

CANADA / JUDGMENT

Dong v. Li

2024 BCCA 404

COURT

British Columbia Court of Appeal

DECIDED

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2024 BCCA 404 Dong v. Li

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

Dong v. Li,

2024 BCCA 404

Date: 20241205

Docket: CA49023

Between:

Yang Dong and Cun Fa Dong

Appellants/

Respondents on Cross Appeal

(Defendants)

And

Kar-Wing Chester Li

Respondent/

Appellant on Cross Appeal

(Plaintiff)

Before:

The Honourable Mr. Justice Groberman

The Honourable Justice Griffin

The Honourable Justice Winteringham

On appeal from: An order of the Supreme Court of British Columbia, dated
March 28, 2023 (Li v. Dong, 2023 BCSC 472, New Westminster Docket M211153).

Counsel for the Appellants:

M.-H. Wright

M.D. Mirosolin

Counsel for the Respondent:

B.E. Fitzpatrick

Place and Date of Hearing:

Vancouver, British Columbia

November 8, 2024

Place and Date of Judgment:

Vancouver, British Columbia

December 5, 2024

Written Reasons by:

The Honourable Mr. Justice Groberman

Concurred in by:

The Honourable Justice Griffin

The Honourable Justice Winteringham

Summary:

The respondent, a laboratory technologist, suffered injuries to his back and knee in a motor vehicle accident for which the appellants admitted responsibility. The injuries do not prevent him from working, but he experiences pain and discomfort by the end of his shifts. Expert evidence suggested that there is a possibility of some improvement in the respondent's symptoms, but he will continue to experience pain and discomfort. The judge made an award that included \$120,000 for impairment of future earning capacity, finding a significant likelihood the respondent will retire earlier than he would have had the accident not occurred. The only direct evidence on that issue was the respondent's statement to that effect, but the judge also took judicial notice of the fact that physical strength and resilience typically diminish with age. The appellants argue the judge's decision was based on speculation and was contrary to his evidentiary findings that the injuries would not worsen. The respondent argues that the damages for loss of future earning capacity were wholly inadequate and should be increased. Held: Appeal

and cross appeal dismissed. The judge was entitled, based on the respondent's evidence and on common knowledge, to reach the conclusion that as the respondent ages, diminished stamina could reasonably lead to early retirement. The damages were not inadequate; to the contrary, the assessment was reasonable. The Court makes observations on the appropriate approach to damages assessed under the principles enunciated in *Pallos v. Insurance Corp. of British Columbia*.

Reasons for Judgment of the Honourable Mr. Justice Groberman:

- [1] The respondent, Mr. Li, was injured in a motor vehicle accident in Vancouver on April 23, 2018. The appellants admitted liability, and a trial took place to assess damages. The trial judge awarded the respondent a total of \$226,102, the bulk of which was non-pecuniary damages (\$90,000) and damages for impairment of future earning capacity (\$120,000). This appeal concerns only the \$120,000 award for impairment of future earning capacity. The appellants say that the award should be set aside or reduced. The respondent cross appeals, arguing that the award should be increased. For reasons that follow, I would dismiss both the appeal and the cross appeal.

Background

- [2] Mr. Li was 40 years old when the accident occurred, 44 years old at the commencement of the trial, and 45 years old at the date of the judgment in the court below. He works as a laboratory technologist at Vancouver General Hospital, earning approximately \$80,000 per year.
- [3] Prior to the accident, he had an active lifestyle. He was happy with his employment, which he described as "the ideal job for him". He planned to continue with it for the rest of his career, and to retire at the age of 65. He had no difficulties with the physical requirements of his work.
- [4] The accident occurred when Mr. Li was driving home from work. His vehicle was struck on the front passenger side by the defendants' vehicle, which failed to stop at a stop sign. The impact pushed Mr. Li's vehicle across the oncoming lane of traffic and onto the sidewalk on the opposite side of the street.
- [5] Mr. Li did not need immediate medical attention after the accident, but did suffer injuries to his back, neck and knee. In the week following the accident, he absented himself from work three days. After a period of recovery, he continued to have knee and back pain, low-level pain in his neck, and, from time to time, headaches.
- [6] Two physiatrists gave expert evidence at trial (one for the respondent and one for the appellants). For the most part, they agreed on their diagnoses. They described the respondent's back and neck pain as chronic myofascial pain in the thoracic and cervical spine, with associated soft tissue injuries. The respondent's left knee pain was found to be secondary to "patellofemoral syndrome" resulting from a contusive injury. Both injuries

were attributable to the accident. The appellants' expert suggested that there were additional injuries to the lumbar spine and shoulder. The judge observed that little turned on whether these additional problems were present but indicated that "[i]f it were necessary to resolve" the differences between the experts' diagnoses, he would conclude that the respondent's expert had "most accurately captured the current nature of [Mr. Li's] accident-related injuries".

