
CANADA / JUDGMENT

Leung v. Mok

2020 BCSC 1456

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Supreme Court of British Columbia

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2020 BCSC 1456 Leung v. Mok

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Leung v. Mok,

2020 BCSC 1456

Date: 20201001

Docket: M172151

Registry: Vancouver

Between:

Leo Leung

Plaintiff

And:

Anna Wo Mok and Wah Ko Mok

Defendants

Docket: M196733

Registry: Vancouver

Between:

Leo Leung

Plaintiff

And:

Shang Zhen Li

Defendant

Before: The Honourable Madam Justice Morellato

Reasons for Judgment

Counsel for the Plaintiff:

I. Lee

Counsel for the Defendants:

J.E. Lord

Place and Date of Trial/Hearing:

Vancouver, B.C.

July 6-9, 2020

Place and Date of Judgment:

Vancouver, B.C.

October 1, 2020

I. Introduction

- [1] This is a personal injury matter arising from two motor vehicle accidents in Vancouver, British Columbia (collectively the "Accidents"). The plaintiff, Mr. Leo Leung, was involved in a collision in the parking lot of the Oakridge Mall on April 1, 2015 ("First Accident"). Two years later, Mr. Leung was in another accident on June 21, 2017, when he was rear-ended near the intersection of East 49th Avenue and Cambie Street ("Second Accident"). First responders were not called in either of the Accidents. Mr. Leung drove his car home after both Accidents.
- [2] The defendants admit liability in both Accidents, conceding that Mr. Leung "has, more likely than not, suffered soft tissue injuries". The parties have also reached an agreement regarding the quantum of special damages. However, the defendants dispute the origins and severity of Mr. Leung's injuries, as well as the specific damage awards sought by Mr. Leung.
- [3] For the reasons that follow, I have concluded that Mr. Leung is entitled to non-pecuniary damages, as well as damages for past loss of earning capacity, future loss of earning capacity, and the future cost of care, as quantified below.

II. Factual Background and summary of Evidence

- [4] Mr. Leung is 37 years old. He was 32 years old at the time of the First Accident. He is a high school graduate and is licensed to sell securities. He has worked as an investment advisor for RBC for approximately a decade. Mr. Leung manages "high worth" client portfolios. He testified he enjoys interacting with his clients and building his practice as an investment adviser.
- [5] Prolonged sitting was, and is, part of Mr. Leung's daily work routine. Mr. Leung's workday begins around 6:15 a.m. or 7:00 a.m. and ends around 3:00 p.m. He sits for approximately 5.5 hours before lunch and for a minimum of 2 hours after lunch.

A. Pre- Accident Activities and Pursuits

- [6] Mr. Leung testified that before the Accidents he was "relatively active" and would go to the gym about 3-4 times a week to exercise, which included weightlifting. He loved motorsports and would race high performance vehicles at raceways 3-5 times a year. Indeed, he enjoyed driving in general and purchased a sports car for that reason. He golfed 1 to 2 times a week during the summer. He also enjoyed going to movie theatres.
- [7] Mr. Leung testified that he took courses towards a Bachelor Arts Degree at Langara College sometime in the early 2000s. He had accumulated approximately 39 credits when he transferred to Simon Fraser University ("SFU") in the fall of 2012. He took night-time course at SFU in an effort to advance his professional qualifications.
- [8] Soon after commencing his night-time courses at SFU, Mr. Leung found working during the day and going to classes at night challenging. After the fall 2012 semester at SFU, he stopped his evening classes for approximately three years. However, after he stopped his classes, Mr. Leung felt he was missing his opportunity for a higher education. He returned to his pursue his post-secondary education in 2015 after the First Accident, and continued his evening studies. He continued to take evening classes at SFU until the end of the spring semester of 2017. He was approximately half-way through the process of earning a bachelors degree in business at the time of his Second Accident.

B. Pre-Accident Health

- [9] Mr. Leung testified that he did not have any significant illnesses and that he rarely missed work prior to the Accidents. While this is strictly correct, the evidence establishes that he did have pre-existing health issues before the Accidents; he had suffered from shoulder pain, flare-ups of lower back and pelvic pain, episodic bouts of anxiety, allergies and asthma.

- [10] Mr. Leung continues to suffer from a pre-existing shoulder injury. In 2008, he received a slight tear in his right shoulder from boxing. The treatment for his right shoulder injury continued into 2013 and 2014, right up until the First Accident in June 2015. Mr. Leung admitted that he received physiotherapy treatments for his shoulder up to three times a week, including the week and days before the First Accident. Mr. Leung maintained that he continues to have strength and mobility issues with his right shoulder.
- [11] Mr. Leung acknowledged that he had sought medical treatment for pelvic and lower back pain before the First Accident from his family doctor and physiotherapists. For example, in June 2014, the record shows, and he did not dispute, that he had a lumbar spine x-ray. Mr. Leung recalled telling his physiotherapist during this time that his job required sitting for long hours. On August 7, 2014, Mr. Leung complained of lower back pain to his family doctor. He acknowledged that prolonged sitting aggravated his back prior to the Accidents.
- [12] Mr. Leung did not agree that he required on-going physiotherapy to the same extent for his lower back as he did for his shoulder. He also testified that he was "still capable of playing golf and going to gym," except when he had "flare-ups". Mr. Leung asserted that his lower back problem had resolved by June 2015 and that he was "still pretty normal".
- [13] On cross-examination, Mr. Leung was taken to physiotherapy records relating to the summer of 2014. These records, indicate that he complained of lower back, pelvic, and neck pain. He testified he remembered the lower back and pelvic pain but not the neck pain. Mr. Leung did not dispute the accuracy of any medical records taken at the time of his treatments.
- [14] Mr. Leung suffers from allergies and regularly receives allergy shots. However, he testified that he usually schedules these appointments after 3:00 p.m., well after the major stock markets have closed. The last time he received allergy shots was in December 2019 or January 2020. Mr. Leung also has suffered from asthma and shortness of breath since he was young. He uses an inhaler to assist him when needed. His asthma has not caused him to lose work. As well, Mr. Leung has suffered from anxiety from time-to-time.

C. The First Accident

- [15] At the time of the First Accident, Mr. Leung was sitting in his parked vehicle, with the engine off, in the Oakridge Mall parking lot. The defendant's vehicle was parked in the adjacent stall, to the right of Mr. Leung's vehicle. The defendant's vehicle backed out of its space and, as it was moving forward and turning to the left, it made contact with the rear bumper of Mr. Leung's vehicle.

- [16] Mr. Leung claims that because of the First Accident he suffered headaches and bruising to his left forehead, as well as neck, shoulder, and back pain. However, Mr. Leung recalls having headaches for "just a couple of days". Mr. Leung testified that he bruised his forehead when it struck the steering wheel during the accident. He explains that his head hit the steering wheel because he was bending over adjusting his floor mat when the defendant's car struck his parked car.
- [17] Mr. Leung testified that he saw his family doctor, Dr. Tam, a few days after the First Accident. Dr. Tam recommended physiotherapy, message therapy, and "maybe" a muscle relaxant. Mr. Leung claimed that he followed the recommended treatment and found it beneficial.
- [18] By the time of the Second Accident in 2017, Mr. Leung testified that he was "80-90% recovered" from the First Accident. His numerical estimates of his recovery after the First Accident varied somewhat; he explained that he was "not good" at using percentage estimates. Later in his testimony, he clarified his evidence by stating that he was "much better" or "mostly recovered" by the time of the Second Accident.

D. The Second Accident

- [19] Mr. Leung testified that after the Second Accident he suffered from "more of the same pain" in his lower back, upper back and shoulders, as well as "numbness and tingling" in both hands. He explained that his injuries from the Second Accident were "much worse" than the First Accident, and that the tingling sensation in his hands "became unbearable" at times.
- [20] Mr. Leung testified that, after the Second Accident, the numbness in his hands would wake him up him. At work, Mr. Leung often needed to "get up" from his desk to "wave" his hands "to get rid of the numbing sensation". While not relieving the numbing sensation entirely, he found that taking Gabapentin helped with his symptoms. In addition to his physical injuries, Mr. Leung he felt "sad" and "feared "getting into another motor vehicle accident". He maintained that he did not have that fear before the Second Accident. He also felt "more fatigued".

