

CANADA / JUDGMENT

Chai v. Greenwood

2020 BCSC 1294

COURT

Supreme Court of British Columbia

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2020 BCSC 1294 Chai v. Greenwood

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Chai v. Greenwood,

2020 BCSC 1294

Date: 20200901

Docket: M180933

Registry: Vancouver

Between:

Swee Loi Chai

Plaintiff

And

Garrett Johnson Greenwood

Defendant

Before: The Honourable Madam Justice Matthews

Reasons for Judgment

Counsel for Plaintiff:

S. Khazamipour

Counsel for Defendant:

V. Dhaliwal

Place and Date of Trial/Hearing:

Vancouver, B.C.

June 8-12 and 15, 2020

Place and Date of Judgment:

Vancouver, B.C.

September 1, 2020

Overview

- [1] Swee Loi Chai claims damages for personal injuries that he suffered in a motor vehicle accident on November 18, 2017 in Vancouver, British Columbia. The defendant Garrett Johnson Greenwood admits liability for the accident. The parties agree that Mr. Chai suffered soft tissue injuries to his neck and back in the accident but dispute the prognosis for those injuries. Mr. Chai claims the accident also caused him to suffer from headaches, sleep deprivation, mood disturbances and tinnitus symptoms. Mr. Greenwood disputes that these problems were caused by the accident.
- [2] The parties have agreed to the damages for past wage loss and special expenses. Mr. Chai also claims damages for pain and suffering and loss of enjoyment of life, future loss of earning capacity and future cost of care. Mr. Greenwood argues the evidence does not support a real and substantial possibility that Mr. Chai will have a future loss of earning capacity because Mr. Chai has continued to function in his pre-accident role, has earned merit based salary increases and has been promoted since the accident. Both parties agree that some measure of future care costs are appropriate, but disagree on the quantum.
- [3] The issues are:
1. What are the nature, prognoses and cause of the plaintiff's injuries, in particular:
 - (a) what is the prognosis for his neck and back pain?
 - (b) are his headaches caused by his accident injuries?
 - (c) are his problems with sleep caused by his accident injuries?
 - (d) are his mood disturbances caused by his accident injuries?
 - (e) are his tinnitus symptoms caused by his accident injuries?
 2. What is the appropriate amount of compensation for pain, suffering and loss of enjoyment of life?
 3. Has Mr. Chai proven a real and substantial possibility of loss of future earning capacity, and if so, how should it be assessed?

4. What is the appropriate compensation for cost of future care?
- [4] The parties adopted a focused approach to the trial that made it clear that there are few facts in dispute. For that reason, where I state facts, they are my findings of facts on undisputed evidence, such as Mr. Chai's background and pre-accident lifestyle and activities. Where facts were disputed, I will describe the conflicting evidence and indicate my findings of fact.
- [5] While Mr. Greenwood did not challenge the reliability or veracity of Mr. Chai's evidence directly, he did make submissions that certain evidence was "embellished". I will deal with those issues as they arise. Overall, I found Mr. Chai to be a straightforward witness whose evidence was consistent with the evidence of other witnesses and generally fits with the preponderance of probabilities. I have no general concerns with either the veracity or the reliability of his evidence.

What injuries were caused by the accident?

- [6] The parties agree that Mr. Chai suffered soft tissue injuries to his neck and back in the accident. However, Mr. Greenwood urges the Court to find that they are not as debilitating as Mr. Chai says they are, and the chance of improvement is much greater than Mr. Chai says is likely. Mr. Chai also has headaches which he asserts are caused by the soft tissue injuries to his neck and back. Mr. Greenwood asserts that the headaches are caused by pre-existing degenerative changes in his cervical spine. Mr. Chai claims that the physical injuries have caused him to enter a vicious cycle of sleep deprivation, physical pain and mood disturbances which reinforce each other. Mr. Greenwood disputes the vicious cycle and asserts that Mr. Chai's sleep disturbances are as a result of sleep apnea, which is not related to Mr. Chai's accident injuries.
- [7] I am of the view that Mr. Chai's soft tissues injuries are significantly debilitating to the extent that Mr. Chai has given up vigorous gym workouts, recreation, socializing and family activities that he loved because of his pain. He struggles at work due to the pain of these injuries. I conclude there will be improvement in Mr. Chai's soft tissue injuries, but it will not be complete and the extent of it is so much in question that the likely improvement is best dealt with as a contingency when assessing loss of future earning capacity and cost of future care. I conclude that the headaches, sleep issues and mood changes were caused by the accident. I conclude that the tinnitus symptoms were not caused by the accident.
- [8] The issues pertaining to headaches and sleep disturbance are causation issues. Mr. Chai must establish on a balance of probabilities that Mr. Greenwood's negligence caused or contributed to them: *Athey v. Leonati*, [1996] 3 S.C.R. 458 at para. 13. The primary test for causation is the "but-for" test: but for the defendant's negligence, would the plaintiff have suffered the injury: *Athey* at para. 14; *Resurfice Corp. v. Hanke*, 2007 SCC 7 at paras. 21-23. To meet the but-for test, there must be a substantial connection between the injury and the defendant's conduct, however the defendant's negligence need not be the sole cause of the injury: *Athey* at paras. 17-20; *Resurfice* at para. 23; *Farrant v. Laktin*, 2011 BCCA 336 at paras. 9-11.

- [9] In order to understand the nature and extent of Mr. Chai's injuries and the connection he says they have to the accident, it is helpful to understand Mr. Chai's pre-accident health and lifestyle.

Mr. Chai's Pre-Accident Health and Lifestyle

- [10] Mr. Chai was born on January 27, 1972. He was 46 years old at the time of the accident. He was born in Brunei. He has eight siblings; the oldest is 19 years older than him and the youngest is three years younger than him.
- [11] Mr. Chai described his Brunei upbringing as part of a large, busy family in a rural home. For the first nine years of his life, Mr. Chai and his family lived on his grandfather's farm. Mr. Chai and his siblings played in the jungle near the farm.
- [12] When Mr. Chai was nine years old, his parents moved the family from Brunei to Canada. One of Mr. Chai's older sisters was already married and living in Victoria. Mr. Chai's parents and five of his siblings lived with that sister for a year. They then moved to East Vancouver where Mr. Chai has lived since.
- [13] Mr. Chai attended the remainder of elementary school and high school in Vancouver. He did very well in school, especially in math and sciences. He achieved an advanced placement in biology by completing university level courses in grade 12. He graduated from high school with honours and enrolled at the University of British Columbia to study sciences.
- [14] After his first year of university, Mr. Chai secured a summer job working as a blackjack dealer at a casino at the Pacific National Exhibition. He loved the work and the casino atmosphere. After the PNE casino closed, Mr. Chai accepted a position at the Renaissance Casino. He worked there year-round while he continued attending UBC. Over the next several years, he increased the work he did at the Renaissance Casino and decreased the amount of courses he was taking so that he could both work and maintain his standing in the bachelor science program at UBC. However, he was not enjoying his university courses and found that the casino work was much more stimulating and challenging.
- [15] In 2004, the Renaissance Casino combined with a casino in Richmond and reopened as the River Rock Casino in Richmond, B.C. By this time, Mr. Chai was working as a dealer supervisor and he went to River Rock Casino in that capacity. Six months after the River Rock Casino opened, Mr. Chai obtained a promotion to the position of pit manager. He accepted this position and decided to cease his studies at UBC permanently. This was part of a decision to have a career in casino management. Mr. Chai aspired to be promoted from a pit manager to casino manager and potentially to higher positions such as operations manager or general manager. Mr. Chai's first language is Hakka, a dialect group of Chinese. Mr. Chai is also fluent in Mandarin, Cantonese and English. He speaks some Malay. Mr. Chai testified, and I accept, that his multi-language fluency is an asset because he can speak the mother tongues of more players than a manager who only speaks English.

