

CANADA / JUDGMENT

Han v. Dular

2023 BCSC 108

COURT

Supreme Court of British Columbia

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2023 BCSC 108 Han v. Dular

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Han v. Dular,

2023 BCSC 108

Date: 20230125

Docket: M159053

Registry: Vancouver

Between:

Min Jeong Han

Plaintiff

And

Mehendra Dular and United Pallet's & Crate's Inc.

Defendants

Before: The Honourable Madam Justice Forth

Reasons for Judgment

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Place and Dates of Trial:

Vancouver, B.C.

October 3, 4, 7, 11, 13-14,

and November 16, 2022

Place and Date of Judgment:

Vancouver, B.C.

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Introduction

- [1] The plaintiff, Min Jeong Han, was injured in a motor vehicle accident that occurred on September 2, 2014 (the "Accident"). She was waiting to merge onto the Alex Fraser Bridge, in Delta, British Columbia, when she was rear ended by a tractor trailer driven by the defendant, Mehendra Dular. Ms. Han commenced this action against Mr. Dular, and the registered owner of the vehicle, United Pallet's & Crate's Inc., (the "defendants"), seeking damages for the injuries she sustained in the Accident. The defendants have admitted liability for the Accident.
- [2] The defendants concede that Ms. Han was injured in the Accident and suffered some soft tissue injuries. However, the defendants disagree with the plaintiff about the nature, extent, and seriousness of the injuries she claims were caused by the Accident. They dispute all heads of damages.

Issues

- [3] The issues raised by the pleadings, evidence, and submissions are:
1. What are the nature, extent, and duration of the injuries suffered by Ms. Han in the Accident?
 2. What is the appropriate award for general damages for pain and suffering?
 3. What is the appropriate award, if any, for loss of future earning capacity?
 4. What is the appropriate award for future care costs?
 5. What amount should be awarded for special damages?

Background

Pre-Accident

- [4] Ms. Han was 31 years old at the time of the Accident and 39 years old as of the date of trial. She was born in South Korea and came to Canada when she was ten years old. She was educated in Canada from grade five onwards, except for a portion of grades eight and nine when she went back to South Korea. She graduated from a high school located in North Vancouver. She is fluent in Korean.

- [5] Ms. Han attended Langara College through a university transfer program, then attended Simon Fraser University ("SFU"). In 2008 she graduated from SFU with a degree in sociology. In 2010 she took some community counselling courses at Vancouver Community College.
- [6] Ms. Han had a number of different jobs, mainly retail and sales positions, while attending college and SFU. After graduation, she worked at HSBC from approximately 2008 to April 2014, when she left the bank to explore other options; she wanted to work in the social services sector.
- [7] At the time of the Accident she was working as a youth support worker for the Family Services of Greater Vancouver, and as a front desk worker at Covenant House, where she had been employed since 2013. She was also volunteering at the Crisis Centre taking mental health distress-related calls, a position she held since 2011.
- [8] In 2014 she got married. At the time of the Accident, Ms. Han was living with her husband in a townhouse located in Surrey, BC.
- [9] Ms. Han testified that prior to the Accident, she had no restrictions on her work and daily activities, and never needed to take time off work due to illness. She also denied having any issues with her ability to focus at work or school prior to the Accident.
- [10] Ms. Han acknowledged that she was diagnosed with scoliosis when she was a teenager. She was told it was stable and would not progress. Dr. Deni Cortese - a chiropractor who treated her post-Accident - testified that the plaintiff's scoliosis was stable and did not require any ongoing care.
- [11] Her scoliosis did not cause any neck pain, though it would cause some discomfort in her upper back. She described it as a disc that ached, and a "mild" pain. She would massage it with her hands and then it would be "okay" for days, weeks, or months.
- [12] The only treatment she received for her discomfort was from a chiropractor, though her scoliosis was not symptomatic right before the Accident. She testified that two or three years before the Accident she had been receiving treatment from a chiropractor, Dr. Scott Park.
- [13] She claimed she would attend once every six months for a check in. Dr. Park's clinical records were put to the plaintiff and they support she was seeing him on a far more frequent basis in the two years prior to the Accident.
- [14] The plaintiff confirmed in cross-examination that she did not have any neck or back pain before the Accident. During her cross-examination, the plaintiff was taken through the clinical notes of Dr. Park for treatment she had prior to the Accident. There were references to attending for upper back, back pain, as well as neck pain. The plaintiff could not remember complaining of pain in those areas.
- [15] Ms. Han denied having any low back pain or any issues with her right shoulder, arm, knee, or foot. Further, she did not have any driving anxiety.

- [16] She described her health as excellent. She had worked out her whole life but, in 2014, she was working extra hard at the gym so she would be fit for her wedding scheduled for later that summer. She was going to the gym three to five times a week, lifting heavier weights, and engaging in more strenuous workouts, such as high intensity training and cardio kick boxing.
- [17] Outside of workouts, she enjoyed camping, traveling, and going out with friends.

Circumstances of the Accident

- [18] On September 2, 2014, Ms. Han was on her way home from work. She was driving alone in her vehicle, a Honda Civic, and was in the merging lane to the deck of the Alex Fraser Bridge. During this time, there was thunderous rain. As she was waiting to merge she heard a bang and her head was jolted back and forth. She described it as a "severe" movement, and her head hit the head rest. After the impact, she felt like she was in a daze. She turned her head right and left to make sure her neck was okay. She then looked in the rear-view mirror and saw a tractor trailer.
- [19] She called her mother, who is an insurance agent, to tell her she had been in an accident. She followed her mother's instructions to get her insurance papers and exchange information with the other driver. She was able to get out of her vehicle. After she obtained the information from the other driver, she phoned her husband to tell him she had been in an accident. She remembers yelling and screaming at him. She has no recollection of the specifics of the conversation with her husband nor of driving home.
- [20] That evening she was feeling okay but when she woke up the next morning her body felt tight, she felt really dizzy, and she was nauseous. She called her doctor to make an appointment.

Credibility of Witnesses

- [21] The parties agree that the credibility of the plaintiff is a crucial issue to be addressed.
- [22] The factors to be considered when assessing credibility were summarized in *Bradshaw v. Stenner*, 2010 BCSC 1398 at para. 186, *aff'd* 2012 BCCA 296, leave to appeal to SCC *ref'd*, 35006 (7 March 2013):

Credibility involves an assessment of the trustworthiness of a witness' testimony based upon the veracity or sincerity of a witness and the accuracy of the evidence that the witness provides (*Raymond v. Bosanquet (Township)* (1919), 59 S.C.R. 452, 50 D.L.R. 560 (S.C.C.)). The art of assessment involves examination of various factors such as the ability and opportunity to observe events, the firmness of his memory, the ability to resist the influence of interest to modify his recollection, whether the witness' evidence harmonizes with independent evidence that has been accepted, whether the witness changes his testimony during direct and cross-examination, whether the witness' testimony seems unreasonable, impossible, or unlikely, whether a witness has a motive to lie, and the demeanour of a witness generally (*Wallace v. Davis*, [1926] 31 O.W.N.

202 (Ont. H.C.); *Faryna v. Chorny*, [1952] 2 D.L.R. 354 (B.C.C.A.) [*Faryna*]; *R. v. S.(R.D.)*, [1997] 3 S.C.R. 484 at para.128 (S.C.C.)). Ultimately, the validity of the evidence depends on whether the evidence is consistent with the probabilities affecting the case as a whole and shown to be in existence at the time (*Faryna* at para. 356).

[23] Justice Mayer echoed these principles and provided further guidance in *Youyi Group Holdings (Canada) Ltd. v. Brentwood Lanes Canada Ltd.*, 2019 BCSC 739 at paras. 89 - 92, *aff'd* 2020 BCCA 130, leave to appeal to SCC *ref'd*, 39246 (21 January 2021) [*Youyi*].

[24] Since this case involves subjective complaints of pain, the resolution of the issues turns to a significant extent on Ms. Han's credibility. It is particularly important to exercise caution and examine her evidence carefully. A useful summary of the authorities where there are little, if any, objective findings, is contained in *Buttar v. Brennan*, 2012 BCSC 531:

[24] In a case such as this where there are little, if any, objective findings except some minor degenerative changes in the neck, back and knee, the following should be taken into account by the trier of fact:

- the assessment of damages in a moderate or moderately severe soft tissue injury is always difficult because the plaintiffs are usually genuine, decent people who honestly try to be as objective and factual as they can. Unfortunately every injured person has a different understanding of his own complaints and injuries, and it falls to judges to translate injuries to damages *Price v. Kostyba* (1982), 70 B.C.L.R. 397 at 397 (S.C.);
- the court should be exceedingly careful when there is little or no objective evidence of continuing injury and when complaints of pain persist for long periods extending beyond the normal or usual recovery (*Price* at 399);
- an injured person is entitled to be fully and properly compensated for any injury or disability caused by a wrongdoer. But no one can expect his fellow citizen or citizens to compensate him in the absence of convincing evidence -- which could be just his own evidence if the surrounding circumstances are consistent -- that his complaints of pain are true reflections of a continuing injury (*Price* at 399);
- the doctor's function is to take the patient's complaints at face value and offer an opinion based on them. It is for the court to assess credibility. If there is a medical or other reason for the doctor to suspect the plaintiff's complaints are not genuine, are inconsistent with the clinical picture or are inconsistent with the known course of such an injury, the court must be told of that. But it is not the doctor's job to conduct an investigation beyond the confines of the examining room *Edmondson v. Payer*, 2011 BCSC 118 at para. 77, *aff'd* 2012 BCCA 114;
- in the absence of objective signs of injury, the court's reliance on the medical profession must proceed from the facts it finds, and must seek congruence between those facts and the advice offered by the medical witnesses as to the possible medical consequences and the potential duration of the injuries *Fan (Guardian ad litem of) v. Chana*, 2009 BCSC 1127 at para. 73;

· in a case of this kind care must be taken in reaching conclusions about injury alleged to have continued long past the expected resolution. The task of the court is to assess the assertion in light of the surrounding circumstances including the medical evidence. The question is whether that evidence supported the plaintiff's assertion and, if not, whether a sound explanation for discounting it was given *Tai v. De Busscher*, 2007 BCCA 371 at para. 41.

