant.

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## **WONG J.:--**

### **INTRODUCTION**

**1** This is a claim of medical negligence against the Defendant, Richmond Hospital. On the second day of trial, the Defendant Hospital admitted liability. The trial then continued for assessment of damages.

**2** The plaintiff, Allen Lee, a then 27-year-old student in excellent health, went into the Hospital on July 19, 1995 for a simple elective operation, a hemorrhoidectomy (removal of hemorrhoids). The operation was successful but while recovering in the Hospital and only 22 1/2 hours after surgery he suffered a severe brain injury. Allen Lee is now profoundly and permanently brain damaged. His brain injury resulted from a deprivation of oxygen to the brain caused by a respiratory depression. The respiratory depression resulted from being given 50 mg of a narcotic called Leritine at 6:35 a.m. on July 20, in combination with a drug called Serax, which had been given earlier but was still active in his system. Respiratory depression is a well-known side effect of Leritine. The nursing staff on duty at the time were aware of this risk from Leritine. His resulting cognitive and physical deficits are substantial.

**3** The case against the defendant Hospital is the failure by the nursing staff to monitor Allen Lee for the known side effects of the Leritine he received at 0635 July 20 and the Serax he had received earlier.

**4** Allen Lee was found in the Hospital at approximately 8:09 a.m. on July 20, 1995 by his surgeon (who happened to be doing his rounds) in respiratory arrest. His heart was beating but he was

not breathing. An immediate "code blue" was issued. Between 6:35 a.m. and 8:09 a.m. there is no record of anyone attending on Allen Lee to check his condition and it was during this period that the respiratory depression had developed.

**5** If the nursing staff had checked his sedation level during this time he could easily have been aroused and the respiratory arrest would not have happened.

**6** Dr. Tsang, the plaintiffs' expert summarized his opinion as follows:

It is my opinion that the brain damage that arose in the case of Mr. Lee resulted from a combination of respiratory depression, upper airway obstruction, and possibly laryngospasm before his respiratory arrest.

**7** The damage claims advanced by Allen Lee for himself and for his mother, Winnie Lee in trust, are as follows:

1. General or non-pecuniary damages;
2. Special damages;
3. Past wage loss;
4. Future wage loss;
5. Cost of future care;
6. Winnie Lee's past wage loss for care given to Allen.

**8** By agreement between counsel, claims of Committee fees, tax gross-up and management fees were left for further submissions (if necessary) at a later date.

**9** Towards the end of the trial, counsel for the defendant conceded that general damages should be set at the upper limit of \$282,000.00 and special damages were agreed at \$65,000.00, inclusive of pre-judgment interest.

**10** Those amounts are so ordered.

#### THE BACKGROUND

**11** As of July 19, 1995 Allen Lee was

- just 27 years of age and in excellent health;
- a graduate of the class of 1992 from the University of British Columbia with a B.Sc. in Biology;
- working full-time as the Chief Billings Clerk for Lawson Lundell having just been promoted in June, 1995 to the position of Chief Billings Clerk;
- a part-time student at B.C.I.T. taking the prerequisite courses for admission into the Chartered Accountancy program;
- working part-time on weekends at an automobile dealership delivering parts;
- living an active and healthy lifestyle centred on family, friends and sports; and
- in love with and planning to marry his long time girlfriend, Jennifer Lam.

**12** As a result of the events of July 20, 1995 Allen Lee

- suffered profound and permanent brain injuries due to the starvation of oxygen to his brain;
- has been required to take various medications which he will be on indefinitely;
- lost his motivation and initiative;
- lost physical control of his own body;
- became dependant on others for almost every aspect of his daily living;
- has and will continue to require 24-hour per day care;
- became immediately unemployed and permanently unemployable;
- lost a promising career as a chartered accountant;
- lost the ability to participate in any of his former activities including driving and all sports; and
- lost his girlfriend.

**13** Allen Lee is a mere shell of his former self. Worse yet, he is aware of the fact that he has suffered what he calls an "accident" which has altered him but from which he vainly hopes for a recovery.

**14** After he was resuscitated following the Code Blue Allen Lee was transferred to the Richmond Hospital's ICU where he remained until his transfer to St. Paul's Hospital on July 21, 1995. While at St. Paul's Hospital Allen's treatment was overseen by Dr. Prout, a neurologist.

