

CANADA / JUDGMENT

Li v. Gill

2020 BCSC 1298

COURT

Supreme Court of British Columbia

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2020 BCSC 1298 Li v. Gill

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Li v. Gill,

2020 BCSC 1298

Date: 20200902

Docket: M154951

Registry: Vancouver

Between:

Shancheng Jing Li

Plaintiff

And

Baldev Singh Gill and Sidhu Services Ltd.

Defendants

Before: The Honourable Madam Justice D. MacDonald

Reasons for Judgment

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Place and Dates of Trial:

Vancouver, B.C.

February 10-14, 18-21,

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Vancouver, B.C.

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Table of Contents

Introduction. 4

Background and Context. 5

Parties' Positions. 6

Plaintiff 6

Defendants. 7

Credibility and Reliability. 8

Legal Principles. 8

Analysis. 11

Reliability. 11

Credibility. 11

Causation. 15

Legal Principles. 15

Analysis. 17

Pre-Existing Conditions. 17

Soft Tissue Injuries. 19

Concussion. 22

Loss of Concentration and Memory. 22

Headaches. 23

Sleep Issues and Anxiety. 24

Depression. 25

Blurry Vision. 25

Tinnitus. 25

Blackouts. 26

Dizziness. 26

Conclusion on Causation. 32

Prognosis. 32

Soft Tissue Injury. 32

Sleep Issues. 33

Dizziness. 33

Non-Pecuniary Damages. 35

Legal Principles. 35

Analysis. 36

Loss of Past Earning Capacity. 39

Legal Principles. 39

Analysis. 40

Loss of Future Earning Capacity. 45

Legal Principles. 45

Analysis. 46

Cost of Future Care. 47

Legal Principles. 47

Analysis. 47

Loss of Housekeeping Capacity. 49

Special Damages. 50

Legal Principles. 50

Analysis. 51

Conclusion. 51

Costs. 52

Introduction

- [1] The plaintiff, Shancheng Jing Li, was injured in a motor vehicle accident on July 16, 2013 (the "Accident"). Her vehicle was hit by a large wheel which had fallen off the back of the vehicle of the defendant, Baldev Singh Gill. The plaintiff testified she was thrust into the roof of her vehicle, hitting her head, and then was moved side to side while trying to bring her vehicle under control.
- [2] The defendants have admitted liability.
- [3] Ms. Li claims she suffered the following injuries as a result of the Accident: soft tissue injuries to her neck, back, and shoulder; concussion; loss of concentration and memory; headaches; sleep issues and anxiety; depression; blurry vision; tinnitus; blackouts; and dizziness.
- [4] The primary issues between the parties are the extent to which the Accident is responsible for Ms. Li's various health issues and what impact these health issues have had on her life.
- [5] While the defendants admit Ms. Li sustained some soft tissue injuries in the Accident, they dispute Ms. Li's claims of dizziness and memory loss are a result of the Accident. Further, the defendants argue Ms. Li is a poor historian. They say her credibility was undermined when she testified regarding a letter she stated was written by her former employer when in fact it was written by her husband.
- [6] For the reasons that follow, I find there are serious reliability and credibility issues in this case. I must therefore approach the evidence cautiously and look for corroborating facts when determining whether the injuries Ms. Li alleges were caused by the Accident.
- [7] Based on a careful scrutiny of the facts, I find that Ms. Li is entitled to only a modest award for the dizziness and the soft tissue injuries she sustained in the Accident. I find the other injuries were not caused by the Accident.

Background and Context

- [8] Ms. Li is originally from China. She received a college diploma from the Beijing Arts and Craft Academy. She also studied at the China Central Arts and Crafts institute. Her specialty was decoration, advertising, photography, and general arts. She worked for a company in Beijing in artistic design and advertising.
- [9] Ms. Li moved to Canada in 1997 with her son and her ex-husband.
- [10] After coming to Canada, Ms. Li and her ex-husband worked in the restaurant industry. During that time, Ms. Li worked as a chef, cashier, receptionist, and ultimately became a restaurant owner. She was known for making traditional dim sum.
- [11] After ten years in the restaurant business, Ms. Li and her ex-husband sold the business. Ms. Li and her ex-husband divorced in 2007.

- [12] Ms. Li's son, Yuan Ping, lives in Richmond. He is married and has two children, a ten-year-old son and an eight-year-old daughter. Ms. Li is very involved in their lives. She takes the children overnight on Friday nights and spends time with them at other times during the week. She and her son are very close.
- [13] Ms. Li met her current husband, Mr. Wu, in or around 2010. Mr. Wu was living in Phoenix when they met online. He is a retired engineer. Ms. Li was impressed with Mr. Wu, finding him intelligent and sharing similar interests to her. They got along well from the first day they met.
- [14] After they married, Mr. Wu moved to Bellingham because he was not yet permitted to live in Canada. Ms. Li would visit him there or he would come to Vancouver and they would spend weekends together. Eventually Mr. Wu was able to move to Vancouver, but not until after the Accident. They now live together in a townhouse in Richmond.
- [15] Ms. Li was 58 years old at the time of the Accident and is presently 65 years old.
- [16] Ms. Li and her husband had been together about three years at the time of the Accident. She describes this as the happiest time of her life.

Parties' Positions

Plaintiff

- [17] On the day of the Accident, Ms. Li was driving northbound on Highway 99 just before Exit 16 in Richmond, BC. She was in the middle lane and the visibility was fine. Shortly before Exit 16, without warning, there was a large vehicle wheel in the middle of the lane in front of Ms. Li's vehicle.
- [18] The front left of her vehicle hit the wheel and she lost control of the car. Ms. Li and Mr. Wu testified that she hit her head on the top of the car. She described the car as hopping up and down and her body went up and down with it. Her memory is the feeling of not being able to control the car. Her husband was asking her to pump the brakes. He eventually tried to help her pump the brakes but they were not working. Ms. Li and her husband, who was in the front passenger seat, used all their strength to try to move the car to the right. They eventually got safely across three lanes to the right side of the road, stopping in the bus lane.
- [19] Ms. Li testified that she was initially in shock and felt physical discomfort all over her body. She felt pain in the back of her head. She felt like her neck could not support her head.
- [20] Mr. Wu testified Ms. Li was scared and crying. Both he and Ms. Li felt that they would die. Mr. Wu testified that it felt like the most dangerous moment in his life.
- [21] Once stopped, Ms. Li could not get out of the car. A young man came and asked her if he could call 911 and if they needed any help. A police officer attended but had to leave because there was another accident caused by another fallen vehicle wheel further up the highway. Eventually a second police officer came and helped her out of the car. A tow truck arrived

just after 4 pm and Ms. Li and her husband rode with the tow truck driver to a repair shop owned by their friend. The owner drove them home around 6 pm, approximately two hours after the Accident. The car was eventually written off.

- [22] Ms. Li testified that she woke up dizzy the next day. She also testified that she slept for two days after the Accident.
- [23] Mr. Wu testified that Ms. Li was in a lot of pain following the Accident. He was also in a lot of pain. The most serious issues with Ms. Li were her headaches, dizziness, and insomnia.
- [24] Ms. Li testified that she has had nightmares since the Accident. If she has a nightmare, she feels low the following day and experiences dizziness. The poor sleep and dizziness made her unable to do exercises.
- [25] Ms. Li takes the position she sustained injuries to her neck, back, and shoulders as a result of the Accident. She and Mr. Wu argue she sustained a concussion when she hit her head on the ceiling of the vehicle during the Accident. She also claims she suffers from headaches, dizziness, nausea, tinnitus, blurry vision, sleeplessness and anxiety, nightmares, loss of memory and focus, and depression since the Accident.
- [26] Ms. Li testified that her pain was alleviated by physiotherapy. Gradually her shoulder and back pain went away. She continues to have issues, primarily with her neck, dizziness, and her memory.

Defendants

- [27] The defendants emphasize that Ms. Li did not go to a hospital after the Accident. The day after the Accident she attended a walk-in clinic and saw Dr. Chan. She saw her own physician, Dr. Jiang, about one week later.
- [28] The defendants allege Ms. Li and her husband mischaracterized the mechanics of the Accident. The defendants argue there is no evidence that Ms. Li hit her head in the Accident or sustained a concussion.
- [29] Following the Accident, the defendants argue Ms. Li did not present with complaints of symptoms of dizziness, headaches, nausea, or any symptom relating to a head injury. She did not have a confirmed diagnosis of benign paroxysmal positional vertigo until September 2019 and therefore there is no proof her dizziness was caused by the Accident.
- [30] The defendants argue Ms. Li was argumentative and evasive throughout her cross-examination and she had a selective memory. The main issues are credibility and reliability. Based on the objective evidence, Ms. Li had pre-Accident history of dizziness, neck and shoulder pain, and headaches.

- [31] In terms of soft tissues injuries, at most, the Accident aggravated Ms. Li's pre-existing neck pain which would have persisted absent the Accident. Her other injuries resolved within months of the Accident.

