

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Ludwig v. Frighetto*,
2012 BCSC 1721

Date: 20121121
Docket: M105953
Registry: Vancouver

Between:

Christian Ludwig

Plaintiff

And

Sergio Frighetto

Defendant

Before: The Honourable Madam Justice Ross

Reasons for Judgment

Counsel for the Plaintiff:

Derek M. Mah

Counsel for the Defendant:

Timothy L. Wong

Place and Date of Trial:

Vancouver, B.C.
October 3-5, 2012

Place and Date of Judgment:

Vancouver, B.C.
November 21, 2012

Introduction

[1] This is an action for personal injuries as a result of a motor vehicle accident that occurred on April 28, 2010. The plaintiff, Christian Ludwig, was the front seat passenger in a vehicle that was rear-ended by the vehicle driven by the defendant, Sergio Frighetto. Liability is not an issue. The plaintiff claims the following heads of damage:

- (a) non-pecuniary loss;
- (b) past wage loss; and
- (c) loss of future earning capacity.

Facts

[2] Mr. Ludwig was born on July 19, 1972 in Thunder Bay, Ontario and has lived in British Columbia since age five. He is 40 years old. Mr. Ludwig graduated from Burnaby Central High School in 1990. After high school, he received a restaurant management certificate from Vancouver Community College in 1991. Since that time he has taken various courses in the hospitality industry and in driving.

[3] Mr. Ludwig was involved in four previous motor vehicle accidents. The first one occurred when he was 16. In that accident, Mr. Ludwig sustained a broken collarbone which was operated on twice. He reported that he recovered fully in two to three years. The next collision occurred ten years ago when his vehicle was t-boned. He reported that he hurt his left elbow in that accident and that he recovered with physiotherapy. The third collision occurred four years ago when Mr. Ludwig was driving a delivery truck and collided with a car. He reported that he was not injured in that accident. The fourth collision occurred three years ago when he rear-ended another car. He reported that he was not injured in that accident.

[4] Mr. Ludwig had no prior WCB claims. Prior to the collision, he reported that he was in good health. He had seasonal asthma and occasional headaches. He testified that he did not have back pain with prolonged driving and did not have sleep problems.

[5] At the time of the collision, Mr. Ludwig lived with his wife, Virginia and their two children, Zachary, who is 14 and Sydney, who is 9. Mr. Ludwig shared the housework with his wife. He vacuumed and was responsible for mowing the lawn. The house was on an 11,000 square foot lot and he described the lawn as like a football field.

[6] Prior to the collision, Mr. Ludwig's recreational activities centred around his children. He skied in the winter with his children at Grouse Mountain. In the summer he camped, swam and played on the trampoline and Slip n Slide in the backyard. He also walked and ran with his dog until September 2010 when his dog passed away.

[7] At the time of the collision, Mr. Ludwig worked at Creekside Custom Foods as the Distribution and Logistics Manager. He had worked there since 2004. Creekside supplies food to the Bread Garden, BC Ferries, WestJet, and Chevron. In addition, it supplies hot lunch programs for various schools throughout the Lower Mainland. As the Distribution and Logistics Manager, Mr. Ludwig worked 40 hours per week, five days per week. At times, he worked overtime and would bank the time.

[8] Mr. Ludwig stated that in a typical day, for the first two hours, he would do administrative work and plan routes for the drivers and then deliver hot lunch to schools from 10:00 a.m. to 2:00 p.m. The hot lunch as were stacked in plastic trays called Cambros, which weigh a couple of hundred pounds and Mr. Ludwig was responsible for loading and unloading them from the truck. At minimum, he delivered three Cambros per day and the maximum was eleven. After delivering the lunches, he returned to the office, sometimes picking up supplies along the way. He would then work in the warehouse to organize inventory, pack pallets, or do administrative duties for the balance of the workday. Mr. Ludwig was paid \$52,500 per year.

[9] The collision occurred on April 28, 2010 at 1:30 p.m. Mr. Ludwig and his colleague, Chuck Yip, were on their way to pick up food for lunch. Mr. Yip was driving his 2005 Nissan Altima. They were stopped at the intersection of St. Albans and Granville in Richmond and waiting to merge when they were rear-ended by the defendant's Subaru Forrester SUV. Mr. Ludwig stated that he had no warning of the

impending collision and was not able to brace or prepare for the impact. The Altima was pushed one to two feet ahead.

[10] Mr. Ludwig stated that his body was thrown forwards and caught by the lap and shoulder belt. He described the force as medium and blunt. Mr. Ludwig testified that he felt pain in his neck and shoulder at the scene. He stated that he wrote down the particulars at the scene. Mr. Ludwig did not go to the hospital. He returned with Mr. Yip to the office and stayed for the balance of the work day.

[11] Mr. Ludwig stated that he had pain in the neck, shoulders and back and he felt a shooting pain into the buttocks that night. He also had a headache.

