

CANADA / JUDGMENT

Ludwiczak v. Nguyen

2020 BCSC 1202

COURT

Supreme Court of British Columbia

DECIDED

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2020 BCSC 1202 Ludwiczak v. Nguyen

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Ludwiczak v. Nguyen,

2020 BCSC 1202

Date: 20200814

Docket: M184392

Registry: New Westminster

Between:

Gerald Marek Ludwiczak

Plaintiff

And

Thi Nguyen and Nguyen-Tuong Nghi Tran

Defendants

Corrected Judgment: The cover page of this judgment was corrected on August 17, 2020 and August 21, 2020.

Before: The Honourable Mr. Justice A. Saunders

Reasons for Judgment

Counsel for the Plaintiff:

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M. Straw

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Place and Date of Trial:

New Westminster, B.C.

December 2-3, 5-6, 9-10, 2019

Place and Date of Judgment:

New Westminster, B.C.

August 14, 2020

- [1] This is an assessment of bodily injury damages, arising out of an October 23, 2014 motor vehicle accident, for which liability is admitted.
- [2] As of the date of the accident Mr. Ludwiczak was 35 years old, employed as a mobile supervisor with GardaWorld, a security guard contractor. He was (and still is) married, with an infant child. He had obtained a Bachelor of Arts in Criminology from Kwantlen Polytechnic in 2009. He was in good health. He enjoyed playing soccer and was particularly enthusiastic about recreational hockey; he would also do light jogging two or three times a week. I accept that he was a hard-working, dedicated employee; his former supervisor, Mr. Eun, described him as a "go-getter" with a great work ethic. Mr. Ludwiczak testified that his normal work schedule was four days on/four off, 12-hour shifts, and that he worked a lot of overtime in addition. Mr. Eun corroborated that evidence, testifying that Mr. Ludwiczak often worked six-on/two-off, and observing that even when Mr. Ludwiczak and his wife had a child, he was coming to work "too much".
- [3] Mr. Ludwiczak testified that a few days after the accident he began experiencing pain and stiffness in his neck with associated headache, and in his lower back. In his direct examination, Mr. Ludwiczak testified that his initial symptoms also included upper back soreness. The headache and, for the most part, the neck issues resolved by 2016. His upper back symptoms have "gotten way better over time"; though certain movements can trigger symptoms. He described how only the week prior to trial, the motion of reaching for his wallet triggered muscle spasm in his upper back. His lower back has improved the least and, he testified, still causes discomfort on a daily basis.
- [4] However, in cross-examination Mr. Ludwiczak admitted that he first noticed upper back symptoms only in connection with working for B.C. Rapid Transit ("BCRTC") as a customer service representative, in connection with their roll-out of the Compass card, a ten-month contract position he started in mid-September, 2015; that was a job that required him to be on his feet for an entire eight-hour shift. This admission, I note, squares with the narrative

of Mr. Ludwiczak's reported symptoms as recorded in the March 2, 2017 expert opinion report of his family physician Dr. Walter, where upper back symptoms are only first mentioned in connection with an office visit on July 12, 2016, almost two years after the accident.

- [5] Mr. Ludwiczak took about a week off work following the accident, hoping for improvement, and then began seeing Dr. Walter. In early December 2014 he began physiotherapy, eventually having 31 treatment sessions at a clinic in Surrey, up to June 2016. He also underwent some active rehabilitation therapy with a clinic in Anmore, in, he testified, 2017. His trainer taught him exercises that he has continued to do on his own. Further, he had massage therapy at a clinic in Vancouver between September 2018 and October 2019, 29 sessions in total; that treatment was recommended by Dr. Walter.
- [6] Mr. Ludwiczak has treated his symptoms, as necessary, with over-the-counter medication, mostly acetaminophen. He prefers not to take medication, and is not currently using any. Dr. Walter has not prescribed or recommended any prescription medication or intrusive procedures. Dr. Neufeld, a specialist in occupational health, who assessed Mr. Ludwiczak in May 2018, recommended a trial of one or more medications commonly used in the management of chronic back pain, such as Amitriptyline and Gabapentin, but Mr. Ludwiczak said he has no intention of taking those drugs.
- [7] Mr. Ludwiczak testified that he no longer plays recreational hockey, as it aggravates his upper and lower back symptoms. He still jogs; he testified that he pushes himself to run, but does not run the distances he could achieve before the accident. He found the active rehabilitation treatments he underwent in 2017 helped improve his running stamina, but he feels he has plateaued since then. Before the accident, he testified, he would swim perhaps once a month; now he doesn't swim so often due to upper back pain. He also testified as to the impact of his injuries on his ability to perform household chores. He is able to do light vacuuming. His wife now mows the lawn, and his mother, who lives with them, helps out with gardening.
- [8] Mr. Ludwiczak did not testify to having any changes in mood or symptoms of mood disturbance. Mr. Ludwiczak's wife testified that he is now easily annoyed and frustrated, because, she assumes, of his pain level. The testimony of Mr. Ludwiczak's mother was more dramatic. She said that he talks constantly about his aches and pains, and seems upset and frustrated. She said that Mr. Ludwiczak would often phone her from work when he was employed as a SkyTrain guard, complaining that he was in so much pain he was going to faint, and that there have been many times when she would come home and find him lying on the floor, complaining that his back was killing him. This evidence is not consistent with Mr. Ludwiczak's reports to Dr. Walter and Dr. Neufeld, and Mr. Ludwiczak himself did not testify to having back pain of such frequency and severity. I therefore find it difficult to give much weight to his mother's testimony.

