

CANADA / JUDGMENT

Guan v. Hayward

2020 BCSC 552

COURT

Supreme Court of British Columbia

DECIDED

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2020 BCSC 552 Guan v. Hayward

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Guan v. Hayward,

2020 BCSC 552

Date: 20200417

Docket: M188728

Registry: New Westminster

Between:

Darian Alexander Guan

Plaintiff

And

Devin Brandon Hayward, Lee William James

Deem and Michael Fuchihara

Defendant

Before: The Honourable Madam Justice Norell

Reasons for Judgment

Counsel for Plaintiff:

J. Guglielmucci

M. Neckelmann

Counsel for Defendant, D. Hayward:

P. Zagozda

T. Hande

Place and Date of Trial/Hearing:

New Westminster, B.C.

February 3-7, 2020

Place and Date of Judgment:

New Westminster, B.C.

April 17, 2020

[1] On April 5, 2015 the plaintiff Mr. Guan was the driver of a vehicle which was hit on the driver side by a vehicle driven by the defendant Mr. Hayward. Liability for the accident has been admitted by Mr. Hayward. The action was discontinued against Mr. Deem and Mr. Fuchihara. These are the reasons for judgment on Mr. Guan's claim for damages.

Mr. Guan

Pre-accident

[2] Mr. Guan is presently 30 years old. He is the eldest of four siblings, and has lived with his extended family in Burnaby, BC since prior to the accident.

[3] Mr. Guan graduated high school in 2007. He was unsure of a career path and for the next several years, worked at a variety of jobs and took courses to upgrade his education. In the autumn of 2007 he attended Langara College for one semester until December and then decided to take a break. In 2008 he worked for about six months in quality control in his aunt's clothing store. In 2009 he worked part-time for the year at Home Depot as a cashier and lot attendant. In 2010 he worked full-time in quality control for about six months at a clothing manufacturer. In 2011 he decided to upgrade his high school education and took two high school courses. In 2012 he was again hired by his aunt full-time for four months, this time as a fabric cutter. In October 2012 he decided to move to Calgary for better career opportunities. He had some friends in Calgary. He worked part-time in the food service department of a hospital throughout most of 2013 until he decided to return to Burnaby to continue his education. He took more high school upgrading courses toward a possible job in finance, but in 2014 a friend of his mother showed him "CNC" machines. Mr. Guan became very interested in this, and it eventually became his present career.

[4] CNC stands "computer numerical control". CNC machines are used to manufacture items, from something small enough to be held in a hand, to large airplane parts. The operator of a CNC machine places the item to be processed into the machine and secures it in place, sets

up tools within the machine, inputs computerized instructions which control those tools and the item to be processed, and then the machine carries out those instructions. Mr. Guan described that he can tell the machine to "do just about anything" from drilling a hole to sculpting metal. At his present job, he works mainly with metals.

- [5] In January and February 2015 Mr. Guan took an introductory CNC course at BCIT. This course was once a week for six hours for eight weeks. Mr. Guan found it "unique" and "appealing". He decided to focus on this as a career and applied to the CNC machinist technician program at BCIT. Only 16 students are accepted at a time, and he went on a waitlist.
- [6] From January to March 2015, Mr. Guan also worked part-time looking after his young cousins who live with their parents in a suite in his family's home. He helped his mother with household chores in the portion of the home occupied by him and his immediate family. He regularly went to the gym. He had started this about 10 months prior to the accident. He went to the gym four to five times per week for one and a half to two hours, and was exercising with heavy weights. He often attended with his friends. He wanted to build muscle and get healthy. He was active with his friends and played badminton, volleyball, and basketball on a recreational basis but not on a team. He also hiked and socialized by going out to dinner and playing video games.

Post-accident

- [7] On the day of the accident Mr. Guan was driving to his gym at about 9 AM. He was driving west on Parker St. in Burnaby and approaching Willingdon Avenue when a truck suddenly appeared and collided with the front left side of his vehicle. Mr. Guan's car spun 180 degrees. The truck ended up hitting another vehicle as well, but Mr. Guan did not see it at the time. The truck flipped upside down.
- [8] Mr. Guan was wearing a seat belt. The driver's side window of his car was smashed and he cut his pinky finger on the glass. His airbag deployed. His left knee was bruised and he thinks it must have hit the inside of his vehicle. Mr. Guan said the accident happened so suddenly it was hard to brace himself. He described it as a "really hard hit". He was stunned and dazed. He remained in his vehicle until someone came to ask if he was okay and let him know an ambulance was on its way. He was taken to Burnaby Hospital, assessed and discharged. A friend brought him home. He laid in bed and collected his thoughts for the remainder of the day.
- [9] The next day his body was sore and he was in a lot of pain. His back ached, his neck was stiff, and his knee was painful and he had trouble bending it. He was in bed most of the day. After a couple of days he went to see his family physician Dr. Nguyen.
- [10] Mr. Guan described his injuries in 2015:

- a) His left knee was bruised and it resolved in two weeks. The cut to his pinky finger did not require stitches and it healed in a week;
 - b) He had neck pain and headaches at the base of his skull. The neck pain was very sharp. Turning his head to the left and right would give him a nauseous feeling. Immediately after the accident the neck pain was constant. He eventually bought a neck brace to restrict movement. He used a heating pad and got massages. The headaches accompanied the neck pain. In the year after the accident he would get headaches twice a week lasting one to two days;
 - c) He had back pain, mostly in his lower back, but it did vary, sometimes extending to the middle and upper back. It was aching pain, at times sharp. In the months following the accident it was constant; and
 - d) He had anxiety when driving and approaching an intersection. He would slow down and his heart would beat fast. Even if he was a passenger in a vehicle he would have to shoulder check. For the first few months it was a lot worse. There was no evidence he stopped driving. He had nightmares regarding the impact of the collision two or three times a week. The nightmares would wake him up. He would be sweating with his heart beating fast.
- [11] Dr. Nguyen prescribed pain medication, muscle relaxants, medication for anxiety, and massage. The pain medications helped but never completely took away the pain. He attended a registered massage therapist once a week and this helped relieve some pain and stiffness. Later that year Dr. Nguyen referred him for physiotherapy. He attended that once a week until the end of 2015 and has not attended physiotherapy since. The physiotherapy relieved a lot of the "stress built up" in his back, but the relief was temporary. After a couple of days it would accumulate again. From April to December 2015 Mr. Guan did not return to his gym. He was still in pain and the exercise aggravated his pain. He was helping "a lot less" around the home. Sweeping and vacuuming aggravated his back because he had to bend forward.
- [12] In January 2016, Mr. Guan was accepted into and started the CNC machinist technician program at BCIT. This is a two year program. The first eight months were days in the classroom alternating with days working with hand tools to become familiar with them. He attended BCIT five days per week, six to seven hours per day. He did homework for a couple of hours most nights. Mr. Guan said that the turning, leaning and bending when using the hand tools gave him a lot of discomfort. He also had to clean out machines, sweep, and clean the floors. He missed about 10 days from school because it was a struggle to do some tasks that required leaning or bending forward for a long period of time.
- [13] Following the first eight months of the course, Mr. Guan did an internship for eight months at a machining firm. He started there in September 2016 and worked 40 hours per week. He said initially he did not have a lot of opportunity to do CNC work, and did more maintenance and errands. He swept floors, and painted an area of patched wall. He later did other duties such as quality control work. He had discomfort when he swept and would sweep an area

