

CANADA / JUDGMENT

Liu v. Conn

2020 BCSC 1195

COURT

Supreme Court of British Columbia

DECIDED

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2020 BCSC 1195 Liu v. Conn

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Liu v. Conn,

2020 BCSC 1195

Date: 20200813

Docket: M170214

Registry: Vancouver

Between:

Ying Kai Liu

Plaintiff

And

Michael Robert Conn and Ang Li

Defendants

- and -

Docket: M181985

Registry: Vancouver

Between:

Ying Kai Liu

Plaintiff

And

Jomon Thekkechira John

Defendant

Corrected Judgment: Paragraphs 134, 136, 141 and 143(e)

were corrected on September 30, 2020

Before: The Honourable Madam Justice E. McDonald

Reasons for Judgment

Counsel for the Plaintiff:

B. McIntosh

Counsel for the Defendants:

Masa Jeftic,

Milos Jeftic

Place and Date of Trial:

Vancouver, B.C.

June 8-9, 11-12, 2020

Place and Date of Judgment:

Vancouver, B.C.

August 13, 2020

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INTRODUCTION

- [1] Mr. Liu seeks damages in relation to injuries that he sustained in three motor vehicle accidents. Mr. Liu claims non-pecuniary loss, past and future loss of income and earning capacity, loss of housekeeping capacity, future cost of care and special damages.
- [2] In each motor vehicle accident, a defendant struck Mr. Liu's vehicle from behind. The defendants admit liability for the accidents.
- [3] The defendants acknowledge that the accidents caused myofascial injuries to Mr. Liu's low back, neck and upper torso. They acknowledge that Mr. Liu is entitled to an award for these injuries. The defendants also acknowledge that Mr. Liu is entitled to the amount he claims for past loss of income.
- [4] However, the defendants deny that Mr. Liu's other injuries, including his complaints of ongoing mechanical low back pain, were caused by the accidents. The defendants say that the accidents did not cause or contribute to Mr. Liu's ongoing low back pain. Rather, the defendants say that pre-existing and degenerative changes in his low back caused his ongoing low back pain.
- [5] Counsel for Mr. Liu submits that the injuries he sustained are indivisible and the defendants are jointly and severally liable for the loss. If the court accepts that the accidents were a contributing cause of Mr. Liu's ongoing mechanical low back pain, then the defendants say that Mr. Liu had a "crumbling skull", which requires consideration of his original position. However, counsel for Mr. Liu submits that Mr. Liu is subject to the "thin skull" rule.

ISSUES

- [6] The issues in this case are: (1) causation; and (2) damages, including the severity of the injuries that Mr. Liu suffered in the accidents and the extent to which the injuries may impair his future capacity to work.

FACTS

The Plaintiff's Personal History

- [7] Mr. Liu is currently 54 years old. He is married and he has two sons, who are currently 24 and 16 years old.
- [8] Mr. Liu was born in China. He immigrated to Canada in 2001. Mr. Liu speaks Mandarin. Although he attended English language classes, Mr. Liu describes his English skills as limited.
- [9] Mr. Liu graduated from university in China with a degree in mechanical engineering. He is very knowledgeable about and skilled at operating machinery. However, Mr. Liu has never worked as an engineer in Canada.
- [10] In 2002, Mr. Liu began working at a Vancouver-based company called Structa Wire Corp. ("Structa"). He works full time as a metal mesh machine operator. Mr. Liu operates specialized machinery that produces wire mesh for use in the construction industry.
- [11] Mr. Liu enjoys his work at Structa and he is a long-term employee. Mr. Liu recently received a promotion and a wage increase.
- [12] Mr. Liu works while standing up at a large piece of machinery. At the start of the manufacturing process, he feeds raw wire into the machine for the production of the finished mesh product. Mr. Liu's duties also require him to manoeuvre finished rolls of wire mesh between the machine and an adjacent counter area for packaging. Each roll of wire mesh weighs approximately 50 pounds.

Prior Accidents and Injuries

- [13] On September 8, 2011, Mr. Liu suffered injuries in a motor vehicle accident. After a couple of years, he fully recovered from his injuries. Neither the 2011 accident, nor the injuries he suffered in that accident, are at issue in this case.
- [14] Mr. Liu also suffered a number of workplace injuries while working at Structa. In 2013, he suffered a workplace injury to his right elbow. Mr. Liu struck his elbow, causing it to swell and bruise. He filed a WorkSafeBC claim related to his injury and he missed one week of work. Mr. Liu's elbow injury fully resolved.

- [15] On August 5, 2014, Mr. Liu suffered another workplace injury. While maneuvering a roll of wire mesh onto a counter for packaging, he injured his upper back. Mr. Liu took himself to the hospital following that injury. The hospital medical staff told him that there was nothing seriously wrong with his back. Mr. Liu received a prescription for medication and physiotherapy. He filed a WorkSafeBC claim related to this upper back injury.
- [16] Mr. Liu missed three to four weeks of work due to his upper back injury. When Mr. Liu returned to work following his upper back injury, Structa allowed him to work light duties. If he needed to move anything heavy, he could ask another employee to assist him. This accommodation lasted for one week after Mr. Liu returned to work. Mr. Liu's upper back injury fully resolved.
- [17] On December 3, 2014, Mr. Liu suffered another workplace injury. While he was reaching up to grab some wire material weighing approximately 50 pounds, Mr. Liu experienced pain in his low back. Mr. Liu continued to work for another half hour before reporting his low back injury to his supervisor.
- [18] Mr. Liu took himself to a walk-in medical clinic for assistance. The doctor at the clinic prescribed him medication and physiotherapy. Mr. Liu's family doctor also recommended that he wear a back brace at work to provide extra support for his low back.
- [19] Following the December 3, 2014 workplace injury, Mr. Liu experienced low back pain and he occasionally experienced symptoms of numbness and tingling in his left leg. Those sensations extended down the outside of his left leg to the area just above his left knee.
- [20] Mr. Liu filed a WorkSafeBC claim related to his low back injury. He missed three weeks of work due to his low back injury.
- [21] On December 29, 2014, Mr. Liu began his gradual return to work following his low back injury. The gradual return to work plan was supposed to take one month and it began with a period of light duties. However, on January 13, 2015, the First Accident interrupted Mr. Liu's gradual return to work plan.
- [22] At the time of the First Accident, Mr. Liu's low back and his left leg symptoms had been steadily improving. Mr. Liu estimates that he was 85% recovered at the time of the First Accident.