Credibility and Reliability

Legal Principles

- [32] Ms. Li's credibility is an important consideration when evaluating the nature of her injuries because the medical experts relied largely, although not exclusively, on her subjective reports.
- [33] The leading authority on credibility is *Bradshaw v. Stenner*, 2010 BCSC 1398, aff'd 2012 BCCA 296. Justice Dillon summarized the key elements as follows:
- [186] Credibility involves an assessment of the trustworthiness of a witness' testimony based upon the veracity or sincerity of a witness and the accuracy of the evidence that the witness provides (*Raymond v. Bosanquet (Township)* (1919), 59 S.C.R. 452, 50 D.L.R. 560 (S.C.C.)). The art of assessment involves examination of various factors such as the ability and opportunity to observe events, the firmness of his memory, the ability to resist the influence of interest to modify his recollection, whether the witness' evidence harmonizes with independent evidence that has been accepted, whether the witness changes his testimony during direct and cross-examination, whether the witness' testimony seems unreasonable, impossible, or unlikely, whether a witness has a motive to lie, and the demeanour of a witness generally (*Wallace v. Davis*, [1926] 31 O.W.N. 202 (Ont.H.C.); *Farnya v. Chorny*, [1952] 2 D.L.R. 152 (B.C.C.A.) [Farnya]; *R. v. S.(R.D.)*, [1997] 3 S.C.R. 484 at para.128 (S.C.C.)). Ultimately, the validity of the evidence depends on whether the evidence is consistent with the probabilities affecting the case as a whole and shown to be in existence at the time (*Farnya* at para. 356).
- [187] It has been suggested that a methodology to adopt is to first consider the testimony of a witness on a 'stand alone' basis, followed by an analysis of whether the witness' story is inherently believable. Then, if the witness testimony has survived relatively intact, the testimony should be evaluated based upon the consistency with other witnesses and with documentary evidence. The testimony of non-party, disinterested witnesses may provide a reliable yardstick for comparison. Finally, the court should determine which version of events is the most consistent with the "preponderance of probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions" (*Overseas Investments (1986) Ltd. v. Cornwall Developments Ltd.* (1993), 12 Alta. L.R. (3d) 298 at para. 13 (Alta. Q.B.)). I have found this approach useful.
- [34] In *Hardychuk v. Johnstone*, 2012 BCSC 1359, Justice Dickson explained the difficulties that arise when a plaintiff deliberately misleads the court:

[9] Where, as here, a plaintiff's case relies on subjective symptoms with little or no objective evidence of continuing injury the court must be exceedingly careful in examining the evidence and assessing credibility: *Price v. Kostryba* (1982), 70 B.C.L.R. 397. If deliberate falsehood is established it may be difficult to disentangle truth from deceit and some truthful aspects of the plaintiff's testimony may lose their force, particularly in the absence of corroboration. That being said, when a plaintiff is accused of deliberate deceit more than speculation or innuendo is required. A charge of deliberate deceit under oath is a serious attack on an individual's integrity which should not be lightly treated or lightly made: *Halteren v. Wilhelm*, 2000 BCCA 2; *Edmondson v. Payer*, 2011 BCSC 118; *Vasiliopoulos v. Dosangh*, 2008 BCCA 399.

[Emphasis added.]

[35] The court in *Sandhu v. Braich* (1991), 61 B.C.L.R. (2d) 273 (C.A.), adopted in *Samuel v. Chrysler Credit Canada Ltd.*, 2007 BCCA 431 at para. 44, addressed the principles to apply when medical experts rely on the subjective complaints of a plaintiff:

49 It is trite law - although I note that what is trite law is frequently brushed aside - that in order for an expert to give an opinion the facts upon which he gives that opinion must be proven by the person who has personal knowledge of them: see *Enge v. Trerise*, (1960), 33 W.W.R. 577, 26 D.L.R. (2d) 529 (B.C.C.A.) and *Lenoard v. British Columbia Hydro & Power Authority* (1964), 50 W.W.R. 546, 49 D.L.R. (2d) 422 (Wilson, C.J.S.C.), in which that most distinguished judge said (at p. 548 [W.W.R.]):

I now enter into an area in which I must consider subjective as well as objective evidence because both were placed before me without objection by counsel. All physicians must I think, rely to some extent on what their patients tell them. If, for instance, a patient had a pain in his neck and went to a doctor mum [sic], challenging him to find what, if anything, was the matter with him, then I think that doctor would be in almost as difficult a position as a lawyer would be if all his client told him was that he wanted to sue Tom Jones, and condescended to no further detail. When the doctor relates in court what his patient told him, he may be stating hearsay, but common sense in the courts has long ago rejected the idea that this evidence may not be heard and has accepted the idea that it should be listened to, not because it proves by itself the truth of the thing stated by the patient to the doctor, but because it defines to an extent his area of exploration and, if confirmed by the doctor's objective observations and by the patient's evidence given at the trial, may be convincing. I see no other approach to medical evidence. It is closely allied to the hypothetical question often put to other expert witnesses where the witness is asked: "Well, granting the existence of such and such facts, what is your opinion?" The doctor says he accepted some statements made by his patient as facts and formed an opinion thereon. Such an opinion, I think, is subject to criticism if the patient does not appear as a witness and corroborate the existence at the time of the symptoms alleged to have been described to the doctor. Such an opinion, in so far as it relies on the credibility of the patient, is subject to ejection by a judge or jury who, having heard the patient, do not find him credible. I do not think they are bound by the doctor's opinion as to credibility but they must pay a considerable regard to it, particularly if it is

related to associated objective evidence, such, for instance, as evidence of spasm. But I do not see any reason why a judge or jury, having heard the expert and the patient, should not, in a proper case, reject the evidence of the expert on the ground that the patient is not a credible witness and that, therefore, the hypothesis on which the expert gave his opinion is not established, having, of course, the fullest regard to the expertise of the doctor and to any objective evidence he has propounded. If this were not so then judges and juries would be completely bound by the opinions of experts as to credibility, and this cannot be.

[36] In *Andrusko v. Alexander*, 2013 BCSC 985, Justice Fitzpatrick made a similar point:

[49] If the plaintiff's account of his or her change in physical, mental, or emotional state as a result of the accident is not convincing, then the hypothesis upon which any expert opinions rest will be undermined: *Samuel v. Chrysler Credit Canada Ltd.*, 2007 BCCA 431 at paras. 15, 49-50.

[37] I am applying the principles expounded in these authorities when assessing the testimony tendered in this case.

Analysis

Reliability

[38] Determining the precise facts and causation is difficult because Ms. Li is a poor historian. At the outset of the trial, Ms. Li indicated she has problems with her memory. This was confirmed by other witnesses and it was evident in her testimony. Various experts mentioned that Ms. Li's history was "vague". Dr. Jaymi Dumper, an otolaryngologist who saw Ms. Li on February 6, 2019, noted that Ms. Li was a difficult historian. Dr. Patrick Chin, an orthopedic surgeon, noted in his report that Ms. Li was a "poor historian". Dr. Chin had to work harder than usual to obtain the information. Dr. Eytan David found it difficult to obtain Ms. Li's history, as did Dr. Marc Boyle.

[39] Dr. Dumper's reports and testimony were based largely on Ms. Li's history. Dr. Dumper accepted what Ms. Li told him regarding her past and present symptoms. Dr. Dumper agreed in cross-examination that if there was a reason to question the reliability of an individual's history, this would affect his assessment. The hypothesis upon which his opinion is based would be undermined. I note there were a number of factual inaccuracies in Dr. Dumper's history.

[40] Ms. Li's memory problems undermine the reliability of her evidence. I must assess the experts' acceptance of what Ms. Li reported to them in the context of Ms. Li being a poor historian. In these circumstances, I will review the evidence with extra caution and look for corroborating evidence from the medical records and other witnesses.

Credibility

- [41] Credibility is a central issue in this case. The following paragraphs are some examples of issues with credibility which arose in this case.
- [42] Dr. Boyle, an orthopedic surgeon, conducted an independent medical examination on January 24, 2018 at the defendants' request. He had concerns regarding Ms. Li's presentation. First, he found that throughout the interview and examination Ms. Li displayed some pain behaviour. For example, Ms. Li moved about constantly in her chair, she held her neck, and she grimaced and groaned. He found this surprising because musculoskeletal pain is associated with immobility; if you move the joints it causes more discomfort. Ms. Li's behaviour was inconsistent with her type of injuries.
- [43] Second, Ms. Li demonstrated a range from 0 to 120 degrees when Dr. Boyle tested her neck for range of motion. However, when Dr. Boyle later asked Ms. Li to extend her low back she fully extended her neck (180 degrees of motion). This suggests she was being less than honest when she demonstrated a more limited range of motion on command.
- [44] Third, Dr. Boyle noted non-organic signs, meaning that there was no organic or physical (either anatomical or pathological) explanation for Ms. Li's symptoms. He found no explanation for decreased sensation in her left upper limb, weakness in her wrist extension, or weakness in her internal rotation in her hand. Her lack of ability in these areas was out of proportion to her diagnosis.
- [45] Similarly, Dr. David, an expert in otolaryngology, conducted an independent medical examination on September 6, 2019 at the request of the defendants. He testified that the severity of the hearing loss Ms. Li reported during testing was much worse than expected given her ability to converse and hear normal conversational tones. Moreover, there were no complaints of hearing problems in the clinical records. Despite her subjective responses, Dr. David found no issues with Ms. Li's hearing.
- [46] Ms. Li testified that all her doctors, including her family doctor, agreed she could not be treated in Canada so she should seek treatment in China. Dr. Jiang, her general practitioner, did not recommend that Ms. Li seek treatment in China. He testified that if he had known she was going to China, he might have said she should continue treatments in China.
- [47]
- [48] There was inconsistent testimony regarding the amount of time Mr. Wu spent in Canada between the time of his marriage to Ms. Li and the date of the Accident. At one point Mr. Wu said he spent up to 75% of his time in Canada; at other times he and Ms. Li testified he came to see her on weekends from Bellingham. He also provided inconsistent evidence regarding when he moved from Phoenix to Bellingham.

- [49] At the examination with Dr. David, Ms. Li denied a "pre-MVA history of dizziness or imbalance." Dr. Dumper stated in his report that Ms. Li advised him that she had not complained of symptoms of dizziness or vertigo prior to the Accident. In fact she had.
- [50] Most troubling, Ms. Li tendered a letter into evidence dated February 5, 2015, addressed to Ms. Li's counsel. It outlined her income and travel times in the years prior to the Accident. It stated that she had lost significant income as a result of the Accident. Ms. Li testified in direct examination that the letter was "written by DAWA", her former employer. She indicated she had no knowledge of how it was created.
- [51] When taken to the letter in cross-examination, Ms. Li initially did not recall seeing the letter before. When further questioned, Ms. Li stated the "accountant did this letter." She thought her name was Wendy. When asked how the accountant would know the details about her contained in the letter, she replied that she advised the accountant of the details. When counsel suggested no one at DAWA wrote the letter because it was not on DAWA letterhead, Ms. Li stated the "accountant wrote [the letter] but I supplied the details."
- [52] When Ms. Li was again confronted with the fact that the letter did not display the company's letterhead, as did a letter from DAWA also in evidence, she was evasive, maintaining that the numbers came from the accountant. When pointedly asked whether the accountant gave her the numbers and then she wrote the letter herself, she stated: "That I really don't remember". She further stated that her working hours were reduced in 2014. She stated the boss's wife, Jennifer, was very unhappy and they had a dispute.
- [53] When again asked who wrote the letter, she stated she had a discussion with the accountant. The accountant asked her to produce documents that showed Ms. Li lost about 15% to 25% in income. Jennifer insisted she only lost 15% as a result of the Accident. They argued about that and others were present.
- [54] When again asked who wrote the letter, she finally admitted that her husband had written the letter as well as a letter written to an ICBC adjuster which used identical language. Ms. Li then stated the accountant "approved it".
- [55] Mr. Wu also testified about the letter. He first stated he simply did the calculations for the letter based on data provided by DAWA. He agreed he prepared the digital version of the letter, but stated it was only a draft. He did the calculations because the accountant could not. His testimony regarding the lack of letterhead and the DAWA signature block on page 4 was problematic. He stated he could not recall the details.
- [56] This testimony was problematic. It is difficult to believe that the accountant was unable to do income calculations. Both Ms. Li and Mr. Wu were evasive when testifying about the letter.
- [57] No one from DAWA was called as a witness regarding this letter.

