

CANADA / JUDGMENT

Siu v. Regehr

2022 BCSC 1876

COURT

Supreme Court of British Columbia

DECIDED

27 October 2022

Source: bccourts.ca · Research copy typeset by Esheria. Not court-issued or certified.

2022 BCSC 1876 Siu v. Regehr

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Siu v. Regehr,

2022 BCSC 1876

Date: 20221027

Docket: M1911606

Registry: Vancouver

Between:

Kwong Kin "Raymond" Siu

Plaintiff

And

Sara Beth Regehr

Defendant

Corrected Judgment: The text of the judgment was corrected on the front page on November 7, 2022

Before: The Honourable Justice Giaschi

Reasons for Judgment

Counsel for the Plaintiff:

J.D. Antifaev

M. Monteith (A/S)

Counsel for the Defendant:

M. Ahmadi

Place and Date of Trial:

Vancouver, B.C.

March 22-25 and April 5-8, 2022

Place and Date of Judgment:

Vancouver, B.C.

October 27, 2022

Table of Contents

Introduction.. 3

Witnesses and Credibility.. 3

Facts.. 6

General 6

Previous Accidents. 7

Pre-Accident Health and Work. 10

The Subject Accident 12

Post- Accident 13

Treatments. 16

Dr. Joy Wee. 21

Effects of the Injuries. 28

Causation.. 31

Legal Principles. 31

Divisible/Indivisible Injuries. 32

Submissions of the Parties. 34

Discussion. 34

Assessment of Damages.. 38

Legal Principles. 38

Submissions. 40

Non-pecuniary Damages. 40

Loss of Earning Capacity. 48

Special Damages. 52

Costs of Future Care. 52

Mitigation.. 55

Order.. 56

Introduction

- [1] The 60-year-old plaintiff was involved in a motor vehicle accident on November 28, 2017 (the "subject accident"). The defendant admits liability for the accident. Hence, the issues in this fast track action concern only the damages to which the plaintiff is entitled.
- [2] The plaintiff submits that he is entitled to awards of \$100,000 for non-pecuniary damages, \$54,000 for loss of earning capacity, \$775.61 for special damages and \$5,000 for costs of future care.
- [3] For the reasons that follow, I award the plaintiff \$60,000 for non-pecuniary damages, \$50,000 for loss of earning capacity, \$775.61 for special damages and nothing for costs of future care.

Witnesses and Credibility

- [4] The witnesses who testified at the trial were all called on behalf of the plaintiff. They were: the plaintiff; Paul Siu, the plaintiff's brother; Joanna Tam, the plaintiff's niece; and Dr. Joy Wee, a physiatrist and expert witness. The defendant called no witnesses.
- [5] The defendant submits that the evidence of the plaintiff is "wholly unreliable" and that the evidence of his brother, Paul Siu, should be given no weight.
- [6] In relation to the plaintiff, the defendant submits that he minimized his injuries suffered in previous accidents, exaggerated his health status just prior to the subject accident, and generally gave inconsistent, contradictory and unbelievable testimony.
- [7] In relation to Paul Siu, the defendant submits that his evidence should be given no weight as he appeared to have spoken with the plaintiff about the evidence he was to give. Although defendant's counsel did not expressly state so, the submission amounted to an allegation that Mr. Siu had been excessively coached. The defendant also pointed out several inconsistencies in Mr. Siu's evidence.
- [8] The plaintiff acknowledges that there are difficulties with his evidence, which he attributes to being an ineffective communicator and to fatigue when giving his evidence. The plaintiff submits that he was honest, open and sincere and did his best to tell the truth.

