

CANADA / JUDGMENT

Han v. Ha

2020 BCSC 1136

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2020 BCSC 1136 Han v. Ha

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Han v. Ha,

2020 BCSC 1136

Date: 20200804

Docket: M179968

Registry: Vancouver

Between:

Sang Hun Han

Plaintiff

And

Colleen Ha and Zina Wong

Defendants

Before: The Honourable Madam Justice Forth

Reasons for Judgment

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Place and Dates of Trial:

Vancouver, B.C.

June 29, 30,

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Place and Date of Judgment:

Vancouver, B.C.

August 4, 2020

Table of Contents

Introduction. 4

Issues. 4

Background. 5

Pre-Accident 5

Circumstances of the Accident 6

Issue 1: What are the Nature and Extent of the Injuries Suffered in the Accident?. 7

Mr. Han's Evidence. 7

Dr. Kaliray - family doctor 9

Dr. Robinson - neurologist 10

Dr. Sudol - physical medicine and rehabilitation. 10

Dr. O'Shaughnessy - psychiatrist 11

Dr. McDowell - neurologist 12

Dr. Latimer - psychiatrist 12

Dr. Toth - treating neurologist 12

Dr. Acharya - physical medicine and rehabilitation. 13

Findings. 13

Issue 2: What is the Appropriate Award of General Damages for Pain and Suffering?. 14

Applicable Law. 14

Analysis and findings of fact 15

Mr. Han's Evidence. 16

Ms. Tang - wife. 17

Mr. Hendry - employer 18

Ms. Best - employer 19

Mr. Wang - friend. 19

Ms. Forsythe - occupational therapist 20

Findings. 20

Issue 3: Has Mr. Han failed to mitigate his damages, and if so, what is the appropriate reduction?. 21

Applicable Law. 21

Defendants' Position. 21

Plaintiff's Position. 22

Analysis. 23

Failure to take or continue with medication. 23

Failure to continue counselling during the second return to work. 26

Referral to a psychiatrist 26

Issue 4: What is the Appropriate Award for Past Wage Loss or Income Earning Capacity?. 28

Issue 5: What is the Appropriate Award for Loss of Future Earning Capacity?. 28

Applicable Law. 28

Plaintiff's Position. 30

Defendants' Position. 31

Analysis. 31

Issue 6: Loss of Housekeeping Capacity. 34

Applicable Law. 34

Plaintiff's Position. 35

Defendants' Position. 36

Analysis. 36

Issue 7: What is the Appropriate Award for the Cost of Future Care?. 38

Applicable Law. 38

Analysis. 40

Physiotherapy or massage therapy. 40

Occupational therapy. 41

Psychological counselling. 41

Medications. 42

Conclusion. 44

Issue 8: What Amount Should be awarded for Special Damages?. 44

Conclusion. 45

Introduction

- [1] The plaintiff, Sang Hun Han, was injured in a motor vehicle accident that occurred on April 20, 2016 in Burnaby (the "Accident"). He was stopped at the intersection of Royal Oak Avenue and Sanders Street when he was rear-ended by a vehicle driven by the defendant, Colleen Ha. Mr. Han commenced this action against Ms. Ha and the registered owner of the vehicle, Zina Wong, seeking damages for the injuries he sustained in the Accident. The defendants have admitted liability for the Accident.
- [2] The defendants concede that Mr. Han was injured in the Accident and suffered some physical injuries. However, the defendants disagree with the plaintiff about the nature, extent, and seriousness of the injuries he claims were caused by the Accident.
- [3] The defendants argue that Mr. Han has failed to mitigate his damages by failing to take advantage of the advice and treatment offered by his doctors, and his failure to use medications suggested or prescribed to him.

Issues

- [4] The issues raised by the pleadings, evidence, and submissions are:
1. What are the nature, extent, and duration of the injuries suffered by Mr. Han as a result of the Accident?
 2. What is the appropriate award for general damages for pain and suffering?
 3. Has Mr. Han failed to mitigate his damages, and if so, what would the appropriate reduction in damages be?
 4. What is the appropriate award for past wage loss or loss of earning capacity?
 5. What is the appropriate award for loss of future earning capacity?

6. Should the plaintiff be awarded a loss of housekeeping capacity, and if so, in what amount?
7. What is the appropriate award for future care costs?
8. What is the appropriate award for special damages?

Background

Pre-Accident

- [5] Mr. Han was born on March 21, 1975 in London, England. He moved to Seoul, South Korea when he was three. At 13, his parents decided to move to Canada so that their son could receive a better education. He completed grades eight and nine. He stopped attending high school in 1994. He then attended two colleges, Langara College and Douglas College, for a total of four years. At Douglas College, he wanted to get into the computer diploma program, but did not complete any degree or diploma.
- [6] From a young age, Mr. Han has had an interest in computers and has always worked in a computer-related job. He started helping his parents in their home-based business, setting up computers and doing some word processing. He then set up a small web business with some friends to provide services to small businesses, which lasted two to three years. He became self-employed doing freelance computer work, mainly repairing computers, setting up networks, and basic training for small businesses, for approximately three to four years.
- [7] In June 2005, Mr. Han applied for and obtained a full-time job at Bootlegger Clothing Inc. ("Bootlegger") working as the IT Site Coordinator. The parent company of Bootlegger is Comark Services Inc. ("Comark"), which operates out of Mississauga, Ontario. He was the only IT staff working in the Richmond, BC office. He was responsible for helping associates set up their computers, trouble-shooting, and communications with the IT department in Ontario.
- [8] Mr. Han loved the job and the opportunity to interact with the other associates.
- [9] Mr. Han met his wife in 2006 and they got married in September 2011. Their first son, Jyles, was born in August 2012. In 2015, they were expecting their second son but, tragically, he was stillborn at 38 weeks. Mr. Han testified to the shock he and his wife experienced and how he was the "backbone" of the family as he tried to support his wife emotionally. He worked remotely from home for about a month. Approximately one month prior to the Accident, the couple found out they were pregnant again. Their third son, Jabez, was born in December 2017.
- [10] Outside of work and family, Mr. Han enjoyed playing video games and playing basketball or badminton with a small group of friends. He also enjoyed going out with friends for dinner. He was healthy and had no physical limitations. He described his emotional state as "very positive", except for the time dealing with the loss of his second son.

- [11] At the time of the Accident, Mr. Han was living with his wife, who was expecting, and their three-year-old son. The future looked positive.

Circumstances of the Accident

- [12] On April 20, 2016, Mr. Han was driving a 2012 Acura Sedan on his way home from work. He was stopped on Royal Oak Avenue at the intersection of Sanders Street. While stopped, he was hit from behind by a 2005 Lexus RX330 Wagon driven by the defendant, Ms. Ha.
- [13] The Accident resulted in damage and repair of \$7,878.37 to Mr. Han's vehicle with significant damage done to the vehicle's trunk. There was \$5,080.28 worth of damage to the other vehicle.
- [14] Mr. Han testified that on impact, he felt his whole body move forward. He was wearing his seatbelt. His knees struck under the dashboard and his head may have hit the headrest. He was able to pull his vehicle to the side of the road and get out. He recalls that he felt weak and numb. He tried to speak to the other driver but had difficulty opening his mouth. He was able to exchange information with the other driver and took a photo of the damage to the rear of his vehicle.
- [15] He returned to his vehicle and sat for about 10 to 20 minutes before slowly driving home. That night, he had trouble sleeping and felt soreness in his neck, back, chest, and in both knees.

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

- [16] As a result of the Accident, Mr. Han claims he suffered soft tissue injuries to his neck, upper back, shoulders, wrists, and ankles. He suffered headaches, dizziness, nausea, and vomiting. In addition, he suffered cognitive issues with problems relating to focus and concentration. He also claims he suffered from significant psychological distress.
- [17] The defendants concede that Mr. Han suffered soft tissue injuries as a result of the Accident, as well as headaches. They acknowledge that the injuries have had a significant impact on the plaintiff's life. Their primary argument is that Mr. Han would not have suffered the significant psychiatric conditions if he had followed the advice of his treating medical practitioners and taken antidepressants at a therapeutic level, promptly sought psychological counselling, and seen a psychiatrist for treatment. I will consider these submissions under Issue 3: Mitigation.
- [18] In order to establish that the Accident caused his injuries, Mr. Han must prove on a balance of probabilities that but for the Accident, he would not have suffered the injuries: *Clements v. Clements*, 2012 SCC 32 at para. 8.