- [7] The experts had a more important disagreement with respect to prognosis. Both agreed that the respondent was unlikely to fully recover from his injuries, but the appellants' expert was of the view that some further improvement might be achieved through a program of rehabilitative physiotherapy, while the respondent's expert was of the view that no further improvement was likely. On that issue, the judge preferred the view of the appellants' expert, finding it likely that some improvement was still possible:
- [142] It is important to keep in mind that the question is not whether Mr. Li's accident symptoms can be resolved -- Dr. Waseem quite rightly notes that their duration and progress suggest they cannot -- but whether some of his pain can be reduced, and his function can thereby be increased. It is true that Mr. Li has not gotten worse using his current approach, but the real question is whether his situation can get better to any meaningful degree. Given its past benefits in that regard, I am satisfied that the added gym-based fitness measures [are] likely to lead to at least some improvement, as Dr. le Nobel anticipated, and thereby lessen suffering. As I result, I prefer Dr. le Nobel's opinion on this point.

The Injuries and the Respondent's Work

- [8] The respondent is, because of his injuries, unable to continue in the active lifestyle that he had before the accident. For the most part, however, he continues to work as he did before the accident. He is required to stand while working and, when performing tests, he must hunch over with his arms and shoulders forward. He is often in that position for extended periods. His work leaves him with soreness in his neck and back, and he has episodes of stabbing sensations between his shoulder blades.
- [9] From time to time, the respondent has taken "sick days", for which he is compensated, but he has not taken any other time off work due to the injuries since the week of the accident. He has refused overtime because he finds that working extended hours causes him significant pain. He accepts overtime hours only when there is an emergency. The trial judge found that his overtime had been reduced, in the period leading up to the trial, by approximately 28 hours per year and awarded him \$6,224 for past income loss.
- [10] The respondent gave evidence that while he had, before the accident, expected to continue working at his job until the age of 65, he now thinks there is a likelihood that he will retire earlier. He anticipates that he will find the discomfort he experiences to be unbearable at some point. The expert witnesses were not specifically asked about how the respondent's injuries might affect his plans to work until the age of 65.

- [11] There was some discussion at trial about accommodations the respondent might seek to ameliorate his working conditions, but the judge accepted that no accommodations were realistically available. It also appeared unlikely that the respondent would have the opportunity to transition to part-time work in the future.

The Award for Loss of Future Earning Capacity

- [12] The judge applied the approach to loss of future earning capacity set out in *Rab v. Prescott*, 2021 BCCA 345:
- [47] [There is] a three-step process for considering claims for loss of future earning capacity, particularly where the evidence indicates no loss of income at the time of trial. The first is evidentiary: whether the evidence discloses a potential future event that could lead to a loss of capacity (e.g., chronic injury, future surgery or risk of arthritis, giving rise to the sort of considerations discussed in *Brown [v. Golai]*, (1985), 26 BCLR (3d) 353]. The second is whether, on the evidence, there is a real and substantial possibility that the future event in question will cause a pecuniary loss. If such a real and substantial possibility exists, the third step is to assess the value of that possible future loss, which step must include assessing the relative likelihood of the possibility occurring--see the discussion in *Dornan [v. Silva]*, 2021 BCCA 228] at paras 93-95.
- [13] The judge considered that the evidence disclosed a potential future event that would lead to income loss: the respondent's strength and resilience diminishing to the point where the pain of working through his injuries becomes such that it is reasonable for him to retire. The judge considered that such an eventuality would result in pecuniary loss. He therefore found the first two steps in *Rab* were satisfied.
- [14] With respect to the third step -- assessing the value of the possible future loss -- the judge cited *Perren v. Lalari*, 2010 BCCA 140 at para. 32 for the proposition that quantification can proceed either by way of the "earnings approach" (a rigorous mathematical assessment estimating the damages) or a "capital asset approach" (more suited to cases where the loss may be less easily measurable).
- [15] In *Pallos v. Insurance Company of British Columbia* (1995), 100 B.C.L.R. (2d) 260, 1995 CanLII 2871 (B.C.C.A.), Justice Finch (as he then was) described various approaches to quantification:
- [43] The cases to which we were referred suggest various means of assigning a dollar value to the loss of capacity to earn income. One method is to postulate a minimum annual income loss for the plaintiff's remaining years of work, to multiply the annual projected loss times the number of year[s] remaining, and to calculate a present value of this sum. Another is to award the plaintiff's entire annual income for one or more years. Another is to award the present value of some nominal percentage loss per annum applied against the plaintiff's expected annual income. In the end, all of these methods seem equally arbitrary. It has, however, often been said that the difficulty of making a fair assessment of damages cannot

relieve the court of its duty to do so

- [16] The Court in Pallos made an award of \$40,000 for loss of capacity to earn income, which was approximately equal to the plaintiff's annual income at the time of the injury. The approach of multiplying pre-accident income by one or more years to quantify such a loss is sometimes referred to as the Pallos approach. The judge applied that approach and awarded the respondent \$120,000, which he described as 1.5 years' salary.