- [9] The defendant refers me to *Chaudry v. Henville*, 2021 BCSC 2318 for the principles and factors related to assessing credibility and reliability.
- [6] The factors to be considered when assessing credibility were summarized in *Bradshaw v. Stenner*, 2010 BCSC 1398, at para. 186, *aff'd* 2012 BCCA 296, where it was stated that the overriding consideration is whether the evidence is consistent with the probabilities affecting the case as a whole and shown to be in existence at the time:
- [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), 1919 CanLII 11 (SCC), 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.); *Faryna v. Chorny*, 1951 CanLII 252 (BC CA), [1952] 2 D.L.R. 354 (B.C.C.A.) [*Faryna*]; *R. v. S.(R.D.)*, 1997 CanLII 324 (SCC), [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 (*Faryna* at para. 356).
- [7] Where there is little objective evidence of a plaintiff's self-reported symptoms, the plaintiff's evidence must be carefully scrutinized, in particular, her injuries of subjective complaints: *Karim v. Li*, 2015 BCSC 498 at paras. 86-89; *Dhaliwal v. Greyhound Canada Transportation Corp.*, 2015 BCSC 2147 at paras. 280-282, varied on other grounds at 2017 BCCA 260; *Edmonson v. Payer*, 2011 BCSC 118 at paras. 36-37, *aff'd* 2012 BCCA 114.
- [8] If the plaintiff's account of his or her change in physical, mental, and or emotional state as a result of the accident is not convincing, then the hypothesis upon which any expert opinion rests will be undermined: *Samuel v. Chrysler Credit Canada Ltd.*, 2007 BCCA 431 at paras. 15, 49-50.
- [10] In *Hardychuk v. Johnstone*, 2012 BCSC 1359, at paras.10-11, Justice Dickinson noted the distinction between the credibility of a witness's testimony and reliability. Credibility relates to truthfulness whereas reliability relates to the ability of a witness to accurately perceive, recall and communicate.
- [10] The typical starting point in a credibility assessment is to presume truthfulness: Halteren. Truthfulness and reliability are not, however, necessarily the same. A witness may sincerely attempt to be truthful but lack the perceptive, recall or narrative capacity to provide reliable testimony. Alternatively, he or she may unconsciously indulge in the human tendency to reconstruct and distort history in a manner that favours a desired outcome. There is, of course, also the possibility that a witness may choose, consciously and deliberately, to lie out

of perceived self-interest or for some other reason. Accordingly, when a witness's evidence is demonstrably inaccurate the challenge from an assessment perspective is to identify the likely reason for the inaccuracy in a cautious, balanced and contextually sensitive way.

- [11] The presumption of truthfulness will be displaced by convincing evidence of deliberate falsehood. Such evidence may take many forms. There is no hard and fast rule as to how falsehood on a plaintiff's part may be demonstrated in a personal injury action. In my view, however, in most such cases fairness will require that a plaintiff be given an opportunity to respond directly to an assertion of deliberate untruthfulness before his or her credibility, as distinct from reliability, is successfully impeached: *R. v. Lyttle*, 2004 SCC 5; *Browne v. Dunn* (1893), 1893 CanLII 65 (FOREP), 6 R. 67 (U.K.H.L.).
- [11] In respect of the plaintiff's testimony, there were many occasions where his evidence was vague and ambiguous and many other occasions where his evidence was inconsistent and contradictory. He sometimes contradicted himself on the witness stand and at other times his evidence was inconsistent with the evidence he gave at his examination for discovery or with the evidence given by his brother or niece. I attribute the various difficulties with the plaintiff's evidence to him having a very poor memory and recollection of many things and to difficulties in communicating, both of which were obvious. I also attribute some of the difficulties to an unconscious or involuntary inability to resist the urge to exaggerate or embellish. I am of the view that, for the most part, the plaintiff did his best to tell the truth. However, there are nevertheless significant reliability concerns with the plaintiff's evidence which require that his evidence be carefully scrutinized.
- [12] In respect of the testimony of Paul Siu, the concerns raised by the defendant are, in my view, valid. Mr. Siu did not appear to have a good memory yet was able to testify to various matters that one would not expect him to have a perfect recollection of. For example, he knew exactly the number of days the plaintiff was not working following a motor vehicle accident in 2013. Paul Siu also gave evidence during his examination-in-chief that he contradicted during his cross-examination. Specifically, during his examination-in-chief he testified that, after the subject accident, he observed the plaintiff's bruises, redness and swelling. He repeated this evidence in cross-examination but said the observation occurred several months after the accident. He then testified that he never actually observed bruises, redness and swelling but was merely told by the plaintiff of these injuries. As a result, I also find that the evidence of Paul Siu suffers from reliability concerns. I do not, however, believe that he was deliberately untruthful or attempted to mislead the court. Rather, he was somewhat careless in giving his evidence. As with the plaintiff's evidence, the evidence of Paul Siu must be carefully scrutinized.