- [9] There was no collateral evidence called, other than from Mr. Ludwiczak's wife and mother. No co-workers testified as to Mr. Ludwiczak complaining of being unable to function at work, nor as to him manifesting pain behaviour. Mr. Ludwiczak did not testify as to ever having to seek any type of accommodation from an employer. Mr. Eun, his supervisor at GardaWorld, testified that he is not aware of Mr. Ludwiczak ever having complained of pain or discomfort; he could not even remember that Mr. Ludwiczak had been in an accident.

Post-Accident Employment

- [10] Mr. Ludwiczak described his supervisor position with GardaWorld as requiring him to be able to walk quickly through larger buildings to "hit" the numerous security scan points, to manage his time and to drive. He described it as a position that entailed a lot of responsibility. GardaWorld had purchased his previous employer, Intercon, prior to the accident, in 2013, and his work schedule became much more demanding under the new ownership. He also testified that there was a lot of staff turnover under GardaWorld, as a result of which his responsibilities further increased.
- [11] As I have noted, Mr. Ludwiczak took a week off following the subject accident. On returning to work, he began delegating more patrols and responses to alarms to his operatives, to avoid straining his back and feeling pain and discomfort. Asked on his direct examination whether his injuries led to a modification of his hours, he said he believed there was some reduction in his hours, but he did not remember the specifics.
- [12] In 2015 - Mr. Ludwiczak could not remember when, exactly - he also began doing part time work for a competitor of GardaWorld, Paladin Security. In cross-examination, he said he had not been as happy in his work with GardaWorld as he had been with Intercon. GardaWorld lost many contracts, he said, and there were many terminations of employees and changes in the work environment. Mr. Ludwiczak indicated in his interview with Paladin that he was open to working all shifts, and he accepted a position with them as a mobile supervisor - the same position he had held with GardaWorld.
- [13] Mr. Ludwiczak attributed, or attempted to attribute, his decision to move to Paladin to thinking that he might be able to manage his pain better in a different environment. That explanation did not make a lot of sense. I cannot think that Mr. Ludwiczak's back pain was terribly severe or that managing his back pain was a significant factor in the move, when what he did was transfer into exactly the same type of work. He did not find any difference in the two positions in that respect and ultimately his supervisor at GardaWorld - Mr. Eun - told him that he could not continue part-time with GardaWorld if he was going also to be working as a mobile supervisor with one of its competitors. Mr. Ludwiczak therefore transferred into static guard position with Paladin.
- [14] Mr. Ludwiczak has held a variety of positions since then. He left his full-time position with GardaWorld and commenced the aforementioned ten-month contract position with BCRTC, in September 2015, although he continued to work part-time for GardaWorld as a mobile

security guard until sometime in 2016. He had actually applied to BCRTC in 2014, prior to the accident. He testified in cross-examination that had his contract with BCRTC been extended, he probably would have kept doing that job. He did not miss any shifts due to his injuries. When his contract with BCRTC came to an end in July 2016, he went on employment insurance, supplemented by some part-time work for Paladin, and after his EI benefits ran out he increased his hours at Paladin to full time between April and July 2017.

