

CANADA / JUDGMENT

Li v. Dong

2023 BCSC 472

COURT

Supreme Court of British Columbia

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2023 BCSC 472 Li v. Dong

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Li v. Dong,

2023 BCSC 472

Date: 20230328

Docket: M211153

Registry: New Westminster

Between:

Kar-Wing Chester Li

Plaintiff

And

Yang Dong and Cun Fa Dong

Defendants

Before: The Honourable Justice Schultes

Reasons for Judgment

Counsel for the Plaintiff:

B. Fitzpatrick

Counsel for the Defendants:

H.S. Rehlan

Place and Date of Trial:

New Westminster, B.C.

June 27-30, 2022

Place and Date of Judgment:

New Westminster, B.C.

March 28, 2023

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Introduction

- [1] This trial dealt with the consequences to the plaintiff Mr. Li of a motor vehicle accident that occurred on April 23, 2018 in Vancouver.
- [2] Liability on the part of the defendants for the accident was admitted. The defendants agree that Mr. Li suffered myofascial tissue injuries to his neck, back and left knee as a result of it. They also agree with the amount of past wage loss and the special damages that he claims.
- [3] Although their counsel brought out some inconsistencies between Mr. Li's testimony and his previous statements in cross-examination, the defendants ultimately conceded that he was a credible and reliable witness.
- [4] As a result, the contested issues are:
- The likelihood of further improvement in Mr. Li's symptoms, as it affects the amount of non-pecuniary damages;
 - Whether he has failed to mitigate his damages by not seeking additional treatment to this point;
 - His entitlement to compensation for his past loss of opportunity to earn overtime, or for his use of sick bank time to cover accident-related absences;
 - The extent of any impairment of his future earning capacity; and
 - His entitlement to costs of future care.

Mr. Li's Narrative

Background

- [5] He is 45 years old. He lives in Vancouver with his intimate partner, Ms. Chan.
- [6] He obtained a Bachelor of Science Degree in Biology from the University of British Columbia in 1999, and a diploma in the Medical Laboratory Science program at the British Columbia Institute of Technology in 2007.
- [7] After graduating from BCIT he worked in several different hospital labs in the lower mainland. Since 2017 he has been a laboratory technologist at Vancouver General Hospital. He currently earns about \$80,000 per year in that position.

Pre-Accident Life

- [8] He described himself as having been "pretty active". He would ride his bike for at least an hour per week, and sometimes went on longer rides around the city, for up to six hours at a time. He was an avid walker, and would regularly travel on foot from his home in East Vancouver to downtown or Stanley Park. He took up longboarding in 2008, and did it regularly from then on. In the winter, he snowboarded at a local mountain, where he held a seasons' pass, once or twice a week.
- [9] He was also an enthusiastic traveller. While he was still a casual employee he would take advantage of that flexibility to go on extended vacations. He took four or five months off for that purpose in 2008, nine months in 2009-10, and three to four months per year for the following three years. In 2013 he obtained a full-time permanent position, and after that could only travel to the extent of his allotted vacation time.
- [10] His vacations were physically active ones, involving pursuits like diving and snorkelling.
- [11] In his home life, he derived great satisfaction from cooking, especially seeing the pleasure that others took in eating the meals he had prepared. When he came back from vacation, he would attempt to reproduce meals from the countries he had visited.
- [12] He and Ms. Chan shared the household tasks equally, with whoever had time taking on the task at hand, except that he did all of the regular cooking. He was physically capable of carrying out everything that was required of him around their home.
- [13] He also considered himself to have been in "pretty good" health. His family doctor had retired in the mid-2000s, so he went to a walk-in clinic when the need for medical care arose. For much of the relevant post-accident period he saw the same doctor at that clinic.
- [14] He had no difficulties with the physical requirements of his job at the VGH lab. This included having the capacity to work overtime when required. He regarded it as the ideal job for him, and planned to work at it until he is 65.

The Accident and Immediate Effects

- [15] It occurred as Mr. Li was driving home from work, east along 16th Avenue. When he reached the intersection of 16th with Quebec Street, his vehicle was struck on the front passenger side by the defendant's vehicle, which had been travelling north on Quebec but did not stop for the stop sign in its direction. The impact pushed Mr. Li's vehicle across the oncoming lane and onto the sidewalk on the opposite side of 16th.
- [16] The fire department attended, but he did not require any medical treatment from them. His vehicle was not drivable and had to be towed, so he walked to Ms. Chan's workplace to get a ride home.

- [17] Right after the accident he noticed that his left knee had been injured. He believed that it had struck the steering wheel or the bottom of the dashboard when the impact occurred.
- [18] The next day he felt "soreness and stiffness" in his neck, back and left shoulder. He began getting headaches in the back of his head, from the "tightness" in his neck and back. His knee remained sore.
- [19] He saw a doctor for the first time on the second day after the accident, at a walk-in clinic. It had been too late to go to a clinic on the day of the accident, and on the day after it he wanted to wait and see if his injuries would improve.
- [20] The accident occurred on a Monday. He took the Tuesday and Wednesday off, but went to work on the Thursday, because he was supervising a student at that point so he did not have to do any of the work tasks himself. When he went in on that Thursday he concluded that being at work was not good for his injuries, so he ended up taking the Friday off.

Treatment and Progress of the Injuries

- [21] He began physiotherapy sessions the week after the accident. For the first three months he went twice per week, then he reduced it to once per week. At that point he added weekly sessions with a kinesiologist, which included being taught exercises and stretches that he could do on his own. The kinesiology continued on a weekly basis until January 2019.
- [22] He agreed that in October 2018 he had told a doctor at the walk-in clinic that the physiotherapy and "active rehab" (kinesiology) were "making a difference" with respect to his symptoms, and that the injury to his neck was "nearly resolved".
- [23] He also testified that his knee pain improved with physiotherapy and doing the exercises that he was taught by the kinesiologist. Unfortunately, with the onset of COVID the gym he used in his building was closed, and he was unable to continue with those exercises. (He and Ms. Chan have since moved to a building closer to VGH, which does not have a gym.) As a result, while his knee pain has decreased overall from the level immediately following the accident, it deteriorated somewhat when he was unable to exercise on his own.
- [24] He has constant, low-level pain in his neck, which he has gotten used to. If he were to press on his neck area it would increase the pain.
- [25] His back pain is ongoing, and is aggravated by the physical requirements of his job. If he "overworks" his back he ends up with a sensation like burning knives being jabbed between his shoulder blades.
- [26] The headaches from neck and back tightness are not as bad as they were originally. They continued until the summer of 2021 then stopped, only to return in May 2022, the month before this trial.

- [27] His shoulder is actually a little worse than it was originally, now making clicking and cracking noises in certain positions.
- [28] The only medication he takes for his symptoms is Advil or Tylenol. He described the use of them as occasional, or intermittent. He is aware that prolonged use of these medications is not healthy. With respect to dosage, he said that he "takes whatever is recommended on the bottle".
- [29] Although physiotherapy and kinesiology were effective in addressing his symptoms, he stopped pursuing them when they were no longer funded by the Insurance Corporation of British Columbia (I infer that he was describing his Part 7 benefits.) This was despite the physiotherapist and kinesiologist telling him that he should continue with these treatments.
- [30] When it was put to him that the only reason he did not continue with the treatments is that he did not want to pay for them up front, he said that "money would be a problem", but he initially maintained that his unwillingness to pay up front was "not the only reason". He explained that his care providers tried to get funding for more sessions, and when that was not approved, he "just stopped". He did not "really know" at that point that he could continue to pay privately, because he had not been in that situation before.
- [31] When the proposition about his unwillingness to pay up front was put to him again, he responded, "Yes, you could say that money was a problem." He added that he "did not really have that much money" to be able to pay for these treatments himself, and it would take a long time to recover them through the present court action.
- [32] He also did not try to get these treatments funded by his employee insurance plan, which had covered the physiotherapy on an unrelated repetitive strain injury that he suffered in the workplace. However, he then recalled receiving a letter from the plan saying that treatment for injuries that had been caused by third parties would not be covered.
- [33] He agreed with the suggestion in cross-examination that as of the trial dates he had not seen a doctor in relation to his injuries from the accident for more than two years. He explained that he saw no point in raising his symptoms again, because the doctor had initially recommended physiotherapy and kinesiology, which he would have continued with but for the funding problem.
- [34] He also explained that he has an auto-immune condition that affects his kidneys, and gyms are one of the riskiest places for COVID infection, so since the pandemic he has not used any other gym facilities to replace the one in his previous building. As a result, biking and weight equipment have been unavailable to him. Even after COVID vaccination became mandatory for gym attendance, he was not willing to take a risk with his existing condition.
- [35] As to the specific benefits of a gym, he agreed that he had found a stationary bike helpful with his accident symptoms when he had access to one in his previous building, because he could adjust the intensity of the riding to suit his needs.