**15** Dr. Prout has continued to treat and assess Allen from July 21, 1995 to the present day. In his medical-legal report dated July 4, 2001 Dr. Prout writes:

My impression following the initial consultation [i.e. July 21, 1995] was that the patient had a picture compatible with an hypoxic encephalopathy following a respiratory arrest. The CT scan was felt to be typical of this type of brain injury. The prognosis was felt to be guarded.

**16** With respect to Allen Lee's status at the time of his discharge from St. Paul's, Dr. Prout writes:

The main neurologic deficits that appeared were an extrapyramidal syndrome with rigidity, masking of facial expression, dystonic posturing, bradyphrenia (slowness of thought), and hypertonia...as well as postural instability and a tendency to fall backwards. The deficits did improve during admission but the patient had significant residual deficits at the time of transfer to G.F. Strong Hospital.

**17** Allen Lee remained a patient at St. Paul's until his transfer to G.F. Strong Hospital, Acquired Brain Injury Program on August 24, 1995. He was an in-patient at G.F. Strong Hospital until he was discharged home on October 11, 1995. However, even after his discharge Allen continued rehabilitative treatment at G.F. Strong as an outpatient until early December, 1995 when he was finally discharged from the program. Between July 15 and August 13, 1999 Allen was readmitted to the outpatient Acquired Brain Injury Program at G.F. Strong for occupational and physiotherapy assessment.

**18** Dr. Donald Lee, no relative, has been Allen Lee's personal physician since November 24, 1993, about 21 months before Allen suffered the brain injury. In his medical report dated August 27, 2001 Dr. Lee writes:

Mr. Allen Lee has been under my care since November 24, 1993. His health had been excellent with no significant history of medical problems. He worked in the accounting department of a law firm and was active involving in sports such as hockey and baseball. He was living independently.

**19** Dr. Lee has continued to treat Allen to the present time and since Allen's discharge from G.F. Strong Dr. Lee has seen him about 21 times, his last appointment being November 13, 2001. With respect to Allen's current status Dr. Lee writes:

In summary the disabilities Mr. Allen Lee suffered as a result of his anoxic injury persisted until present. They are attributed to damages to parts of his brain including the basal gangila area. The functional disturbances can be summarized as follows:

1. Mobility. ... he exhibited Parkinson's like extrapyramidal symptoms with wide base and unsteady gait. He would shuffle when he walks. He has freezing episodes and sometimes falls due to his unsteadiness. His body is rigid and his facial expression has a masked feature.
2. Cognition. The anoxic damage affected his cognitive process... A decrease in motivation and initiation was noted in all reports. This has the biggest impact on his daily activities, as he requires prompting to get out of bed in the morning and to take medications. He is unable to resume school ...He cannot resume employment, let alone continuing his previous occupation. He is dependent on others to provide care and cannot live by himself, and will always require supervision at all times for his safety. His daily activities require it to be structured and organized, as he is unable to do it by himself. He cannot cook. His mother manages his finances.
3. Speech and communication. He has moderate dysarthria with slow slurred speech, flat intonation and reduced fluency. The content of his speech is quite limited .... His handwriting was noticed to be so small. ...

**20** Dr. Prout, Allen Lee's treating neurologist, last assessed him on June 19th, 2001. In terms of Allen's current condition Dr. Prout writes:

Following an initial degree of improvement the patient has remained stable and in my opinion has not changed with respect to his neurologic status over the last several years.

and

In my opinion this patient has suffered an hypoxic brain injury as the result of an apparent respiratory arrest. The brain injury has resulted in multiple deficits. The primary deficit is that of parkinsonian syndrome. As a result of this syndrome the

patient has been left with multiple motor difficulties. These include difficulty with speech due to hypophonia, abnormal facial expressions, muscle stiffness in the trunk and limbs, bradykinesia (slowness of movement) in the upper and lower limbs, dystonic posturing (abnormal muscle contractions) affecting the jaw and face as well as the upper more than the lower limbs), an extremely abnormal gait with shuffling and frequent freezing (becoming immobile) as well as marked postural instability with a tendency to topple and fall.

In addition to the parkinsonian syndrome the patient has persistent cognitive and behavioural deficits as outlined above.

