
CANADA / JUDGMENT

Pan v. Lau and Tai

2020 BCSC 288

COURT

Supreme Court of British Columbia

DECIDED

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2020 BCSC 288 Pan v. Lau and Tai

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Pan v. Lau and Tai,

2020 BCSC 288

Date: 20200302

Docket: M184229

Registry: Vancouver

Between:

Guo Ping Pan

Plaintiff

And

Sally Tai and Yen Lau, also known as

Yen Ching Michelle Lau

Defendants

Before: The Honourable Mr. Justice Ehrcke

Reasons for Judgment

Counsel for Plaintiff:

David M. Smart

Counsel for Defendants:

Bryan Tsui

C. Gallardo-Gabanan (A/S)

Place and Date of Trial:

Vancouver, B.C.

January 27-31, 2020

February 3, 2020

Place and Date of Judgment:

Vancouver, B.C.

March 2, 2020

I. introduction

- [1] The plaintiff, Guo Ping Pan, seeks damages for injuries she sustained in a motor vehicle accident at the intersection of West Blvd. and 41st Avenue in Vancouver, British Columbia on April 19, 2016. The defendants' liability is admitted.
- [2] At the time of the accident, Ms. Pan was a passenger in the rear seat of a vehicle driven by her husband, Jun Ma. She was seated directly behind him. According to Mr. Ma's evidence, which is uncontradicted, he was driving southbound on West Blvd. and entered the intersection on a green light, when the defendants' vehicle, travelling on 41st Avenue, struck the left front side of his car. He said the defendants' vehicle was going at a high speed and there was a strong impact. This is confirmed by the fact that the estimate for repairs of the damage to the two vehicles was in excess of \$30,000 each. The impact from the collision caused Ms. Pan's airbag to deploy. The defendants' vehicle was being driven by the defendant Sally Tai with the consent of its owner, Yen Lau.
- [3] Following the accident, the plaintiff's vehicle was undriveable, and the police arranged for the plaintiff and her husband to take a taxi to their townhome in Richmond, where they live with their adult daughter, Li Ma. Ms. Pan began to experience tightness, pain and dizziness. She did not sleep well that night. Both her husband and her daughter noticed that she seemed nervous and distraught. Mr. Ma testified that his wife did not seem to be herself. Ms. Ma said that her mother was jumping from topic to topic when she spoke.
- [4] The plaintiff claims that as a result of the accident, she suffered injury and pain to her neck, shoulders, upper and lower back; pain and numbness in her legs; headaches, dizziness and nausea; loss of concentration; difficulty with memory; irritability; poor sleep and fatigue; depression and anxiety.

- [5] Almost four years have now passed since the accident. Although the worst of the physical symptoms have mostly resolved, the plaintiff says that she still has some stiffness and pain, as well as psychological and cognitive difficulties that continue to be a concern.
- [6] Mr. Ma was also injured in the accident. He has commenced his own court action in that regard, but that trial has not yet taken place.

II. the trial evidence

- [7] Seven witnesses testified at trial: the plaintiff, Ms. Pan; her daughter, Li Ma; the plaintiff's husband, Jun Ma; Dr. Joy Wee, who was qualified as an expert in psychiatry; Dr. James Schmidt, who was qualified as an expert in neuro-psychology; Dr. Terrence Ho, who was qualified as a medical doctor with a general practice; and Dr. Timothy McDowell, a defence witness who was qualified as an expert in neurology. In addition, numerous medical reports and other documents were filed as exhibits.
- [8] The plaintiff and her husband have limited English-language skills, and both testified with a Mandarin interpreter. Their daughter speaks both English and Mandarin. She assisted the plaintiff in communicating with some of the medical professionals.
- [9] I found all three members of the family to be generally credible and reliable witnesses. I do not accept the defence contention that Ms. Ma's evidence should be discounted because of bias in favour of her mother.