Mr. Han's Evidence

- [19] In my view, Mr. Han was a forthright and credible witness. I found him to be genuine and honest and I have no reason to doubt the veracity of his testimony. He did not exaggerate his symptoms or the impact on his life. His evidence was supported by the lay witnesses and experts that testified.
- [20] Prior to the Accident, Mr. Han was physically healthy. He had no pre-existing conditions. He was able to work full-time in his chosen profession.
- [21] Mr. Han described how during the Accident, his body was pushed forward on impact. That evening, he immediately felt some symptoms. The symptoms progressively got worse. Upon his return to work the next day, he had a headache and had trouble looking at the computer screen. He had trouble remembering passwords and was clumsy. The symptoms progressed after the Accident and he was experiencing daily headaches with nausea and vomiting from time-to-time.
- [22] Two days after the Accident, Mr. Han attended a walk-in clinic. He had a family doctor, but that doctor does not deal with ICBC cases. Mr. Han saw Dr. Cremona Ticea, who continued to provide treatment until March 24, 2017. At that time, she requested that Mr. Han find another family doctor since she was not prepared to be involved in a case that might go to court.
- [23] In his visit with Dr. Ticea on April 22, 2016, Mr. Han reported pain in his neck, shoulders, and upper arm. He had numbness and weakness in his wrist and lower legs. The doctor noted a bruise on the right knee. Mr. Han reported difficulty with concentration, migraines, and nausea. Prescriptions for Naproxen, an anti-inflammatory, and Flexeril, a muscle relaxant, were given, as well as for physiotherapy. Mr. Han took the medication, but it did not make him feel "functional".
- [24] Over the next few weeks, Mr. Han had symptoms of dizziness with driving and feeling carsick. He also felt pain and stiffness in his upper back, mostly on the right side. In addition, he felt pain in both wrists, knees, and ankles.
- [25] On April 27, 2016, Mr. Han's symptoms were worsening so he went to the emergency department. He had x-rays of his neck and shoulders which were reported as "normal". A CT scan of his head was ordered. He returned two days later for the scan, which was reported as "normal".
- [26] Mr. Han was initially off work from April 27, 2016 to August 14, 2016. He began a gradual return to work on August 15, 2016, but stopped working again on May 28, 2017. He was off work until October 16, 2019, when he returned for a second gradual return to work. He stopped working on January 3, 2019 and has not worked since that date.
- [27] On a return visit to Dr. Ticea on May 6, 2016, Mr. Han reported he had not started physiotherapy since he was dizzy. Dr. Ticea referred Mr. Han to a concussion clinic.

- [28] Mr. Han continued to see Dr. Ticea at regular intervals, complaining of symptoms. By July 2016, Mr. Han reported to Dr. Ticea feelings of being angry and that his wife felt he had changed.

Dr. Kaliray - family doctor

- [29] Mr. Han was able to locate a family doctor who would take him as a patient and he commenced seeing Dr. Pavan Kaliray. Dr. Kaliray, an expert in family medicine, prepared one report and testified at trial on behalf of the plaintiff. Dr. Kaliray began treating Mr. Han on April 20, 2017 and remains his family doctor. At the April 20, 2017 visit, Mr. Han reported that the pain in his neck, shoulders, and upper to mid back had slowly been improving. He continued to have wrist pain and weakness. He reported symptoms of headaches, dizziness, lethargy, an inability to concentrate and focus, and poor memory that was slowly improving. Dr. Kaliray initially diagnosed post-concussion syndrome. Dr. Kaliray recommended Mr. Han continue with occupational therapy, massage therapy, and vestibular therapy. He made a referral for imaging and a neurological consultation.
- [30] Dr. Kaliray saw Mr. Han on an ongoing basis, and Dr. Kaliray's opinion was that Mr. Han had suffered a post-traumatic cervical and thoracic sprain injury with ongoing chronic pain and cervicogenic headaches. The lumbar sprain-strain injury had resolved. Dr. Kaliray opined there was possible post-concussion syndrome. He diagnosed post-traumatic psychological symptoms consistent with major depressive disorder and generalised anxiety disorder, which he recommended be confirmed by a psychiatrist.
- [31] Dr. Kaliray was of the opinion that all of the post-traumatic injuries were directly caused by the Accident. He states that Mr. Han had no pre-existing issues and there were no other incidents that could better explain his symptoms. His opinion was that Mr. Han will experience symptoms, to some degree, in the long term.

Dr. Robinson - neurologist

- [32] Dr. Gordon Robinson, a neurologist with a speciality in the treatment of headaches, prepared a report and testified at the trial on behalf of the plaintiff. Dr. Robinson assessed Mr. Han on January 10, 2019 and prepared a report dated January 22, 2019. Dr. Robinson opined that Mr. Han sustained soft tissue injuries to his neck and upper back. His view was that Mr. Han was misdiagnosed with a traumatic brain injury and that Mr. Han's current symptoms are best explained as being caused by psychological distress as well as chronic headaches, neck, and upper back pain. He diagnosed Mr. Han as having persistent post-traumatic headaches related to the soft tissue injury to his neck sustained in the Accident.
- [33] Dr. Robinson testified that Mr. Han has a poor prognosis for recovery and his anxiety is a potent aggravator of his headache disorder.

Dr. Sudol - physical medicine and rehabilitation

- [34] Dr. Malgorzata Sudol, a specialist in physical medicine and rehabilitation, provided one report and testified at trial on behalf of the plaintiff. Dr. Sudol assessed Mr. Han on August 26, 2019 and prepared a report dated October 29, 2019. She opined that Mr. Han suffered from musculoligamentous injuries through the neck, shoulder girdles, mid back, and upper extremities, with the low back and lower extremity symptoms having resolved. In addition, he suffered from post-traumatic headaches and post-traumatic visual-vestibular symptoms with associated dizziness, nausea, fatigue, and cognitive difficulties, along with mood and sleep disturbances.
- [35] Dr. Sudol opined that since there was no pre-existing history, and considering the temporal connection of the musculoligamentous symptoms to the Accident, it is almost certain the injuries were sustained in the Accident. Respecting the headaches, vestibular symptoms, mood, and sleep disturbances, she opined that it was more likely than not these symptoms were caused by the Accident.
- [36] Dr. Sudol's opinion on prognosis was that since Mr. Han had been symptomatic for over three years, he was likely to continue to have symptoms in the upcoming years; however, his symptoms could lessen if he is able to progress and maintain an appropriate rehabilitation program for the soft tissue injuries. She opines that the post-traumatic headaches are also likely to persist over the upcoming years, with treatment of the anxiety and depression a large factor. Her opinion is that Mr. Han's return to competitive/sustainable employment will likely be challenging and will depend on treatment and response of his emotional and psychological state, as well as headaches and the visual-vestibular symptomology.

Dr. O'Shaughnessy - psychiatrist

- [37] Dr. Roy O'Shaughnessy, psychiatrist, prepared two expert reports and testified at the trial on behalf of the plaintiff. Dr. O'Shaughnessy assessed Mr. Han on October 17, 2018 and prepared a report dated November 5, 2018. He reassessed Mr. Han on January 29, 2020 and prepared a report dated February 10, 2020. Dr. O'Shaughnessy opined that Mr. Han did not suffer a concussive injury but has experienced symptoms comparable to Post-Traumatic Stress Disorder ("PTSD") since the Accident. Further, he has developed depression and anxiety. All of these mental disorders were directly caused by the Accident and would not have occurred otherwise.
- [38] Dr. O'Shaughnessy testified that Mr. Han's treatment was sent down the wrong course and he was told he had a brain injury when he did not. Dr. O'Shaughnessy's opinion was that Mr. Han was "misdiagnosed, mistreated and sent in the wrong direction" and has not had the proper treatment.

- [39] Dr. O'Shaughnessy opined that Mr. Han's prognosis is quite concerning. Dr. O'Shaughnessy testified that Mr. Han would likely need to be treated with three to four medications under the supervision of a psychiatrist and not a family doctor.

Dr. McDowell - neurologist

- [40] Dr. Timothy McDowell, neurologist, prepared a report dated March 3, 2020, but did not testify at trial. He assessed Mr. Han on March 1, 2020 at the request of the defendants. Dr. McDowell opines that Mr. Han developed a headache disorder the day of the Accident and he meets the criteria for post-traumatic headaches. Dr. McDowell's view was that treatment of issues relating to anxiety and depression may also improve his outlook from a headache perspective.