Facts

General

- [13] The plaintiff was 55 years of age at the time of the accident and 60 years of age at the time of the trial. He is a native Cantonese speaker. He gave his evidence at the trial through an interpreter. He emigrated to Canada from Hong Kong in 1974 together with his mother and two older sisters.
- [14] The plaintiff is single. He never married and has no children. He has minimal education. He left high school after completing grade 10. He has no other education and has no certifications or qualifications of any significance.
- [15] Prior to 2006, the plaintiff had worked at a variety of jobs including: delivering newspapers, working at restaurants as a waiter or in food preparation, cleaning, laundry pickup and delivery, and working in a mechanical shop. In or about 2006, the plaintiff began working for Ramez Faizan Enterprises as a driver delivering auto parts around the lower mainland, but mostly to locations in Vancouver and Richmond. His job consisted of loading a delivery truck, driving the truck to the delivery locations, unloading the truck at those locations and then returning to the depot. He also, at times worked at the depot, sometimes referred to as the store, where he prepared loads for delivery. He was employed with Ramez at the time of the subject accident.
- [16] The plaintiff's income tax returns disclose he earned a modest income in the years before the accident. In the years 2013 to 2017, he earned between \$24,800 and \$27,600 per year. Since the accident he has had no income from employment.

Previous Accidents

- [17] A significant issue in the matter is the plaintiff's health immediately prior to the subject accident and the extent to which he had recovered from injuries suffered in prior motor vehicle accidents.
- [18] The plaintiff testified to being involved in three prior motor vehicle accidents. He did not know the dates of the accidents or even seem to recall the years of the accidents. Other evidence, including notices of civil claim filed in respect of two of the prior accidents, establish that the accidents occurred in January 2010, September 2010 and December 2013.
- [19] The plaintiff testified during his examination-in-chief that he suffered injuries to his back, knee, and head in the January 2010 accident and that he suffered injuries to his head, back, leg and arm in the September 2010 accident. He further testified that he fully recovered from those injuries within two years.
- [20] In cross-examination, in relation to the January 2010 accident, the plaintiff testified that he was not sure whether he had injured his head. After being taken to his notice of claim for that accident, he testified that his head felt foggy for a short period of time following the

accident. He also testified to suffering from chest pain and injuries to the shoulder, neck, upper back, right knee, and right calf muscle. In respect of both 2010 accidents, he testified that the injuries were painful and caused him difficulties walking. He further testified that after the 2010 accidents he developed a driving phobia that got a bit better after two or three years.

- [21] In respect of the 2013 accident, the plaintiff testified during his examination-in-chief that he injured his head, leg and knee in that accident.
- [22] In cross-examination in relation to the 2013 accident, the plaintiff testified that his injuries from that accident consisted of a concussion, nose pain, injury to both shoulders, headaches, memory loss, ringing in the ears, fatigue, sleep problems, periodic depression, and bleeding from the nose. He also acknowledged that he sought medical help for bleeding from the rectum but was not sure if that was related to the 2013 accident.
- [23] The plaintiff was directed to various clinical notes and records during his cross-examination, particularly records of Dr. Chan who was the plaintiff's treating physician at the time of the earlier accidents and until the latter part of 2016. These records indicated, among other things, that in 2016 the plaintiff had complained of foot pain and headaches. The plaintiff was unable to recall making such complaints.
- [24] The plaintiff was also directed in cross-examination to a report dated March 2, 2016 by Dr. Gurdeep Parhar. The plaintiff recalled the visit to Dr. Parhar and acknowledged he then had pain in the neck, mid and lower back, right and left shoulder, and right leg. He also acknowledged that he was then sometimes depressed and had ringing in the ears.
- [25] The plaintiff gave confusing and contradictory evidence as to the amount of time he was absent from work as a consequence of the prior accidents. During his examination in chief, he first testified that he was absent from work for eight to 12 months after the 2010 accidents. He then said he was absent from work for two years after one of the accidents, closer to 2013. On the second day of giving his evidence in-chief, he purported to clarify that he was not working for eight to 12 months following his 2010 accidents and for one to two years following the 2013 accident. He then said he could not recall if he took time off from work following his 2013 accident. He then said he was not off work for very long following the 2013 accident. After being taken to his income tax returns, he testified that he worked full time in 2014, which suggests that he took a minimal amount of time off from work following the 2013 accident.
- [26] The plaintiff's 2013 income tax return indicates that he was working for all, or most of 2013, and an income tax return information slip for 2012 indicates that he did not file a return for 2012. Thus, suggesting he was not working in 2012.
- [27] In cross-examination, the plaintiff testified that he was not working for eight to 12 months following the first of the 2010 accidents and that he was not working for two years following the second of the 2010 accidents.