and then take a break. He had discomfort when he was packing things, depending on his posture. The internship was a requirement for him to graduate. He was having a lot of pain and discomfort, but he did not want to make excuses and he wanted to graduate, so he just coped with it. He missed a couple of days when he woke up sore, and one day he asked to leave early when he hurt his back.

- [14] In 2016 Mr. Guan was still feeling pain in his lower back and neck. It had improved but the pain depended on what he was doing. He had headaches about twice a month. He had nightmares one to two times per month. His anxiety improved "a lot" but he still would catch himself. He was more aware of his surroundings, especially when driving. He had to do a week of welding at the course which he found difficult because the welding "popped" at him and would give him "a little panic" and he would have to take a break. He was still attending massage. He continued to take medications which helped, but did not completely alleviate the pain. Mr. Guan started to go back to the gym to do light workouts and stretching, but he did not attend as often as before the accident.
- [15] Mr. Guan successfully completed the internship at the machining firm at the end of April 2017, and returned to BCIT to continue the course. In this part of the course he learned more of how a simulator works and how to code the machines. He successfully completed the course in December 2017 with an overall grade of 87%. His injuries did not affect his grades or delay his graduation.
- [16] In 2017 Mr. Guan felt improved but he still had pain in his back and neck. The headaches were not as frequent. He had nightmares, but not very often. He still had a little bit of anxiety if something "popped" in front of him and he still had to shoulder check when he was a passenger in a car. He continued with massage therapy and had chiropractic treatments. He thinks he stopped taking medications but he is not sure. Even though medications helped, he did not want to rely on them.
- [17] In 2018 Mr. Guan said he "improved a lot". He still had pain in his lower back, depending on the position he was in, for example, if he stood for a long period of time. His neck was still "a little bit of a problem" but it had also improved. He could still get sharp pain if he had to look up or to the right or left. He still had headaches which accompanied the neck pain. The nightmares decreased to one in six months. The anxiety "had definitely improved a lot".
- [18] In 2018 Mr. Guan's family physician referred him to a pain specialist for the purpose of seeing if he had fully recovered. The pain specialist (also a Dr. Nguyen) recommended an injection but Mr. Guan did not want to do it because he is afraid of needles and after doing some research thought the relief would only be temporary.
- [19] In April 2018 Mr. Guan stopped all massage and chiropractic treatments because he was not sure they helped him improve and it was getting costly. The relief was temporary. Mr. Guan attended the gym once per month but he never stayed with it consistently. He said he had lost motivation and did not want to damage his back and neck.

- [20] In June 2018 Mr. Guan found a job as a CNC machinist with CWS Industries, his present employer. For the first while he shadowed an employee who was doing the bulk of the work and Mr. Guan mostly watched. That employee retired in early 2019 and Mr. Guan took over his duties. Mr. Guan works mostly on a CNS machine which he referred to as the Haas machine. It machines parts from hand size up to 800 pounds which require a crane to position. Mr. Guan uses a crane most days. Employees are required to use a crane for any weight over 50 pounds. Mr. Guan is at the Haas machine "pretty much the whole day". He has to lean forward a little to load the machine and set up tools. He will repeat the process multiple times per day. He spends about 30 to 45 minutes per day doing this. The coding usually takes less than an hour. While the machine is processing he is standing and watching. Ninety percent of his day is standing, but he is able to sit if his back is bothering him. He has to clean and sweep chips out of the machine each day.
- [21] Recently, he was trained on a drill press which is not computer-operated. He has to reach overhead and pull down, but it is not too heavy. He uses it a few times a month. He works full time, 40 hours per week. When asked if he has any difficulty at work, he said he works through any pain and he is more affected at the end of the week. In 2018 he did not lose any time from work as a result of his injuries. When he experiences symptoms, he tries to stretch and sit down.
- [22] As of 2019, Mr. Guan said he had "come a long way" and "definitely improved a lot". However, at the beginning of 2019, when the employee he was working under retired, his responsibilities increased. Because he was new at the job he was slower, and he had to work a little longer or occasionally work an extra day to catch up. With the more extensive work, his pain increased. He may have lost a couple of days of work to his injuries. Currently, he does not have to work so many extra hours and he is again working an average of 40 hours per week. He says every day he tries his best to go to work and cope with the pain.
- [23] Mr. Guan likes his job and his employer and hopes to stay with both. He has not sought any accommodations at work other than to take a break if needed. His injuries are not preventing him from working but he still feels intermittent pain when working. He feels he can perform his job but wonders how the pain may affect him if his pain persists for another five years. He has been thinking of furthering his career by getting a Red Seal as a CNC machinist. To do so, he has to work another 4000 hours as a machinist and take two more years of education. Once he receives a Red Seal his income will increase. He started at CWS at \$22.00 per hour, and that increased in April 2019 to \$25.48 per hour. A CNC machinist with a Red Seal can make \$30 to \$40 per hour, depending on the province and location. He has not thought of retirement as he is 30 years old and has another 30 to 35 years of work ahead of him. If he does not get a Red Seal, he will be limited to annual merit increases of one to four percent. He has not spoken to his employer specifically about getting a Red Seal, but they did offer the opportunity. With a Red Seal, his job responsibilities would possibly increase. He would work on different machines, and would probably have to use more manual machines.