Did the Judge Err in Finding a Loss of Capacity to Earn Income?

- [17] The appellants contend that the judge's determination that Mr. Li's symptoms will not likely get worse, and might even improve, is incompatible with his view that Mr. Li may choose early retirement due to his pain and discomfort. In my view, the two findings are not incompatible. The judge's finding that the injuries will not worsen does not mean that the respondent will be able to endure them forever. The judge was entitled to take notice of the fact that a person's stamina is likely to diminish with age, and that at some point, it may not be reasonable to expect Mr. Li to work through his pain and discomfort.
- [18] This Court has, in previous cases, accepted that prolonged exposure to pain and discomfort can take a toll in the longer term. In *Morlan v. Barrett*, 2012 BCCA 66, the Court was faced with a situation of a plaintiff whose condition had (at least arguably) stabilized. The Court accepted, however, that although the plaintiff was able to work, the pain might ultimately cause her career to be shortened:
- [39] As previously mentioned, the trial judge gave two reasons for finding that there was a real and substantial possibility that fibromyalgia would shorten Ms. Morlan's working career. The first reason was based on what he described as "common experience" that a person with a stable but persistent energy-draining condition will find it more difficult to continue working as he or she grows older .
- [40] With respect to the first reason, the appellants submit that it was not open to the trial judge to have regard to "common experience" as there was no evidence to support this being so. I disagree.
- [41] Accepting that, to use the expression used at trial and at the hearing of this appeal, Ms. Morlan's condition had "plateaued", the fact remains that she would forever suffer from debilitating chronic pain along with headaches, symptoms that could be reduced, but not eliminated, by medication. In other words, throughout each and every day of her life, Ms. Morlan would have to cope with some level of discomfort. In my view, it was open to the trial judge to find--essentially as a matter of common sense--that constant and continuous pain takes its toll and that, over time, such pain will have a detrimental effect on a person's ability to work, regardless of what accommodations an employer is prepared to make.

- [19] Similarly, in *Davies v. Penner*, 2023 BCCA 300, a plaintiff who suffered chronic pain was awarded damages at trial for loss of future earning capacity despite the fact that she was able to continue in her job, had a "cautiously optimistic prognosis" for some improvement in her symptoms, and suffered no current loss of income. This Court accepted that such a person might reasonably be expected to retire early:
- [38] The judge found that Ms. Penner experiences chronic pain which affects her ability to perform tasks required for her work. While she had been able to work through the pain because of her dedication, she did so by making accommodations. The pain affects her mood and the judge accepted that at the end of a week of work, she is "at the end of [her] rope". The judge found that the chronic pain symptoms would not resolve and may not significantly improve .
- [40] The key question at the first stage of the Rab analysis is whether the evidence discloses a potential future event that could give rise to a loss of future earning capacity: Rab at para. 47. The potential future event identified by the judge was the continued existence of the respondent's chronic pain, leading to a loss of capacity as she ages.
- [20] The appellant in *Davies* attempted to distinguish *Morlan*, pointing out that in *Morlan*, the expert evidence included some possibility that the plaintiff's symptoms would become more pronounced over time, so that the discussion of a "common experience" inference was not essential to the decision. This Court was not persuaded. After quoting para. 41 of *Morlan* and noting that Ms. Penner's prognosis was better than that of the plaintiff in *Morlan*, the Court upheld the judge's determination that a loss of future earning capacity was nonetheless made out:
- [43] The judge considered the respondent's evidence as well as the medical evidence and did not ignore the differences between this case and the findings in *Morlan*. The judge found that the pain and limitations suffered by Ms. Penner, which had persisted for five years, took a toll on her and may have a detrimental effect on her future ability to work . She acknowledged that Ms. Penner had a more optimistic prognosis than the plaintiff in *Morlan*, but held that the cases were similar in that neither plaintiff had a prognosis of full recovery. The judge found that if Ms. Penner's pain continued, it might "further affect her ability to perform her work functions" and that this was sufficient to satisfy the first step in the Rab analysis . The judge did not err in her consideration of Ms. Penner's symptoms, their interaction with her work duties, and the potential for a future loss of capacity based on the inference, similar to that made in *Morlan*, that the toll taken by chronic pain over time could reduce her capacity to work.