- [15] At about this time Mr. Ludwiczak considered a position as a corrections officer, and went so far as to take a practice test respecting his physical abilities. His back hurt for several days afterwards. Dr. Walters discouraged him from pursuing this job due to his continuing back symptoms, though Mr. Ludwiczak was keen enough to pursue this position that he saw another doctor for a second opinion.
- [16] In July 2017, he began working for Western Protection Alliance, doing mobile security on a pipeline construction project at locations in Surrey and Coquitlam; he worked 12-hour shifts, eight days on, six off. He held that position until January 2018, when his employer's contract came to an end.
- [17] Mr. Ludwiczak then obtained his certification in traffic control. He worked three shifts for Universal Flagging as a trainee, earning somewhere around \$16 per hour, but, he testified, quit as his back was not feeling very good after the shifts. He testified that if he would have stayed on, it would have become a full-time position.
- [18] He was then back on employment insurance benefits until August or September 2018, and during that time pursued a number of other career options. Sometime during that year, he applied to BCRTC to work as a SkyTrain attendant. In early 2018, he testified, he applied to Coast Mountain Transit to undergo training as a bus driver, and passed through the interview and reference checks. Coast Mountain could not commit to a time frame for a hiring decision, however, and so he continued to pursue other opportunities. He applied for a position with the Liquor Distribution Branch ("BCLDB") as a Loss Prevention Officer. In October 2018, he received an offer from Canada Post to work as a letter carrier on a temporary, on-call basis. He knew that this position would require him to lift and carry heavy satchels, but he pursued it nonetheless. He attended Canada Post's training program, was placed on the call-in list, and worked a couple of shifts as a trainee. He did find it hard on his back. He then received a job offer from BCLDB, which he accepted. He continued to work part time for Paladin.
- [19] Mr. Ludwiczak testified that the BCLDB job has been the best one for his back. Much of his shifts are spent in a sitting position. He described the job as providing the flexibility of allowing him to walk whenever he wants to. In terms of his back issues, he said, "this is the job for me". Unfortunately, however, his position has now been made redundant due to a reorganization. His employer has offered other positions to him, in clerical, warehousing, and sales. There is also continuing work available in loss prevention on an auxiliary part-time basis, with transition to full time being dependent on seniority. At the time of trial, Mr.

Ludwiczak was uncertain as to which option he would pursue. He was not aware what accommodations his employer might grant him in respect of the sales and warehouse positions. He was leaning towards taking the auxiliary loss prevention position, in which case he would supplement his income with additional shifts, up to full time hours, with Paladin.

Expert Medical Evidence

- [20] As to the medical evidence, Dr. Walter, in two reports filed as expert opinion evidence, describes 18 clinical visits between November 2014 and February 2017, and a further eight visits between March 2017 and March 2019. On the first visit, the diagnosis was "multiple soft tissue injuries and headache". That diagnosis has not changed. There is no record of Dr. Walter finding objective signs of injury on any of these visits. There is mention of palpation eliciting complaints of tenderness on only five of those 26 visits, although on some of those other occasions Mr. Ludwiczak did remark that his pain was "deeper". Dr. Walter, in his second report, opined that Mr. Ludwiczak would require further assessments and treatments; he did not elaborate. He expressed the opinion that Mr. Ludwiczak should fully recover in time, although he did not expect any significant change "for several years to come", and the chance of full recovery would diminish as time goes on. In cross-examination, he clarified that by "several years" he means three to seven.
- [21] Dr. Neufeld provided an expert opinion on the impact of Mr. Ludwiczak's injuries on his employability. His opinion was based on review of Dr. Walter's records, Mr. Ludwiczak's self-assessment in various questionnaires used by Dr. Neufeld, and a physical examination. Dr. Neufeld did not make a diagnosis. The symptoms Mr. Ludwiczak described to Dr. Neufeld were lower back pain with some radiation down his left leg, of a severity of three out of ten, occurring 10 days a month, and for two to three hours at a time; and, upper back pain producing constant discomfort that "requires lots of stretching and taking breaks", with a similar frequency and duration, and a severity of two out of ten. Dr. Neufeld testified that these pain severity numbers are far lower than he normally sees. He did not explore with Mr. Ludwiczak whether the severity of the symptoms was greater than these 3/10 and 2/10 measures after prolonged periods of intense physical activity. On examination, the findings were essentially normal except for subjective report of left lower back pain on straight leg raising, with the associated objective sign of a positive tripod sign. He did not complain of leg pain during the examination. Dr. Neufeld described the objective findings as "subtle".
- [22] Dr. Neufeld noted that Mr. Ludwiczak does not have an overly negative perception of himself as a very disabled person; his score on the Pain Disability Index was low. He also evaluated Mr. Ludwiczak as having a moderate to high degree of kinesiophobia, i.e. fear of re-injury, and he felt it likely that this had interfered with Mr. Ludwiczak's effective physical rehabilitation.