Dr. Latimer - psychiatrist

- [41] Dr. Paul Latimer, psychiatrist, prepared a report dated March 23, 2020, tendered on behalf of the defendants. Dr. Latimer assessed Mr. Han on March 16, 2020. Dr. Latimer opined that Mr. Han suffered a severe psychological reaction to the Accident and that he meets the DSM diagnostic criteria for Major Depressive Disorder, Generalized Anxiety Disorder, Panic Disorder, and PTSD. He opines that the prognosis is poor but that Mr. Han has not had adequate treatment. Dr. Latimer opined that Mr. Han needs a higher dose of antidepressant and should be under the care of a psychiatrist and not just a family doctor. Dr. Latimer testified that the advantage of psychiatric oversight is that a psychiatrist is more likely to prescribe the higher dosage of medication and provide the necessary reassurance so that Mr. Han will continue taking the medication.

Dr. Toth - treating neurologist

- [42] Dr. Toth, a neurologist, testified as a treating physician. He first saw Mr. Han on July 22, 2016, on referral by Dr. Ticea. Dr. Toth's view was that Mr. Han had sustained a low-grade concussion and was suffering from ongoing post-traumatic migraines. Mr. Han returned to see Dr. Toth on April 25, 2019, on a referral by Dr. Kaliray. At this visit, Mr. Han reported daily headaches with only minor improvement since 2016. Dr. Toth and Mr. Han agreed that a trial of Botox would be attempted. Dr. Toth testified that his view was that Botox treatments could provide some assistance to Mr. Han to relieve the headaches. The first Botox treatment occurred on September 11, 2019. Mr. Han has had four Botox treatments. Mr. Han testified that the severity of the headaches had reduced, but not the frequency.

Dr. Acharya - physical medicine and rehabilitation

- [43] Dr. Hernish Acharya, a specialist in physical medicine and rehabilitation, prepared one report dated March 3, 2020 and testified at trial on behalf of the defendants. Dr. Acharya assessed Mr. Han on March 2, 2020. He agreed with the opinions of the other experts that Mr. Han did not suffer a concussion. He opined that the symptoms of pain, mood

dysfunction, sleep dysfunction, and the vague non-neurological cognitive symptoms were all in keeping with chronic pain syndrome. His opinion was that but for the Accident, it was unlikely that Mr. Han would have developed chronic pain syndrome. His view was that the psychological and psychiatric symptoms had not been adequately managed to date. He opined that it is unlikely that Mr. Han will experience a pain-free life, but the self-limitation may be improved and he should be encouraged to return to full activities in all spectrums of his life.

Findings

[44] Based on the medical evidence, I find that Mr. Han suffered soft tissue injuries to his neck, chest, shoulders, upper back, knees, and ankles. He also developed significant psychiatric illnesses of PTSD, major depressive disorder, and generalized anxiety disorder with panic attacks. Mr. Han continues to suffer from persistent post-traumatic headaches. He has made some strides in his recovery from the soft tissue injuries, but he remains significantly impacted by his psychiatric illnesses and headaches. His prognosis for the future is uncertain. He has yet to undergo an adequate therapeutic trial of medications and psychological counselling.

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

[45] Mr. Han seeks an award of \$240,000. The defendants submit that an award for general damages should be \$125,000, with a deduction of 50% for Mr. Han's failure to mitigate.

Applicable Law

[46] A plaintiff is entitled to reasonable damages for his pain and suffering. The plaintiff should be placed in the same position he would have been if the Accident had not occurred, but not in a better position.

[47] 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.

[48] In *Stapley v. Hejslet*, 2006 BCCA 34, the Court of Appeal outlined the factors to be considered when assessing non-pecuniary damages at para. 46:

[46] The inexhaustive list of common factors cited in *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).

[49] 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

- [50] Mr. Han relies on *Felix v. Hearne*, 2011 BCSC 1236; *Burdett v. Eidse*, 2010 BCSC 219, rev'd in part 2011 BCCA 191; *Chowdhry v. Burnaby (City of)*, 2008 BCSC 1337; and *Young v. Anderson*, 2008 BCSC 1306, to support an argument that the appropriate award for general damages is in the range of \$240,000. Mr. Han submits that he has suffered more significant symptoms than were suffered in most of these cases and was younger than all of these plaintiffs.
- [51] I find that the cases cited by Mr. Han are somewhat comparable, although in most of the cases the plaintiffs were diagnosed with having sustained a traumatic brain injury. In the case of Ms. Felix, the impact on her was compounded by the death of her boyfriend in the significant accident she was involved in.
- [52] The defendants rely on *Evans v. Keill*, 2018 BCSC 1651, and *Iampietro v. Leung*, 2019 BCSC 1750, to support an argument that the appropriate award for general damages should be in the range of \$120,000 to \$150,000. In my view, the nature and impact of the injuries in these cases are much less than those Mr. Han experienced, both in terms of severity and persistence of symptoms. In *Evans*, by the time of trial, the plaintiff's psychological condition had improved, she was no longer suffering from the somatic symptom disorder, and her depression was managed. She was no longer in need of any psychological treatment. This is not the situation faced by Mr. Han. In *Iampietro*, the plaintiff testified that her lower back pain and headaches were now rare. She did have ongoing symptoms as of the date of trial, the most serious being the psychological injuries.

- [53] While all of these cases are helpful to provide a general framework, as noted in Stapley at para. 45, the impact on Mr. Han as an individual is the key.

Mr. Han's Evidence

- [54] Mr. Han suffered soft tissue injuries to his neck, shoulders, upper back, chest, wrists, knees, and ankles. He continues to suffer from persistent post-traumatic headaches, dizziness, and nausea. He experiences cognitive problems, including a lack of focus and concentration. He developed and continues to suffer from significant psychiatric illnesses.
- [55] Mr. Han continues to experience stiffness and pain in his neck, back, and shoulders. His wrists are "somewhat better" than before.
- [56] Mr. Han continues to have daily headaches, although the Botox treatment he has been receiving over the past nine months has assisted and his headache level has gone down. He continues to get headaches that are caused by visual movements and tracking. These headaches make him feel foggy, overwhelmed, and unable to do things.
- [57] His sleep continues to be impacted. He wakes up every three to four hours, or even more often.
- [58] Mr. Han's ongoing symptoms have affected his relationship with his wife. They sleep in separate bedrooms and have done so since shortly after the Accident. His view is that his wife is frustrated with him and that he has been neglecting his wife's feelings. He feels overwhelmed with the situation. He is scared to talk to her since he fears what she might say and how he might react. As a result, he does not talk to his wife as much as he used to.
- [59] Mr. Han's condition has affected his relationship with his sons. He wants to be able to go out and play basketball and soccer with his two boys, but he cannot because of the headaches and neck and back pain. This makes him feel bad every day.
- [60] The impact on Mr. Han's work has been significant. He tried returning to work twice and was unsuccessful. He was not happy and felt more disappointed that he was unsuccessful. As Mr. Han described it, it felt like he was "fighting with air" and he could not "find any result no matter how hard [he] tried". The most he was able to work was three hours, twice a week.
- [61] Mr. Han was active in a variety of rehabilitative treatments. He testified that his injuries have significantly affected his ability to work and his ability to take part in recreational activities. He has tried to return to work twice and has failed. He can play a few minutes of simple video games on his phone. He has not been able to return to basketball or badminton.

- [62] Mr. Han described that as time passed and he did not improve, he felt disappointed that he continued to struggle. He felt "foggy" and would just have to lie down. His mood has gotten better since his family doctor prescribed another antidepressant, Sertraline, in February 2020. He no longer has thoughts of self-harm or being overwhelmed, and he is less anxious and depressed.
- [63] In the late fall of 2019, Mr. Han also had to deal with family issues. His father needed back surgery and was hospitalized. His mother was diagnosed with cancer and had to undergo chemotherapy. He had to help both his parents. His father was sent home from rehabilitation and lived with Mr. Han for two to three weeks in January 2020. Mr. Han was not able to cope and his father had to be sent to a nursing home.