E. Diagnosis of Dr. Harpreet Sangha

- [21] Dr. Sangha tendered an expert report on behalf of Mr. Leung. He is a licenced physiatrist, with expertise in physical medicine and rehabilitation. He performed an independent medical examination of Mr. Leung on July 23, 2019 and issued his report on September 11, 2019.
- [22] While Dr. Sangha was not aware that Mr. Leung was seeing a physiotherapist prior to the First Accident in 2015, he was aware that Mr. Leung had received treatment for back pain in 2014.
- [23] Dr. Sangha made the following diagnosis with regard to Mr. Leung's back and shoulder:

Cervical strain with chronic myofascial impairment of the cervical spine and bilateral periscapular regions;

Lumbosacral strain with chronic myofascial impairment and "what looks to be a component of SI joint mediated pain, bilaterally."

[24] Dr. Sangha was unsure of the etiology of Mr. Leung's intermittent numbness in his hands. He was also unaware of any evidence of a spinal cord injury or static peripheral nerve injury. He opined that Mr. Leung's symptoms were not likely caused by a neurological problem.

F. Diagnosis of Dr. Michael Ko

[25] The defendants tendered expert evidence from Dr. Michael Ko. Dr. Ko is a licenced physiatrist, who was also qualified as an expert in physical medicine and rehabilitation. Dr. Ko conducted an independent physical examination of Mr. Leung on August 19, 2019 and issued his expert report on September 30, 2019. His report provides, in part, as follows:

From a physical perspective, Mr. Leung sustained a soft tissue injury to the neck and lower back after the April 1, 2015 accident which appears to have been 90% improved or resolved when he was involved in a motor vehicle accident in June 2017. Currently, as a result of the second motor vehicle accident, he states that he continues to experience intermittent neck pain and lower back pain which has become more intensified and new onset of the bilateral shoulder pain. He states that the pain is intermittent in frequency, occurring about three to four times a week and last about two hours. This does not appear to have affected his employment status nor his recreational activities; he continues to be enjoying racing cars although Mr. Leung states that he does it less frequently after his 2017 motor vehicle accident. He remains independent in the activities of daily living which is defined as eating, grooming, showering, toileting, and dressing. The clinical examination was quite unremarkable. There was no evidence of any nerve injury or other structural musculoskeletal pathology.

Therefore, from a physical perspective, the following are Mr. Leung's injuries pertaining to his April 1, 2015 accident:

1. Sprain/strain injury of the cervical spine.
2. Sprain/strain injury of the lumbar spine.

The following are Mr. Leung's injuries, from a physical perspective, pertaining to his June 2017 motor vehicle accident:

1. Aggravation of pre-existing sprain/strain injury of the cervical spine.
2. Aggravation of pre-existing sprain/strain injury of the lumbar spine.
3. Sprain/strain injury of the bilateral trapezii.

In sum, Dr. Ko's report suggests that Mr. Leung suffered aggravations in his neck, lower and upper back and new injuries to the trapezii area of his shoulders.

G. Diagnosis of Dr. Latimer

- [26] Dr. Paul Latimer was qualified to give evidence in the area of psychiatry. Mr. Leung waived the right to cross-examine Dr. Latimer. Accordingly, his expert report, completed on June 27, 2019, was accepted into evidence as read.
- [27] Dr. Latimer assessed Mr. Leung on June 25, 2019. Dr. Latimer diagnosed Mr. Leung with mild driving anxiety and phobia arising from the Second Accident. Nevertheless, Dr. Latimer described Mr. Leung as "highly motivated to overcome his driving anxiety "because he has a passion for cars and driving".

H. Mr. Leung's Treatments and Prognosis for Recovery following the Second Accident

1. Physiotherapy, Chiropractors, and Massages

- [28] In total, since the First Accident, Mr. Leung has had about 100 physiotherapy treatments, 60 chiropractic treatments, and 30 massages. He testified that while this treatment helped him feel better, his neck and back continue to bother him. These injuries have required active rehabilitation. Indeed, most of the special damages, of over \$10,000, arose from regular physiotherapy and chiropractic treatment after the Second Accident.
- [29] Mr. Leung testified that his chiropractic treatments are \$100 per visit; registered massage therapy treatments are \$140 a visit; and his physiotherapy treatments are \$80 a session.
- [30] The expert witnesses disagree somewhat over the type of treatments that would be beneficial to Mr. Leung. On one side, Dr. Sangha opined that intermittent access to massage and physiotherapy for Mr. Leung's flare-ups and dysfunction would be reasonable. In contrast, Dr. Ko did not recommend either massages or physiotherapy. Neither expert recommend the continued use of chiropractic therapy.
- [31] Both Dr. Ko and Dr. Sangha acknowledged that Mr. Leung appropriately engaged in regular physical exercise to assuage his injuries. Dr. Sangha recommended a therapeutic program at the gym as an appropriate treatment for Mr. Leung's myofascial injuries. Dr. Sangha also encouraged Yoga, opining that it is effective for patients with chronic pain. On cross-examination, Dr. Sangha recalled that he recommended regular cardio-vascular exercises and strength training to Mr. Leung, including walking five days a week, swimming, and exercising on an elliptical trainer. Agreeing with Dr. Sangha, Dr. Ko testified that Mr. Leung would benefit from regular cardiovascular exercises and strength training, three to five times per week.

2. Mr. Leung's Prognosis

a) Physical Injuries

[32] Both experts opined that Mr. Leung is not likely to recover fully from his physical injuries. Dr. Sangha opines:

[Mr. Leung] was susceptible to reinjury due to the first accident. He is at risk for further exacerbation and flare-ups much as he already experiences specifically in the low back but to a certain extent as well in the neck and upper back. Given it is now over two years since the second accident, he had, in my opinion on the balance of probabilities, reached maximum medical recovery. The likelihood of further improvement of his physical impairments is negligible. As such, the treatment strategies provided below are given to minimize symptoms and maximize functions within the confines of his impairment state.

Dr. Ko also acknowledged that it is unlikely Mr. Leung would experience a complete resolution of his symptoms.

[33] Mr. Leung testified that the numbness and tingling symptoms in his fingers have now improved overall. While he is no longer taking Gabapentin on a regular basis, he does "on occasion" continue to take Gabapentin for these symptoms. When his symptoms were at their worst, he could not feel his fingers while driving; during this period, he took up to nine pills a day. Now, when his symptoms sporadically flare-up, he takes about three pills a day. In addition to Gabapentin, Mr. Leung was also prescribed Naproxen, Tylenol 3, and Cyclobenzaprine, as needed, to alleviate his symptoms.

[34] Mr. Leung has returned to "working-out" at the gym after the Second Accident. In fact, in August 2019, he told Dr. Ko that he was weightlifting three to four times per week with intermittent neck, lower back, and shoulder pain.

[35] Mr. Leung's recreational activities continue to be negatively impacted. For example, Mr. Leung testified that he is not able to golf, or enjoy golf, as much because of his symptoms. He testified he could not remember if he had gone back to any autocross events after the Second Accident. However, he acknowledged on cross-examination that one of his friends provided him with the opportunity to drive a Porsche on a racetrack in California in 2018. Currently, Mr. Leung owns a high performance race- car, which he drives on racetracks. He wears a helmet, which weighs about 10 lbs or less, while on the track; there is no evidence that he has difficulty doing so.

b) Psychological Difficulties

[36] Dr. Latimer concluded that Mr. Leung's prognosis for overcoming his driving anxiety was "excellent", and that his mild driving anxiety did not require any treatment. By Mr. Leung's own testimony, his "driving anxiety is improving". Mr. Leung has been managing his anxiety on his own, without the need for professional intervention. In sum, the evidence suggests that Mr. Leung has, or will, overcome his driving anxiety without further treatment.