The Motor Vehicle Accidents

- [23] Mr. Liu and his wife, Ms. Bai, drove to work together in their Subaru. Each workday, they travelled between their home in Coquitlam and their workplaces in Vancouver. Mr. Liu did the driving during their commute.

- [24] On January 13, 2015, Mr. Liu and Ms. Bai were driving home from work. Mr. Liu was travelling in the curb lane when the defendant, Michael Conn, struck the rear of Mr. Liu's Subaru (the "First Accident"). Mr. Liu described the defendant's vehicle as a large Ford F350 truck with metal bars running across the front bumper.
- [25] Mr. Liu described feeling two separate impacts during the First Accident. He also described the force of the impacts as "medium". His body moved "back and forth" in his seat during the impacts, even though he was wearing a seatbelt. After the collision, he pulled onto a side street where he exchanged information with the defendant.
- [26] According to photographs taken following the First Accident, Mr. Liu's Subaru suffered damage to the rear bumper. There was denting and puncture damage concentrated on the driver's side of the Subaru's rear bumper.
- [27] Mr. Liu drove home immediately following the accident. By the time Mr. Liu arrived home, he said he was experiencing serious pain and tightness in his low back.
- [28] On January 14, 2015, Mr. Liu went to his usual medical clinic. Mr. Liu received a referral for physiotherapy and massage therapy. The following day, Mr. Liu visited another doctor's office where he obtained a note excusing him from work until February 2, 2015.
- [29] Following the First Accident, Mr. Liu attended physiotherapy treatments regularly. He began a program of regular swimming exercise recommended to him by Dr. Ngui. Mr. Liu missed approximately 13 days of work following the First Accident. On February 2, 2015, Mr. Liu returned to work at Structa, starting with light duties.
- [30] On March 9, 2016, Mr. Liu underwent a CT scan of his lumbar spine at the request of Dr. Ngui. The CT scan showed some mild stenosis with possible impingement of certain left-sided nerve roots and some mild to moderate degenerative facet changes.
- [31] On April 25, 2016, Mr. Liu and Ms. Bai were driving to work in their Subaru when the second accident occurred (the "Second Accident"). Mr. Liu was waiting at a stop sign when a Jeep driven by the defendant, Ang Li, struck the rear of Mr. Liu's Subaru.
- [32] The impact pushed Mr. Liu forward in the driver's seat, although he described the force as "not very serious". Mr. Liu said that the Second Accident left a dent in the Subaru's rear bumper. Mr. Liu could not see any damage to the Jeep. Mr. Liu exchanged information with the defendant and then he and Ms. Bai proceeded to work.
- [33] Mr. Liu said that he initially had no increased pain in his low back following the Second Accident. However, his low back, neck and shoulders felt "tight". After working for an hour or so, Mr. Liu began to feel increased pain in his low back, so he left work to see his doctor.
- [34] When Mr. Liu arrived at his doctor's office, Mr. Liu was experiencing a pain level from his low back and left leg that he described as four or five out of 10. He said that just prior to the Second Accident, the pain level in his low back was two or three out of 10.

- [35] Mr. Liu missed two days of work following the Second Accident. The neck and shoulder pain he experienced after the Second Accident resolved within a month or two. However, Mr. Liu's low back pain has continued and he says that it never improves beyond a level of pain that he describes as one or two out of 10. He says that sometimes, depending on what he is doing, the pain level increases to three or four out of 10.
- [36] Following the Second Accident, Mr. Liu says that he began feeling "down" and "sad". While driving, he became worried and preoccupied about getting into another accident.
- [37] On May 28, 2016, Mr. Liu was playing volleyball with a group of friends. During the game, Mr. Liu fell and fractured his left ankle. Mr. Liu went to the hospital where he received crutches and a special boot to wear while his left ankle healed.
- [38] Mr. Liu was off work for six weeks due to his left ankle fracture. During this time, he received Employment Insurance benefits. Mr. Liu's ankle has fully recovered.
- [39] On September 29, 2017, Mr. Liu and Ms. Bai were driving their Subaru during their commute when the third and final accident occurred (the "Third Accident"). The driver travelling ahead of Mr. Liu came to a stop and Mr. Liu also stopped. After Mr. Liu stopped, the defendant, Jomon John, struck the rear of Mr. Liu's Subaru. The defendant was driving a van.
- [40] Mr. Liu said the impact of the Third Accident felt like the strongest of the three accidents. He remembers being pushed forward in his seat by the impact, even though he was wearing a seatbelt. The Third Accident caused considerable damage to the Subaru's rear bumper. Mr. Liu and Ms. Bai had to drive home slowly because their vehicle was making an unusual noise.
- [41] Mr. Liu said that in the evening following the Third Accident, his low back pain increased and his neck and shoulders felt "tight". Before the Third Accident, Mr. Liu estimated that he was 85% recovered from the Second Accident. However, after the Third Accident, he said his pain level went to five out of 10.
- [42] Mr. Liu missed four days of work after the Third Accident. His doctor recommended that he attend physiotherapy treatments to treat his injuries from the Third Accident. Mr. Liu attended 17 physiotherapy sessions after the Third Accident until January of 2018.
- [43] In the years following the Third Accident, Mr. Liu says that the pain and discomfort from his low back injuries is always there and it ranges from mild, being 2 out of 10, to times when it flares up to reach four or five out of 10. Mr. Liu also says that the numbness in his leg has worsened since the Third Accident. However, after about one or two months, the painful sensation in Mr. Liu's neck and shoulders resolved.