In my opinion the patient is profoundly disabled. He is disabled in the social, vocational and recreational spheres. In my opinion he is unable to pursue any meaningful employment at this time and is markedly limited in his ability to pursue social or recreational activities . ... Any further recreational activities are able only with full supervision. ...

He is in my opinion not safe to live alone and requires supervision. In my opinion he needs a 24-hour assistant or companion both for assistance with activities of daily living as well as safety due to his marked postural instability and lack of insight. At this point he lives at home but were he to attempt independent living I feel he would require a live-in companion or assistant and would require home-making assistance. ...

This patient has a permanent disability ... and in my opinion there is no reasonable chance of further improvement at this time.

**21** In addition to his medical doctors, Allen Lee has also been treated by Dr. David Chan, a psychologist. He first saw Allen Lee in December, 1995 and has continued to treat him to the present. In addition, Dr. Chan conducted a neuropsychological assessment of Allen on August 14 and 15, 2001 the results of which are contained in his report of September 12, 2001. Dr. Chan is of the opinion that Allen Lee

... continues to exhibit inefficiency in his cognitive processes which in turn disrupts his higher order mental and physical functioning. Specific deficits exist in cognitive functions, particularly in such areas as abstract reasoning ability, problems solving and memory. It is probable that the cortical and subcortical structures associated with the temporal and frontal lobes and basal ganglia of the brain were particularly implicated.

... From a neuropsychological perspective, Mr. Lee exhibits significant disruption of behaviour and personality. It appears to be a direct consequence of the earlier described hypoxic brain injury. I have found no evidence to attribute this disruption to any other psychological disorder.

... it is unlikely that he will ever show further recovery of his pre-injury cognitive functions. Considering Mr. Lee's physical and cognitive impairment he is not

likely to be employed in the competitive labour market. Mr. Lee is having difficulty with his independent living.

... It is important to provide Mr. Lee with a one-to-one lifeskills worker to assist him with his daily activity. ... he probably requires 24 hours of assistance and supervision...

**22** In summary, all of Allen Lee's treating doctors agree that Allen Lee has sustained a significant brain injury that has profoundly affected his life. The injury is permanent. The deficits he has will not improve in the future. These deficits impact every aspect of Allen's daily life; they have turned him into an invalid/shut-in, rendered him permanently unemployable and requires that he have 24-hour care.

**23** One of the more ugly aspects of the injury is that it has left Allen with some understanding of the fact that he has changed but with no real insight into the change or ability to "fix" what is wrong.

#### ALLEN LEE'S LOSS OF INCOME CLAIM

**24** Allen Lee is making a claim for both past loss of income and future loss of earnings. His claim is based on the income he would have expected to earn as a moderately successful Chartered Accountant, his chosen career.

**25** At the time Mr. Lee suffered his injuries he was employed full time as the Chief Billings Clerk for the law firm of Lawson Lundell in Vancouver. He originally started with the firm on November 1, 1993 as an entry level billings clerk but as of June 21, 1995, a month before the incident, he was promoted to the position of Chief Billings Clerk.

**26** As of July, 1995 Mr. Lee was earning \$1,950 per month and was up for a salary review at the end of the year due to his promotion.

**27** In addition to his full-time job Mr. Lee also worked part-time at an automobile dealership in Richmond on weekends, a job he held for about 8 months before he was injured. He worked in the parts department delivering parts and was paid minimum wage.

**28** On top of his work obligations Allen Lee was also a part-time student at BCIT taking the prerequisite courses for admission into the Chartered Accountant's student program. He started at BCIT in the fall of 1993. It was submitted on his behalf that it would have taken him approximately three years to complete the required courses as a part-time student. His career plan was to become a Chartered Accountant and he was taking the courses at BCIT which would lead directly to his qualifying for entry into the CA Student program as of September 1, 1998.

**29** For Allen Lee entering the CA Student program in September, 1998 he would be articled to an approved accounting firm for a period of no less than 30 months following which he would write a final exam in September, of 2001. The pass rate in British Columbia of the exam is about +90%. Once he passed the exam Allen would be a fully qualified Chartered Accountant.