3. The Interruption of COVID-19

- [37] The COVID-19 Pandemic ("Pandemic"), which begun earlier this year, interrupted Mr. Leung's recovery. He testified that "before the pandemic, I was getting a lot better", although he still had sporadic numbness and tingling in his fingers. Mr. Leung testified that prior to the Pandemic, he was about 80-85% recovered. However, as physiotherapy and other treatments became unavailable because of the Pandemic, Mr. Leung's symptoms worsened. Mr. Leung testified that, currently, his neck is, "extremely sore all the time, especially after the pandemic and not getting treatment".
- [38] About two weeks after the Pandemic "lock-down" began in British Columbia in March 2020, Mr. Leung started doing Yoga at his home to help with his symptoms. He was also skipping on his balcony and doing sit-ups. He was not able, however, to go to the gym or to physiotherapy, chiropractic, or message treatments. He explained that at the beginning of the Pandemic, his work was taking a lot of his time and he eventually stopped practicing Yoga at home.
- [39] Mr. Leung agreed that his condition worsened because he exercised less at the beginning of the Pandemic. He explained that he tried to stay at home as much as possible to respect COVID-19 social distancing rules, and that it was not feasible for him to buy gym equipment for his 750 square foot apartment.
- [40] Mr. Leung explained that he found that stretches and Yoga helped him. He said, "If I go for walks or am more active, I don't get as stiff."
- [41] Mr. Leung, along with virtually all of his co-workers, have been working at home since the Pandemic spread to Vancouver earlier this year. At the time of trial, Mr. Leung was, quite understandably, unsure when he would be able to go back to working at his office at RBC. Mr. Leung's office at RBC is ergonomically designed to reduce strain on his lower back, neck, and shoulders. However, Mr. Leung does not have an ergonomic desk or chair for his home office.
- [42] Mr. Leung found himself becoming less efficient at work when his neck and lower back symptoms increased during the Pandemic. According to Mr. Leung, "prolonged sitting or being immobilized" causes his neck and his back to get very stiff, even when he is sleeping. When trying to work, Mr. Leung described that the best he could manage at his desk was 1.5 hours before he "experienced stiffness". In some cases, it was "just a half hour".
- [43] As the restrictions of the Pandemic eased and Mr. Leung has once again been able to receive treatment, his symptoms have improved. He testified that resuming physiotherapy has been "very helpful".

I. Mr. Leung's Work at RBC

- [44] Mr. Leung's income is based principally on commissions. His commission income decreased significantly after the Second Accident:

2013: \$81,124 2014: \$93,120 2015: \$108,326 (First Accident in April) 2016: \$164,098 2017: \$140,285 (Second Accident in June) 2018: \$131,015 2019: \$104,999

- [45] Mr. Leung testified that this reduction stemmed from his injuries and that he feels less capable of earning income overall. For instance, he described himself as "less available at work due to treatments" such as physiotherapy or message therapy. Mr. Leung is also of the view that he was generally "less active" at work because of his pain and fatigue, and because he had difficulty sitting for extended periods. He also testified that sometime he stayed home because his back and neck bothered him "so much", although he acknowledged that "did not happen very often". Mr. Leung acknowledged that he rarely missed any work prior to the Accidents, and that he continued to work full-time after both Accidents.
- [46] Mr. Leung stated that, "if I work harder, I make more money." He explained that the "majority of my commissions are through new issue deals -- those deals are usually offered after the market closes" such that "when new issue deals become available I missed those opportunities" because he was not working due to medical appointments. Mr. Leung conceded that there is usually only a small percentage of trading after the stock market closes. Nevertheless, he maintained that it could be quite busy after trading hours in dealing with a particular stock.
- [47] While Mr. Leung anticipated that his annual income would continue to grow, on cross-examination, he agreed that his income from commissions has fluctuated from year-to-year. He candidly acknowledged that general market volatility was also a factor that affected his commission income. He noted that there were "lower numbers of deals closing" in the years after the Second Accident.
- [48] Dr. Sangha opined that Mr. Leung is able to continue to work and that "he is fortunate that his job demands appear to be relatively sedentary." Dr. Sangha also posited that the "distracting elements of chronic pain cannot be discounted as a factor that impacts his overall function" and that:

Overall, the accident-related impairments have impacted on his capacities. I consider Mr. Leung to be therefore at a competitive disadvantage. He is not functioning at the same level which has impacted on his earning potential and career advancement.

Dr. Sangha explained that pain is distracting and fatiguing, and therefore, Mr. Leung's reports of being less efficient and less focussed are reasonable given his chronic pain.

J. Marketability and Post-Secondary Education

- [49] Mr. Leung testified he feels less marketable or attractive to employers because of his ongoing symptoms. He explained that if he were to start with a new employer, it would be harder to take time off to go to his necessary medical treatments. As a result, Mr. Leung believes he would be a less attractive employee.

[50] Mr. Leung also testified that he would have been further along in his post-secondary education at SFU if the Second Accident in 2017 had not occurred. Mr. Leung was taking two courses a semester, two semesters a year at the time of the Second Accident. He agreed that it would take him approximately 4.5 years to complete his undergraduate degree part-time, had he not stopped taking courses in 2017. He acknowledged that finishing his degree would take longer if the courses he was required to take were not available when his work schedule permitted. He also acknowledged that if he continued to take his courses consistently and without interruption in 2017, he would not have finished his course work and completed his business degree until 2022, at the earliest.

III. Legal Analysis

A. Credibility

- [51] The defendants submit that the "credibility and reliability of the plaintiff's evidence is of 'heightened importance' in this case." They note that Mr. Leung called no family members, no friends, treatment providers, co-workers, or other lay witnesses. He relied only on his own viva voce evidence and the opinion of Dr. Sangha, who saw him on a single time on July 23, 2019. Therefore, the defendants argue, Mr. Leung's evidence "exists in a relative void of any other evidence to corroborate his symptoms, outside of the opinions that Dr. Sangha is qualified to give."
- [52] The defendants do not submit that the Mr. Leung intentionally misled the court with his evidence. Rather, they contend that Mr. Leung's evidence was inconsistent. For example, his recollection of his attendance at school or how busy he was in specific years. In support of their submission, the defendants' rely on *Faryna v. Chorny*, [1952] 2 D.L.R. 354 at 357-358 (B.C.C.A) and *Bradshaw v. Stenner*, 2010 BCSC 1398 at paras. 186-188.
- [53] I agree that Mr. Leung did not intentionally mislead the court. While his evidence was inconsistent or unclear in some respects, this is understandable given the numbers of years that have passed and the numerous events that have informed the evidentiary matrix. Overall, I find that Mr. Leung was a credible witness. He presented as an articulate, intelligent professional.
- [54] In light of the evidence as a whole, and the particular circumstance before me, the mere fact that Mr. Leung's specific evidence was not corroborated by that of other lay witnesses, does not in itself undermine his credibility or the reliability of his evidence. Of course, the clarity of his evidence or lack thereof, in its totality, necessarily affects the strength of his case on a balance of probabilities.