- [24] Currently, back pain is his biggest issue. It is intermittent and not constant. It became intermittent in 2018. He sometimes goes two days without pain, but not any longer than that. The back pain is tolerable, but it depends on the type of work he has to do, and his position and bending. The back pain is not improving "a whole lot" at this point. The back pain improved in 2018 despite working, but the pain increased in 2019 when his duties increased. The beginning of the week is better than the end of the week. On weekends he spends a lot of time resting. His sitting tolerance has improved. He still has to adjust himself, but not as much as before. He has not been back to the gym consistently.
- [25] The neck pain is no longer constant, and depends on his activities and the position of his head. He has neck pain one to two times per week, depending on his posture, but it is not as bad as initially. When asked if he still has headaches, he said, "no, not really, not as bad". The headaches last about two hours. He agrees they are still improving. He does not take medication for them. He gets a nightmare maybe once a year. His anxiety has improved.
- [26] He does not take any medications. He agreed that when he was first prescribed medication he did not take it. He said that was because he did not want to become dependent. If it were affordable he would like to do massage therapy and chiropractic treatment to help loosen up the muscles in his back, and decrease the pain, stress and tension. The last time he had this treatment was in April 2018. He stopped because he was starting to feel better and he did not think the treatment was furthering recovery. Despite stopping treatment, he continued to see some improvement in the pain.
- [27] He now is working full-time and earning income. He has extended health benefits at work, but he has not investigated this. His massage therapist, chiropractor and pain specialist recommended he increase his activity at the gym. He has not done that consistently, but he has done stretches at home. He has not had treatment for anxiety. He stopped taking mood medication in 2017. His family physician discussed referral to a psychiatrist, but he declined. He said he has a hard time opening up and he would prefer to cope with it.
- [28] Currently, he hikes occasionally, but on more flat ground. He does a very light workout, mostly stretching at home four to five times per week. He is not doing a workout anywhere close to what he did prior to the accident. Prior to the accident he was almost 170 pounds. Now he weighs 150 pounds. He has lost a lot of muscle. When he was going to the gym four to five times per week prior to the accident, he was working part-time for his aunt and uncle and attending school one day per week. He had a lot of free time. Once he started the CNC course full-time and was doing homework in the evenings, he had less time to go to the gym. As for recreational activities with his friends, he had more time in 2014 and 2015, and as he and his friends grew older and had more responsibilities, it was harder to get together. He agreed school and then work are one reason he does not do as much exercise now, but says it is not the entire reason. Initially his pain prevented him, and after that he lost motivation. He would still be going to the gym if he had not stopped because of the accident.

- [29] He still experiences pain while doing chores. He continues to live with his family. He agreed at the time of the accident there were other adults living in the family home, and everyone pitched in as needed. His mother was the primary caretaker. At the time before the accident everyone else was busy. He had difficulty doing housework for about six months to a year.

Ms. Anna Guan

- [30] Mr. Guan's mother testified. She confirmed much of Mr. Guan's testimony regarding his life prior to the accident. She described her son as quiet and someone who does not like to talk much. She described him as "sunshine" as a child. He played with his siblings. After his father died 20 years ago, Mr. Guan helped her with chores such as vacuuming, cleaning, dishes and laundry.
- [31] After he was home on the day of the accident, Mr. Guan stayed in bed. The next day he was tired and pale. His neck was painful and she tried to massage it. He did not eat much. When he was in pain, she tried to help by doing scraping and cupping, which are Chinese treatments, alternating with massage on other days. She bought a massager. After the accident, Mr. Guan helped her less, and he was cranky and less patient with his siblings. She could see in his face that he was not happy. She said her son is not a person who will say he is in pain. He will "put it inside his heart".
- [32] While Mr. Guan was taking the CNC course at BCIT in 2016, she dropped him off and picked him up every day. He was getting better. He was more patient and she could see from his face he was feeling better. His pain at this time was always around his neck and back. If he sat or stood for a long time his back hurt. She still did scraping and cupping on Mr. Guan, but less often than before. In the evenings, Mr. Guan looked tired. He was not smiling. His face had no expression. He may have missed school a few times. In 2018 when Mr. Guan worked everyday at CWS, sometimes he did not feel well. She does not know if he missed time from work.
- [33] Currently, Mr. Guan is gradually improving and is a lot better. He is thinner than he used to be. At the end of the week he is sometimes tired. The last time she did massage, cupping or scraping on him was in the middle of 2019, and at that time the frequency had reduced to about every 10 days.

Ms. Linh Dinh

- [34] Ms. Dinh is a friend of Mr. Guan. They met while Mr. Guan was living in Calgary. She described Mr. Guan then as reserved but friendly, with a good sense of humour. He was very strong. They went for long walks, shopping, and ate out frequently. She saw him four times a week in Calgary, both alone and in groups. They exercised together one to two times per week in the evenings. After Mr. Guan moved back to Burnaby, they kept in touch, mainly by text. She moved back to Vancouver three months later in the beginning of 2015. They did the same things together in Vancouver, but went to the gym more frequently because they both

wanted to get more fit. Mr. Guan was very health-conscious and ate well. His mood was stress free, and they had an active social life.

- [35] She first saw Mr. Guan three weeks after the accident. He was not moving much. He looked very uncomfortable. She could see in his face that he was not okay. He laid on the floor when he was uncomfortable. In the months after the accident he was the same. He lost muscle mass and was getting thinner. He had pain in his back and neck. He was stressed, and did not come out to socialize with her and their friends as much. She rarely saw him. They did not do the same activities. She has not exercised with him since the accident. She now sees him about once per month, and they go out to eat, or he visits her. In the past one to two years, he seems tired and uncomfortable. They are not as close anymore. He often declines when she and their friends ask him to come over.