The Plaintiff's Situation Before and After the Accident

- [10] Ms. Pan was born in Shanghai, China in 1959. She is now 63 years old, and she was 59 at the time of the accident. She graduated from a two-year technical college in 1976, having studied chemistry. She worked for seven years in a chemical factory. She and her husband married in 1981, and their daughter was born in 1983. They came to Canada around 1990 and became Canadian citizens in 1993.
- [11] Starting in 1993, the couple purchased and operated a succession of restaurants in the Vancouver area. From 2005 to 2012, they owned and operated Jun Sushi on Cambie Street. They sold that restaurant in late 2012 and during 2013, Ms. Pan worked about 10 hours a week looking after a neighbour's children for \$10 per hour. In April 2014, they purchased a restaurant in Kitsilano which they operated under the name Sushi Lano. They also purchased the strata lot where the restaurant operated. In addition to paying themselves a salary of around \$3,000 per month, the restaurant business also paid them a rental amount of \$2,000 per month for the use of the strata lot. They worked 10 or 11 hour days, 6 days a week, but both said that they enjoyed their work and took great satisfaction in it.

- [12] At home, Ms. Pan did most of the cleaning and laundry, while her husband did most of the cooking. They did the shopping together. Because of their long work schedule, there was little time for recreation, but Ms. Pan did play ping pong, practiced yoga, and went for walks or hikes. She took pride in keeping a clean and tidy home, and regularly entertained friends there. She described herself as a happy person who was in good health.
- [13] On April 15, 2016, just a few days before the accident, Ms. Pan was diagnosed with colon cancer. She decided to travel to Shanghai, China for treatment in order to avoid a wait time for treatment here. They bought plane tickets to leave on April 20th and to return to Canada in June. They closed the restaurant, telling customers that they would reopen in June. At that time, they had no plans to retire.
- [14] The accident happened in the evening of April 19, 2016, as they were on their way home from the restaurant. Because their flight was leaving on April 20th, they had little time for medical consultations regarding the accident before they left. Ms. Pan could not go to her regular family physician, Dr. Fong, because that office had not opened yet. Instead, her daughter drove her to a walk-in clinic, where she saw Dr. Ho, who examined her and found soft-tissue injuries. That same day, she boarded her flight for Shanghai.
- [15] She had surgery for her colon cancer later that week, but following the surgery, she was told that she would also need a course of chemotherapy, which kept her in Shanghai until November, 2016.
- [16] As a result, they were not able to return to Vancouver to reopen the restaurant in June as had been planned. Instead, they wound up selling the restaurant business. The new owner changed the name of the restaurant and entered into a 3-year lease for the strata lot paying roughly \$2,000 per month rent, but the lease was terminated in September 2018 because of a default on the lease payments. The property remained vacant from August 2018 to August 2019, and they ultimately sold the strata lot for \$478,000 in August 2019.
- [17] Neither the plaintiff nor her husband has returned to work since the accident. Ms. Pan feels that she cannot return to work because of a combination of low back pain and cognitive difficulties. As a result, the couple have found it necessary to rely on financial help from relatives.
- [18] Ms. Pan testified that she was relieved at the end of her chemotherapy when she was told that her treatment had been a success. Upon returning to Canada, however, she found that she was still experiencing the effects of the motor vehicle accident, and she grew depressed when treatment was not effective.
- [19] She continued to see Dr. Ho in this regard. He recommended a chiropractor and active rehabilitation. She followed through on those recommendations. She has attended Dr. Chow, a chiropractor; Peggy Lee, a registered massage therapist; KARP Rehabilitation for active rehabilitation; and Dr. Xiao Yuan for muscle injections. She has also seen Dr. Joy Wee, a physiatrist, and Bessie Wang, a psychologist.