[25] In light of the above, an assessment of the plaintiff's credibility is critical:

The test must reasonably subject his story to an examination of its consistency with the probabilities which surround the currently existing conditions. In short, the real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions.

Faryna v. Chorny, [1952] 2 D.L.R. 354 at 357.

[25] In cases where there is little or no objective evidence of continuing injury and complaints of persistent pain beyond the usual recovery period, there must be evidence of a convincing nature; the plaintiff's own evidence, if consistent with the surrounding circumstances, may suffice: *Maslen v. Rubenstein* (1993), 83 B.C.L.R. (2d) 131 at para. 15, 1993 CanLII 2465 (C.A.). If a plaintiff's account to experts of her accident-related physical, mental, or emotional condition is different from her trial evidence, the hypothesis upon which expert opinions rest may be undermined: *Samuel v. Chrysler Credit Canada Ltd.*, 2007 BCCA 431 at paras. 15, 49-50.

Positions of the Parties

Defendants' Position

[26] The defendants submit that the plaintiff's evidence is not reliable for the following reasons:

- a. The subjective reporting of her symptoms was very inconsistent and contradictory;
- b. The plaintiff's version of facts was not backed up by having employers, co-workers, her family doctor, or the appointed ICBC doctor testify;
- c. The plaintiff disagreed with clinical entries in medical records and other evidence;
- d. The plaintiff failed to itemize a number of symptoms in her notice of civil claim;
- e. Her pain journal detailed significant issues in June 2014, which was prior to the Accident; and
- f. Her current symptoms were not reported consistently to her medical and legal report writers.

[27] The defendants submit that as a result of the plaintiff's lack of credibility and reliable reporting, the objective facts should be the only evidence relied upon.

Plaintiff's Position

[28] The plaintiff disputes the defendants' statement that every potential witness that could have something meaningful to say needs to be called. If that was a requirement, the length of the trial would be more than a month. There is no need for a plaintiff to call every possible witness, nor is it economically feasible to run litigation in that fashion.

Analysis

[29] I will deal with each of the assertions made by the defendants.

Inconsistency of reporting of symptoms

[30] The plaintiff was giving evidence on symptoms that she had experienced over a period of more than nine years ago. In my view, it is understandable that she would struggle to remember the particular symptoms she had and how long they had lasted.

[31] In my view, that there was some inconsistency in the reporting of symptoms is not a basis for impeaching the entirety of Ms. Han's testimony. It does, however, raise concerns and I need to closely examine her evidence.

Failure to call other witnesses

[32] The defendants did not expressly argue that Ms. Han's failure to call other witnesses provides an adverse inference. In essence, however, that is their argument.

[33] In *Insurance Corporation of British Columbia v. Mehat*, 2018 BCCA 242 [Mehat] at para. 86, the Court of Appeal affirmed the test for drawing an adverse inference set out in *Lau v. Insurance Corporation of British Columbia*, 2012 BCSC 1226, aff'd 2014 BCCA 442 citing Sopinka, Lederman & Bryant, *The Law of Evidence in Canada*, 3d ed. (Markham: LexisNexis, 2009) at 377:

In civil cases, an unfavourable inference can be drawn when, in the absence of an explanation, a party litigant does not testify, or fails to provide affidavit evidence on an application, or fails to call a witness who would have knowledge of the facts and would be assumed to be willing to assist that party. In the same vein, an adverse inference may be drawn against a party who does not call a material witness over whom he or she has exclusive control and does not explain it away. Such failure amounts to an implied admission that the evidence of the absent witness would be contrary to the party's case, or at least would not support it.

[34] The drawing of an adverse inference is discretionary: Mehat at para. 88. The inference should only be drawn in circumstances where, absent sufficient explanation, the evidence of the person who could have been - but was not - called, would have been superior to other similar evidence: Lederman, Bryant, & Fuerst, *The Law of Evidence in Canada* (2018, 5th ed.) at §6.471, cited in *Singh v. Reddy*, 2019 BCCA 79 at para. 8.

- [35] It is open for the court to draw an adverse inference for a failure to call a material witness. In *Buksh v. Miles*, 2008 BCCA 318, the Court accepted that an adverse inference could be drawn for failure to call a relevant medical treatment provider as a witness, when that particular witness was a treating family doctor: see also *Brar v. Ismail*, 2018 BCSC 1487.
- [36] I note that there is no property to a witness. If the defendants felt that any of these witnesses had material evidence, they could have subpoenaed and called those witnesses.
- [37] I am not persuaded that there was any need to call employers and co-workers. The plaintiff does not claim she cannot perform the work she does. She testified that she needs breaks and needs to get up to stretch. I am not persuaded that the nature of the injuries is such that these types of witnesses were material and would have aided in my fact-finding role. If the defendants saw the need to call these types of witnesses they could have done so.
- [38] The failure to call the plaintiff's family doctor, Dr. Emily Sung, is not persuasive since her family doctor does not deal with ICBC and did not provide treatment for her Accident-related injuries. The plaintiff was referred to another family doctor in the same clinic, Dr. Juan Kim, who is equipped to provide care for individuals involved in incidents like the Accident. The defendants refer to this doctor as the "ICBC appointed doctor". That terminology is not accurate. Dr. Kim is a family doctor working in the same practice group as Dr. Sung, who agrees to treat individuals who have suffered motor vehicle accident injuries.
- [39] Further, I note that pre-Accident clinical records have been produced. The defendants put to the plaintiff various clinical entries of Dr. Kim. In particular, two key entries were put to Ms. Han relating to alleged statements she made to Dr. Kim: one in May of 2016, and another in July of 2017, that she was 90 percent recovered. The plaintiff denied making those statements. The defendants submit that these clinical entries of Dr. Kim should be preferred over the evidence of the plaintiff.
- [40] The clinical records of Dr. Kim were not marked as exhibits at trial. As an out-of-court statement tendered for the truth of its contents, this falls under hearsay and is presumptively inadmissible: *R v. Bradshaw*, 2017 SCC 35 at paras. 1, 20 - 21. The Supreme Court of Canada in *Bradshaw* outlines exceptions to this presumption at paras. 22-23:

.[S]ome hearsay evidence "presents minimal dangers and its exclusion, rather than its admission, would impede accurate fact finding" Thus, categorical exceptions to the rule excluding hearsay developed through the common law over time. These traditional exceptions are based on admitting types of hearsay statements that were considered necessary and reliable, such as dying declarations

Eventually, a more flexible approach to hearsay developed through the jurisprudence. Under the principled exception, hearsay can exceptionally be admitted into evidence when the party tendering it demonstrates that the twin criteria of necessity and threshold reliability are met on a balance of probabilities

(citations omitted)

- [41] If the defendants wanted to establish proof that the statements were made by the plaintiff to Dr. Kim, it was incumbent on them to call Dr. Kim in light of the plaintiff's denial.
- [42] The defendants did not do so. There is no weight that can be placed on those statements without the proper introduction of the evidence which the defendants failed to do.
- [43] I am not persuaded that any adverse inference should be drawn in this case for the failure of the plaintiff to call the additional witnesses identified by the defendants.

Plaintiff's disagreement with clinical entries

- [44] The defendants highlight that Dr. Kim's clinical entries provide no reference to headaches, a concussion, concussion related symptoms, and/or mood issues for almost four years. When confronted with these lack of entries, the plaintiff suggested that either she did not report such symptoms, or that Dr. Kim failed to record things properly. The plaintiff explained her appointments with Dr. Kim were very quick - less than five minutes - and the doctor usually encouraged her to discuss one issue per appointment.
- [45] The plaintiff conceded that she may not have reported every symptom, such as having headaches, to Dr. Kim. Her explanation was that she did not want the Accident to take over her life and she wanted to move forward. She thinks that is why she may not have mentioned the head pain. It was also not clear to her whether all of the symptoms came from the Accident. She further testified that she did not know she had suffered a concussion until recently: it was not until she was preparing for this trial that she realized that she had symptoms of a concussion.
- [46] I accept that the lack of documentation of symptoms by a family doctor may support that either the plaintiff was not experiencing the symptoms, or that that there were more pressing issues that the plaintiff was addressing.
- [47] In *Edmondson v. Payer*, 2011 BCSC 118, Justice N. Smith cautions against placing too much weight on the content or absence of clinical notes when assessing the credibility of a plaintiff in a personal injury case:
- [36] While the content of a clinical record may be evidence for some purposes, the absence of a record is not, in itself, evidence of anything. For example, the absence of reference to a symptom in a doctor's notes of a particular visit cannot be the sole basis for any inference about the existence or non-existence of that symptom. At most, it indicates only that it was not the focus of discussion on that occasion.
- [37] The same applies to a complete absence of a clinical record. Except in severe or catastrophic cases, the injury at issue is not the only thing of consequence in the plaintiff's life. There certainly may be cases where a plaintiff's description of his or her symptoms is clearly inconsistent with a failure to seek medical attention, permitting the court to draw adverse

conclusions about the plaintiff's credibility. But a plaintiff whose condition neither deteriorates nor improves is not obliged to constantly bother busy doctors with reports that nothing has changed, particularly if the plaintiff has no reason to expect the doctors will be able to offer any new or different treatment. Similarly, a plaintiff who seeks medical attention for unrelated conditions is not obliged to recount the history of the accident and resulting injury to a doctor who is not being asked to treat that injury and has no reason to be interested in it.