- [44] Mr. Liu has no ongoing problems with his neck or shoulders. His feelings of fear while driving have also improved. Mr. Liu no longer attends physiotherapy sessions and he takes no pain medications. During the trial, Mr. Liu said that he was experiencing a current level of low back pain and leg symptoms that he rated as two or three out of 10.
- [45] Mr. Liu's low back pain sometimes "flares up", depending on what he is doing, such as heavy lifting. Sometimes, Mr. Liu has minimal or mild lower back pain. Mr. Liu says that he is now 85% recovered from his low back injury.

Medical Evidence

Dr. Daniel Ngui

- [46] Dr. Ngui has been Mr. Liu's family doctor since mid-2013. Dr. Ngui treated Mr. Liu following his workplace accidents and the motor vehicle accidents. During medical appointments, Dr. Ngui and Mr. Liu communicated in English. Sometimes, Ms. Bai would attend appointments to translate for Mr. Liu.
- [47] In his medical report dated June 7, 2017, which pre-dated the Third Accident, Dr. Ngui stated:

In my opinion, he sustained soft tissue injuries to his upper right and left shoulder and cervical muscles, right low back and he had some symptoms of lumbar spine nerve root irritation on his left side. Specifically, the patient had musculoskeletal injuries involving his upper traps and right lumbar erector spinae or low back muscles due to his MVA. He had some sciatica like symptoms. The extent of soft tissue injuries was of moderate severity as they caused pain and an absence from work for 13 days. However, for the most part, he has had good resolution of his neck injuries and some recovery of his lower back musculoskeletal injuries. However, at 1 and ½ years post accident, he is still having some mild low back pain with some symptoms of numbness of his left leg consistent with nerve root irritation of his lumbar spine.

- [48] Dr. Ngui noted that Mr. Liu had completely recovered from his earlier workplace accidents and so, in his opinion, it was most likely that Mr. Liu's muscle injuries were caused by the First Accident. Dr. Ngui also said that at a point when Mr. Liu was 85% recovered from the First Accident, the Second Accident caused a flare-up of his right low back pain and leg pain.
- [49] In his medical report dated June 7, 2017, Dr. Ngui said that Mr. Liu's likelihood of recovery from his injuries was good; however, this pre-dated the Third Accident. At trial, Dr. Ngui's prognosis for Mr. Liu's recovery was guarded due to Mr. Liu's persisting mild, low back pain and leg numbness.
- [50] Shortly before the First Accident, following Mr. Liu's gradual return to work from his low back workplace injury, Mr. Liu reported to Dr. Ngui that he had mild-to-moderate pain in his low back and numbness in his left leg. However, Dr. Ngui appeared to believe that Mr. Liu had fully recovered - or that he would fully recover - from his workplace low back injury.

Dr. Navraj Heran

[51] Dr. Heran is a neurologist who examined the plaintiff on January 27, 2020. In his report dated January 28, 2020, Dr. Heran provided the following diagnoses of the plaintiff as a consequence of the First Accident:

- a) Myofascial injuries involving neck and upper torso - resolved;
- b) Myofascial injuries involving the low back - likely resolved; and
- c) Mechanical low back pain likely arising from L4-5 level with left sided L4 or 5 dynamic radiculopathy.

[52] Dr. Heran stated that the Second and Third Accidents exacerbated the myofascial sources of Mr. Liu's symptoms. Dr. Heran noted that Mr. Liu hurt his back at work approximately six weeks before the First Accident. He provided the following opinion on the relationship between the work-related injury and the motor vehicle accidents:

He had recovery from [the work-related injury] and reports complete resolution and the clinical records support that this may have arisen. This is the same area of site that hence is vulnerable and has been stereotypically worsened following the three motor vehicle accidents, albeit only durably following the first of the three subject accidents. Had this propensity not been present, he likely would not have incurred the same degree of pain or the course that he has followed with persistent low back pain of mechanical origin. Had the subject accidents not transpired, Mr. Liu likely would not have had persisting problems in the long-term unless a superimposed traumatic event or other issue arose.

[53] In discussing Mr. Liu's prognosis, Dr. Heran noted that Mr. Liu presents with persisting low back pain as a dominant issue and persistent numbness into his left leg, although the numbness has not worsened. He says Mr. Liu has not had any radiating left leg pain for about a year and he appears to have plateaued. All myofascial sources of symptoms in Mr. Liu's neck and upper torso, and probably also in his lower back, have resolved.

[54] Dr. Heran believes that Mr. Liu is at risk for exacerbations and aggravations in his neck and upper torso. Mr. Liu's low back is also probably at increased risk for accelerated arthritis and he faces substantial risk for redevelopment of lumbar radiculopathy into his left leg. Dr. Heran recommends passive and active modality therapies, imaging and potential interventions, such as facet blocks and platelet rich plasma (PRP) injections. Overall, Dr. Heran stated that Mr. Liu has an excellent outlook for further improvements.