- [58] Based on a balance of probabilities, I find that no one from DAWA authorized the letter or approved its contents. I find that both Ms. Li and Mr. Wu were less than forthcoming regarding the drafting of the letter and its contents.
- [59] The difficulty with bending the truth like this is that it colours all of Ms. Li's and Mr. Wu's evidence. They have demonstrated to this Court that they are prepared to mislead the Court to further Ms. Li's case.
- [60] Given these concerns, I must approach Ms. Li's and Mr. Wu's testimony with particular scrutiny. I must examine the evidence for its consistency with other evidence presented at trial. I cannot simply accept uncorroborated testimony. I cannot accept the testimony of either Ms. Li or Mr. Wu unless it is consistent with other evidence I do accept. Overall, the evidence of Ms. Li and Mr. Wu must be tested against its harmony with other evidence, the preponderance of the probabilities, and with its reasonableness: *Faryna v. Chorny*, [1952] 2 D.L.R. 354 at 357 (B.C.C.A.).

Causation

Legal Principles

- [61] The law of causation is well established. Before assessing damages, the "plaintiff must establish a causal connection between the defendant's negligence and [the plaintiff's] pain": *Farrant v. Laktin*, 2011 BCCA 336 at para. 8. The plaintiff bears the onus of proving that the defendant's negligence was the cause of her current symptoms: *Warkentin v. Riggs*, 2010 BCSC 1706 at para. 107.
- [62] The generally accepted test for causation is the "but for" test: *Resurface Corp. v. Hanke*, 2007 SCC 7 at paras. 21-22. The plaintiff bears the onus of proving on a balance of probabilities that but for the defendant's negligent act or omission, the injury would not have occurred: *Athey v. Leonati*, [1996] 3 S.C.R. 458 [Athey]; *Blackwater v. Plint*, 2005 SCC 58. Causation is found if the injury would not have occurred without the defendant's negligence: *Clements v. Clements*, 2012 SCC 32 at para. 8 [Clements].
- [63] The plaintiff need not establish that the defendant's negligence was the sole cause of the injury: *Athey* at para. 17. In *Karim v. Li*, 2015 BCSC 498 [Karim], Justice Abrioux addressed non-tortious contributing causes to personal injuries:
- [92] A defendant is liable for any injuries caused or contributed to by his or her negligence. If the defendant's conduct is found to be a cause of the injury, the presence of other non-tortious contributing causes does not reduce the extent of the defendant's liability. However, if the defendants did not cause an injury, the defendants will not be liable for any losses or damages flowing from that injury: *Brewster v. Li*, 2013 BCSC 774 at para. 78; *Blackwater v. Plint*, 2005 SCC 58 at para. 78.

- [64] In *Athey*, the Supreme Court of Canada discussed the need to take a pre-existing condition of the plaintiff into account:
- [35] 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. 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. 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.
- [65] In *Karim*, *Abrioux J.* explained the difference between the thin and crumbling skull doctrines:
- [99] It is a basic principle of tort law that the plaintiff must be placed in the position he or she would have been in had the defendant's tortious act not occurred: *Athey* at 466; *Blackwater* (SCC) at para. 81. The thin skull rule provides that a defendant must take his or her victim as they find them, even if the plaintiff's injuries are more severe than they would be for a normal person. However, the crumbling skull rule provides that the defendants need not compensate the plaintiff for any debilitating effects of a pre-existing condition which the plaintiff would have experienced whether or not injury was sustained by the defendant's tortious act. See *Athey* at 473.
- [100] The name "crumbling skull" doctrine can be misleading and it should not be assumed to contrast manifest and disabling conditions with latent conditions triggered by the tort: *T.W.N.A. v. Canada (Ministry of Indian Affairs)* (sub nom *A. (T.W.N.) v. Clarke*), 2003 BCCA 670 at para. 26. In *T.W.N.A.*, *Smith J.A.* for the Court of Appeal observed that both latent and active pre-existing conditions must be considered in assessing the plaintiff's original position and the difference between the two conditions only arises in the assessment of damages: paras. 29-30. See also *York v. Johnston* (1997), 37 B.C.L.R. (3d) 235.
- [66] Latent and pre-existing conditions must therefore be taken into account when assessing damages: *T.W.N.A. v. Canada (Ministry of Indian Affairs)*, 2003 BCCA 670 at para. 30 [TWNA]. The plaintiff is to be put back to their original position, not a better position: *Athey* at para. 32.
- [67] The Court of Appeal in TWNA held that if the evidence demonstrates a "measurable risk" or a "realistic chance" that the plaintiff's pre-existing condition would have resulted in a loss regardless of the defendant's negligence, damages should be reduced: para. 35. In other words, the defendant need not prove, on a balance of probabilities, the plaintiff's pre-existing condition would have caused a loss. The contingency that a loss would occur should be given weight according to its relative likelihood, and accounted for in the award: TWNA at para. 48. The defendant is only liable for worsening the pre-existing condition.

Analysis

Pre-Existing Conditions

- [68] Dr. Jiang testified for the plaintiff. Dr. Jiang testified that he has been Ms. Li's treating physician since 2011. From his clinical notes, it appears that he has been her treating physician since March 2013, a few months before she was in the Accident. Dr. Jiang communicates with Ms. Li in Mandarin.
- [69] Dr. Jiang testified that when he first saw Ms. Li she was generally well, with only a history of acid reflux and high cholesterol. He stated Ms. Li had no history of dizziness, anxiety, or sleep issues. Although he did not review her past history when she first became his patient, Dr. Jiang testified that he reviewed her medical history when he was asked to prepare a medical legal report for this claim. He became aware that there were two x-rays of her cervical spine, one in 2006 and the other in 2011. When questioned, he could not rule out that her previous history is connected to her current injuries. He testified that if her cervical spine injuries were persistent, they would affect her injuries from the Accident. In redirect, Dr. Jiang stated that if a patient's x-rays were normal and there were no complaints for two years prior to the accident, those prior injuries are probably not related to the current injuries.
- [70] Ms. Li was taken to the clinical records of her former family physician, Dr. Hui. The records indicated intermittent neck discomfort and dizziness when she turned her head to the left side. They also stated she tested mild positive on a Romberg test. Ms. Li did not deny seeing Dr. Hui in October 2011 with these complaints. She agreed that he had arranged an x-ray of her neck.
- [71] Ms. Li reported to Dr. Dumper that she had some problems in her neck in the early 2000s, approximately ten years prior to the Accident. According to Ms. Li, her neck issues had, for the most part, resolved at the time of the Accident.
- [72] Dr. Dumper was taken to clinical notes that Ms. Li had complaints of neck pain and dizziness in 2006. Dr. Dumper testified that he had seen Dr. Hui's notes relating to dizziness but he discounted the notes because Ms. Li told him the symptoms were different. However, he admitted it was very easy for Ms. Li to get confused and, with respect to Dr. Hui's report, "there was some smoke there" and he had wanted to investigate further until he talked to Ms. Li.
- [73] Ms. Li's prior neck symptoms lasted for over a year. Dr. Chin testified that by definition ongoing pain symptomology of more than six months is considered chronic. Dr. Boyle agreed with this statement in cross-examination.
- [74] Ms. Li admitted to having dizziness, neck and shoulder issues, and headaches before the Accident. She testified that this was over a decade ago, when she was working long hours and was menopausal. She believes her dizziness was caused by fatigue. Ms. Li testified that

acupuncture resolved her dizziness, her headaches, and her shoulder problem. Ms. Li also received treatment from an employee's mother, an expert in traditional Chinese medicine. After more than six months and many needles, her dizziness resolved. She testified her headache and shoulder problems also resolved.

- [75] In 2011, while working in the restaurant industry, Ms. Li pulled a lever on a large flour mixer and seriously injured her lower back. According to Ms. Li's testimony, she was off work for seven or eight months to recover from that injury. Ms. Li admitted that she also pulled her neck but it slowly got better to the point she thought it was fully recovered. It took her seven to nine months to recover; after one year she was fully recovered.
- [76] Despite the above testimony, the medical records indicate Ms. Li had neck pain and dizziness two years prior to the Accident. In her testimony, Ms. Li stated she did not recall having problems with her back between 2011 and the Accident. She advised Dr. Chin that her neck was 90% better before the Accident.
- [77] Ms. Li also suffered from blurry vision when she worked in the restaurant industry. She testified that after she left labour-intensive work, she did not experience blurry vision again. Ms. Li testified that she had some ringing in her ears when she went through menopause, when she could not sleep well.
- [78] The evidence establishes that prior to the Accident, and as recently as 2011, Ms. Li had problems with her neck and shoulder and that she also suffered from dizziness when she turned her head to the left. She also had some headaches and back pain prior to the Accident. Based on Dr. Hui's clinical records and Ms. Li's testimony during discoveries, her dizziness and neck pain both lasted over a year and were therefore chronic.
- [79] I therefore find Ms. Li had chronic neck pain and dizziness prior to the Accident.

Soft Tissue Injuries

- [80] Dr. Jiang diagnosed soft tissue injuries from the Accident. He testified that Ms. Li has experienced some improvement with treatment. Today, Ms. Li's soft tissue injury complaints are about her neck. Ms. Li testified that she has no pain in her shoulders today. She testified that her shoulder pain probably resolved within a few months.
- [81] Dr. Patrick Chin, an orthopaedic surgeon, conducted an independent medical examination of Ms. Li on April 16, 2018 at the request of the plaintiff. He testified that Ms. Li's neck pain is not just from the spine but also from her neck muscles. In an acute injury, the individual's muscles tense up so they lose the normal curvature. He confirmed that an x-ray taken on May 28, 2014 showed a "straightening of the normal cervical lordosis", which can cause pain. In his opinion, Ms. Li's neck pain is chronic because it has lasted more than six months. Dr. Chin testified that in his opinion the neck pain was caused by the Accident.