- [23] Dr. Neufeld opined that Mr. Ludwiczak's symptoms were caused by the accident. He assessed Mr. Ludwiczak as having pain-limited tolerance for prolonged standing and walking; and as being incapable of repetitive stooping, kneeling, crouching and crawling, and medium load handling. Dr. Neufeld described some of these physical activities as being beyond the requirements of Mr. Ludwiczak's pre- and post-accident occupations. However, this finding was based on Mr. Ludwiczak's own description of his occupation requirements, which Dr. Neufeld noted were in some cases more extreme than given in the National Occupation Classification. A Job Demand Analysis, which would have resolved these discrepancies, was not undertaken.
- [24] Dr. Neufeld is of the opinion that maximum medical improvement had not yet been achieved as of the date of his assessment. Mr. Ludwiczak's condition, he said, could be further improved through appropriate medication and rehabilitation efforts, in particular an exercise program focused on flexibility, endurance, and strength, especially core strength.
- [25] I do not give great weight to the negative aspects of Dr. Neufeld's assessment, for two reasons.
- [26] First, Dr. Neufeld did not explain how his assessment of Mr. Ludwiczak's disability could be reconciled with a pain severity of only 2/10 or 3/10. It is therefore unclear to me to what extent Mr. Ludwiczak's limitations reflect an actual degree of disability, as opposed to them reflecting a reluctance to engage in greater exertion due to the kinesiophobia Dr. Neufeld identified.
- [27] Second, Dr. Neufeld's finding of a causal connection between the accident and the upper back pain was based on an assumption or characterization of the upper back symptoms as "radiating" from the lower back. That is not how Mr. Ludwiczak described his upper back symptoms when he testified, and not how he ever reported the symptoms to Dr. Walter. Further, Dr. Neufeld also says that the lower back pain "at times radiating to his left leg and upper back has been persistent since shortly after the motor vehicle collision" (emphasis added); but, as I noted above, Mr. Ludwiczak's evidence is that the upper back symptoms did not emerge until many months after the accident, and the first mention of upper back symptoms to Dr. Walter was nearly two years later.
- [28] To assume a connection between an accident and a symptom simply because one precedes the other is to fall into the fallacy of post hoc ergo propter hoc reasoning. A causal connection may be inferred from a purely temporal connection when other possibilities are eliminated, but the inference becomes weaker as the gap in time increases: see *White v. Stonestreet*, 2006 BCSC 801, at paras. 73-76. Given the significant gap in time between the accident and the emergence of Mr. Ludwiczak's upper back issues, and given no specific analysis was undertaken of the cause of the upper back pain later emerging, I cannot find it has been proven on a balance of probabilities that the symptom of upper back soreness is as a result of the subject accident. Dr. Neufeld's report does not distinguish between the degrees of impairment that result from Mr. Ludwiczak's upper and lower back issues, which

of course complicates the process of finding the extent of any disability attributable to the accident.

- [29] The plaintiff also tendered as expert evidence a functional capacity evaluation conducted by an occupational therapist, Mr. Mark Jaschke, in July 2019. Mr. Jaschke opined that Mr. Ludwiczak is capable of personal care and household tasks that do not exceed "entry-level" medium strength or require prolonged static back flexion while applying force, or prolonged work above shoulder height. Examples of work that would be beyond his capacity are snow shovelling, tree pruning, and ladder work while reaching. With respect to employment-related activities, Mr. Jaschke noted similar limitations to those identified by Dr. Neufeld, in respect of stressful body positioning, prolonged standing, walking, and stair climbing. He felt that Mr. Ludwiczak did not meet the full demands of a position such as a security guard mobile supervisor, and would be incapable of tolerating the demands of a letter carrier (a position he briefly attempted following the accident). Like Dr. Neufeld, Mr. Jaschke did not differentiate between the limitations imposed by Mr. Ludwiczak's upper and lower back pain and discomfort. Curiously, Mr. Jaschke also included neck pain as one of Mr. Ludwiczak's current symptoms, though Mr. Ludwiczak gave no evidence to that effect at trial and, as I have noted, testified that his neck had resolved for the most part by 2016.
- [30] As with Dr. Neufeld's report, Mr. Jaschke's assessment of Mr. Ludwiczak's capabilities did not include a Job Demand Analysis, so there is no direct evidence of loss of capacity to engage in the discrete physical aspects of the various jobs Mr. Ludwiczak has held. I accept that Mr. Jaschke's evaluation provides some evidence of a loss of capacity due to lower back injury sustained in the accident. But that evidence has to be weighed against the plaintiff's own evidence and his own conduct, such as his very modest rating of his pain severity to Dr. Neufeld, his ability to tolerate long shifts over successive days with Western Protection Alliance, and his applying for work as a SkyTrain attendant in 2018, notwithstanding that such a job would obviously require prolonged periods of standing and walking.