B. Causation and Pre-existing Conditions

1. Summary of Parties' positions

- [55] The plaintiff argues he sustained injuries to his lower back, neck and shoulders in the First Accident and that the Second Accident exacerbated the injuries he sustained in the First Accident. The defendants assert that they are not liable for the debilitating effects of any of Mr. Leung's symptoms, which existed prior to the First Accident. They argue that Mr. Leung would have continued to experience his pre-existing symptoms, even if the Accidents had not occurred.
- [56] The defendants submit the evidence need not show that Mr. Leung's pre-existing conditions were disabling immediately before the Accidents in order to reduce this court's assessment of damages. Instead, they submit, his pre-existing conditions were both active and latent weaknesses, which most likely contributed to the losses and injuries in question. Therefore, Mr. Leung's pre-existing conditions are to be taken into account, because they affected Mr. Leung's lifestyle and recreational pursuits both before and after the Accidents. Counsel relies on *Krause v. Gill*, 2006 BCSC 1459, where the Court reasoned as follows:
- [42] As I understand *Athey*, supra, and many of the cases that have considered it, the distinction between "thin skull" and "crumbling skull" does not depend on whether the plaintiff's pre-existing condition was active immediately before the second source or cause of injury. A weakness inherent in a plaintiff, which might realistically cause or contribute to a loss, regardless of the negligence of a defendant, is relevant in the assessment of damages: see *T.W.N.A. v. Canada* (2003), 22 B.C.L.R. (4th) 1 (C.A.) at para. 48, 2003 BCCA 670 (CanLII); *York v. Johnston* (1997), 1997 CanLII 4043 (BC CA), 37 B.C.L.R. (3d) 235 (C.A.), *McKelvie v. Ng* (2001), 90 B.C.L.R. (3d) 62, 2001 BCCA 384 (CanLII).
- [43] As set out in *Athey*, supra, and the other cases, the main objective is to reflect the difference between the plaintiff's original position and his injured position. If there is a measurable risk that a pre-existing condition would have detrimentally affected him in the future, regardless of the defendant's negligence, then this contingency should be accounted for in reducing the amount of damages.
- [57] Accordingly, the defendants assert that a pre-existing condition is part of a plaintiff's original position and that such a pre-existing weakness, inherent in the plaintiff's health, is a contingency that must reduce the assessment of damages. They submit that it is not necessary that they prove the contingencies to a certainty; rather, they are to be given weight according to their relative likelihood (i.e., measureable risk).

2. Findings of the Court on Causation

- [58] In *Clements v. Clements*, 2012 SCC 32 at paras. 7-13, the Supreme Court of Canada reaffirmed the "but for" test for factual causation in negligence. That is, the plaintiff must demonstrate, on the balance of probabilities, that "but for" the defendant's negligence, they would not have suffered their injuries. The defendants need not be the only cause of the plaintiff's injuries; they merely need to be a cause of those injuries: *Athey v. Leonati*, [1996] 3 S.C.R. 458 at paras. 16-17; *Blackwater v. Plint*, 2005 SCC 58 at para. 78. Furthermore, while the trial judge must apply a robust and pragmatic approach to the "but for" assessment,

scientific proof of a causal relationship is not required: Clements, at para. 46.

[59] Tortfeasors must take their victims as they find them, even in circumstances where the plaintiff's injuries are more severe than they would be for a normal person (i.e., the "thin skull" rule). However, a defendant need not compensate the plaintiff for any debilitating effects of a pre-existing condition which the plaintiff would have experienced in any event, and in the absence of the defendant's negligence (the "crumbling skull" rule): Athey, at paras. 32-35; Blackwater, at para. 78. The following passage from Athey aptly explains the delineation between the thin-skull rule and the crumbling-skull rule:

34 .The "crumbling skull" doctrine is an awkward label for a fairly simple idea. It is named after the well-known "thin skull" rule, which makes the tortfeasor liable for the plaintiff's injuries even if the injuries are unexpectedly severe owing to a pre-existing condition. The tortfeasor must take his or her victim as the tortfeasor finds the victim, and is therefore liable even though the plaintiff's losses are more dramatic than they would be for the average person.

35 The so-called "crumbling skull" rule simply recognizes that the pre-existing condition was inherent in the plaintiff's "original position". The defendant need not put the plaintiff in a position better than his or her original position. The defendant is liable for the injuries caused, even if they are extreme, but need not compensate the plaintiff for any debilitating effects of the pre-existing condition which the plaintiff would have experienced anyway. The defendant is liable for the additional damage but not the pre-existing damage [citations removed]. Likewise, 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 removed]. This is consistent with the general rule that the plaintiff must be returned to the position he would have been in, with all of its attendant risks and shortcomings, and not a better position.

[emphasis added]

In sum, tortfeasors are only liable for injuries that are caused by their negligence.

[60] The law is clear that a pre-existing condition is a negative contingency that must be considered when assessing damages: T.W.N.A. v. Canada, 2003 BCCA 670 at para.48. As Justice Abrioux, as he then was, summarized in Karim v. Li, 2015 BCSC 498, at para. 118:

A pre-existing condition is part of the plaintiff's original position: T.W.N.A. at para. 28. Pre-existing weaknesses inherent in a plaintiff are contingencies that should be accounted for in the assessment of damages. It is not necessary that contingencies be proven to a certainty but rather that they are given weight according to their relative likelihood: T.W.N.A. at para. 48.

[61] Nevertheless, as Justice Groberman aptly noted in Gordon v. Ahn, 2017 BCCA 221 at para. 33, "[d]escribing a plaintiff as coming within the 'crumbling skull doctrine' does not eliminate the need for a complete analysis of the pain and suffering caused by the accident."

- [62] In this light, and based on all the evidence before me, I am satisfied that Mr. Leung had pre-existing lower back, pelvic, and right shoulder problems prior to the Accidents that have continued to affect his physical mobility, as well as his general health and quality of life. I also find that there is a real and substantial possibility, indeed probability, which these pre-existing conditions would continue into the future even if the Accidents had not occurred. Accordingly, Mr. Leung is not entitled to compensation for these pre-existing conditions.
- [63] While Mr. Leung asserts he had no lower back pain or hip pain immediately prior to the First Accident, on his own evidence, he had a prior medical history of these conditions. It is noteworthy, that Mr. Leung testified that prolonged sitting at his job, before the Accidents, caused him lower back and pelvic pain, for which he sought treatment. Furthermore, it is undisputed that he had a shoulder injury that was symptomatic and painful in the month, weeks and days shortly before the First Accident. On the evidence as whole, I find that that his back, shoulder, and pelvis were problem areas or physical weaknesses prior to the Accidents. Since these pre-existing conditions contributed, and are likely to continue to contribute, to Mr. Leung's symptoms, they constitute negative contingencies that must be taken into account in assessing damages.
- [64] While I find that Mr. Leung's pre-existing symptoms (i.e., in his lower back, pelvis, and right shoulder) were exacerbated to a small degree by the First Accident and to a discernibly greater degree by the Second Accident, I also find that Mr. Leung suffered new bilateral injuries to his shoulders during the Accidents, as affirmed by the expert evidence. Further, while there is some evidence that Mr. Leung experienced some neck pain prior to the First Accident, the evidence does not support a conclusion that this constituted a pre-existing condition, latent or otherwise. Nevertheless, I do find that the Accidents caused a neck injury; this is borne out by Mr. Leung's evidence and that of both experts.
- [65] I also find that Mr. Leung suffers from numbness and tingling in his fingers, as well as a mild driving anxiety because of the Second Accident. Accordingly, the defendants must compensate Mr. Leung for these injuries.
- [66] There are numerous cases where negative contingency reductions have been applied to pre-existing conditions: *Szostakiwskyj v. Launay*, 2020 BCSC 653; *Radacina v. Aquino*, 2020 BCSC 1143; *Anderson v. Molon*, 2020 BCSC 1247; *MacIntosh v. Davison*, 2013 BCSC 2264; *Duifhuis v. Bloom*, 2013 BCSC 1180; *Baglot v. Fourie*, 2019 BCSC 122. I address the nature and scope of the applicable negative contingency later in these Reasons, as it relates to the each assessment of damages.