- [48] The absence of a reference to a particular symptom on a particular day in the medical records does not mean that the symptom did not persist on that day, or was no longer present. To make such an inference would be unfair.

Failure to itemize symptoms in the notice of civil claim

- [49] The defendants noted that the plaintiff failed to list in the notice of civil claim that she had a concussion, head injury, dizziness, ringing in her ears, and memory issues. They argue that as a result, this raises issues regarding causation and credibility. I am not persuaded that anything turns on the failure of the plaintiff to itemize every particular symptom when the notice of civil claim was drafted. The claim was drafted by her lawyer at a time when he may or may not have had the full particulars of the claim before him, including all of the clinical records and the expert reports. Further, the notice of civil claim does reference physical injury, psychological injury, shock and nervous upset, and "other injuries which are diagnosed by the Plaintiff's physicians" under the personal injuries category.

- [50] I give no weight to this submission by the defendants.

Pain journal issue

- [51] The plaintiff was cross-examined about her pain journal. Her entries in the journal were typed. In particular, she was asked about the last page containing entries starting on June 1, 2014. The font for the last page is different from that used in the first three pages. The first page starts with an entry dated "Sept/02/2014" at approximately 5:30 p.m. and describes the circumstances of the Accident. The defendants ordered a transcript of the plaintiff's cross-examination to confirm what her evidence was. The plaintiff was asked:

Q Okay. So this - these are a journal of your pain at the time that it says in the date - the dates that it says right?

A Yes

- [52] The defence counsel referred the plaintiff to the last page of the pain journal that has entries allegedly for June 1 to July 3, 2014. Each of the entries were put to the plaintiff. The entries read as follows:

2014

June 1

Felt tingling on my inner arm as I was walking my dog in the morning.

June 3

My shoulders were aching and my right upper back as well as I was driving to work

June 5th

I drove to the gym after I woke up and felt aching on the back of my neck.

June 7th

As I was sitting at work, I felt a surge of pain hit behind my neck on the right side. The pain went away after few seconds and after that it would come again for a couple of seconds and went away.

June 14th

As I was sitting at work, I felt a surge of pain approx. 10 seconds hit behind my neck on the right side.

June 19

While I was walking for 10 minutes to my car from a building. I felt a surge of pain on my right knee and went away after few seconds.

June 20

I was walking causally for an hour and a half, and felt my mid lower back aching for a bit.

June 21

While I was sitting down at work, I felt a surge of pain and ache behind my right side of the neck. The pain lasted for a couple of minutes and went away.

June 28-July 3

I had aching pain in my right arm but noticed the pain was not sharp as in the past the pain was short lived. I went to a workout class and was doing bicep curls weighing 5 lbs and noticed there was a bit of a ache on my right inner arm and when I stopped doing them, the pain went away. At least once a day, I have aching pain in the back of my neck on the right side. Also I noticed I feel more of these aches in my neck when I am feeling anxious or stressed out.

[53] If made in June 2014, these entries would have been before the Accident, which occurred on September 2, 2014. If these entries were made in June 2014 they would be inconsistent with the evidence given by the plaintiff in direct-examination respecting any pre-Accident symptoms.

- [54] I granted leave to allow the plaintiff to rely on an affidavit filed on October 24, 2022, prior to the commencement of closing arguments on November 16, 2022. I found it was in the interest of justice to do so. The affidavit was sworn by the plaintiff and attached a copy of her marriage certificate, the passport picture page, and all the marked pages of her passport. The marriage certificate confirms the date of marriage as June 21, 2014, in Indonesia. Her passport shows she entered Indonesia on June 15, 2014, and departed on June 29, 2014. I allowed the filing of this affidavit since there was already evidence at the trial on the date of the plaintiff's marriage. The plaintiff testified that she got married in June 2014.
- [55] The plaintiff's mother also testified to this event. The mother stated that when she arrived in Indonesia on June 17, 2014, her daughter was already there. The plaintiff married her husband on June 21, 2014, and after the wedding, her daughter went to Japan for maybe one week.
- [56] It is clear to me when cross-referencing the entries on the pain journal for June 2014, it is not possible they were made at that time. I note that the pain journal records Ms. Han as walking to her car on June 19, 2014, and as working on June 21, 2014. However, on both those dates the plaintiff was in Indonesia. It is not clear to me when those entries were made, but I accept that they were not made in June 2014 before the Accident.

Her pain symptoms were not reported consistently in the medical/legal report

- [57] The defendants claim that the plaintiff's reporting to her experts is "unreliable and flawed" and that the subjective reporting by the plaintiff to Dr. Raymond Ancill, a psychiatrist, should not be relied upon when not supported by other evidence. I am not persuaded that any inconsistencies in the evidence provided by the plaintiff to the experts are so significant that it casts a doubt on the veracity of the plaintiff's evidence. Further, the events Ms. Han was asked to recall took place many years ago. I accept that the plaintiff may not have a clear recollection of all the particulars of events that happened so long ago.

Conclusion on credibility issues

- [58] I have concluded that a careful review of the plaintiff's evidence is necessary and caution should be taken since most of the symptoms she complains of are subjective. Overall, however, I am not persuaded that this plaintiff is not credible. I reject the defendants' submission that Ms. Han provided "evasive, non-answering" answers in her cross-examination. I find she strived to answer honestly. Though she did struggle with remembering some details of the symptoms, as commented on elsewhere, this is understandable when considering more than nine years have passed since the Accident.
- [59] I find that Ms. Han is a stoic and determined individual who has done her very best to return to work, studies, and other activities. She presents as a young woman with a plan for her life, who was not going to allow the Accident-related injuries to deter her from that plan.

Issue 1: What are the Nature and Extent of the Injuries Suffered in the Accident?

[60] Ms. Han claims that as a result of the Accident, she suffered soft tissue injuries to her neck, back, right shoulder, right knee, right arm, and right foot. She also suffered from headaches, post-concussion symptoms, cognitive issues, and anxiety. The anxiety was mostly related to driving.

Defendants' Position

[61] The defendants concede that Ms. Han suffered soft tissue injuries that largely resolved after two years, and experienced some mild anxiety around driving. They acknowledge though she does suffer from headaches, they are infrequent and not disabling. When she does experience headaches, they are "short lived", lasting from five to ten minutes. Ms. Han denied having any visual disturbances, nausea, vomiting, sensitivity to light or sound accompanying her headaches. The defendants submit Ms. Han suffers upper and lower back pain at the same frequency. As such, the defendants argue that these symptoms are very infrequent.

[62] The defendants further point out that Ms. Han had the pre-existing condition of scoliosis. This was a source of pre-Accident complaints in her low back, neck, cervical spine, and shoulders. She has since returned to all of her recreational activities with some modifications.

Applicable Law

[63] In order to establish that the Accident caused her injuries, Ms. Han must prove on a balance of probabilities that but for the Accident, she would not have suffered the injuries: *Clements v. Clements*, 2012 SCC 32 at para. 8. One of the issues raised by the defendants is the extent to which Ms. Han's problems arise from her pre-existing conditions.

[64] The defendants are only liable for injuries caused by the Accident. As noted in *Athey v. Leonati*, [1996] 3 S.C.R. 458 at para. 35, 1996 CanLII 183:

if there is a measurable risk that the pre-existing condition would have detrimentally affected the plaintiff in the future, regardless of the defendant's negligence, then this can be taken into account in reducing the overall award

(citations omitted. See also *Moore v. Kyba*, 2012 BCCA 361 at para. 43)

[65] The extent of the risk relating to the pre-existing condition does not need to be proven on a balance of probabilities, but instead is given weight according to its relative likelihood. This was described by the Court of Appeal in *T.W.N.A. v. Canada (Ministry of Indian Affairs)*, 2003 BCCA 670:

[28] ... a pre-existing condition, whether it is quiescent or active, is part of the plaintiff's original position.

[48] ... Whether manifest or not, a weakness inherent in a plaintiff that might realistically cause or contribute to the loss claimed regardless of the tort is relevant to the assessment of damages. It is a contingency that should be accounted for in the award. Moreover, such a contingency does not have to be proven to a certainty. Rather, it should be given weight according to its relative likelihood.

Ms. Han's Evidence

[66] The day after the Accident Ms. Han saw Dr. Kim, who assessed her as having a grade two strain of her neck and back. Dr. Kim prescribed a pain reliever and a muscle relaxant. Ms. Han testified that she suffered injuries to a number of locations of her body. Her right shoulder was injured, as well as the area from her upper back down to her lower back. She experienced pain in her right elbow, fingers, knee, and foot.

[67] After the Accident, she experienced a lot of anxiety and fear related to driving. She took transit for about one week but returned to driving as taking transit was too hard on her injured body. As a result of this driving-related anxiety, she said she felt that she withdrew from life and would mostly stay at home.