- [16] In 2011, Mr. Chai was promoted to relief casino manager at River Rock. A relief casino manager is usually a pit manager who works most of his or her shifts as a pit manager and some shifts as a casino manager when the casino manager is unavailable. Mr. Chai worked as a pit manager/relief casino manager at River Rock from 2011 to 2015.
- [17] In September 2015, River Rock Casino restructured its upper management staff and Mr. Chai was laid off. Mr. Chai's layoff was associated with a buyout package which precluded him from working for another casino for a period of time. Mr. Chai obtained his life insurance license and sold life insurance for several months. When his severance package terms allowed, he was hired by Edge Water Casino in Vancouver as a pit manager. He worked the graveyard shift which, generally speaking, runs from 8 p.m. to 6 a.m. His position was transferred to the Parq Casino, a newly built and larger facility owned by the same gaming company that ran Edge Water Casino. At the time of the accident, Mr. Chai was a pit manager at Parq Casino, working the graveyard shift.
- [18] Mr. Chai lives with his father in the main floor suite of a two-suite home owned by his brother. His brother, sister-in-law, and their children live in the upper floor suite.
- [19] Mr. Chai described his family as tight knit and happy. He described that he and his brothers love sports. He testified that playing basketball is a frequent family past-time. He and his niece Sylvia Chu, who lives in Victoria, both testified that Ms. Chu travels to Vancouver for family events such as birthdays of her cousins, aunts, uncles and her grandfather. She does so about eight times per year. These family gatherings typically involved a lunch or dinner meal where the family would gather and sometimes play basketball and Mahjong. I find the evidence as a whole is indicative of a close family, including his extended family of in-laws, nieces and nephews.
- [20] Attendance at the gym was part of Mr. Chai's regular routine prior to the accident. He went to the gym five days a week where he would do an aerobic workout on a treadmill or bike and then lift weights. His weightlifting was a source of pride for him. His best friend, Thomas Chiao, testified that they were both regular attendees at the gym and went together some days. He testified that Mr. Chai was very intense and focused at his workouts. Mr. Chiao testified that Mr. Chai took obvious pride in his weightlifting accomplishments. Several witnesses, including co-workers, testified that Mr. Chai was very passionate about exercise and physical health and would encourage others to use the gym to create a source of physical energy and wellness that would help them in all aspects of their life. I conclude that physical fitness was key to Mr. Chai's sense of well-being and a source of pride prior to the accident.
- [21] Mr. Chai testified that on a typical working day he got up after about seven hours of sleep. He went to the gym for a workout, relaxed, and had dinner with a friend or co-worker prior to going to work for his shift that commenced at 8 p.m. and ended at 6 a.m.

- [22] Around their home, Mr. Chai's father did most of the cooking and Mr. Chai did most of the heavy cleaning. Mr. Chai described deep cleaning of the bathrooms, kitchens and all surfaces including scrubbing toilets, tubs, sinks, washing floors and walls, and cleaning behind the fridge and stove. Mr. Chai testified that his father would do light cleaning, including cleaning up after he had prepared a meal. Mr. Chai also shared meals regularly with his father. Mr. Chai's father was 87 years old at the time of the trial.
- [23] Recreationally, Mr. Chai played basketball, swam, played in a competitive dodgeball league, cycled, skied and played tennis. He described that most of his friends were active like him. He would get together with friends to undertake these activities or play cards.

The Accident

- [24] On November 18, 2017, Mr. Chai was driving to work in his 2013 Lexis hybrid vehicle. He was driving on Quebec Street towards Terminal Avenue. Mr. Greenwood entered Mr. Chai's lane and collided with Mr. Chai's vehicle.
- [25] After the impact, Mr. Chai and Mr. Greenwood exchanged information and Mr. Chai drove his vehicle to a nearby McDonald's parking lot and parked it there. He then called a friend who took him to St. Paul's emergency department. He also called the Parq's on shift casino manager, Sue King, and advised her that he had been in an accident and would not be at work that evening.
- [26] At St. Paul's Hospital, Mr. Chai was experiencing neck pain, back pain, left knee pain, pain in his right ring finger and had developed a headache. The medical personnel placed a neck brace on Mr. Chai's neck and splinted his right ring finger which had collided with some portion of the interior of his vehicle during the accident. He was given pain medication. The medical personnel sent him for images of his neck. He was discharged in the early hours of November 19, 2017.
- [27] On November 19, 2017, the day after the accident, Mr. Chai testified that he developed a pounding headache and a sore neck. He had pain in his shoulders and upper back, middle back, and lower back. Two days after the accident, Mr. Chai attended a walk-in clinic and was given Flexeril, a muscle relaxant, and a topical cream for muscle pain. Ten days after the accident Mr. Chai saw Dr. Yuriy Savchuk, who became his family doctor, and has been until the present. Mr. Chai stayed away from work for the first few days after the accident, missing four shifts. He returned and worked four shifts after which he went off work for an extended leave. He was off work until February 1, 2018.
- [28] The parties entered into an agreed statement of facts relating to liability, special damages, physiotherapy visits, visits to Dr. Savchuk, massage therapy treatments, past wage loss, medical visits pertaining to counselling, and the dates on which Mr. Chai saw doctors and received physiotherapy, massage therapy and counselling treatments. The agreed statement of facts summarizes the purpose of the visits, what was said at the visits and any treatments or prescriptions recommendations. This is an efficient and helpful approach to the medical

evidence in such a case that avoids treatment providers having to testify and avoids a record that includes many pages of medical records. Instead, the record includes a small book of agreed facts that sets these matters out in a chronological form that is extremely useful to the trier of fact.

Neck, Shoulder and Back Strains

- [29] Mr. Greenwood agrees that Mr. Chai suffered injuries to the soft tissues of his neck, shoulder and back and they were caused by the accident. The difference in the positions of the parties relates to the extent to which these ongoing injuries are disabling and the extent of improvement that can be anticipated.
- [30] On his first visit to Dr. Savchuk, on November 30, 2017, Dr. Savchuk observed that Mr. Chai had spasms and tenderness in his neck and upper back and lower back. He diagnosed Mr. Chai with soft tissue injuries to his neck, upper back and lower back and recommended that he attend active physiotherapy. Mr. Chai saw Dr. Savchuk monthly until about June 2018, after which time he began to see him about every three or four months. Mr. Chai regularly reported pain in his neck and upper back and problems sleeping. Dr. Savchuk prescribed Naproxen for the pain and a muscle relaxant. Mr. Chai reported improvement to Dr. Savchuk in February and March 2018 following his return to work.
- [31] Mr. Chai testified that in 2018 he was still having significant pain and headaches but also had time on his hands because he was not able to resume his pre-accident routine of work, sleep and exercise. He decided to take on food delivery for Foodie and Uber Eats. This involves picking up food orders from restaurants and delivering the food to those who ordered it. Mr. Chai saw this as a way to increase his activity somewhat as well as make some money. This evidence was not disputed and I accept it.
- [32] Mr. Chai testified that he had some slow but gradual improvement in 2018 and 2019. He described the year leading up to the trial, which was a half of 2019 and half of 2020, to be a plateau year. He described the gradual improvement of his injuries slowing down to the point where he was not noticing improvement for significant periods of time. However, he also testified that occasionally after his symptoms plateaued he would notice some improvement followed by another plateau. At the time of trial, Mr. Chai testified that he has ongoing neck and back pain. His back pain is the more frequent than his neck pain and more difficult to manage. His neck pain is less frequent but still flares up from time-to-time. I accept this evidence.
- [33] Mr. Chai testified that because of the pain in his neck and back, he has not returned to a regular gym workout routine or exercise for recreation, except in a very limited manner, in the two-and-a-half years since the accident. He has not played competitive dodgeball since the accident. When the captain of the team called him to ask him to play he declined. He no longer plays basketball with his brothers. He does not ski or play tennis. He has gone on some hikes of less than an hour duration on level ground. I accept this evidence.