Ms. Tang - wife

- [64] Winnie Tang, Mr. Han's wife, testified to Mr. Han being in good health prior to the Accident. She described his mental outlook as "positive". He was, in her words, a "sweet guy", "hardworking", "very good to elders", and "very sociable". He was active in sports and would play badminton, go jogging, and play basketball. Mr. Han helped out with his firstborn son and there was a very equal division of labour in the house with Mr. Han helping with shopping, cleaning, vacuuming, and laundry. The only chore Mr. Han did not do was washing dishes.
- [65] After the Accident, the couple moved into different rooms. Ms. Tang testified this happened since Mr. Han did not want to wake her up at night. Mr. Han had difficulty going shopping since it made him feel nauseous. Ms. Tang took over doing most of the shopping and household chores. Mr. Han's energy level was "very bad". Ms. Tang never saw Mr. Han vomit but heard him vomiting from outside the bathroom. When driving, Mr. Han would become carsick. Mr. Han was not able to play as much with his son. Ms. Tang began taking her son out of the house since she did not want him to see his father staying home and "hid[ing] in his corner".
- [66] Mr. Han also became less social and rarely goes out to see his friends. Mr. Han is slow to respond or does not respond at all in conversations. Ms. Tang described their relationship as one where they do not talk much. They are like housemates. She has tried to talk to her husband about this but he does not respond. She does not think he understands how bad she is feeling. She feels rejected. She feels she has lost a good friend and she no longer has Mr. Han to rely on. She described that she is not really living with him but she is carrying on her own life with their only connection being the children. She still loves him.

Mr. Hendry - employer

- [67] Bryan Hendry is the IT supervisor at Comark and was involved in hiring Mr. Han for his position as the IT Site Coordinator for the Richmond Bootlegger office. Mr. Hendry described Mr. Han as a "perfect candidate for the job". He appeared eager to learn and

"happy go lucky". Once hired, Mr. Han showed great customer service skills and was always willing to stay late to help. There were no performance issues before the Accident. Mr. Hendry described Mr. Han in social situations as being "the life of the party", "out-going", and just a "great guy". Mr. Han had good written and verbal skills and was a very good communicator. After the Accident, Mr. Han came back to work and he was not the same. He seemed quiet and reserved. As the day progressed, he would be squinting. He appeared to have problems with fatigue and concentration. During a conversation, he would pause before he answered and it appeared that he would be struggling to put words together to answer.

- [68] Mr. Hendry testified that due to restructuring, Mr. Han's position has been cut and he has been let go. The company is now in proceedings under the Companies' Creditors Arrangement Act. The Bootlegger office is moving to Winnipeg. Mr. Hendry would hire Mr. Han back if his condition improved.

Ms. Best - employer

- [69] Cari Best, the human resources manager at Bootlegger, knew Mr. Han when he first started at Bootlegger until 2010. Ms. Best left Bootlegger at that time and returned in February 2016. Prior to the Accident, she described Mr. Han as a strong employee. He was always very helpful and quick to accommodate the needs of others. There were no performance issues. When she returned in February 2016, she did not notice any change in Mr. Han.
- [70] After the Accident, she testified that Mr. Han did not seem his "normal self". She became so concerned that she told him to go and see a doctor. When he came back to work in August 2016, he was working with another contract employee. She felt that Mr. Han could not do what he needed to do the job; the "reliability" was not there. When he returned in 2019, he was assisting another IT Site Coordinator who had been hired. Mr. Han started working two shifts a week and never progressed to three shifts a week. The work he was doing was very limited and was more akin to a very entry-level job. He was on very light duty. Ms. Best testified that Mr. Han appeared sad, like when you have a bad tension headache. It looked like he had trouble concentrating.

Mr. Wang - friend

- [71] Damian Wang, a friend, met Mr. Han about fifteen years ago. Before the Accident, he described Mr. Han as a very considerate, down-to-earth person. They enjoyed the same circle of friends. He was not aware of any health issues that Mr. Han had. After the Accident, he testified to seeing Mr. Han showing signs of a backache and appearing tired. Mr. Han would have to take his glasses off. When they got together, he appeared to be in pain and would need to rest. The biggest change that Mr. Wang noted was in Mr. Han's energy level, which he described as "negative" energy. It was hard to have a conversation with Mr. Han.

Ms. Forsythe - occupational therapist

- [72] Kathleen Forsythe, an occupational therapist who commenced working with Mr. Han in December 2016, testified to the host of difficulties that Mr. Han had. During their sessions, he had trouble with word-finding, got lost in his thoughts, often appeared fatigued, and seemed to have varying degrees of low mood. The only improvement she has noted is some benefit with the use of Botox. Almost all of the screening tools she uses have placed Mr. Han in the severe range for symptoms.

Findings

- [73] What is most striking is the consistency of the evidence amongst Mr. Han, the witnesses, and the experts who testified. I do not hesitate to accept any of their evidence.
- [74] I am prepared to accept Mr. Han's evidence as a true reflection of what he experiences. If anything, it appears to me that Mr. Han downplays the impact his mental illnesses have on him.
- [75] The Accident has caused a significant change in Mr. Han's ability to work at his chosen profession. He is currently not working and tried twice to return to work. There is some support in the evidence that, with the proper medication supervised by a psychiatrist coupled with psychological counselling, there is the prospect of some improvement. There is support for the fact that, since the symptoms have now become entrenched, any improvement will be difficult and there remains a significant risk that Mr. Han will continue to experience some symptoms in the future.
- [76] I have reviewed the cases and in assessing the particular circumstances of this plaintiff, I am of the view that the appropriate award for non-pecuniary damages is \$190,000. The issue of whether this award should be reduced due to a failure to mitigate will be discussed next.

Issue 3: Has Mr. Han failed to mitigate his damages, and if so, what is the appropriate reduction?

Applicable Law

- [77] A plaintiff has an obligation to take all reasonable measures to reduce his or her damages, including undergoing treatment to alleviate or cure injuries: *Danicek v. Alexander Holburn Beaudin & Lang*, 2010 BCSC 1111 at para. 234.
- [78] Once the plaintiff has proved the defendants' liability, the defendants must prove that the plaintiff acted unreasonably and that reasonable conduct would have reduced or eliminated the loss. Whether the plaintiff acted reasonably is a factual question and it involves a consideration of all of the circumstances: *Gilbert v. Bottle*, 2011 BCSC 1389 at para. 202.
- [79] The test for failure to mitigate is set out in *Chiu v. Chiu*, 2002 BCCA 618 at para. 57:

[57] The onus is on the defendant to prove that the plaintiff could have avoided all or a portion of his loss. In a personal injury case in which the plaintiff has not pursued a course of medical treatment recommended to him by doctors, the defendant must prove two things: (1) that the plaintiff acted unreasonably in eschewing the recommended treatment, and (2) the extent, if any, to which the plaintiff's damages would have been reduced had he acted reasonably .

Defendants' Position

[80] The defendants agree that Mr. Han has participated in the great majority of the treatments his care providers have recommended. The defendants submit that Mr. Han has failed to mitigate in the following three aspects:

- a. failing to continue to take medication prescribed to him;
- b. not continuing with counselling during his second gradual return to work; and
- c. failing to promptly seek a referral to a psychiatrist.

[81] The defendants' suggested reduction for a failure to mitigate in this case is 50%. The defendants rely in support on the decision of Justice Verhoeven in *Mullens v. Toor*, 2016 BCSC 1645.

Plaintiff's Position

[82] The plaintiff's position is that Mr. Han attended hundreds of medical appointments since the date of the Accident. He has been followed closely by his family doctor and occupational therapist in charting a course for his treatment. The reason Mr. Han did not continue with the antidepressants initially prescribed was that they caused him side effects that he could not tolerate.

[83] The plaintiff argues that there is no medical evidence that Mr. Han's symptoms would have been reduced by some other course of treatment. He further disputes that he has delayed seeking a referral to a psychiatrist. Once his family doctor became aware of the recommendation made by Dr. O'Shaughnessy, a referral to a psychiatrist was made. Unfortunately, no psychiatrist was prepared to see Mr. Han, which is not of his doing.

[84] The plaintiff's position is that the *Mullens* case is distinguishable since in that case, the plaintiff failed to return to work, whereas Mr. Han has attempted two gradual returns to work without success. In *Mullens*, the Court found that "there is good evidence that a return to work would have benefitted her mood disorder, in addition to mitigating her pecuniary loss": at para. 109. The same evidence does not exist in this case. Furthermore, Mr. Han submits that the plaintiff in the *Mullens* case had a concern that a diagnosis of depression and taking antidepressants could have some negative consequences. The Court noted that, "[e]mbarrassment about accepting treatment for a mental injury is not a valid excuse": at para. 116. Mr. Han was not reluctant to accept a diagnosis. He was told he had suffered a

concussion and he was suffering from post-concussion syndrome. He was told he needed to attend a concussion clinic. There is no evidence that Mr. Han is embarrassed about having a mental injury.