**30** In calculating Allen Lee's loss of income, both past and future, the following assumptions have been made on his behalf:

- a) He would have returned to work within 10 days or so of his surgery. For ease of calculation it has been assumed that he would return to work on August 1, 1995;
- b) Until August 31, 1998 he would have continued full-time work at Lawson Lundell as the Chief Billings Clerk while he went to night school at BCIT;
- c) From September 1, 1998 to November 18, 2001 he would have been employed with a public accounting firm, having left Lawson Lundell's employ;
- d) He would have successfully completed the CA Student program and examinations, and become a qualified C.A. in November, 2001;
- e) Allen Lee would have continued working as a C.A. until age 70; and
- f) Allen Lee will not have any employment earnings in the future.

**31** Larry Hanson, a qualified Chartered Accountant and a partner in a medium sized accounting firm in Vancouver gave evidence of what salary Allen could have expected to earn as a student C.A. and then throughout his career as a qualified C.A.

**32** A claim for both past and future loss of income of \$4,019,307.00 has been advanced on behalf of Allen Lee.

#### The Applicable Law

**33** If in a personal injury damage action the plaintiff is able to prove that he was gainfully employed, and there was no reason to expect that he would not continue to be so gainfully employed, then the Court may award damages in lieu of the wages he was then receiving from such gainful employment.

**34** If, however, the plaintiff was not gainfully employed at the time of the accident, but intended to be and was capable of being so gainfully employed thereafter, the Court must make a reasonable allowance for the probable loss of future income due to the plaintiff having been deprived of that opportunity: *Conklin v. Smith* (1998), 88 D.L.R. (3d) 317 (S.C.C.).

**35** It is an error in law in a loss of chance or loss of opportunity claim to treat the plaintiff as if he had in fact succeeded in the opportunity and thereby measure his loss as the full value of that opportunity.

**36** What has to be assessed is the loss of opportunity. Approached in that way, the actuarial evidence presented, while affording some guide as to the range to be considered, should not be simply adopted by the Court as the basis for the award: *Campbell v. Tenhaven*, [1989] B.C.J. No. 307, February 7, 1989, Victoria, No. CAV00734 (B.C.C.A.).

**37** While actuarial evidence is very helpful, ultimately it is for the court to make an assessment assisted to the extent it is possible by the actuarial evidence: *Campbell*, supra.

**38** The Loss of opportunity must be a real and significant possibility and not a claim that is no more than fanciful: *Graybriar Investments Ltd. v. Davis & Company* (1990), 46 B.C.L.R.(2d) 164 (S.C.B.C.).

**39** It is not appropriate to first establish the full value of the lost opportunity and then estimate the percentage chance of realizing the opportunity, as the two stages cannot be kept clearly separated. The amount to be assessed for loss of opportunity represents an exercise of judgment based upon the particular facts of the case: *Papageorgiou v. Seyl* (1990), 45 B.C.L.R. (2d) 319 (B.C.C.A.).

## Analysis

**40** The defence contention is that although Allen Lee had an espoused intention and desire to become a Chartered Accountant it is unlikely he would have succeeded. It was submitted that Mr. Lee was not academically inclined to satisfy the requirements to achieve either a Chartered Accountant or a Certified General Accountant designation. They say he would likely have ended his days as a billing clerk.

**41** To support that contention, the defendant argues that Mr. Lee was a 27 year-old graduate of university with an academic record in post-secondary education exhibiting significant difficulties including two failed years - years three and five. At 22 years of age, he had already abandoned his first goal to be a medical doctor. At 25 years of age, Mr. Lee was working as a billing clerk in a law firm. At 24 years of age, Mr. Lee was applying to a medical laboratory technician program at BCIT, a program to which he was not accepted. At 25 years of age, Mr. Lee was searching for an alternative career.

**42** It may very well be the case that Mr. Lee was desirous of becoming a chartered accountant, and he may have advised his family of this professed goal. However, a desire does not equal a success. While Mr. Lee may have had these goals, he was not academically inclined so as to be able to satisfy the requirements of either of these professional designation programs.

**43** In Allen Lee's family his two older brothers are university graduates: one employed as a computer software support programmer and another a dentist. With reference to his parents, his mother, Winnie Lee, has a grade nine education from Hong Kong and worked as a seamstress. His father Benson Lee was trained as an electronics engineer in Hong Kong but since the family's immigration to Canada was only able to work as an electronics mechanic.