- [34] Dr. Savchuk recommended active rehabilitation. Mr. Chai has worked with his physiotherapist and massage therapist, but mainly with his physiotherapist, for active and physio exercises, which he does. He finds the stretching is most helpful and he does that on a daily basis. He has tried to return to the gym on a couple of occasions but after being on a treadmill or a bicycle for a few minutes he would find that his pain, particularly in his back, would begin to increase. He could not maintain a workout for the duration he was used to and he could not lift weights at all. I accept this evidence.
- [35] Mr. Chai led the evidence of Dr. Najam Mian, a specialist in physical medicine and rehabilitation, who also completed a sub-specialty in the diagnosis and treatment of chronic pain disorders. Dr. Mian testified that Mr. Chai has sprain and strain injuries to the muscles and structure in his cervical, thoracic and lumbar spine, and symptoms of mechanical pain known as myofascial pain syndrome. Myofascial pain syndrome occurs when tightness in the muscles and fascia around the spine cause pain. Dr. Mian testified that Mr. Chai has classic features of myofascial pain syndrome because of the type of the pain he described and because it is aggravated by prolonged positions.
- [36] Dr. Mian noted that the CT scan of Mr. Chai's cervical spine taken the day of the accident showed partially protruding discs at two levels and disc space narrowing. Dr. Mian testified that he could not say whether these abnormalities pre-existed the accident or occurred in the accident but he did not think they were contributing to Mr. Chai's current symptomatology and so were not relevant.
- [37] Dr. Mian opined that it is unlikely that Mr. Chai will have a complete recovery from his chronic pain condition. He makes recommendations for treatments that he opines will result in significant improvement. He opined that Mr. Chai will continue to experience flare-ups of his pain for the remainder of his life.
- [38] Dr. Mian recommends an active rehabilitation program supervised by a kinesiologist two times per week for three months. He suggests a trial of a tricyclic antidepressant medication to improve Mr. Chai's pain and sleep. He recommends chronic pain education classes and education in chronic pain self-management.
- [39] Dr. Mian opined that Mr. Chai can continue to work in his current role as a pit manager and relief casino manager but he will also continue to be limited in his ability to undertaking walking, sitting or standing for prolonged periods of time. Dr. Mian opined that Mr. Chai is not suited to do any jobs that involve lifting heavy objects or repetitive physical work and if he were required to do so he would be at a disadvantage compared to his peers.

- [40] Dr. Mian opined that if Mr. Chai is able to slowly integrate back into resistance and weight workouts, along with aerobic and stretching exercises, Mr. Chai should be able to return to hiking and potentially biking, but it is not likely that he will be able to play dodgeball or ski. Dr. Mian testified that Mr. Chai is capable of light housework but does not recommend that he undertake prolonged food preparation or heavier housekeeping tasks, such as cleaning washrooms or walls, on a regular basis.
- [41] Dr. Mark Gatha, an orthopedic surgeon, provided opinion evidence led by Mr. Greenwood. Dr. Gatha diagnosed mechanical low back pain, myofascial neck and shoulder pain and opined that they are related to the November 18, 2017 accident. He advised that Mr. Chai's complaints of tinnitus and headaches are outside his expertise.
- [42] Dr. Gatha testified that the findings on the CT scan taken the day of the accident are pre-accident degenerative changes in his spine. Given Dr. Gatha's expertise in orthopedic management, and that Dr. Mian testified that he was unable to determine the timing of those changes, I accept Dr. Gatha's opinion. However, like Dr. Mian, Dr. Gatha is of the view that those abnormalities are "unrelated". I understand this to mean that the changes seen on the CT scan are not playing a role in Mr. Chai's current symptoms.
- [43] Dr. Gatha opined that Mr. Chai's myofascial neck and shoulder pain will likely have residual symptoms but there is room for improvement. He opines that there is room for significant improvement in Mr. Chai's low back pain. For that reason, he does not anticipate that Mr. Chai will be permanently disabled but will have ongoing pain to a certain level.
- [44] Dr. Gatha opined that even though Mr. Chai has had weekly physiotherapy or massage treatments, he has been "under-treated" and should experience improvement with a more focused and frequent treatment regime that includes continuing with massage therapy once a week for 12 weeks, continuing on with a further 12 weeks if it provides improvement, and an active rehabilitation program focused on core strengthening. He also recommends that Mr. Chai do hot yoga to improve core strength and to address the stiffness and pain that he experiences in his back.
- [45] The experts of both parties opined that these injuries cause chronic mechanical myofascial pain. Both opine that improvement is possible. Both opine that it is likely that Mr. Chai will have some degree of continued back pain.
- [46] I conclude that Mr. Chai has chronic neck and back pain. The chronic back pain is more severe and limiting than the chronic neck pain. I conclude that improvement is possible, but even with improvement Mr. Chai will experience pain when he works, if he continues to work in jobs that require prolonged sitting, standing or walking and he will continue to experience pain on physical exertion that is weight bearing or involves impact.

Headaches

- [47] Mr. Greenwood accepts that the accident caused Mr. Chai to have headaches but disputes that they lasted over two years. He argues that the headaches could be caused by the changes seen on the CT scan. He refers to Dr. Mian's evidence that the headaches could have more than one trigger.
- [48] Mr. Chai testified that he had headaches in the months following the accident, at least daily, and sometimes several times a day. The frequency of those have improved to the point where he sometimes goes a few days between headaches. He described as good days on which a a headache may only last for half an hour or an hour. He takes Tylenol and Naproxen for his headaches and pain. He does not know what triggers his headaches.
- [49] Dr. Mian diagnosed Mr. Chai with mixed post-traumatic headaches that are likely tension headaches and potentially migraine headaches. Dr. Mian opined that the tension and/or migraine components of Mr. Chai's headaches are due to the accident injuries to the neck, upper and lower back. He also testified that they could be caused by abnormalities in his cervical spine noted on the CT scan taken the day of the accident.
- [50] Dr. Gatha testified that this area is outside of his expertise.
- [51] Even if the defendant is correct that there is more than one cause of the headaches and one of the causes is not tortious, causation is established if the accident is a cause. I accept that Mr. Chai has proven an association between his headaches and the accident injuries such that the accident is a but-for cause of the ongoing headaches.

Sleep Disturbance

- [52] Mr. Greenwood argues that on the evidence, it is more likely that Mr. Chai's sleep disturbance is caused by sleep apnea than his accident injuries.
- [53] Mr. Chai testified that prior to the accident, despite working graveyard shifts, he slept well, woke up refreshed and had a lot of energy. He attributes this to his routine of gym workouts. He testified that the high intensity workouts at the gym gave him endorphins, which made him energetic and allowed him to manage his stress.
- [54] Mr. Chai reported difficulties falling asleep and staying asleep since the accident. He testified that he would sleep for three hours or so, and then wake up due to pain. He testified that he found it hard to get in a comfortable position to sleep and he wakes up and cannot get back to sleep due to anxious thoughts or feelings of sadness. He testified that his counsellor suggested meditation for this, and he has used that with some success, but sometimes he cannot help how he feels. He has tried two different sleep medications prescribed by Dr. Savchuk. The first left him feeling groggy and disoriented which he found to be extremely challenging while at work. The second medication has been more effective. He testified that shortly after the accident, he had to take sleep medication every time he tried to sleep. He testified that his sleep has improved, and he now takes it when he needs it.