- [20] Over time, Ms. Pan's physical symptoms have gradually improved, although she still has problems with low back pain. Some of the therapy, such as chiropractic and massage, has provided temporary relief, but no apparent lasting benefit. She found that the muscle injections were not useful.
- [21] Ms. Pan's cognitive and psychological problems have persisted. In terms of depression, the worst period was in late 2017 and early 2018, when she began to have suicidal thoughts. Fortunately, her depression improved significantly when she began counselling with a psychologist, Bessie Wang. However, her anxiety and cognitive symptoms have not improved as much. Both her husband and her daughter gave evidence that her mental state is still significantly worse than before the accident. They say that she worries excessively, becomes irritable and confused, and has trouble focusing. She does not appear to enjoy life as much as she did before the accident.
- [22] As an example of Ms. Pan's cognitive changes, her daughter described how she used to be very quick with mental math. At the market, she would do calculations in her head for discounts or sales tax, whereas now she has to rely on a calculator.
- [23] Ms. Pan testified that her memory now is poor. She often forgets her glasses or leaves the key in the lock. She says she has trouble following television shows or understanding what she reads and has trouble concentrating. She said she is scared of the smallest thing. She still will not drive, and she is afraid to ride with others. She worries and becomes scared if her daughter or her husband come home late. She said her sleep is not good on an average of 4-5 times a week. She gets nightmares, wakes in the middle of the night and cannot return to sleep. She states it was not like this before the accident.
- [24] Because of her lower back problems, Ms. Pan still cannot do housework as efficiently as before. For example, it is difficult for her to bend to use the vacuum. As a result, their home is never as clean and tidy as it was before the accident. Ms. Pan explained that because of this, she does not invite guests over to their house to visit as regularly as she had in the past.
- [25] Following the counselling advice of Bessie Wang, Ms. Pan has again become involved in activities like singing and dancing, which improve her mood. She does some yoga and some walking, but she cannot do either to the same extent as before the accident. She has not resumed ping pong.

Medical Reports

- [26] In his report dated November 7, 2019, Dr. Ho wrote that Ms. Pan continues to complain of flare-ups of stiffness and pain to the neck, upper back, upper shoulders, and lower back; difficulty concentrating and focusing; difficulty with logical thinking; numbness and tingling to the lower extremities bilaterally from the knee down to the level of the foot; anxiety, especially around vehicles; and being unable to resume her pre-accident activity level. He made a diagnosis of soft-tissue injuries, anxiety and chronic headaches. He said that in his opinion, the accident is the main cause of her condition.

- [27] Counsel for the defendant notes that Dr. Ho's records do not indicate he received any complaint of cognitive impairment until September 25, 2019, and submits that this should cast doubt on whether any such impairment was caused by the accident. As well, he submits that it may be an indication of a failure to mitigate, by failing to obtain early treatment for such symptoms. Plaintiff's counsel submits that there may have been a failure of communication with Dr. Ho, due to his inability to speak Mandarin, and Ms. Pan's very limited ability to speak English.
- [28] The physiatrist Dr. Wee wrote in her report dated August 30, 2019 that Ms. Pan suffered muscular strain or myofascial pain syndrome, as well as a mild traumatic brain injury. She also found that Ms. Pan had a curve in her low spine, which may affect her ability to stretch her low back muscles adequately. She said it was likely that some residual impairments would persist even after the next 2 to 3 years, and that Ms. Pan would likely continue to experience some degree of back pain long-term even after a course of treatment and improvements.
- [29] The neuropsychologist, Dr. Schmidt, wrote in his report dated October 22, 2019 that Ms. Pan might have suffered a neuropsychologically significant mild traumatic brain injury, but "all other things being equal, she would have been expected to show a full recovery."
- [30] Having conducted various tests and having interviewed Ms. Pan and her daughter, he wrote:

Taking the historical information together with the test results and interview findings, it is my opinion that Ms. Pan does have difficulties with mental efficiency and basic focused attention. However, it is also my opinion that on the balance of probabilities these difficulties are not likely due to traumatic brain injury, but rather are manifestations of her other problems including her ongoing pain, depression, and anxiety. Her anxiety is both generalized and focused, specifically on vehicles and driving.

From a diagnostic standpoint, then, it is in my opinion more likely than not that Ms. Pan suffers from significant emotional disruption as a result of the accident in question. Determining the exact nature of that emotional disruption is extremely difficult given the language and cultural factors, both of which can impact on how emotional disturbances present. In that context I would conclude that she is suffering, at minimum, from an Adjustment Disorder with Mixed Anxiety and Depressed Mood, and may be suffering from a Major Depressive Disorder and/or a Generalized Anxiety Disorder. She is also in my opinion suffering from a Specific Phobia related to driving and motor vehicles. Finally, she presents with at least elements of a Posttraumatic Stress Disorder. It is further in my opinion more likely than not that but for the accident in question she would not be showing the emotional disruption she currently demonstrates.