[12] The next day, Mr. Ludwig attended his family physician, Dr. Look. Mr. Ludwig testified that he was having pain in the neck and shoulder. Dr. Look's clinical records for April 28, 2010 note:

pain/stiffness neck and upper back on left. limbs okay; h/a yesterday; no neck/back problems in past; stiff lower back this am... Usu no lumbar pain.;no meds; no missed work

The clinical notes record on examination

h/n n...., tender left posterior neck/traps/upper back; tender lumbar bilateral; ROM neck pain all directions

[13] Dr. Look's diagnosis was neck and upper back strain. He prescribed ice and anti-inflammatories and asked Mr. Ludwig to return in two weeks. Dr. Look did not recommend any therapy and suggested that Mr. Ludwig take time off work.

[14] Mr. Ludwig did not take time off work. He stated that his employer frowned upon employees taking sick time. It was his evidence that at some point during the recovery, he did take some time off when he was groggy from the effects of painkillers and felt not in the condition to drive.

[15] Mr. Ludwig stated that he went back to Dr. Look in a couple of weeks. It was his evidence that at that point there was no significant change in his headaches, back and shoulder pain, and the pain he described as being in his buttocks. He testified that in that visit Dr. Look recommended that he go to massage therapy.

[16] The clinical records reflect that the next visit took place on May 25, 2010, about a month later. The records contain the following:

pain and stiffness upper back/neck; worse on l; no missed work; driving truck 3 days per week; aggravated by driving;

on examination-

tender l posterior neck; tender bilat lumbar; massage ther

[17] Mr. Ludwig did not attend massage therapy. It was his evidence that Mr. Yip had gone to physiotherapy but had reported no improvement. Mr. Ludwig said that he had a busy schedule and felt that he could not allocate time to a treatment if it was not going to result in improvement. He said that Dr. Look recommended swimming as an alternative and that he did engage in that activity.

[18] Mr. Ludwig testified that for the rest of that year his symptoms were constant, but manageable. He stated that the pain was in his neck, shoulders and low back and that he continued to suffer from headaches. He stated that he had suffered from headaches before the accident, but the headaches after the accident were more intense.

[19] It was his evidence that lifting, driving, sitting and the physical demands of his work made the symptoms worse. He stated that he developed a problem sleeping. He testified that he generally sleeps on his left side, and that was the side that hurt. He would wake approximately every two hours and re-adjust his position.

[20] It was his evidence that he took up swimming on Dr. Look's recommendation. He did not mow his lawn, but hired a gardener. He stated that he gained 15 to 20 pounds. It was his evidence that the medication that he was prescribed did not help and left him groggy.

[21] Mr. Ludwig separated from his wife, Virginia, in September 2010. He acknowledges that the collision did not cause the breakdown of the marriage.

[22] Dr. Look's clinical records note two further visits in 2010 in June to deal with pneumonia. In July and August 2010, Dr. Look's office left telephone messages for

Mr. Ludwig to come in to see Dr. Look for the purpose of completing a CL 19 form for ICBC.

[23] Mr. Ludwig attended on Dr. Look on August 18, 2010 for that purpose. The clinical notes with respect to that visit state:

pain between shoulder blades, esp driving/sitting for 1 hour; logistics and distribution mgr with food manufacturer usually office work; some time lower back otherwise fine; sleep still disrupted b/c upper back pain wakes a few times a night therefore kicked out of bedroom by spouse; neck is stiff sometimes; no h/a after a few weeks; no meds; no missed work; avoiding trampoline and gym swimming helpful; no massage no physio

on examination, the notes record

tender r neck; tender r traps between scap; ROM neck r lat pain with lat flex to l; ROM back pain with rotation to r; pain in r upper back

the diagnosis was neck and upper back strain

[24] Dr. Look prepared a CL 19 form. The form noted tenderness in the right cervical and thoracic spine; none noted in the lumbar spine or with straight leg raising; pain on palpation in the thoracic spine with right rotation and in the cervical spine with left lateral flexion and none in the lumbar spine. The subjective complaints noted were neck and upper back pain and stiffness. The current subjective complaints were neck and upper back pain, worse with sitting/driving over an hour, sleep disturbance. Dr. Look concluded that the motor vehicle-related injuries were not preventing the patient from returning to working full duties full-time. He noted limitations with respect to the trampoline and gym and remarked that Mr. Ludwig was recovering nicely.

[25] Mr. Ludwig attended Dr. Look on September 9, 2010. The clinical records note:

driving x 2 ½ wks 8 hrs daily, back aggravated ...entire back, tylenol; swimming three times a week.

[26] There was a further visit on September 13, 2010. The clinical notes state:

pain persists since past week or so; during past t2 weeks constant pain with no relief; taking naproxen and cyclobenzaprine without benefit; massage therapy; painful to pick up kids 7-year-old daughter; did not mow lawn this

summer; limited driving b/c driver back; will be driving 4 hrs daily next week; declined pills; posture bad b/c low back pain

[27] Mr. Ludwig testified that by the end of 2010 he was becoming more active. He was increasing his core strength and his general fitness. He walked and then ultimately jogged six to eight kilometres, six days a week. He was swimming twice a week.