- [55] Mr. Chai has not been diagnosed with sleep apnea. According to Mr. Chai, references to sleep apnea started when he filled out a questionnaire for Dr. Gatha. Mr. Chai testified that he did not know what sleep apnea was at the time he filled out the questionnaire, but because he has trouble sleeping, he answered affirmatively to a question that referenced poor sleep and sleep apnea. Mr. Chai saw Dr. Mian on December 19, 2019, before he saw Dr. Gatha. Dr. Mian reported that Mr. Chai told him that sometimes he wakes up gasping for air. Dr. Mian stated that Mr. Chai had never been tested for sleep apnea, and opined that he could not rule it out. Accordingly, the first reference to sleep apnea is that of Dr. Mian, who made it based on what Mr. Chai told him. However, I do not understand Dr. Mian's reference to sleep apnea to be a statement by Mr. Chai that he has sleep apnea. Nor is it clear that when Mr. Chai told Dr. Mian that he sometimes wakes up gasping for air, they discussed the possibility of sleep apnea. On March 3, 2020, Mr. Chai told his physiotherapist that sleep apnea was suspected and he would have further investigations. This statement was made after Dr. Mian's report had been written.
- [56] I find that prior to seeing these experts, Mr. Chai had never been suspected of having sleep apnea and did not know what it was. As a result of what he told Dr. Mian about his sleep, Dr. Mian opined that he has chronic insomnia disorder which is part of the vicious pain cycle he described. Dr. Mian opined that it is possible that sleep apnea is contributing to his sleeping problems, but it cannot be diagnosed other than through a sleep test so he could not rule it out. Dr. Gatha did not mention sleep in his report.
- [57] I find that Mr. Chai did not have problems with sleep or feeling refreshed after sleep prior to the accident. Although the possibility of sleep apnea came up during the medical legal investigations, the evidence is that it is a possibility that has not been ruled in or out. It does not eliminate pain and mood disturbance as causes of his sleep problems and I find that he has proven on a balance of probabilities that they interfere with his sleep. I find that Mr. Chai's sleep disturbance negatively affects his perception of pain and his mood. I conclude that the accident is a but-for cause of Mr. Chai's sleep problems and part of a negative cycle of pain, poor sleep and poor mood.
- [58] Dr. Mian opined that the cognitive difficulties that Mr. Chai is experiencing is likely due to his dysfunctional chronic pain, sleep and mood disturbances. Dr. Mian recommended that Mr. Chai take a tricyclic antidepressant such as Nortriptyline to reduce his nighttime pain and assist his sleep. Dr. Mian opined that this type of drug may assist with breaking down the vicious cycle. I accept this opinion and find that Mr. Chai's sleep, and the affect that lack of sleep has on his pain perception and mood, may improve.

Mood Disturbance

- [59] Mr. Chai's friend, Mr. Chiao, and his niece, Ms. Chu, testified that after the accident Mr. Chai socially withdrew.

- [60] Mr. Chiao said he called Mr. Chai several times and asked him to meet him for a meal or go for a bike ride but Mr. Chai was not willing. Mr. Chai testified that he felt unmotivated and he did not want to go out because he was in pain and knew he would not be able to do the things he usually did with his friends. Mr. Chiao finally saw Mr. Chai about two or three months after the accident. Mr. Chiao was surprised to see that Mr. Chai had gained weight and commented on it.
- [61] Ms. Chu and Mr. Chai are relatively close in age because Ms. Chu is the daughter of Mr. Chai's sister who is many years older than him. Ms. Chu testified that she and her uncle socialized with each other and together with other family members frequently prior to the accident. She testified that her uncle no longer attended all family functions as he had prior to the accident. She testified that when he did attend he was less outgoing and chatty than he had been and would often leave early without telling anyone that he was leaving. Ms. Chu testified that several family members asked her what she thought was going on with him because he was so withdrawn. Ms. Chu noticed that Mr. Chai did not sit next to her at family functions as he had always done prior to the accident and so she was not able to talk with him the way she used to. Ms. Chu testified that she became very concerned about Mr. Chai's emotional well-being and so suggested to him that he attend counselling. She testified that she did not know whether he did or not.
- [62] In fact, Dr. Savchuk suggested counselling for Mr. Chai in 2018 and Mr. Chai attended counselling every two weeks from May 2018 to December 2018. Mr. Chai and his counsellor discussed his feelings of hopelessness and frustration about whether his pain would ever go away. He reported that he had a depressed mood and he did not feel like engaging in social activities.
- [63] In addition, Mr. Chai and his counsellor addressed the anxiety over driving that Mr. Chai experienced after the accident. Mr. Chai's counsellor suggested that Mr. Chai drive more often and for slightly longer distances than his short commute to work each day. This was one of the reasons why Mr. Chai took the work delivering food. He found that over time his driving anxiety diminished.
- [64] Dr. Mian opined that Mr. Chai has a mood disturbance caused by his accident injuries and insomnia that is part of his cycle of chronic pain. He opined that patients with mood disturbances have a poor prognosis for chronic pain.
- [65] Dr. Mian testified that Mr. Chai's situation is summarized as a vicious cycle of pain, sleep disorder, and mood disturbance. He described this vicious cycle as one where pain interferes with sleep which affects mood and enhances the experience of pain. Low mood also affects the ability to sleep and enhances the experience of pain. This cycle of these dysfunctions exacerbate each other. I accept this opinion. I conclude that the accident is a but-for cause of Mr. Chai's mood disturbance, which is a component of the negative cycle described by Dr. Mian.

Tinnitus

- [66] Mr. Chai testified that a few months after the accident, after he returned to work in February 2018, he noticed ringing in his ears. He testified at first it was daily, but it has improved such that it comes and goes. Mr. Chai was not able to recall exactly when it started. The first time he reported it to a doctor was to his family doctor in April 2019. When he was asked about that on cross-examination, he said it probably started a few months before he reported it to Dr. Savchuk.
- [67] Dr. Mian opined that post-traumatic tinnitus can be associated with a mild traumatic brain injury, however he does not believe that Mr. Chai has a brain injury. He recommended that Mr. Chai be assessed by an ear, nose and throat specialist. Dr. Gatha reported this diagnosis as part of Mr. Chai's description of his symptoms but he stated that tinnitus is outside his area of expertise.
- [68] The only evidence linking the tinnitus to the accident is that it started after the accident. The evidence as to when Mr. Chai started experiencing ringing in his ears is not precise. I observe that if the tinnitus started a few months before April 2019, it started about a year after he returned to work and not around his return to work. There is no medical evidence linking it to the accident.
- [69] I conclude that Mr. Chai has not met the burden of proof to establish that the ringing in his ears is caused by an accident injury.

Damages

- [70] The fundamental principle of compensation in personal injury cases is that a plaintiff should receive full and fair compensation, calculated to place him or her in the same position as he or she would have been had the tort not been committed, insofar as this can be achieved by a monetary award: *Lines v. W & D Logging Co. Ltd.*, 2009 BCCA 106 at para. 167, citing *Ratych v. Bloomer*, [1990] 1 S.C.R. 940 at 962-63.

Pain, Suffering and Loss of Enjoyment of Life

- [71] Mr. Chai submits that an appropriate award for pain, suffering and loss of enjoyment of life is \$100,000 to \$125,000.
- [72] Mr. Greenwood submits that the appropriate award for pain, suffering and loss of enjoyment of life is \$45,000 to \$55,000.
- [73] I assess damages for pain, suffering and loss of enjoyment of life at \$120,000.

- [74] Damages for pain, suffering and loss of enjoyment of life are often referred to as non-pecuniary damages because they are awarded for things that cannot have a monetary measure of loss assigned to them, as opposed to pecuniary damages, for things that are monetary in nature, such as loss of earning capacity and cost of future care. Full and fair compensation is accomplished by ensuring that the pecuniary losses are appropriately compensated and will not erode the non-pecuniary damages.

The Stapley Factors

- [75] In *Stapley v. Hejslet*, 2006 BCCA 34 at para. 46, the Court of Appeal set out a non-exhaustive list of factors to consider when assessing damages for pain, suffering and loss of enjoyment of life: age of the plaintiff; nature of the injury; severity and duration of pain; disability; emotional suffering; loss or impairment of life; impairment of family, marital and social relationships; impairment of physical and mental abilities; loss of lifestyle; and the plaintiff's stoicism.
- [76] Mr. Chai was 45 years old at the time of the accident and so his entire adulthood has not been affected by these injuries. However, were it not for the accident, given his commitment to physical fitness and healthy living, he had many years of an extremely active lifestyle, and the ability to maintain a physically and mentally taxing occupation, ahead of him. He now must persevere through the pain and stress he experiences at work over the next twenty years or so.
- [77] The injuries are not severe in the sense that Mr. Chai continues to function and can relieve the pain by restricting his activity. I accept that the pain during the period Mr. Chai was off work was significant. The nature of his injuries and their duration is such that the pain has become chronic, the sleep disturbance is regular, and the mood changes are constant. This vicious cycle, as Dr. Mian describes it, affects all aspects of his life.
- [78] The impairment of Mr. Chai's lifestyle is significant. He testified, and I accept, that he developed a routine of work, sleep, eating healthy and exercise that all worked together. He had worked graveyard shifts for many years and was content to continue doing so because he could sleep well. He slept well, he believes, because he exercised vigorously and ate well.
- [79] It is clear from his evidence and that of his niece that their large family was relatively close. Mr. Chai lives with his father in one part of a house and his brother's family lives in the other part of the house. The extended family gathers several times a year to celebrate birthdays and Chinese New Year. I accept Ms. Chu's evidence that while Mr. Chai continues to attend family gatherings, he is subdued to the extent that Ms. Chu has suggested counselling to Mr. Chai, not knowing that he has undergone counselling. Mr. Chai testified that the traditional Chinese male does not complain about these types of problems or about pain, but just bears them silently. I conclude that is how he approaches his post-accident circumstances with his family.