[55] Dr. Heran referred Mr. Liu for a lumbar spine MRI. The MRI showed impingement of the left L5 nerve root in the lateral recess. In Dr. Heran's addendum report dated March 11, 2020, he noted that the MRI confirmed a structural source explaining Mr. Liu's ongoing pain, namely a mild stenosis at L4-5 with impingement of the left L5 nerve root.

- [56] In cross-examination, Dr. Heran agreed it was likely that the degenerative changes noted in the MRI pre-dated the First Accident. He agreed that it was possible that regular wear and tear or pre-existing injuries could cause Mr. Liu's mechanical low back pain.
- [57] Dr. Heran also agreed that Mr. Liu's low back workplace injury, which had not fully healed before the First Accident, made him susceptible to further injury. However, Dr. Heran noted that Mr. Liu progressed after the workplace injury to the point where he had little pain and was able to return to work. In Dr. Heran's opinion, the First Accident compounded Mr. Liu's injury and caused a recurrence of pain.

ANALYSIS

Causation

- [58] The defendants do not dispute that the motor vehicle accidents caused Mr. Liu's myofascial low back, neck and upper torso injuries, all of which have fully resolved. However, they deny causing Mr. Liu's residual and ongoing mechanical low back pain and leg pain or numbness. They attribute his ongoing mechanical low back pain and leg pain or numbness to pre-existing conditions, including injuries from the 2014 workplace accident involving his low back.
- [59] The defendants say that Mr. Liu ought not to be placed in a better position than he would have been absent their negligence. Therefore, the defendants say that Mr. Liu should receive no compensation for damages that he would have suffered anyway, by virtue of his pre-existing condition: *Blackwater v. Plint*, 2005 SCC 58 at para. 78.
- [60] To succeed, Mr. Liu must establish on a balance of probabilities that the negligent acts of the defendants were a cause - but not the sole cause - of the injury and loss: *Dale v. Vickers*, 2019 BCSC 821 at para. 134, citing *Athey v. Leonati*, [1996] 3 S.C.R. 458 at paras. 13-17.
- [61] Justice Dardi summarized the applicable legal principles in *Brooks v. Habib*, 2019 BCSC 1398 at para. 226:

A plaintiff need not establish that a defendant's tortious conduct is the sole cause of the injury. As long as the plaintiff establishes a substantial connection between the injuries and the defendant's negligence beyond the de minimus range, a defendant will be fully liable for the harm suffered, even if other causal factors, for which the defendant is not responsible, were at play in producing the harm. Put another way and to the same effect, apportionment does not lie between tortious causes and non-tortious causes of injury or loss. The law does not excuse the defendant from liability merely because causal factors for which he or she is not responsible also helped to produce the harm: *Farrant v. Laktin*, 2011 BCCA 336 at paras. 9 and 11; *Athey*; *Resurfice Corp. v. Hanke*, 2007 SCC 7; *Clements v. Clements*, 2012 SCC 32.

- [62] The defendants say that the crumbling skull rule applies to this case. Under the crumbling skull rule, where there is a "measurable risk" that a pre-existing condition would have adversely affected a plaintiff in the future in any event, that may be taken into account in reducing the overall award: Dale at para. 136. The defendants argue that they are not required to compensate Mr. Liu for the detrimental effects of the disc protrusion and degenerative changes that he would have experienced anyway.
- [63] The defendants submit that, as Mr. Liu is now 85% recovered and he has returned to his regular full-time work duties, full compensation for their negligent acts would place Mr. Liu in a better position that he was in prior to the accidents. The defendants urge me to reduce any award of damage by 30% to account for Mr. Liu's pre-existing degenerative and low back disc protrusion and the chance that he would have developed low back symptoms in any event.
- [64] I disagree that the crumbling skull rule applies in the present circumstances. While Mr. Liu's low back was vulnerable to injury, for the reasons that follow, I can detect no measurable risk that the disc protrusion and degenerative changes in his low back would have adversely affected him in any event.
- [65] Just prior to the First Accident, Mr. Liu reported symptoms of low back pain and left leg numbness to Dr. Ngui. Mr. Liu was attending physiotherapy and he had started a gradual return to work program. By his own evidence, Mr. Liu was 85% recovered from the workplace injury when the First Accident took place.
- [66] There is no pre-accident imaging to show conclusively that the disc protrusion and degenerative changes pre-dated the First Accident. Dr. Heran opined that these conditions likely pre-dated the First Accident. However, Dr. Heran was also of the opinion that Mr. Liu was likely to have made a full recovery from the workplace injury to his low back.
- [67] In formulating that aspect of his opinion, Dr. Heran placed considerable weight on Mr. Liu's pattern of full recovery from previous injuries. Dr. Heran also noted that Mr. Liu had sufficiently recovered from the low back injury to allow him to resume work prior to the First Accident.
- [68] After the First Accident, Mr. Liu reported new pain radiating down his left leg. This new pain was significant because it was indicative of nerve root impingement. The MRI of Mr. Liu's lumbar spine confirmed that there was a likely mechanical source for the left leg symptoms.
- [69] According to Dr. Heran, this new pain symptom was different from the leg numbness and heaviness that Mr. Liu reported prior to the First Accident. It was also consistent with injuries that Mr. Liu received in the First Accident. Dr. Heran disagreed that Mr. Liu's increased pain following the First Accident could be due to soft tissue injuries layered over Mr. Liu's disc protrusion and degenerative changes.