[68] In the first couple of weeks post-Accident, she experienced dizziness and nausea, and described that she was "in a daze". She continued to experience some episodes of dizziness between 2015 and 2020. She did experience some blurry vision, particularly when driving or working. She was more sensitive to noise and lights. She still finds walking in traffic causes some discomfort, so she wears headphones. She has also experienced a ringing like a dial tone in her ears. It sometimes lasts for a few seconds and sometimes happens a few times a day. She also wears sunglasses to filter the sun and glasses to filter the computer light.

[69] As previously noted, in cross-examination it was put to the plaintiff that she told Dr. Kim on May 20, 2016, that she was "about 90% resolved" and on July 13, 2017, that "90% recovered". Ms. Han denied this, Dr. Kim was not called as a witness, and the clinical records were not marked as exhibits at trial. As such, the only evidence I have on this issue is the evidence of the plaintiff's denial at trial.

[70] Ms. Han also stated that immediately after the Accident she would wake up in the middle of the night aching with pain. The pain would last for a few seconds, and Ms. Han - who described herself as a heavy sleeper - would go back to sleep. She can sleep well depending on the firmness of the mattress. A softer mattress is more problematic.

[71] She described her headaches as a "like everyday occurrence" after the Accident. In the first month they felt more intense and then they became more infrequent. She agreed that her headaches experienced during the first three months post-Accident were more painful than in the following months, where they decreased in intensity and frequency.

[72] The headaches could last a few seconds and go away, or last for a few hours. She described them as sporadic. She also experienced migraines two or three times.

- [73] At her discovery conducted on May 27, 2019, she stated she got headaches once a month or once every couple of months that would last a few minutes or up to 10 minutes and then go away. In 2022, she stated she got headaches about once a week or once every two weeks. Before the Accident, she only had a headache once. She also experienced some blurry vision which gradually decreased.
- [74] Ms. Han described her current symptoms as being headaches, forgetfulness, having issues with focus, sensitivity to light, and noise distraction. She also has neck, shoulder, and back pain. She will very sporadically get some pain in her right knee when driving or in her leg after working at the computer. About once every three months she will feel some numbness or stiffness in her arm. She described it as "very mild". She has also experienced some pain when typing: her wrist and arm will start to ache.
- [75] When describing the pain in her mid to lower back, she stated in the first few months post-Accident it would stiffen and ache, but the pain and frequency did decrease in the following months. Ms. Han described the pain in her upper back as slowly improving, though over the last five years it would sometimes come on spontaneously. When in pain, she massages the muscles.
- [76] The pain resurges when she does more activities. Ms. Han described the pain as intermittent, lasting a few seconds, and then it would go away. If she was working on the computer the pain would either last a few seconds or it would ache throughout the day.
- [77] By December 2014, Ms. Han reported that the pain in her neck was less intense and frequent, describing it as "more dull." Currently, if she is working on the computer and typing, her neck and shoulders will stiffen and ache.
- [78] Ms. Han described issues with her memory and forgetting appointments. She gave the example that she had forgotten to advise her employer that she was attending the trial. She also shared that when studying at the University of Victoria, she found articles difficult to understand and it took longer to read them. She sought and obtained help from a tutor and teaching assistant.
- [79] Ms. Han has gone on a number of holidays since the Accident. In 2016 she travelled to Korea and Japan. In 2017 she went to Eastern Europe, and in 2019 to Indonesia. While travelling she found her whole body would ache, and she would need to get more rest.
- [80] On the advice of all her treating medical practitioners post-Accident, Ms. Han did return to physical exercise. She had to start with lighter weights and then gradually progress to heavier ones. Ms. Han testified that her injuries impacted her ability to workout in the same fashion in the gym. Her doctor told her to try and get back into a routine. Initially she could not squat, jump, or do lunges but she gradually got her movement back.

- [81] In June 2017, she participated in the "Tough Mudder" in Whistler, BC. In a Facebook post, she described the event as a "5 mile with 13 obstacle course". She did the half obstacle course, and, though she recalls she skipped one of the obstacles, she was able to complete the course.
- [82] Post-Accident, she also received chiropractor, acupuncture, massage, and active physiotherapy treatments. The acupuncture involved massage work and some cupping. She does not recall having any needling. The treatments were all recommended by her doctor.
- [83] Ms. Han described feeling like she "wasted eight years of her life" due to the Accident, and that her chronic pain limits what she can do.
- [84] Ms. Han agreed that on July 27, 2019, she attended at Royal Columbian Hospital emergency department, after she had hit her head on a cupboard. She felt slightly dizzy and decided to have it checked out. The plaintiff was discharged the same day. She did not notice any change in her symptoms attributed to this incident.

Evidence of Lay Witnesses

- [85] Before considering the medical evidence, I will consider the evidence of the plaintiff's sister and mother on Ms. Han's physical and mental condition before and after the Accident.
- [86] Theresa Han is the plaintiff's sister. She did not live in the same household as the plaintiff at the time of the Accident. After the Accident, she recalled the plaintiff talking more about pains and sores around her body. The plaintiff also mentioned headaches and occasional vertigo. She was more anxious while driving, and generally in her daily life. Ms. Han's sister noticed that the plaintiff seemed more forgetful, and that she would sometimes forget appointments. She noticed that her sister did not focus on things for long periods, and instead did things for short periods of time. She was not like that before the Accident.
- [87] Her sister recalled that after the Accident, though Ms. Han slowly started getting back into the gym, she no longer pushed herself as hard.
- [88] Joanna Han is the plaintiff's mother. She testified that prior to the Accident her daughter was in good health. They were members of Fitness World and would exercise together. She described the plaintiff as being a bright, active, and positive person. Ms. Han's mother described that her daughter had a "very minor" crooked spine that was identified when she was in high school. There was no treatment needed. After the Accident, her mother explained that the plaintiff was a little bit different. She noticed that the plaintiff was more hyper and short-tempered. The plaintiff complained to her mother that her body ached, at times she was a little bit dizzy, and she experienced headaches. Her mother recalls that the plaintiff was fearful of going out and driving.
- [89] I turn now to a summary of the medical evidence.

Dr. Raymond Ancill, Psychiatrist

- [90] Dr. Ancill, a psychiatrist, provided one report and testified at trial on behalf of the plaintiff. He assessed Ms. Han on June 2, 2022, and prepared a report dated June 20, 2022. He diagnosed her with a significant concussion, and reported that she continues to present with symptoms of persistent post-concussion syndrome arising from the Accident. He recorded that Ms. Han reported the following: persistence of headaches and fatigue; sensitivity to light and noise; mental fogging; difficulty with concentration and memory; being more emotional; being irritable; experiencing sadness at times; being anxious; issues with word-finding; and poor multi-tasking. Dr. Ancill further opined that Ms. Han suffered a mild traumatic brain injury as well as post-injury fatigue. To mitigate the fatigue, he recommended a trial dose of a low-potency psychostimulant.
- [91] Dr. Ancill found that Ms. Han was currently suffering from an adjustment disorder with anxiety. The recommended treatment would be SSRI antidepressants and cognitive behavioural therapy. He testified that in his experience, an initial period of 12 sessions would be appropriate for the cognitive behaviour therapy, and he anticipated there may be relapses. He also noted that Ms. Han had driving-related anxiety. Finally, he concurred with Dr. John le Nobel, another expert witness, that the plaintiff had developed post-traumatic headaches. He classified the headaches as chronic tension-type headaches as well as some primary stabbing headaches. His prognosis for a full and sustained recovery from the post-traumatic headaches was poor, due to the length of time she had been experiencing them, and because such headaches are challenging to treat.
- [92] Dr. Ancill did not find that Ms. Han was currently suffering from somatic symptom disorder with predominant pain, which is a psychiatric disorder. He would defer to others to comment on the physical aspect of her complaints of chronic pain.
- [93] His prognosis is that the likelihood of a sustained recovery from the post-concussive symptomatology is poor since it has persisted for over two years. The anxiety disorder is now chronic.

Dr. John le Nobel, Physical Medicine and Rehabilitation Specialist

- [94] Dr. le Nobel provided one report and testified at the trial on behalf of the plaintiff. Dr. le Nobel assessed the plaintiff on May 10, 2022, and prepared a report dated the same. He opined that Ms. Han had persistent post-traumatic headaches, myofascial tissue injuries, and right knee pain from the Accident. He also noted that he did not find any objective signs of injury.
- [95] Dr. le Nobel's opinion was that Ms. Han had no ongoing cognitive or neurobehavioural problems attributable to the Accident.

- [96] His prognosis was for ongoing pain in the future and he diagnosed Ms. Han's headaches, spinal and paraspinal pain, and right knee pain as chronic. He testified that he does not anticipate that Ms. Han will return to all of her pre-collision activities in a symptom-free state.
- [97] Dr. le Nobel opined that her past treatments have been appropriate. He also recommended further exercise based in multi-disciplinary rehabilitation with a kinesiologist with access to pain-modulating medications and manual therapy if she has increased pain. Dr. le Nobel clarified in his testimony that he was recommending some manual therapy while she was working with the kinesiologist if she had a pain flareup or if pain was preventing her from progressing. He agreed a person might not need all types of manual therapy. If a chiropractor was able to give therapy, and the plaintiff could progress, then there would be no need for physiotherapy as well.
- [98] He also recommended a 12 to 18 month program, meeting several times monthly. In testimony, Dr. le Nobel clarified that several times monthly meant "three".
- [99] Dr. le Nobel opined that if Ms. Han were not able to take micro breaks from work, this could compromise her employability.