[80] I find that Mr. Chai he has significantly withdrawn from his prior social activities. With his non-work friends, socialization often centred around physical activity, such as tennis, skiing and dodgeball. He no longer does these things and he does not like to go out with his friends or talk to them on the phone because of his pain and his mood changes. With his work team, he often met for dinner prior to a shift or went out for breakfast after a shift. He does not attend these gatherings as often. He often played basketball with his brothers and cannot do that anymore.

Housekeeping

[81] Mr. Chai seeks his loss of housekeeping capacity to be assessed as part of pain, suffering and loss of enjoyment of life. Mr. Greenwood asserts that no loss has been proven. However, if I find it has been proven, he agrees that it should be assessed as part of pain, suffering and loss of enjoyment of life.

[82] Loss of housekeeping capacity is compensable and may be part of an award for pain, suffering and loss of enjoyment of life. In *McTavish v. MacGillivray*, 2000 BCCA 164 at paras. 67-68, the Court of Appeal held that a plaintiff whose ability to perform housekeeping is diminished should be compensated, including for work that other family members have gratuitously assisted with after the accident. Loss of housekeeping capacity can be considered as an aspect of pain, suffering and loss of enjoyment of life or as a separate head of damages: *Liu v. Bains*, 2016 BCCA 374 at paras. 25-29. In *Kim v. Lin*, 2018 BCCA 77 at para. 33, the Court of Appeal explained that a pecuniary award is appropriate in cases where the plaintiff has suffered a true loss of capacity. Where the loss is "more in keeping with loss of amenities, or increased pain and suffering", the award should be an aspect of non-pecuniary damages.

[83] As I have already described, prior to the accident, Mr. Chai and his father divided the household duties. Mr. Chai described himself as particular about the deep cleaning he did. He testified that since the accident, he cannot do this deep cleaning and his older sister, Ms. Chu's mother, does it when she comes to Vancouver to visit with her father and other family. Ms. Chu testified that since the accident, her mother will spend the morning of a weekend day cleaning the home in which Mr. Chai and his father live before the family gathers for a meal. Ms. Chu testified that her mother did not do this prior to the accident.

[84] Mr. Greenwood characterizes this as the type of assistance that family members typically give and so it is not compensable. I do not agree. Mr. Chai's sister has taken over the work that Mr. Chai did for the home in which he and his father live. It is not expected that one's sibling will take over deep cleaning of one's home indefinitely. It was also work that Mr. Chai did to a particular level given his particular standards of cleanliness. This is an aspect of his non-pecuniary losses that is worthy of recognition and compensation.

Comparator Cases

- [85] Courts also consider cases in which the plaintiff has suffered similar injuries. They are only a guide since similar injuries may not have similar consequences for the injured person: *Lindal v. Lindal*, [1981] 2 S.C.R. 629 at 637.
- [86] Mr. Chai relies on *Tzotzolis v. Wyman*, 2019 BCSC 2026; *De La Garza v. Carson*, 2018 BCSC 1858; *Bruno v. Diamzon*, 2014 BCSC 1270; *Adams v. Rhys-Williams*, 2020 BCSC 598. The damages for pain, suffering and loss of enjoyment of life in those cases range from \$95,000-\$125,000.
- [87] Mr. Greenwood relies on *Spence v. Yellow Cab Company Ltd.*, 2019 BCSC 1540; *Kelly v. Kotz*, 2014 BCSC 244; *De Vries v. Poltorak*, 2013 BCSC 2527. The damages for pain, suffering and loss of enjoyment of life in those cases range from \$45,000-\$50,000.
- [88] The cases cited by the defendant do not describe injuries as debilitating as those suffered by Mr. Chai. For example, in *Spence*, the plaintiff suffered soft tissue injuries to his neck, shoulder and lower back but did not advance a claim for future loss of earning capacity despite his occupation as a personal trainer and fitness instructor. The court found that his injuries were not debilitating (at paras. 89, 94). There were no claims advanced or findings of mood disturbance or for loss of housekeeping capacity.
- [89] The cases cited by the plaintiff have similarities to this case. An aspect of Mr. Chai's claim that is unique is that, as I will describe, I have not accepted the quantum of loss of earning capacity that he seeks because I believe he will continue to perform his job capably. However, he will struggle to do so at a cost to his emotional well-being and the ability to participate in other aspects of his life. He will reserve the limited amount of energy and pain reduced movement he can manage in a day for his work as he has been doing since the accident. I consider it appropriate to reflect that in his non-pecuniary damages.
- [90] I award \$120,000 for pain, suffering and loss of enjoyment of life.

Loss of Earning Capacity

- [91] The parties have agreed on damages for past wage loss but disagree on whether the plaintiff has proved that he has a real and substantial possibility of future income loss. Mr. Chai says he has and his damages should be assessed at \$225,000 to \$320,000 based on a 20-25% reduction in capacity. Mr. Greenwood argues that the evidence shows that Mr. Chai has continued working at his pre-accident job without any reduction in performance, he has been promoted and received pay raises, and so there is no evidence to support a finding that there will be future income loss.
- [92] I conclude that Mr. Chai has proven a real and substantial possibility of income loss based on the evidence of how his injuries affect him at work, the expert evidence as to the appropriate accommodations for his injuries and my finding that some of those accommodations are not practically possible and others may be officially available but are

not feasible because they run counter to the workplace culture. I find that Mr. Chai is not able to do physical work and is not as competitive to be promoted to the types of positions he has long aspired to.

- [93] Mr. Chai testified that after his extended time off work from December 2017 to February 1, 2018, he found it difficult to get through shifts. His work as a pit manager and relief casino manager involves standing and walking for several hours of the shift. When he works as a pit manager he either works on the floor of the main casino or in a salon. He testified that the work culture of the casino is that pit managers and relief casino managers rarely take long breaks. They take short breaks to use the facilities and to have a quick bite to eat.
- [94] Prior to the accident and after the accident until December 2019, the casino manager to whom Mr. Chai reported to was Ms. King. Stanley Sun is another pit manager/relief casino manager who works the same shift as Mr. Chai. Ms. Choy is a pit manager on the same shift. Jian Zheng is a dealer supervisor on the same shift. These people all testified that the majority of the shift of a pit manager/relief casino manager would be spent walking or standing. The operations manager of Parq Casino, Tekboon Lee, also testified. Mr. Lee's evidence about the physical nature of the job of a pit manager or a relief casino manager was different. He testified that a pit manager working the floor would be walking two to two-and-one-half hours in an eight hour shift and sitting one to one-and-a-half hours in an eight hour shift. He testified that a salon shift involved sitting for about one-and-a-half to two hours in an eight hour shift. He did not testify about the other hours in either type of shift. Mr. Chai, Ms. King and his co-workers all testified that an eight hour shift on the floor involves about six hours of standing and walking and about two hours of sitting and it is the reverse when working as a salon manager.
- [95] Mr. Chai found both types of shifts difficult because he has increased pain when he is either sitting, standing, or walking for prolonged periods of time and needs to change position in order to relieve the pain. His co-worker Mr. Zheng testified that after the accident he would observe Mr. Chai lying down in the dealer's supervisor break room which he had never seen Mr. Chai do prior to the accident. Mr. Chai testified that he found the floor shifts more difficult to manage than the salon shifts because of the prolonged sitting and standing and the inability to switch between sitting and standing as much as one can working in the salons. Both he and Mr. Sun testified that a co-worker had switched shifts with him so that he could work in the salons more often. Mr. Chai testified that working as a salon manager was not a complete answer to the problem because in that position the prolonged sitting is problematic. He also testified that when a co-worker volunteered to switch, he accepted it, but he did not believe it was an accommodation he could ask for regularly. Mr. Chai testified that he missed some shifts due to his inability to manage his pain. Ms. King confirmed that he called in sick from time-to-time after the accident, and more than he did before the accident. She testified this was a detriment to his performance because reliable attendance is a valued characteristic in a pit manager or relief casino manager.