**44** Taking into account Allen Lee's family environment of professional achievement among family members, their work ethic, the fact that Allen Lee is himself a university graduate with varied work experience, I think it was a real possibility that Allen Lee would have become a chartered accountant with a moderately successful career.

**45** The time lines for his career must be determined.

**46** Between September 1993 and July 1995 Allen Lee had completed one prerequisite course towards the chartered accountancy program. At the pace which he was undertaking his prerequisite studies of one to two courses per year at BCIT I think, absent his injury, Allen Lee would not have completed his necessary prerequisite courses in order to be enrolled for the three year CA program until the date of trial - the end of November 2001.

**47** If Allen Lee continued to work up to the date of trial as a billing clerk at Lawson Lundell, his past wage loss can be calculated at \$175,633.00; from that amount must be deducted \$5,571.15 short term employment disability benefits provided by Lawson Lundell, leaving a past wage loss of \$170,091.85.

**48** Mr. Lee also receives long term disability benefits from his insurer ManuLife which are subject to subrogated repayments. It was agreed by counsel that because of section 1 subsection 4 of the Court Order Interest Act there is no pre-judgment interest payable on the ManuLife portion of past income loss paid to Mr. Lee. Court order interest however will apply to the other portions calculated at Registrars rates up to the date for Reasons for Judgment.

## FUTURE WAGE LOSS

**49** After considering both plaintiff and defendant counsels' submissions, I accept and adopt the projections and calculations by the defendant's economic expert Mr. Hildebrand, found in Exhibit 14 Tab 5 Table 4, for a public practice employee commencing employment in year 2001 until retirement at age 65.

**50** The present value of future loss is \$1,335,300.00.

**51** Although the reduced life-expectancy for Allen Lee because of his traumatic brain injury and symptoms of Parkinsonism is estimated at 5.7 years, his life expectancy of an additional 37.3 years plus his current age of 33 years gives him a mortality figure of 70.3 years-past what I would estimate as his future retirement age. Accordingly, I see no need to adjust for potential negative or positive contingencies as they balance out. "Lost years" deductions for living expenses would not apply, as his reduced life expectancy age exceeds his anticipated retirement age.

**52** Future wage loss based on Allen Lee's loss of chance is therefore set at \$1,335,300.00.

**53** Court order interest at Registrars rate will run from November 19, 2001.

#### COST OF FUTURE CARE

**54** Plaintiff's counsel have advanced a claim for cost of future care at net present value of \$2,899,006.00 based on an average of the range from \$2,866,168.00 to \$2,931,845.00.

**55** I accept Dr. Chambers opinion that Allen Lee's normal additional life expectancy of 43 years has been reduced by 5.7 years to a future life-expectancy of 37.3 more years.

**56** The defendant accepted that the plaintiff should have 24 hour live-in care, but has not accepted the cost of some services postulated by Ms. McLean, the occupational therapist future care expert in her report of September 14, 2001.

**57** At page 22 of her report Ms. McLean recommends that the Court accept the Bayshore estimate plus an additional 10% contingency in the event that Mr. Lee has to use the services of another agency for 24 hour care, if it is difficult for Bayshore to find a suitable live-in caregiver replacement.

**58** This additional 10% contingency adds \$10,404.70 per year to the postulated attendant costs and \$225,743.00 to the present value of future costs.

**59** On pages 21-22 of her report, Ms. McLean says that one of the benefits of using an agency to provide the 24 hour caregiver, rather than have Mr. Lee's family hire a caregiver directly, is that it can "provide replacements when the caregiver is ill, on vacation, quits or just does not show up for work".

**60** It runs contrary to the reasons given for the use of an agency in the first place (as opposed to privately hired care, which is more expensive), to add a surcharge to the award for a possibility that the agency itself will not be able to provide the services that they have contracted to provide.

**61** It was submitted that this extra cost is unreasonable to be imposed on the defendant.

**62** In her report at pages 19-20, Ms. McLean recommends an occupational therapist/case manager for 2-4 hours per month.

**63** She sets out that expected cost per year at page 27 of her report at \$1,920.00 - \$4,080.00 per year or an average of \$3,000.00 per year.

**64** According to her report at page 19, the case management services are required to help Mr. Lee organize and set up appointments such as relate to ongoing medical and therapy care and make on-going arrangements as required to ensure attendant care provisions of support workers.