- [36] He still does stretching exercises on his own. In addition, he has been able to walk to work since he and Ms. Chan have moved closer to VGH, and this has allowed him to recover some strength in his knee.
- [37] He was also cross-examined on the rehabilitation recommendations that were made by the expert witnesses in this trial.
- [38] He was not aware that Dr. le Nobel, who provided a report on behalf of the defendants, had recommended "progressive exercise-based multidisciplinary rehabilitation", including kinesiology, until he was provided with Dr. le Nobel's report "a month or two" before trial. Until then, he was also unaware that Dr. le Nobel had recommended facet joint injections to relieve his symptoms.
- [39] He received the report from one of the expert witnesses called on his behalf, the chiropractor Dr. Jung, in 2020. He did not inquire about chiropractor treatments with his own doctor (at the walk-in clinic, I took counsel to mean) because it was "during the height of COVID", and he was not looking to have any one-on-one therapeutic sessions at that time. He emphasized that while he wanted to get better, he had to weigh that wish against the problems with his immune system and the risk of COVID.

Effect on Lifestyle

- [40] Unlike their "50/50" domestic arrangements before the accident, Mr. Li now does the cooking, and attempts to assist with the dishes, but Ms. Chan has to do all of the other household tasks. Vacuuming, dusting, laundry and taking out the garbage all involve neck positions or arm movement that aggravate his symptoms. Cooking, especially chopping, and washing the dishes also have that effect, but I took him to be saying that he manages to carry out those tasks anyway.
- [41] He still enjoys cooking, but does not make large family meals anymore. Ms. Chan likes soups and stews, but he avoids making them, because they are labour-intensive and require him to stand over a pot and stir, which strains his shoulder blade and neck. He cooks simpler things, and uses an air fryer more.
- [42] His cycling has decreased - as of the trial dates in June 2022 he had not gone for a ride that year. His most recent ride was the previous summer, for one or two hours. Holding on to the handlebars tires his back and pedalling makes his knee sore, he explained, and he is only able to ride for about an hour before the pain increases. As a result, he prefers activities that involve less impact, like going for walks.
- [43] He has given up longboarding, concluding that his body is not strong enough to stay on the board, and take falls when necessary. The particular problem is his left leg, which is responsible for pushing the board forward and braking, and which he no longer believes is strong enough (due to his knee problem, I took him to mean).

- [44] He fell off of his longboard and landed on his hand in December 2019, eventually requiring a trip to the emergency ward to determine whether his hand was broken (it turned out to be a soft tissue injury, which has healed). He agreed that he had felt "well enough" by then to try longboarding again, but pointed out that he had suffered the injury when he was just attempting to go around the block on his longboard.
- [45] He tried snowboarding again in 2022, but could only manage to do four runs before having to stop. It then took three weeks for his left knee to return to its "normal" post-accident level of soreness.
- [46] With respect to recreational activities on vacation, he has given up diving because he believes that the tanks would be too heavy for his back. He still snorkels, but cannot do it for as long a period because the swimming involved strains his back. He also tries to walk as much as possible, but when doing so he needs to take more breaks than previously.
- [47] He is able to decrease the pain caused by the physical activities that he has to engage in somewhat by resting.
- [48] In addition to these physical symptoms, he also described experiencing some anxiety when driving. This takes the form of being extremely vigilant and cautious about what is happening on the road. Given how his accident occurred, he becomes extremely concerned about other drivers running stop signs or red lights.

Effect on Work

- [49] He works Monday to Friday for three weeks out of four, and then Thursday to Sunday on the fourth week. The shifts are eight hours long, with two 45-minute breaks.
- [50] In general, the job requires him to stand all day, and the tests that he performs involve hunching over, with his arms and shoulders forward, often for extended periods.
- [51] He said that his lab gets busier every year. Efforts have been made to alleviate the workload, but not much has changed so far. The effect on him of these increasingly busier work days is to increase the soreness in his neck and back, and to bring about more frequent episodes of the stabbing sensation between his shoulder blades.
- [52] To explain more specifically how his work tasks aggravate his pain symptoms (in addition to the effects on his neck and back of maintaining the required posture when carrying out the tests that I have previously described), he reviewed photos of the work stations within his lab, which are called "benches".
- [53] Different tests are carried out at each bench. A large number of tests has to be completed during each shift. Some of them have to be completed very quickly, because of their importance to the patients involved. The overall urgency of the testing is increased by the fact that all of the requests that come in have to be completed by a cut-off time for his shift, otherwise the doctors who have made the requests will not get the results that day. More

generally, there is the requirement that meticulous attention be paid to each test, so that the results are accurate.

- [54] Several of the tasks (for example, spinning blood samples in a centrifuge, loading samples into racks of a testing machine, and capping test tubes) involve repetitious manual tasks that put particular strain on his neck, back and shoulder. The requirements of prolonged standing and constant walking back and forth between machines also puts strain on his neck, back and knee. These are all job requirements that he was previously able to manage without difficulty.
- [55] As I have mentioned, he had planned to remain at the VGH lab for the rest of his working life (which he expected would have been until age 65), but in light of these pain symptoms he considers it unlikely that he will be able to continue for that long. Specifically, he anticipates that his current levels of pain will only increase as he ages.
- [56] He agreed that to this point however, his supervisors have never suggested to him that they are not satisfied with his performance.
- [57] Although there are some part-time positions in the lab, his position is classified as full-time, and he did not believe that it could be changed. He would have to approach his union about that possibility.
- [58] He has also not requested any accommodations from his supervisors to address the tasks that aggravate his pain symptoms. Nor has he asked his union to assist him in that regard. He was skeptical that any accommodations would be available even if he made such a request - he has observed a colleague having to do all of their previous tasks after having been injured in a motor vehicle accident that left them with a limp. He admitted that he was not familiar with the process of seeking accommodations however.
- [59] While he accepted the hypothetical possibility that adding staff would reduce his workload and make it easier for him to function in his job, he said that in practice it has proved difficult to increase the number of positions in his lab, because of the funding issues involved. He gave the example of their afternoon shift, which has not received any additional positions even though their supervisors are aware that it is extremely busy.
- [60] As I mentioned previously, in 2019 he suffered a repetitive strain injury to his wrist from a manual task (moving test samples between containers using a pipette) that has to be performed very quickly at a particular bench. He took sick time because of the injury, in August of that year, and his safety officer assisted him in contacting WorkSafe BC. His workplace injury claim was ultimately denied, but improvements were made to the equipment and staffing of that bench. He is also not assigned to it as much as he was before his injury.
- [61] His wrist has recovered, and it is not a factor in his ongoing ability to work.

- [62] The machine that was added to do the pipetting at that bench has not turned out to be much help however, because it frequently fails to analyze some of the samples, and is actually slower than performing the manual process. As a result, he and most of the other technologists choose not to use the machine. In addition, the pipetting of samples for in-patient tests still has to be done by hand.
- [63] Mr. Li did not agree with the suggestion that this workplace injury provided an example of a situation in which he had been able to request "modifications" from his supervisor to address an injury. He said that all he had asked for initially was to be assigned to that bench less often, but nothing happened until WorkSafe became involved. Although being assigned to that bench less often has a beneficial effect on his back pain, he pointed out that working at the other benches cause him back pain too.