[82] Dr. Boyle, an expert in orthopedic surgery, conducted an independent medical examination of Ms. Li on January 24, 2018 at the request of the defendants. He questioned the extent of Ms. Li's injuries. He opined that because they are soft tissue injuries, Ms. Li's injuries should resolve over time.

[83] Dr. Boyle was subjected to vigorous cross-examination. The plaintiff was critical of Dr. Boyle's findings, saying he admitted in cross-examination the following:

- a. patient history is important;
- b. pain is subjective, and different people experience pain in different ways;
- c. if symptomology from a myofascial strain continues to persist three to nine months following the injury, it is likely to continue to do so indefinitely;
- d. the longer the symptomology persists, the less likely it is to recover;
- e. pain behavior can be personal or cultural;
- f. sitting for extended periods of time is commonly difficult for people with persisting symptomology from upper body myofascial strains, and can result in them shifting positions;
- g. chronic pain may necessitate a person modifying and, in some cases, reducing their work load;
- h. chronic headaches and myofascial pain can impact one's abilities to work with computers for extended periods of time;
- i. pain can be limiting and affect leisure, household, and work activities;
- j. passive modalities can help with symptom management, although an active program is primary; and
- k. myofascial injuries would not be expected to show on imaging.

[84] I agree with the foregoing. However, the problem for Ms. Li is my findings regarding her credibility and reliability. Dr. Boyle's answers to the hypothetical questions put to him did not overcome his concerns with Ms. Li's examination. In this context, I take seriously the statements in Dr. Boyle's report and his testimony that Ms. Li displayed:

- a. pain behaviour that was inconsistent with musculoskeletal pain;
- b. exaggerated neck restrictions;
- c. decreased sensation in her left upper limb without either anatomical or pathological explanation;
- d. weakness in her wrist and thumb when extended, inconsistent with how weakness would present; and

e. lack of effort.

- [85] Dr. Boyle diagnosed Ms. Li with myofascial strain in her neck and mild impingement syndrome of her left shoulder. Dr. Boyle found Ms. Li's limitations on her examination to be out of proportion to this diagnosis and inconsistent with the injuries she sustained. He did not accept that her neck pain persists. He emphasized that Ms. Li has taken no pain medication, no muscle relaxants, and no anti-inflammatories for her pain.
- [86] I found Dr. Boyle's evidence to be credible. He made admissions when reasonable. Despite an impressive cross-examination, his opinions were not undermined in a meaningful way.
- [87] I have ignored the last question put to Dr. Boyle in re-examination because Ms. Derber did not question him during her cross-examination about Ms. Li's pre-existing conditions or prior injuries.
- [88] I find that the Accident aggravated Ms. Li's pre-existing neck and shoulder pain. I find on a balance of probabilities that Ms. Li continues to suffer from some residual neck pain, even though this exceeds the expected time period for recovery. Her shoulder and back pain resolved within a few months of the Accident.

Concussion

- [89] Both Ms. Li and Mr. Wu testified that Ms. Li struck her head on the ceiling of the vehicle during the Accident. Ms. Li reported this to a number of experts, but she did not report this to Dr. Boyle.
- [90] Dr. Chan's clinical records from the day following the Accident have no mention of Ms. Li hitting her head. There are no notations in the record of bumps, bruising, headache, loss of consciousness, nausea, or dizziness. Ms. Li agreed that these clinical notes were accurate.
- [91] In his report, written five years after the Accident, Dr. Jiang states Ms. Li suffered from a mild head concussion and a "soft tissue injury, mainly involving neck, shoulder and back areas." Dr. Jiang agreed in cross-examination there was no mention of head pain or concussion in his clinical notes post-Accident. It was put to Dr. Jiang in cross-examination that a concussion is a mild traumatic brain injury which is serious. He agreed. He agreed that there are specific treatments for concussion, which he did not prescribe. Dr. Jiang also agreed had there been a concussion diagnosis he would want to monitor the patient. He did not do so.
- [92] Vomiting can be evidence of a concussion. Ms. Li testified that she had severe vomiting following the Accident. She later testified that she had vomited twice. Dr. Jiang's clinical notes and his report do not mention nausea or vomiting.

- [93] The evidence does not establish, on a balance of probabilities, that Ms. Li suffered from a head trauma or that she sustained a concussion in the Accident. The only evidence of a concussion is based on Ms. Li's self-reporting which was not corroborated by the medical records or the testimony I accept from the various experts.

Loss of Concentration and Memory

- [94] Ms. Li has had problems with her memory since the Accident. She forgets to go to specialists. She sends articles to the wrong places. She also has problems with concentration and focus. Before she completes one thing she will start something else. Sometimes her work is delayed, or mistakes are made. When she misses work, she becomes anxious. She also becomes anxious when she cannot finish her work on time.
- [95] I have no reason to question that today Ms. Li suffers from memory and concentration issues but the question is whether they are caused by the Accident.
- [96] Issues relating to memory and concentration do not arise in the medical records following the Accident. As stated above, I am unable to conclude that Ms. Li sustained a head trauma or a concussion as a result of the Accident. Absent these types of injuries, Ms. Li is unable to relate her memory issues or any cognitive impairment to the Accident. There was no expert evidence regarding memory issues or cognitive function that is in any way causally linked to the Accident. There is no corroborating lay evidence that Ms. Li's memory issues arose as a result of the Accident apart from the testimony of Mr. Wu that he did not observe Ms. Li having any memory issues prior to the Accident.
- [97] While there is a temporal connection between Ms. Li's memory issues and the Accident, there is no cause and effect relationship between them. While the memory loss and cognitive difficulties occurred after the Accident, they were not demonstrated to be caused by the Accident. Causation need not be estimated with scientific precision. Nevertheless, I find that a temporal connection, alone, is insufficient to find it was a cause of Ms. Li's memory loss: *Mudry v. Minhas*, 2010 BCSC 637 at paras. 49-50.
- [98] I find there is insufficient evidence for me to conclude that Ms. Li's memory and cognitive issues were caused by the Accident, especially in light of the credibility issues with the two primary lay witnesses.

Headaches

- [99] Ms. Li's testimony was inconsistent regarding headaches. She testified that headaches come with her dizziness. Ms. Li saw a headache specialist. She advised the specialist that she was no longer experiencing headaches.
- [100] In cross-examination, Dr. Jiang agreed that the first mention of a headache was almost two years after the Accident, on October 20, 2015. He also agreed that complaints of headaches are inherently subjective.

[101] Dr. Dumper noted that Ms. Li suffers from headaches but was unsure if they were related to the Accident or if they were "just normal headaches".

[102] The evidence is insufficient for me to find a causal connection between the Accident and Ms. Li's headaches.

Sleep Issues and Anxiety

[103] Ms. Li testified that she had many nightmares following the Accident. She continues to have nightmares but not nearly as often as in the six months following the Accident.

[104] Ms. Li testified her pattern is she cannot sleep well for two days, and then the third night she can sleep for seven hours. She testified she can sleep for eight hours when her grandchildren stay overnight.

[105] Ms. Li acknowledged she takes sleeping pills when she cannot sleep. Ms. Li testified that she was not getting much sleep during the trial. After being on the stand off and on for four days, she had a bad night and did not attend trial the following day.

[106] Mr. Wu testified Ms. Li did not have nightmares prior to the Accident. She did after the Accident. He stated Ms. Li's sleep issues improved gradually.

[107] Ms. Li also complained about anxiety, but there is not enough in the medical records for me to find that it is related to the Accident. In fact, in a document dated August 15, 2014, Dr. Jiang, Ms. Li's treating physician, stated that she suffers from anxiety which is "non-MVA-related".

[108] I accept that Ms. Li had some nightmares and issues sleeping following the Accident. These have improved over time.

Depression

[109] Ms. Li states she has had depressed mood since the Accident. Mr. Ping admitted his mother was sad at the time she divorced his father in 2007. However, she was very happy after she became a newspaper reporter and after she met Mr. Wu. Mr. Wu finds Ms. Li to be irritable today.

[110] There was no medical evidence to establish that Ms. Li suffers from depression, or even low mood, as a result of the Accident. The lay testimony was insufficient for me to draw this conclusion, especially given the problems with Ms. Li's and Mr. Wu's credibility.

Blurry Vision

[111] Ms. Li testified that she suffers from blurry vision. She testified this started after the Accident but its onset has been gradual. The Accident has expedited the aging of her eyes. She cannot write for an extended period of time because her vision becomes blurred.

[112] Again, there is nothing in the medical records or the testimony of the experts to establish a link between Ms. Li's vision and the Accident. The lay testimony was insufficient for me to draw this conclusion. I also note Ms. Li suffered from blurry vision when she worked in the restaurant industry.

[113] I find that any difficulties Ms. Li has experienced with vision are not a result of the Accident.

Tinnitus

[114] Ms. Li testified she had tinnitus, "noise like mosquitoes", in her ears following the Accident. In direct examination, Ms. Li testified that her tinnitus was bad for the first three or four months after the Accident and then gradually went away over a year or two. In her discovery evidence, she testified that her tinnitus lasted for one or two months following the Accident and then gradually went away.

[115] I accept that Ms. Li suffered from tinnitus following the Accident. However it was not serious, it has resolved, and, according to the medical records, she had experienced tinnitus in the past.

Blackouts

[116] Ms. Li also complained of blackout attacks, which Dr. Dumper found to be one of her most bothersome symptoms. They do not seem to occur when she is not moving. Ms. Li did not provide any viva voce testimony about such attacks nor is there a complaint of loss of consciousness or blackouts in the medical records following the Accident. Dr. Dumper suspects they are a component of anxiety or potentially PTSD. There was no medical evidence to substantiate a PTSD diagnosis and no evidence from lay witnesses to corroborate Ms. Li's complaints of blackouts.

[117] If Ms. Li suffers from blackouts, there is not enough evidence to establish it was caused by the Accident.

Dizziness

[118] Ms. Li testified that her problems today are from dizziness. Her dizziness is most notable when she is in a crowd of people. Turning left causes her to become dizzy, as does sleeping on her left side. She testified that about a year after the Accident she tried dancing with her husband. She could not do so because she could not turn to the left without feeling dizzy.

