CANADA / JUDGMENT

Wangert v. Saur

2013 BCSC 99

COURT
Supreme Court of British Columbia

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2013 BCSC 99 Wangert v. Saur

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Wangert v. Saur,

2013 BCSC 99

Date: 20130125

Docket: M091908

Registry: Vancouver

Between:

Michael C. Wangert

Plaintiff

And

Michael Patrick Saur, Deceased

Defendant

Before: The Honourable Mr Justice Abrioux

Reasons for Judgment

Counsel for Plaintiff:

N. Bower

Counsel for Defendant:

T.M. Jones

Place and Date of Trial:

Vancouver, B.C.

September 10-14, 2012

Place and Date of Judgment:

Vancouver, B.C.

January 25, 2013

I INTRODUCTION

[1] Michael Wangert seeks damages for the injuries he sustained in a motor vehicle accident which occurred on May 1, 2007 (the "Accident"), which resulted in the death of the defendant.

[2] The principal issues relate to general damages for pain and suffering and the effect the psychological injuries sustained in the Accident had on the plaintiff's income and pension.

II AGREED STATEMENT OF FACTS

[3] An agreed statement of facts was entered as an exhibit at the trial:

AGREED STATEMENT OF FACTS

1. At approximately 7:15 a.m. on May 1, 2007, the Plaintiff MICHAEL C. WANGERT and the Defendant MICHAEL PATRICK SAUR ("the Parties") were involved in a collision on Harris Road in the City of Pitt Meadows, Province of British Columbia ("the Accident").

2. At the time of the Accident the Plaintiff was operating a freight train for Canadian Pacific Railway as an engineer ("the Plaintiffs Train"). At the time of the Accident the Plaintiff was in the course of his employment with Canadian Pacific Railway.

3. At the time of the Accident the Plaintiff was employed by Canadian Pacific Railway as a locomotive engineer.

4. At the time of the Accident the Defendant was operating a black 1980 Chevrolet van bearing British Columbia licence plate 7766JB, owned by the Defendant ("the Defendant's Van").

5. The collision between the Defendant's Van and the Plaintiff's Train occurred solely as a result of the Defendant's negligence.

6. As a result of the Accident, the Plaintiff suffered psychological injury.

7. Following the Accident the Plaintiff received a debriefing through Canadian Pacific Railway's Critical Incident Response Program. The Plaintiff received this debriefing for two hours each on May 2nd, May 3rd, and May 5th, 2007, together with the conductor of the Plaintiffs Train.

8. Following the Accident the Plaintiff was off work from the date of the Accident until May 15, 2007, when he returned to work full time at full duties.

9. On January 28, 2011, Dr. Larry Krywaniuk, Ph.D., a registered psychologist, prepared a Medical-Legal Report regarding the Plaintiff. Dr. Krywaniuk diagnosed the Plaintiff as suffering from Post-Traumatic Stress Disorder (PTSD) in partial remission, and with a Mood Disorder characterized by symptoms of anxiety and depression. In Dr. Krywaniuk's opinion, these conditions were caused by the Accident.

10. On March 11, 2011, Dr. Paul Steinberg, a psychiatrist, conducted an independent psychiatric evaluation of the Plaintiff, and diagnosed the Plaintiff as suffering from Post-Traumatic Stress Disorder, then in partial remission, caused by the Accident. Dr. Steinberg did not diagnose any other mood disorder or cognitive disturbance.

11. Following his independent psychiatric evaluation of the Plaintiff, Dr. Steinberg felt bound to report his findings to the Plaintiff's employer, Canadian Pacific Railway, as the Plaintiff was working in a safety-sensitive position.

12. Following the receipt of Dr. Steinberg's report, Canadian Pacific Railway removed the Plaintiff from his position on March 24, 2011.

13. Following a graduated return to work beginning January 22, 2012, the Plaintiff made a full return to work on May 31, 2012.

14. The Plaintiff's graduated return to work began with four hours a day of work in the train yard, switching trains. He then worked on trains outside the yard under supervision. When the Plaintiff made his full return to work he was able to work on trains outside the yard without supervision at full hours.

15. The Plaintiff retired from his employment with Canadian Pacific Railway effective June 1, 2012.

16. As of the date of his full return to work on May 31, 2012, the Plaintiff was capable of performing his full work duties without any difficulty resulting from the Accident.

17. The Plaintiff claims special damages of $18,271.19.

18. The documents contained in the Joint Book of Documents are true and accurate:

a) At Tab B, the Health Care Payment Detail and MSP Payment Detail printouts for the Plaintiff's compensation claim with the Workers' Compensation Board;

b) At Tab C, the Plaintiff's employment file with Canadian Pacific;

c) At Tab D, the Plaintiff's tax returns and T4 forms;

d) At Tab E, the Canadian Pacific pension guide and amendments; and

e) At Tab F, the email from Ellen Williamson, Manager Pension Member Services, Canadian Pacific, setting out the Plaintiff's pensionable earnings, contributions, and other details from 2006 to 2012.