Mr. Matt Campbell

- [36] Mr. Campbell was Mr. Guan's direct supervisor for about six months. After that, Mr. Campbell was promoted and Mr. Guan still reports to him, but he sees him less, about twice per day. He described Mr. Guan as a great employee doing a great job. Mr. Guan is on-time for work and does not call in sick. Mr. Campbell does not socialize with Mr. Guan outside of work. He described Mr. Guan as quiet, punctual, and a person of integrity who keeps to himself. The odd time Mr. Guan has called that he is not coming to work, Mr. Campbell does not have to question it.
- [37] Mr. Campbell is a CNC machinist and obtained his Red Seal in 2004 or 2005. To embark on the training, a candidate has to have a job, and every 2000 hours of work the candidate goes to school for training. There is then another 2000 hours of work. There are four levels of training. After that, the employee writes an exam to obtain an interprovincial ticket. It takes approximately four years to get a Red Seal. The wage rate is between \$25 and \$35 per hour, depending on the level of qualification. Mr. Guan's work at CWS Industries could count toward a Red Seal ticket. He and Mr. Guan have briefly discussed an apprenticeship for a Red Seal. Presently, CWS Industries has one or two apprentices and they are just finishing their training. The next step logically would be for Mr. Guan to take the course. Mr. Guan has already completed the entry level.
- [38] When Mr. Guan started with CWS Industries, he was trained under another machinist, and was honing his skills. When the machinist Mr. Guan was working under retired, Mr. Guan took over his job. Mr. Guan has now taken on more responsibility and is running the CNC machine on his own. He has to write the computer programs and load the parts himself. He has to clean parts, sweep and do daily audits. If there is a back up, he is expected to work extra hours.
- [39] Mr. Campbell described the Haas CNC machine Mr. Guan uses. The size of a part being processed varies considerably, but on average the parts are 200 pounds. The tools used within the Haas machine are between five and 100 pounds, with an average weight of 10

pounds. Tools are changed on average about once per hour. Employees are not permitted to lift anything over 50 pounds. CWS Industries has two CNC machines. Mr. Guan is also starting to use the drill press, which is a manual machine. CWS has other machines. If Mr. Campbell hired a Red Seal employee, he would expect him or her to know how to run every machine in the shop. Mr. Guan is not required to operate other machines, but it would be a good skill to have. The lathe is the most physically demanding machine there. There is also a saw that requires some kneeling. All of the machines are physically demanding to operate. The shop is large, with a concrete floor and it is cold. They have five cranes. They have anti-fatigue mats for their employees.

- [40] Employees receive an annual merit increase based on performance. For those without a Red Seal, the maximum wage rate would be about \$30 per hour, but if Mr. Guan decides to pursue a Red Seal he will get a percentage of a journeyman rate. Mr. Guan received a wage increase because of his performance. CWS had started him at a lower rate because he was training. The maximum Red Seal rate at CWS Industries is about \$35 to \$40 per hour.
- [41] Mr. Campbell does not know if Mr. Guan took any days off from work because of his injuries because they usually do not ask employees why they are sick. He has sometimes noticed Mr. Guan look sore and sit down to take a "micro break".

Dr. Paul Chapman

- [42] Dr. Chapman is a physiatrist. He assessed Mr. Guan for an independent medical evaluation on April 12, 2019. Mr. Guan's complaints were low back pain, neck soreness, and anxiety with driving. The back pain was intermittent but occurring most days, and worse with standing or sitting longer than an hour. His work duties perpetuate the pain. The pain is better with position change, stretching and movement. The neck pain was intermittent and occurring daily. The driving anxiety had mostly settled. Dr. Chapman diagnosed:

New onset low back pain worse with prolonged sitting and on examination with extension, query facet joints as pain generator.

New onset neck pain. Worse with extension, query facet joints as pain generator.

New onset relative deconditioning secondary to decreased activity as a result of low back pain.

New onset anxiety with driving (improved). Defer to psychiatry for further.

- [43] Dr. Chapman opined that Mr. Guan had a short period of disability from school initially and that he does not presently have any disability with respect to work, although he does have ongoing discomfort in the performance of his job duties. He opined that Mr. Guan's injuries have not impaired his capacity to earn income. Mr. Guan is working in his chosen field and managing his duties. He does not have a disability with respect to household work. Mr. Guan has a mild, partial disability with respect to recreational activities.

[44] Dr. Chapman suggested a bone scan to investigate the facet joints of the cervical and lumbar spine which might be amenable to treatment. As for treatment, he recommended: an ongoing, general aerobic-based fitness program; education regarding posture correction; a program of stretching tight muscles across the hip and pelvis; and a program of dedicated core strengthening. These could be undertaken under the guidance of a kinesiologist or physical therapist. Dr. Chapman also recommended assessment for foot orthoses as Mr. Guan has pre-existing flat feet and this can contribute to back pain. He also suggested a stress-relieving mat to stand on at work and Kevlar boots which are lighter than steel-toed boots.

[45] As for the future, Dr. Chapman opined:

I think there is some potential for further improvement with investigations/treatment suggestions made in the body of the report.

It is difficult to comment on permanence at this point given the above.

If however, Mr. Guan does not see improvement with the above suggestions, then I would expect Mr. Guan would stay at a similar level of ongoing discomfort resulting in partial limitation in the realm of recreation and that he would have ongoing discomfort relating to performing his job duties.

[46] Dr. Chapman did not give evidence that Mr. Guan may get worse over time.

[47] In cross-examination, Dr. Chapman confirmed that Mr. Guan told him he was feeling 75% of his normal self; that he was working full-time with frequent overtime; that he had no problems or limitations at home; he was waiting for the weather to improve to engage in hiking, but he was also partially limited by time (work and school); and that his mood was "fine".

[48] Dr. Chapman thinks Mr. Guan suffered soft tissue injuries, but he also suspects Mr. Guan has a facet joint problem, which is why he suggested a bone scan. A bone scan would not necessarily show a problem, but if it did, it may allow a radiologist to inject a specific spot. Mr. Guan could perform the recommended exercises himself once he was educated. When Dr. Chapman examined Mr. Guan, he had full range of motion of the neck and back with pain on extension of both. Dr. Chapman did not find any objective signs of injury to the neck and back.