[119] Ms. Li's dizziness is a spinning sensation related to postural changes. Ms. Li testified that her dizziness does not occur every day. It goes away when she sits or stands for a while. It has improved over time.

- [120] Mr. Ping, whom I found to be a credible witness, testified that his mother's dizziness started shortly after the Accident. He did not recall exactly when. He noticed that when she was playing with her grandchildren, she would need to lay down due to feeling dizzy.
- [121] The medical experts were cross-examined on the date on which Ms. Li first reported dizziness to the medical practitioners. There is no mention of dizziness in the clinical records of Dr. Chan, the doctor who saw Ms. Li the day after the Accident.
- [122] Ms. Li testified that she told Dr. Jiang on July 26, 2013 that she suffered from dizziness and headaches. Dr. Jiang testified that Ms. Li's primary complaint following the Accident was her neck pain and stiffness in her shoulder.
- [123] In his medical legal report, Dr. Jiang reports "immediate dizziness post-MVA." According to Dr. Jiang's clinical notes, Ms. Li did not complain of dizziness until December 2013, approximately four and a half months after the Accident. Dizziness was also under the notation of non-ICBC issues. Dr. Jiang testified dizziness was under this heading due to insurance coverage. However, he agreed that in December 2013 he had not concluded what the dizziness was from, and thought it might be related to Ms. Li's high blood pressure. He also agreed in cross-examination that he had not made a diagnostic conclusion regarding her dizziness as of April 15, 2014. He agreed he made the note "HTN", which refers to hypertension. This can cause dizziness. Dr. Jiang did not link dizziness to the Accident until after April 2014.
- [124] In cross-examination, Dr. Jiang agreed that had Ms. Li been concerned with dizziness, it would be a key word in his clinical notes. Dr. Jiang testified that he may have missed a few things on the first visit, such as back pain. He also testified Ms. Li may have complained about dizziness a few visits after her initial visit. This is consistent with the clinical notes. Dr. Jiang testified that Ms. Li's dizziness has been up and down, but it has never completely resolved.
- [125] Dr. Dumper specializes in the treatment of disorders of dizziness and balance, also known as the vestibular system. At the request of Ms. Li's counsel, he conducted an independent medical examination of Ms. Li on February 6, 2019. Ms. Li described episodes of dizziness to him lasting between 5 to 20 seconds, typically triggered by rolling to the left in bed. She could also be triggered, at certain times, in the general environment. She reported to Dr. Dumper that after the Accident the world did not feel level.
- [126] Dr. Dumper noted that Ms. Li's symptoms were validated through a test called Computerized Dynamic Posturography which was conducted by Mr. Mallison, Ph.D. He had administered the testing for vestibular deficit in July 2018. However, Dr. David testified that the raw data used by Mr. Mallison does not support this diagnosis. Dr. Dumper, in his addendum report, agreed this test cannot be used in isolation but maintained it is a useful tool.

- [127] Dr. Dumper relied on the history elicited from Ms. Li. From Ms. Li's history, Dr. Dumper stated that Ms. Li had extreme dizziness in the initial 48 hours following the Accident. This is not supported by the clinical records.
- [128] Dr. Dumper agreed in cross-examination there was no reference to dizziness, nausea, spinning, head injury, or concussion when Ms. Li attended a walk-in clinic the day after the Accident. This is despite her testimony that she went to the walk-in clinic due to the dizziness she was experiencing. The complaint was about pain in her neck and shoulder.
- [129] Dr. Dumper's physical examination of Ms. Li was normal. He did some balancing tests on Ms. Li. He confirmed that she has benign paroxysmal positional vertigo (BPPV) on her left side. He noted that stones in Ms. Li's inner ear, the utricle, become dislodged and collect in her left posterior balance canal. If she turns her head to the left, these stones form a piston and create abnormal movement of her copula. She will then experience the room as spinning. When previously tested, there were no documented objective findings of BPPV.
- [130] Dr. Dumper defended his findings of dizziness directly after the Accident by stating that the records of walk-in clinic doctors are unreliable. I do not accept this explanation. Dr. Dumper testified that Ms. Li may have been reporting only the most problematic symptoms right after the Accident: her neck and shoulder pain. Dr. Dumper also supported his diagnosis of dizziness caused by the Accident on records from a traditional Chinese medicine practitioner and a physiotherapist.
- [131] In addition to BPPV, Dr. Dumper diagnosed Ms. Li with mild visual vestibular mismatch. Dr. Dumper did not have a clear etiology or cause for the vestibular mismatch. Dr. Dumper testified that Ms. Li's vestibular mismatch may result in her getting dizzy when too much is going on around her. This is because there is too much visual noise in her peripheral vision and she must rely on her vision due to her impairment. This is consistent with Ms. Li's testimony.
- [132] Dr. Dumper concluded that Ms. Li's BPPV symptoms came on after the Accident and the Accident was directly causative of her symptoms. He based this on a lack of a clear record of vestibular complaints prior to the Accident[1] and significant head trauma from the Accident. As a result, he stated in his report, "this appears to be directly attributable to the accident from a time course, and motor vehicle trauma, whiplash, and head trauma are all noted to be causes of this condition."
- [133] Dr. David, who specializes in otolaryngology, questioned the causal connection between the Accident and Ms. Li's dizziness because the references to dizziness were "not corroborated across time by the medical practitioners." Dr. David opined that there is no causal connection between the Accident and the diagnosis of BPPV. Dr. David emphasized that it was not until after April 2014 that Dr. Jiang documented that Ms. Li's dizziness had a temporal connection to the Accident. Dr. David testified that a review of her medical notes shows she did not consistently complain about dizziness until nine months following the Accident. In his opinion, this is not typical for BPPV caused by a motor vehicle accident.

- [134] Dr. David testified that if dizziness arose from the Accident, usually there would be a "sudden and dramatic onset of dizziness." When pressed during cross-examination, he explained it would be expected to be reported in the first four weeks from the trauma.
- [135] A number of records were put to Dr. David in cross-examination, establishing a reporting of symptoms of dizziness shortly after the Accident. These records were from a Chinese Medicine Treatment Centre dated July 25, 2013, where it was recorded that Ms. Li stated "some time when I feel dizzy or headache, I will throw up." Another record from Aykroyd Physiotherapy Centre dated October 2, 2013 recorded that Ms. Li was experiencing dizziness. The third record was a medical certificate from Dr. Bang Duan, a traditional Chinese Doctor of Orthopedics and Traumatology who treated Ms. Li from October 2013 to December 2014. The doctor's notes stated that in July 2013, she was injured in a car accident from which she suffered neck pain and dizziness.
- [136] Dr. David discounted these reports because he did not feel that these practitioners were qualified to meaningfully explore and document these symptoms. Dr. David testified their opinions were not evidence-based. As a result, he restricted his review to a review of the medical records of the physicians. I find this explanation problematic. The records were not proffered for a diagnosis or the truth of their contents. They were proffered to support complaints of dizziness contemporaneous with the Accident.
- [137] Dr. David administered the Dix-Hallpike test to Ms. Li. The test requires the physician to reposition the patient quickly. If they test positive for BPPV, there will be abnormal reflexive eye position changes. Ms. Li tested positive. Dr. David suggested that the lack of a positive Dix-Hallpike test, prior to the one he administered in 2019, also suggested a lack of a causal connection.[2]
- [138] Dr. David agreed in cross-examination that BPPV can come and go. It can resolve or be quiescent so a negative test result does not mean Ms. Li did not previously suffer from BPPV.
- [139] Finally, Ms. Li refused to have the Video Electronystagmogram, Cervical Vestibular Evoked Myogenic Potential, and Ocular Vestibular Evoked Myogenic Potential tests done. According to Dr. David, the Video Electronystagmogram test is the objective gold standard test of inner ear balance function. Ms. Li had a normal test in the past.
- [140] Dr. David stated in his report that Ms. Li reported to him that she had not had any symptoms of vertigo in the preceding 11 months prior to his examination. This was not in his notes and I place no weight on this comment.
- [141] Despite Dr. David's concerns, I accept that Ms. Li suffered from dizziness after the Accident. Ms. Li reported dizziness to the individual who treated her at Alive Sports Injury, a traditional Chinese treatment centre, on July 25, 2013, nine days after the Accident. On October 2, 2013 the Aykroyd Physiotherapy notes record a complaint of dizziness. There are similar records in November 2013. While these practitioners are not qualified to diagnose

BPPV or other inner ear abnormalities, they do provide corroborating evidence that Ms. Li was complaining of dizziness at the relevant time. They support a temporal connection between dizziness and the Accident.

[142] Dr. Dumper testified that BPPV is a condition that can reoccur, for example in a head trauma or whiplash injury. If she had clear evidence of positional vertigo before the Accident, this would be "more of a re-exacerbation of her previous condition."

[143] On a balance of probabilities, I find that Ms. Li suffered from dizziness, caused by BPPV, in the weeks following the Accident. However, because she had a history of dizziness prior to the Accident, I find that her pre-existing dizziness was aggravated by the Accident, not solely caused by it.

[144] Dr. Dumper diagnosed mild vestibular mismatch resulting in Ms. Li becoming dizzy when there is too much "visual noise" in her surrounding environment. This was consistent with Ms. Li's testimony. I find it is more likely than not that Ms. Li suffers from a mild form of vestibular mismatch. There is no evidence that this was a pre-existing condition.

Conclusion on Causation

[145] In my view, the expert medical evidence together with the evidence of Ms. Li and Mr. Wu establishes, on a balance of probabilities, that the defendants' negligence caused the following injuries:

- an exacerbation of pre-existing neck and shoulder pain, resulting in ongoing mild chronic neck pain;
- tinnitus, which has resolved;
- nightmares and sleep issues which have improved over time;
- a vestibular or inner ear injury (BPPV), aggravating Ms. Li's pre-existing issues with sporadic dizziness; and
- mild vestibular mismatch resulting in Ms. Li getting dizzy when there is too much visual noise in her surrounding environment.

[146] Ms. Li's pre-existing dizziness and neck conditions were aggravated by the Accident.

[147] The defendants' breach of their duty of care was the cause of some, but not all, of Ms. Li's injuries.