For the purposes of trial, the Parties agree that the above stated facts are true and correct.

III BACKGROUND

[4] In addition to the above, the following background information is germane to the plaintiff's claims.

[5] The plaintiff was born on February 28, 1957. He was 55 years old at the time of trial.

[6] Mr. Wangert has a son who lives in Montreal and a 17-year-old daughter who lives in Cranbrook with her mother, Cindy Wangert. The plaintiff and Ms. Wangert were married in 1983.

[7] When the plaintiff and Ms. Wangert divorced, she moved with the children from the Lower Mainland to Cranbrook, B.C. The plaintiff then moved to Cranbrook to be near his family but returned to the Lower Mainland in 1999. He did so because he preferred to live in the Vancouver area. He believed that he was not working sufficient hours due to his family responsibilities. He thought it would be good for the children to be able to spend some time in the Lower Mainland. He bought a house in Maple Ridge in 2000. He arranged for his children to come visit him over school holidays and long weekends. Notwithstanding this, by 2006 while he still saw his children from time to time, it was not as frequent as before.

[8] The plaintiff has suffered from gout since his early 20's. Prior to the Accident, he was off work for two or three days per year due to this condition.

[9] In the years prior to the Accident, the plaintiff was on-call hauling freight. He would usually operate a freight train to and from Boston Bar. He preferred working freight since it was more remunerative than working in the freight yard. He was allowed to work a maximum of 3800 miles per month.

[10] The plaintiff was expected to be available seven days a week, unless he was on mandatory time off after having worked a certain number of consecutive hours. He could also decline work by booking "unfit" status or if he was sick. "Unfit" could occur if he did not consider himself physically fit for duty. This included being tired or under stress.

[11] From 2003 to 2012 the plaintiff had the following T4 earnings:

· 2003: $70,247

· 2004: $65,404

· 2005: $69,594

· 2006: $68,024

· 2007: $68,315

· 2008: $82,759

· 2009: $82,784

· 2010: $93,818

· 2011: $32,159

[12] Prior to his retirement effective June 1, 2012, the plaintiff's T4 earnings for 2012 were $50,442.

[13] The plaintiff was reprimanded a number of times for absenteeism both before and after the Accident. Prior to the Accident, this included time he took off to be with his children. It was the plaintiff's evidence that immediately prior to the Accident, he intended to work as many hours as possible for five years in order to maximize his pensionable earnings. It was his intention to retire as of June 1, 2012.

[14] The plaintiff testified that although his income did increase following the Accident, what he did earn was a "far cry" from what he should have earned had he not been injured. It was his evidence that in the year prior to the Accident, being 2006, he could have earned more income if he had not been "doing the long-distance dad thing".

[15] According to the plaintiff, a significant portion of his absenteeism following May 1, 2007, was due to the psychological effects of the Accident. He acknowledged that he did miss some time from work after the Accident for personal reasons and separate knee and elbow injuries unrelated to the Accident. He testified he could not estimate how much time he missed from work due to the Accident.

[16] It was the plaintiff's evidence that his lifestyle did not change "so much" following the Accident. He still continued to work freight trains. His moods did change, however, and he felt as though his personal relationships suffered as a result. He knew he had to work as hard as he could in order to make the "best five" years of income in order to maximize his pension.

[17] The plaintiff was not familiar with the concept of "constructed earnings" being a component of the calculation of his pension. He was also under the impression that his pension would be based on his five years of earnings leading up to his retirement as opposed to his best five consecutive years of income.

[18] The plaintiff acknowledged that with the exception of some counselling he received in the immediate aftermath of the Accident, it was not until he was involved in the litigation process that he obtained professional assistance. He believed his employer would penalize him if he booked "unfit" days due to the anxiety he was suffering due to the Accident. Although CP Rail was compassionate for three months or so after the Accident, his perception was that his employer was harassing him regarding his absenteeism.

[19] The plaintiff believed that he would deal with the effects of the Accident as best as he could by working. He stated, "I had to work as much as I could. I dealt with it on my own as I dealt with the stresses in my life". It was only when he was examined by Dr. Krywaniuk in January 2011 and then Dr. Steinberg on behalf of the defendant in early 2012, that the diagnosis of post traumatic stress disorder was made. Dr. Steinberg reported his findings to Canadian Pacific. It was recommended that the plaintiff stop working for a period of time. He was then treated by a psychiatrist and a psychologist. This greatly assisted him and resulted in his returning to work on a gradual basis in January 2012. He was cleared to return to work full time in late May 2012. A few days later, being June 1, 2012, he retired.