Summary of the Plaintiff's Condition

- [31] I find that Mr. Ludwiczak suffered mild to moderate soft tissue injuries in the subject accident, leading to headache and neck pain that resolved within approximately 18 months, and chronic low back discomfort which has persisted and still becomes particularly painful with prolonged physical exertion. The low back pain has precluded him from engaging in recreational hockey and has limited some forms of exercise, in particular long jogs. The fact that he has continued to seek employment in his pre-accident career in security, that he has shown little objective evidence of impairment, and that he limits his medication simply to over-the-counter painkillers (and will not even consider trials of the prescription medications recommended by Dr. Neufeld), as well as the very minor reporting of pain severity to Dr. Neufeld, all strongly point to Mr. Ludwiczak being able to function adequately, with some limitations.

- [32] In *Stapley v. Hejslet*, 2006 BCCA 34 [Stapley], Madam Justice Kirkpatrick provided at para. 45 an "inexhaustive list" of the factors that commonly bear on an award of non-pecuniary damages: a plaintiff's age; the nature of the injury; the severity and duration of pain; disability; emotional suffering; loss or impairment of life, of family, marital and social relationships, and of physical and mental abilities; and, loss of lifestyle. In none of these categories has the impact of Mr. Ludwiczak's injuries been particularly severe.
- [33] I have included the evidence of Mr. Ludwiczak's post-accident employment in the list of the factors I have weighed in assessing the extent of his disability. I do not wish to overstate the significance of that factor. In *Stapley*, Kirkpatrick J.A. cautioned against a plaintiff's stoicism leading to a plaintiff being penalized, and I recognize the possibility that stoicism on the part of Mr. Ludwiczak may have been a factor in his continuing to seek employment; that he may have "worked through his injuries". But the problem of assessing damages in the case of injury to a stoical individual goes beyond avoiding drawing negative inferences from evidence of their post-accident activities. When a plaintiff does not articulate his degree of pain, disability and impairment - and, in particular, when a plaintiff has only described to a doctor the severity of their pain as being a "2" or "3" on a scale of 10 - the Court cannot simply assume that stoicism has impeded them from providing more fulsome testimony and "fill in the blanks". A plaintiff bears the burden of proof, and my findings must accord with the weight of the evidence.
- [34] There is little precise evidence as to his prognosis. Dr. Neufeld's opinion that his condition can be further improved through appropriate medication and effective rehabilitation, is the best guide to his likely outcome. I approach the quantification of his damages on the basis of Mr. Ludwiczak likely facing several more years of low back discomfort and restrictions in his activities that will gradually improve, and that the positive and negative contingencies balance each other out.

Non-Pecuniary Damages

- [35] As to non-pecuniary damages, the plaintiff submits that the award should be in the range of \$85,000, citing *Elzinga v. Sharpe*, 2019 BCSC 314 [Elzinga], and *Mojahedi v. Arian System Inc.*, 2016 BCSC 1225 [Mojahedi]. The injuries, and the impact of those injuries on the plaintiffs in those cases are significantly worse than in the present case. For example, the symptoms suffered by the plaintiff in *Elzinga* were described as including severe flare ups, "akin to a fork being plunged into his neck or back", leading to one doctor recommending radio frequency ablation therapy to his back, and laser treatment to his neck. In *Mojahedi*, the plaintiff, in addition to chronic pain, suffered fatigue, anxiety, and depression; he had undergone counselling for his psychological issues, and there was a possibility of future referral for spinal injections to address his lumbar pain.

[36] The defence contends that the range should be \$30,000 to \$40,000, citing *Lopez v. VW Credit Canada Inc.*, 2008 BCSC 320; *Sidhu v. Liang*, 2009 BCSC 1697; *Pavan v. Guolo*, 2016 BCSC 324; and *Jones v. McLerie*, 2016 BCSC 763. Those cases are somewhat more comparable, although two of them are now significantly dated. I assess Mr. Ludwiczak's non-pecuniary loss at \$50,000.

Past Loss of Earning Capacity

[37] The plaintiff seeks damages for both past and future loss of income earning capacity.

[38] The plaintiff quantifies the past loss on the assumption that but for the accident he would have continued in his employment with GardaWorld, earning a similar income, adjusted on the basis of increase in the average weekly earnings for all BC workers. Comparing his after-tax position on such income, to his actual after-tax T4 and EI earnings, the plaintiff's economist expert Mr. Benning puts Mr. Ludwiczak's pre-trial income loss at \$62,773. The plaintiff seeks an award under this head of \$50,000.

[39] The defendant's position is that so long as Mr. Ludwiczak remained employed by GardaWorld he in fact continued his pre-accident pattern of working "significant overtime hours", as shown by the payroll records in evidence. The defendant says his pre-trial income loss should be limited to \$1,200, reflecting a loss of one week's income. The defendant says it has not been proven that Mr. Ludwiczak would have remained with GardaWorld but for the accident. The defendant's income losses since then, it is submitted, have been as a consequence of him taking short-term contracts with Western Protection Alliance and BCRTC, with foreseeable periods of unemployment following the termination of those contracts.