**65** In her evidence in chief Ms. McLean agreed with Ms. Simpson's view that an average of one hour per month for a case manager was adequate. However she testified that the occupational therapist portion of the service would increase it to 2 to 4 hours per month.

**66** In her cross-examination Ms. McLean expanded on her estimated of the case management time to 1 to 2 hours per month.

**67** Ms. McLean did not know of any appointments for Mr. Lee other than regularly scheduled appointments with his neurologist (neuropsychologist) that the care worker could arrange.

**68** She did think that a case manager would be needed to find another attendant if the agency could not supply one or find another agency if it was decided to change agencies.

**69** In her cross-examination she gave evidence that the periodic assessments by the occupational therapist could be every 3 - 6 months or every couple of weeks, once a month.

**70** A case manager/OT 2-4 hours per month works out to 24 -28 hours per year, which it was submitted is not a realistic assessment of the need when one considers the services that Ms. McLean says an attendant care agency itself and its attendant will provide.

**71** It was submitted that 1 hour per month for the care manager/OT for 12 hours per year, is a more reasonable number. I agree.

#### Allowance for Footwear

**72** Ms. McLean has costed an allowance for footwear at \$180.00-\$240.00 yearly. In answer to a question from the Court it was confirmed that this footwear is not custom-made. There is no medical foundation in the evidence for this expense. *Milana v. Bartsch* (1985), 49 B.C.L.R. (2d) 33 (B.C.S.C) at p. 83, stands for the proposition that the award for cost of future care must be justified on a medical basis.

#### Walker (Future Possibility)

**73** Ms. McLean has costed a walker at \$75.95-\$575.00 every 5 to 7 years (if required).

**74** There is no evidence of any such requirement now or in the future. As a result, there is no medical foundation for this expense.

#### Non-prescription Medication

**75** Ms. McLean has costed "brain gum" for Mr. Lee at a yearly cost of \$684.38 with the recommendation that a medical specialist be consulted regarding whether or not this is appropriate for Mr. Lee.

**76** No medical specialist gave any opinion in that regard as a matter of evidence. As a result there is no medical foundation for this item.

#### Nutritional Supplement

**77** In her evidence in chief Ms. McLean confirmed that the quote in Ms. Simpson's report of a yearly cost of \$1,087.70 was the correct estimate, rather than her own estimate of \$1,211.80-\$1,314.00 per year.

**78** I agree with defendant's counsel that the above items questioned should be deducted from the McLean estimate. However other expenses outlined in Ms. McLean's report are accepted.

**THE REQUIRED DISCOUNT RATE FOR THE ATTENDANT COSTS**

**79** The Chief Justice of the Supreme Court derives his/her authority to set the discount rates, from Section 56 of the Law and Equity Act.

**80** Section 56 of the Law and Equity Act states:

56 (1) In this section:

"discount rate" means the rate, expressed as a percentage, used in calculating the present value of future damages;

"future damages" means damages to compensate for pecuniary losses to be incurred, or expenditures to be made, after the date of the trial judgment in a proceeding.

(2) The Chief Justice of the Supreme Court may make regulations prescribing

- (a) a discount rate that is deemed to be the future difference between the investment rate of interest and the rate of increase of earnings due to inflation and general increases in productivity, and
- (b) a discount rate that is deemed to be the future difference between the investment rate of interest and the rate of general price inflation.

(3) In a proceeding, the discount rate prescribed under subsection (2)(a) must be used in calculating the present value of future damages that are intended to compensate for or are determined with reference to

- (a) loss of future earnings because of partial or total loss of income earning capacity, or
- (b) loss of dependency under the Family Compensation Act.

(4) The discount rate prescribed under subsection (2)(b) must be used in calculating the present value of all future damages other than those referred to in subsection (3).

**81** Section 56(3) states that the discount rate prescribed under subsection (2)(a) - presently 2.5% - must be used on the loss of future earnings claim.

**82** Section 56(4) states that the discount rate prescribed under subsection (2)(b) - presently 3.5% - must be used for all other future damages. (Underlining added).

**83** The attendant costs are not part of the claim for loss of future earnings but are part of the claim for future care costs, and therefore come within Section 56(4) and Section 56(2)(b) of the Law and Equity Act and must be discounted at 3.5%.