[20] Wayne Weatherbee is a locomotive engineer who works for CP Rail. He has been employed with CP Rail for over 30 years and is planning to retire in March 2014.

[21] Mr. Weatherbee testified that he has known the plaintiff for 20 years. They became good friends approximately 10 years ago. He lives nearby and they socialize. He confirmed that in the years following 2002, the plaintiff took time off from work to be with his children. His impression was that they were less interested in visiting their father when they reached their teenage years.

[22] In his interaction with the plaintiff following the Accident, he noticed that the plaintiff appeared to be more withdrawn. It was also his impression that as of early 2007, the plaintiff had been working more than he had in the past. His attendance at work was reduced after the Accident. He observed that the plaintiff seemed nervous.

[23] Mr. Weatherbee earned approximately $116,000 or $117,000 in 2011. He was not maximizing the monthly miles available to him that year. He indicated that other engineers work more than he did but they would have to be "married to the railroad".

[24] Mr. Weatherbee stated that he has booked off "sick" and "unfit" over the past number of years. He has also been cautioned for absenteeism. He was aware of instances where the plaintiff attempted to get approved leaves of absences. His position was similar to the plaintiff's in that he also had difficulties getting time off from work. If his request was refused, he would take the time off by booking "unfit".

[25] Mr. Weatherbee took nine or 10 days off work in 2011. He said that although he had no more than three or four missed calls in the last two years, he was verbally warned for having rejected shifts when asked to work. He indicated he was aware that the plaintiff had been reprimanded for absenteeism in the first part of 2007.

[26] Craig Brown, another locomotive engineer at CP Rail, also testified. He qualified as an engineer in 1982. He is vice president of the Teamsters union which represents workers from Vancouver to Kamloops. Mr. Brown's employment income in 2010 and 2011 was approximately $130,000. He received credit for the time he spent conducting union affairs.

[27] Mr. Brown stated that most locomotive engineers would take a total of 30 to 35 days off from work a year on the basis that they were sick, unfit for work or had reached the maximum number of miles per month. It was also his evidence that other CP locomotive engineers attempted to maximize their earnings in their last five years prior to retirement in order to earn a higher pension. Engineers who had chosen lower paying positions for most of their careers would often decide to spend their last five years working on the freight trains, since it was more remunerative.

IV FINDINGS OF FACT

[28] I make the following findings of fact:

· the Accident occurred at a most unfortunate time for the plaintiff. He had reached the point in his life where he was able to work increased hours with CP Rail in anticipation of attempting to maximize his income for pension purposes;

· although medical treatment for his post traumatic stress disorder did not formally commence until the spring of 2011, his "self-help" treatment from the Accident until that point in time did result in a decrease of symptoms. This is demonstrated by both Dr. Krywaniuk and Dr. Steinberg concluding that the plaintiff's condition was in partial remission when they assessed him;

· the plaintiff's T4 income stream in the years prior to the Accident, particularly 2005 and 2006, of approximately $68,000, is not indicative of what he would likely have earned had the Accident not occurred;

· although the plaintiff's income did increase after the Accident to approximately $94,000 in 2010, it would have been even higher had the Accident not occurred;

· I do not accept, however, that the plaintiff's gross income would have been in the range of that earned by Mr. Weatherbee or Mr. Brown, that is $117,000 to $130,000 per year. That is because although Mr. Wangert says he intended to work more hours, I must take his employment history into account. This included instances when he took time off from work for personal reasons, and when he refused calls in situations where he believed CP Rail could not require him to work. He also continued to take time off from work to be with his children, although this was less than had been the case prior to 2007.

V MITIGATION

[29] Prior to assessing the plaintiff's damages, I will deal with the defendant's submissions that the plaintiff has failed to mitigate his damages.

[30] There are essentially two components to those submissions. The first is that the plaintiff failed to seek appropriate treatment in a timely fashion. The second is that the plaintiff had the option of working past age 55. Since the plaintiff had recovered from his post traumatic stress disorder by May 2012, the defendant submits he should have continued working past his planned retirement date to maximize his average earnings over the last 60 months of

employment. This would have increased his retirement pension benefits thereby mitigating, if not eliminating, his claim for loss of retirement pension benefits arising from the injuries sustained in the Accident.

[31] The plaintiff has an obligation to take all reasonable measures to reduce his loss. The defendant bears the burden of establishing that he has failed to act reasonably to do so.

[32] Frers v. De Moulin, 2002 BCSC 408, sets out the elements which must be proven by the defendant:

[217] The defendants referred to Janiak v. Ippolito, [1985] 1 S.C.R. 146; Maslen v. Rubenstein (1993), 83 B.C.L.R. (2d) 131 (C.A.) and Zahynacz v. Kozak, [1998] B.C.J. No. 1947 (Q.L.) (S.C.) and conceded that they have the onus to establish three elements:

(a) there were steps that the plaintiff could have taken that might have avoided or reduced the loss;

(b) those steps were reasonable; and

(c) the amount by which those steps would have avoided or reduced the loss.