[40] First, I do accept that there was a significant loss of overtime employment with GardaWorld in the months following the accident. The difficulty lies in quantifying the loss on the available documentary evidence.

[41] In the year prior to the accident, the payroll records show Mr. Ludwiczak working 2,032 hours of regular time, and 1,000 hours of overtime. Roughly, for each 8-day period of four-on/four-off, Mr. Ludwiczak averaged 44 hours of regular time and 21 hours of overtime. This appears consistent with Mr. Ludwiczak's evidence that he worked a lot of overtime, and Mr. Eun's evidence that he often worked six-on/two-off. The post-accident payroll records, however, show a marked drop off in overtime. At his pre-accident rate, in the time period remaining to the end of the calendar year he would have worked about 352 hours regular time, and about half that - 175 hours - of overtime. Instead, his overtime fell to just 101 hours. At a weighted average wage of \$27.35, that amounts to a pre-tax loss during 2014 alone of \$2,762.35.

[42] The GardaWorld payroll records for 2015 show a similar pattern. However, most of the records are broken down by customer or location, rather than time period, and so it is not possible to precisely attribute changes in hours as between the time period when Mr.

Ludwiczak remained a full-time employee, and the period when he left full time employment with GardaWorld for Paladin, and then later began he began working for BCRTC. Further, I have no evidence from GardaWorld as to the availability of the same amount of overtime work, had Mr. Ludwiczak been fit to return to work at his pre-accident pace. At most, the 2015 payroll records could be seen as consistent with Mr. Ludwiczak losing overtime income in the range of approximately \$8,280 over the first six months of the year. Given the gaps in the evidence, I attribute half that loss to Mr. Ludwiczak's injuries. I therefore assess his pre-trial, pre-tax loss for 2014 and 2015, up to the point of his leaving Garda World, at \$6,900.

[43] I agree with the defence that the plaintiff has not proven a causal connection between his injuries and leaving his full-time position with GardaWorld. I say this for several reasons:

- a) His pattern of working six 12-hour days straight, followed by two days off, seems gruelling, and may not have been sustainable in any event;
- b) Even before the accident he had considered other job opportunities, and had applied to BCRTC in 2014; and
- c) When asked in cross-examination whether he would have pursued the ten-month contract with BCRTC but for the accident, Mr. Ludwiczak replied affirmatively and unequivocally; he said he would have applied for that position in any event, but kept working as a mobile guard on a part-time basis. In contrast, when asked whether he would have stayed on with GardaWorld full-time but for the accident, he was unable to give a definite answer.

[44] Therefor, I find no further loss of pre-trial earning capacity up to July 2016, when his BCRTC contract came to an end.

[45] Between July 2016 and the commencement of employment with BCLDB in November 2018 I accept Mr. Ludwiczak's earning capacity continued to be potentially impacted by his injuries. He was unable to undergo the corrections officer physical; he found letter-carrying too difficult; he was only able to work a few shifts doing traffic control, after obtaining his certification. However, I am not satisfied there was a real and substantial possibility of him having earned more in any of those positions, but for the accident, than his actual post-accident earnings. There is no evidence of the availability of full-time employment with those particular employers. I have real doubt as to whether a position as a letter carrier would have been compatible with Mr. Ludwiczak's temperament and career interests. The same holds true for being a bus driver, a job he had considered and applied for, but gave up pursuing when offered the BCLDB position. Further, there is the complication that some of his work-related impairment may have been due to soreness in his upper back, which I am unable to attribute to the accident.

[46] In *Brown v. Gola* (1985), 26 B.C.L.R. (3d) 353, Mr. Justice Finch, as he then was, summarized the factors that go into assessing a loss of earning capacity on the basis of a diminished capital asset as including whether a plaintiff has been rendered less capable

overall from earning income from all types of employment; is less marketable or attractive as an employee to potential employers; or has lost the ability to take advantage of all job opportunities which might otherwise have been open to him, had he or she not been injured. The latter factor, as I have said, is problematic in the present case, but I am satisfied that Mr. Ludwiczak's lower back symptoms did adversely impact his overall capability and marketability, in that limited time period. Mr. Ludwiczak, with a wife and young daughter to support, was highly motivated to find employment, and had served with GardaWorld as a dedicated, conscientious employee. If find it likely that but for the accident his job options, when his temporary contracts ended, would have been expanded, his periods of unemployment would have been shorter and his income would have been greater. I assess a further loss of \$20,000, pre-tax.

[47] I find no real and substantial possibility of pre-trial earnings loss attributable to the accident, after Mr. Ludwiczak began working full-time for BCLDB.