Loss of Overtime and Use of Sick Days

- [64] Under their collective agreement, lab technologists receive one and a half times their normal hourly rate for the first two hours of overtime, and double time for any hours that they work in addition to that. If they have to miss their meal break when performing overtime, which he said is unusual, they receive two and a half times their normal rate. Overtime is normally assigned in four-hour blocks, and is available to employees in order of their seniority.
- [65] In contrast to his pre-accident capacity, he said he prefers not to accept overtime when it is offered, because an additional four hours of work is "too much" for his back. He only accepts it when the employer is "absolutely desperate", and cannot find anyone else. This is reflected in his payroll records, which show only eight hours of overtime between the date of the accident and August 2021. In contrast, he did nine hours just in the period from January to April 2018, all during the two-week pay period ending on April 5. He was not prepared to accept the suggestion that his overtime frequency was the same as that January to April period for his entire pre-accident employment at VGH, without first being shown the records.
- [66] In the absence of his back problems, he expected that he would have worked overtime approximately four hours every two weeks. After subtracting some overtime hours that he was able to work in 2022, and 20% for tax, his net past loss of overtime to the trial date would be \$21,967.68.
- [67] He is also entitled to a certain number of hours of sick leave for each year. Although he continues to be paid his hourly rate according to his job description, for those days, there is a slight degree of under-compensation at times, because when he works on the bench that has the large amount of pipetting, which has higher job classification attached to it, he is paid \$1.00 per hour more.

- [68] He reviewed his payroll records in the evidence, which spanned the period from the week of the accident to August 5, 2021, and identified the dates on which he had drawn on sick leave because of accident-related pain symptoms. He recalled some additional days between the end of the period covered by those records and the trial on which his symptoms had also required him to miss work.
- [69] The total gross amount of sick pay that he claimed due to the accident as of the trial was \$4,646.56. (The terms of his collective agreement require him to repay to the employer any portion of a personal injury award that compensates him for paid sick time, so this aspect of his claim is subrogated. Since it is the employer who will ultimately be reimbursed, his counsel submits that the gross amount involved should be awarded.)
- [70] His approach to the use of his sick time is to assess his pain level the night before a shift, and to call in sick if the level is increasing. He takes this approach because trying to work on top of an already increasing pain load would make him too uncomfortable to carry on.
- [71] He has not applied for any long-term disability benefits that may be available under his collective agreement in relation to these accident symptoms.

Potential Supporting Evidence

Ms. Chan

- [72] She has observed that Mr. Li continues to experience pain in his neck, shoulder, back and left knee. He also has headaches, although not as frequently as he did closer to the accident, and suffers from anxiety when driving.
- [73] She provides him with neck and shoulder massages to address his symptoms in those areas, and they have purchased a vibrating massage gun to assist in the process. She has also seen him rub his own neck when he starts cooking, or stopping to do that part-way through cooking.
- [74] She described him engaging in stretching when he gets up in the morning. If work has been especially busy, he will also stretch when he gets home. In the evening he takes a shower and then does stretches and other exercises for 30 to 45 minutes afterwards, based on "sheets" that were given to him by a physiotherapist.
- [75] Mr. Li's walking has been affected by his symptoms, she said. Before the accident, he walked quickly and could walk "all day long". Now he is unable to go for such long distances, and needs to stop and rest, to rub his knee or stretch his shoulder. She also confirmed his lack of success in returning to longboarding and snowboarding.
- [76] Before the accident, Mr. Li was a "pretty easy-going, positive, happy person", whereas she now finds that he becomes more easily irritated.

- [77] She confirmed Mr. Li's evidence about their post-accident shift from an equal sharing of the household duties to her taking responsibility for everything except cooking. She also confirmed that his cooking has transitioned from elaborate, sometimes multi-dish meals that took several hours to prepare, to simple items, such as stir-frys.
- [78] On the work front, Ms. Chan confirmed the post-accident increase in Mr. Li's use of his sick days, which he now takes whenever he cannot manage the physical demands of his job. She believed that occurred about once per month. The most recent example she recalled was in April 2022, when he took time off to rest because of headaches.
- [79] As to the actual physical demands of his job, Ms. Chan was able to confirm, based on her own duties as a lab technologist, the challenges that he described in carrying out the tests at the benches depicted in the photos. These included having to spend most of the day standing, to look down constantly while carrying out detail-oriented tasks, to pipette a large number of samples under time pressure, and to put on and remove a variety of sample container lids.

Dr. Jung

- [80] Although his initial training was as a chiropractor, he was qualified as an expert in the diagnosis, treatment and management of chronic pain.
- [81] In addition to his initial chiropractic training, this finding of expertise was based on, among other things, (1) his completion of a three-year postgraduate program in rehabilitation from a chiropractic college, and a certificate program in pain management from a rehabilitation medicine school; (2) his extensive continuing education on various aspects of chronic pain; and (3) his practice as a chiropractic specialist in physical and occupational rehabilitation on referral from medical practitioners, which is predominantly concerned with complex pain arising from motor vehicle accidents.
- [82] He rejected the suggestion that his specialty was solely chiropractic, or that he would necessarily defer to the opinion of a physiatrist on anything other than the medical technique of carrying out injections into the facet joints of the spine. While he might "possibly" also defer to a more certain prognosis from a physiatrist who has "a clinical practice treating outpatients for back pain", he pointed out that his work is referred to him by just such clinicians.
- [83] He examined Mr. Li in July 2019, and his report was prepared in March 2020. He believed that its completion was delayed because Mr. Li's former counsel wanted to send him some documents, which he never actually received. As a result of this omission, his opinion was based solely on the history he obtained from Mr. Li and his physical examination.
- [84] Based on his examination and the history he received from Mr. Li, he expressed the opinion that as a result of the accident Mr. Li had suffered soft tissue injuries to his neck, mid-back and low back, and facet joint injuries to his neck and mid-back.

- [85] His physical examination revealed tenderness to palpation and hypertonicity (hardness of muscle tone) in various muscle groups at the cervical (neck) and thoracic (upper-back and mid-back) levels, with those signs being more prominent on the right side of Mr. Li's body.
- [86] He also found that Mr. Li had a limited range of motion in his neck, mid-back and low back. What was more significant than the limits themselves, he explained, was the extent to which they differed from one side of his body to the other.
- [87] Finally on the issue of Mr. Li's soft tissue injuries, Dr. Jung's testing of his strength in various areas revealed weakness in his neck, his grip and his lifting capacity - the last of these measures being an aspect of his strength in the activities of daily living.
- [88] Dr. Jung identified the facet joint issue based on a lack of "fluid motion" in some of the vertebrae in Mr. Li's cervical and thoracic spine. He was able to reproduce some of Mr. Li's neck and mid-back pain by putting pressure on these areas, which suggested to him that the problem originated in the facet joints.
- [89] Mr. Li's responses to a series of questionnaires that Dr. Jung provided were consistent with these findings. He fell within the category of patients who can cope with most activities of daily living, and his level of pain disability fell within the "mild" range. Dr. Jung assessed his chronic pain severity as 1 or 2 out of a maximum of 4.
- [90] Despite these generally positive results, Mr. Li also demonstrated a degree of "caution or hesitation" about engaging in certain physical activities. Dr. Jung thought that this might account for his low score on the lifting test, which was inconsistent with his apparently normal back and core strength.
- [91] With respect to treatment, Dr. Jung was optimistic that Mr. Li could reduce his pain and increase his function. He recommended that Mr. Li receive:
- additional physiotherapy, including trials of cold laser and/or shockwave therapy. Those particular treatments have been found "to promote a psychological change that can potentially reduce an individual's pain complaint." Ideally, the physiotherapist involved would have experience in dealing with patients who have "fear avoidance" behaviours with respect to physical activities, or kinesiophobia (an excessive fear of reinjuring oneself through movement);
 - massage therapy, to reduce the hypertonicity of his muscle tissues - three times a week for several weeks, twice a week for several weeks and then tapering down from there; and
 - chiropractic treatment, specifically spinal manipulation, which Dr. Jung has found triggers a pain inhibit response, in addition to increasing joint mobility. A schedule similar to the one he had recommended for massage therapy would be appropriate.
- [92] In addition, he recommended that Mr. Li:

- Maintain his existing level of exercise, and return to his full level of pre-accident recreational activities. Because he may not be able to tell the difference initially between activities that cause him pain and those that are actually injuring, it will be all the more important that he receives the support from a physiotherapist who is trained in dealing with that concern.