- [96] All of the Parq Casino witnesses also testified that the physical lifting requirements of a pit manager include carrying approximately 20 pound loads of supplies of chips, pens, papers and playing cards to the pits and salons. In addition, some of the gaming tables are equipped with machines that shuffle cards and machines from which the cards are dealt, called shoes. Occasionally one of these machines will break down. The British Columbia Lottery Corporation has personnel on site who maintain the shoes and shufflers but those persons are not on-site after about 11 p.m. If a machine malfunctions overnight, it must either be replaced or the table at which the gaming is taking place shut down. One of the jobs of a pit manager and a relief casino manager is to keep the gaming going because that is what creates revenue for the casino. Accordingly, if a shuffler or a shoe breaks down, the late-night pit manager will replace it with a functioning machine. This involves bending down under the gaming table to unplug the broken down machine and switching in a replacement machine. Both machines have to be lifted and carried at least several feet. They weigh 25-30 pounds each. All of the witnesses who work the graveyard shift testified that if a pit manager does not feel like he or she can lift the machine, they can ask another pit manager or a dealer supervisor for assistance. Mr. Lee testified that pit managers are free to ask for assistance in swapping out malfunctioning machines. The graveyard shift employees testified that the ability to get such assistance depends on what the person who is being asked to assist is dealing with at that time. All of the witnesses testified as to the chaotic and frenzied pace of casinos. If a machine breaks down and needs to be replaced so that gaming can proceed, a pit manager must replace it quickly or find someone else to do it quickly.
- [97] With regard to accommodations generally, Mr. Chai testified that none were available. Mr. Greenwood challenged this evidence and asked Mr. Lee whether accommodations would be available for an employee who is having physical difficulty doing his or her job. Mr. Lee, who has overall authority for human resources issues, testified that if he received such a request, they would attempt to accommodate and if they did not feel they could, he would refer the matter to legal counsel for advice on how to address the situation. He was not aware of any such request having come from Mr. Chai. Ms. King's evidence was significantly different. She testified that while accommodations can be made in the sense that an employee, with a medical note, could receive medical leave from working, the nature of the job does not lend itself to accommodations to relieve an employee from sitting, standing or walking. The nature of the job is that a pit manager who is on the floor of the casino must move between the tables, must check to ensure that the dealer supervisors and the dealers are conforming with gaming regulations and are addressing any conflicts that come up between the players and the dealers or any disruptive players. The nature of addressing these issues and supervising the compliance with regulations means that the pit managers and/or relief casino managers must walk between the areas and dealers for which they are responsible. A salon manager does the same thing except they do it in a smaller room with high-rolling players. The sitting portion of the positions involve working at a computer to enter in data and reports pertaining to the job duties I have just described. Mr. Lee did not testify as to what accommodations would be made for a pit manager who could not tolerate walking or

standing for several hours at a time.

- [98] Having considered all of the evidence, it is my view that the evidence of Mr. Chai, Ms. King, Mr. Sun and Ms. Choy is more accurate about the duties and lack of accommodations for the physical aspects of the job available to pit managers and relief casino managers. These individuals actually do the job on the graveyard shift. Mr. Lee did not testify that he had ever worked as a pit manager or relief casino manager or casino manager. As operations manager, he generally works 10 a.m. to 6 p.m. Approximately once a week he works an afternoon to late evening shift so that he sees the casino at its busiest and has exposure to the people who are working the graveyard shift. That means he has exposure to when Mr. Chai works for a few hours once per week and only has exposure to Mr. Chai if Mr. Chai is on shift the day that Mr. Lee works a later shift. My impression was that Mr. Lee was a careful witness and was testifying as to what he knows and observes. However, he does not observe the full graveyard shift and did not testify that he ever had.
- [99] Mr. Chai testified that since the accident he has struggled at work to focus on various aspects of his job including: reviewing surveillance tape to determine if a player was cheating; quickly calculating the status of bets at a table when called upon to determine whether the dealer had made an error; resolving disputes between players or between players and the dealer; and dealing with players who had consumed too much alcohol or were being asked to leave due to suspected or confirmed cheating. He attributes these struggles to his neck pain, back pain and headaches. The witnesses whose work involves resolving such disputes testified that it is the job of a pit manager or relief casino manager to try to resolve the issue in a way that allows gaming to continue and keeps the player happy if possible or, if being asked to leave, leaves with a minimum amount of disruption. It is very important that high-rolling players who have disputes in the casino have been resolved in such a manner that the player wishes to return to the casino. These witnesses testified that a pit manager or relief casino manager must be patient and listen to all those involved and then quickly assess the situation, make a decision, and deliver it in a manner that is acceptable to all of those involved. Ms. King testified that this was an area in which Mr. Chai's long experience as a pit manager and a relief casino manager before he came to Edge Water and then Parq Casinos was very valued and relied upon by those he worked with. Ms. King testified that she noticed that after the accident, Mr. Chai would call upon her as casino manager to assist with these situations more often than he had prior to the accident.
- [100] Mr. Chai testified that he prided himself on his ability to be patient and to listen to and resolve these disputes. He testified that after the accident he did not have the same confidence to resolve disputes and would dread dealing with them when the situation arose. He testified that he asked security to accompany him more often than he did prior to the accident and that he has trouble being patient for long enough to secure a good outcome. He says he feels himself rushing to the resolution instead of listening long enough. He attributes this to the pain he is in and his inability to focus and concentrate for the same duration as he was able to prior to the accident.

- [101] Mr. Chai also testified that he felt less friendly and approachable when working. Being friendly, outgoing and approachable is in the job description for his position. It is considered important in order to keep the morale of the dealers and dealer supervisors high so that they in turn are interacting with the customers in a positive and friendly manner. It is also considered important for the interactions between a pit manager, the casino managers and the players so that the players have a good experience at the casino and wish to keep playing and return.
- [102] Mr. Chai testified that he does not discuss his struggles with other people unless asked directly. He attributes this to what he described as the expectation of the culture in which he was brought up to not complain but rather keep his problems to himself and to try to overcome them with sheer effort.
- [103] Mr. Chai's co-workers testified that he seemed slightly more reserved at work after the accident. They testified that they could see that he was in pain although he would only discuss it if he was directly asked about it. Some of them noticed a change in expression on his face and the way he held his body. They all noticed that he no longer was enthusiastically talking about exercise and working out at the gym. Some of the witnesses noticed that Mr. Chai had put on weight since the accident.
- [104] I accept Mr. Chai's evidence that he is in pain, less confident and less patient and therefore struggles with his job duties. I accept the evidence of his co-workers about his change in demeanour at work. But I also find that Mr. Chai has continued to perform his job duties capably and at a high level. He has received the maximum performance-based salary increases in each year since the accident. His promotion from pit manager to pit manager/relief casino manager occurred in October 2018, approximately 11 months after the accident at which time Mr. Chai was struggling to perform his job as described.
- [105] I accept that Mr. Chai is struggling as he describes but that his efforts are sufficient to maintain a level of performance that is high.

Past Wage Loss

- [106] The parties agree that Mr. Chai's loss from his pre-trial missed work due to the injuries caused by the accident is \$9,244.86. I award that sum.