- [70] After considering all of the evidence, I have concluded that while Mr. Liu's low back was vulnerable to further injury at the time of the First Accident, there is insufficient evidence to conclude that the disc protrusion and degenerative changes in his low back would have adversely affected Mr. Liu in any event.
- [71] In my view, there is no measurable risk that Mr. Liu would have developed mechanical low back symptoms and left leg symptoms in any event had the motor vehicle accidents not occurred. There is no evidence that the degenerative changes or disc protrusion in Mr. Liu's low back would have worsened or caused him ongoing pain in the absence of the motor vehicle accidents.
- [72] I agree with Dr. Heran that Mr. Liu's low back was vulnerable to injury at the time of the First Accident. As such, I have concluded that the thin skull rule applies and the defendants must take their victim as they found him: *Blackwater* at para. 79.
- [73] The motor vehicle accidents involving the defendants diverted Mr. Liu from his path to full recovery from his lower back injury. I am satisfied that but for the accidents, Mr. Liu would not have suffered the injuries diagnosed by Dr. Heran as myofascial injuries involving his neck, upper torso and low back, mechanical low back pain and left leg radiculopathy. Dr. Heran was also of the view, and I agree, that the subsequent accidents exacerbated the myofascial sources of Mr. Liu's symptoms.
- [74] Mr. Liu has discharged his burden of proving that the injuries he sustained in the motor vehicle accidents caused or contributed to the ongoing mechanical low back associated with the disc protrusion and the left-sided nerve root impingement. Once the burden is met, causation must be accepted as a certainty: *Athey* at para. 30.
- [75] I also find that the injuries Mr. Liu sustained in the three motor vehicle accidents are indivisible and the defendants did not argue to the contrary.

Non-Pecuniary Loss

- [76] Damages for non-pecuniary loss compensate for pain and suffering, loss of enjoyment of life and loss of amenities. Determining the amount to award requires consideration of a variety of factors and the underlying ameliorative purpose must be borne in mind: *Stapley v. Hejslet*, 2006 BCCA 34, at paras. 45 and 46.
- [77] The factors described in paragraph 46 of *Stapley* that are to be taken into account include the plaintiff's age, the nature of his injuries, the severity and duration of pain, his emotional suffering, the level of disability, the impairment of social relationships, the impairment of physical abilities and the plaintiff's stoicism. The award for non-pecuniary damages relates to personal circumstances in that it does not depend on the seriousness of the injury; rather, it relates to the loss in the context of the plaintiff's particular circumstances: *Tisalona v. Easton*, 2017 BCCA 272 at para. 39; citing *Stapley* [*Tisalona CA*].

- [78] Each case is to be decided on its own facts. However, compensation should be fair to all parties, with fairness measured by comparison to awards in similar cases as general or rough guidance: *Delgiglio v. Becker*, 2012 BCSC 480 at para. 90. Determining non-pecuniary loss should involve an assessment of the loss suffered to date as well as into the future: *Tisalona CA* at para. 39.
- [79] The evidence supports my finding that because of the defendants' negligence, Mr. Liu suffered myofascial neck, low back and upper torso pain that has since resolved. He also suffered a worsening of his mechanical low back pain and left leg pain and numbness. Mr. Liu continues to experience mild to moderate pain and discomfort associated with his low back injury, including numbness in his leg. This pain can flare up on occasion. However, it appears that Mr. Liu's low back pain and left leg numbness is often in the mild to moderate range.
- [80] The evidence of the medical experts also supports my finding that, given the length of time since the accidents, Mr. Liu is unlikely to ever fully recover from his low back pain and left leg numbness and his pain is likely to worsen in the future. Dr. Heran described a number of treatments that may assist Mr. Liu in the future, including PRP injections and possible surgery.
- [81] Mr. Liu and Ms. Bai testified that Mr. Liu became fearful while driving and he experienced feelings of worry and sadness after the motor vehicle accidents. His fear of driving has now resolved. However, I accept that Mr. Liu experienced a temporary fear of driving and occasional feelings of sadness and worry about his injuries from the motor vehicle accidents.
- [82] Mr. Liu and Ms. Bai testified that following the motor vehicle accidents, Mr. Liu stopped playing badminton with his son and he played volleyball less frequently. While I accept that Mr. Liu played volleyball with less frequency after the First and Second Accidents, I am unable to find that he reduced his volleyball playing because of the vehicle accidents rather than his 2016 ankle fracture.
- [83] Ms. Bai also testified that since the accidents, Mr. Liu has had less energy and desire to engage in leisure activities in the Lower Mainland. He often goes to bed early. They spend less time together as a couple and a family due to Mr. Liu's sad moods and low back pain.
- [84] In May of 2018, Mr. Liu took his youngest son on a trip to Disneyland. Mr. Liu said that during this trip, his son wanted to go on amusement park rides with him. However, after one or two rides, Mr. Liu said that his low back pain increased to the point that he could not go on any more rides with his son. Mr. Liu felt very badly about not being able to enjoy the rides with his son.
- [85] Mr. Liu has been able to continue traveling with his family, including taking a long flight to visit extended family in China. Mr. Liu was forthright and matter-of-fact in explaining how he dealt with his low back pain while he was on long flights.