- Purchase a water-based pillow, which Dr. Jung finds in his clinical practice is capable of reducing similar neck and back complaints (it would also address his insomnia, a further concern that emerged from the questionnaires).

[93] In Dr. Jung's view a beneficial "synergistic" effect on Mr. Li's symptoms could be achieved if the physiotherapy, massage therapy and chiropractic treatment could be provided at "relatively the same time".

[94] Acknowledging the inherent challenges of forecasting any patient's medical outcome, he did not identify any "red flags" indicating that Mr. Li is unlikely to recover fully from his injuries. On that basis, he expected that Mr. Li would recover. That said, he added that while 80% of the population makes a full recovery from soft tissue injuries that were sustained in motor vehicle accidents, 5-15% develop chronic pain despite the absence of any red flags, and despite their compliance with an exercise program. He also stressed that no matter what he recommends, the results will not be the same for all patients who have the same injuries.

[95] The other caution that Dr. Jung raised is that both the medical literature and his clinical experience indicate that most patients in this situation reach a plateau of recovery about two years after the accident. As of the date of his report, Mr. Li's two-year mark was rapidly approaching. Nevertheless, he expressed the opinion that Mr. Li falls into a category of patients for whom that "window of opportunity" to improve his symptoms can be extended by up to eight months, because they have a positive attitude and healthy pre-accident lifestyle.

[96] When it was suggested to him that Mr. Li would be farther along in his recovery if he had continued with physiotherapy from the point that he stopped, Dr. Jung agreed that he would have continued to improve, "and then reach[ed] a plateau". When it was further suggested that there was no way to know that a plateau would actually be reached until that treatment was taken, he referred to the "general understanding" that patients who still have symptoms after the two-year mark do not completely recover. He clarified that at the time he saw Mr. Li he put him in the 80% of patients that do recover fully, but if he were to see him again, after the two-year period has passed, Mr. Li would likely fall within the 5-15% (if Mr. Li still has symptoms, I took him to mean).

- [97] With respect to the date of his report, Dr. Jung acknowledged that Mr. Li was still within his two-year window for recovery at that time, and that he was not now offering the opinion that Mr. Li had plateaued in his recovery. Mr. Li's symptoms could have worsened or improved since then, and he was not in a position to comment on the current prognosis. He agreed that Dr. le Nobel, who saw Mr. Li in February of 2022, was in a better position to comment on that subject.
- [98] In response to the suggestion that Mr. Li is the "author of his own misfortune" if he has not engaged in the rehabilitative steps listed in the report, despite being one of those patients to whom a longer window of opportunity applies, Dr. Jung pointed out that he does not control what happens to his reports, which are not direct recommendations to plaintiffs. In particular, he does not know if plaintiffs read them.
- [99] When pressed on the benefit to Mr. Li of having followed his recommendations, Dr. Jung resiled somewhat from the apparent confidence in the efficacy of those measures that he had expressed in his report. He said that all of the treatments he had recommended "had the potential to be important", although the physiotherapy had been shown to be effective in managing "some of [Mr. Li's] pain". He explained that although physiotherapy was helpful, its benefits were "short-lived", and that even if Mr. Li had continued with physiotherapy it would not have resolved his symptoms completely. Instead, it offered only "temporary symptomatic pain relief".
- [100] He expanded on this point in re-examination, noting that improving a patient's function is a process of trial and error, and that he does not know when making his recommendations which of them will work. In the context of a single examination of a plaintiff, all he can do is "lay out things for the person to try".
- [101] He did not see there being any potential benefits of further kinesiology, because Mr. Li already has good low back and neck strength, and he did not think that continuing with it would have made a further difference in Mr. Li's recovery.
- [102] He said that, in essence, "everything could have been done" (correctly, I took it) and Mr. Li might still have fallen into the 5-15% who will not improve.

Dr. Waseem

- [103] He is a physiatrist, whose practice includes the assessment and treatment of patients who suffer from, among other conditions, myofascial pain and chronic pain. He examined Mr. Li in March 2022. He also had the benefit of Mr. Li's medical records and Dr. Jung's report.
- [104] His examination revealed tenderness to palpation in the muscles of both sides of the neck, upper-back and mid-back areas, as well as stiffness, increased muscle tone and "trigger points" (muscle knots) in those areas. Unlike Dr. Jung, he did not find any abnormal restrictions in the range of motion in these areas. Nor did he make any finding suggestive of facet joint problems.

- [105] By compressing the patellofemoral area of the left knee (where the kneecap and the femur meet), he was able to reproduce Mr. Li's pain symptoms in that area.
- [106] He said that Mr. Li's headaches were not of "major clinical concern", as Mr. Li was not reporting them to be a particular source of disability. He also reported that Mr. Li's driving anxiety had resolved.
- [107] His opinion was that Mr. Li suffers from (1) chronic myofascial pain of the cervical and thoracic spines, as a result of "sprain/strain" to the soft tissues in those areas; and (2) chronic left knee pain secondary to "patellofemoral syndrome", as result of a "contusive" (bruising) injury to that knee. He attributed both conditions to the accident.
- [108] He expected that these injuries would "linger" and result in functional limitations to Mr. Li's tolerance for cervical flexion (bending his neck forward) and repetitive movements of his upper extremities. These limitations are permanent, he said. He did not identify any particular limitations arising from the knee problem.
- [109] Given the length of time that Mr. Li has had these issues and the way in which they have progressed, Dr. Waseem believed that it was unlikely that he would fully recover from them, but rather that he would continue to experience pain. On a more positive note, there were no indications of a future decline in his condition, and he had demonstrated resilience by "largely resuming most of his normal activities".
- [110] Despite the pain that Mr. Li experiences, Dr. Waseem found that there was "no significant disability", although in cross-examination he acknowledged that Mr. Li is "partially disabled" because there are things that he cannot do for as long as he could before the accident.
- [111] He expected that Mr. Li would experience limitations at work as a result of the reduction in his tolerance for certain movements, and that he would need to modify his recreational activities.
- [112] The expected nature of these workplace limitations was that there would be no alteration in the types of things Mr. Li could do, but that he would be able to do them less frequently, because of the pain involved.
- [113] He was not prepared to accept the suggestion that the absence of negative indications for the future means that "there is hope" that Mr. Li can "get back to normal". Mr. Li's situation is a "mixed bag", because he is functioning at a high level, but with some degree of ongoing pain. Rather, he was optimistic that Mr. Li will be able to maintain his current level of functioning.
- [114] His treatment recommendations for Mr. Li were "self-directed exercises and sporadic use of over-the-counter analgesics". He noted in that regard that Mr. Li's condition had not deteriorated, despite not having had any physiotherapy since 2019, that he has a regime of home exercises that he had been taught, and that his use of Advil is sporadic.

[115] Crucially in terms of future treatment requirements, Dr. Waseem rejected the proposition that chronic pain symptoms are due to deconditioning and muscle imbalance. Chronic pain is complex and multi-factorial, he said, and those are not the reasons for Mr. Li's chronic pain. He displayed no evidence of muscle atrophy, he had not gained significant weight, and he was still engaged in, rather than avoiding, some form of energetic activity.

Defendants' Evidence

Dr. le Nobel

[116] He has been a medical doctor since 1975 and qualified as a physiatrist in 1984, after initially pursuing training in orthopedics. 95% of his current practice consists of providing medical-legal reports. He examined Mr. Li in February 2022.

[117] Like the other expert witnesses in this case, his opinion is that Mr. Li's pain is due to myofascial tissue injuries. He identified that pain as being in the "left shoulder girdle, spinal and paraspinal cervical, thoracic interscapular, and lumbar" areas.

[118] He also believed that the facet joints in the lumbar spine were "potential pain generators". He was able to provoke pain in that area by having Mr. Li bend backwards, which puts those joints under increasing pressure.