Prognosis

Soft Tissue Injury

[148] In terms of prognosis, Dr. Jiang testified that Ms. Li's soft tissue injuries were not causing her problems with her activities of daily living. Dr. Boyle testified that Ms. Li had full range of motion, including extension, rotation, and lateral flexion, which is considered a positive prognostic factor in terms of improvement following a soft tissue injury. In his report he states:

Positive prognostic factors include an absence of significant prior history, absence of neuritic upper extremity complaints, absence of significant degenerative changes, free range of motion and the normal neurological exam

[149] Dr. Boyle testified that Ms. Li's musculoskeletal complaints do not prevent her from being active.

[150] Dr. Boyle concluded it is likely Ms. Li will undergo a degree of resolution, and that any relapse with some symptoms will not likely be intrusive. Dr. Boyle testified that Ms. Li has a good prognosis for recovery. He agreed in cross-examination that a good prognosis means that Ms. Li's injuries will remain the same and not worsen. Ms. Li's work is sedentary, without heavy requirements. If anything, Dr. Boyle opined, she can work with ergonomic modifications such as a sit-stand desk and telephone adaptation.

[151] Despite its persistence, there is no evidence that Ms. Li's ongoing neck pain will significantly limit her abilities to participate in work, leisure activities, and household chores. I find that her neck pain is not highly intrusive.

Sleep Issues

[152] There is not enough information from the medical experts to establish that Ms. Li's nightmares and sleep issues have persisted to any significant degree. I find that Ms. Li will continue to suffer with these challenges, but in a minor way which will not significantly affect her activities of daily living.

Dizziness

[153] In terms of her dizziness, Dr. Jiang testified that Ms. Li may improve, especially with vestibular physiotherapy, but there is a chance her dizziness will persist for a long time.

[154] Dr. Dumper stated Ms. Li's dizziness seemed to resolve toward the end of September 2013. Since then it has been occurring intermittently, at least a couple of episodes per month. Dr. Dumper found that Ms. Li's BPPV does not affect her daily activities of living as it is very intermittent when it comes on.

- [155] Dr. David testified that BPPV typically goes away in four to six weeks of its own accord. Physiotherapy manoeuvres are effective in curing BPPV. Dr. Dumper also testified that BPPV is very short-lived and generally lasts 10 to 20 seconds. If the patient turns over the other way, effectively emptying the canal, the stone will go back into place for weeks or months. Both in his report and his testimony Dr. Dumper referred to patients being able to self-treat BPPV.
- [156] Dr. David treated Ms. Li with the particle-repositioning manoeuvre at the independent medical examination. This is a curative manoeuvre where the patient is rolled a certain way to drop the loose salt crystals back into their normal resting spot. Dr. David testified this manoeuvre has a greater than 90% success rate. Upon performance of the manoeuvre on Ms. Li, there was no evidence of "second stage nystagmus" which was present prior to the manoeuvre. Dr. David testified this indicated the manoeuvre was successful.
- [157] Further, Dr. David testified that where patients exhibit ongoing symptoms despite treatment and physiotherapy exercises, a surgical cure is available. This is known as posterior semicircular canal plugging which is a safe, same day procedure, under general anaesthesia.
- [158] In his report, Dr. David states "Ms. Li has no ongoing complaints of dizziness or imbalance. She has no day-to-day restrictions in her level of activity, including driving, and exercising, due to a complaint of imbalance." Dr. David opined that BPPV is not considered a significant disability for most people because it does not prevent them from their activities of daily living or from working. Dr. Dumper did not offer his opinion regarding Ms. Li's ability to perform her work.
- [159] Based on the above, I find that Ms. Li's dizziness is not significant in terms of limiting her daily activities or her ability to perform her job.

Non-Pecuniary Damages

Legal Principles

- [160] Non-pecuniary damages are awarded to compensate the plaintiff for "pain, suffering, loss of enjoyment of life and loss of amenities": *Trites v. Penner*, 2010 BCSC 882 at para. 188. They are to provide solace to plaintiffs, and to ameliorate their conditions. Non-pecuniary damages must be fair to all parties; fairness is measured against awards made in comparable cases.
- [161] Non-pecuniary damages do not focus on the injury alone but include a number of factors. As set out in *Stapley v. Hejslet*, 2006 BCCA 34 at para. 46, leave to appeal ref'd [2006] S.C.C.A. No. 100, the factors that influence an award of non-pecuniary damages include:
- a) age of the plaintiff;
 - b) nature of the injury;

- c) severity and duration of pain;
- d) disability;
- e) emotional suffering;
- f) loss or impairment of life;
- 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 penalize the plaintiff).

[162] Ms. Li submits that an appropriate award for non-pecuniary damages is \$175,000. She relies on the following cases:

- a) Kijowski v. Scott, 2015 BCSC 2335 [Kijowski];
- b) Ingram v. Munroe, 2019 BCSC 234 [Ingram];
- c) Cantin v. Petersen, 2012 BCSC 549;
- d) Mayer v. Umabao, 2016 BCSC 506; and
- e) Young v. Anderson, 2008 BCSC 1306.

[163] The defendants submit that an appropriate award is \$20,000 to \$35,000. They rely on the following cases:

- Nagaria v. Dhaliwal, 2018 BCSC 569 [Nagaria];
- Tisalona v. Easton, 2015 BCSC 565;
- Hoque v. Howard Carter Lease Ltd., 2020 BCSC 160; and
- Glendenning v. Matwychuk, 2019 BCSC 1661 [Glendenning].

[164] In determining non-pecuniary damages, I have considered the cases to which the plaintiff and defendants referred. I have paid particular attention to Ingram, Kijowski, Nagaria, and Glendenning.

Analysis

[165] Ms. Li was in relatively good health prior to the Accident. Mr. Wu testified he was specifically looking for a wife with excellent health and saw evidence of it in her ability to run with her grandchildren, swim, dance, and work hard. Ms. Li testified that she and Mr. Wu had a rewarding intimate life and were very happy. Mr. Wu testified that Ms. Li was an outgoing and happy person, and always smiled at everyone.

- [166] Mr. Wu testified that pre-Accident he and Ms. Li enjoyed spending time dancing, swimming, playing ping-pong, fishing, and singing in Ms. Li's choir. Ms. Li testified she enjoyed table tennis and did yoga once or twice per week. She swam every two or three days. She and Mr. Wu fished in the spring, summer, and fall. They also walked for about 30 minutes every day after dinner.
- [167] Mr. Ping testified his mother attended all types of social events and was very active prior to the Accident. She had been president of the Chinese Women's Association.
- [168] Ms. Li testified that before the Accident she did all the cooking and all the housecleaning. This is not surprising as Mr. Wu did not live with her prior to the Accident. As already stated, from the evidence it is unclear how much time he spent with Ms. Li but it was not full time.
- [169] The Accident caused significant distress for both Ms. Li and Mr. Wu. Immediately after the Accident Ms. Li had back, neck, and shoulder pain. After the Accident Ms. Li also had nightmares and began experiencing tinnitus and dizziness. The tinnitus settled down after a few months. She also suffered from lack of sleep for which she has used melatonin, Huangqi, Gjouji, and sleeping pills to address.
- [170] After the Accident, Ms. Li feared driving because she was afraid something would appear in front of her. She had subsequent accidents when she was anxious or nervous. Her fear disappeared about two years after the Accident. She is not anxious today when driving but she no longer drives on the highway.
- [171] Mr. Ping testified that his mother continues to cook post-Accident. He testified that she is not in great physical shape. The biggest change is that his mother does not clean and does not have as much endurance as she did pre-Accident. She still does homework with the grandchildren.
- [172] Ms. Li testified that she put on weight following the Accident and had low energy. She could not play table tennis because her reflexes were slow. She tried fishing but could not keep balance on the boat and therefore stopped. She gave up her yoga membership.
- [173] Ms. Li testified that since the Accident she does not do sports because she has to go to doctors and attend treatments. She cannot swim for a long period of time because she cannot turn to the left or right. She cannot do freestyle so she basically stopped swimming.
- [174] I accept that Ms. Li was previously an active woman. Due to the Accident, she has had mild chronic pain in her neck. She also suffers from intermittent dizziness. These injuries have somewhat curtailed her activities, affected her relationships, and diminished her enjoyment of life. However, the evidence established that Ms. Li manages her daily living activities with limited assistance. The injuries that were partially caused by the Accident have not significantly affected her daily activities. Ms. Li testified she experienced significant improvements one year after the Accident.

- [175] The evidence established that many of Ms. Li's injuries and attendant symptoms were either not caused by the Accident, or have resolved since the Accident. Of the remaining injuries, I find that Ms. Li's life has been affected by them but not to the extent claimed. Ms. Li is only entitled to a modest award for these injuries.
- [176] In these circumstances, and taking into account the principles emanating from Stapley and the authorities cited, I find that an award of \$120,000 is appropriate for non-pecuniary damages. This award includes damages for loss of housekeeping capacity.
- [177] The defendants are not liable for damages that were not caused by the injury: *Brewster v. Li*, 2013 BCSC 774 at para. 78. Under the crumbling skull doctrine, tortfeasors need not compensate the plaintiff for debilitating effects of a pre-existing condition which they would have experienced in any event: *Athey* at paras. 32-35. Even if Ms. Li had not been injured in the Accident, there is a measurable risk that Ms. Li's pre-existing neck issues and bouts of dizziness would have affected her enjoyment of life going forward. While these pre-existing conditions may not have been active at the time of the Accident (there was inconsistent testimony regarding her neck pain on this point), there is a realistic chance that they would have caused Ms. Li some problems in the future even without the Accident.
- [178] Based on the evidence before me, I find that there was a 20% chance that Ms. Li's neck pain would cause her difficulties in the future, and a 15% chance that her dizziness would cause her future difficulties. Based on these two pre-existing conditions, I reduce Ms. Li's non-pecuniary award by 35% to account for Ms. Li's pre-existing conditions.