C. Damage Assessments

1. Non-Pecuniary Damages

[67] Non-pecuniary damages compensate plaintiffs for their pain, suffering, loss of enjoyment of life, and loss of amenities: *Sehra v. Randhawa*, 2020 BCSC 752 at para. 110. In determining non-pecuniary damages, each case must be assessed based on the particular facts before the court: *Trites v. Penner*, 2010 BCSC 882 at paras. 188-189. When making that assessment, the following factors delineated in *Stapley v. Hejslet*, 2006 BCCA 34 at para. 46, are key considerations:

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

[68] Further, as noted by the Court of Appeal in *Moskaleva v. Laurie*, 2009 BCCA 260 at para. 95, the amount of the non-pecuniary award should compensate for more than just direct injuries:

[95] The underlying purpose of non-pecuniary damages is to "make life more endurable" and should be seen as compensating for more than just a plaintiff's direct injuries [citations omitted]. In *Lindal*, at 637, Dickson J. for the Court emphasized that the quantum of an award is determined through a functional approach and should not necessarily correlate with the gravity of the injury:

Thus the amount of an award for non-pecuniary damage should not depend alone upon the seriousness of the injury but upon its ability to ameliorate the condition of the victim considering his or her particular situation. It therefore will not follow that in considering what part of the maximum should be awarded the gravity of the injury alone will be determinative. An appreciation of the individual's loss is the key and the "need for solace will not necessarily correlate with the seriousness of the injury". In dealing with an award of this nature it will be

impossible to develop a "tariff". An award will vary in each case "to meet the specific circumstances of the individual case".

[69] I have examined each of the factors in Stapley and our Court of Appeal's functional analysis in Moskaleva in light of the circumstances of this case. Furthermore, I have considered the authorities relied upon by both parties, giving due consideration to what guidance they offer and their relative comparability to the facts before me, keeping in mind that the compensation awarded must be fair to all parties.

[70] I have taken into account the specific submissions of the parties on the factors that ought to inform my assessment of non-pecuniary damages, in light of the evidence outlined above. In doing so, I have considered the nature and scope of the injuries Mr. Leung's sustained as a result of the Accidents, each of which I've discussed earlier in these reasons. I have also considered how Mr. Leung's overall health, recreational capacities, and general lifestyle have been impaired because of the Accidents. For example, I have take into account his diagnosed driving anxiety, as well as his excellent prognosis in this regard. In addition, I have considered not only how the exacerbation of his condition effected his professional life, but also how his recreational and social activities (such as golfing) are impacted.

[71] Counsel of Mr. Leung points out that the parties' medical experts, Dr. Sangha and Dr. Ko, both agreed that Mr. Leung suffers from chronic soft tissue injuries to his neck, back, and shoulders. In this regard, I have also considered Mr. Leung's testimony that, prior to the COVID-19 pandemic, he was about 80-85% recovered, with the exception of sporadic numbness and tingling in his fingers..

a) Mitigation

[72] Counsel for the defendant argues that, while Mr. Leung's inactivity after the COVID-19 "lock-down" contributed to the worsening of his symptoms, this was not an inevitability. He argues Mr. Leung's inactivity during this period is "akin to a failure to mitigate" because Mr. Leung did not follow the active exercise regime that was recommended by his doctors. Nothing, counsel asserts, was preventing Mr. Leung from exercising at home.

[73] Counsel for Mr. Leung asserts that although his activity level decreased in March of this year because of the Pandemic, he continued to do some at home exercises, including Yoga.

[74] For a failure to mitigate to apply, the defendants bear the heavy burden of proving: 1) the plaintiff acted unreasonably in forgoing recommended treatment, and 2) that the plaintiff's damages would have been reduced had he acted reasonably: Chiu v. Chiu, 2002 BCCA 618 at para. 57; and Janiak v. Ippolito, [1985] 1 S.C.R. 146, 1985 CanLII 62 (S.C.C).

[75] In my view, the defendants have not discharged their burden of demonstrating that Mr. Leung unreasonably eschewed any recommended treatment. I accept Mr. Leung's evidence that he continued with some physical exercises after the COVID-19 Pandemic struck in March of this year, although I also find that he reduced his level of exercise. Nevertheless, I do not find it appropriate to hold him accountable for his physical setback in recent months.

While he may have made more effort to stay physically fit, I find that he made sufficient effort given the unusual circumstances surrounding the Pandemic. He reasonably balanced the restrictions imposed by the Pandemic with his recovery efforts. I am also satisfied that if the COVID-19 pandemic had not struck, it is more likely that not that his condition would not have worsened as it did.

- [76] I also find that, in the fullness of time, it is very likely that Mr. Leung will adapt and return to his former exercise regime. I also find that his current exacerbated symptoms will likely improve to a significant degree. However, I accept that Mr. Leung's symptoms relating to his lower back, pelvis, neck, and shoulder are chronic in nature and are unlikely to resolve completely. I also accept that he is likely to continue experience sporadic numbness and tingling in his fingers.
- [77] Mr. Leung seeks \$80,000 in non-pecuniary damages. Counsel for the defence submits that a fair and reasonable range for Mr. Leung's non-pecuniary damages ought to be in the range of \$40,000 to \$45,000. I am of the view that the cases relied on by Mr. Leung are, generally, more aligned with the facts of this case than those relied on by the defendants, although I remain mindful of the axiom that each case must be decided on its own particular facts.
- [78] In light of all the evidence and the applicable authorities, I am of the view that non-pecuniary damages of \$70,000 is reasonable and fair. However, as I discussed earlier, because of his pre-existing conditions and symptoms relating to his lower back, pelvis, and shoulder, there is ample authority that a negative contingency ought to apply. Based on the evidence before me, and the applicable case law, I find that a negative contingency of 35% is appropriate, reasonable and fair. A 35% reduction of \$70,000 is \$24,500, yielding an award of \$45,500.

2. Past Loss of Income Earning Capacity

- [79] Compensation for past loss of earning capacity is to be based on the loss of the value of the work that the injured plaintiff would have performed but was unable to perform because of the injury: *Rowe v. Bobell Express Ltd.*, 2005 BCCA 141 at para. 30; *M.B. v. British Columbia*, 2003 SCC 53 at para. 49.
- [80] In *Gao v. Dietrich*, 2018 BCCA 372 at paras. 39-40, our Court of Appeal provides guidance on the applicable standard of proof when assessing this loss:
- [39] The rationale for distinct standards of proof for past actual events and past hypothetical events was explained by Madam Justice Rowles in *Smith v. Knudsen*, 2004 BCCA 613 at para. 29:

What would have happened in the past but for the injury is no more "knowable" than what will happen in the future and therefore it is appropriate to assess the likelihood of hypothetical and future events rather than applying the balance of probabilities test that is applied with respect to past actual events.

- [40] These principles have been reiterated by this Court recently in *Grewal* at paras. 43-46, and *Rousta* at paras. 14-17. To the extent that other decisions could be read to hold that a past hypothetical event must be proven on a balance of probabilities they must be regarded as *per incuriam*: *Grewal* at para. 47.
- [81] Thus, a plaintiff is not required to prove loss of past earning capacity on a balance of probabilities. The question is whether there is a real and substantial possibility of the loss. A future or hypothetical possibility may be considered if it is a real and substantial possibility, not mere speculation: *Athey* at para. 27; *Morlan v. Barrett*, 2012 BCCA 66 at para. 38.
- [82] I find that the combination of Mr. Leung's neck and back pain from prolonged sitting at work, and their exacerbation from the Second Accident, coupled with his ongoing shoulder pain and his need to attending multiple physiotherapy, massage therapy, chiropractic appointments, and active rehabilitation sessions throughout his workweek, impacted his work productivity and, consequently, his commission earnings. As Dr. Sangha opined, the "distracting elements of chronic pain cannot be discounted as a factor that impacts overall function." Dr. Sangha further noted that chronic pain is not only distracting but also fatiguing, such that patients like Mr. Leung are less focused and productive at work.
- [83] The year after his First Accident, while taking evening courses, Mr. Leung set a new benchmark for his commission income, achieving his highest commission sales in 2016 of \$164,098. During the year of his Second Accident on June 21, 2017, Mr. Leung experienced a drop in his commission of about \$24,000, earning \$140,285. In 2018, Mr. Leung's commissions dropped a further \$11,000 down to \$131,015; in 2019, Mr. Leung's commissions dropped another \$26,000 to \$104,999. His 2019 commissions were comparable to his earning in 2015 and higher than what they were in 2014 and 2013, as set out early in these Reasons.
- [84] Mr. Leung candidly acknowledged that the significant drop in his commission income, in the years following the Second Accident, was also due to unforeseen and unpredictable market forces. Therefore, he does not seek to "blame the Accidents" as the only cause of his decreased commissions in 2017, 2018, and 2019.
- [2] For purposes of assessing Mr. Leung's past loss of earning capacity, his counsel used 2016 as a benchmark for Mr. Leung's potential commission earnings. He submits that his client suffered a cumulative decrease in commission earnings of approximately \$115,000 from 2017 to 2019 inclusive. However, taking into consideration the effect of "negative contingencies" such as economic market forces, Mr. Leung's counsel submits that a 50% of the cumulative decrease in commission income or \$57,000 (i.e., 50% of \$115,000) would be an appropriate reduction. Counsel for Mr. Leung further submits, "allowing for the fact that such an award is not simply a matter of mathematical calculation," that a \$50,000 award for loss of past earning capacity would be appropriate.