[28] It was Mr. Ludwig's evidence that in the spring of 2011 he felt about the same. The pain was in the same areas. His sleep continued to be poor. When he had a bad sleep that resulted in low energy, he felt bad. He said he was sent to a sleep apnea specialist in March 2011 and received a diagnosis of mild to moderate sleep apnea. It was his evidence that sleep was not an issue for him prior to the motor vehicle accident although he was overweight prior to the accident and he did snore, two conditions associated with sleep apnea.

[29] It was his evidence that in the summer of 2011 he was not doing as much driving at work because there were no school deliveries. He stated that his neck and shoulder felt better, but his low back was the same. He stated that he continued to suffer from headaches and poor sleep. He was still carrying on with the walking, jogging and swimming program and had lost 36 pounds.

[30] Dr. Look's clinical records note a visit on March 1, 2011. On that date the notes reflect that Mr. Ludwig complained of

lumbar pain, shooting pain down R leg to foot. naproxen and flexerill; dieting, up to 270 lbs now 238 lbs; walking daily 6-8 kms; treadmill; difficulty sleeping b/c back stiffness; separated; living on own....

[31] Mr. Ludwig was back to see Dr. Look again on March 4, 2011. The clinical records note:

pain, bilat upper back – stiff and sore; neck ok in past few months, occas stiff; still not able to exercise. eg walking/ jogging on treadmill; walking in January. ok; after sitting 1 hour tightness in upper and lower back; working F/T, 2 days off 5 months ago, 1 day off after taking meds feeling groggy the next day 6 weeks ago,

not skiing, unable to pick up 7-year-old daughter, unable to mow lawn, sleep, still poor; mood off because poor sleep, h/a due to poor sleep, no meds currently

on examination,

ROM neck pain rotation r and l and flex/ext'

ROM shoulder normal bilat;

ROM back pain with ext, lat, flex, bilat, rotation bilat

tender under scapulae bilat; tender lumbar bilat;

[32] Mr. Ludwig attended on Dr. Look on June 9, 2011. The clinical records reflect the diagnosis of mild to moderate obstructive sleep apnea. Reference is made to very stressful divorce.

[33] Mr. Ludwig attended on Dr. Look in August and November 2011 for visits that had nothing to do with the motor vehicle accident. Mr. Ludwig reported that in January 2012 he bought a road bike and started biking as opposed to jogging. He found that his weight increased when he stopped jogging. He had suffered an injury to his calf and so could not jog.

[34] Mr. Ludwig reported that in the spring of 2012 the pain in his neck and shoulders was intermittent. He stated that the low back pain, however, was constant. The symptoms were aggravated by driving. He said that he still had trouble sleeping and headaches. He described his mood as improved. At this time he was prescribed Celebrex, a new medication for his lower back, and found it to be helpful.

[35] Dr. Look's clinical records reflect a visit on February 22, 2012 at which Mr. Ludwig noted that he was driving a lot at work and had back pain and stiffness. His weight was recorded to be 260 pounds. On examination, Dr. Look recorded lumbar tenderness bilaterally. He prescribed medication, diet and exercise.

[36] Mr. Ludwig returned to Dr. Look on March 12, 2012. In this visit he complained of low back pain. The clinical records note :

low back pain; driving a lot recently; not exercising.

On examination, the clinical records reflect :

no lumbar tenderness, ROM back pain all directions, wt 259 pounds.

[37] Mr. Ludwig returned to Dr. Look on May 29, 2012. The visit primarily dealt with matters unrelated to the motor vehicle accident. The record notes pain lower left spine, one year, worse without exercise.

[38] Mr. Ludwig visited Dr. Look again on June 12. The clinical records note

shoulders/upper back, better – stiff, but not as bad. Worse with sleeping on that side. Wakes up at night but sleep not bad otherwise. Aggravated by driving too long or when reversing into loading bay when making contact. Lower back, worse than before – constant pain. Back stiff in morning on waking. Shoulder and back aggravated by prolonged sitting. Tylenol and advil in a.m. Celebrex on occasion. Exercise inc bike riding as advised; running not tolerated by back. Did not ski this year b/c of injury. Work full time with discomfort. Missed few days since accident, mainly shortly following accident.

On examination

tenderness, l spine and bilat lumbar; ROM . Pain, especially forward flex and ext; ROM shoulders normal bilat wt 259

[39] Mr. Ludwig stated that in July 2012 he was injured at work, suffering an injury to his calf. Dr. Look recommended that he take one to two weeks off work, but Mr. Ludwig went to work anyway. He found that the calf got a lot worse so that he began to experience problems walking. He could not do anything physical, including gentle walking and picking things up. In the result, he had to take time off work, totalling two and a half weeks.