Analysis

Failure to take or continue with medication

- [85] I will focus first on Mr. Han's first graduated return to work and how taking or continuing medication would have impacted this return.
- [86] Mr. Han went off work on April 27, 2016 on the advice of Dr. Ticea. Dr. Ticea prescribed a muscle relaxant and an anti-inflammatory on April 22, 2016. On the same day, Mr. Han filled a prescription for both. Mr. Han testified that Naproxen did not make him feel functional and the Flexeril did not seem to have much effect. There is no evidence that if Mr. Han had continued these medications, it would have assisted him with the issues that he faced on his return to work in August 2016.
- [87] Mr. Han saw Dr. Toth, a neurologist, on July 28, 2016. The main thrust of his complaints were his headaches. Dr. Toth states in his consult report:

We talked about different options for helping with his ongoing headaches. I explained we need to do something prophylactic at this time. He did not want to try something pharmacological and, instead I prescribed riboflavin and magnesium as a combination which are both scientifically proven but more conservative in their benefit.

- [88] Dr. Toth testified that since he was seeing Mr. Han only a few months after the Accident, it was reasonable to start with something more conservative. The evidence before me provides no basis on which to be critical of the decision that Mr. Han and Dr. Toth arrived at.
- [89] The next medication that was prescribed was Cymbalta, an antidepressant. Dr. Ticea recommended this medication since Mr. Han reported some personality changes and anger issues on August 18, 2016. Of note, Mr. Han had already returned to work at this point in time. Mr. Han did not initially take the Cymbalta since the main problem he was experiencing were headaches and he was not sure how an antidepressant could assist him with those. He was also optimistic that he was about to get better. Mr. Han agreed to take the Cymbalta in November 2018. Upon taking it, he found that it caused his nausea to become worse and he was vomiting more often. Mr. Han was already struggling with nausea and vomiting at this time. I am not convinced that his decision to stop taking this medication was unreasonable in light of the other symptoms he was experiencing.

- [90] Of further importance is the information that Mr. Han had been given by both Dr. Ticea and Dr. Toth. They believed he was suffering from a concussion. In early 2017, Mr. Han began counselling and vestibular rehabilitation. As it turned out, these treatments were ineffective and based on an incorrect diagnosis of a concussion. Mr. Han cannot be faulted for this when he followed the advice of his doctors to pursue these therapies.
- [91] On May 5, 2017, Dr. Kaliray prescribed Trintellix, an antidepressant, for Mr. Han. In the spring of 2017, Mr. Han was attending a series of different therapies, including massage therapy, physiotherapy, vestibular rehabilitation, and counselling sessions.
- [92] Mr. Han filled the prescription for Trintellix on May 30, 2017. There is no evidence to support that the delay of a little over three weeks made any difference in this treatment. Mr. Han is held to a standard of reasonableness, not perfection, and mere delay in seeking recommended treatment is not necessarily unreasonable: see *Lourenco v. Pham*, 2013 BCSC 2090 at paras. 52-56.
- [93] Mr. Han tried this medication for several weeks. He discontinued it since, although it did help with the headaches, he began vomiting a couple of times a day. He also found that it did not help him with his mood, but made him feel "weird", like he was "muted" and not able to express his emotions.
- [94] Dr. Kaliray testified that in his opinion, Mr. Han's actions in discontinuing the antidepressant medication were reasonable.
- [95] Mr. Han ultimately tried a third antidepressant, Sertraline, in February 2020, which he continues to take. His evidence is that this medication does not cause the same side effects and has improved his mood.
- [96] His family doctor testified that the medications may help with covering up the symptoms, but they will not cure his problems.
- [97] Instead of relying exclusively on medications, Mr. Han has tried to follow the other recommendations made, such as attending the Concussion Clinic, counselling, Botox treatments, and other treatment modalities.
- [98] I am not convinced that Mr. Han has failed to mitigate in respect to taking the antidepressants he has been prescribed.
- [99] A further medication recommended to Mr. Han was Topiramate by Dr. Toth, his treating neurologist. Dr. Toth recently advised Mr. Han that this medication could be taken in place of the Botox or as an adjunct. Mr. Han decided not to take this medication after learning of the potential side effects.

- [100] Dr. Robinson testified that Topiramate, an anti-seizure medication, has a very "low likelihood of working" for Mr. Han and there is a high level of adverse events (side effects) including mental slowness, word-finding difficulties, depression, and suicidal ideation. In Dr. Robinson's opinion, his expectation that it would be helpful for Mr. Han was low and he would not recommend it.
- [101] This evidence supports that Mr. Han's decision not to take Topiramate was reasonable.
- [102] In any event, the defendants have not shown on a balance of probabilities that taking some other medications would have reduced Mr. Han's symptoms. It appears that under the current medication regime, Mr. Han has only seen some limited improvement. The fact that earlier treatment may have been efficacious is insufficient: see e.g. *Smith v. Both*, 2013 BCSC 1995 at paras. 110-11; *Manson v. Kalar*, 2011 BCSC 373 at para. 40.
- [103] I see no basis on which to reduce the damages for past wage loss or any other head of damages, since there is no evidence that if he had taken the various antidepressants, they would have allowed him to return to work in any capacity or would have significantly reduced his symptoms.

Failure to continue counselling during the second return to work

- [104] The defendants are critical of Mr. Han for his failure to continue psychological counselling with Dr. Lai during his second return to work. Mr. Han saw Dr. Lai on October 4, 2019, and did not return until January 27, 2020. Mr. Han returned to work for the second time on October 16, 2019. Mr. Han testified that during this period, he had "a lot of stuff going on" and he was not sure if he had missed an appointment. By the end of November 2019, Mr. Han was dealing with both of his parents facing serious health challenges with which he was trying to assist them.
- [105] Mr. Han testified that attending sessions with Dr. Lai has assisted him in making peace with the impact the Accident has had on him.
- [106] I am not convinced that if Mr. Han had seen Dr. Lai for some counselling sessions during the second return to work, this would have resulted in a better outcome. Mr. Han was facing a number of challenges when he returned to work for the second time, including the unfortunate medical challenges both of his parents faced. In addition, the medical evidence is that Mr. Han needs a psychiatrist for pharmacological management along with psychological counselling in order to address his complex psychiatric conditions.

Referral to a psychiatrist

- [107] Mr. Han was told he had suffered from a concussion by both his family doctor and Dr. Toth, a neurologist. It was not until he read the report of Dr. O'Shaughnessy that he understood that he had been misdiagnosed and he needed to be seen by a psychiatrist.

- [108] On February 6, 2019, Mr. Han discussed with his family doctor, Dr. Kaliray, the medical-legal reports and the suggestions in these reports. Dr. Kaliray noted that Mr. Han was keen for a referral to a psychiatrist and neurologist. Dr. Kaliray was able to obtain a referral to a neurologist, Dr. Toth, but was unable to secure a referral to a psychiatrist. Dr. Kaliray was not able to find a psychiatrist willing to see Mr. Han since he had a motor vehicle accident and there was an ongoing ICBC claim. This doctor testified to his understanding that once the claim has been resolved, a successful referral can be made to a psychiatrist. The waiting list is likely close to the one-year mark.
- [109] The fact that Mr. Han has not yet seen a psychiatrist does not rest on his shoulders, but on the fact that the current system appears to result in greater difficulty accessing treatment for certain individuals with ongoing litigation files. I am not in a position to comment on why this has happened, but only that Mr. Han is not responsible for it.
- [110] I am not convinced that the defendants have discharged their burden of proving that Mr. Han has failed to mitigate. In my view, Mr. Han has acted in a reasonable manner when considering the medical advice he received.
- [111] The Mullens case can be distinguished on its facts. In that case, Verhoeven J. found that the plaintiff had failed to attempt to return to work despite evidence that it would have benefitted her mood disorder to do so, and that if she had made such an attempt, she would likely have been successful at it. She did not provide any acceptable justification for her refusal to attempt to return to her job. She was also "unreasonably resistant" to accepting medical treatment and refused to acknowledge her diagnoses. Unlike Mr. Han, she did not refuse the treatment because of side effects, but instead unreasonably focused on her physical injuries instead of acknowledging her mental illness. Mr. Han, by contrast, made genuine efforts to return to his job but was unable to do so because of the ongoing effects of his injuries sustained in the Accident. As I have explained above, he has acted reasonably in his course of medical treatment.
- [112] For these reasons, I am not prepared to reduce any damages due to a failure to mitigate.