Loss of Past Earning Capacity

Legal Principles

- [179] A claim for past loss of income is a claim for loss of earning capacity. It is a claim for the loss of the value of the work the plaintiff would have performed but for the injury: *Rowe v. Bobell Express Ltd.*, 2005 BCCA 141 at para. 30.
- [180] Pursuant to s. 98 of the Insurance (Vehicle) Act, R.S.B.C. 1996, c. 231, a plaintiff is entitled to recover damages for his or her past net income loss. This means that in the ordinary course, the court must deduct the amount of income tax payable from lost gross earnings: *Hudniuk v. Warkentin*, 2003 BCSC 62; *Karim* at para. 132.
- [181] An assessment of past and future loss involves a consideration of hypothetical events. A plaintiff is not required to prove these hypothetical events on a balance of probabilities; the assessment of loss is determined by weighing the possibility and probability of the events. The future or hypothetical event will be taken into consideration as long as it is a real and substantial possibility and not mere speculation: *Athey* at para. 27; *Karim* at para. 133; *Grewal v. Naumann*, 2017 BCCA 158 [Grewal].

[182] If the plaintiff establishes a real and substantial possibility of loss, the court must determine the measure of damages by assessing the likelihood of the event: Grewal at para. 48. Depending on the facts of the case, a loss may be quantified either on an earnings approach or using a capital asset approach. Damages under this head must be assessed and not calculated: Perren v. Lalari, 2010 BCCA 140 at para. 32; Grewal at para. 48.

Analysis

[183] Ms. Li began working, on contract, with a Chinese newspaper, DAWA, in 2007 or 2008. She worked for DAWA for approximately five years. Ms. Li was contracted to look for companies and businesses to advertise in the DAWA newspaper. If a business placed an advertisement, she received a 25% commission. She then promoted the business by writing a report on it, advising the business on marketing, and helping to work out a business plan.

[184] Prior to the Accident, Ms. Li often attended events such as restaurant openings and film festivals. She would take photos and write an article in the newspaper about the events. Ms. Li testified that she was very happy working for DAWA. She was avoiding physical work and she was using some of her skills from her degrees in China. She was pleased with her income, which was about \$30,000 per annum.

[185] Approximately a year before the Accident Ms. Li started her own advertising business, Sonia Li Ads and PR Ltd. She started this business because clients were asking if they could expand their businesses by putting advertisements in papers other than DAWA. Ms. Li testified she set up a company and provided her advertising services through the company. She incorporated the business in 2014 and is the sole shareholder of the business.

[186] Ms. Li testified that in the first half of 2013, she was attracting more and more clients for advertising. DAWA was happy with her work and her income was approximately \$37,000 per annum.

[187] Ms. Li testified that after Mr. Wu moved to Canada in 2014, he assisted her with her work. They went to events together. If she was unable to go to an event, for example to attend a treatment, he would attend alone. He learned to write reports and do photography.

[188] Ms. Li and Mr. Wu testified that because she reduced her hours due to the Accident, DAWA was no longer satisfied with her work. Ms. Li testified her reduced hours were due to her numerous medical appointments and her lack of physical energy. They said her business decreased by 15% due to the Accident. There was no evidence of this apart from the testimony of Ms. Li and Mr. Wu, and the letter Mr. Wu wrote which Ms. Li initially claimed was written by DAWA's accountant.

[189] In cross-examination Ms. Li admitted DAWA was unhappy with her unwillingness to be exclusive (she was working with other media companies). Ms. Li refused an option to sign an exclusivity contract, and her relationship with DAWA was terminated in 2015. This was the year after she incorporated her own company.

- [190] In 2015 Ms. Li partnered with other media companies that were doing business online. DAWA was a print only company. Ms. Li helped found Lahoo.com ("Lahoo"), a web-based advertising business, and became vice-president of marketing. Ms. Li testified that Lahoo has seven or eight sales agents; she is the top sales agent for Lahoo. Although evasive on cross-examination, Ms. Li eventually admitted she also became a minor shareholder in Lahoo.
- [191] In 2015 Ms. Li's company started Rise Weekly magazine. There was an increase in her company's business and she increased her staff. Ms. Li now has two to three assistants to help her, including a young reporter/journalist named Bin X-Hui, and Mr. Wu. Ms. Li testified that since 2016 Mr. Wu has been providing significant assistance to help her complete her work. He assumed all the photography assignments. He conducts interviews, writes articles, and uploads her work online.
- [192] In terms of her loss of income between the Accident and the date of trial, Ms. Li submits she was unable to work for the first month following the Accident and then slowly began to return to work part-time. Her evidence was vague on this point.
- [193] The best I can discern from the evidence is that Ms. Li was unable to work for approximately the first eight weeks following the Accident. Based on her testimony, Ms. Li began working post-Accident in September 2013, helping an individual with calligraphy for a book he was publishing. She also did the news release for the book and wrote a long report for the author. Although her health was "not good", when she worked on this event she "forgot everything". However after this event she had to take a break for treatments and she "felt exhausted". This may be the part-time work referred to in her submissions. I accept that she worked part-time for the four weeks following the work she did in September 2013.
- [194] In total, I find Ms. Li missed ten weeks of work due to the Accident.
- [195] Apart from ten weeks of missed work, Ms. Li's evidence that her ability to earn a salary was significantly diminished as a result of the Accident does not accord with the financial statements. Based on Ms. Li's 2013 and 2014 personal tax returns and her company's corporate tax returns, Ms. Li's business has grown steadily since the Accident. Ms. Li explained this by testifying she also sold water machines, had a financial planning business, and received some real estate commissions during this period of time. Unfortunately, these businesses were not separated on the financial statements to which I was referred so I cannot determine how much income was from her advertising income and how much was from other sources.

- [196] Ms. Li argued the Accident affected her income due to her lessened ability to work in her advertising sales business. She alleged decreased hours and productivity due to her ongoing symptoms rendering her less capable of performing her job. She testified she has to obtain regular assistance from her husband and third parties to complete her work tasks. Ms. Li testified that she could have done all the work herself, but for her reduced energy and memory issues due to the Accident.
- [197] Much of Ms. Li's testimony, and that of her husband, centred on her memory loss, blurry vision, and cognitive deficits. I have found these conditions were not caused by the Accident. Ms. Li assumed because there is a temporal relationship between the Accident and her memory loss and related difficulties, they must be caused by the Accident. Yet there is a difference between correlation and causation.
- [198] Ms. Li also complained about ongoing soft tissue injuries and dizziness. Dr. Jiang testified that Ms. Li's soft tissue injuries were not preventing Ms. Li from working. Dr. Boyle had the same opinion. I accept these opinions.
- [199] That leaves Ms. Li's dizziness. Ms. Li testified that today her dizziness is most noticeable when she is in a crowd. She becomes irritable and must leave. Ms. Li testified she only attends large events when she has no choice.
- [200] An example was in the spring of 2014, less than a year after the Accident. Ms. Li testified she attended an event for the opening of a large Chinese supermarket in Richmond. The event was outdoors and there were large crowds. Ms. Li became overwhelmed, felt dizzy, and vomited at the event. Her friend had to take her home early. Her friend was not called to testify.
- [201] There was another event, approximately one and a half years after the Accident, which Ms. Li attended. When taking photos she found she could not move her neck. She went to the washroom and vomited. She said she was dizzy and Paul Wu, a colleague at DAWA, took her away from the event. This incident was not confirmed by Paul Wu who was called as a witness.
- [202] As already mentioned, Ms. Li testified that but for the Accident she could have done all the work herself. She would not need to hire other employees. She has less energy to write reports. Today she only works on the website of Lahoo, as well as Rise Weekly. This is why she hires people to help, but then she has to share her income.[3] But for the Accident, she testified, her income would be much higher.
- [203] I did not find this testimony to be persuasive. Given the amount of work her new company had at this time, hiring of two or three assistants would be natural. Further, although called as a witness, Paul Wu offered little insight into Ms. Li's work following the Accident. He did not corroborate her version of the effect of the Accident on her performance. He testified she was active both before and after the Accident.

[204] Ms. Li's testimony also does not harmonize with the income figures before me. Since the Accident, Ms. Li's business has been generating more revenue each year, both when it operated as a sole proprietorship and later as a corporation. Apart from ten weeks of missed work, Ms. Li continued to work post-Accident, started Rise Weekly, grew her own company, and became vice-president of marketing at Lahoo. This is not evidence of diminished performance, even without turning to the financial records.

[205] The defendants helpfully summarized the financial records in the following table:

Year

Total Revenue

Salaries/Wages

Vehicle Expenses

Travel Expenses

Meals and entertainment

Total Expenses

2012

\$30,019 (Gross Business Income)

Sole proprietorship income

(before incorporation)

2013

\$41,408 (Gross Business Income)

2014

\$45,169 (commission)

Sonia Li Ads & PR Ltd. is incorporated in October 2014

2015

\$49,662

\$11,000

\$2,179

\$9,762

\$10,781

\$54,392

2016

\$80,662

\$38,000

\$4,411

\$7,970

\$11,687

\$83,071

2017

\$90,615

\$21,000

\$4,938

\$3,508

\$10,698

\$96,800

2018

\$104,653

\$17,000

\$5,129

\$4,959

\$11,350

\$84,568

[206] I do not have Ms. Li's financial information for 2019.

[207] Ms. Li's post-Accident expenses exceed her pre-Accident income. Although she must now pay employees, hiring employees is natural for a growing business. Her husband also works in the business but, since the business has expanded, it is logical that Ms. Li cannot run it alone.

[208] Ms. Li has not established that she sustained past income loss as a result of the Accident, apart from the ten weeks in the immediate post-Accident period.

[209] I estimate Ms. Li's past wage loss between the date of the Accident and the date of the trial was approximately \$10,790. This calculation is based on her income of approximately \$41,000 in 2013, divided by 38 weeks (accounting for ten weeks of missed work and four weeks of vacation) to estimate her weekly income. I have multiplied her weekly income by ten to arrive at \$10,790.

[210] I leave it to the parties to make the appropriate adjustments to reach the net figure.