[40] Mr. Ludwig returned to Dr. Look on July 17, 2012 in relation to the calf injury suffered at work. There were subsequent visits to deal with this injury on July 24, August 10 and September 6, 2012.

[41] The occupational rehabilitation intake report prepared in conjunction with the rehabilitation program dated August 29, 2012 notes that Mr. Ludwig stated that since that injury he has had an increase in his low back symptoms due to his altered gait that was caused by the calf injury.

[42] Mr. Ludwig returned to his employment on August 13, 2012 to light duties. He was told shortly after that his position had been eliminated because his employer had no work for him. Following this, he entered into a rehabilitation program through

WorkSafeBC. The program was primarily for his calf injury but there was also work on his core strength, whole body and back.

[43] Mr. Ludwig began work in a new position at Centennial Foods on October 9, 2012. The position is a new position for Centennial Foods and similar to his job at Creekside. He will be in a warehouse doing shipping and receiving and driving two to three days per week. There will be a heavy physical component to his job. Mr. Ludwig testified that he has some concerns that these demands will aggravate his pain. He will be paid \$19 per hour which is approximately \$39,000 per year.

[44] At present, Mr. Ludwig lives in a basement suite in Port Coquitlam. He is able to carry out all of the housework. He shares joint custody of his children. It was his testimony that he has not returned to running, jumping on the trampoline, playing on the Slip n Slide, or skiing – all of the activities he enjoyed doing with his children. It was his evidence that the injuries affected his relationship with his children and in particular, with his daughter Sydney.

Expert Evidence

[45] In his March 6, 2011 report, Dr. Look states at p. 3:

Mr. Ludwig was seen most recently on March 4, 2011. He was still complaining of a stiff and sore upper back bilaterally. He mentioned that his neck has been okay for the past few months except for occasional stiffness. He finds that he still is not able to exercise such as walking or jogging on a treadmill. He had been walking in January 2011 and that was tolerated well apparently. He notes that after sitting for about one hour there is tightness in the upper and lower back. He continues to work full time. Looking back he did miss two days of work about five months ago and one day about six weeks ago after taking medications and feeling groggy the following day. He has not been skiing and has not been able to pick up his seven year old daughter and has been unable to mow the lawn. His sleep continues to be poor and he feels that he is moody because of this. He also suffers from some headaches due to his difficulty with sleep. He is not taking any regular medications currently. On examination there was tenderness in the upper scapular area and tenderness in the lumbar areas bilaterally. Range of motion of the neck revealed pain with rotation to the right and left, as well as on flexion and extension. Range of motion of the shoulders was normal bilaterally and the range of motion of the back showed pain with extension and lateral flexion bilaterally and with rotation to the right and left. He was prescribed activities as tolerated, as well as Tylenol and Advil p.r.n.

In summary, Mr. Ludwig continues to have some symptoms which may be attributable to the neck and back particularly the upper back strain sustained in his motor vehicle accident in question. His right sciatica symptoms noted in recent weeks may not be related to the motor vehicle accident. His ongoing difficulty with activities such as jogging and sitting for prolonged periods, as well as difficulty with sleep may all be due to injuries suffered from his accident. His continued difficulties with sleep may interfere with his full recovery and certainly can have a negative effect on his mood. He has not missed much work, 3 days in the almost 1 year since his accident but he does have continued discomfort because of an injury sustained in his accident. I anticipate that with time over the next several months and with continued activities and treatment that his symptoms should diminish and that he should be able to resume most, if not all, of his pre-accident activities. It is expected that he should have a near full recovery from his accident related injuries over the next several months or the next few years.

[46] Dr. Look clarified in oral evidence that when he used the term “may” in the report he meant “likely”.

[47] In his July 9, 2012 report, Dr. Look states at p. 4:

He was seen next and most recently on June 12, 2012. He mentioned that at this time his shoulder and upper back were better. There is still some stiffness but not as bad as previous. He was worse when sleeping on his affected side. He mentions that he still wakes up at night but the sleep is not bad otherwise. His symptoms are aggravated by driving for long periods particularly when reversing his car at work into the loading bay as his vehicle makes contact with the bay. His lower back is worse than before and he complains of constant pain. There is back stiffness upon waking up in the morning. His shoulder and back are aggravated by prolonged sitting. He takes Tylenol and Advil in the morning and Celebrex on occasion. He exercises including bicycle riding as advised. He has not been able to tolerate running because of his back. He has not participating in any recent massage, physiotherapy, acupuncture, or chiropractic treatments. Because of his injuries he did not ski this past year but has continued to work full time despite the discomfort. He has missed just a few days since the accident as mentioned above. When examined this day there was tenderness in the lumbar spine and on both sides of his lower back. Range of motion was of his back revealed pain especially with forward flexion and extension. His shoulder range of motion was normal on both sides. He weight on this date was noted to be 259 pounds. For his ongoing symptoms for his upper back strain, he was prescribed activity as tolerated and Tylenol or Advil as needed.