The prognosis of this matter from a psychological standpoint must be seen as guarded. Ms. Pan's language limitations represent a significant barrier to her receiving many forms of psychological intervention that might otherwise be beneficial to her. Although she has not received optimal treatment because of the language limitations, she has nevertheless received appropriate treatments which have produced only limited benefits. Likewise, given the amount time that has

passed, the likelihood of any spontaneous resolution of her emotional disruption is becoming less and less likely.

[31] The neurologist, Dr. Tim McDowell, conducted an independent medical examination for the defence. In his report dated October 29, 2019, he provided a diagnosis of concussion, and mechanical soft tissue injuries to the low back and neck. He wrote:

Ms. Pan is a 62-year old female who was involved in a motor vehicle accident on April 19, 2016. She reports that there was a gap in her memory at the time of the accident which would be consistent with transient neurologic symptoms, likely after hitting her head. This meets the criteria for concussion/mild traumatic brain injury (mTBI). This is in concordance with what other physicians have reported contemporaneously. She also describes significant anxiety symptoms. It is possible that most of her transient symptoms were in fact related to an acute stress response and were psychological in nature, rather than sequelae of a mTBI; but, on balance, I think it is more likely than not that she did have a concussion. Typically the symptoms of concussion resolve within days to weeks. When symptoms persist beyond one year it is generally recommended to investigate for alternative etiology of the symptoms. At this point I think it is unlikely that her cognitive complaints, which are improving, are related to the concussion. I think it is more likely that they are nonspecific and related to chronic pain and psychological factors. Her chemotherapy may have contributed to these symptoms initially; however it is difficult to comment without knowing the specific regimen....

Headaches starting within seven days of a concussion or whiplash injury would fulfil the criteria for posttraumatic headaches. Since she denies a previous history of headaches to a significant degree it is likely she did have posttraumatic headaches. They are now rare and brief.

I would not expect significant disability from a neurologic perspective at this time or moving forward. Again, it is difficult to retrospectively assess how much of her symptoms are related to the underlying malignancy and its treatment versus the concussion and but for the cancer, I think it is reasonable to say she may have been partially disabled from a concussion/headache perspective for several days to approximately three months after the accident.

The intermittent dizziness she is describing could be further evaluated by ENT. If it becomes more disabling, brain imaging could be considered for this as well and neuro-vestibular testing could also be considered.

I do not see any evidence of a significant cervical or lumbar radiculopathy. Her mechanical neck and lower back pain are best opined on by the relevant experts.

Similarly, although it may be a significant aspect of her overall symptoms, I will not comment specifically on her psychiatric/anxiety issues.

III. causation

- [32] The test for causation in tort cases was explained by the Supreme Court of Canada in *Athey v. Leonati*, [1996] 3 SCR 458. The issue there was whether the defendant was fully liable for damages flowing from the plaintiff's disc herniation. The Court summarized the test at para. 41:
- [41] The applicable principles can be summarized as follows. If the injuries sustained in the motor vehicle accidents caused or contributed to the disc herniation, then the defendants are fully liable for the damages flowing from the herniation. The plaintiff must prove causation by meeting the "but for" or material contribution test. Future or hypothetical events can be factored into the calculation of damages according to degrees of probability, but causation of the injury must be determined to be proven or not proven. This has the following ramifications:
1. If the disc herniation would likely have occurred at the same time, without the injuries sustained in the accident, then causation is not proven.
 2. If it was necessary to have both the accidents and the pre-existing back condition for the herniation to occur, then causation is proven, since the herniation would not have occurred but for the accidents. Even if the accidents played a minor role, the defendant would be fully liable because the accidents were still a necessary contributing cause.
 3. If the accidents alone could have been a sufficient cause, and the pre-existing back condition alone could have been a sufficient cause, then it is unclear which was the cause-in-fact of the disc herniation. The trial judge must determine, on a balance of probabilities, whether the defendant's negligence materially contributed to the injury.
- [33] I am satisfied on all the evidence that following the accident, Ms. Pan suffered soft-tissue injuries and pain to her neck, shoulders and back, as well as headaches and difficulty sleeping. She sought and obtained appropriate treatment for these physical injuries, and the symptoms gradually improved over time, to the point that she is now about 70% recovered, except for her low back pain, which has resolved only about 50% to date. She still continues to experience low back pain 2 to 3 times per week for a few hours at a time. This pain is often triggered by bending over, and she finds it difficult to stand for more than 30 minutes at a time without resting. She continues to have neck and shoulder pain once or twice per month, especially when she tries to read. She experiences dizziness, perhaps once per week, although that is variable, and she has headaches about once per month.
- [34] Applying the "but for" or material contribution test for causation as explained in *Athey v. Leonati*, I am satisfied that these injuries were caused by the motor vehicle accident that resulted from the defendants' negligence.