Issue 4: What is the Appropriate Award for Past Wage Loss or Income Earning Capacity?

- [113] The parties agreed on the plaintiff's pre-accident earnings, the dates of periods off work, and periods of graduated return to work. The parties have further agreed that, subject to arguments respecting causation and mitigation, Mr. Han's net wage loss for regular pay is \$213,270.
- [114] The defendants submit that if Mr. Han had stayed on the medication prescribed to him and had actively pursued and accepted treatment, he would have been successful in his first graduated return to work and would have been able to work at least part-time since that time. I do not accept this argument for the reasons explained above.

[115] Since I have not found that Mr. Han failed to mitigate up to the date of the trial, the award for past wage loss is \$213,270.

Issue 5: What is the Appropriate Award for Loss of Future Earning Capacity?

Applicable Law

[116] A claim for loss of future earning capacity raises two key questions: (1) has the plaintiff's earning capacity been impaired by their injuries; and, if so, (2) what compensation should be awarded for the resulting harm that will accrue over time?

[117] 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:

- a) 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;
- b) 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;
- c) 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;
- d) The two possible approaches to assessment of loss of future earning capacity are the "earnings approach" and the "capital asset approach"; *Brown v. Golaïy* (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.

[118] In *Grewal v. Naumann*, 2017 BCCA 158 at paras. 48-49, the Court of Appeal provided a summary of the assessment of loss of future earning capacity and the application of the "real and substantial possibility" standard:

- [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.

Plaintiff's Position

- [119] Mr. Han is advancing a claim for loss of future earning capacity on the basis that but for the Accident, he would have continued to work full-time in the IT field. He claims that he can no longer work at that job and he is likely unable to work at any job for the remainder of his life. He argues that as a result of the several ongoing medical diagnoses, with very little improvement, it is "very very unlikely" that he will return to paid employment. He claims that there is no altruistic, selfless, or accommodating employer in his future, so he will be competing for jobs against candidates without his impairments and disabilities in a competitive market.
- [120] The plaintiff submits that any residual earning capacity is speculative. His prognosis remains very poor and even with psychiatric treatment, there is not a real and substantial possibility he will be able to return to competitive employment. As such, the plaintiff argues that no reduction should be made for any residual earning capacity. Alternatively, any reduction should be modest, in the range of 5% to 10%.
- [121] The plaintiff claims that the appropriate approach is the earnings approach since Mr. Han had been employed for many years at the same job. He had established his career path.
- [122] The plaintiff submits that in respect to the future loss, it should be calculated on the basis that he would likely have been earning \$75,800 per year in wages and non-wage benefits. Using the CIVJI civil jury instructions table, appendix E, the present value of that loss over 20 years is \$1,287,645.

[123] The plaintiff submits that when looking at general contingencies, any modification up or down should be modest. He submits that there are no specific contingencies that apply to him. Although Mr. Han's employment with Bootlegger has ended, other employers had attempted to recruit him in the past. He always declined since he was happy with his work at Bootlegger.

Defendants' Position

[124] The defendants' position is that the plaintiff is seeking a finding of a total and permanent disability when the evidence does not support such a finding. They submit that there is too much uncertainty in the evidence with respect to the plaintiff's prognosis and no expert has opined that the plaintiff is totally and permanently disabled.

[125] The defendants argue that a common theme to the testimonies of all the experts is that Mr. Han has not yet received proper treatment for all of his psychiatric conditions, and it is not known how he will respond to treatment when he receives it.

[126] The defendants submit that the capital asset approach should be used since Mr. Han is no longer employed at Bootlegger and his loss is no longer easily measureable.

[127] The defendants' position is that Mr. Han's future loss should be assessed at two to three years of his pre-accident income, subject to a further reduction for his failure to mitigate.

Analysis

[128] Mr. Han has a strong work history and has demonstrated a good work ethic. He was employed for over ten years with the same employer doing the same job. His employer was happy with him, and he was happy with the job. His future appeared secured at the time of the Accident.

[129] At the date of trial, his future with the same employer was no longer secure since the company was closing the store in Richmond and moving to Winnipeg. Some staff were being offered jobs in Winnipeg.

[130] In my view, it is highly unlikely that Mr. Han would have taken a transfer to Winnipeg to keep this job. This is because Mr. Han has demonstrated strong loyalty to his parents. He is the only child and he clearly feels a commitment to helping out both of his parents. Furthermore, his wife owns her own company in New Westminster and the family is close to her parents, who provide a great deal of childcare.

[131] That means that in 2020, Mr. Han would have been looking for another job, most likely in the IT field. It is work that he enjoyed.

[132] I accept that with his level of experience, work ethic, and personality, he would have found some type of employment in the IT field.

- [133] In assessing Mr. Han's future loss, I need to consider which is the appropriate approach: the earnings approach or capital asset approach.
- [134] The earnings approach involves a form of math-oriented methodology such as: (i) postulating a minimum annual income loss for the plaintiff's remaining years of work, multiplying the annual projected loss by the number of remaining years, and calculating a present value; or (ii) awarding the plaintiff's entire annual income for a year or two: *Pallos v. Insurance Company of British Columbia* (1995), 100 B.C.L.R. (2d) 260 at para. 43; *Gilbert* at para. 233.
- [135] The capital asset approach, on the other hand, involves considering factors such as: (i) whether the plaintiff has been rendered less capable overall of earning income from all types of employment; (ii) whether the plaintiff is less marketable or attractive as a potential employee; (iii) whether the plaintiff has lost the ability to take advantage of all job opportunities that might otherwise have been open; and (iv) whether the plaintiff is less valuable to himself as a person capable of earning income in a competitive labour market: *Hoy v. Williams*, 2014 BCSC 234 at para. 158.
- [136] The capital asset approach is more useful when the loss is not easily measurable: *Perren v. Lalari*, 2010 BCCA 140 at para. 32. Although the capital asset approach is not a "mathematical calculation", the trial judge must still explain the factual basis of the award: *Morgan v. Galbraith*, 2013 BCCA 305 at para. 56.
- [137] In my view, the earnings approach should be used since Mr. Han had embarked on his career path and had an established earnings history prior to the Accident. I find that Mr. Han would have continued to work in a similar position until he retired.
- [138] There remains the issue of whether Mr. Han's symptoms may improve to the extent that he could return to his previous occupation, or some other type of occupation, if he receives the psychiatric treatment recommended.
- [139] The overwhelming consensus of the medical experts is that Mr. Han has not received appropriate treatment. He needs to be seen by a psychiatrist and placed on further medication, complimented by psychological counselling. However, even if he has the appropriate treatment, it remains an uncertainty whether he will improve to the extent he can return to full-time work.
- [140] Presently, Mr. Han is receiving psychological counselling, which he finds beneficial, and he is on an antidepressant, which has also assisted him. This bodes well for his future.
- [141] The most unfortunate evidence is that the family doctor has not been able to secure a referral to a psychiatrist for Mr. Han since he has an active "ICBC" file. Once the action has been concluded, it is anticipated that a referral can be made, but Mr. Han will be on a waiting list. As noted above, the evidence supports that he may have to wait up to a year before he can be seen by a psychiatrist.

- [142] Once he is seen by the psychiatrist and the appropriate medication regime is put in place, it is likely to be two or three years from now. I accept that during this period, Mr. Han should be reimbursed for his wage loss since he will not be capable of returning to work. I further accept that Mr. Han would have faced unemployment from Bootlegger at the same time as this trial regardless of the Accident. He would have been faced with looking for a new job during a difficult time period with the impact of COVID-19.
- [143] I am not convinced that Mr. Han is permanently disabled for the rest of his life from all occupations. In my view, once Mr. Han has received the appropriate treatment, he will be able to return to some work, but on less than a full-time basis.
- [144] Bearing in mind the applicable principles, in light of the evidence and weighing the pertinent contingencies, I assess a fair and reasonable amount over the next three years to be two and a half times his prior annual wage of \$75,800. This works out to an award of five-sixths of his annual income each year over the next three years. I further conclude that Mr. Han should be awarded one-half of his past annual salary each year for the following 17 years to compensate for his diminished capacity to work even after he is receiving proper treatment.
- [145] The present value of this amount, at a discount rate of 1.5% in accordance with s. 56 of the Law and Equity Act, R.S.B.C. 1996, c. 253, and s. 1(a) of the Law and Equity Regulation, B.C. Reg. 352/81, using the present value multipliers in the CIVJI civil jury instructions, comes to a total of approximately \$725,000 for future loss of income.