In summary, Mr. Ludwig has suffered neck and back strain particularly the upper back which is due to his April 28, 2010 MVA. His symptoms seem to be worse with prolonged sitting and driving and have interfered with his sleep. He has not missed more than a few days since the accident. But his work, which does require driving at times and sometimes prolonged sitting seems to have aggravated his symptoms at times. His recreational activities have been significantly curtailed including his household chores and yard work and

he has been unable to work out significantly because of his injuries. Activities such as picking up his seven year old daughter have been difficult because of his symptoms. His neck has seemed to improve and he most recently has just had lower back pain. He continues to need some ongoing pain killers with ongoing physical activity and exercise to continue his rehabilitation.

....

His obstructive sleep apnea as well as going through a stressful divorce may interfere with his sleep and mood. His right sided sciatica was noted in spring 2011 may not be necessarily related to the accident. It is difficult to see what portion of his ongoing lower back complaints are still related to his MVA. In any case, I think his condition will improve over the next several months and years. Although, sciatica symptoms may come up again in the future, it appears he may continue to have ongoing symptoms for some time in the order of at least the next few years especially with other issues that would be affecting his sleep, as well as the possible lumbar disc problem which may be giving rise to his sciatica symptoms. Given the past couple months, unfortunately I anticipate that Mr. Ludwig will continue to have back issues for the foreseeable future. Hopefully, with increased exercise and pain medication as needed he will continue to improve and hopefully his sciatica pain will not be a significant issue in the future, although this is difficult to predict. If it turns out that he does have significant lumbar disc problem surgery may have to be something that is contemplated in some situations.

[48] Dr. Stewart is an expert physiatrist. In her March 15, 2011 report, Dr. Stewart states at pp. 7-8:

Mr. Ludwig reported that he had none of his presenting problems prior to the motor vehicle collision of April 28, 2010, and Dr. Look's report to ICBC corroborates that history. Subsequent to the collision Mr. Ludwig experienced neck and back pain and headaches, and his symptoms had persisted largely unchanged when I saw him seven months after the collision. In addition to his other symptoms, he had signs and symptoms of nerve root irritation in the right leg but no impairment of nerve function on examination. He had had no rehabilitation for his injuries at that time. Given his history, it is my opinion that Mr. Ludwig sustained soft tissue injury to his neck and back in the motor vehicle collision, and that his symptoms have been aggravated by the physical demands of his job, including the need to sit to drive. He was still early in his recovery from his injuries.

....

In my opinion Mr. Ludwig's failure to pursue the massage therapy and medications prescribed by Dr. Look in no way hindered his recovery from his injuries. He will not require any surgery in future because of his injuries. His injuries will not result in degenerative changes in his spine or joints in the future.

Non-Pecuniary Loss

[49] Mr. Ludwig was 40 years old and in good health at the time of the collision. Counsel submits that as a result of the collision, Mr. Ludwig suffered soft tissue injuries to his neck, upper back/shoulders, and low back which continue to impact him more than two years later. As a result of his physical injuries, his sleep is poor and he is more irritable and short tempered at times. It was submitted that Mr. Ludwig's life has been affected in all realms – at work, with friends, at home, and with his children. He cannot enjoy the activities that he once did with his children.

[50] Mr. Ludwig submits that the case law establishes a lower range between \$23,000 and \$30,000 for soft tissue injuries to the neck and back along with headaches and poor sleep when the injuries have resolved in less than two years. Counsel submitted that when the pain persists longer than two years and is chronic for the foreseeable future, the case law establishes a higher range between \$55,000 and \$63,000. The plaintiff cited the following cases in relation to this issue: *Pardanyi v. Wilson*, 2004 BCSC 1804; *Orrell v. Lynch*, 2008 BCSC 1696; *Pratt v. Barlow*, 2008 BCSC 1764; *Driscoll v. Desharnais*, 2009 BCSC 306; *Ryan v. Klakowich*, 2011 BCSC 835; *Guzman Gonzalez v. Dueck*, 2012 BCSC 792; *Scoffield v. Jentsch*, 2012 BCSC 1130.

[51] Mr. Ludwig submitted that, given the nature of his injuries and that the injuries have still not resolved, the non-pecuniary award should be set at \$45,000.

[52] The defendant submitted that the plaintiff was involved in a minor accident. The vehicle Mr. Ludwig was in required only \$878.94 in parts and labour to repair. The defendant's vehicle suffered no damage, except for a crack to the licence plate holder. Neither Mr. Frighetto nor Mrs. Frighetto was injured in the accident, although both are elderly and Mrs. Frighetto suffers from back problems.

[53] The defendant submitted that minor accidents involving virtually no damage to either vehicle are situations in which the court should take a cautious approach toward findings on damage, particularly where there were difficulties with the plaintiff's credibility: see *Vasilyev v. Fetigan*, 2007 BCSC 1759. In addition, the

defendant relies upon the caution expressed in *Price v. Kostryba* (1982), 70 B.C.L.R. 397, with respect to the circumstances where there is little or no objective evidence of continuing injury and where complaints of pain have persisted for long periods extending beyond the normal or usual recovery.