[119] Like Dr. Waseem, he concluded that Mr. Li's left knee pain was "patellofemoral" in its origins.

[120] He said that Mr. Li is "deconditioned [,] based on his report of reduced activity level and reduced activity tolerance". He also referred to Mr. Li's "obesity", which he clarified related to a protruding stomach. However, Mr. Li's body-mass index, a common measure of obesity, is in the normal range.

[121] Despite the three years and ten months that had elapsed since the accident by the time he examined Mr. Li, he said that the prognosis for functional improvement is "favorable". In his opinion, diligent application of an exercise-based rehabilitation program should allow Mr. Li to "return, perhaps with some modification, to most of all of what would, by now, be his level of participation in his pre-collision activities".

[122] Such a program would involve:

- Design by a kinesiologist, including instruction on correct technique, incremental increases, and substitute exercises;
- Mr. Li keeping a diary of his compliance with it;
- Non-impact cardiovascular fitness and strengthening of the essential supporting muscles using a variety of different kinds of equipment, in particular weights and resistance devices;

- Measures to manage the provocation of his symptoms that will inevitably result from the exercises; and

- Reconfiguration of the program if the symptoms that get provoked, such as to Mr. Li's neck, are too severe.

[123] He also recommended that Mr. Li have "liberal access" to an exercise facility, and that he be provided with a range of exercise equipment for his home, "pain modulators", and guidance from the kinesiologist several times a month for 12-14 months. In cross-examination, he clarified that he meant the equipment to be an alternative to the exercise facility, in light of Mr. Li's reluctance to exercise in a public place, and that it was "not really practical" to have the elaborate types of gym equipment that he had mentioned in his report in Mr. Li's home, other than a frame to mount his bike on so he could ride it as a stationary one.

[124] In addition, he said that it would be beneficial to have an occupational therapist assess Mr. Li's home and workplace to identify any "structural or procedural changes or equipment" that would reduce his musculoskeletal strain.

[125] In response to questions in cross-examination, Dr. le Nobel provided costs estimates for some of the services and equipment he had recommended - the gym membership, assistance from a kinesiologist, walking poles, weights, and the stand for Mr. Li's bike.

[126] In addition, injections of a local anesthetic into Mr. Li's lumbar facet joints would also be useful, both to determine to what degree those joints are generating his pain, and because the anesthetic lasts approximately six months, during which time the pain relief that Mr. Li experiences will assist his active rehabilitation.

[127] He said that the overall length of this rehabilitation program "will best be known in time".

[128] In cross-examination, Dr. le Nobel agreed, in light of the more than four years that had passed since the accident by then, that Mr. Li's symptoms "had certainly been going on for a long time", and that they would "fit anyone's definition of chronic pain".

[129] As to the likely success of the recommended rehabilitation program, He said that it should lead to functional improvement and that it "may" make Mr. Li's chronic pain better. However, he also agreed that "more than likely [Mr. Li] will still have some pain ongoing."

[130] He explained in re-examination that these responses did not alter the prognosis in his report. He emphasized that Mr. Li would "probably have some degree of pain", but that he would anticipate that the program would improve his function, and allow him to return to some or all of his activities. As a result, Mr. Li's "outlook would improve and his suffering would be less".

Essential Findings of Fact

- [131] The concession on behalf of the defendants that Mr. Li was a credible and reliable witness, and that he has essentially suffered the injuries that he claims, was a sensible and appropriate one. His narrative of events seemed completely straightforward, as did his responses when he was confronted with contradictory propositions. The limited number of prior inconsistent statements that were put to him had to do with the progress of his injuries, a matter that is largely common ground between the expert witnesses who saw him most recently. While his testimony did not necessarily require any additional support in light of its plausibility, Ms. Chan's testimony was largely consistent with it.
- [132] Based on my acceptance of Mr. Li's evidence, I would characterize the severity of his symptoms as normally in the mild to moderate range of severity, with greater severity when they are aggravated by the physical demands of his job, or other physical activity. They have interfered to a meaningful degree with his former recreational activities and his contribution to household duties. He is able to fulfil his work requirements, but at the cost of aggravating some of his symptoms[1].
- [133] The significant factual disputes in this case arise from the expert evidence, specifically on the question of whether, and to what extent Mr. Li's pain symptoms and level of functioning can be improved by further active rehabilitation, as Dr. le Nobel recommended.
- [134] On those issues, I am unable to give any significant weight to Dr. Jung's opinion. First of all, it is quite stale in relation to the trial date - the examination on which it is based was carried out almost three years earlier - and he quite properly deferred to a more recent prognosis. More significantly, his strongly-qualified responses in cross-examination on the likelihood that the various treatments he had recommended in his report would improve Mr. Li's function were in stark contrast to the optimistic forecast he had offered in the report. I was left with the impression that he was expressing less confidence in the success of those recommendations because Mr. Li had not followed them, which demonstrates an unacceptably strategic approach to giving expert testimony. Even if that was not his intention, the unexplained lack of consistency between his report and his answers on cross-examination would undermine his opinion to the same extent.
- [135] Dr. Waseem and Dr. le Nobel both struck me as careful and balanced expert witnesses. Neither of them displayed any discernible partisanship, and they both engaged with cross-examination in a thoughtful way.
- [136] They made different findings on the question of whether Mr. Li's facet joints may be contributing to his pain, and therefore whether his lumbar area is involved. They also differed on whether Mr. Li's left shoulder is a particular source of pain.
- [137] I note that low back pain was not prominent in Mr. Li's testimony about his symptoms, and that he referred to his shoulder only in relation to the noises it makes when he moves it, so not much turns on these differences, in terms of assessing the overall impact of the

accident on him. If it were necessary to resolve them, I would say that because Dr. le Nobel described the lumbar facet joints as "potential" sources of pain and recommended further study of their role through the injection of an anesthetic, and because Mr. Li did not testify about any major pain issues from his shoulder, Dr. Waseem has most accurately captured the current nature of his accident-related injuries.

- [138] The essential difference between these opinions that does need to be resolved however, is with respect to prognosis, in particular whether Mr. Li's function can be improved by further active rehabilitation, despite the time that has passed since the accident.
- [139] The assertion in Dr. le Nobel's report that Mr. Li is "deconditioned" was said to be "based on his report of reduced activity level and reduced activity tolerance", rather than any specific observations of his physical condition. Dr. le Nobel's description of his examination of Mr. Li does not describe any observations associated with a lack of fitness except his "generous abdominal pannus", which I took to be the protuberance that he described in his testimony. In fact, he described Mr. Li's muscle tone as "normal". This accords with Dr. Waseem's observation that there was no evidence of muscle atrophy. Further, whatever the cause of Mr. Li's protruding abdomen, Dr. Waseem also pointed out that he had not gained a significant amount of weight. These factors support Dr. Waseem's view that no further exercise program is required.
- [140] Mr. Li testified that physiotherapy, which is not being recommended by Dr. le Nobel, helped to relieve his symptoms. The active rehabilitation supported by the kinesiologist also helped, and he has continued to perform the stretches provided to him by the kinesiologist since that service stopped being funded. Dr. Waseem observed that his symptoms have not deteriorated despite the lack of physiotherapy, and found it significant in terms of his ongoing fitness level, that he has kept up the stretching. What has been missing from his exercise regimen, based on Dr. le Nobel's recommendations, is the weight and resistance training, as well as the use of a stationary bicycle.
- [141] I think that the decisive factor on this issue is the past beneficial effect of the gym activities during the post-accident period. Mr. Li accepted the suggestion that the active rehabilitation was making a difference with his symptoms, and agreed that he had told his doctor at one point that the neck problems were "nearly resolved" as a result of it. The situation with his knee had also improved as a result of his gym work. The termination of the funding deprived him of the continuing assistance of a kinesiologist, the onset of COVID prevented him from accessing the gym in his building, and his fears arising from his vulnerable immune system have prevented him from accessing a public gym since then.
- [142] It is important to keep in mind that the question is not whether Mr. Li's accident symptoms can be resolved - Dr. Waseem quite rightly notes that their duration and progress suggest they cannot - but whether some of his pain can be reduced, and his function can thereby be increased. It is true that Mr. Li has not gotten worse using his current approach, but the real question is whether his situation can get better to any meaningful degree. Given its past

benefits in that regard, I am satisfied that the added gym-based fitness measures is likely to lead to at least some improvement, as Dr. le Nobel anticipated, and thereby lessen suffering. As I result, I prefer Dr. le Nobel's opinion on this point.