**84** There is no authority to depart from the statutory requirements of Section 56 of the Law and Equity Act: see *Pickering & Pickering v. Deakin et al* (1985), 58 B.C.L.R. 145 (B.C.C.A.) at. pp. 160-161.

**85** The defendants estimate of cost of future care is approximately \$2,342,000.00.

**86** I would ask counsel to do a re-calculation of the cost of future care based on the perimeters I have prescribed.

#### WAGE LOSS FOR THE MOTHER, MRS. WINNIE LEE

**87** Through a claim in trust by Allen Lee on behalf of his mother, Winnie Lee, there is a claim for her wage loss from July 20, 1995 to the date that Reasons for Judgment are released.

**88** The amount claimed, as set out in the report of John Struthers, the plaintiff's economic expert (Exhibit 3 Tab 7) is approximately \$162,709.00 to November 19, 2001, the first day of trial. There is also a claim for an additional 8% or \$13,016.00 for loss of non wage benefits for a total of \$175,725.00. Pre-judgment interest is also claimed.

**89** If Mrs. Lee was awarded the same amount that an attendant would be paid to care for Allen Lee, that amount is \$144.00 per day (\$120.00 plus 20% or \$24.00 for benefits). This is the daily rate Ms. McLean has stated is necessary to provide appropriate and adequate attending care to Allen less the administrative costs. The amount of the claim then is estimated to be \$315,300.00 plus pre-judgment interest.

**90** On July 20, 1995 Mrs. Lee, who is now 61 years of age, was employed full time as a seamstress at the Pan Pacific Hotel, a job she had held since 1985. A job she enjoyed and needed in order to contribute financially to household needs including the mortgage on the family home. It was a job she intended to work at until her retirement at age 65. It was a job that paid not only a salary but also substantial non-wage benefits including not only the usual employment benefits such as EI and CPP, but also a pension plan, extended medical benefits, vision care, dental care, long term disability and group life insurance.

**91** As a result of his injuries on July 19, 1995 Allen Lee has and continues to require 24 hour a day care, seven days per week, a fact that has been conceded by the Richmond Hospital. Given the Lee family's financial circumstances Allen and his family have been unable to hire attendants to provide the care that he needs. As a result the responsibility for providing the care Allen needs has fallen squarely on the shoulders of the family and in particular, Mrs. Lee.

**92** In order to care for her son after his tragic accident, Mrs. Lee quit her job as a full time seamstress at the Pan Pacific Hotel.

**93** The Defendant Hospital, submitted that Mrs. Lee's past income loss claim should be only a percentage of time that she was actually taking care of Allen from a disability-related perspective which has precluded her from earning income. There is also an allegation that Mrs. Lee was also

paid an income for domestic and office work by her second son, the dentist Dr. James Lee, which should be deducted from her claim.

**94** While there is evidence that Allen currently enjoys several rehabilitative day outings per week supervised by persons other than Mrs. Lee, the evidence is clear that Mrs. Lee has been the primary and constant care giver for Allen since his injuries. The defendant has also conceded that Allen requires a future live in attendant with 24-hour care. Under these circumstances I do not think it appropriate to penalize Mrs. Lee simply because Allen is also given some outings during the week.

**95** Prior to Allen's injury, Dr. James Lee paid his mother room and board while living in the family home. After Allen's injury, James Lee married and continued to live in the family home together with his wife and children for which he continued to pay his mother, albeit at a higher rate than previously when he was single. Mrs. Lee also continued to do occasional office work for James by answering call forwarding phone calls from his office to the family home and running errands for his office. While I have no doubt that Dr. Lee decided to stay at the family home in order to financially assist his mother, much of that type of work was performed by Mrs. Lee for James before Allen's injury when she was still employed full time by the Pan Pacific Hotel as a seamstress.

**96** Accordingly, I do not think it appropriate to deduct funds supplied by James, as that source of income was previously enjoyed by Mrs. Lee.

**97** Mrs. Lee received disability income of \$4,620.00, unemployment insurance sick leave and Pan Pacific benevolent payments of \$4,620.00 which I agree with the defendant must be deducted.