[49] In re-examination, Mr. Guan's counsel tried to lead from Dr. Chapman that he would defer to a functional capacity evaluator regarding Mr. Guan's ability to do his job. Dr. Chapman answered that the best determination of capacity is what Mr. Guan has demonstrated he can do in his job and whether he is able to sustain that.

Mr. Russell McNeil

[50] Mr. McNeil is an occupational therapist and work capacity evaluator. He assessed Mr. Guan on July 24, 2019. Mr. Guan told Mr. McNeil he was working full-time, five to six days per week, eight to 12 hours per day, with occasional overtime. At the time of the testing, Mr. Guan reported neck and lower back pain of 3/10. Mr. Guan weighed 160 pounds.

[51] Mr. McNeill opined:

Based on assessment result of July 24, 2019, Mr. Guan has demonstrated restrictions in his capacity to perform his work as a Machinist on a full time basis at a competitively employable work pace. Without accommodations to pace himself and limit the amount of bending, low level work, lifting and carrying, he would more likely than not be unable to sustain the physical demands of the work.

He has demonstrated restrictions in his capacity to perform the strength and stamina requirements of the work and he would require accommodations. He has also demonstrated restriction in his capacity to perform the repetitive dynamic and static bending and static neck extension (looking up) required of the work.

[52] Mr. Guan assessed his own restrictions for his job as having a slight restriction for frequent standing, and being moderately restricted for frequent bending/stooping. Mr. McNeil assessed these two functions the same, but assessed Mr. Guan's other functions as worse. Mr. McNeil found Mr. Guan slightly restricted in crouching and kneeling, slightly to moderately restricted in occasionally lifting 50 pounds, slightly restricted in carrying 50 pounds, and slightly restricted in occasionally pushing/pulling 100 pounds. Mr. Guan assessed himself as being able to do all of these things. Mr. McNeil concludes that Mr. Guan has a tendency to overestimate his strength and underrate his restrictions. Mr. McNeil opined that Mr. Guan has the capacity to perform household, yard, and home maintenance work, and recreational activities, but he will need to pace himself with activities requiring static and dynamic spinal positioning.

[53] Mr. McNeil made the following recommendations: a supervised exercise program with a kinesiologist or personal trainer to address spinal and core strengthening; and massage therapy and chiropractic treatment to manage or possibly reduce chronic tension and assist with pain management.

[54] Mr. Guan had provided to Mr. McNeil pictures of the Haas machine and of Mr. Guan reaching within the machine, using the crane, and showing the types of items being processed. These were helpful in demonstrating Mr. Guan's work postures.

[55] In cross-examination, Mr. McNeil's agreed his report is based on one day of testing, but disagreed his assessment precluded Mr. Guan from performing at a higher level on any other day. He said Mr. Guan could only perform at a lower level and not a higher level because the testing was designed to take him to his maximum level. The next day Mr. Guan was asked to report to him. The message he received was "I just got home from work and I'm just checking in with you. My lower back and hamstrings are a bit sore today".

Dr. Tung Duc Nguyen

[56] Dr. Nguyen has been Mr. Guan's family physician since 2000. He provided a report dated September 13, 2018. Dr. Nguyen diagnosed accident-related soft tissue injuries to the back and neck, and mild mood depression, possibly aggravated by the accident. He prescribed non-steroidal anti-inflammatories, muscle relaxants and anti-depressants, physiotherapy, massage therapy, and chiropractic treatment. Mr. Guan reported improvement in his symptoms over time. His mood was slightly depressed and it is possible his mild depression was caused by the accident. As for work, he opined:

Mr. Guan is currently working but his work and activities are slightly limited in terms of lifting or handling heavy loads or weights due to his pain in back and neck.

I think he may consider a change his work for a lighter duty. I suggest that his management would allow him to sit more frequently at work, or he needs to be re-trained to work in an office sitting-at desk duty.

His pain has improved significantly to the point where he has begun performing his regular hobbies and duties at work but slightly limited to applying immense strength as he needs to work his way back into shape and health.

[57] Dr. Nguyen recommend a stretching program and education on pain management and proper body mechanics that would incorporate Mr. Guan's job demands.

[58] Dr. Nguyen said his opinions have not changed since his report. He saw Mr. Guan two times in 2019. Although he considered referral to a psychiatrist three times, he did not refer Mr. Guan to a psychiatrist. He had planned to do so, but Mr. Guan was hesitant and improved over time. He counselled Mr. Guan, but he did not refer him for counselling. Mr. Guan's anxiety was not severe. At least one time, Mr. Guan told him he did not want medication.

[59] Mr. Guan reported to him that his neck and back pain occasionally affects his performance at work and his personal life. Dr. Nguyen did not have details of this, for example how often "occasionally" is. He recalls at one point they discussed changing jobs, but later on Dr. Nguyen changed his mind because Mr. Guan seemed to be improving. Dr. Nguyen's opinion in his report regarding lighter duties is therefore qualified by his testimony. Mr. Guan told him he was working overtime and he advised him to cut down his hours because of his pain. He has not had that conversation with Mr. Guan in the last year. Dr. Nguyen said it was unusual for a young person to still have pain from soft tissue injuries after this length of

time.

Causation

[60] Mr. Guan has established on a balance of probabilities that the accident caused his injuries. Although Mr. Guan had seen Dr. Nguyen for a low back injury about six months prior to the accident and on another occasion had indicated to another treating physician that he was experiencing some stress prior to the accident, there is no indication these were continuing problems at the time of the accident.

Non-pecuniary damages

[61] The purpose of non-pecuniary damages is to compensate for pain, suffering, loss of enjoyment of life and loss of amenities. While awards in other cases provide guidance, each case must be determined on its own facts. Factors to consider in determining the award were set out in *Stapley v. Hejslet*, 2006 BCCA 34:

[46] The inexhaustive list of common factors cited in *Boyd* [*Boyd v. Harris* (2004), 237 D.L.R. (4th) 193] that influence an award of non-pecuniary damages includes:

- (a) age of the plaintiff;
- (b) nature of the injury;
- (c) severity and duration of pain;
- (d) disability;
- (e) emotional suffering; and
- (f) loss or impairment of life;

I would add the following factors, although they may arguably be subsumed in the above list:

- (g) impairment of family, marital and social relationships;
- (h) impairment of physical and mental abilities;
- (i) loss of lifestyle; and
- (j) the plaintiff's stoicism (as a factor that should not, generally speaking, penalize the plaintiff: *Giang v. Clayton*, [2005] B.C.J. No. 163 (QL), 2005 BCCA 54).