Non-Pecuniary Damages

- [143] The purpose of non-pecuniary damages is to compensate a plaintiff for "pain, suffering, loss of enjoyment of life and loss of amenities": *Jackson v. Lai*, 2007 BCSC 1023 at para. 134.
- [144] Among the factors that can influence the amount of the award are the age of the plaintiff, the nature of the injury, the severity and duration of the pain, and the degree of disability, emotional suffering and impairment of life experienced by the plaintiff, including impairment of their important relationships and lifestyle pursuits. Crucially, a plaintiff should not generally be penalized for their stoicism: *Stapley v. Hejslet*, 2006 BCCA 34, at para. 46.
- [145] The amount of the award is guided by what is required to ameliorate the condition of the plaintiff in their particular situation. Their need for solace may not necessarily correlate with the seriousness of their injury. Because of this need to recognize the specific circumstances, there can be no general "tariff" of awards: *Lindal v. Lindal*, [1981] 2 S.C.R. 629 at 637. Despite this, other decisions dealing with similar circumstances can serve as a guide in arriving at an award that is "just and fair" to both parties: *Kuskis v. Tin*, 2008 BCSC 862 at paras. 135-136.
- [146] A plaintiff's prognosis is obviously relevant to the assessment of non-pecuniary damages, because it indicates the likely extent of their pain and suffering and loss of amenities. There will frequently be a connection between the possibility of further improvement and their future care needs. But the relevance of a remaining likelihood of improvement in a plaintiff's symptoms must not be confused with a failure to mitigate their damages by not pursuing recommended treatment, which involves a different analysis and must be proven by the defendant.
- [147] The amount being sought by Mr. Li for non-pecuniary damages in this case is also intended to recognize his loss of housekeeping capacity as a result of his injuries. When the plaintiff has suffered a true loss of such capacity, a pecuniary award, which can be valued according to the cost of replacement services, may be appropriate; whereas a loss that "is more in keeping with a loss of amenities, or increased pain and suffering" may be included in non-pecuniary damages. However, this is not an inflexible rule, and a court has discretion to address the loss in either manner: *Kim v. Lin*, 2018 BCCA 77 at paras. 33-34.
- [148] Mr. Li's counsel submits that an award of \$100,000 is justified here.
- [149] Two decisions from 2019, involving slightly younger plaintiffs, are said to offer useful comparisons to Mr. Li's situation, once their awards are adjusted for inflation:

· Khademolhosseini v. Ji, 2019 BCSC 854: the plaintiff "suffered [from] ongoing neck and upper back pain, and cervicogenic headaches". It was not likely that these symptoms would improve meaningfully. They had reduced his former enthusiastic participation in recreational athletics and, notably in light of our circumstances, caused him pain when working as an engineer in his nanotechnology lab. Despite the pain, he continued to perform all of the required tasks, because of his "desire to succeed in his profession". The trial judge emphasized, in keeping with Stapley, that the plaintiff's willingness to work through the pain should not penalize him when assessing his damages. An award of \$85,000 was made.

· Harris v. Gill, 2019 BCSC 1665: the plaintiff was found to suffer from "mild to moderate" chronic low back pain. His other accident-related symptoms had resolved by the trial. The judge found that the pain was "likely permanent", but that there was a "real possibility" the plaintiff "may benefit from future treatments and fully recover." Once again, these injuries had significantly restricted the plaintiff's former recreational activities, and had also affected his ability to contribute to household tasks. Like the plaintiff in Khademolhosseini, this plaintiff had continued to work despite "considerable pain", and the trial judge similarly stressed that he should not be penalized for his stoicism. The award was \$80,000.

[150] In addition, O'Brien v. Cernovec, 2016 BCSC 1881, is cited for its approach to the incorporation of loss of housekeeping capacity into non-pecuniary damages - the plaintiff's "discomfort and the additional time he will need to perform some housekeeping tasks" was taken into account when arriving at a suitable award.

[151] The defendants' counsel submits that an award in the range of \$35-40,000 would be more appropriate here.

[152] Counsel places strong emphasis on Mr. Li's favourable prognosis, and refers to decisions involving plaintiffs across a fairly wide age range who were able to resume all or most of their pre-accident activities:

· Haug v. Funk, 2022 BCSC 378: the plaintiff suffered from "activity-related" pain to her neck and back. As of the trial this pain was "mild, but persistent and chronic". The trial judge found a high probability that the plaintiff's symptom levels would be significantly reduced following the reconditioning that had been recommended to her. Most importantly, the trial judge found that "[e]ssentially, the plaintiff is able to and does do the same things as before the [a]ccident, but with somewhat less intensity and somewhat less frequency, although COVID-19 is also a factor in frequency. However, the most strenuous of these activities now aggravate her injuries and cause mild pain." Before a deduction for failure to mitigate, the non-pecuniary damages awarded were \$30,000. (After our trial concluded, this decision was successfully appealed (2023 BCCA 110) on the issue of the judge's failure to make any award for the loss of amenity or increased pain and suffering in relation to her housekeeping capacity. The award of non-pecuniary damages was increased by \$5,000 to correct that error, but the amount of the original award under that heading, leaving aside the housekeeping issue, was not disturbed.)

· *Nguyen v Bhatti*, 2017 BCSC 1537: the plaintiff suffered soft tissue injuries to his neck, back and right shoulder in a 2012 accident. These were an aggravation of pre-existing injuries. The trial judge, who had significant concerns about the plaintiff's credibility, found that his symptoms had greatly improved by 2014-15 and had substantially resolved a few months before trial. She rejected his testimony that he remained in constant pain. The award for non-pecuniary damages was \$45,000, before a reduction for failure to mitigate.

· *Hoque v. Howard Carter Lease Ltd.*, 2020 BCSC 160: the plaintiff suffered soft tissue injuries to his neck, shoulder and back. The only medical evidence tendered indicated that his symptoms had resolved two years before trial. The trial judge did not specifically indicate whether he accepted the defendants' submission that the injuries were "mild to moderate in severity and had a minimal impact on the life of the plaintiff", but he made an award of non-pecuniary damages (\$35,000) that was at the higher end of the range submitted by the defendants, and above the range suggested by the plaintiff. This makes it likely that he accepted that submission.

· *Rosso v. Balubal*, 2014 BCSC 1786: Although the trial judge found that the plaintiff's evidence was not reliable with respect to many of the effects of the accident that he claimed, she accepted that he had suffered soft tissue injuries to his neck and back and would continue to experience some ongoing pain in the future. She found that this pain was "relatively mild" and that it could be managed with regular exercise. She also found that the injuries had had a "minor impact" on his life. After canvassing damage awards in other decisions involving "modest" injuries, she awarded \$20,000.

[153] Bearing in mind that no two cases are identical and that the ranges established by other decisions provide guidance, rather than imposing a rigid framework, I would say that the cases relied on by the defendants are not helpful comparators. They involved, variously, symptoms that minimally interfered with the plaintiff's life, had resolved before the trial date, or were "relatively mild". None of these descriptions apply to Mr. Li's situation.

[154] The cases relied on by Mr. Li's counsel are more closely comparable, in particular, the element of persevering through pain symptoms to maintain employment. Khademolhosseini has to be seen as more aggravated because there was little prospect of improvement in the plaintiff's symptoms, and the trial judge's description of the level of perseverance required of the plaintiff in Harris suggests a greater burden of pain than is imposed on Mr. Li by the aggravation of his symptoms at work.

[155] Mr. Li's counsel has not calculated the required adjustment for inflation of these decisions. Based on the online inflation calculator provided by the Bank of Canada, the damages in Khademolhosseini in 2023 dollars would be \$97,915, and \$92,155 in Harris. Keeping those figures in mind, I would, in the absence of any consideration of lost housekeeping capacity, have awarded non-pecuniary damages of \$80,000.