[54] It was the defendant's submission that Mr. Ludwig, while credible, was a poor historian. Counsel submitted that his evidence lacked specificity, and did not match the history of complaints set out in Dr. Look's clinical records. The defendant concedes that Mr. Ludwig suffered a strain of his neck and upper back. Counsel submits that this complaint resolved as early as September 2010 or at the latest March 2011.

[55] The defendant submitted that the moodiness and sleep disturbance were caused by other non-accident related issues. In addition, the defendant submitted that the complaints of low back pain and shooting pain down the right leg were not a result of the accident. It was the defendant's submission that the pain and suffering complained of from September 2010 was caused by a change in the plaintiff's activity, resulting in daily driving up to eight hours a day. In the defendant's submission this was a new and separate event which led to Mr. Ludwig's complaints and accordingly he is not entitled to compensation from the defendant for that particular injury.

[56] It was the defendant's submission that, in the circumstances, the proper award for non-pecuniary damage from mild neck and upper back strain that had resolved within six months of injury is \$7,000 to \$9,000, citing the following cases in support: *Booth v. Hedderick*, 2004 BCSC 132; *Al-Mundlawi v. Gara*, 2005 BCSC 740; *Vasilyev*; *Bentrott v. Weich*, 2008 BCPC 50; *Gradek v. DaimlerChrysler Financial Services Canada Inc.*, 2009 BCSC 1572; *Morales v. Neilson*, 2009 BCSC 1890; and *Parmar v. Lahay*, 2011 BCSC 1628.

[57] It is the case that this collision was at low velocity and resulted in very little appreciable damage to either vehicle. Moreover, neither of the Frighetts suffered any injury. However, they were both able to prepare for the collision. In any event

the question is what injuries, if any, were suffered by the plaintiff. In making that determination the credibility and reliability of the plaintiff's evidence is a crucial consideration. In that regard, I found Mr. Ludwig to be a credible witness, but a relatively poor historian with respect to his injuries.

[58] I do not, however, agree with the defendant's submission that Mr. Ludwig's low back complaints were caused by factors unrelated to the motor vehicle accident. First, Mr. Ludwig did not suffer from low back complaints prior to the motor vehicle accident in question. Second, while Dr. Look acknowledged that low back complaints can be caused by prolonged driving, in this case Mr. Ludwig had been doing considerable driving during all but the summer months as part of his work and, prior to the accident at issue, had not suffered low back pain. Finally, Dr. Look noted on examination tender lumbar bilateral on the day following the motor vehicle accident.

[59] However, while I find that the motor vehicle accident resulted in low back strain, I have concluded that Mr. Ludwig's evidence that the low back pain has been virtually continual since the accident to be unreliable. I note that there were substantial periods shortly after the accident in which Mr. Ludwig did not complain of lower back pain, and when none was noted on examination.

[60] In addition I have concluded that the motor vehicle accident is not the only cause contributing to the lower back pain that Mr. Ludwig complains of at present. For example, it appears that Mr. Ludwig reported that the calf injury suffered at work in July 2012 resulted in an increase in his low back symptoms due to his altered gait. Further, Dr. Look stated that "it is difficult to see what portion of his ongoing lower back complaints are still related to his MVA."

[61] This is significant in this case because a plaintiff is entitled to be compensated for the damage caused by the tortious act, not for the consequences of independent intervening acts. As Mr. Justice Major, for the Court, explained in *Athey v. Leonati*, [1996] 3 S.C.R. 458, at para. 32:

To understand these cases, and to see why they are not applicable to the present situation, one need only consider first principles. The essential purpose and most basic principle of tort law is that the plaintiff must be placed in the position he or she would have been in absent the defendant's negligence (the "original position"). However, the plaintiff is not to be placed in a position better than his or her original one. It is therefore necessary not only to determine the plaintiff's position after the tort but also to assess what the "original position" would have been. It is the difference between these positions, the "original position" and the "injured position", which is the plaintiff's loss. In the cases referred to above, the intervening event was unrelated to the tort and therefore affected the plaintiff's "original position". The net loss was therefore not as great as it might have otherwise seemed, so damages were reduced to reflect this.

[62] I find that the motor vehicle accident caused neck, shoulder and upper and lower back strain. The symptoms attributable to the motor vehicle accident, particularly in the neck, shoulder and upper back have improved substantially but have not completely resolved. Prolonged sitting or driving will result in a flare-up.

[63] I agree with the defendant's submission that the shooting pain extending into the right leg described by Mr. Ludwig is not related to the motor vehicle accident. I find that Mr. Ludwig's recollection that this symptom arose immediately following the accident is mistaken. I note that Dr. Look's clinical records make no reference to reports of such pain or to observations on examination consistent with such pain until nearly one year after the motor vehicle accident. The first reference to shooting pain down the right leg to the foot occurs in the clinical records of March 1, 2011. Finally, Dr. Look's opinion was that the right sciatic symptoms "may not be related to the motor vehicle accident. As noted earlier, Dr. Look clarified in his evidence that when he used the term "may", he meant likely.