Dr. Deni Cortese, Chiropractor

- [100] Dr. Cortese first saw Ms. Han on September 30, 2014, on referral by her lawyer. He further assessed her on May 10, 2022, and prepared a report dated May 11, 2022.
- [101] On September 30, 2014, Ms. Han noted the following complaints: neck and shoulder pain; reduced movements in the neck due to pain; head pain; dizziness; numbness and tingling in her arms; mid back tingling; lower spine pain; altered sensations in her lower extremities; ringing in her ears; difficulty with memory; nausea; and visual disturbances. During this visit, Ms. Han reported that some of these symptoms had improved, and that her predominant problem was associated with the neck pain. She also reported headaches occurring weekly.
- [102] On examination, Dr. Cortese noted pain, hypertonicity, and altered tissue texture in areas of the plaintiff's back. He testified that the hypertonicity and altered tissue findings were objective.
- [103] Ms. Han returned to see Dr. Cortese on October 8, 2014. At this appointment she rated herself as having a moderate level of disability in relation to her neck injuries. She further reported that some of her concentration and reading abilities were affected by the pain. She again reported headaches, and further noted they were experienced infrequently.

- [104] As noted, on May 10, 2022, Ms. Han attended Dr. Cortese for the purpose of preparing a report. During this visit she reported that she had remained very active physically, exercising almost daily. Her exercise included weight training, yoga, kick boxing, walking, and hiking. She attested to sleeping well, and estimated her recovery at seven out of ten.
- [105] Dr. Cortese carried out a neurological examination during the May 10, 2022 assessment and it was normal.
- [106] Dr. Cortese recorded Ms. Han's current complaints as including a dull aching neck pain - mostly right sided - which was intermittent in nature, occurring once every one to two weeks. Factors aggravating the pain include stress, prolonged sitting, and computer work. Relief was obtained through changing her posture, massage, and stretching.
- [107] Also recorded were headaches that were typically short lived - five to ten minutes - occurring biweekly. Ms. Han denied any visual disturbances, nausea, vomiting, or sensitivity to light or sound accompanying the headaches. She finds relief with resting.
- [108] Dr. Cortese also noted that Ms. Han has back pain: upper back pain that occurred about once every two weeks and lower back pain - aggravated by computer work or prolonged sitting - that occurred about once every one to two weeks. She reported some hip tightness about once a month.
- [109] Ms. Han also stated that her right elbow, right knee, and right shoulder felt better.
- [110] Ms. Han reported that her injuries affected how long she could sit, which in turn affected her work. Her injuries also changed her ability to perform some domestic activities, in particular washing the tub and toilets in the washrooms. Vacuuming had to be modified due to exacerbation of her symptoms.
- [111] Dr. Cortese opined that she had sustained a Type II whiplash associated disorder of the cervical and lumbar spine, right knee ligament strain, right elbow soft tissue strain, right shoulder cuff strain, post-concussive injury, and myofascial pain syndrome.
- [112] Dr. Cortese also noted that Ms. Han attended his clinic for treatment twice a week. This was reduced as she progressed. Post-Accident she was seen:
- First 12 months (September 2014 - 2015): approximately 35 times
 - 2015 - 2016: eight times
 - 2017: five times
 - 2019: seven times
 - 2020: 11 times
- [113] He opined that the long-term prognosis that Ms. Han would recover fully from her motor vehicle injuries was poor.

Findings

- [114] I accept that Ms. Han had scoliosis as a pre-existing condition and it would likely have required some ongoing chiropractic treatment similar to the treatment she had pre-Accident. I am not persuaded that her scoliosis impacted her ability to carry out her work duties, her hobbies, nor her activities of daily living.
- [115] I find that Ms. Han suffered soft tissue injuries in the Accident to her right shoulder, arm, and right knee, but she made a full recovery from those injuries. She does have some ongoing symptoms of neck and back pain but it is infrequent and not disabling. I accept that she still experiences some cognitive issues but that they do not prevent her from working or participating in her regular recreational pursuits. Her headaches continue but are not disabling and occur, at most, a few times a month. They usually are very short, a matter of seconds, though can last a few hours.

Issue 2: What is the Appropriate Award of General Damages for Pain and Suffering?

- [116] Ms. Han seeks an award of \$150,000 in non-pecuniary damages. The defendants submit that the general damages should be in the range of \$30,000 to \$40,000.

Applicable Law

- [117] A plaintiff is entitled to reasonable damages for her pain and suffering. The plaintiff should be placed in the same position she would have been in if the Accident had not occurred, but not in a better position.
- [118] Non-pecuniary damages are awarded to compensate the plaintiff for pain, suffering, loss of enjoyment of life, and loss of amenities. The compensation awarded should be fair to all parties, and fairness is measured against awards made in comparable cases. Such cases, though helpful, serve only as a rough guide. Each case depends on its own unique facts: *Trites v. Penner*, 2010 BCSC 882 at paras. 188-89.
- [119] In *Stapley v. Hejslet*, 2006 BCCA 34, leave to appeal to SCC ref'd, 31373 (20 October 2006), the Court of Appeal outlined the factors to be considered when assessing non-pecuniary damages at para. 46:

The inexhaustive list of common factors cited in *Boyd* [*Boyd v. Harris*, 2004 BCCA 146] 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).

[Emphasis in original]

[120] The assessment of non-pecuniary damages is necessarily influenced by the individual plaintiff's personal experience in dealing with his or her injuries and their consequences, and the plaintiff's ability to articulate those experiences: *Dilello v. Montgomery*, 2005 BCCA 56 at para. 25.

Analysis and Findings of Fact

[121] Ms. Han relies on *Hawkins v. Kumar*, 2019 BCSC 1896, *McMullin v. Trelenberg*, 2020 BCSC 49, and *Cole v. Sandhu*, 2020 BCSC 709, to support an argument that the appropriate award for general damages is \$150,000.

[122] In my view, these cases bear no similarity to the situation faced by this plaintiff.

[123] In *Hawkins*, the 50-year-old female plaintiff had been involved in two accidents. She sustained a mild traumatic brain injury with associated symptoms including vertigo, nausea, dizziness, headaches, double vision, weakness in learning, memory, and concentration, and language difficulties. She also suffered soft tissue injuries to the neck, upper back, lower back, and trapezius, and an anxiety disorder. The expert evidence supported that the plaintiff suffered from cognitive difficulties that impacted her workplace. The plaintiff required multiple and continuous visits to treating physicians, various medications, massage therapy, intramuscular injections, and regular physiotherapy. She continued to have sleep problems. The Court found the effect of her injuries on her life had been dramatic and ongoing. She was no longer able to workout, ski, or hike due to pain and experienced fatigue and cognitive disabilities. The injuries dramatically affected her ability to work: the cognitive impairments adversely affected her work performance and severely limited her occupational choices. The impact on her lifestyle and abilities were dramatic and ongoing. She was awarded general damages in the amount of \$140,000.

[124] In *McMullin*, the 32-year-old female plaintiff had pre-existing chronic pelvic pain and occasional headaches. As a result of her accident she suffered chronic pain of the head and neck and mechanical low back pain, as well as chronic headaches and depression. The

Court found that the accident would likely cause the plaintiff to suffer acute pain and deprive her of independent capabilities for the rest of her life. The plaintiff's evidence was that her neck was in a state of constant tension and the lightest pressure would cause her neck pain to flareup. She also had chronic headaches that would flareup and cause acute pain. She described unrelenting pain in her lower back and waist: moving the wrong way would cause the pain to sharpen and she felt like she was being stabbed. She suffers from these three conditions all day and all night. The prognosis was that these conditions would plague her all her life. The only relief was offered by strong narcotics, including fentanyl and OxyContin. Other treatments, including chiropractic, radiofrequency ablation, acupuncture, stretching, and treatment at a pain clinic, provided no significant relief. Since the accident, the plaintiff had not been able to shop or complete housework, and had pain with washing her hair. She had to give up playing guitar since the strap caused her excruciating pain. She could no longer engage in any of her prior sporting activities. She engaged in few social engagements because of the pain. She was awarded non-pecuniary damages in the amount of \$150,000.

[125] In *Cole*, the 25-year-old female plaintiff had been involved in two accidents. She suffered myofascial tissue injury to the right sided mid-back, and right shoulder pain. She was in chronic pain and suffered depression and anxiety. She developed a driving phobia. Prior to the accidents, she had some issues with anxiety and depression. The Court found that the accidents had, at para. 54: "thrown the plaintiff into an indefinite cycle of chronic pain, anxiety, and depression that has impacted all aspects of her life." She was prevented from working at her passion, being with whales in the ocean. She suffered significant psychological issues and was diagnosed with a persistent depressive disorder. She was awarded non-pecuniary damages in the amount of \$175,000.

[126] I see no comparison in these three cases to the situation faced by Ms. Han. In these cases, the injuries sustained more severely impacted these plaintiff's lives and were far more disabling.

[127] The defendants rely on *Stone v. Milev*, 2022 BCSC 319, *Palmer v. Pozniak*, 2021 BCSC 1703, *Callow v. Van Hoek-Patterson*, 2021 BCSC 1423 and *Cegielka v. Grace*, 2020 BCSC 115 to support an award in the range of \$30,000 to \$40,000. I disagree with the defendants' submission that all of these cases are similar to the plaintiff's condition, although I agree they are closer to Ms. Han's situation than the cases the plaintiff cites.