[156] There is an element of loss of amenities in the effect of Mr. Li's injuries on his housekeeping capacity, in that he has lost the ability to prepare elaborate meals, which was previously a source of great pleasure to him. There is also an element of pain and suffering,

in that he continues to be responsible for the cooking in his household, on a much less elaborate scale, even though there is some pain from his symptoms as a result. So, while his inability to uphold his former equal share of the other household duties appears to be the kind of "true" loss of capacity described in Kim, this is an appropriate case in which to exercise my discretion to reflect the loss of housekeeping capacity in the non-pecuniary damages. Considering the overall impact of this loss on Mr. Li's quality of life, I would say that an additional \$10,000 should be added, for an overall award under this heading of \$90,000.

Failure to Mitigate

[157] As recently affirmed by the Court of Appeal in Haug, at para. 22, the test remains as set out in Chiu v Chiu, 2002 BCCA 618:

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. These principles are found in Janiak v. Ippolito, [1985] 1 S.C.R. 146.

[158] Haug also confirmed, at para. 75, that the burden is on the defendants to prove the elements of a failure to mitigate on a balance of probabilities.

[159] Counsel for the defendants submits that Mr. Li acted unreasonably in failing to follow the recommendations of Dr. Jung and Dr. le Nobel. While he concedes that while such recommendations normally carry little weight in the analysis of an alleged failure to mitigate, they are more significant here because Mr. Li has not seen a treating physician for more than two years. Counsel also relies on paras. 80-82 of the trial decision in Haug for the proposition that it is unreasonable for a plaintiff not to pursue treatment because they do not want to pay for the services up front.

[160] I think that the authority relied on by Mr. Li's counsel is decisive on this issue. In Kowalski v. Chepil, 2021 BCSC 1585 at paras. 93-96, the trial judge, relying on the decision of the Court of Appeal in Thomasson v. Moeller, 2016 BCCA 14, at para. 39, held that independent medical experts who provide experts reports are not treating physicians whose recommendations a plaintiff is required to follow. The recommendations that a plaintiff must fail to comply with in order to be subject to a finding of failure to mitigate are those of their treating medical professionals.

[161] I do not see how a failure by Mr. Li to see his family doctor for a lengthy period can confer any different status on the expert witnesses in this case than is established in these authorities.

[162] The further argument that it was unreasonable for Mr. Li to cease his physiotherapy and kinesiology treatments once ICBC was no longer funding them also does not advance the defendants' position. The treatments that Mr. Li declined to pay for himself were not recommended by either of the experts in question, so no question of a refusal to follow their recommendations is even engaged.

Past Income Loss

[163] A claim for what is often described as "past loss of income" is often a claim for loss of earning capacity; that is, a claim for 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.

[164] When assessing loss under this heading, past hypothetical events (that is, what a plaintiff would have earned but for the accident) are to be treated the same way as future hypothetical events - they are to be given weight in accordance with their relative likelihood. They do not have to be proven on a balance of probabilities. They must however be real and substantial possibilities and not mere speculation. Actual past losses must be proven on a balance of probabilities: *Gill v. Probert*, 2001 BCCA 331 at para.9; *Athey v. Leonati*, [1996] 3 S.C.R. 458 at para. 27.

[165] As I indicated at the outset, the parties agree on the amount of Mr. Li's actual past wage loss due to the accident - that is, pay he actually lost from missing work. That amount is \$427.50[2].

[166] With respect to loss of sick days, the applicable principle is that if an employee continues to receive wages while off of work, and has "given up something" in order to receive those wages, they have suffered a loss that is recoverable. This applies to the use of days from a sick bank: *Roberts v. Earthy*, [1995] B.C.J. No. 1034 (S.C.) at para. 6, citing *Ratych v. Bloomer*, [1990] 1 S.C.R. 940 at p.972.

[167] Accordingly, I conclude that Mr. Li is entitled be compensated for those sick days that were used to address his accident symptoms. There was no reason to doubt his ability to identify those days from among the total number of sick days he took.

[168] However, I do not agree that the award should be the gross amount of his loss. He is entitled to be compensated for what he would have received if those sick days had been available to him to replace his pay in non-accident-related situations, which would have been net of taxes. The gross amount paid by his employer, or their entitlement to recover any award in relation to loss of wages or benefits pursuant to the collective agreement, is not part of that analysis. Accordingly, the gross amount of \$4,646.55 will be reduced by 20% for taxes, and the award will be \$3717.24.

- [169] I accept Mr. Li's evidence that he was reluctant to work overtime after the accident because the required additional four hours were too much for his back, and that he did so only when the employer was desperate for assistance.
- [170] The problem is in identifying the amount of his resulting loss. There was no identified basis for his assertion that but for his injuries he would have worked approximately four hours of overtime every two weeks, either in his past practice or his life circumstances in the post-accident period. That assertion must therefore be seen as speculative.
- [171] His records only go back to the beginning of 2018, but the hours taken in the approximately four months before the accident offer at least some reliable indication of his pre-accident overtime practice. Extrapolating from that approximately four-month period, I am comfortable finding that it is extremely likely that he would have worked at least 27 hours of overtime per year from the accident to the date of trial. This would be in addition to the minimal overtime that he actually did work, which I am satisfied was based on the extraordinary needs of the employer, rather than on his hypothetical preferences.
- [172] Since there is generally a four-hour minimum overtime shift, that figure can reliably be rounded up to 28 hours per year. His hourly wage is \$37.36 and I accept that the first two hours of a four-hour shift would be at one and a half times that rate (\$56.04) and the second two hours would be at twice that rate (\$74.72). This means that he would have earned \$261.52 per overtime shift seven times per year, or \$1,830.64 per year. Therefore, in the four years and three months between the accident and the trial I am satisfied he would have earned 4.25 times that amount, for a gross amount of lost overtime of \$7780. After the application of 20% for taxes the award will be \$6,224.

Impairment of Future Earning Capacity

- [173] *Rab v. Prescott*, 2021 BCCA 345, at para. 47 helpfully clarified the correct approach to a claim for damages of this nature.
- [174] First, the judge must determine whether the evidence discloses a potential future event that could lead to a loss of capacity. The next question is whether the evidence shows a real and substantial possibility that the future event will lead to a pecuniary loss. Finally, the value of that possible future loss must be assessed, including the relative likelihood of the possibility occurring.
- [175] The identified loss may be then quantified either on an "earnings" approach or a "capital asset" approach: *Perren v. Lalari*, 2010 BCCA 140 at para. 32.
- [176] The capital asset approach, which focuses on the loss or impairment of the plaintiff's earning capacity as an asset available to them, will be more appropriate when the loss is not easily measurable. Even when that approach is used, there still has to be proof of a real and substantial possibility of a future event leading to an income loss: *Perren* at para. 32. In other words, there is no award for a loss of capacity in itself.

- [177] Even when it is clear that the future event will lead to a pecuniary loss, as in the case of a significant and lasting injury, "it may still be necessary to assess the possibility and likelihood of future hypothetical events occurring that may affect the quantification of the loss, such as potential positive or negative contingencies": Rab at para. 29.
- [178] In essence, "the award involves a comparison between the likely future of the plaintiff if the accident had not happened and the plaintiff's likely future after the accident has happened": Gregory v. Insurance Corporation of British Columbia, 2011 BCCA 144 at para 32.
- [179] Mr. Li's counsel submits that it "stands to reason" that over time his chronic pain will have a detrimental effect on his ability to work. Dr. le Nobel concedes that he will have some ongoing pain even if the further rehabilitative program is successful. The core of this position is Mr. Li's testimony that he now considers it unlikely that he will be able to follow through with his previous plan to work until he is 65. Given the evidence that part-time work in this lab is unavailable that may place him in a position of having to look for work elsewhere.
- [180] His counsel submits that since the effect of Mr. Li's injuries has been to render him "less valuable to himself as a person capable of income in a competitive market" the capital asset approach should be used to value his loss. Counsel relies on the observation in Pallos v. Insurance Corp. of British Columbia (1995), 100 BCLR (2d) 260 (CA), that one means of valuing such a loss is to award the plaintiff's entire income for "one or more years". In this case, counsel submits that two years' income is appropriate, plus another year to reflect the likely loss of overtime opportunities. The total award would therefore be \$239,500.
- [181] In contrast, the defendants' counsel submits that the evidence has not disclosed a potential future event leading to a loss of capacity, or a real and substantial possibility that it will cause Mr. Li a pecuniary loss. No career paths have been foreclosed to him by his injuries, nor has he missed any income earning opportunities. His earnings have continued to increase every year since the accident. His supervisors have not expressed any concerns with his work, nor has he requested any accommodations in the workplace for his symptoms. There has also been no functional capacity evaluation to support an assertion that he is precluded from engaging in certain activities.
- [182] Mr. Li's situation is said to be comparable to the plaintiff in Tisalona v. Easton, 2015 BCSC 565 - a lab technologist who remained able to perform all of her required work tasks after the accident, and had not received any negative feedback from her supervisors, or sought any accommodations. The trial judge in that case also commented on the absence of a functional capacity evaluation, which might have shown that certain occupations were foreclosed to her. Based on these factors, the trial judge concluded that the plaintiff had failed to establish a real and substantial possibility of a future event leading to an income loss.