- [35] I am also satisfied that Ms. Pan had, and continues to have, problems of a cognitive and psychological nature, including difficulty with memory and concentration, loss of mental acuity, anxiety, and depression.
- [36] The causation of these cognitive and psychological symptoms is less straightforward than the physical symptoms on account of the possible alternate explanation that the plaintiff's diagnosis of cancer and her treatment with chemotherapy may have contributed to her feelings of depression and her cognitive impairment. The defendants submit that various other disappointing events in her life may have contributed to the plaintiff's depression. Nevertheless, I agree with counsel for the plaintiff that the test is not whether other factors may have contributed to these symptoms, but rather whether the motor vehicle accident was a material cause. The onus is not on the plaintiff to prove this beyond a reasonable doubt, but only on a balance of probabilities. Applying that standard, I am satisfied that plaintiff has met its burden. On all the evidence, including the expert medical reports and especially the neuropsychological report of Dr. Schmidt, I am satisfied on a balance of probabilities that the accident was a material cause of the plaintiff's cognitive and psychological symptoms.

IV. damages

Non-Pecuniary Damages and Loss of Housekeeping Capacity

- [37] The overarching principle in assessing non-pecuniary damages is that the plaintiff is entitled to be put in the position she would have been, absent the defendant's negligence, to the extent that this can be done with money. The award in each case must be specific to the individual circumstances.
- [38] In *Stapley v. Hejslet*, 2006 BCCA 34 the British Columbia Court of Appeal set out a helpful list of factors to consider in assessing non-pecuniary damages:
- [46] The inexhaustive list of common factors cited in *Boyd* that influence an award of non-pecuniary damages includes:
- (a) age of the plaintiff;
 - (b) nature of the injury;
 - (c) severity and duration of pain;
 - (d) disability;
 - (e) emotional suffering; and
 - (f) loss or impairment of life;

I would add the following factors, although they may arguably be subsumed in the above list:

- (g) impairment of family, marital and social relationships;