- [85] Counsel for the defendants submits that Mr. Leung is not entitled to any award for loss of past earning capacity. He underscores that Mr. Leung missed one or possibly two days following the First Accident and only one day following the Second Accident. The defendants point out that Mr. Leung's income in 2019 of \$104,999 was significantly higher than his 2013 or 2014 earnings; further, his earnings of \$140,285 in 2017 and \$131,015 in 2018 were his second and third best earning years ever.
- [86] Counsel for the defendants asserts that the Mr. Leung did not lead evidence that proves a past loss of earning capacity. He did not call colleagues to testify that their commissions from 2017 through 2019 had a less significant drop than Mr. Leung's, notwithstanding market conditions. Further, counsel assert that Mr. Leung did not identify "a single client, document or transaction" that was lost in order to establish a loss that occurred after the First Accident or the Second Accident.
- [87] Counsel for the defendants submits that the "drop-off in income in the three years following 2016 should not be afforded any weight, and is not evidence that proves any loss occurred. He asserts that Mr. Leung's cumulative commission earnings for the years 2017 to 2019 is \$376,299, an average of \$125,433 per annum. The cumulative commission earnings for the years 2014 to 2016 is \$365,544, an average of \$121,848 per annum. If 2013 is included in the pre-accident average, this drops to an average of \$111,667 per annum.
- [88] Further, counsel for the defendant asserts that if Mr. Leung's drop in income is a function of the severity of his symptoms following the Second Accident, one would expect a 'bounce back' in 2019 because his symptoms were improving. Counsel underscored Mr. Leung's testimony that his symptoms gradually improved, to the point of being 80 to 85 per cent recovery by early 2020, before the COVID-19 Pandemic struck. Counsel for the defendant underscores, the fact that Mr. Leung's income declined significantly between 2018 and 2019, points to factors other than his continuing symptoms as the reason for his falling income.
- [89] Counsel for the defendants also argues that while Mr. Leung testified that his expectation was that his performance would increase year-to-year, he led no substantive evidence about how this would occur, other than to point to a general growth in his client base. The defendants submit that these statements should be given little to no weight. In short, the defendants submit that Mr. Leung has failed to satisfy his burden of proof with respect to a past loss of earnings.
- [90] The assessment of loss of earning capacity is challenging and difficult in this case. I am satisfied nevertheless, based on the totality of the evidence before me, that the Mr. Leung's pre-existing conditions were exacerbated by the defendants' negligence, primarily because of the Second Accident. Consequently, I find he also suffered fatigue and a reduction in his productivity, efficiency, and focus at his job that made him less capable of earning income overall. More specifically, the injuries he suffered in the Second Accident and the resulting symptoms have lead me to the conclusion that there is a real and substantial possibility that Mr. Leung has suffered a diminished earning capacity that has resulted in a pecuniary loss.

- [91] The more challenging task before me is how to fairly and reasonably assess the extent of Mr. Leung's loss of capacity. This endeavor is made more challenging because his commission earnings are confounded by market fluctuations, and by his pre-existing conditions as well as a recent period of inactivity caused primarily by COVID-19 circumstances that are beyond anyone's control or responsibility.
- [92] I have also found that Mr. Leung's current condition is very likely to improve significantly in the future to at least the point he acknowledges he was at in March of this year before the Pandemic lock-down. I note that in the year after his Second Accident, his 2018 commission income was at \$131,000, yet a year later, during a time when he acknowledged his symptoms were improving, he experienced a further and significant decrease in his commission income, down to \$104,000. In this light, it is apparent his income level was not only affected by his symptoms but likely by economic market forces as well, as Mr. Leung acknowledged.
- [93] Mr. Leung's significant concession to reduce his past income loss from \$115,000 to \$50,000 in light of negative contingencies is understandable but not sufficient, in light of all the circumstances. These circumstances not only include income tax deductions from his gross income, as well as negative contingencies associated with unforeseen economic forces, but also the continuing effect of his pre-existing conditions on his over all health throughout that period. While challenging to assess, in light of the totality of the evidence before me regarding Mr. Leung's past loss of earning capacity, I am of the view that an award \$35,000 for this loss is both reasonable and fair.

3. Future Loss of Earning Capacity

a) Real and Substantial Possibility of Future Events Leading to an Income Loss

- [94] In order to receive an award for loss of earning capacity, a plaintiff must prove that there is a real and substantial possibility of a future event leading to an income loss. If the plaintiff discharges that burden of proof, then depending upon the facts of the case, the plaintiff may prove the quantification of that loss of earning capacity, either on an earnings approach or a capital asset approach: *Perren v. Lalari*, 2010 BCCA 140 at para. 32.

- [95] In *Pololos v. Cinnamon-Lopez*, 2016 BCSC 81 at para. 133, Justice Voith, as he then was, conveniently summarized the applicable first principles as follows:

- [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. 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.
- [96] Counsel for the defendants submit that Mr. Leung has failed to prove any loss of future earning capacity. I disagree. I have already found that Mr. Leung has sustained an exacerbation of pre-existing symptoms relating to his lower back, pelvis, and right shoulder, as well as new injuries to his neck and shoulders, including numbness and tingling in his fingers. Together these symptoms have limited his capacity to perform certain activities, including his work as an investment advisor. I also find that there is a real and substantial possibility that his future income earning capacity has also been impaired. Accordingly, he is entitled to compensation. Notably, what is being compensated is not the loss of projected future earnings, but the loss or impairment of earning capacity as a capital asset.
- [97] Mr. Leung also asserts that he experienced a diminishment in his marketability to future employers due not only to his chronic pain and its effects on his productivity but, also, because of the delay in the completion of his business program at SFU. He testified that following the Second Accident, he found it difficult to travel to campus, sit for prolonged hours in class and study, while working full-time. Mr. Leung also asserted that once he obtained his undergraduate degree "it could lead him to being accepted into an MBA or CFA designation program." This "could possibly lead to finding work at private equity firms where salaries are significantly higher" than his, which he asserts are generally in the range of \$250,000 annually as a base salary, plus bonuses "possibly equal to that salary".