[128] In *Stone*, the plaintiff was awarded non-pecuniary damages in the amount of \$30,000. The 45-year-old male plaintiff was found to have significant credibility issues. He suffered soft tissue injuries to his back, neck, and shoulder that were mild to moderate. He had some ongoing mild back pain and occasional neck pain. The Court found that the plaintiff had exaggerated his pain and the impact of the accident injuries. As the Court put it, the plaintiff's testimony in chief amounted to "figurative misrepresentation knowingly offered": at para. 53. The Court found that the plaintiff suffered neck and pain soft tissue issues and a right shoulder sprain that resolved in a relatively short period of time. The neck and

shoulder issues had significantly resolved approximately two years after the accident. The plaintiff's future prognosis was some mild back pain with strenuous activity and occasional neck pain at the extremes of his movement range. There was no impact on his work and he was able to do the same household and yard work as he did before the accident.

- [129] In *Palmer*, the plaintiff was awarded non-pecuniary damages in the amount of \$35,000. The 35-year-old male plaintiff suffered relatively mild injuries as a result of the accident. The Court found that the plaintiff had exaggerated the force of the accident and the immediate effect on him. There was no impact on the plaintiff's ability to work and he was able to undertake all household chores with some discomfort. His ability to partake in activities was impacted in a minor manner. The Court found that the plaintiff's condition could markedly improve if he followed a dedicated active rehabilitation program.
- [130] In *Callow*, the plaintiff was awarded damages in the amount of \$35,000 for pain and suffering. The 20-year-old male university student suffered moderate soft tissue injuries to his neck, upper back, and shoulders which, despite treatment, remained symptomatic. The plaintiff had tried extensive therapies. He had headaches that only occasionally occurred. The plaintiff had some degree of upper back/shoulder discomfort after exercise or exertion. The injuries were described as being "episodically symptomatic" after activity. The plaintiff missed no classes, continued to work without difficulty, and traveled with his family and partner.
- [131] In *Cegielka*, the plaintiff was awarded non-pecuniary damages in the amount of \$40,000. The 32-year-old plaintiff suffered soft tissue injuries to his neck, back, and shoulders. It was accepted that he suffered from anxiety and depression. At the time of the trial, the shoulder and lower back injuries had substantially resolved but the neck and upper back continued to have ongoing periodic mild pain. The depression and anxiety were ongoing as well. The Court found that the plaintiff had overstated the impact on his life, while downplaying, somewhat unfairly, other events. There was no impact on his ability to work as a carpenter.
- [132] While these cases can be somewhat helpful to bookmark the upper and lower ranges, as noted in *Stapley* "[a]n appreciation of the individual's loss is the key" and damages awarded will vary dependant on each individual's specific circumstances: at para 45.

Findings

- [133] I accept that Ms. Han had scoliosis prior to the Accident but it was stable and in no way impacted her ability to work and engage in any of her recreational or social activities. I find that the injuries in the Accident resulted in some significant pain that gradually improved.
- [134] The medical experts opine that her prognosis for complete recovery is low.

- [135] She has engaged in all reasonable treatments and has returned to active physical workouts as was recommended by her physicians. I accept that her return to physical workouts and activities has been instrumental in her recovery. She is not one to sit back and watch life pass her by. She has actively pursued schooling and different career opportunities. She should be given credit for this.
- [136] I further accept that she continues to suffer from some cognitive issues arising from the concussion she sustained. These cognitive issues have made it more challenging for her in her studies. She described these issues occurring while trying to study at the University of Victoria: she had difficulty reading articles and it took her longer to do so. She sought out and obtained assistance from others.
- [137] Although her mother had difficulty in describing the change in her daughter, I accept she has observed one. The plaintiff is more irritable, short-tempered, and has trouble focusing.
- [138] I have reviewed the cases. In assessing the particular circumstances of Ms. Han, I am of the view that the appropriate award for non-pecuniary damages is \$85,000. This amount also factors in the impact the Accident-related injuries have had on her ability to housekeep. I will comment further on this when reviewing the future care costs claim.

Issue 3: What is the Appropriate Award of Loss of Future Earning Capacity?

Applicable Law

- [139] A claim for loss of future earning capacity raises two key questions: (1) has the plaintiff's earning capacity been impaired by her injuries; and, if so, (2) what compensation should be awarded for the resulting harm that will accrue over time?
- [140] The decision in *Pololos v. Cinnamon-Lopez*, 2016 BCSC 81, provides an excellent summary of the applicable leading principles on the assessment of loss of future earning capacity:
- [133] The relevant legal principles are well-established:
- To the extent possible, a plaintiff should be put in the position he/she would have been in, but for the injuries caused by the defendant's negligence; *Lines v. W & D Logging Co. Ltd.*, 2009 BCCA 106 at para. 185, leave to appeal ref'd [2009] S.C.C.A. No. 197;
 - The central task of the Court is to compare the likely future of the plaintiff's working life if the Accident had not occurred with the plaintiff's likely future working life after the Accident; *Gregory v. Insurance Corporation of British Columbia*, 2011 BCCA 144 at para. 32;
 - The assessment of loss must be based on the evidence, but requires an exercise of judgment and is not a mathematical calculation; *Rosvold v. Dunlop*, 2001 BCCA 1 at para. 18;
 - The two possible approaches to assessment of loss of future earning capacity are the "earnings approach" and the "capital asset approach"; *Brown v. Golaiy* (1985), 26 B.C.L.R. (3d) 353 at para. 7 (S.C.); and *Perren v. Lalari*, 2010 BCCA 140 at paras. 11-12;

- e) Under either approach, the plaintiff must prove that there is a "real and substantial possibility" of various future events leading to an income loss; Perren at para. 33;
 - f) The earnings approach will be more appropriate when the loss is more easily measurable; Westbroek v. Brizuela, 2014 BCCA 48 at para. 64. Furthermore, while assessing an award for future loss of income is not a purely mathematical exercise, the Court should endeavour to use factual mathematical anchors as a starting foundation to quantify such loss; Jurczak v. Mauro, 2013 BCCA 507 at paras. 36-37.
 - g) When relying on an "earnings approach", the Court must nevertheless always consider the overall fairness and reasonableness of the award, taking into account all of the evidence; Rosvold at para. 11.
- [141] Also, in Grewal v. Naumann, 2017 BCCA 158, the Court of Appeal provided a summary on the assessment of loss of future earning capacity and the application of a "real and substantial possibility" principle:
- [48] In summary, an assessment of loss of both past and future earning capacity involves a consideration of hypothetical events. The plaintiff is not required to prove these hypothetical events on a balance of probabilities. A future or hypothetical possibility will be taken into consideration as long as it is a real and substantial possibility and not mere speculation. If the plaintiff establishes a real and substantial possibility, the Court must then determine the measure of damages by assessing the likelihood of the event. Depending on the facts of the case, a loss may be quantified either on an earnings approach or on a capital asset approach: Perren v. Lalari, 2010 BCCA 140 at para. 32.
- [49] The assessment of past or future loss requires the court to estimate a pecuniary loss by weighing possibilities and probabilities of hypothetical events. The use of economic and statistical evidence does not turn the assessment into a calculation but can be a helpful tool in determining what is fair and reasonable in the circumstances: Dunbar v. Mendez, 2016 BCCA 211 at para. 21.
- [142] A claim for future loss of earning capacity requires the court to compare the plaintiff's likely future working life if the accident had not happened with the likely one after its occurrence, accounting for negative and positive contingencies: Gregory v. Insurance Corporation of British Columbia, 2011 BCCA 144 at paras. 32-33.
- [143] Depending on the facts of the case, the loss may be quantified either on an earnings approach or on a capital asset approach: Perren v. Lalari, 2010 BCCA 140 at para. 32. The earnings approach is typically used in cases where there is an identifiable loss of income, for example, where the plaintiff has an established work history: Kringhaug v. Men, 2022 BCCA 186 at para. 43. The capital asset approach is typically used when this is not the case and the court makes an award for the loss of opportunity including, for example, in the case of a young plaintiff whose career path is uncertain: Perren at paras. 12 and 32.

- [144] The assessment of damages is a matter of judgment, not calculation: *Rosvold v. Dunlop*, 2001 BCCA 1 at para. 18. Economic and statistical evidence may provide a useful tool to assist in determining what is fair and reasonable in the circumstances: *Grewal* at para. 49; *Dunbar v. Mendez*, 2016 BCCA 211 at para. 21. An inability to perform an occupation that is not a realistic alternative is not proof of a future loss: *Perren* at para. 32; see also *Steward v. Berezan*, 2007 BCCA 150.

Plaintiff's Position

- [145] Ms. Han is advancing a claim for loss of future earning capacity on the basis that as a result of the Accident she has been rendered less capable overall from all types of employment due to the various physical and psychological issues she continues to have. She is less marketable, and although Ms. Han did not testify to any job opportunities she has missed, she did comment on how she would have moved through her career path more expeditiously.
- [146] The plaintiff submits that the approach set out in *Pallos v. Insurance Co. of British Columbia*, [1995] B.C.J. No. 2 at para. 43, 1995 Can LII 2871 (B.C.C.A.) is appropriate: using her income earned in 2021 and multiplying it four times for a sum of \$313,530.