- (h) impairment of physical and mental abilities;
 - (i) loss of lifestyle; and
 - (j) the plaintiff's stoicism (as a factor that should not, generally speaking, penalize the plaintiff: *Giang v. Clayton*, [2005] B.C.J. No. 163 (QL), 2005 BCCA 54).
- [39] The plaintiff in the present case submits that an appropriate award for non-pecuniary damages would be \$125,000. The plaintiff refers to the following cases.
- [40] In *Broomfield v Lof*, 2019 BCSC 1155, \$130,000 was awarded for general damages to a 42 year-old woman who sustained a concussion and soft tissue injuries to her neck, shoulders, and back as a result of a motor vehicle accident. She had severe headaches causing nausea, and she became irritable, argumentative, and withdrawn. Four years after the accident, she still suffered from depression and chronic pain disorder, and was still experiencing lengthy headaches with nausea connected to neck pain.
- [41] In *Ingram v Munroe*, 2019 BCSC 234, the court awarded \$110,000 for general damages to a 62-year-old warehouse technician who experienced headaches, neck pain, dizziness, right knee pain, left shoulder pain, vision issues, light and noise sensitivity, tinnitus, sleep disruption, difficulty concentrating, memory issues and mood impacts as a result of a motor vehicle accident. The court found that the plaintiff was unable to return to work and that this affected her sense of self-worth.
- [42] In *Reimer v Bischoff*, 2015 BCSC 1876, rev'd on other grounds 2017 BCCA 4, the court awarded \$100,000 in general damages to a 55 year-old woman who suffered soft tissue injuries to her neck, shoulder and low back. She also suffered from chronic dizziness, TMJ injury, aggravation of pre-existing migraine condition, adjustment disorder with mixed anxiety and depression, fatigue and cognitive deficits.
- [43] In *Wiles v Seabrook*, 2019 BCSC 13, a 60 year-old man was awarded \$120,000 in general damages for injuries sustained in two motor vehicle accidents. He suffered chronic whiplash associated disorder, chronic myofascial pain syndrome, right C5 facet fracture, depressive symptoms, sleep disorder, MBTI, adjustment disorder with depressed mood verging on major depressive disorder, somatic symptom disorder, STI of neck and upper back and post-traumatic headaches, depression and anxiety.
- [44] The Defendants submit that non-pecuniary damages in this case should be assessed at \$35,000 to \$60,000. They refer to the following authorities in support of their position.
- [45] In *Liu v Zhang*, 2019 BCSC 778, a 56 year-old woman was awarded \$60,000 in non-pecuniary damages. She had persistent symptoms of headaches, dizziness, back pain and occasional neck pain due to a motor vehicle accident.

- [46] In *Johal v Radek*, 2016 BCSC 454, a 70 year-old woman who was struck on the driver side of her vehicle, was off work for 11 months and was diagnosed with a soft tissue injury to her neck, mid-back, and lower-back. She experienced periodic headaches, sleep issues, anxiety and some left shoulder and left arm pain. She was awarded \$60,000 in non-pecuniary damages. For comparison purposes, some adjustment would have to be made to account for inflation.
- [47] In *Piper v Hassan*, 2012 BCSC 189, a 50 year-old man was awarded \$50,000 in non-pecuniary damages for injuries from a motor vehicle accident. He suffered lower back and neck pain which persisted and disabled him from work, but the court found that his ongoing lower back pain and neck pain were caused by a snow shovelling incident. He suffered from a pre-existing depression, which was exacerbated by the motor vehicle accident. The injuries interfered with his enjoyment of golfing and motorcycle riding. Again, the amount awarded would have to be adjusted for inflation to make this case comparable.
- [48] *Abraha v Suri*, 2019 BCSC 1855, was a case in which a 52 year-old woman suffered neck, shoulder and lower back pain, sleep issues, psychological difficulties, anxiety, depression, and cognitive changes including memory loss, arising from a rear-end motor vehicle accident. She was awarded \$70,000 in non-pecuniary damages, as well as \$15,000 for loss of housekeeping capacity.
- [49] No two cases are ever identical on their facts, and the authorities cited by both the plaintiff and the defendants simply provide guidance as to an appropriate award for comparable pain, suffering, and loss of amenities of life.
- [50] In the present case, the plaintiff seeks an award of \$25,000 for loss of housekeeping capacity in addition to the award for non-pecuniary damages. I am satisfied on the evidence that as a result of the accident, Ms. Pan has suffered a reduction in her capacity to perform housework and domestic chores. This is largely related to her back pain, which is exacerbated by the bending which is inevitably involved in such chores as vacuuming and cleaning. Her capacity now is about 50% of what it was before the accident, and despite the help she receives from her husband and daughter, the result is that the home is now not kept as clean and tidy as it used to be. Whereas a clean house used to be a source of pride for Ms. Pan, she finds that she is now somewhat reluctant to invite people over to visit, because her home is not as clean as she would like it to be.
- [51] In *Kim v Lin*, 2018 BCCA 77, the British Columbia Court of Appeal recognized that there are two ways of compensating for a proven loss of housekeeping capacity: either as a separate head of damages, or as a component of non-pecuniary damages. The court said, at para. 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.

[52] In the case of Ms. Pan, I find that her loss of housekeeping capacity is most appropriately considered as the loss of an amenity. It is something that negatively affects her enjoyment of life. I shall therefore take this into account in assessing the award for non-pecuniary damages.