[33] It is clear that the goal of damages in an action for tort is to compensate the injured party as completely as possible for the loss suffered as a result of the negligent action or inaction of the defendant: Cunningham v. Wheeler, [1994] 1 S.C.R. 359.

[34] In this case, I accept the plaintiff's evidence that he had always planned to retire at the age of 55. He had spent many years working for CP Rail.

[35] The defendant did not cite any legal authority supporting his position that a plaintiff could have mitigated losses by working past his or her planned retirement age. I was also unable to find any.

[36] In my view, planning for retirement is a very important stage in a person's life. When one has the opportunity to retire at a certain age, even though continuing to work remains available, the decision to retire is not entered into lightly. It is not for the tortfeasor to take the position that the plaintiff's failure to change his life plan due to an accident which occurred through no fault of his own, amounts to unreasonable conduct.

[37] I have also concluded that the plaintiff was not required to seek psychiatric or psychological assistance prior to 2011. This is not a case of specific treatment recommendations being made at an early stage which the plaintiff declined to follow.

[38] It was the plaintiff's belief CP Rail would not react positively if he turned down work opportunities because he was troubled by the Accident. His self-help remedy, which was essentially to persevere as best he could was successful to a point. His income continued to increase in the years following the Accident and by late 2010 and early 2011, his post traumatic stress disorder was in partial remission.

[39] In his report, Dr. Krywaniuk noted that it is common for individuals in the plaintiff's situation to not actively seek treatment.

[40] In fact, the plaintiff's gross employment earnings for the first three months of 2011 were $32,159, which would have equated to a gross annual income of approximately $128,000 on the assumption he would continue to work at that rate for the rest of the year. While that assumption may be flawed, the plaintiff was clearly on track to earn more that year than in any other previous year.

[41] Once Dr. Steinberg contacted CP Rail, the plaintiff's employer did agree he should be provided with a leave of absence. The plaintiff concurred and, within approximately a year which included treatment, the post traumatic stress disorder was in complete remission.

[42] Under these circumstances, the defendant has not established the three elements pertaining to failure to mitigate. The plaintiff's alleged failure to actively seek psychological treatment in the aftermath of the Accident was not unreasonable in the circumstances. Even if it had been, the defendant has not established to what extent that treatment would have been successful in that particular timeframe and to what extent the plaintiff's damages would have been reduced.

VI NON PECUNIARY DAMAGES

[43] The plaintiff submits the award of general damages should be in the range of $70,000 - $80,000. It is the defendant's position that a reasonable range is $20,000 -$40,000 with a further reduction to reflect the plaintiff's failure to mitigate. I have reviewed the various authorities to which I was referred. The circumstances of this case, in my view, are much less significant than those in Bonham v. Weir, 2009 BCSC 1080, Smith v. Williams, 2011 BCSC 1806, and Vagramov v. Zipursky, 2010 BCSC 414.

[44] The plaintiff was the operator of a train which struck the defendant's vehicle at a railway crossing. From the plaintiff's vantage point, he had a clear view of the immediate events leading up to the collision which resulted in the death of the defendant.

[45] This was a horrific event which resulted in a diagnosis of post traumatic stress disorder. The Accident affected the plaintiff's moods and his ability to work. His symptoms continued for a significant period of time. They were only in partial remission more than 3 l/2 years after the Accident. It was not until the spring of 2012, almost five years after the Accident, that they were in full remission.

[46] I have also considered Matkin v. Gaurian, 2003 BCSC 763 and Weafer (Guardian of) v. Vancouver Coastal Health Authority, 2007 BCSC 481 where the non pecuniary damage awards were $40,000 and $55,000 respectively. I have adjusted these for inflation.

[47] Taking into account the factors set out in Stapley v. Hejslet, 2006 BCCA 34, I award non pecuniary damages of $50,000.

VII PECUNIARY DAMAGES

A: Introduction

[48] Two economists gave evidence on behalf of the parties: Howard Teasley for the plaintiff and Mark Szekely for the defendant.

[49] Both experts were provided with certain assumptions as to the plaintiff's income after the Accident and/or made certain assumptions based on documents provided to them. Their opinions related to the plaintiff's wage loss up to trial and his potential loss of pension income.

[50] I was not assisted by Mr. Teasley. During his evidence he made numerous corrections to his report of August 30, 2012. In fact, during the course of his evidence, Mr. Teasley provided a report "updated to 10 September 2012". Unfortunately, when testifying with respect to this report he identified additional errors. On the whole his evidence fell short of the requisite clarity required to assist the trier of fact.