Issue 6: Loss of Housekeeping Capacity

Applicable Law

- [146] Housekeeping services have an economic value. The loss or impairment of a plaintiff's capacity to perform them is, therefore, compensable: *Harrington v. Sangha*, 2011 BCSC 1035 at paras. 155-56.
- [147] The governing principles that apply to awards for loss or impairment of housekeeping capacity were summarised by Justice Newbury in *Dykeman v. Porohowski*, 2010 BCCA 36 at para. 29, where she noted that these claims must be carefully scrutinized.
- [148] There is no obligation to demonstrate that replacement housekeeping costs were actually incurred since the award reflects a loss of a personal capacity: *O'Connell v. Yung*, 2012 BCCA 57 at para. 67.
- [149] In *Hardychuk v. Johnstone*, 2012 BCSC 1359, Justice Dickson made the following comment:
- [168] When housekeeping services have been provided by other household members a claim for compensation must be scrutinised carefully. Although grievous injury need not be established, the court should ask whether the services went above and beyond the ordinary give and take to be expected in a home and were required by the plaintiff's injuries or

would have been performed in any event. A relatively minor adjustment of duties within a household will not justify a discrete award under this head of damages: Dykeman, Campbell v. Banman, 2009 BCCA 484.

Plaintiff's Position

- [150] The plaintiff advances both a past and future claim for loss of housekeeping capacity on the basis that he has not been able to return to the majority of housekeeping services that he did before the Accident. He now can do some limited housekeeping jobs, such as putting dishes into the dishwasher, and light chores, such as picking up around the house. He also runs errands. The vast majority of the housework is completed by his wife, who is also working two jobs.
- [151] The plaintiff seeks to quantify this loss using the costs allowed under ICBC benefits at \$145/week. He assesses the claim for past loss of housekeeping capacity based on 216 weeks multiplied by \$145, which he rounds up for a claim of \$31,500.
- [152] The future loss of housekeeping capacity claim is based on the premise that Mr. Han is not expected to return to full functioning around his home. There is also the risk that he will be living on his own and he will have a difficult time caring for himself and his children.
- [153] The plaintiff seeks to quantify the future loss using the same amount of \$145 per week, for 52 weeks a year, for 30 years. Using the 30-year multiplier at a 2% discount rate, the net present value is \$168,869. The claim sought is \$160,000.

Defendants' Position

- [154] The defendants argue that a \$5,000 award should be given for past loss of housekeeping capacity. There should be no award for future loss of housekeeping capacity on the basis that there is still the possibility Mr. Han will improve. He is still capable of doing many chores, such as driving, and physical tasks, such as shoveling snow.

Analysis

- [155] Prior to the Accident, Mr. Han testified that he and his wife divided evenly the housework. This evidence was supported by Ms. Tang, his wife, who confirmed that they essentially shared the housekeeping responsibilities.
- [156] Mr. Han is currently significantly impaired from doing housework since certain housework, such as vacuuming, causes an increase in his headaches. He is also impaired from other activities due to his ongoing problems with dizziness and nausea. He finds sorting laundry makes him dizzy. He is able to load the dishwasher, do errands, do some shopping, and transport his children to school and activities.
- [157] Dr. Kaliray notes in his report that Mr. Han has been unable to do his usual household and domestic duties.

[158] Dr. Sudol comments that she would not expect Mr. Han to return to "fast paced or straining recreational activities" at this time, but does not comment on housework.

[159] Dr. Archarya notes that:

However, with appropriate hurt vs. harm counselling, he may reduce his self-limitation on activities and therefore may participate fully in his vocational, recreational, and domestic activities at any time of his choosing. That is, given that I could not find a clear underlying neurological or orthopaedic structural issue, there is no medical evidence upon which to impose a medical restriction on Mr. Han. In fact, doing so has been shown to be counterproductive and can worsen the prognosis for a chronic pain syndrome. Return to full activities of his life should be encouraged.

[160] Kathleen Forsythe, the treating occupational therapist, testified that she recommended that Mr. Han have assistance with homecare of the maximum benefit allowable under ICBC benefits at \$145/week. These benefits were not provided. The recommendation for assistance in homemaking originated from a recommendation made by an occupational therapist at the Advanced Concussion Clinic ("ACC"). The recommendation was based on a need to aid in energy conservation and symptom management so that Mr. Han may benefit from therapy. The evidence at the trial supported that the referral to the ACC was likely misdirected since Mr. Han did not suffer a concussion.

[161] Ms. Tang testified to the efforts she now has to undergo to complete the housekeeping. After arriving home from her work running her optical store, she completes the housework with a phone attached to her hip, so she can answer it as she is on call with an interpretation service. Ms. Tang estimated that she is now doing about five extra hours of housekeeping a week that was previously done by Mr. Han. As I have noted, with the proper future treatment, there will hopefully be some improvement in Mr. Han's symptoms, which will allow him to return to at least some of his pre-accident housekeeping chores.

[162] I accept that some household chores are currently difficult for Mr. Han to do, such as vacuuming, since the noise affects his headaches. I am not convinced that he is physically disabled from completing other household chores. I accept that his current disability stems from his psychiatric conditions, which prevent him from returning to many aspects of his life.

[163] I find that a fair and reasonable award for the loss of past housekeeping capacity is \$15,000.

[164] For the future, much depends on Mr. Han receiving appropriate treatment. All of the experts agree that Mr. Han's psychiatric conditions need to be properly addressed and they have not been to date. In my view, Mr. Han is likely to continue to have some impairment in household chores until his psychiatric conditions are addressed and he has returned to better functioning.

- [165] I am not convinced that the fact that Mr. Han might be living on his own if his marriage breaks down should be considered. As explained above, this head of damage is intended to compensate the plaintiff for his loss of capacity. The extent to which his capacity for housekeeping tasks is impaired by the injuries incurred in the Accident will be the same regardless of whether or not there is a breakdown in the marriage.
- [166] I am also of the view that once the two boys are older, they can and should be expected to help around the home and as they get older the child care duties will decrease.
- [167] In light of all of the evidence, I would assess the future loss of housekeeping capacity at \$30,000.

Issue 7: What is the Appropriate Award for the Cost of Future Care?

- [168] Mr. Han advances a claim for future care of \$164,506. This is based on the evidence that he continues to have treatment for massage therapy, occupational therapy, and psychological counselling. In addition, this covers the funds for medication costs along with ongoing Botox treatments.
- [169] The defendants submit that a number of the plaintiff's claims for future care costs are excessive and not supported by medical justification. They further argue that the uncertainty of Mr. Han's prognosis ought to be taken into account.

Applicable Law

- [170] The plaintiff is entitled to compensation for the cost of future care based on what is reasonably necessary to restore him to his 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 (S.C.); *Spehar et al. v. Beazley et al.*, 2002 BCSC 1104 at para. 55; *Gignac v. Insurance Corporation of British Columbia*, 2012 BCCA 351 at paras. 29-30.
- [171] Cost of future care is established if there is medical justification for the claim and 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.
- [172] 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.

- [173] In *Penner v. Insurance Corporation of British Columbia*, 2011 BCCA 135 at para. 13, the court noted that common sense should inform awards of cost of future care, quoting the following paragraphs from *Travis v. Kwon*, 2009 BCSC 63:
- [109] Claims for damages for cost of future care have grown exponentially following the decisions of the Supreme Court of Canada in the trilogy of decisions usually cited under *Andrews v. Grand & Toy, Alberta Ltd.*, [1978] 2 S.C.R. 229, [1978] 1 W.W.R. 577.
- [110] While such claims are no longer confined to catastrophic injury cases, it is useful from time to time to remind oneself that damages for future care grew out of catastrophic injuries and were intended to ensure, so far as possible, that a catastrophically injured plaintiff could live as complete and independent a life as was reasonably attainable through an award of damages.
- [111] This is worth mentioning because the passage of time has led to claims for items such as, in this case, the present value of the future cost of a long-handed duster, long-handed scrubber, and replacement heads for the scrubber, in cases where injuries are nowhere near catastrophic in nature or result.

Analysis

- [174] The plaintiff did not tender a report from a future care expert. The evidence of need comes from some of the expert reports and from the actual treatments that Mr. Han has had over the years.