Defendants' Position

- [147] The defendants submit that the plaintiff has not advanced sufficient evidence to establish that there is a real and substantial possibility she will lose income in the future. They point out that during the most acute period of her recovery she did not miss any work. Further, she did not miss any work in the first year post-Accident or beyond. The defendants argue that the fact she did not take any time off paid work and has made no claim for past wage loss, or past loss of opportunity, is instructive for considering her future earning capacity.
- [148] The defendants point out that since the Accident the plaintiff has increased her working hours, added volunteer hours, advanced her career, and changed jobs to align more with her previous Bachelor's degree. Ms. Han has articulated a plan for the future which she feels is achievable. In addition to increasing her working and volunteering hours, she has continued her schooling, which involves 11 lecture hours over three days and additional hours spent studying. This accounts for approximately 17 hours per week of school related work, thus, argues the defence, illustrating that she has an abundance of capacity.
- [149] The defendants submit that there is no expert evidence that supports a reduction in her work capacity. Both Dr. Ancill and Dr. Cortese are silent on the effects on her ability to work. There were no functional capacity evaluations. There was no medical evidence presented to indicate that she cannot do the tasks she is qualified to do or inclined to seek to do. Ms. Han reported having good performance reviews and receiving a promotion while with the Canadian Mental Health Association ("CMHA"). She has worked continually since the Accident and until the trial. Further, she has recently been recruited to work at a new

job.

- [150] The defendants note that the plaintiff reported to Dr. le Nobel that she takes micro-breaks. Ms. Han testified to these breaks, giving evidence that she would stand up every 30 minutes or so. In regard to this point, the defendants reference the decision in *Best v. Jerzyk*, 2015 BCSC 1877, which involved a graphic artist who needed to take "stretch breaks" while working. In *Best*, the Court stated:
- [32] I can assume, or take judicial notice, that no job is permanent. However, even if I am also prepared to accept that there is a substantial possibility her physical condition will continue indefinitely in whole or in part, I do not think Ms. Best has established that would result in an income loss.
- [33] First, there is nothing to show that she would not be able to find another teaching position at the same salary.
- [34] Second, and more fundamentally, there is no evidence other than her own that an employer would be less likely to hire her because she would have to take breaks from her computer work to stretch. She did not say that anyone told her to enforce that policy as a supervisor nor did anyone remonstrate her from taking breaks. While Ms. Best was a credible witness, I think her reluctance to take stretch breaks is more a demonstration of her own wanting to "tough things out" than a requirement of employment. A stretch break is a very small job accommodation for an employer to make and, while my decision does not hinge on this, one that an employer is probably legally required to provide under the Human Rights Code, R.S.B.C 1996, c. 210.
- [151] The defendants further rely on the decision in *Sawires v. Paris*, 2021 BCSC 240, another case in which the plaintiff needed to take micro-breaks, in support of their argument that the Court reject that there was any loss of earning capacity.

Relevant Evidence

- [152] After the Accident, Ms. Han did not miss any paid work but missed some volunteering.
- [153] In 2021, she attended the University of Victoria and took two semesters towards obtaining her Bachelor's in Social Work. She has been taking a US design program at a private college, which teaches her to design websites to be more accessible to users. She described having a hard time with some of the projects, arising from a lack of focus and comprehension.
- [154] After the Accident, Ms. Han continued working at Covenant House until she left in 2017. While working there she applied for and obtained a job with the CMHA as a patient coordinator. Between the two jobs she was working close to 40 hours a week. She experienced some challenges as she would not volunteer for driving, and had some difficulties cooking. She worked in that capacity from November 2016 and then was promoted in March 2019 as a vocational rehabilitation coordinator. In 2018, she also worked a casual job as a switchboard operator for the Burnaby RCMP.

[155] The plaintiff agreed that her employment earnings were as set out in her tax returns:

2012

\$27,582

2013

\$32,788

2014

\$31,356

2015

\$28,172

2016

\$38,081

2017

\$50,469

2018

\$26,012

2019

\$65,360

2020

\$77,848

[156] In August 2022, she secured a job working at WorkSafeBC as a vocational rehabilitation consultant. She was recruited by the HR person at WorkSafeBC. Her plan for the future is to work at WorkSafeBC, hopefully moving into the tech department, and then start doing freelance work and work remotely. Her long-term plans are to finish her Bachelor's program, go on to get a Master's degree, and open her own practice. She would continue to work freelance on the side.

Analysis

[157] Justice Grauer, writing for the Court in *Rab v. Prescott*, 2021 BCCA 345, set out a three-step process for considering claims for loss of future earning capacity at para. 47:

- a) Does the evidence disclose a potential future event that could give rise to a loss of capacity?

- b) Is there a real and substantial possibility that the future event in question will cause a pecuniary loss to the plaintiff?
- c) What is the value of that possible loss, having regard to the relative likelihood of it occurring?

[158] In considering the first step of the analysis, I conclude that the evidence does not disclose a potential future event that could give rise to a loss of capacity. Justice Grauer also notes at paras. 35 and 47 that assessment of this step may give rise to considerations discussed in *Brown v. Golaiy* (1985), 26 B.C.L.R. (3d) 353, 1985 CanLII 149 (S.C.):

[8] The means by which the value of the lost, or impaired, asset is to be assessed varies of course from case to case. Some of the considerations to take into account in making that assessment include whether:

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. [t]he plaintiff is less valuable to himself as a person capable of earning income in a competitive labour market.

[159] Though Ms. Han still has some Accident-related injuries that have not completely resolved, they have not impacted her ability to work over the past nine years. Further, I am not persuaded that the factors identified in *Brown* at para. 8 are present.

[160] In my view, Ms. Han has not been rendered less capable overall of earning income from all types of employment or less able to take advantage of all job opportunities. The overall evidence supports that Ms. Han remains a capable, marketable, and attractive employee as supported by her recruitment to work at WorkSafeBC. The burden is on the plaintiff to show that she is less capable or less employable. She has failed to do so. There is no evidence that supports that she has lost the ability to take advantage of all available job opportunities. Rather, Ms. Han has gone on to pursue a variety of jobs over the past nine years. I have no doubt that Ms. Han is capable of earning income in the competitive labour market as she has proven.

[161] I turn to consider the next step of whether Ms. Han has established a real and substantial possibility of a future income loss as a result of her Accident-related injuries. I am not persuaded that Ms. Han has demonstrated that as a consequence of the injuries she has suffered in the Accident, her earning capacity has been impaired. She has failed to show a real and substantial possibility of any pecuniary loss. It has been over nine years since the Accident and the plaintiff has not suffered any loss of income. She has been able to work full time, while engaging in volunteer work and undertaking studies, with some challenges

with reading and comprehension of articles. She testified to the need to take "micro-breaks" while sitting too long. These micro-breaks consist of standing every 30 minutes. After the short break she is able to return to work. I cannot conceive of a situation where an employer would deny an employee the opportunity to stand and stretch.

[162] Based on my findings, step three of the analysis is not needed as there is no loss to quantify. There is no award made for loss of future earning capacity.

Issue 4: What is the Appropriate Award for the Cost of Future Care?

[163] Ms. Han advances a claim for the cost of future care in the amount of \$311,767, based on the recommendations made in the cost of future care report of Russell McNeil dated June 27, 2022. Mr. McNeil assessed the plaintiff on June 13, 2022. The services and costs recommended by Mr. McNeil were quantified in the economist report of Kevin Turnbull dated July 11, 2022 as follows:

- Pain management - body pillow, heating pad, and TENS unit: \$2,116
- Homemaking Assistive devices - lightweight vacuum, steam mop, and cordless scrubber: \$1,660
- Housekeeping assistance - annually for a housekeeper to age 80: \$49,797
- Seasonal cleaner - annually to age 75: \$14,249
- Ergonomic assistive devices: \$7,194
- Gym pass: \$13,352
- Kinesiologist - for one and a half years: \$6,676
- Chiropractic treatments - 24 sessions annually for life: \$49,612
- Physiotherapy treatments - 24 sessions annually for life: \$85,049
- Massage therapy - 24 sessions annually for life: \$81,860

[164] In addition to the claims quantified in the economist report, the plaintiff points out that Mr. McNeil recommended an allowance for psychological counselling. Dr. Ancill testified that an allotment of 12 sessions for cognitive behavioural therapy would be appropriate with potential for more, if needed. The plaintiff advances an additional claim for \$5,000 to cover this contingency.

[165] The defendants submit that the evidence is insufficient to form the foundation for an award for future care costs, except for the recommendation made by Dr. le Noble for a kinesiology-led active rehabilitation program and for some adjunct therapy during this period. The defendants submit that an award of \$6,500 for the active rehabilitation program and \$2,000 for adjunct manual therapy would be appropriate.

Applicable Law

- [166] The plaintiff is entitled to compensation for the cost of future care based on what is reasonably necessary to restore her to her pre-accident condition insofar as that is possible. When full restoration cannot be achieved, the court must strive to assure full compensation through the provision of adequate future care. The award is to be based on what is reasonably necessary on the medical evidence to preserve and promote the plaintiff's mental and physical health: *Milina v. Bartsch* (1985), 49 B.C.L.R. (2d) 33 at para. 184, 1985 CanLII 179 (S.C.); *Spehar et al. v. Beazley et al.*, 2002 BCSC 1104 at para. 55 aff'd 2004 BCCA 290; *Gignac v. Insurance Corporation of British Columbia*, 2012 BCCA 351 at paras. 29-30.
- [167] Cost of future care is established if there is medical justification for the claim and if the claim is reasonable: *Aberdeen v. Zanatta*, 2008 BCCA 420 at para. 42; *Milina* at para. 84; *Tsalamandris v. McLeod*, 2012 BCCA 239 at paras. 62-63.
- [168] Future care costs are "justified" if they are justified in the medical sense and likely to be incurred by the plaintiff. The award of damages is thus a matter of prediction as to what will happen in the future. If a plaintiff has not used a particular item or service in the past, it may be inappropriate to include its cost in a future care award. However, if the evidence shows that previously rejected services are reasonably expected to be required and likely to be incurred, the plaintiff can recover for such services: *Izony v. Weidlich*, 2006 BCSC 1315 at para. 74; *O'Connell v. Yung*, 2012 BCCA 57 at paras. 55, 60, 68-70.
- [169] In *Penner v. Insurance Corporation of British Columbia*, 2011 BCCA 135 at para. 13, the Court noted that common sense should inform awards for cost of future care.