Future Loss of Earning Capacity

- [107] Mr. Chai submits that he is significantly limited in many ways that are relevant to the reasons he was excellent at his job before the accident: ability to sit, stand or walk for prolonged periods; to lift and carry heavy supplies and machines; to be enthusiastic with his team and players; to be patient in chaotic and emotionally charged circumstances; to engage in mental mathematics; and to problem solve on the fly. Since the accident, Mr. Chai has taken eight sick days other than those in the first few months after the accident. He does not claim pecuniary loss for the eight days off, but submits that the evidence that

he has taken more sick days than he did prior to the accident should be taken into account in assessing his future loss of earning capacity.

- [108] Mr. Chai argues there is a real and substantial possibility that he will work fewer hours, retire earlier or leave casino work altogether and so he has a proven loss of future earning capacity.
- [109] Mr. Greenwood submits that Mr. Chai has not met his burden to establish a real and substantial possibility that his earnings will be lower due to his accident injuries and so no award should be made.
- [110] Awards for loss of future earning capacity involve comparing the likely future earnings of the plaintiff if the accident had not happened and the plaintiff's likely future earnings taking the accident into account based on the specifics of the plaintiff's circumstances: *Gregory v. Insurance Corporation of British Columbia*, 2011 BCCA 144 at paras. 32-33. There are two widely used approaches to quantify loss of future earning capacity: the earnings approach and the capital asset approach. Under both approaches, the threshold issue is proof of a real and substantial possibility that the plaintiff will lose income in the future due to the accident injuries: *Grewal v. Naumann*, 2017 BCCA 158 at para. 48. Under both approaches, the court must assess the loss, not calculate it, and must consider the overall fairness and reasonableness of the award: *Rosvold v. Dunlop*, 2001 BCCA 1 at paras. 11, 18; *Shapiro v. Dailey*, 2012 BCCA 128 at para. 40, citing *Morris v. Rose Estate* (1996), 23 B.C.L.R. (3d) 256 at para. 28 (C.A).

Real and substantial possibility of a future event leading to income loss

- [111] Mr. Greenwood submits that because Mr. Chai has been able to complete his job duties and has even been promoted since the accident, there is no evidentiary foundation for a finding that there is a possibility of a future event leading to income loss and the only basis for the award is mere speculation.
- [112] I conclude that Mr. Chai has met his burden to show a real and substantial possibility of a future event leading to income loss.
- [113] As the threshold descriptor suggests, the burden on the plaintiff is not to prove the hypothetical future loss by meeting or exceeding the balance of probabilities, it is met by showing a real and substantial possibility: *Zwinge v. Neylan*, 2017 BCSC 1861 at para. 72, citing the dissent (but not on this point) in *Grewal* at para. 48. The assessment should take into account the likelihood of a future income loss factoring in all substantial possibilities and giving them weight according to how likely they are to occur: *Parypa v. Wickware*, 1999 BCCA 88 at para. 67. The plaintiff cannot meet its burden through mere speculation, subjective fears or theoretical concerns: *Perren v. Lalari*, 2010 BCCA 140 at para. 31; *Luck v. Shack*, 2019 BCSC 1172 at paras. 176-77, 182, 186; *Kim v. Morier*, 2014 BCCA 63 at para. 8.

[114] Determining whether the evidence supports a real and substantial possibility of a future event leading to income loss can be a challenging exercise where the plaintiff has significant debilitating injuries but is still functioning in his or her pre-accident occupation. It is clear from the jurisprudence that the task of the court is to determine whether the hypothetical events have evidentiary support that rises above "mere speculation". It is also clear that plaintiffs who work at their pre-accident jobs post-accident are not precluded from advancing an evidentiary basis of a real and substantial possibility of future income loss. One example is a plaintiff who was on an upward career trajectory but is stalled or limited on that trajectory due to the accident injuries: *Clark v. Kouba*, 2014 BCCA 50.

[115] Several cases have discussed the type of evidence that rise above mere speculation, subjective fears and theoretical concerns:

- a) evidence of ongoing pain and fatigue that makes it difficult for a plaintiff to perform his or her job requirements can be a basis on which the court can conclude that it is possible that the plaintiff will not be able to continue at that work to his or her intended retirement;
- b) medical evidence linking the prognosis of chronic injuries to the ability to continue to work;
- c) medical evidence of unsuitability to undertake certain types of work;
- d) where an employer or a prospective employer is aware that the plaintiff has chronic pain and the job is physical, it may be reasonable to make an inference that the plaintiff's prospects are limited; and,
- e) medical evidence or other evidence that the plaintiff will not be able to continue in his or her present work.

See *Clark* at paras. 33-37; *Hoy v. Williams*, 2014 BCSC 234 at para. 164; *Raptis v. Chalabiani*, 2017 BCSC 1548 at paras. 182-183; *Sevinski v. Vance*, 2011 BCSC 892 at para. 105.

[116] Evidence of injuries that limit a person's capacity, but not in his or her present work, may also satisfy a real and substantial possibility of future loss of income. A person may be required to leave their employment and if the injuries limit what they can do, the range of re-employment opportunities may be limited and cause them to take longer to find replacement employment or cause them to accept lower paying replacement employment: *Grewal* at para. 75, *Shapiro* at paras. 32-34 *Hoy* at para. 161.

[117] In this case, the evidence of Mr. Chai, supported by Dr. Mian and the observations of Mr. Chai's co-workers, establishes that Mr. Chai has limitations in his ability to do certain tasks compared to before the accident. Dr. Mian opined that Mr. Chai will continue to be affected at work by his limitations in his ability to walk long distances, to sit for prolonged periods and to stand for prolonged periods. He recommended that Mr. Chai be provided breaks and a quiet room when he has headaches. He testified that in a job requiring heavy lifting and repetitive tasks, he would be disadvantaged compared to his peers. He opined that the treatment recommendations he makes could lessen, but not eliminate, these limitations.

- [118] Dr. Gatha opined that Mr. Chai will have residual low back pain but there is room for improvement in his current situation with more treatment. However, he did not opine on whether the residual low back pain he expects will affect Mr. Chai's ability to do his job or the level of pain he will experience when he does his job, except to make a general statement (which was not expressly related to Mr. Chai's work) that he does "not anticipate permanent disability". This opinion is too vague to be of assistance.
- [119] Mr. Chai has had the ambition to become a casino manager, then an operations manager and perhaps a general manager for a long time. Ms. King knew of his ambition to be promoted to casino manager. She testified that after the accident she perceived Mr. Chai to be less motivated and keen to advance, less confident in his ability to handle things and that he seemed to shy away from stressful situations. While Ms. King is not the person who will make a decision to promote Mr. Chai or his co-workers to casino manager if a position becomes available, if she is asked for a reference her view could hurt Mr. Chai. Mr. Lee, the person who would make the decision, does not share Ms. King's perception. This is a coincidental benefit to Mr. Chai at this point in time but the person in the position to make the decision at the time it might be made in the future cannot be assured.
- [120] Mr. Sun also noticed changes in Mr. Chai's approach to his work including that he takes more breaks than he used to. Mr. Sun testified, and I accept, that he had seen Mr. Chai ask for help moving shuffler machines. Similarly, Mr. Sun testified that Mr. Chai called for security to assist him when he was en route to deal with potentially confrontational situations more than he used to.
- [121] I find that the types of self-help accommodations that Mr. Chai is employing fly in the face of the workplace culture and were noticed by Ms. King and Mr. Sun. While accommodations may be available if they are asked for, not all of the accommodations Mr. Chai needs, or that Dr. Mian suggests, are available and those that can be requested put a person who seeks to compete for a promotion to casino manager at a competitive disadvantage.
- [122] Dr. Mian's recommendations are not feasible in Mr. Chai's current position. Mr. Chai struggles on nonetheless, to his credit, but it is reasonable to infer the possibility that he will not be able to do so indefinitely. In addition, he is vulnerable if economic circumstances lead to the end of his employment at Parq Casino. The evidence shows that when River Rock laid off several pit managers, including Mr. Chai, his excellent performance and experience allowed him to find replacement work that led to his current position. If that were to occur at Parq Casino and Mr. Chai is honest about the accommodations he needs and his current struggles with the demands of the work when seeking a new position, he will not be as competitively employable except perhaps in smaller casinos where the walking distance is not as great or the set up allows for more time to alternate sitting, standing and walking.