[62] Mr. Guan is relatively young. As a result of the accident, I find he suffered the following injuries. He suffered a minor cut to his finger and a bruised knee which quickly resolved within a couple of weeks. He suffered mild anxiety and nightmares, and some depressed mood, which substantially resolved within a couple of years. He had headaches which were frequent at first and substantially resolved by 2018. His most significant injuries are neck pain and back pain which were initially constant and continue on a regular but intermittent basis today. There are now days when he does not have back or neck pain at all. His injuries

are primarily soft tissue, although Dr. Chapman raised the possibility of facet joint pain. However, Mr. Guan chose not to have that investigated. Other than physiotherapy which occurred only in 2015, Mr. Guan has relied on passive therapies of massage and chiropractic. He stopped all passive therapies in 2018 but continued to see improvement. He no longer takes prescription medication for his injuries, and has not done so for a couple of years.

- [63] The injuries caused Mr. Guan to be not as patient and cheerful with his family, and for a while he was less able to help with chores at home. The injuries initially affected his social and recreational activities with friends, and after that he lost motivation. I find that the continuing reduction in motivation for social and recreational pursuits is largely a function of him attending school, working full-time and having more responsibilities, rather than his injuries.
- [64] Defense counsel refers to Dr. Nguyen's evidence that it is unusual for soft tissue pain to persist this long. Counsel refers to *Price v. Kostyba*, 70 B.C.L.R. 397, 1982 CanLII 36 (S.C.) and argues it is necessary for the court to exercise caution and to examine all the evidence carefully where there is little or no objective evidence of continuing injury and when complaints of pain persist for long periods of time beyond the usual recovery time. I note that Dr. Chapman also suggested the possibility of a facet joint injury.
- [65] I found Mr. Guan to be a sincere and frank witness. He did not exaggerate his injuries, and was quick to say that he had much improvement in his symptoms over time. However, he also states he continues to have intermittent back and neck pain, worse with certain activities, and I accept that evidence. I also accept his and his mother's evidence that he is a quiet individual who chooses to try to cope with his injuries and do the best he can, rather than complain to others. This is consistent with Ms. Dinh's evidence of his withdrawal from most social activities. It is also consistent with Mr. Campbell's evidence that Mr. Guan is a good employee and he never has to question if Mr. Guan calls in sick. Mr. Guan continues to have some intermittent pain while maintaining full-time work. Mr. Guan is a fairly stoic individual, and should not be punished for his stoicism. Although there is a possibility Mr. Guan's pain will remain the same, I find it is likely it will continue to improve over time, as opined by Dr. Chapman, particularly if Mr. Guan embarks on a conditioning program as recommended by his family physician, Dr. Chapman, and Mr. McNeil. There is no expert opinion that his injuries will get worse over time.
- [66] Mr. Guan's counsel submits the range for non-pecuniary damages for someone of similar age and with similar injuries suffered by Mr. Guan is \$85,000 to \$120,000. Defense counsel argues that the range is \$30,000 to \$40,000. I have considered the following cases cited to me by Mr. Guan's counsel: *Lock v. Floreani*, 2017 BCSC 1313 [Lock]; *Johal v. Meyede*, 2013 BCSC 2381; *Walks v. Cody*, 2019 BCSC 1371 [Walks]; *Duda v. Sekhon*, 2015 BCSC 2393 [Duda]; and *Khademolhosseini v. Ji*, 2019 BCSC 854. I have also considered the following cases to me by defense counsel: *Mirsaeidi v. Coleman*, 2014 BCSC 415 [Mirsaeidi]; *Randhawa v. Chiang*, 2014 BCSC 631; and *Madsen v. Bekker*, 2012 BCSC 112 [Madsen].

- [67] The cases cited by Mr. Guan's counsel are closer to his injuries, but in general were more chronic and significant. For example, in *Lock*, the plaintiff was awarded \$115,000 in non-pecuniary damages (approximately \$120,000 in today's dollars) and had chronic myofascial pain in her left shoulder, arm and back which interfered with work and prevented her extensive pre-accident recreational activities.
- [68] The cases cited by defense counsel concern injuries which are less severe than those suffered by Mr. Guan. For example, in *Mirsaeidi*, the plaintiff suffered soft tissue injuries to his back and neck. The neck pain resolved within five months and the back pain improved but not had completely resolved. The pain was less frequent than that suffered by Mr. Guan. After the accident the plaintiff was able to play soccer at the highest amateur level. The court awarded non-pecuniary damages of \$25,000 (approximately \$27,500 in today's dollars). In *Madsen* the plaintiff had right shoulder and neck pain which completely resolved within six months and had some ongoing lower back pain causing mild pain with prolonged lifting, bending or crouching, but not disabling for any of his activities. Non-pecuniary damages were assessed at \$40,000 (approximately \$45,000 in today's dollars).
- [69] The cases closest in functional effect were *Walks* and *Duda*. In *Walks*, the 26 year old plaintiff was working as a housecleaner as well as doing manual work in house demolition. She suffered neck, left shoulder and upper back injuries for which she was not fully recovered four years later. The court found with conditioning these would improve but would not fully recover. The plaintiff suffered depression and driving anxiety, but this was likely to resolve with psychotherapy. The plaintiff re-trained as an early childhood educator. The court assessed non-pecuniary damages at \$90,000. Her psychological injuries were more significant than those of Mr. Guan.
- [70] In *Duda*, the plaintiff was 25 years old at the time of two accidents that took place months apart. She was a medical radiographer. She was off six weeks from work from the first accident and was on a gradual return to work when the second accident occurred. She did not take time off work from the second accident, but her gradual return to work program was extended. She suffered soft tissue injuries to her neck, shoulder, and thoracic and lumbar spine, and aggravation of these in the second accident. She had extensive physiotherapy. She estimated she was 75% recovered and had not returned to her pre-accident level of work. Work aggravated the pain. She was awarded \$80,000 in non-pecuniary damages (approximately \$86,000 in today's dollars).
- [71] I assess Mr. Guan's non-pecuniary damages at \$75,000.