- [98] The defendants submit that in light of an 80-85% improvement in his symptoms before March of 2020, there is no reasonable explanation why Mr. Leung cannot re-enroll in post-secondary classes in the future, on a part-time basis as he once did. Counsel for the defendant notes that Mr. Leung testified he attended such classes while recovering from injuries sustained in the First Accident; accordingly, Mr. Leung could choose to attend classes again in the future, as he did in the past.
- [99] Based on Mr. Leung's own evidence, he would not have completed his studies towards an undergraduate business degree until sometime in 2022 at the earliest, even if the Accidents did not occur. I have also already found that there is a real and substantial possibility that Mr. Leung will improve to at least the level of physical health he was at prior to March of this year when the COVID-19 pandemic struck. While I accept that the Second Accident likely delayed the completion of his post-secondary education, I do not accept that he is no longer physically capable of pursuing his post-secondary goals. I see no real or substantial possibility that he will not be able to pursue his post-secondary goals because of the injuries sustained in the Accidents.
- [100] The defendants further submit that Mr. Leung did not lead any evidence on the likelihood that obtaining an undergraduate degree would result in an increase in his future earnings. Moreover, they argue that Mr. Leung did not lead evidence that he would either likely be accepted into an MBA degree program, or that upon completion of further schooling, he would successfully transition into a more lucrative career. By Mr. Leung's own admission, he did not know what requirements there might be to a successful admission into an MBA program. He also admitted that he might need to take a significant period of time out of the workforce in order to do this. Counsel for the defendants notes there was no evidence from faculty or admissions staff from any university about the plaintiff as a potential candidate. In sum, the defendants submit that Mr. Leung's assertions of obtaining a much more lucrative job because of a future MBA are speculative. I agree. Mr. Leung has the burden of proving that his future educational opportunities are realistic opportunities: *Johnstone v. Rogic*, 2019 BCCA 469 at para. 55. The evidence before me does not support a real and substantial likelihood that Mr. Leung's income would increase dramatically in the future as he declares. This assertion is not supported by the evidence and, in the final analysis, I must rely on the evidence before me.
- b) Quantifying Future Income Loss
- [101] Where a loss of capacity is established, there are two common approaches to the quantification of the loss. The plaintiff may prove the quantification of the loss of earning capacity, either on an earnings approach, as in *Steenblok v. Funk* (1990), 46 B.C.L.R. (2d) 133 (C.A.), or through a capital asset approach, as in *Brown v. Golaiy*, (1985), 26 B.C.L.R. (3d) 353 (S.C.). The former approach will be more useful when the loss is more easily measurable, as it was in *Steenblok*. The latter approach will be more useful when the loss is not as easily measurable, as in *Pallos v. Insurance Corp. of British Columbia* (1995), 100 B.C.L.R. (2d) 260 (C.A.) and *Romanchych v. Vallianatos*, 2010 BCCA 20.

- [102] Counsel for Mr. Leung submits that a capital asset approach is appropriate in this case and would yield the fairest and most reasonable result. I agree. I am not persuaded that a strict mathematical assessment of Mr. Leung's earnings potential, based, for example, only on his highest income-earning year, even with the benefit of expert analysis and multipliers (reflecting various contingencies) is appropriate. Nor am I persuaded that such an approach would yield a reasonable or just result in this case. A capital asset approach is appropriate in this case and expert evidence is not necessary for a capital asset assessment: *Gillespie v. Yellow Cab Company Ltd.*, 2015 BCCA 450 at paras. 12, 48-55.
- [103] As previously noted, Mr. Leung's own evidence is that he has had an earning history and trajectory that has been significantly impacted by market place contingencies, including how hard he chooses to work in any given year. Properly assessing future loss of earning capacity in this context, based on an earnings approach, is more riddled with conjecture and assumption than the usual assessment of this nature would entail. As the court reasoned in *Perren*, at paras. 12 and 32, the capital asset method of assessment is more appropriate in cases such as these where the loss is not easily measurable.
- [104] When applying a capital asset approach, as in *Rosvold v. Dunlop*, 2001 BCCA 1 at para. 10, courts consider the following factors from *Brown v. Golaiy*, 1985 CanLii 149 (B.C.S.C.):
1. whether the plaintiff has been rendered less capable overall from earning income from all types of employment;
 2. whether the plaintiff is less marketable or attractive as an employee to potential employers;
 3. whether the plaintiff has lost the ability to take advantage of all job opportunities which might otherwise have been open to her had she not been injured; and
 4. whether the plaintiff is less valuable to herself as a person capable of earning income in a competitive labour market.
- [105] An application of these factors, affirms my conclusion that Mr. Leung has suffered a loss of future income capacity which must be compensated. The unresolved nature of Mr. Leung's ongoing physical limitations arising from the Second Accident, and his chronic pain have rendered him less capable overall of earning income in all types of employment. As well, Mr. Leung expressed a genuine sense of being less valuable to himself, as a person capable of earning income in a competitive labour market. His evidence, and Dr. Sanga's, also supports the contention that he is less marketable or attractive to employers.
- [106] In cases where the capital asset approach has applied, the courts have awarded the plaintiff's annual income for one or more years: *Devito v. Watson*, 2020 BCSC 1106 at para. 103; *Da Silva v. Pollard*, 2019 BCSC 2249 at para. 151; *Pallos* at para. 43. As such, relying on a single year's income, as Mr. Leung's counsel has proposed, is consistent with this case law.

- [107] I have attempted to assess Mr. Leung's future loss of earning capacity by using a reasonable and fair assessment of his annual income, as previous cases have done. Informing this analysis is Mr. Leung's candid evidence that by the beginning of this year, he had improved substantially. While I appreciate that the COVID-19 crisis caused him to suffer a physical set back, I am of the view, in light of Mr. Leung's evidence, along with that of Dr. Sangha, Dr. Ko and Dr. Latimer, that Mr. Leung's symptoms will continue to improve, providing he follows the recommended exercise regime. However, I also accept that Mr. Leung's condition is unlikely to completely resolve and, further, that he will continue to suffer flare-ups in his condition from time to time that are likely to impact his future income earning capacity.
- [108] Mr. Leung's bases his loss of future earning capacity on his average yearly commission income over a seven-year period from 2013 to 2019. His average annual income over this period was \$117,500. However, counsel submitted that, using this sum as a guide, and "allowing for the fact that such an award is not simply a matter of mathematical calculation, Mr. Leung seeks an award of \$100,000 for loss of future earning capacity."
- [109] As stated above, Mr. Leung's annual income in 2016, prior to the Second Accident, reached a high of \$164,098. However, Mr. Leung acknowledged that his income fluctuated from year-to-year because of economic conditions. This evidence is also supported, at least in part, by significant fluctuations in Mr. Leung's income in recent years. In 2015, his commission income was \$108,326, \$55,772 lower than it was in 2016. Mr. Leung's his 2016 income was an approximate 50% increase in one year. By comparison, there was a 20% reduction in his commission earnings (i.e., a \$26,016 difference) from 2018 to 2019, during a time when Mr. Leung indicated his condition was improving.
- [110] In light of the particular factual matrix before me, it is challenging to determine a reasonable and fair assessment of Mr. Leung's annual commission earnings. Also challenging is the appropriate negative or positive contingencies to be applied, including the consideration of market fluctuations which could increase or reduce his income.
- [111] In the unique circumstance of this case, I have concluded that assessing Mr. Leung's loss of future earning capacity by commencing with an average of his annual commission income is a fair and reasonable approach; such an approach captures both increases and decreases in economic market factors. I am also of the view that the fairest and most accurate reflection of Mr. Leung's income, absent the negligence of the Defendants, would comprise an average income derived from the years of 2015, 2016 and 2019. In selecting these years, I have considered that 2019 was a year where Mr. Leung testified he was experiencing a significant improvement in his symptoms, and 2016 was the year he earned his highest income to date. An average of these three years yields the amount of \$125,807.67. I am mindful that 2015 was the year of Mr. Leung's First Accident; however, the evidence before me does not establish a real and substantial likelihood that Mr. Leung's income earning capacity was reduced because of the First Accident.

[112] As discussed earlier in these Reasons, Mr. Leung's pre-existing injuries constitute a negative contingency that must inform my assessment of loss. I am of the view that deducting 35% (i.e., \$44,032.68) is also appropriate in the context of assessing future loss of earning capacity. Deducting \$44,032.68 from the sum of \$125,807.67 yields an award of \$81,774.99. Recognizing that these are not purely mathematical assessments, I conclude that an award of \$82,000 for future loss of earning capacity is fair and reasonable in light of whole of the evidence before me.