[53] On all the evidence, and taking account of the various factors listed in *Stapley v. Hejslet*, I am satisfied that non-pecuniary damages, including loss of housekeeping capacity, should be assessed at \$80,000.

Mitigation

[54] The defendants submit that the plaintiff's award for damages should be reduced on account of a failure to take reasonable steps to mitigate her losses.

[55] In *Janiak v Ippolito*, [1985] 1 SCR 146, the Supreme Court of Canada held at para. 32 the defendant bears the burden of proving that the plaintiff could have and should have mitigated her loss.

[56] The defendants submit that the plaintiff did not report all her symptoms in a timely way to Dr. Ho and that she should have found a Mandarin speaking doctor and a Mandarin speaking counsellor.

[57] There is evidence that Dr. Ho recommended psychological counselling in January 2018, but that Mrs. Pan did not begin treatments with Bessie Wong until April 2, 2019.

[58] I am not satisfied that the defendants have met the burden on them of establishing a failure to mitigate. There clearly were some language difficulties, but the plaintiff took reasonable steps of having her daughter assist her with communication. Although it would have been desirable to be treated by Mandarin speaking professionals, there is evidence that Mandarin speaking counsellors are in short supply and this would have involved a long waiting period.

[59] As well, I am not satisfied that the defendants have shown that any delay in obtaining treatment had the effect of delaying resolution of the plaintiff's symptoms.

[60] I would not make any reduction in the damages award for failure to mitigate.

Loss of Earning Capacity

[61] The plaintiff submits that she should be awarded \$50,000-\$75,000 for loss of earning capacity as a result of the accident.

- [62] The defendants submit that there should be no award under this head of damages, because it has not been shown that any loss is attributable to the accident.
- [63] The relevant legal principles were summarized by Madam Justice Warren in *Bhandal v Charlebois*, 2015 BCSC 2315, at paras. 150-153:
- [150] To establish a claim for future loss of income earning capacity, a plaintiff must first prove a real and substantial possibility of a future event leading to a loss of income, as opposed to a speculative loss: *Perren v. Lalari*, 2010 BCCA 140 at para. 32. The onus on the plaintiff is not heavy but must nonetheless be met: *Kim v. Morier*, 2014 BCCA 63 at para. 7.
- [151] If the plaintiff discharges that burden, then the loss must be assessed, taking into account all realistic positive and negative contingencies. The assessment may employ what has been referred to as an "earnings approach" or a "capital asset approach": *Schenker v. Scott*, 2014 BCCA 203 at paras. 50-51; *Morgan v. Galbraith*, 2013 BCCA 305 at para. 53; and *Perren* at para. 32.
- [152] The earnings approach is generally appropriate where the loss is more easily measurable, such as where the plaintiff has some earnings history and where the court can reasonably estimate what his/her likely future earning capacity will be. This approach typically involves an assessment of the plaintiff's estimated annual income loss multiplied by the remaining years of work and then discounted to reflect current value, or alternatively, awarding the plaintiff's entire annual income for a year or two: *Pallos v. Insurance Corp. of British Columbia* (1995), 100 B.C.L.R. (2d) 260 (C.A.) at para. 43; and *Gilbert v. Bottle*, 2011 BCSC 1389 at para. 233.
- [153] The capital asset approach, which is typically used in cases where the loss is not as easily measurable, involves consideration of a number of factors including whether the plaintiff has been rendered less capable overall of earning income from all types of employment, is less marketable or attractive as a potential employee, has lost the ability to take advantage of all job opportunities that might otherwise have been open, and is less valuable to himself as a person capable of earning income in a competitive labour market: *Brown v. Golaiy* (1985), 26 B.C.L.R. (3d) 353 (S.C.) at para. 8; and *Morgan* at paras. 53 and 56. As stated recently by Justice Schultes in *Litt v. Guo*, 2015 BCSC 2207 at para. 388:
- [These factors] must be addressed in the context of the facts of the case, and the trial judge must make findings of fact as to the nature and extent of the plaintiff's loss of capacity and how that loss may impact on the plaintiff's ability to earn income: *Morris v. Rose Estate* (1996), 23 B.C.L.R. (3d) 256 (C.A.) at para. 24. In other words, while the capital asset approach is not the mathematical calculation, the trial judge must still make findings of fact on which to base the assessment: *Morgan* at para. 54.
- [64] I agree with counsel for the plaintiff that in this case, the capital asset approach is more appropriate than the earnings approach.