[64] Mr. Ludwig alleges that the motor vehicle accident has caused poor mood and that this has continued to the present. I accept that this was the case in the immediate aftermath of the accident; however, by the fall of 2011, I find that other factors, notably the difficult divorce and later loss of employment, were the cause of Mr. Ludwig's poor mood.

[65] With respect to the complaints of disturbance to sleep, I accept that in the immediate aftermath of the accident the pain, particularly in the upper left side of the

back, interfered with Mr. Ludwig's sleep. I accept that when Mr. Ludwig has flare-ups his sleep is disturbed. However Dr. Look stated in his opinion of July 9, 2012 that the obstructive sleep apnea as well as going through a stressful divorce may (likely) interfere with his sleep.

[66] Mr. Ludwig stated that he suffered from headaches before the motor vehicle accident, but that following the accident the headaches were more intense. I accept that this was the case for a period of some months; however as the neck and upper back strain resolved, I find the headaches had returned to his pre-accident frequency and severity again except in response to flare-ups. In that regard, I note Dr. Look's clerical notes of August 18, 2010 which state no headache after a few weeks and the paucity of reports concerning headache thereafter in the clinical records.

[67] The soft tissue injuries that Mr. Ludwig suffered have improved but have not completely resolved. While he is not disabled from performing his job functions, certain aspects of the physical demands of his employment, such as driving or sitting for extended periods aggravate his symptoms. The injuries have interfered with his enjoyment of leisure activities and playing with his children. His prognosis for a full recovery is promising but still uncertain. I award \$30,000 for non-pecuniary loss.

Mitigation

[68] The defendant submits that Mr. Ludwig failed to mitigate his damages by failing to follow the recommendations of Dr. Look. However while it is true that Mr. Ludwig did not take the massage therapy that Dr. Look prescribed, Dr. Look stated that it was optional if Mr. Ludwig was able to continue to be active without it. Mr. Ludwig did continue to be active and did commence swimming as recommended by Dr. Look. Mr. Ludwig did not take some of the medications prescribed because of adverse side effects. Dr. Stewart stated that the failure to pursue massage therapy and medications prescribed by Dr. Look in no way hindered Mr. Ludwig's recovery.

[69] I find that the defendant has not met the burden to establish that Mr. Ludwig failed to mitigate his damages.

Past Wage Loss

[70] Mr. Ludwig submits that at the time of the collision, he worked 40 hours per week and earned \$52,500 per year. He asserts that, as a result of his injuries from the collision he took two sick days and four vacation days, which were paid by Creekside to him. He seeks recovery for this amount as past wage loss.

[71] Reference was made to an agreement dated July 12, 2011 between Creekside food and Mr. Ludwig whereby the parties agreed that:

...in any case where an employee is paid by Creekside foods during any absence due to illness or injury where the employee receives compensation from a third party ...for an accidental bodily injury or illness, there should be no “double dipping”. Employees shall agree to repay to Creekside food the total amount of compensation they receive or will in future receive from Creekside foods for the periods of disability resulting from the above-noted accident or illness, in the event they receive any compensation from a third partyfor that same period.

[72] In addition, Mr. Ludwig relied upon a memo on Creekside stationery from Ellen dated July 21, 2011, which states:

In response to your letter dated July 18, 2011. Please see below:

1. The amount owed to Creekside foods for repayment of the two sick days would \$400.00 (\$25/HR x 16 hours).
2. The money for Chris to repurchase his four vacation days would be \$800 (\$25/hr x 32 hrs).

[73] Some reference to missing work as a result of the injuries suffered in a motor vehicle accident is found in the clinical records of Dr. Look. There are the following references:

- April 29, 2010 – no missed work.
- May 25, 2010 – no missed work.
- August 18, 2010 – no missed work.
- In his March 6, 2011 report, Dr. Look states “he has not missed much work, 3 days in the almost 1 year since his accident ...”

- March 4, 2011 – 2 days off 5 months ago, 1 day off after taking meds and feeling groggy the next day, 6 weeks ago.
- June 12, 2012 – work full time with discomfort, missed few days since accident, mainly shortly following accident. It should be noted however that this report appears to be inconsistent with the notes made shortly following the accident since shortly following the accident the notes indicate no missed work. It also appears to be inconsistent with the note made in 2011 since that notation does not relate to a time frame shortly following the accident.

[74] It should be noted that Dr. Look's medical records do contain specific reference to missed work with respect to other reasons unrelated to the motor vehicle accident. In addition, the records contain a copy of a doctor's note certifying that he was unable to work for medical reasons on specified dates as a result of a chest ailment. No such note is present in relation to any time taken off work in relation to injuries suffered in the motor vehicle accident.