- [86] Mr. Liu is responsible for the yard work and Ms. Bai looks after the interior of their home. However, following the motor vehicle accidents, Mr. Liu's low back pain has hindered his ability to carry out the yard work, such as mowing the lawn. Initially, Mr. Liu's sons took over mowing but they are now too busy to do so.
- [87] Ms. Bai testified that Mr. Liu has stopped maintaining the yard in a neat and tidy manner. Ms. Bai said this has become a contentious issue between them since she values a well-maintained yard.
- [88] Mr. Liu has maintained, and even enhanced, his career at Structa in the years following the motor vehicle accidents. He enjoys and identifies closely with his work. Mr. Liu is clearly a hardworking and intelligent individual.
- [89] Overall, I found Mr. Liu to be an honest and reliable witness. He answered questions put to him in a straightforward manner. He remained consistent throughout his testimony. He did not exaggerate or attempt to dramatize his recollection of events. He did not minimize or obfuscate events when answering questions about his previous accidents and injuries. Counsel for the defendants rightly concedes that Mr. Liu is a credible witness.
- [90] After considering the evidence, I find that Mr. Liu suffered the following personal impacts from the motor vehicle accidents:
- a) ongoing mild to moderate mechanical pain arising from his low back with left leg pain and/or numbness;
 - b) pain from myofascial injuries to his low back, neck and upper torso that has now resolved;
 - c) temporary fear of driving that has now resolved;
 - d) occasional feelings of worry and sadness regarding his injuries;
 - e) impairment of his quality of life in terms of his engagement in social, leisure, gardening and sporting activities;
 - f) impairment of his relationship with his spouse and sons; and
 - g) impairment of his past and future income earning capacity.
- [91] Counsel for Mr. Liu submits that the award for non-pecuniary loss should be \$100,000. As support for the amount claimed, he relies on *Delgiglio; McCartney v. McArthur*, 2014 BCSC 2164; and *Muhammedi v. Ogloff*, 2013 BCSC 496. In these cases, the plaintiffs received awards of non-pecuniary damages of \$80,000, \$75,000 and \$95,000, respectively.
- [92] The plaintiff's counsel suggested that *Muhammedi* is the most analogous case to the present one. In *Muhammedi*, a 40 year old plaintiff suffered injuries similar to Mr. Liu's injuries, including a herniated disc in her low back. In *Muhammedi*, the plaintiff experienced some improvement to her injuries but there was evidence that she would never fully recover.

- [93] In Muhammedi the plaintiff received an award of \$95,000 for her non-pecuniary injuries. However, some important aspects of that case are distinguishable. For example, Ms. Muhammedi possessed only a grade 6 education and she spoke little English. At the time of the accident, she was a full time homemaker and mother to six children, including an infant. Her injuries prevented her from realizing her ambition of working outside of the home.
- [94] Ms. Muhammedi's injuries also prevented her caring for her family, including her infant, and from caring for the family home. In my view, the present circumstances do not indicate that Mr. Liu has suffered a comparable loss of amenities or enjoyment of life as the plaintiff in Muhammedi.
- [95] In Delgiglio, the plaintiff suffered injuries when the truck he was driving was "t-boned" by a police cruiser. Justice Gropper described the plaintiff as having a "checkered medical history" associated with injuries sustained in numerous previous motor vehicle accidents. The plaintiff also suffered from degenerative back conditions and other debilitating medical conditions.
- [96] Mr. Delgiglio claimed that the accident re-aggravated his neck and low back pain. In awarding non-pecuniary damages of \$80,000, Justice Gropper noted that the plaintiff's pain resulted from the injuries sustained in the accident, which were not mild or moderate in nature, and they were likely to continue without improvement throughout his life. In my view, Mr. Liu's injuries are less severe than those at issue in Delgiglio.
- [97] Counsel for the defendants submits that the award for non-pecuniary damages should be \$30,000 or \$35,000. The defendants submit that Mr. Liu has largely recovered from his injuries; he has been able to continue working at his job; and he had been able to resume playing volleyball. As support for the quantum of the non-pecuniary damages, the defendants rely on *Olynyk v. Turner*, 2012 BCSC 1138; *Tisalona v. Easton*, 2015 BCSC 565 [Tisalona SC] aff'd at 2017 BCCA 272; and *Hunter v. Yuan*, 2010 BCSC 1526.
- [98] In *Olynyk* and *Tisalona SC*, the plaintiffs received \$28,000 and \$32,000, respectively, after the court had factored in reductions to account for the plaintiffs' pre-existing symptoms. In *Hunter*, there was no reduction for pre-existing symptoms and the plaintiff, who was 85% recovered from soft tissue injuries at the time of trial, received an award of non-pecuniary damages of \$35,000.
- [99] In my view, *Olynyk* and *Tisalona SC* are distinguishable due to my finding that despite Mr. Liu's pre-existing condition, there is no measurable risk that the disc protrusion and degenerative changes in Mr. Liu's low back would have adversely affected him in any event.
- [100] Therefore, after considering the factors described in *Stapley*, as well as the evidence and the authorities referred to by the parties, I have decided that a fair and reasonable award for Mr. Liu's non-pecuniary loss is \$50,000.

Past and Future Loss of Income and Earning Capacity

[101] The parties agree that Mr. Liu is entitled to an award for missing work as a result of the motor vehicle accidents. They agree Mr. Liu's gross past wage loss is \$3,525.

[102] The parties acknowledge that this amount is subject to deduction for income tax. I leave it to the parties to calculate the net amount of Mr. Liu's past wage loss.

[103] I turn now to address the plaintiff's claim for future loss of income and earning capacity. The plaintiff submits that I ought to employ the capital asset approach to assess this loss. The defendants take the position that there is no claim for future loss of income earning capacity.

[104] In *Perren v. Lalari*, 2010 BCCA 140 at para. 32, Justice Garson reiterates the nature of the burden that always rests with a plaintiff to establish loss of future income earning capacity:

A plaintiff must always prove, as was noted by Donald J.A. in *Steward*, by Bauman J. in *Chang*, and by Tysoe J.A. in *Romanchych*, that there is a real and substantial possibility of a future event leading to an income loss. If the plaintiff discharges that burden of proof, then depending upon the facts of the case, the plaintiff may prove the quantification of that loss of earning capacity, either on an earnings approach, as in *Steenblok*, or a capital asset approach, as in *Brown*. The former approach will be more useful when the loss is more easily measurable, as it was in *Steenblok*. The latter approach will be more useful when the loss is not as easily measurable, as in *Pallos* and *Romanchych*. A plaintiff may indeed be able to prove that there is a substantial possibility of a future loss of income despite having returned to his or her usual employment.