- [21] The same considerations apply in the case before us. Mr. Li works with significant pain and discomfort. While his injuries are not expected to get worse (and may improve a bit), they are permanent and will continue to cause pain and discomfort that is exacerbated by his work. The judge made no error in finding that chronic pain would take a toll over the years, nor was he wrong to accept the common sense proposition that a person's stamina is likely to decrease as they get older.
- [22] In saying this, I do not ignore the Court's caution in *Davies*:
- [44] I must emphasize that the fact that a claimant experiences chronic pain does not, on its own, satisfy the first step in the *Rab* analysis. There is no "common sense" inference that can be drawn from the mere existence of chronic pain. It is only possible for a judge to draw an inference based on all of the medical and lay evidence about the nature and extent of a claimant's injuries, the claimant's circumstances, and the impact that work has on their ability to function.
- [23] In the case before us, the judge carefully examined the medical and lay evidence, and the findings he made were open to him. I see no reversible error in his conclusion that Mr. Li was entitled to be compensated for a loss of future earning capacity.

Quantification of the Loss

- [24] Both the appellants and respondent take issue with the judge's quantification of the loss. The judge employed the *Pallos* approach of awarding the plaintiff a multiple of his current earnings to compensate him for his loss of future earning capacity. Such an approach has been described as a "rough and ready one" (see *Rab* at paras. 66 and 75; *Davies* at para. 49; *Fatla v. McCarthy*, 2024 BCCA 311 at para. 43).
- [25] The appellants contend that the judge did not provide sufficient discussion in the judgment to justify the amount of damages awarded, which they say is excessive. The respondent also takes issue with the analysis, arguing that the judge must have felt constrained by the idea that damages under the *Pallos* approach will typically amount to one or two years' income. The respondent says the award was too low.
- [26] It is now well established that "the task of the court is to assess damages not to calculate them on some mathematical formula": *Mulholland v. Riley Estate* (1995), 12 BCLR (3d) 248, 1995 CanLII 1971 (B.C.C.A.) at para. 43.
- [27] The assessment of damages for loss of future earning capacity is not intended to be a wholly arbitrary one, however. Such awards are not simple conventional awards made as a matter of course. While it is common to see awards for loss of future earning capacity that are one or two times current income, it is important to recognize that there is no "rule of thumb" mandating or justifying such a quantification. A judge is required to assess the damages in each individual case after full consideration of the evidence.

- [28] Although an award for loss of future earning capacity is not a simple mathematical calculation, "if there are mathematical aids that may be of some assistance, the court should start its analysis by considering them" (*Jurczak v. Mauro*, 2013 BCCA 507 at para. 37) and should not brush them aside without reason (*Fatla* at paras. 40-43).
- [29] Often, a judge will be faced with numerous possibilities and variables in assessing the loss of future earning capacity, and the assessment will be a rough one. As this Court has said, judges are not, in making such awards, required to "show [their] math": *Kringhaug v. Men*, 2022 BCCA 186 at para. 50. An award will be upheld as long as it is a reasonable one on the evidence.
- [30] In the case before us, the judge was faced with several considerations in fixing the award. He understood that the respondent had lost income from his inability to regularly take overtime work and had to factor that loss into his assessment. He also found that there was a significant possibility that the respondent would retire from his job earlier than he had planned and would be unable to make up the lost income. Given the uncertainties surrounding the timing of any early retirement, there was considerable room for debate as to the amount of any such loss.
- [31] The judge also had to take into account the fact that the losses he was assessing were future losses. As such, he needed to consider whether the respondent's real income was on an upward trajectory at the time of the accident, or, on the contrary, had reached a plateau. Importantly, the damages also needed to be discounted to reflect present value.
- [32] The respondent suggests that the trial judge may have felt constrained in his award by the fact that the *Pallos* approach is now frequently described as one of "awarding one or two years' income" to a plaintiff (see, for example, *Rab* at para. 66). I see nothing in the judgment to suggest that the judge felt he was so constrained. Indeed, he specifically chose not to follow the common practice of awarding an integral multiple of earnings, instead choosing a fractional one.
- [33] In any event, the amount awarded appears to have a rational connection to the respondent's loss. While the respondent may well retire earlier than he anticipated, the judgment does not suggest a very substantial shortening of his career. The income loss occasioned by early retirement will occur many years from now, and so there is a significant discount to be applied in order to account for present value. The respondent's loss of overtime compensation, similarly, will take place over time, and is subject to some uncertainties.
- [34] In the circumstances, the judge's award of 1.5 times the respondent's current salary to account for loss of future earning capacity was a proper assessment. I would not interfere with it.

Costs

[35] At the hearing of this matter, the parties agreed that in the event that both the appeal and cross appeal were dismissed, each party should bear their own costs of the appeal. I am satisfied that such an order is appropriate.

Disposition

[36] I would dismiss the appeal and cross appeal, with each party to bear their own costs of the proceedings in this Court.

"The Honourable Mr. Justice Groberman"

I AGREE:

"The Honourable Justice Griffin"

I AGREE:

"The Honourable Justice Winteringham"

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