[75] It is the position of the defendant that the plaintiff had not yet to prove that there is past wage loss as a result of injuries suffered from the accident. Counsel notes that the plaintiff's evidence is sketchy with respect to this issue. He was not specific with respect to how many days he actually missed from work as a result of injuries sustained in the accident, and when these occurred.

[76] It was the plaintiff's evidence that when he would phone in to advise the employer that he was taking time off work he would give a reason and the representative from Creekside would make a note of that. However, there is no evidence from Creekside to that effect. In addition, the document from Creekside makes reference to two sick days and four vacation days, but does not specify that these were days noted to be in relation to injuries suffered from the motor vehicle accident. There is evidence that Mr. Ludwig took time off work for other reasons as, for example, when he was suffering from pneumonia.

[77] The burden is on Mr. Ludwig to establish this loss. I have concluded that he has failed to discharge this burden and make no award for past wage loss.

Loss of Income Earning Capacity

[78] Mr. Ludwig submits that he suffers from chronic soft tissue damage to his neck, upper back, shoulders, and low back. As a result, he says that he cannot sit or drive for long periods and has difficulty moving or carrying heavy items. This damage has impaired his ability to earn income. Counsel submits further that it is a “common sense inference” that:

constant and continuous pain takes its toll, and that over time, such pain will have a detrimental effect on the person’s ability to work, regardless of what accommodations the employer is prepared to make.

[79] Counsel submits that, based on Dr. Look’s optimistic prognosis for Mr. Ludwig’s recovery, and given that he has 25 years left in the workforce, his loss of future earning capacity should be set at \$20,000, being an amount that is fair and reasonable, representing half of his annual income.

[80] It was the defendant’s position that Mr. Ludwig is not entitled to an award for loss of capacity to earn income as a result of the injuries suffered in the accident. The defendant notes that Mr. Ludwig was substantially recovered from the injuries within months of the accident. There is no prognosis that he has suffered permanent injury or that he suffers from any disability to work.

[81] It was the defendant’s submission that the plaintiff bears the onus to prove that the future losses are a real possibility and that there is a reasonable chance that such loss will occur. Counsel submitted that there must be evidence that the plaintiff has suffered a permanent injury and permanent pain which limited his capacity to perform certain activities and permanently impaired his income earning capacity.

[82] In *Perren v. Lalari*, 2010 BCCA 140, Madam Justice Garson stated the test at para. 32 as follows:

A plaintiff must always prove, as was noted by Donald J.A. in *Steward*, by Bauman J. in *Chang*, and by Tysoe J.A. in *Romanchych*, that there is a real

and substantial possibility of a future event leading to an income loss. If the plaintiff discharges that burden of proof, then depending upon the facts of the case, the plaintiff may prove the quantification of that loss of earning capacity, either on an earnings approach, as in *Steenblok*, or a capital asset approach, as in *Brown*.

[83] In the present case, I have concluded that Mr. Ludwig did not establish that he lost time from work as a result of the accident. Moreover, while he suffered injury, the injuries did not disable him from performing his functions at work. His employment with Creekside was terminated but for reasons unrelated to the injuries suffered in the motor vehicle accident. He has since found new employment with similar duties. Counsel submitted that the court could infer that the reduced salary associated with the new position is the result of the reduced bargaining power of an injured worker. There is no evidence to support such an inference and it would be pure speculation to reach that conclusion.

[84] I find that there is no ongoing disability caused by the motor vehicle accident that would impair his ability to earn income. Mr. Ludwig submits that the constant pain will erode his ability to earn an income. However, while he continues to experience pain, his prognosis is generally positive, thus distinguishing this case from situations such as *Morlan v. Barrett*, 2012 BCCA 66, in which the court found a real and substantial possibility that the fibromyalgia would shorten the plaintiff's career as well as a substantial possibility that the plaintiff's condition would worsen over time. Neither feature is present in this case. Mr. Ludwig's prognosis is positive. There is no suggestion that the injuries caused by the motor vehicle accident could shorten his working life. Nor is there any evidence of opportunities that are not available to Mr. Ludwig because of his injuries.

[85] The plaintiff relies upon *Driscoll v. Desharnais*, 2009 BCSC 306. However, in that case, the court found that the plaintiff was no longer able to do all of the work he could do previously and that fewer opportunities were available to him. He was forced to obtain the assistance of younger workers to assist in performing tasks that he was able to perform before he was injured. None of those features are present in this case.

[86] Mr. Ludwig does continue to suffer from pain. However, as Madam Justice MacKenzie noted in *Moore v. Cabral*, 2006 BCSC 920, at para. 78:

Ongoing symptoms alone do not mandate an award for loss of earning capacity.

[87] I find that Mr. Ludwig has not established a real and substantial possibility of a future loss of income.

Conclusion

[88] In the result, I award Mr. Ludwig \$30,000 for non-pecuniary loss.

“Ross J.”