[51] I was, on the other hand, assisted to some extent by Mr. Szekely's evidence, which consisted of his report of September 6, 2012, and his testimony during the trial.

B: Past Loss of Income/Loss of Earning Capacity

[52] The plaintiff's position is that he is entitled to compensation for the two weeks he was absent from work in the aftermath of the Accident and, furthermore, the time he was undergoing treatment from the end of March 2011 to February 2012, and the four months thereafter when he was on a graduated return-to-work.

[53] In addition, he should be compensated for the fact that he earned less income from 2007-2012 than he otherwise would have had the Accident not occurred, due to his post traumatic stress disorder.

[54] The defendant accepts a net past wage loss of approximately $2,200 for the time missed from work immediately after the Accident. This is slightly higher than the plaintiff's calculation of that loss. The defendant's calculation was based on an approximate 20% deduction from gross income. I award the plaintiff the amount he sought, being a net loss of $1,920.92.

[55] The defendant also accepts that the Accident caused the plaintiff's time off from work in 2011 and 2012, with the exception of a week's absence in January 2011, which resulted from a sore back. In his written submissions, he submits the total past wage loss is approximately "$50,000 - $58,000 in round numbers".

[56] During oral submissions, defence counsel stated compensation for this head of damages should not be as low as the range set out in his written submission.

[57] The plaintiff points to the fact that his net income for the three months he worked in 2011 was approximately $28,700. Accordingly, his net income loss for 10 months commencing late March 2011 should alone amount to approximately $95,700.

[58] The plaintiff says that if his actual earnings equaled those of Mr. Brown, then his past loss of net income could be as high as $131,400. However, he acknowledges a difference between them, since Mr. Brown's evidence was that he had sought out opportunities to work and had no family obligations. The plaintiff, on the other hand, continued to spend some time with his children after the Accident, although not as much as in the past.

[59] The plaintiff submits that but for the Accident, he would likely have earned more than he did. The midpoint between his lost net income based on actual earned income, and lost net income based on assumed earnings equal to Mr. Brown, was approximately $113,000. He submits this amount represents an appropriate award for past loss of income.

[60] In Rowe v. Bobell Express Ltd., 2005 BCCA 141, it was stated at paras. 30 and 31:

. . . a claim for what is often described as "past loss of income" is actually a claim for loss of earning capacity; that is, a claim for the loss of the value of the work that the injured plaintiff would have performed but was unable to perform because of the injury.

Evidence of this value may take many forms. As was said by Kenneth D. Cooper-Stephenson in Personal Injury Damages in Canada, 2nd ed. (Scarborough, Ont.: Carswell, 1996) at 205-06,

... The essence of the task under this head of damages is to award compensation for any pecuniary loss which will result from an inability to work. "Loss of the value of work" is the substance of the claim - loss of the value of any work the plaintiff would have done but for the accident but now will be unable to do. The loss framed in this way may be measured in different ways. Sometimes it will be measured by reference to the actual earnings the plaintiff would have received; sometimes by a replacement cost evaluation of tasks which the plaintiff will now be unable to perform; sometimes by an assessment of reduced company profits; and sometimes by the amount of secondary income lost, such as shared family income.

[Underlining added in Rowe; italics in original.]

[61] One factor which supports the plaintiff's position is his gross employment income for the first three months of 2011. It amounted to approximately $10,700 per month or $128,000 for that calendar year. This suggests that the plaintiff's income increased as his symptoms decreased.

[62] On the other hand, it was the plaintiff's evidence that he could not specifically point to any particular occasions when he booked "sick" or "unfit" or did not return calls for work as a result of the psychological effects of the Accident. There is also the fact that in 2009, when the effects of the Accident were presumably more significant than when he was assessed by Dr. Krywaniuk and Dr. Steinberg in late 2010 and early 2011, the plaintiff claimed only 12 sick/unfit days. This was well within the norm of other locomotive engineers.

[63] Table B of Mr. Szekely's report provides a calculation of after-tax loss of employment income based on the assumption of 100% of pensionable earnings as opposed to what was the case prior to the Accident, being 89.8%. This results in an after-tax loss of approximately $73,400. This scenario, for the reasons I have outlined, assumes lower absent accident earnings than I consider would have been the case had the Accident not occurred.

[64] Taking these various factors into account, I have concluded an appropriate award for this head of damages is the approximate midpoint between the $60,000 initially submitted by the defendant as reasonable and the $113,000 submitted by the plaintiff, being $85,000.

C: Loss of Pension Income

(1) Introduction

[65] A locomotive engineer employed by CP Rail is entitled to a pension based on "pensionable earnings". Pensionable earnings include regular salary, overtime pay and "constructed earnings". Constructed earnings refer to the earnings an employee would have received if he had worked and contributed during any period of "pensionable leave". Pensionable leave includes sick leave. Sick time counts towards constructed earnings as does taking time off work for being "unfit". Time taken off for personal reasons does not count towards constructed earnings. A pension is based on both actual and constructed earnings.