[123] Mr. Chai works with others who share his ambition to be promoted. There are fewer positions as casino manager than there are pit managers and there is only one operations manager and one general manager. While he has been able to complete his job duties and earned a promotion after his injuries, the ongoing strain of working in pain and with less confidence put him at a competitive disadvantage to keep up the levels necessary to be the successful candidate should a promotion become available. His position compared to his pre-accident position to achieve this goal has worsened due to his accident injuries and his position vis-à-vis the other contenders has also worsened.

Quantification

[124] Mr. Chai submits that the capital asset approach is appropriate in this case because he is working at his pre-accident position full-time and the loss will arise from limited durability and decreased opportunity to earn promotions. Mr. Greenwood did not make submissions on the approach to quantification.

[125] I agree that the circumstances of this case make the capital asset approach appropriate because the loss is not apt to be measured or calculated, see Perren at para. 32. The relevant considerations are:

- a) whether the plaintiff has been rendered less capable overall from earning income from all types of employment;
- b) whether the plaintiff is less marketable or attractive as a potential employee;
- c) whether the plaintiff has lost the ability to take advantage of all job opportunities that might otherwise have been open to him or her; and,
- d) whether the plaintiff is less valuable to himself or herself as a person capable of earning income in a competitive labour market.

Perren at para. 11; see also Brown v. Golaiy (1985), 26 B.C.L.R. (3d) 353 at para. 8 (S.C.); Gilbert v. Bottle, 2011 BCSC 1389 at para. 233; Morgan v. Galbraith, 2013 BCCA 305 at paras. 53, 56.

[126] The evidence shows that Mr. Chai is not capable of taking on work involving regular heavy lifting or repetitive physical demands. Because of that, he is less capable overall than he was before the accident. He is clearly less valuable to himself because of his loss of confidence and patience in stressful situations and because of his diminished enthusiasm for the gaming atmosphere and his team. He has not lost the opportunity to compete for a promotion to casino manager, in fact the evidence is that the opportunity to compete is still there for him. However, the opportunity is not as robust as it once was because, as I have found, he is less marketable and competitive than he was prior to the accident.

- [127] The capital asset approach may use projections of earnings as an evidentiary reference point for the assessment. Mr. Chai's annual earnings are approximately \$61,000 per annum. Mr. Chai suggests that the evidence supports a conclusion that his capacity has been diminished by 25-35%. Using the net present multiplier from the Civil Jury Instructions, compared to his without accident lifetime earnings, he submits that the award should be in the range of \$225,000 to \$320,000.
- [128] This proposed methodology is acceptable but begs the question of the level of impairment. While I have concluded that Mr. Chai has established a real and substantial possibility of future income loss, based on the evidence I am of the view that Mr. Chai will likely continue to perform adequately and perhaps superiorly, in his position. However, this performance will only be possible with a struggle, as he has done since the accident, using his remarkable determination to do his job virtually at all costs. The chance of loss comes from the chance that he will burn out due to the pain and stress before he would have otherwise retired or he will not successfully compete for a promotion to casino manager that he would have successfully competed for. Doing the best I can, I would say the chances of one of those things occurring is around 10-15% and a loss of about \$90,000-\$135,000 before deduction for contingencies.
- [129] Because the assessment of the percentage loss of capacity is unsatisfactorily arbitrary, it is appropriate to test the outcome against other approaches used under the capital asset approach.
- [130] An approach discussed in cases such as *Grimm v. Young*, 2019 BCSC 1549 at paras. 118-20, is to award a multiple of the annual pre-accident income as an approximation of the loss of earnings capacity. In *Pallos* at para. 43, the court described using one or more years as the basis for the assessment. In *Grimm*, citing *Pallos* and *Miller v. Lawlor*, 2012 BCSC 387 (where the court utilized three years annual income to assess future loss of earning capacity), Mr. Justice Riley determined that due to the plaintiff's young age, the range of uncertainty and the presence of several negative contingencies, the assessment should be based on one year's salary plus a figure related to a certain category of additional loss of earning capacity.
- [131] An award based on one to two years of earnings would be in the range of \$61,000 to \$122,000.
- [132] The court must take into account positive and negative contingencies. In this case, contingencies that put upward pressure on the assessment are that the treatment options available will not be successful and Mr. Chai will not sustain his current efforts to work through his pain, sleep deprivation and low mood for a much more significant portion of the 20 or so working years he has left. Another contingency that puts upward pressure on the award is that he will not be successful at achieving promotion due to his injuries and would have had he not been injured. The promoted earnings would have been higher and would mean using his current earnings as a basis for the assessment for the award results

in a number that is inappropriately low.

- [133] Contingencies that go the other way are the chance of successful treatment that allows him to work pain-free or with less pain than he currently experiences, reducing the chance of burn out and increasing the chance that he becomes equally competitive for promotions. Another is that he might not have been promoted even if he had not suffered his injuries because the competition is so stiff.
- [134] To a certain extent the contingencies cancel each other out but overall, my view is that Mr. Chai's drive is such that scenarios that are positive for his future are more likely than the contrary. I reduce the award by 5% for downward pressure contingencies. I assess his future loss of earning capacity to be \$100,000.

Cost of Future Care

- [135] Awards of cost of future care must be objectively supported by medical evidence, the claims must be reasonable, and if the plaintiff will not use the services, the awards ought not to be made: *Milina v. Bartsch* (1985), 49 B.C.L.R. (2d) 33 at 84 (S.C.), *aff'd* (1987), 49 B.C.L.R. (2d) 99 (C.A.); *Krangle (Guardian ad litem of) v. Brisco*, 2002 SCC 9 at para. 21; *Izony v. Weidlich*, 2006 BCSC 1315 at para. 74; *S.R. v. Trasolini*, 2013 BCSC 1135 at paras. 222-24.
- [136] There must be an evidentiary link between the claim and the treatment of an injury or disability caused by the accident. To determine whether the cost of a particular item or service is justified on the evidence, the court often considers the recommendations of doctors and other health care providers: *J.J. v. Barton*, 2017 BCSC 1196 at paras. 74-75.
- [137] Mr. Chai relies on the recommendations made by Dr. Mian and Dr. Gatha for active rehabilitation, medications, massage therapy, physiotherapy and yoga. He relies on evidence of the costs of the therapies and medications he has already undertaken, including active rehabilitation, massage and physiotherapy, as evidence of the likely future cost. On this basis, he asserts that an award of \$17,658 is appropriate using the 2% discount rate set out in the Civil Jury Instructions.
- [138] Mr. Greenwood submits that massage therapy, active rehabilitation and hot yoga are medically justified. He proposes an award of \$4,248, which is based on these treatments being of relatively short duration; three to six months. My understanding of the medical evidence was that these recommendations were long term, needed to improve the current position to the extent possible (but not likely to be a complete recovery) and then to maintain it. Given the efforts that Mr. Chai has made to undergo treatment to date, it is highly unlikely that three to six months is going to cause significant improvement and it will not likely maintain it.
- [139] It is appropriate to take into account contingencies. In this case, the contingencies are that Mr. Chai does not have success with these treatments and discontinues some or all of them long term. He could also have excellent improvement and discontinue them for that

reason.

[140] I assess damages based on Mr. Chai's approach but reduce the amount by 25% for the contingency that he does not undergo all of the treatments long term. The award is \$13,250.

Special Damages

[141] The parties agree that special damages are \$5,110.40

Summary of Damages and Costs

[142] The damages are:

a) non-pecuniary damages:

\$120,000.00

b) past wage loss:

\$9,244.86

c) future loss of earning capacity:

\$100,000.00

d) cost of future care

\$13,250.00

e) special damages:

\$ 5,110.40

[143] The total is \$247,605.26.

[144] Subject to any matters of which I am not aware relating to costs, I award Mr. Chai costs at Scale B. If the parties wish to address costs, within 30 days of these reasons for judgment they shall contact the Registry to arrange for a date and shall deliver written submissions to me through the Registry and written reply submissions, if any, within 45 days of these reasons for judgment.

"Matthews J."

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