Loss of earning capacity

- [72] Mr. Guan testified that he lost some time from work when he was feeling sore, and when asked if it was days or hours said it was a "bit of both", but could not identify specific days. As a result, Mr. Guan does not seek an award for past loss of capacity.

- [73] Mr. Guan does seek an award for future loss of capacity. Mr. Guan is entitled to be put in the position he would have been in had the accident not occurred. The test to be applied is whether there is a real and substantial possibility that the events in question will occur. These are given weight according to their likelihood. The overall fairness and reasonableness of the award must be considered: *Rousta v. MacKay*, 2018 BCCA 29 at paras. 13-16.
- [74] In *Parker v. Lemon*, 2012 BCSC 27, the court summarized the principles for assessment of future loss of earning capacity as set out in *Perren v. Lalari*, 2010 BCCA 140:
- [42] The approach to such claims is well set out in the decision of Garson J.A. in *Perren v. Lalari*, 2010 BCCA 140 at paras. 25-32, which I summarize as follows:
- (1) A plaintiff must first prove there is a real and substantial possibility of a future event leading to an income loss before the Court will embark on an assessment of the loss;
 - (2) A future or hypothetical possibility will be taken into consideration as long as it is a real and substantial possibility and not mere speculation;
 - (3) A plaintiff may be able to prove that there is a substantial possibility of a future income loss despite having returned to his or her employment;
 - (4) An inability to perform an occupation that is not a realistic alternative occupation is not proof of a future loss;
 - (5) It is not the loss of earnings but rather the loss of earning capacity for which compensation must be made;
 - (6) If the plaintiff discharges the burden of proof, then there must be quantification of that loss;
 - (7) Two available methods of quantifying the loss are (a) an earnings approach or (b) a capital asset approach;
 - (8) An earnings approach will be more useful when the loss is more easily measurable;
 - (9) The capital asset approach will be more useful when the loss is not easily measurable.
- [75] Mr. Guan claims \$379,000 for future loss of capacity. This is calculated on the assumption that Mr. Guan will earn his Red Seal in 2022 and will earn \$70,000 at that time and continue in this occupation until age 65. Using the discount rate mandated by the regulations under the Law and Equity Act, R.S.B.C. 1996, c. 253, the present value of this is \$1,895,292. Mr. Guan's counsel submits a 20% reduction is appropriate and applies this to come to a figure of \$379,000. This is on the basis that Mr. Guan plans to obtain a Red Seal and when he does so he will be required to operate all of the machinery, most of which are manually operated. All of the machines are physically demanding to use. Mr. Guan refers to Mr. McNeil's conclusions, quoted above, that Mr. Guan has demonstrated restrictions in his capacity to perform work as a machinist at a competitively employable work pace, and would require accommodations.

- [76] In contrast, defense counsel submits that Mr. Guan has failed to prove a real and substantial possibility of an event leading to a loss, and there should be no award. Counsel argues that Mr. Guan was not working at the time of the accident. He subsequently went on to successfully complete a two-year full-time program, and since June 2018 has been working full-time with overtime. Mr. Guan is able to do all of his job duties, albeit with some aching at times, and the need to take small breaks.
- [77] Mr. McNeil's opinion, based on his testing, is that Mr. Guan has restrictions to perform his work on a full-time basis at a competitively employable work pace and he will not be able to sustain the physical demands of full-time work. However, Mr. Guan is working and his supervisor described him as doing a great job. Some of Mr. McNeil's test results were inconsistent. For example, neck rotation by one grading system was restricted, but on another grading system was normal. Dr. Chapman found neck rotation to be full. At other times, Mr. McNeil's test results were inconsistent with Mr. Guan's demonstrated abilities at work. For example, Mr. Guan's lifting and carrying capacity was at the 19th percentile, but he has for the past more than 1.5 years worked in a physical job and lifted up to 50 pounds at work. As a result, I put less weight on Mr. McNeil's conclusions, but nonetheless accept there are some demonstrated reductions in Mr. Guan's current capacity.
- [78] Dr. Nguyen's report was written in September 2018, soon after Mr. Guan had started working at CWS Industries. Although Dr. Nguyen opined regarding Mr. Guan's ability to work, he did not have any details of Mr. Guan's work and how often Mr. Guan was experiencing aching in his back at work. Mr. Chapman's more positive opinion as to Mr. Guan's capacity is likewise limited to some extent by reliance on what Mr. Guan told him about his job, although he also did a physical examination. Dr. Chapman addresses Mr. Guan's current job but does not address Mr. Guan's ability to do a more physically demanding job. As for Mr. Guan's ability to continue to work in his current job, Dr. Chapman gave what in my view is the most practical and realistic answer of capacity, and that is Mr. Guan's demonstrated ability to do his job and his longevity in that job.
- [79] One future unknown event is whether Mr. Guan's intermittent back and neck pain will improve. Based on Dr. Chapman's opinion, it is likely that if Mr. Guan embarks on a conditioning program as recommended by all experts and his treating physician, his pain will improve, but it is possible it may stay the same. Another unknown future event is whether Mr. Guan will obtain his Red Seal. I find there is a strong likelihood this will take place. Mr. Guan likes his work and wants to further his career. Another unknown future event is whether having to work more on manual machines when he gets a Red Seal will cause Mr. Guan's symptoms to increase and cause him to lose work. Mr. Guan has not worked on any of those other machines except the drill press, which he can operate.
- [80] Has Mr. Guan proven a real and substantial possibility, not speculation, of a future event leading to an income loss? Considering the likelihood of improvement, and that Mr. Guan has continued in his current job doing good work for the past 1.5 years, I do not find a real and substantial possibility that he will not be able to continue with his current job as a CNC

machinist without a Red Seal. As for whether Mr. Guan may be limited in the future from doing a more physically demanding job, such as aspects of a Red Seal CNC machinist or any other physically demanding job, I have concluded, based on all of the evidence, that there is a real and substantial possibility of a future event leading to a loss, but the risk of that is low.