[66] Constructed earnings are calculated by increasing the pensionable earnings from the previous year by the applicable negotiated salary increase and then dividing that amount by 365 in order to get a daily rate.

[67] In addition, the higher of the average earnings of either the last 60 months before retirement or the best five consecutive calendar years is used to calculate the amount of pension.

[68] In May 2012 the plaintiff was advised by CP Rail's Pension Services that he had a shortage of $9,147.43 in pension contributions. In order to be credited with the service and corresponding pension benefit, he was required to pay this amount in full prior to his retirement date.

[69] Upon his retirement, the plaintiff received a monthly pension of $5,166. There was evidence to the effect that the average wage for two locomotive engineers just senior to the plaintiff and two immediately junior engineers was $121,547.19. Using this income, a locomotive engineer with 34 years and 11 months service who had reached the age of 55 years would receive an estimated monthly pension of $6,513 for life.

[70] Mr. Szekely's lifetime pension multiplier per $1,000 loss per year was $12,449. Mr. Teasley's was approximately $12,900.

(2) The Plaintiff's Position

[71] The plaintiff's position is that his pensionable earnings would have been higher but for the effects of the Accident. That is because the actual income component would have been higher and the constructive earnings portion lower.

[72] The plaintiff also submits that he had to contribute $9,147.43 in order to maximize the contributed income portion of his pension. Without that contribution, he would not have benefited from certain constructed earnings and the amount of his monthly pension would have been $4,345 as opposed to $5,155. Since he had to contribute for pensionable leave to be included in pensionable earnings, the "insurance exception to the rule against double recovery applies to the amount of the plaintiff's pension based on his pensionable earnings above his pension amount based on his actual earnings". He relies, amongst other authorities, on Druet v. Sandman Hotels, Inns & Suites Limited, 2011 BCSC 232, which applies the "collateral benefits" principles set out in Cunningham v. Wheeler.

[73] The plaintiff's position is to the effect that if his actual pension is used as a basis of the calculation for his loss then, since it includes pensionable earnings based on both actual and constructive earnings, then he is "forced to share the benefits of his contributions with the tortfeasor": see Kean v. Porter, 2008 BCSC 1594 at paras. 108 to 111.

[74] The plaintiff submits that if his earnings had been $20,000 higher per year after the Accident, then the current value of the loss to his pension compared to the pension amount he actually receives is approximately $170,000. If his pension based on past wage loss of approximately $114,700 is compared to his pension based on actual earnings, without including pensionable earnings above actual earnings (that is constructed earnings), then the current value of the lost pension would be approximately $247,000. This amount is calculated by using a notional monthly pension of $4,345, as opposed to the actual pension of $5,155.

(3) The Defendant's Position

[75] The defendant's position is that the plaintiff's approach reflects a misapplication of Cunningham v. Wheeler, "which considered the private insurance exception and extended it to apply to disability payments made under the terms of a collective agreement". Payment by the plaintiff of the sum of $9,147.43 in order to benefit from constructive earnings did not render that portion of his pensionable amount a "collateral benefit" which should not accrue to the tortfeasor's benefit. Any loss of pension should be based on the amount actually received as opposed to the notional amount of $4,345, which does not include constructed earnings.

[76] The defendant also submits that the value of the plaintiff's pension was not affected by the Accident. That is because, to the extent the plaintiff did not work due to his being "unfit" or "sick", the amount of the lost shifts was included in his constructed earnings and thus in his pensionable earnings. Accordingly, the plaintiff has not established any loss of pension income.

(4) Discussion

[77] In Khairati v. Prasad, 2002 BCSC 360, Coultas J. provided the following summary of the principles which apply with respect to the non-deductibility of collateral benefits:

[307] The issue was revisited by the Supreme Court of Canada four years later in Cunningham v. Wheeler, [1994] 1 S.C.R. 359. Before the Supreme Court of Canada were three appeals from the British Columbia Court of Appeal in which that Court had followed Ratych and deducted certain disability benefits paid under a collective bargaining agreement from the plaintiff's damage awards. Cory J. writing for the majority, limited Ratych to placing an evidentiary burden upon the plaintiffs to establish they had paid for the provision of disability benefits. In all three appeals, Cory J. found evidence of payment which moved them out of the realm of Ratych and placed them within an exception from deduction for private policies of insurance first recognized in Bradburn v. Great Western Railway Co. (1874), [1874-80] All E.R. Rep. 195 (Ex. Div.).