**98** The issue of family involvement in providing care to a family member has been dealt with by the Supreme Court of Canada in *Andrews v. Grand & Toy*, [1978] 2 S.C.R. 229 when Mr. Justice Dickson, on behalf of the court said at page 243:

The evidence showed that the mother of the appellant James Andrews was living alone, in a second-floor apartment and that relations between Andrews and his mother were strained at times. This should have no bearing in minimizing Andrew's damages. Even if his mother had been able to look after Andrews in her own home, there is now ample authority for saying that dedicated wives or mothers who choose to devote their lives to looking after infirm husbands or sons are not expected to do so on a gratuitous basis.

**99** In *Cunningham v. Harrison*, [1973] 1 Q.B. 942, a case involving a man who was rendered a quadriplegic, Lord Denning, M.R., considered the situation where a wife renders nursing and other services to the plaintiff. He said at p. 952:

It seems to me that when a husband is grievously injured - and is entitled to damages - then it is only right and just that, if his wife renders services to him, instead of a nurse, he should recover compensation for the value of the services that his wife has rendered. It should not be necessary to draw up a legal agreement for them. On recovering such an amount, the husband should hold it on trust for her and pay it over to her. She cannot herself sue the wrongdoer (see *Best v. Samuel Fox & Co. Ltd.* [1952] A.C. 716); but she has rendered services necessitated by the wrong-doing, and should be compensated for it. If she had given up paid work to look after him, he would clearly have been entitled to re-

cover on her behalf; because the family income would have dropped by so much: see *Wattson v. Port of London Authority* [1069] 1 Lloyd's Rep. 95, 102, per Megaw J. Even though she had not been doing paid work but only domestic duties in the house, nevertheless all extra attendance on him certainly calls for compensation.

**100** In the case of *Feng v. Graham*, [1988] B.C.J. No. 514 (C.A.) the Court of Appeal dismissed the defendant's appeal of an award compensating the plaintiff for the services provided to her by her husband. Mr. Justice Wallace reviewed the case law on the issue, including *Cunningham*, supra, and concluded at p. 5:

It would appear from the review of the authorities cited that a claim for nursing and domestic services rendered by members of the injured parties' immediate family are allowed where the plaintiff establishes the need for such services as a consequence of the injury, and provided that they are rendered to or on behalf of the plaintiff. It is not necessary that the plaintiff establish that he or she is under any legal or moral liability to pay the amount awarded to the provider of the services.

**101** It was submitted that the evidence is overwhelming and undisputed that since the time of his accident Allen Lee has required the assistance and help of other individuals, particularly his family, in order to function on a day to day basis. The evidence is also clear that without the 24 hour care he has received Allen would not have the functional capacity that he enjoys at this time. Therefore Mrs. Lee is entitled to be compensated for the lost wages she has incurred as a result of having to quit her job as a seamstress to care for Allen. Alternatively she is entitled to receive compensation for the nursing, domestic and other valuable services that she has given to Allen since his injury and which services he would normally have had to pay for.

**102** The wage/salary portion of Mrs. Lee's claim for past loss of income has been set out in the letter from Susanna Ng, Disability and Benefits Manager for the Pan Pacific Hotel. (Exhibit 8, Tab 8). In the attachments to her letter Ms. Ng has set out the earnings that a full time seamstress could have expected to earn during the period for which the loss is claimed. >From that amount Ms. Ng has deducted the amount of income Mrs. Lee actually earned with the net result being the loss for the period of time in question. Mr. Struthers utilized Ms. Ng's letter in order to calculate what Mrs. Lee's past loss of income from the date of Allen's accident to the start of the trial.

**103** >From the amount of \$175,725.00 less \$9,240.00, I fix Mrs. Lee's claim in trust for past wage loss at \$166,485.00. She is also entitled to Court Order Interest at varying Registrars rate from time to time up to this date for Reasons for Judgment.

## CONCLUSION

**104** In summary the plaintiff Allen Lee is entitled to the following:

1. General or non-pecuniary damages: \$282,000.00;
2. Special damages (inclusive of interest): \$65,000.00;
3. Past wage loss: \$170,091.85;
4. Future wage loss: \$1,335,000.00;
5. Past wage loss held in trust for Mrs. Winnie Lee: \$166,485.00;

6. Cost of future care to be re-calculated by counsel and subject to confirmation by the Court.

**105** Court Order Interest on the claims for past wage loss.

**106** Plaintiff is also entitled to costs.

WONG J.

cp/s/qlsng/qlbrl