[Emphasis in original.]

[105] Justice Garson also reiterates at para. 30 of *Perren*, the applicability of basic principles from *Athey and Andrews v. Grand & Toy Alberta Ltd.*, [1978] 2 S.C.R. 229 that:

1. A future or hypothetical possibility will be taken into consideration as long as it is a real and substantial possibility and not mere speculation [*Athey* at para. 27], and
2. It is not loss of earnings but, rather, loss of earning capacity for which compensation must be made [*Andrews* at 251].

[106] As the court stated in *Brown v. Golaiy* (1985), 26 B.C.L.R. (3d) 353, when calculating loss of income earning capacity using the capital asset approach, the court may consider whether the plaintiff:

- a) has been rendered less capable overall of earning income from all types of employment;
- b) is less marketable or attractive as a potential employee;
- c) has lost the ability to take advantage of all job opportunities that might otherwise have been open; and

- d) is less valuable to themselves as a person capable of earning income in a competitive labour market.
- [107] The question of whether Mr. Liu will suffer a loss of future income earning capacity involves hypothetical events. Hypothetical or future events do not need to be proven on a balance of probabilities; rather they are given weight based on their relative likelihood: *Athey* at para. 27.
- [108] Counsel for the defendants submits that Mr. Liu has failed to establish a loss of earning capacity. They submit that Mr. Liu's concern that he will be unable to continue working at his present job is purely speculative.
- [109] Mr. Liu has been able to continue working at his job performing his regular duties. He has received a post-accident promotion and pay raise. He has only missed a few days of work due to his injuries since the Third Accident. There is no functional capacity assessment to demonstrate that Mr. Liu lacks the capacity to perform his job on an ongoing basis.
- [110] Counsel for the defendants refers me to decisions such as *Tisalona SC* and *Ju v. Morpurgo*, 2019 BCSC 194, where the court dismissed claims for loss of future income earning capacity. However, in *Tisalona SC* and *Ju*, the injuries at issue were different and the plaintiffs in those cases managed to continue performing jobs that did not involve heavy lifting.
- [111] In *Urwin v. Hanson*, 2019 BCSC 1145, the court had expert evidence that the plaintiff did not meet the full physical demands of his pre-accident job as a warehouse receiver or his current job as a receiver foreman. However, the plaintiff missed no work due to the motor vehicle accident.
- [112] In *Urwin*, the plaintiff also received a post-accident promotion and wage increase. He was able to resume heavy lifting and he worked many hours of overtime following the accident. The court concluded that the evidence, including the plaintiff's worries about losing his job, failed to establish a real and substantial possibility of a future event leading to economic loss.
- [113] Mr. Liu submits that there are many possibilities that could negatively affect his earning capacity in the future. For example, his job involves heavy lifting and he submits he could injure his low back again while on the job. He also submits that *Structa* might close or he could be fired. He worries that his weak low back and his poor English skills make him less attractive to a new employer.
- [114] Mr. Liu also submits that his low back pain might worsen over time and he may suffer a flare-up that prevents him from working. The chance of Mr. Liu's low back pain worsening over time, seems to me to be the only likely scenario that raises a substantial possibility that Mr. Liu may suffer a loss of future earning capacity.

- [115] Dr. Heran opined that Mr. Liu was vulnerable to injury and that he was at risk for accelerated arthritis and radiculopathy in his leg that could prevent him from working. He also noted that Mr. Liu could require surgery to his low back in the future if his condition worsened or if he could not tolerate the pain.
- [116] The plaintiff's counsel submits that the motor vehicle accidents have rendered Mr. Liu substantially impaired in terms of his value in a competitive labour market. He has permanent chronic pain in his low back and numbness in his left leg and he is vulnerable to injury.
- [117] The plaintiff's counsel urges me to find a 25% reduction in Mr. Liu's future earning capacity based on Mr. Liu working 11 more years. He calculates this 25% reduction over 11 years to be \$144,421. He submits that \$125,000 would be an appropriate amount to award.
- [118] I have concluded that Mr. Liu's concerns that he may lose his job and that he would have trouble finding another job, while genuinely held, are not real and substantial possibilities. These concerns do not "rise above the level of [his] own subjective perception": Ju at para. 59.
- [119] There is no evidence to establish that Mr. Liu is unable to function at his job or that he is at risk of dismissal. To the contrary, there is evidence that Mr. Liu is a valued, long-term employee, and Structa has accommodated his physical condition on several occasions in the past.
- [120] On the other hand, there is evidence that Mr. Liu is likely to experience future flare-ups of his low back pain and left leg pain. I find that there is a real and substantial possibility that Mr. Liu will miss some work in the future due to the mechanical low back pain and left leg pain caused by the motor vehicle accidents.
- [121] While Mr. Liu has managed to carry on with full-time work at his regular job following each of the motor vehicle accidents, I have concluded that the evidence supports a finding that Mr. Liu will suffer a future loss of earning capacity, although not to the degree suggested by counsel for the plaintiff.
- [122] I also find that Mr. Liu is likely, at some point in the future, to need treatments such as PRP injections or even surgery to his low back. There is a real and substantial possibility that Mr. Liu will miss periods of work, perhaps many months, before, during and after such treatments.
- [123] Since this loss is not easily quantifiable, the capital asset approach is more appropriate in this case. The assessment of loss under this head of damage is not intended to be a purely mathematical calculation. After considering the Brown factors and the evidence, I award Mr. Liu \$40,000 for his loss of future earning capacity.