[308] Since Ratych and Cunningham, I find the law in terms of deductibility of collateral benefits can be summarized:

1) McLachlin J.'s rule in Ratych states that when a plaintiff receives a wage benefit under an agreement from which no direct cost to the plaintiff can be traced the benefit should be deducted, unless the court is satisfied that the employer or fund which paid the wage benefit is entitled to be reimbursed for it on the principle of subrogation.

2) When a plaintiff receives a wage benefit at an actual cost then the benefit should be deducted minus the actual cost (see Ratych p. 972). For example, if a plaintiff had to give up sick days in order to receive a benefit then the plaintiff would be compensated for the lost sick days.

3) When a plaintiff receives collateral benefits from an insurance policy in which direct costs can be traced to that plaintiff then such benefits are not deductible. This is the "insurance exception".

4) When a plaintiff receives collateral benefits from a charitable source this is not deductible. This is the "charity exception".

[78] Burgess v. Lau, 1996 Carswell BC 227 (S.C.), involved a police officer who was injured in a motor vehicle accident. Leggatt J. considered a submission which has similarities to the one being advanced by the plaintiff in this case:

[18] In that case the Supreme Court of Canada also agreed that the private insurance exception to the rule against double recovery was an understood and accepted rule in Canadian law. However, this exception seems to have been restricted to private insurance policies only. In the case of private insurance the insured has the forethought to take out and pay for a policy which will provide him with income on the happening of an unforeseeable event i.e., an accident. The purpose of taking out such an insurance policy may well be that the insured

> will be better off in the event of an accident. This expectation is that at the very least he will receive the insurance money when an accident occurs. It would be unfair to allow the tortfeasor to benefit from the insured's foresight by deducting the amount of the insurance policy from the wage loss claim and it would also be unjust not to compensate a plaintiff for taking precautions to minimize the loss flowing from a negligent act. In Cunningham (supra) Cory J. reviewed the rationale for allowing the exception to the rule for allowing recovery, pp. 400-401:

I think the exemption for the private policy of insurance should be maintained. It has a long history. It is understood and accepted. There has never been any confusion as to when it should be applied. More importantly it is based on fairness. All who insure themselves for disability benefits are displaying wisdom and forethought in making provision for the continuation of some income in case of disabling injury or illness. The acquisition of the policy has social benefits for those insured, their dependants and indeed their community. It represents forbearance and self-denial on the on the part of the purchaser of the policy to provide for contingencies. The individual may never make a claim on the policy and the premiums paid may be a total loss. Yet the policy provides security.

Recovery in tort is dependent on the plaintiff establishing injury and loss resulting from an act of misfeasance or nonfeasance on the part of the defendant, the tortfeasor. I can see no reason why a tortfeasor should benefit from the sacrifices made by a plaintiff in obtaining an insurance policy to provide for lost wages. Tort recovery is based on some wrongdoing. It makes little sense for a wrongdoer to benefit from the private act of forethought and sacrifice to a plaintiff.

[19] In the case of a pension, the pension holder invests money to be paid to him upon the happening of a certain event, namely, when he reaches a certain age and retires from his job. The purpose in contributing to a pension then is so the pension holder will be receiving income when he is no longer receiving wages from work. The expectation is not to be better off in the case of an accident but to have income when he retires or at a certain age and is no longer earning a wage from his employer. The plaintiff should be put in the position he would have been if he were able to work and be retired at the same time. Accordingly, the plaintiff does not have the same type of wisdom which Cory J. refers to in his judgement, that is, in paying into his pension he was not "making provision for the continuation of some income in the case of a disabling injury or illness", he was planning his retirement from employment. The plaintiff then should not receive an extra unplanned benefit from the pension. This is not a case where the defendant will benefit from the forethought of the plaintiff to prepare against an accident.

[20] I have accordingly come to the conclusion that in assessing the future loss to the plaintiff consideration must be given to potential loss of pension benefits due to early retirement and the potential of loss of opportunity for employment as a result of the injury, but only the loss which would accrue to earnings over and above the amount which might have been earned from his pension.

[79] The issue in Burgess was whether pension benefits could be deducted by the defendant tortfeasor from the plaintiff's claim for damages for what was termed "future wage loss". In this case the plaintiff's submission pertains to the method whereby pension benefits are calculated.

[80] In my view, Cunningham v. Wheeler does not apply. That is because this case does not involve the type of wage loss or disability benefits paid to a plaintiff under a plan of insurance. Rather, it involves the operation of CP Rail's pension plan and the calculation of benefits thereunder. In calculating the benefits, the retiree receives credit for monies actually earned together with notional credits for certain types of leave including being sick or unfit to work. There is no element of insurance. There is also no link or nexus between the pension amount paid and the alleged losses flowing from the injuries sustained in the Accident. The plaintiff's pension is not a "benefit" in the sense that term is used in Cunningham v. Wheeler and its companion authorities.