- [81] Mr. Guan was young when injured and had not established a pattern of income in his chosen career. However, for the past four years, he has attended school or worked full-time. In my view, either the earnings or capital asset approach could be used to assess the loss.
- [82] Using the earnings approach, I can find no basis on the evidence to support a 20% reduction in his work capacity as suggested by his counsel. I have considered Mr. Guan's evidence as to his lost time from work in the internship. There is evidence of some sick days from the CWS employment and a comment on Mr. Guan's first review to be careful about taking days away from work. However, the cause of the sick days is not stated, so I have discounted those days.
- [83] As one possible initial calculation, I have considered his prior sick days as a predictor of possible loss in the future as a Red Seal machinist, when it is likely he will have improved, but where he may have to do more physically demanding work which may exacerbate his symptoms. At a rate of \$35 per hour, and an assumption of three days per year, the loss is \$840 per year. Using the multiplier for present value, that is a loss of approximately \$23,000 before assessing the overall reasonableness of the award.
- [84] I have also considered another possible starting point calculation using the difference in income between working in his present non-Red Seal position and a Red Seal position, and multiplying that by a discount to reflect the low probability of a loss. The difference in income as a Red Seal machinist is about \$20,000 per year. Using the multiplier for present value, the difference between the two incomes before discount is approximately \$541,512. Considering the expert evidence, I would assess the probability of Mr. Guan not being able to carry out all the duties of a Red Seal CNC machinist as being low. Applying a low possibility of five to ten percent results in figures of \$27,000 to \$54,000.
- [85] In my view, an award in this range is also consistent with the factors considered in a loss of capacity approach as set out in *Brown v. Golaiy*, (1985) 26 B.C.L.R. (3d) 353 (S.C.). The factors to consider include:
1. The plaintiff has been rendered less capable overall from earning income from all types of employment;
 2. The plaintiff is less marketable or attractive as an employee to potential employers;
 3. The plaintiff has lost the ability to take advantage of all job opportunities which might otherwise have been open to him, had he not been injured; and
 4. The plaintiff is less valuable to himself as a person capable of earning income in a competitive labour market.

- [86] Considering those factors, I find that Mr. Guan has been rendered less capable overall of doing more physically demanding work than he is presently doing, and is thus less valuable to himself as a person in a competitive labour market. Although that will likely improve over time, there is still a low but real and substantial possibility it may not. Mr. Guan has a long career ahead of him, and given Mr. McNeil's testing, and Dr. Chapman's opinion, in my view it is not speculative that Mr. Guan may one day be foreclosed the opportunity to do more physically demanding work.
- [87] Considering all of the above, and the negative and positive contingencies, I assess future loss of capacity at \$35,000.

Cost of future care

- [88] The test for determining an award for future cost of care is set out in *Milina v. Bartsch* (1985), 49 B.C.L.R. (2d) 33 (S.C.):

The test for determining the appropriate award under the heading of cost of future care, it may be inferred, is an objective one based on medical evidence.

These authorities establish (1) that there must be a medical justification for claims for cost of future care; and (2) that the claims must be reasonable.

- [89] To be justified, the cost must also be likely to be incurred by the plaintiff: *Ferguson v. Watt*, 2018 BCSC 1587 at para. 161.
- [90] All of the experts have recommended that Mr. Guan embark on a program of conditioning. Despite Dr. Nguyen (GP) making that recommendation in April 2018, Dr. Chapman making that recommendation in May 2019, and Mr. McNeil making that recommendation in October 2019, Mr. Guan has not fully done this. However, I think to a large extent this has been a result of Mr. Guan adapting to increased duties in his job and some lack of motivation. In my view, the expense of an exercise program and related education is both medically justified and reasonable. However, I find that a gym pass is something Mr. Guan would likely have incurred in any event since he regularly attended a gym prior to the accident. I therefore award the cost of a kinesiologist as recommended by Mr. McNeil for one year. As Mr. Guan is struggling to motivate himself to go to the gym, I also make provision for the cost of a personal trainer. In total, including the cost of a kinesiologist and some allowance for a personal trainer, I assess future care costs for an exercise program at \$1500.
- [91] Mr. McNeil recommends massage and chiropractic treatment. Mr. Guan has not attended either of these since April 2018, nearly two years ago, yet he continued to improve. He suggested in cross-examination he did not continue because it was costly, however he is now working full-time and has an extended health plan through his employer. He did not know what those benefits covered, so I conclude he has not looked into whether he could have coverage through that plan. For both the exercise program and the massage and chiropractic treatment, given the likely improvement in Mr. Guan's condition, I do not find that it is

medically justified or reasonable to award these costs for the rest of his working life, as claimed by Mr. Guan. I therefore decline to make an award for those costs.

Special damages

[92] A claim for special damages must be reasonable: Redl v. Sellin, 2013 BCSC 581 at para. 55.

[93] Mr. Guan seeks special damages of \$13,675.73 for treatment, medical and travel expenses as a result of his injuries. Defense counsel concede \$12,219.22 of that total. They take issue with the cost of travel to the massage and chiropractic clinic which is in Vancouver, arguing Mr. Guan could have gone to a clinic closer to where he lived. However, this was the clinic recommended by Dr. Nguyen and I do not find it was unreasonable at the time for Mr. Guan to attend there. Defense counsel also take issue with three sessions of massage at Spa Utopia. I agree the records indicate these sessions were not done for therapeutic purposes. I therefore deduct the cost of those three sessions and travel to those sessions. As a result, I award Mr. Guan the sum of \$13,244 for special damages.

Summary

[94] Mr. Guan will have judgment against Mr. Hayward in the following amounts:

a)

Non-pecuniary damages:

\$75,000

b)

Future loss of capacity:

\$35,000

c)

Cost of future care:

\$1,500

d)

Special damages:

\$13,244

Total damages:

\$124,744

[95] Mr. Guan is also entitled to interest in accordance with the Court Order Interest Act, R.S.B.C. 1996, c. 79.

Costs

[96] Unless there were offers to settle which impact the issue of costs, Mr. Guan is awarded his costs of the action at Scale B. If there is a need to make submissions on costs, the parties should arrange an appearance before me through Trial Scheduling.

"Norell J."

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