Loss of Future Earning Capacity

Legal Principles

[211] Justice Voith in *Pololos v. Cinnamon-Lopez*, 2016 BCSC 81, articulates the well established principles on the assessment of loss of future earning capacity:

[133]

- a) To the extent possible, a plaintiff should be put in the position he/she would have been in, but for the injuries caused by the defendant's negligence; *Lines v. W & D Logging Co. Ltd.*, 2009 BCCA 106 at para. 185, leave to appeal ref'd [2009] S.C.C.A. No. 197;
- b) The central task of the Court is to compare the likely future of the plaintiff's working life if the Accident had not occurred with the plaintiff's likely future working life after the Accident; *Gregory v. Insurance Corporation of British Columbia*, 2011 BCCA 144 at para. 32;
- c) The assessment of loss must be based on the evidence, but requires an exercise of judgment and is not a mathematical calculation; *Rosvold v. Dunlop*, 2001 BCCA 1 at para. 18;
- d) The two possible approaches to assessment of loss of future earning capacity are the "earnings approach" and the "capital asset approach"; *Brown v. Golaïy* (1985), 26 B.C.L.R. (3d) 353 at para. 7 (S.C.); and *Perren v. Lalari*, 2010 BCCA 140 at paras. 11-12;
- e) Under either approach, the plaintiff must prove that there is a "real and substantial possibility" of various future events leading to an income loss; *Perren* at para. 33;
- f) The earnings approach will be more appropriate when the loss is more easily measurable; *Westbroek v. Brizuela*, 2014 BCCA 48 at para. 64. Furthermore, while assessing an award for future loss of income is not a purely mathematical exercise, the Court should endeavour to use factual mathematical anchors as a starting foundation to quantify such loss; *Jurczak v. Mauro*, 2013 BCCA 507 at paras. 36-37.
- g) When relying on an "earnings approach", the Court must nevertheless always consider the overall fairness and reasonableness of the award, taking into account all of the evidence; *Rosvold* at para. 11.

[212] The real and substantial possibility analysis outlined in the previous section also applies to loss of future earning capacity.

Analysis

- [213] The factual findings in the previous section apply to loss of future earning capacity. The evidence does not establish Ms. Li suffered from a decline in income following the Accident. None of the experts who testified gave an opinion that Ms. Li is or was restricted from performing her job. Her own treating physician stated in an ICBC document filled out a year after the Accident that she is capable of medium strength work.
- [214] Ms. Li's residual neck discomfort and dizziness do not limit her ability to work. Her work is sedentary so her chronic neck injury can be managed. Her dizziness is sporadic and lasts only a few moments. If Dr. David did not cure Ms. Li when he performed the particle-repositioning maneuver, he testified there is a surgical cure which has a greater than 98% success rate. In any event, I find that Ms. Li's dizziness is not significant in terms of her ability to perform her work.
- [215] To the extent Ms. Li is experiencing difficulties at work due to memory loss and poor concentration, these difficulties are not caused by the Accident. However, it may well explain her loss of productivity and need for additional assistance from Mr. Wu.
- [216] Ms. Li bears the onus of establishing a loss of income going forward. I find Ms. Li has not established a real and substantial possibility of future events leading to an income loss. Her business grew steadily after the Accident.
- [217] Any ongoing pain and dizziness Ms. Li experiences has been compensated through the award of non-pecuniary damages. I decline to award any amount for loss of future earning capacity to Ms. Li.

Cost of Future Care

Legal Principles

- [218] Future care costs must be medically necessary, legitimate, and reasonable. There must be an evidentiary link between the medical experts' assessment of disability and the recommended care: *Paur v. Providence Health Care*, 2017 BCCA 161 at para. 109; *Chaudhry v. John Doe*, 2017 BCSC 1895 at para. 159.
- [219] The defendants rely on *Cheng v. Kamboz*, 2009 BCSC 1160 at para. 61. In *Cheng*, this Court refused the plaintiff's claim for future chiropractic, massage, and acupuncture treatments because:
- (a) they did not provide any permanent beneficial result;
 - (b) they were not recommended by the physicians; and
 - (c) they may have been necessitated by the plaintiff's pre-existing conditions, not the accident at issue.

Analysis

- [220] Some of Ms. Li's medical experts recommended treatments which are considered passive because they provide only temporary relief. The defendants argue that because there is no additional improvement from these treatments, they should not be expected to compensate the plaintiff for these treatments for the rest of her life.
- [221] Ms. Li gave evidence that the physiotherapy, acupuncture, and massage treatments she has undergone since the Accident provided her with relief. Ms. Li testified if she does not attend treatment for a few weeks, her symptoms increase. Mr. Wu testified that as a result of physiotherapy, acupuncture, and massage, Ms. Li's physical conditions improved.
- [222] Ms. Li's shoulder, back, and headache symptoms resolved with the assistance of physiotherapy.
- [223] Dr. Jiang recommended physiotherapy, acupuncture, and massage for symptom management and long-term improvement. He also emphasized that lifestyle adjustments are very important for Ms. Li. Dr. Dumper testified that if one's neck is tight, this can affect the peripheral proprioception nerves. Massage, acupuncture, and chiropractor treatments can assist.
- [224] Dr. Chin opined that acupuncture and massage are passive therapies that do not provide long-term material changes compared to active therapies. Dr. Boyle opined that treatments such as massage, acupuncture, and chiropractic therapy are important during the acute phase following an injury but are of no benefit beyond the first number of months. Passive treatments may be detrimental by reinforcing the need for more treatments. Dr. Boyle recommends a self-administered program of stretching and strengthening exercises which could be reviewed by a physiotherapist.
- [225] Based on the above, I will provide a modest award for passive treatments and physiotherapy for Ms. Li in the future. I believe an award of \$2,500 for massage, acupuncture, and general physiotherapy going forward is reasonable in the circumstances.
- [226] Dr. Dumper recommends that Ms. Li undergo a course of vestibular physiotherapy with directions on how to correct symptoms of BPPV when they occur. He testified that 95% of patients get better with treatment. With vestibular physiotherapy, Ms. Li "can have some significant objective improvement in her balance system and function."
- [227] Dr. Jiang also recommended vestibular physiotherapy. I agree with Dr. Dumper and Dr. Jiang that the course of vestibular physiotherapy will be helpful for Ms. Li. Accepting that each session costs approximately \$85, I award \$1,275 for these treatments going forward.
- [228] I was not provided with sufficient medical evidence to make an award for psychotherapy. Since there was some medical evidence that Ms. Li requires sleep aids, I will award \$3,000 for ongoing sleeping aids. I am not prepared to make an award for other supplements that were not medically supported.

[229] Given that I have only awarded a modest amount, the award for the cost of future care is not to be reduced due to Ms. Li's pre-existing conditions.

Loss of Housekeeping Capacity

[230] In *Kim v. Lin*, 2018 BCCA 77, the Court of Appeal addressed the loss of housekeeping capacity. The court discussed the difference between a pecuniary award for loss of housekeeping capacity and the inclusion of damages as part of a general award for non-pecuniary damages. The court's conclusion is summarized as follows:

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

[231] I have found that while Ms. Li has a residual soft tissue injury and some ongoing dizziness, neither of these is as limiting as her testimony would suggest. Even Dr. Jiang agreed Ms. Li's soft tissue injuries were not causing her issues with her activities of daily living. Dr. Dumper confirmed that Ms. Li's BPPV does not affect activities of daily living because it is only very intermittent.

[232] I find that Ms. Li can do most housekeeping chores with limited assistance. Based on the above principles, I conclude that Ms. Li's loss of housekeeping capacity is in keeping with a loss of amenities. I have included her loss of housekeeping capacity in the award for non-pecuniary damages.

Special Damages

Legal Principles

[233] The fundamental principle governing special damages is that of *restitutio in integrum*. The plaintiff is to be restored to the position they would have been in had the accident not occurred: *Milina v. Bartsch* (1985), 49 B.C.L.R. (2d) 33 (S.C.).

[234] In *MacIntosh v. Davison*, 2013 BCSC 2264, Justice Davies made the following helpful comments:

- [128] In summary, I am satisfied that when assessing special damages the standard is the reasonableness of the expense claimed in the context of the injuries suffered. Medical justification for any expense is a factor to be considered, but not the only one. Subjective factors can also be considered including whether the plaintiff believed the treatments were reasonably necessary.
- [235] The defendants raised an objection regarding the documents put into evidence to support special damages. The defendants argue Ms. Li was not taken to the documents in testimony and they are therefore inadmissible (apart from one document she was taken only to the table of contents). The defendants submit there was no evidence regarding how these care items are to be quantified. I have considered this objection. Where Ms. Li has tendered no evidence regarding an item, I find that the item is inadmissible. Where some evidence was tendered, I will estimate the appropriate amount to be awarded, if justified.

Analysis

- [236] Ms. Li's list of special damages includes an extensive list of supplements. She tendered no evidence, medical or otherwise, to justify their use. I am not awarding her special costs for these supplements.
- [237] I conclude that Ms. Li is entitled to recover 80% of her physiotherapy costs up to the date of trial. She is also entitled to recover three years' worth of acupuncture and massage treatments. This award is not to be reduced for Ms. Li's pre-existing dizziness. It should be reduced by 20% for Ms. Li's pre-existing neck injury.
- [238] Ms. Li has not established that any travel expenses for trips to China were reasonable or necessary. In China she received similar treatments she would have received had she stayed in Canada. As a result, these treatments were not reasonably incurred.
- [239] Many of the items in Ms. Li's list of expenses were not discussed in the evidence heard in this trial. Accordingly, there is no evidence to support that these items were incurred as a result of the Accident.

Conclusion

- [240] Ms. Li is entitled to the following damages:

Non-pecuniary damages

\$78,000 (\$120,000 reduced by
35%)

Past wage loss

\$10,790

Future loss of earning capacity

Nil

Cost of future care

\$6,775

Special damages

As awarded (parties to calculate precise amount)

[241] I leave it to the parties to make any appropriate adjustments and to calculate pre-judgment interest on the award.

Costs

[242] Subject to any issues the parties wish to raise, the plaintiff is entitled to costs. Within 45 days of this judgment, either party is at liberty to file an application to address costs.

"D. MacDonald J."

- [1] Dr. Dumper noted that when he discussed a pre-Accident history of dizziness, she convinced him it was very brief and not similar to her current symptoms. She said it was different so he discounted the past dizziness. He testified it could have been positional vertigo and related to her then tight shoulder.
- [2] Dr. David testified that Dr. Jiang did not administer the test even though it is regularly administered by family practitioners. Dr. Wong and Dr. Dumper had administered the Dix-Hallpike to Ms. Li and on both occasions it was negative. Dr. Dumper did not mention the negative test he conducted in his report. It was removed from an earlier draft. According to Dr. Dumper, Dr. Mackie, a neurologist, did not administer the test in 2015 because Ms. Li had neck and shoulder pain.
- [3] Lahoo pays Ms. Li a 25% commission. This is paid to her company, Sonia Li Ads and PR Ltd. Ms. Li pays her husband, her assistant, and her employees through her company.

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