Loss of Housekeeping Capacity

- [124] Ms. Bai testified that after the accidents, Mr. Liu stopped helping her with the cooking and he stopped doing the yard work. As I mentioned above, Mr. Liu and Ms. Bai had an arrangement where she maintained the interior of the home and Mr. Liu maintained the yard.
- [125] Mr. Liu claims \$15,000 for loss of housekeeping capacity related to his loss of ability to do heavy yard work, such as mowing the lawns.
- [126] Given the lack of evidence concerning Mr. Liu's functional capacity to carry out housekeeping tasks or the cost of replacement, I have concluded that his aspect of the claim is more appropriately factored into the analysis of non-pecuniary loss: *Eaton v. Regan*, 2005 BCSC 3 at para. 46.
- [127] As I explained earlier in my reasons, I considered Mr. Liu's problems managing yard work as part of my assessment of non-pecuniary losses. Therefore, Mr. Liu's claim for a stand-alone award for loss of housekeeping capacity is dismissed.

Cost of Future Care

- [128] Mr. Liu is entitled to compensation for cost of future care based on what is reasonably necessary according to the medical evidence, to put him back to his pre-accident condition, to the extent that it is possible: *Delgiglio* at para. 115.
- [129] Mr. Liu claims \$7,500 for the cost of future care consisting of \$5,000 for annual swimming passes, \$1,000 for therapies such as physiotherapy and active rehab and \$1,500 for PRP injections.

PRP Injections

- [130] Dr. Heran recommended PRP injections to treat Mr. Liu's low back pain. Mr. Liu has not undertaken PRP injections to date, mainly because his pain is manageable and he has achieved 85% recovery without that treatment. The defendants say there is no likelihood that Mr. Liu will undertake PRP injections and no evidence that his condition will worsen.
- [131] Mr. Liu confirmed that he was willing to undergo PRP injections if his back pain worsens or if he cannot work. Mr. Liu already experiences flare-ups of pain, especially when he is undertaking heavy work duties.
- [132] There must be a likelihood that a plaintiff will incur costs before an award for future care can be made: *Maltese v. Pratap*, 2014 BCSC 18 at para. 78. After reviewing the evidence, I have concluded that there is a real likelihood that that Mr. Liu will experience ongoing mechanical low back pain and left leg numbness or pain. I have also concluded that there is a real likelihood that Mr. Liu will suffer continued flare-ups.

[133] If find that Mr. Liu is likely to pursue the PRP injections recommended by Dr. Heran, especially if he is unable to work due to increased pain. In these circumstances, I have concluded that an award for \$1,500 for the cost of future PRP injections is appropriate.

Swimming Passes

[134] The plaintiff seeks \$5,000 to cover ten years of swimming passes. The defendants agree that Mr. Liu is properly entitled to award to cover the cost of swimming passes. However, they urge me to limit the award to cover only two to five years of passes, up to a maximum of \$2,500.

[135] The evidence establishes that Mr. Liu has diligently followed medical advice to swim on a regular basis. Dr. Ngui recommended swimming to assist Mr. Liu with his maintenance program. Dr. Heran agreed that swimming might be beneficial to Mr. Liu's condition because it unloads the spine.

[136] Mr. Liu pays approximately \$460 per year to swim at his local public recreation centre. At present, he is successfully maintaining his condition on a program that includes frequent swimming. While I have no recommendation from an occupational therapist, there is medical evidence supportive of this expense. I have concluded that it is reasonable for Mr. Liu to receive an award of \$5,000 for the cost of ten years of swimming passes. This will potentially assist Mr. Liu over the remaining years of his working life.

Physiotherapy/Active Rehabilitation Treatments

[137] Dr. Heran did not recommend future physiotherapy treatments on the basis that it has not been proven as beneficial for patients such as Mr. Liu. However, Dr. Ngui recommended future monthly physical therapy treatment for up to 12 months to deal with potential flare-ups.

[138] Mr. Liu was referred to and he attended physiotherapy in the years following the workplace accidents and the motor vehicle accidents. He found it helpful and he chose it over massage therapy. However, Mr. Liu was no longer attending physiotherapy at the time of the trial.

[139] I accept Dr. Ngui's recommendation of future physiotherapy treatment. Based on the evidence, I am satisfied that Mr. Liu has benefitted from past physiotherapy treatment.

[140] It is likely that Mr. Liu will require and seek out this care in the future, for example, when he experiences a flare-up of pain. I have concluded that an award of \$1,000 for future physiotherapy costs is reasonable.

[141] The total amount of the award for future care is \$7,500.

Special Damages

[142] The parties agree that Mr. Liu is entitled to \$4,100.26 for special damages. Therefore, Mr. Liu is awarded \$4,100.26 as special damages.

CONCLUSION

[143] The plaintiff is entitled to the following:

- a) Non-pecuniary damages: \$50,000
- b) Past wage loss: \$3,525 (subject to required deductions)
- c) Loss of future earning capacity: \$40,000
- d) Loss of housekeeping capacity: \$0
- e) Cost of future care: \$7,500
- f) Special damages: \$4,100.26

[144] The cost of future care award granted to the plaintiff entitles him to an income tax gross up to account for taxes paid on the lump sum award. I grant the parties liberty to speak to the issue if they are unable to agree on a tax calculation or if there is any other calculation issue. The parties also have liberty to speak to any issues that arise regarding the application of the Court Order Interest Act, R.S.B.C. 1996, c. 79.

[145] Unless there are circumstances that I am unaware of, Mr. Liu is entitled to his costs at Scale B. If the parties are unable to agree on costs, they may arrange to speak to the issue within 90 days of the date of these reasons. Each party will provide written submissions of 10 pages or less within one week of any further hearing regarding the issue of costs.

"E. McDonald J."

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