- [183] If, despite these submissions, I am satisfied that the requirements of proving a loss under this heading have been met, the defendants' counsel submits that the award should be limited to \$20,000, which is approximately three months' earnings for Mr. Li.
- [184] Despite the able arguments on this point by the defendants' counsel, I am satisfied that the elements of an impairment of future earning capacity as set out in Rab have been proven here.
- [185] Even in Dr. le Nobel's best-case scenario, Mr. Li will suffer some ongoing pain, which is aggravated by the physical requirements of his job. His capacity has already been diminished by the fact that his ability to complete all of the required tasks comes at the cost of provoking his pain symptoms. I am satisfied that he has not received any complaints from his supervisors because he has been willing to pay that cost. The defendants' counsel did not specify what accommodations Mr. Li could have asked for, and the defendants' expert, Dr. le Nobel, did not suggest that he should be provided with any. Mr. Li's skepticism that accommodations would be granted is supported by the fact that a WorkSafe complaint was required before anything was done about the bench that had caused his repetitive strain injury. Most significantly, his symptoms are provoked by one of the core requirements of his job - leaning over samples while conducting the required analyses in a meticulous manner - and it is difficult to see how that requirement could be subject to an accommodation.
- [186] It also seems obvious that there is a real and substantial possibility of an event leading to a pecuniary loss. I feel comfortable taking notice that physical strength and resilience diminishes with age, and it is quite realistic to envision that as Mr. Li ages he will become less able to endure the consequences of his required work postures for his pain symptoms, as he testified. This could well result in a decision to retire earlier than he had planned before the accident.
- [187] Given the residual pain that Dr. le Nobel concedes will continue even if the rehabilitation plan is successful, I do not think my acceptance of his opinion about its benefits undermines the possibility of a pecuniary loss, although the cost to Mr. Li of working through pain may be somewhat less if the plan is successful.
- [188] With respect to valuing this impairment, the Court of Appeal explained in Rab that the so-called Pallos approach of awarding the present value of one or two years of a plaintiff's earnings is well-suited to a situation like Mr. Li's:

72 These are the sort of cases this Court had in mind in Pallos, where the plaintiff continues to earn income at or close to his or her pre-accident level, but has suffered an impairment that may affect that plaintiff's ability to continue doing so at some point in the future. In such cases, using the plaintiff's immediate pre-accident income as a tool in assessing her lost capacity makes sense

- [189] I will take that approach here. I think the hypothetical future possibilities have to take into account the likelihood, which I have found is a meaningful one, that the program recommended by Dr. le Nobel will reduce Mr. Li's pain level and improve his functioning. Based on Mr. Li's evidence, I think this would inevitably include his functioning in the workplace. That possibility has to moderate the award somewhat. Fortunately, neither of the expert physiatrists saw any likelihood that his condition will decline.
- [190] Balancing these various considerations, I conclude that an appropriate award under this heading is one and a half years of Mr. Li's current salary, or \$120,000. I am moderating the two years sought by his counsel in light of the likelihood of improvement in his symptoms. I think the loss of overtime is adequately reflected in his overall loss of capacity, and does not justify the award of an additional year of earnings.

Cost of Future Care

- [191] Claims made for future care must be both medically justified and reasonable. An award "should reflect what the evidence establishes is reasonably necessary to preserve the plaintiff's health": *Milina v. Bartsch* (1985), 49 B.C.L.R. (2d) 33 (S.C.) at paras. 199 and 201; *aff'd* (1987), 49 B.C.L.R. (2d) 99 (C.A.). The standard is one of real and substantial risk of future pecuniary loss, through the plaintiff incurring costs of care: *Graham v. Rourke* (1990), 74 D.L.R. (4th) 1 (Ont. C.A.).
- [192] The requirement is one of medical justification, as opposed to medical necessity and it "requires only some evidence that the expense claimed is directly related to the disability arising out of the accident, and is incurred with a view toward ameliorating its impact": *Harrington v. Sangha*, 2011 BCSC 1035, at para. 151.
- [193] I do not think that it is tenable to argue on this issue, as the defendants' counsel does, that Mr. Li's lack of recent contact with a family physician means that there is no real and substantial possibility that he will incur the costs of Dr. le Nobel's suggested rehabilitation program. The two types of care are fundamentally different in their nature and purpose, and the absence of the former says nothing useful about Mr. Li's likely approach to the latter. Given his willingness to pursue assistance from a kinesiologist when it was previously funded, I think the likelihood of his taking advantage of further funded active rehabilitation is actually quite strong.
- [194] The total cost of Dr. le Nobel's recommendations, based on the estimates in his testimony, would be \$5,218. Mr. Li's counsel submits that a "ball park" award of \$7,000 should be made, but I am reluctant to do so, because with one exception Dr. le Nobel's total is the only one that was provided in the evidence, and I cannot risk a windfall to Mr. Li based on speculation. The exception is that Dr. le Nobel's hourly rate for kinesiologists (\$60) is less than the fee limit for standard treatment by them in the Insurance (Motor Vehicle) Act Regulation (\$78), which was made an exhibit to the Agreed Statement of Facts in this case. Further, the cost of an assessment by a kinesiologist, which will obviously be required

based on Dr. le Nobel's recommendations (\$135), was not included in his estimates. I would add an additional \$500 to address these shortfalls, for a total of \$5718.

[195] Since these costs will be incurred for only 14 months, immediately following this judgment, it is unrealistic to speak of an income stream needing to be invested to fund them. The effect of the present value tables contained in Appendix E of the Continuing Legal Education Society's Civil Jury Instructions, which I am permitted to refer to when there has been no actuarial evidence (see, for example, *Dunn v. Heise*, 2021 BCSC 754 at para. 202), would actually have the effect of reducing the award in the first year, and the amount awarded will only be required for two months of the second "year" under the tables. Therefore, I decline to adjust this award.

Special Damages

[196] The parties have agreed that these are \$479.99.

Summary

[197] The amounts awarded are:

- Non-pecuniary damages: \$90,000
- Actual past wage loss: \$427
- Loss of sick days: \$3,253
- Loss of overtime: \$6,224
- Impairment of future earning capacity: \$120,000
- Cost of future care: \$5718
- Special damages: \$480.00
- Total damages: \$226,102

[198] Mr. Li has succeeded in establishing liability and obtaining a remedy, although the damages were not in the amounts that he sought (see *Loft v. Nat*, 2014 BCCA 108 at para.46), so in the absence of any other factors that might affect costs, he is entitled to receive his costs, at the ordinary scale of difficulty.

[199] If there are such factors, counsel can arrange to make written submissions on costs, according to whatever schedule for the exchange and filing of the submissions is suitable to them.

"Schultes J."

[1] The issue of driving anxiety, which Dr. Waseem said has resolved, was not pursued.

- [2] Given the scale of the total award here, calculating individual awards down to the cents risks absurdity, so I will round the amounts in question up or down depending on whether the cents involved are higher than 50.
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