Physiotherapy or massage therapy

- [175] The plaintiff seeks funding for monthly massage or physiotherapy until age 75.
- [176] The support for this claim comes from a comment made in Dr. Kaliray's report in which he recommends that, "Mr. Han continue his current rehabilitation regime which, as far as I am aware, consists of physiotherapy, AR [active rehabilitation], OT input, psychology, vestibular rehabilitation and a self-managed exercise routine."
- [177] Dr. Kaliray testified at trial that he recommends that Mr. Han continue ongoing massage therapy so long as he finds it beneficial.
- [178] Neither of the psychiatrists recommends any massage therapy. Dr. Acharay's opinion was that Mr. Han suffers from chronic pain syndrome, with no remaining physical injury, and recommends no massage or physical therapy.
- [179] Dr. Sudol recommends in her October 29, 2019 report that Mr. Han have 14 to 16 further sessions with a physiotherapist or kinesiologist for the purposes of guiding upper extremity and core strengthening exercises.

- [180] The defendants point out that since the end of October 2019, Mr. Han has already had at least five physiotherapy treatments, so funding should be provided for only another 9 to 11 sessions. It is not clear to me what type of physiotherapy treatments Mr. Han has had since the end of October 2019 and whether these treatments focused on the recommendations made by Dr. Sudol.
- [181] Mr. Han testified that massage therapy does provide some pain relief to his upper shoulders and neck that lasts for a couple of days or less than one week.
- [182] In my view, Mr. Han should be keenly focused on his recovery over the next two to three years. The focus of that recovery should be on his psychiatric conditions but also coupled with other therapies that can assist him to return to a more functional life.
- [183] In my view, it is reasonable to allow some further monthly massages for a two-year period. He should also be funded for 16 physiotherapy or kinesiology sessions as recommended by Dr. Sudol.
- [184] Using the costs of a massage treatment at \$125 per session, an award of 24 sessions over the next two years amounts to \$3,000.
- [185] Using the costs of a physiotherapy treatment at \$132 per session, 16 sessions would amount to a cost of \$2,112.

Occupational therapy

- [186] Mr. Han has been regularly attending occupational therapy sessions with Ms. Forsythe since December 2, 2016. The plaintiff seeks funding for ongoing occupational therapy sessions once a month for two years, and then twice a year to age 75.
- [187] During the active period of rehabilitation that Mr. Han should be undertaking, I see that there is a justification for the plaintiff to continue to have support from an occupational therapist. I do not see the need for life-long support.
- [188] In my view, the cost of two years of occupational therapy support once a month at \$105 per session should be funded. This would amount to \$2,520.

Psychological counselling

- [189] Mr. Han has been attending psychological counselling since April 2019 with Dr. Macy Lai. All of the expert evidence supports the need for psychological counselling coupled with an appropriate medication regime. The plaintiff seeks psychological counselling twice a month for two years and then six times a year thereafter to age 75. The defendants argue that two years of counselling would be reasonable and there is no medical justification for 30 years.

- [190] The psychological counselling is a critical component for Mr. Han's recovery. In addition, it is clear that this couple needs to attend for some marriage counselling. An important component of Mr. Han's recovery is to have his wife by his side. She has done an admirable job in taking over many responsibilities, in shouldering two jobs, the majority of the care of the household, and the children. It appears from their evidence that the largest hurdle is for them to communicate with each other. I accept that the communication issue that has arisen between them is a result of the Accident. Hopefully, through some marriage counselling, the lines of communication will be reopened and they can return to being the supportive couple they were before the Accident.
- [191] During the next two years, I agree that Mr. Han should receive counselling twice a month to assist him. At the same time, the couple should attend a counsellor with specialization in marriage counselling.
- [192] After the two years, it is reasonable that Mr. Han has some further psychological counselling for another three years. This is to assist him when he returns to some type of occupation and the added stress that may initially cause. After five years of counselling, I do not see the need for any ongoing counselling for the rest of Mr. Han's life.
- [193] I conclude a fair and reasonable amount for psychological counselling, including marriage counselling sessions, is \$10,000.

Medications

- [194] Mr. Han is currently taking Sertraline, an antidepressant, at a yearly cost of approximately \$640. Dr. O'Shaughnessy's opinion was that Mr. Han would need polypharmacy, meaning the use of multiple medications, in order to treat his serious psychiatric issues. The plaintiff has only sought funding for the Sertraline.
- [195] The defendants argue that no award should be given for medication on the basis that the plaintiff has demonstrated a general unwillingness to stay on medication prescribed to him.
- [196] Mr. Han testified that the current medication has been beneficial in improving his mood. In my view, Mr. Han has come to appreciate the importance of this type of medication coupled with psychological counselling, and with future insights of a psychiatrist, he will likely remain on medications prescribed.
- [197] It is likely that Mr. Han will be on medications for a significant period of time. In my view, the amount claimed of \$14,400 is reasonable.

- [198] The plaintiff has had four Botox treatments and they have assisted in reducing the intensity, but not the frequency, of his headaches. The medical experts supported the use of Botox as a headache treatment. Dr. Robinson states in his report that Botox would be a reasonable consideration and if there is a "substantial response", the treatment would be required every three months, usually indefinitely.
- [199] Dr. Robinson testified that after the preparation of his report, he reviewed the records of Dr. Toth and his opinion was that the treatments had not resulted in meaningful improvement and that he would be pessimistic that Botox is going to be a treatment that would be worthwhile continuing into the future.
- [200] Dr. Toth, who testified as Mr. Han's treating neurologist, was the doctor providing the Botox treatments. Dr. Toth testified that on the occasion of the fourth Botox treatment, he advised Mr. Han that Botox would probably not be helpful any further. Mr. Han requested the injections proceed. Dr. Toth agreed to inject the Botox since Mr. Han had purchased it and had it with him.
- [201] Dr. Toth testified that he did not recommend Botox be used further and recommended Topiramate. Mr. Han advised him that he did not wish to use the Topiramate.
- [202] Based on the medical evidence of Dr. Robinson and Dr. Toth, I am not convinced that the defendants should be funding ongoing Botox treatments for the next 30 years. Although Mr. Han feels his headaches are improving with the Botox injections, the medical evidence does not support the ongoing use of Botox.
- [203] There is no medical justification for an award of ongoing Botox treatments.

Conclusion

- [204] The total amount awarded for future care costs is \$32,032, comprised of:
- a) \$5,112 for massage therapy and physiotherapy;
 - b) \$2,520 for occupational therapy;
 - c) \$10,000 for counselling; and
 - d) \$14,400 for medications.

Issue 8: What Amount Should be awarded for Special Damages?

- [205] 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; *Milina* at para. 78.

[206] Mr. Han has actively sought treatment from a number of different therapies. He has attended for massage therapy, physiotherapy, vestibular rehabilitation, optometric vision rehabilitation therapy, and counselling therapy. He has also incurred the costs of medication, the most significant being for the Botox treatments he had in 2019 and 2020. The parties agreed to the dates, nature of, and costs of the various treatments Mr. Han has had. The total cost amounted to \$85,371.63. Mr. Han was reimbursed for the majority of the costs, with the outstanding amount claimed of \$14,915.

[207] The defendants submit that the amount claimed for special damages should be reduced in half for the plaintiff's failure to mitigate his damages. Based on my findings on the mitigation issue above, Mr. Han is entitled to be reimbursed fully for the outstanding special damages.

Conclusion

[208] In summary, Mr. Han is entitled to the following damages:

a.

Non-pecuniary damages:

\$190,000

b.

Past net wage loss:

\$213,270

c.

Future loss of earning capacity:

\$725,000

d.

Cost of future care:

\$32,032

e.

Past and future loss of housekeeping capacity

\$45,000

e.

Special damages

\$14,915

TOTAL

\$1,220,217

[209] The plaintiff is entitled to interest on the past wage loss and special damages.

[210] The parties can hopefully work out any adjustment that needs to be made pursuant to s. 83 of the Insurance (Vehicle) Act, R.S.B.C. 1996, c. 231 and the application of the provisions of Part 7 of the Insurance (Vehicle) Regulation, B.C. Reg. 447/83. If they cannot, they have leave to set down a date to make further submissions on these issues.

[211] If the parties cannot agree on costs, the plaintiff is at liberty to submit written submissions within 60 days of the date of these reasons. The defendants are to submit written submissions within 15 days of the receipt of the plaintiff's submissions. Any reply submissions must be submitted within 10 days of the receipt of the defendants' written submissions.

"Forth J."

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