[48] The total gross loss of income earning capacity, pre-trial, is therefore assessed at \$26,900.

Future Loss of Earning Capacity

[49] As to future loss of earning capacity, the plaintiff filed the aforementioned report of Mr. Benning, and also a vocational assessment authored by Ms. Tiffany Chan.

[50] Ms. Chan's conclusion is that Mr. Ludwiczak is not competitively employable as a security guard. However, in reaching that conclusion Ms. Chan assumed facts as to his pre-and post-accident work history that are not in evidence and that at some points were contrary to the evidence. Mr. Ludwiczak, she said, told her that his position with GardaWorld as a mobile supervisor consisted mostly of duties related to physical patrols, which was not the description he gave in his testimony. He told her that GardaWorld "was not accommodating and expected him to keep working in his pre-accident position and duties". That was not Mr. Ludwiczak's evidence at trial; he gave no evidence of having sought accommodations from that employer, and, as I have noted, his supervisor Mr. Eun was unaware Mr. Ludwiczak had been in an accident. Ms. Chan also records Mr. Ludwiczak having told her that as his contract with BCRTC was coming to an end he wanted to stay on with that employer and pursue other job opportunities, but was unable to do so due to aggravated upper and lower back pain; and, that he went on EI for eight months after that contract ended "due to back pain issues". Mr. Ludwiczak testified to none of that. Mr. Ludwiczak told Ms. Chan he did not pursue a position with Coast Transit because his neighbour, who was a bus driver, told him the job would not provide him with flexibility to change his seated position; his evidence on cross-examination, however, was that he was torn between Canada Post, Coast Mountain and BCLDB - "struggled mightily" was how he put it - and he just wasn't getting anywhere with Coast Mountain.

- [51] Ms. Chan conceded in cross-examination that Mr. Ludwiczak reported to her no difficulties with the physical aspects of working as a security guard for Paladin and Western Protection Alliance. Her recommendations include Mr. Ludwiczak being provided with an "ergonomic workstation"; he has never made such a request of his employer, and Ms. Chan conceded that his employer would have a duty to accommodate such a request, so long as it did not impose a hardship on the employer.
- [52] As with the other experts, Ms. Chan assumed that Mr. Ludwiczak's upper back soreness after prolonged exertions is an injury attributable to the accident.
- [53] I find Ms. Chan's conclusion significantly overstates the limitations on Mr. Ludwiczak's capacity.
- [54] Mr. Benning's report includes tables that, with the usual adjustments for labour market and other contingencies, provide multipliers from which the present value of each \$1,000 of loss, year-by-year to age 66, can be determined. Pursuant to instructions from the plaintiff's counsel, Mr. Benning provided as an example estimates of future loss based on the difference between his current income with BCLDB, and the income of a SkyTrain attendant. Depending on the availability of additional income with SkyTrain through shift differentials and overtime, which could increase the annual shortfall in income from \$23,000 a year to \$37,000, Mr. Benning calculated a present value loss of between \$369,932 and \$595,108.
- [55] The evidence at trial did not support a loss assessment based on work as a SkyTrain attendant being unavailable to Mr. Ludwiczak because of his injuries.
- [56] The plaintiff's counsel did not rely on either the Chan or Benning reports in closing submissions. Instead, counsel simply framed the argument in terms of Mr. Ludwiczak being evidently disqualified from at least some forms of employment; he is, it is submitted, less employable. It was submitted that the cumulative effect of each \$1,000 in lost income, annually, to age 65 is a present value loss of \$16,084; annual losses of \$10,000 over that period years yields a value ten times that, \$160,840, and counsel points to Mr. Ludwiczak's current earnings still being \$10,000 to \$13,000 below his pre-accident income level. Accounting for negative contingencies, counsel suggests a present value award of \$130,000.
- [57] For the reasons stated above, I have found it is not appropriate to gauge Mr. Ludwiczak's loss of capacity on the basis of a straight comparison with his pre-accident annual earnings at GardaWorld.
- [58] The defence says the plaintiff has failed to prove a real and substantial possibility of future loss of income. The defence points to the post-accident periods of full employment: when he worked full-time hours with BCRTC, while continuing to work part time with both GardaWorld and Paladin; when he would work eight consecutive 12-hour shifts with Western Protection Alliance, while also picking up shifts with Paladin; and, when he worked for BCLDB, also while working part time with Paladin. His condition has improved to the point

that he is no longer taking even Tylenol. Ms. Chan conceded that Mr. Ludwiczak is very good at obtaining employment; though she expressed concern as to his ability to maintain employment, the defence says that has not been borne out.