- [65] The unusual aspect of the present case is that the plaintiff and her husband closed the Sushi Lano restaurant just before the motor vehicle accident occurred. The closure was not because of the motor vehicle accident, but rather, it was because of Ms. Pan's cancer diagnosis. Although she and her husband initially intended to reopen the restaurant, they gave up that idea when they learned how long the course of chemotherapy in China would take.
- [66] As the plaintiff explained, because of the length of the chemotherapy, their return to Canada would be during the restaurant's slow season. They decided that it was better to sell the Sushi Lano business and lease their strata lot to the purchaser, as this would allow them to have a stream of income from the rent. Ultimately, the new owner closed the business in September 2018 and removed or altered the equipment in the strata lot. The plaintiff and her husband subsequently sold the strata lot. I agree with the defendants that the decision not to reopen the restaurant was unrelated to the motor vehicle accident.
- [67] Although prior to the cancer diagnosis, the plaintiff and her husband had made no plans to retire, I am not satisfied that there is evidence to show a real and substantial possibility that but for the accident, they might have bought and run a new restaurant after their return from China.
- [68] I must then consider the possibility of Ms. Pan obtaining other employment.
- [69] I do not accept the plaintiff's position that because of the accident, she is incapable of any kind of work. In his November 7, 2019 report, Dr. Ho wrote:
- Ms. Pan is well suited to any occupation requiring light to heavy physical work. Very heavy physical work or sustained positioning, or such recreational activities notably with her neck, shoulders, and back, may exacerbate flare-ups of her symptoms.
- Should Ms. Pan look for employment, she may be somewhat more restricted in her ability to find work, considering her symptoms and injuries. She would likely have more difficulty to participate in very physically demanding occupations or activities.
- On a balance of probability, Ms. Pan is more likely to injure herself in the future should she pursue such a line of work or activity.
- [70] Despite being "well suited to any occupation requiring light to heavy physical work", Ms. Pan has not attempted any form of employment after the completion of her chemotherapy in China. According to Dr. Ho, the plaintiff has lost the ability to do "very heavy physical work", but in my view, she has not satisfied the burden of showing a real and substantial possibility that but for the accident, she might have sought or found such employment.
- [71] It would appear that Ms. Pan's lack of ability to speak English might be a significant barrier to her finding work, but that limitation is unrelated to the accident.

[72] As for cognitive impairment, there is simply not enough evidence to support a claim that she has lost a capital asset relative to employment as a result of the accident. In her report dated August 30, 2019, Dr. Wee advised Ms. Pan to seek "involvement by occupational therapy (OT) over at least 6 months in providing relevant strategies for impairments." Dr. Wee went on to say that "OT could also work with her on potential for return to work assessment." As well, Dr. Schmidt wrote in his October 22, 2019 report, "I believe that it would be useful for her to work with a vocational consultant to explore whether there is any kind of work she might be able to return to..." Despite those recommendations, Ms. Pan has not made any effort to see an occupational therapist or vocational consultant.

[73] Accordingly, I agree with the defendants that the plaintiff has not shown that she is entitled to an award for loss of earning capacity, either past or future.

Special Damages

[74] The Defendants have admitted special damages in the amount of \$395.12

[75] The Plaintiff has not advanced any argument in support of an award for the cost of future care.

V. summary and conclusion

[76] It is admitted that the defendants were negligent and wholly liable for the accident.

[77] I award the following damages to Ms. Pan for the injuries she suffered as a result of the accident:

Non-pecuniary damages (including loss of housekeeping)

\$80,000.00

Loss of Income-Earning Capacity

Nil

Special Damages

\$395.12

Total:

\$80,395.12

[78] The parties may appear before me for submissions on costs if they cannot agree on the appropriate order.

"Ehrcke J"

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Prepared on 29 October 2026 · Esheria