[81] The issue remains, however, whether the plaintiff's monthly pension of $5,166 is less than it otherwise would have been but for the Accident.

[82] The average monthly pension for locomotive engineers who are in a similar seniority position to the plaintiff at the time of their retirement is $6,513 for life. This is based on average annual pensionable earnings of approximately $121,500. The plaintiff's monthly pension is $5,166, a difference of $1,347 or $16,164 per year. Applying Mr. Szekely's pension loss multiplier of $12,449 per $1,000 results in a potential loss of $201,000.

[83] It is for the plaintiff to establish a real and substantial possibility of a future economic loss. In response to the plaintiff's claim for past loss of income, the defendant conceded that the effects of the Accident did result in the plaintiff's income being reduced to some degree. The plaintiff's actual earnings prior to retirement form one component of the calculation of his pension amount. Accordingly, I do not accept the defendant's submission that there can be no damages for loss of pension.

[84] The plaintiff has established, in my view, a real and substantial possibility that he has suffered a future pecuniary loss as a result of the injuries sustained in the Accident.

[85] Damages in relation to future events are to be "assessed" rather than "calculated". In determining what I consider to be an appropriate award under this head of damages, I have considered the following:

(a) Mr. Brown's earnings were above those of the "average" CP Rail locomotive engineer in a position similar to the plaintiff and who would have received a pension of $6,166 per month;

(b) Mr. Weatherbee's income for 2011 would have placed him in the below average category had that been his average income used to calculate his pension. 2011 was but one year to be included. There was no evidence indicating his income for either his best 60 months or five consecutive years prior to retirement. There was also no evidence as to what his anticipated monthly pension would be;

(c) the plaintiff was not, from an earnings perspective, an "average" locomotive engineer for the applicable timeframe prior to his retirement. He was also not an average locomotive engineer from an earnings perspective prior to the Accident;

(d) the plaintiff may have been an average or above average locomotive engineer from an earnings perspective in 2011 had he not stopped working in late March that year to undergo treatment for his post traumatic stress disorder. But to do so he would have had to continue to work at a similar level for the remaining nine months of the year as he had in the first three months;

(e) at no point did the plaintiff's T4 earnings ever approach, even for one year let alone for five years, the "average" earnings of $121,000, consecutive or otherwise referred to by Mr. Brown. In fact, in 2009, he had T4 earnings of $82,784 even though he had only 12 unfit or sick days;

(f) the plaintiff, both before and after the Accident would not make himself available for work, that is, not answer the phone if he did not wish to work a particular shift. Potential earnings for the shift in question would not form a part of contributed earnings for pension purposes;

(g) a locomotive engineer such as the plaintiff, who does not work a particular shift due to being unfit or sick, drops to the bottom of the call board for future shifts. This may also affect his income;

(h) it had always been the plaintiff's intention to retire as of June 1, 2012. He was also aware that his earnings from 2007 onwards would play a significant role in the calculation of his pension. But he could not point to any particular shifts or time periods when he declined to work for reasons specifically due to the effects of the Accident. His evidence was "general" in nature to the effect he believed that but for the Accident, he would have worked more. No contemporaneous record was kept to record the shifts allegedly lost due to the effects of the Accident;

(i) there were several occasions when the plaintiff chose not to work shifts prior to the Accident for personal reasons, such as family responsibilities. This was also the case, to some extent, following the Accident. In addition, he did on at least one occasion miss some time from work for health issues unrelated to the Accident;

(j) I have awarded the plaintiff $85,000 for past loss of income attributable to the Accident. This amount should notionally be added to the plaintiff's actual earnings component used to calculate what his pension would have been but for the Accident. There would then have been some reduction in the contributed earnings portion.

[86] When I take all these factors into account, I conclude that the sum of $201,000 referred to in paragraph 82 above does not represent an appropriate assessment of damages for loss of pension benefits attributable to the Accident. It must be significantly discounted.

[87] At page 8 of his report, Mr. Szekely provides an example of a net loss of pension of approximately $85,000 based on a $10,000 reduction in annual pensionable earnings. I appreciate there is not a strict correlation between the net past loss of income of $85,000 I have awarded the plaintiff and Mr. Szekely's example. This amount, however, given what I have stated above is, in my view, one which is fair to both parties with respect to the claim for loss of pension income.

D: Special Damages

[88] These are agreed at $18,271.19.

VII CONCLUSION

[89] I award the plaintiff the following:

General damages

$ 50,000.00

Past loss of income/earning capacity

$ 85,000.00

Loss of pension income

$ 85,000.00

Special damages

$ 18,271.19

TOTAL

$238,271.19

The plaintiff shall have his costs at Scale B unless there are factors that impact the question of costs. If so, either party has liberty to apply to speak to costs.

"Abrioux J."

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