- [59] While there is some strength to the defence's position, it is also the case that during periods of unemployment Mr. Ludwiczak has sought out employment which turned out not to be suitable because of his back issues. That was his experience in traffic control and in letter carrying. The medical evidence provides some basis to conclude that his issues with prolonged postural positions would also make being a bus driver unsuitable. Though his lower back injury will likely become less and less disabling, to the point of likely resolving completely in a few years' time, for as long as that injury persists there is a real and substantial possibility that Mr. Ludwiczak will lack the capacity to take on more remunerative employment, and to supplement his income with part-time work to the full extent he would have if injury-free. I find it unrealistic to assess this loss of capacity on the basis that it will persist to age 65. To the extent there are possible outcomes arising out of the negative contingency of the loss of capacity continuing until retirement, they are balanced by the range of possible outcomes in which his loss is negligible.
- [60] I therefore find Mr. Ludwiczak has sustained a loss of future capacity that is appropriate to assess as a loss of a capital asset.
- [61] As Mr. Justice Branch wrote in *Daleh v. Schroeder*, 2019 BCSC 1179, referring to the decision of Finch J.A., as he then was, in *Pallos v. Insurance Co. of British Columbia*, [1995] 3 W.W.R. 728:
- [146] One to three years' salary is typically awarded under the so-called "Pallos approach", used in cases where an individual continues to work after the accident and where it is difficult to formulate a realistic mathematical probability analysis.

I award Mr. Ludwiczak the sum of \$60,000 for loss of future earning capacity, representing approximately one year's income.

Cost of Future Care

- [62] The plaintiff claims \$100,000 under this head of damages. This claim is based on a list of future aids and therapies, and estimated costs, set out in the report of Mr. Jaschke, and includes an occupational therapist for the purpose of education in body mechanics and symptom management techniques; a kinesiologist to supervise an exercise program; massage therapy; medications; symptom management aids and equipment; and, yard work and home maintenance services.
- [63] There is no evidence that Mr. Ludwiczak requires the services of an occupational therapist; he knows to move around and stretch his back when it becomes tight. Mr. Jaschke noted in his report that a medical opinion would have to be obtained as to the need for any future or ongoing physical therapies such as massage or physiotherapy. There is no medical evidence

that Mr. Ludwiczak requires such therapies as a method of treating his back condition, as opposed to simply giving symptomatic relief. Compensation for the cost of therapies that provide only symptomatic relief is afforded through the award of non-pecuniary damages: *Hollyer v. Gaston*, 2016 BCSC 1401, at para. 129; the same goes for the symptom management aids and equipment Mr. Jaschke recommends. Mr. Ludwiczak has no intention of taking any prescription medications.

[64] Dr. Neufeld recommended Mr. Ludwiczak participate in 24 sessions of supervised exercise with a kinesiologist, over a period of 12 months. Mr. Jaschke says that one-hour sessions with a kinesiologist typically cost \$75-\$90. This supports an award in the range of \$1,800-\$2,160. I award \$2,000 in respect of that future cost.

[65] There is medical evidence that Mr. Ludwiczak, so long as his low back is symptomatic, should not be engaging in the heavier aspects of home maintenance and yard work. Mr. Jaschke opines that an annual budget of \$2,850 to \$5,100 would be reasonable for yard and garden bed clean-up, gutter and downspout cleaning, hedge trimming, and snow removal. I allow \$15,000 under this head.

Special Damages

[66] The plaintiff claims for the cost of physiotherapy, in the amount of \$1,575; active rehabilitation therapy, in the amount of \$2,622.54; and massage therapy in the amount of \$3,498.00; all for a total of \$7,695.65. The defence agrees with physiotherapy and active rehabilitation charges, except for the interest component of the latter, \$461.11. I agree that interest on special damages is not recoverable: *McKay v. Raiwal*, 2015 BCSC 220, at para. 86.

[67] The massage therapy expenses were incurred from September 2018 onwards. They appear to have been only for the purpose of symptomatic relief; there is no evidence of them being medically required or recommended as a method of promoting healing or recovery. Again, this expense is reflected in the award of non-pecuniary damages.

[68] The special damages claim is allowed in the amount of \$3,711.39.

Conclusion

[69] I assess the plaintiff's damages in the following amounts:

Non-pecuniary Damages:

\$50,000

Past Loss of Earning Capacity:

\$26,900 (Gross)

Future Loss of Earning Capacity:

\$60,000

Cost of Future Care:

\$17,000

Special Damages:

\$3,711.39

[70] I leave to counsel the calculation of the net past loss of earnings award, with liberty to apply if they cannot agree.

[71] Finally, the plaintiff will have his costs at Scale B. If there are issues affecting costs I am unaware of, the parties will have liberty to apply, and should make arrangements with Scheduling for a further hearing.

"A. Saunders J."

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