Analysis

- [170] The plaintiff tendered a report from Mr. McNeil in support of the claim for cost of future care. I will deal with each of the claims advanced.

Pain Management Devices

- [171] Mr. McNeil recommends the purchase of some devices since Ms. Han reported to him that she was not able to sleep throughout the night due to pain. Ms. Han's evidence at trial was that she would occasionally wake up from pain that would last a few seconds. She described herself as a heavy sleeper and would get back to sleep. She reported to Dr. Cortese on May 10, 2022, that she was sleeping well.
- [172] In my view the comments set out in *Palmer*, in which Mr. McNeil was the same expert, are equally applicable here:
- [123] I agree with the defendant that many of the expenses claimed for the cost of future care are not reasonably necessary. In my view, while a contour pillow, body pillow, and mattress topper may be helpful, they are not reasonably necessary to promote Mr. Palmer's health. I

also find Mr. Palmer's claim for a lightweight vacuum, steam mop, and electric scrubber are also not reasonably necessary. These are items that Mr. Palmer would likely purchase in any event and there is no evidence that he does not already have these items or what the difference in cost would be between a lightweight and regular weight vacuum.

[173] I am not persuaded these items are reasonably necessary in light of Ms. Han's evidence and at most, they might be helpful. No award is made for these items.

Homemaking Assistive Devices

[174] I am of the same view as expressed in Palmer, that these devices are not reasonably necessary and that many households would have these devices as part of the normal cleaning devices, except for the cordless electric tub/tile scrubber. It has been over nine years since the Accident and if these devices were ones Ms. Han needed to assist, she would have purchased them. No award will be made for these assistive devices.

Homemaking Assistance

[175] In *Kim v. Lin*, 2018 BCCA 77, the Court of Appeal considered the principles related to a loss of housekeeping capacity and noted as follows:

[33] Therefore, where a plaintiff suffers an injury which would make a reasonable person in the plaintiff's circumstances unable to perform usual and necessary household work -- i.e., where the plaintiff has suffered a true loss of capacity -- that loss may be compensated by a pecuniary damages award. Where the plaintiff suffers a loss that is more in keeping with a loss of amenities, or increased pain and suffering, that loss may instead be compensated by a non-pecuniary damages award. However, I do not wish to create an inflexible rule for courts addressing these awards, and as this Court said in *Liu*, "it lies in the trial judge's discretion whether to address such a claim as part of the non-pecuniary loss or as a segregated pecuniary head of damage": at para. 26.

[176] The plaintiff's evidence is that she is able to complete all house keeping chores but it takes longer and she feels discomfort afterwards. She testified that after the Accident she shared in the household duties with her husband but she lessened how often she would vacuum. When she returned to doing housework she found her body was more "achy", and would take a break or take more frequent breaks. She would also divide the work into small areas so she would not have to clean as long. In 2020, she started having two people come in to help clean the detached home she was living in. They came once a month for about two and half hours. She also found doing yard work difficult. She paid about \$400 or \$500 for some individuals to come and help out with the yard work. I am not persuaded in light of the evidence that a life-long award for homemaking and yard assistance is appropriate. She can perform all of the household chores but takes long to accomplish them. I decline to make any award for these costs but have considered her reduced homemaking ability in the general damages award I have made.

Ergonomic Assistive Devices

[177] The plaintiff testified that she requested an ergonomic assessment and received one. She has been provided with a more ergonomically friendly keyboard and a computer stand that goes up and down to use at home. I note that Mr. McNeil suggested she needs these assistive devices to allow her to remain productive. I find that she has been productive, and I am not persuaded that these devices should be funded by the defendants.

Gym Pass

[178] Ms. Han was very clear on how important physical exercise was to her for many years. It is clear to me that Ms. Han has been able to maintain her fitness level with the variety of fitness exercises she engages in. She has actively participated in many gym activities since her twenties. Prior to the Accident, she was going to the gym for four to five different classes a week. She had a membership at a gym and worked out with her mother and sister. I do not accept the plaintiff's argument that before it was optional but now she needs it. It is clear to me that the cost of a gym membership is one that this plaintiff would have incurred despite the Accident: see *Shapiro v. Dailey*, 2012 BCCA 128 at paras. 51-55. No award for a lifelong gym pass is made.

Kinesiologist

[179] Dr. le Noble recommended that the plaintiff have access to further exercise in a multi-disciplinary rehabilitation program with a kinesiologist to assist her in her activities and goals. Dr. le Noble recommended that guidance by a kinesiologist be provided several times a month, for a period of 12 to 18 months. The defendants agreed that this was necessary and an award should be made. I award the costs for a kinesiologist for a period of 15 months, for three sessions a month, as recommended by Dr. le Nobel. This amounts to a total of 45 sessions at a cost of \$84.00 per session. The award for kinesiology funding is \$3,780.

Chiropractic Treatments

[180] The plaintiff seeks funding for 24 sessions at a cost of \$120 per session for life. There was no medical recommendation that this should be funded. Dr. le Nobel opined that some type of therapy should be provided to help manage periods of exacerbated pain.

[181] I accept that during the period when she is participating in the exercise program supervised by the kinesiologist, she may suffer some exacerbation of pain for which treatment would be necessary. Dr. le Nobel noted the therapy would be as an adjunct to the active rehabilitation. I see no basis to award a lifelong bi-monthly award. The plaintiff will receive funding for 30 sessions at a cost of \$70 per session. The award for future chiropractic services will be \$2,100.

Physiotherapy/Massage Treatments

[182] There is no medical necessity for lifelong physiotherapy or massage sessions. There was no evidence from any medical expert that she needs physiotherapy and massage treatments for life arising from the Accident-related injuries. I am not convinced on the evidence that an award for these passive modalities should be made.

Counselling

[183] Ms. Han testified that in 2017 she went for counselling through an employment assistance program for counselling sessions for anxiety, self worth, and self confidence. She attended for about one year. Ms. Han testified that this counselling had to do with anxiety that stemmed from the Accident. In cross-examination, her discovery evidence was put to her that the counselling she had was "not specifically about the accident". She agreed that the counselling was about her confidence level and not to treat Accident-related issues. She had some further counselling in 2019 and 2022. During these sessions the focus was on marriage issues.

[184] I accept that some contingency should be provided for some further counselling. Dr. Ancill suggested an initial set of 12 sessions of cognitive behaviour therapy. Mr. McNeil provided a cost per session at \$225. I award the sum of \$2,700 for these sessions.

[185] The total amount awarded for future care costs is \$8,580.

Issue 5: What Amount Should be Awarded for Special Damages?

[186] It is well established that an injured person is entitled to recover the reasonable out-of-pocket expenses he or she incurred as a result of an accident. This is grounded in the fundamental governing principle that an injured person is to be restored to the position he or she would have been in had the accident not occurred: *X. v. Y.*, 2011 BCSC 944 at para. 281, citing *Milina* at para. 78.

[187] The plaintiff presents a claim for special damages totalling \$13,347 for costs incurred for chiropractic, massage, acupuncture, and physiotherapy sessions. The defendants contest the amount of \$4,415 for the Burnaby Heights Integrative Health care on the basis that there was no evidence of a doctor's referral and no records to show if these were for therapeutic or relaxation purposes.

[188] Ms. Han testified that she attended a registered massage therapist ("RMT") for massage therapy in 2020, and continued up until June or July, 2022. She stated that this was to "check out" her body. She testified that the RMT was treating her neck, shoulders, back, and sometimes her knee or foot.

[189] I accept that Ms. Han incurred the expenses for massage therapy and it was reasonable for her to do so. I note that Dr. le Nobel commented that the massage therapy, physiotherapy, chiropractic, and acupuncture treatments have been appropriate and did provide Ms. Han with some temporary symptom reduction.

[190] I would award all of the special damages sought in the amount of \$13,347.

Conclusion

[191] In summary, Ms. Han is entitled to the following damages:

a.

Non-pecuniary damages:

\$85,000

b.

Future loss of earning capacity:

nil

c.

Cost of future care:

\$8,580

Special damages:

\$13,347

TOTAL

\$106,927

[192] The plaintiff is entitled to interest on the special damages.

[193] If the parties cannot agree on costs, the parties are at liberty to apply to address the issue within 30 days of the pronouncement of these reasons. They should do so by sending in a joint letter to Trial Scheduling with a proposed schedule for written submissions of the parties.

[194] Plaintiff's counsel asked that a time limit be placed on the issue of Part 7 deductions. He suggested that ICBC have one week after the reasons are released to provide an affidavit and argument. In my view that is too short a period. I will direct that ICBC will provide any affidavit evidence and argument in support of any Part 7 deductions within three months of the release of these reasons, unless the parties otherwise agree.

"Forth J."

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