4. Cost of Future Care

[113] In *Krangle (Guardian ad litem of) v. Brisco*, 2002 SCC 9, the Supreme Court of Canada provides the following guidance on assessing damages for cost of future care:

[21] Damages for cost of future care are a matter of prediction. No one knows the future. Yet the rule that damages must be assessed once and for all at the time of trial (subject to modification on appeal) requires courts to peer into the future and fix the damages for future care as best they can. In doing so, courts rely on the evidence as to what care is likely to be in the injured person's best interest. Then they calculate the present costs of providing that care and may make an adjustment for the contingency that the future may differ from what the evidence at trial indicates.

[22] The resulting award may be said to reflect the reasonable or normal expectations of what the injured person will require

[114] The test for determining the appropriate award for cost of future care is an objective one based on the evidence and on costs reasonably and medically necessary to restore plaintiffs to there pre-accident condition, insofar as possible; such costs must also be reasonable in the sense that they are costs the plaintiff will likely incur: *Pololos* at para. 144; *Loeppky v. Insurance Corporation of British Columbia*, 2012 BCSC 7 at para. 109; *Peters v. Ortner*, 2013 BCSC 1861 at para. 141; and *Tsalamandris v. McLeod*, 2012 BCCA 239 at paras. 62-63. Each case must be determined based on its own unique circumstances. Further, the assessment of damages for cost of future care is not a precise accounting exercise: *Krangle* at para. 21; *Peters* at para. 144.

[115] In *Dzumhur v. Davoody*, 2015 BCSC 2316, Justice Kent summarizes the law, providing further guidance as follows:

[244] The principles applicable to the assessment of claims and awards for the cost of future care might be summarized as follows:

- the purpose of any award is to provide physical arrangement for assistance, equipment and facilities directly related to the injuries;
- the focus is on the injuries of the innocent party... Fairness to the other party is achieved by ensuring that the items claimed are legitimate and justifiable;

- the test for determining the appropriate award is an objective one based on medical evidence;
- there must be: (1) a medical justification for the items claimed; and (2) the claim must be reasonable;
- the concept of "medical justification" is not the same or as narrow as "medically necessary";
- admissible evidence from medical professionals (doctors, nurses, occupational therapists, et cetera) can be taken into account to determine future care needs;
- however, specific items of future care need not be expressly approved by medical experts... It is sufficient that the whole of the evidence supports the award for specific items;
- still, particularly in non-catastrophic cases, a little common sense should inform the analysis despite however much particular items might be recommended by experts in the field; and
- no award is appropriate for expenses that the plaintiff would have incurred in any event.

[116] I have also considered that the costs awarded must be fair to both parties: *Andrews v. Grand & Toy Alberta Ltd.*, [1978] 2 S.C.R. 229 at 241-242.

[117] Counsel for Mr. Leung asserts that given his client's age and both medical experts' opinions on the chronicity and permanence of his pain, his award for future care is based on an allowance of these treatments on an average of once per month for the next 20 years, which amounts to the following:

physiotherapy: \$80 per month (\$960 annually) x 20 years = \$19,200

chiropractic: \$100 per month (\$1,200 annually) x 20 years = \$24,000

massage therapy: \$140 per month (\$1,680 annually) x 20 years = \$33,600

[118] Mr. Leung relies on Dr. Sangha's opinion that "intermittent access to massage and physical therapy for when [Mr. Leung] has flare-ups of pain and dysfunction would be reasonable." Counsel for Mr. Leung correctly acknowledged that there would be no additional cost to attend a gym in order to continue with his recommended exercises, since he would already have incurred this cost regardless of the Accidents.

[119] Mr. Leung asserts that he may require Gabapentin in the future, depending on how well he can cope with his symptoms of numbness and tingling. He seeks the sum of \$500 for his future prescription costs.

[120] The cost of these treatments and medication total \$77,300. Mr. Leung concedes that negative contingencies apply and, accordingly, he seeks an award of \$50,000 for future cost of care.

- [121] Counsel for the defendants asserts that the treatments that Mr. Leung wishes to attend go far beyond what is recommended by the medical experts. He notes that neither Dr. Latimer nor Dr. Ko recommended any formal treatment. Dr. Ko recommended that the plaintiff continue with weightlifting exercises in combination with low-impact cardiovascular exercise three to five times per week. Dr. Ko did not recommend physiotherapy or message therapy or any other medical treatment.
- [122] The defendants submit that the opinion of Dr. Ko with respect to future treatment should be preferred to Dr. Sangha. Dr. Ko saw Mr. Mr. Leung a month or so later than Dr. Sangha and, in the defendants submission, Dr. Ko' examination is more contemporaneous and reliable, suggesting a lesser degree and frequency of pain.
- [123] In the alternative, the defendants submit that, even if the court were to find that a modest award was warranted for cost of future care, the plaintiff has not provided sufficient evidence about how to quantify such an award. They point out that the only evidence that was led on the subject was Mr. Leung's recollection of the costs of previous sessions with his chiropractor, massage therapist, and physiotherapist. There is no expert report that provides an opinion with respect to the valuation of any cost of future care recommendation, and Mr. Leung did not submit any documents to support his viva voce evidence. For all these reasons, the defendants submit that the plaintiff's claim for cost of future care should be dismissed.
- [124] While the defendant's submissions have some merit, particularly in regard to the opposing opinions of Dr. Ko and Dr. Sangha on future treatment, I am nonetheless of the view that physiotherapy therapy is likely to be medically justified, and is a reasonable measure to restore Mr. Leung to his pre-accidents condition. More specifically, physiotherapy is justified particularly during those times when he experiences what Dr. Sangha referred to as "flare-ups". Notably, neither expert recommended chiropractic treatment. I am not persuaded that both physiotherapy and message is justified, particularly in light of Dr. Ko's opinion where he did not recommend either physiotherapy or message. While I appreciate that expert evidence may not be strictly necessary, Mr. Leung must nevertheless provide persuasive evidence, on a balance of probabilities, that each of the costs of future care he seeks meets the requisite legal tests set out above. I find that he has done so only in regard to the cost of physiotherapy treatments and Gabapentin.
- [125] Mr. Leung proposes the sum of \$19,200 over a 20-year period (i.e., \$80 per month and \$960 annually) for cost of future care relating to physiotherapy treatments. This is a reasonable calculation in the circumstances taking into account that Mr. Leung is still a relatively young man and I have found that his symptoms are not likely to resolve completely. I am also of the view that the \$500 claimed for prescription medication is medically justified and reasonable. Together, these items total \$19,700.

[126] As noted above, counsel for Mr. Leung acknowledges that negative contingencies apply to the award of cost of future care in this case. I am of the view that a negative contingency of 35% is also appropriate to account for Mr. Leung's pre-existing conditions and his anticipated improvement to his pre-Pandemic condition. Notably, Mr. Leung submitted that his back and pelvic area pain prior to the Accidents had resolved and were inconsequential such that they did not constitute pre-existing conditions; this submission was not borne out by the evidence. Accordingly, I find that there is a real and substantial possibility that Mr. Leung would have needed physiotherapy and pain medication even if the Accidents had not occurred. Deducting the 35% contingency of \$6,895, from \$19,700, yields a total of \$12,805. In my view, the sum of \$12,805 is a fair and reasonable award for Mr. Leung's cost of future care.

5. Special Damages

[127] As noted at the outset, the parties have agreed on special damages in the amount of \$10,880.06 for treatment and other expenses incurred as a result of the accidents.

IV. DISPOSITION

[128] Mr. Leung is entitled the following damage awards:

1.

Non-pecuniary Damages:

\$45,500.00

2.

Loss of Past Earning Capacity:

\$35,000.00

3.

Loss of Future Earning Capacity:

\$82,000.00

4.

Cost of Future Care:

\$12,805.00

5.

Special Damages:

\$10,880.06

TOTAL:

\$186,185.06

[129] Subject to any submissions, the parties may wish to make on the question of costs, and absent any circumstances of which I am unaware, Mr. Leung is entitled to his costs at Scale B.

"MORELLATO J."

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