- [28] Doing the best I can with this confusing evidence, and relying primarily upon the plaintiff's income tax information, I find that he took two years off from work in relation to the 2010 accidents. In relation to the 2013 accident, based on the submissions of the parties, they seem to accept that the plaintiff was absent from work for 20 days following the 2013 accident.
- [29] The plaintiff agreed in cross-examination that he thought there were some changes to his job duties when he returned to work, specifically, that he worked in the store more often. He said that he asked his manager for this change in duties so he could see if his body could handle the return to work. He did not agree that he worked fewer hours after returning to work but, after being taken to his discovery evidence, he agreed he also worked fewer hours.
- [30] The clinical notes of Dr. Chan were agreed to be admitted as business records. These notes were mostly impossible to decipher and, therefore, the parties entered into an agreement as to the contents of the notes. The notes indicate that the plaintiff's injuries from the prior accidents included: soreness/pain all over body, headaches, neck pain, and foot pain. The last deciphered entry is dated August 17, 2016. That entry records nose bleeding, pain left foot toes, and headaches.
- [31] There was also some evidence at trial related to an incident at work in or about 2016 where the plaintiff was struck in the head by a trunk lid.

Pre-Accident Health and Work

- [32] In relation to the period of time just prior to the subject accident, the plaintiff gave very confusing evidence regarding his health, whether he was working full time and whether he was on light duties.
- [33] During his evidence in-chief, the plaintiff said he fully recovered from the injuries suffered in the 2010 accidents within two years. In relation to the 2013 accident, he testified that after three or four years he still had neck problems but after attending physiotherapy, the neck problems gradually resolved. He thus, implied his injuries from the 2013 accident had resolved. However, when asked what pain he was still having just before the 2017 accident, he replied he still had pain, mainly back pain, which occurred when he worked too hard. The plaintiff was also asked whether he was having difficulties performing his job duties just before the subject accident. He replied that he experienced pain when carrying heavy objects and that when he was driving he wanted to fall asleep. He also later testified during his examination-in-chief that, just prior to the subject accident, he was generally in physical pain from too much work and was still suffering from injuries incurred in the previous car accidents. In cross-examination, he acknowledged that in the six months before the subject accident he was still using an ointment for pain. He said he was having pain in the shoulders, hip, lower back, knees, legs and neck. He also acknowledged the pain caused him difficulties walking and lifting heavy objects.

- [34] Concerning the sleep difficulties, in cross-examination, the plaintiff testified that he had been having issues with wanting to fall asleep while driving for three months prior to the subject accident and that the problem was getting serious one or two months prior to the subject accident. He said he was considering taking time off from work because of this and that he had spoken to his manager about doing so. He then changed his answer and said that he could not recall if he had spoken to his manager but believed he did take a couple of days off from work.
- [35] Rather importantly, when asked during his examination-in-chief what his plans were if the 2017 accident had not occurred, he replied that he would consider taking time off from work to see if his health improved.
- [36] The plaintiff's evidence of the number of hours he was working was also confusing. At one point during his examination-in-chief, he said he was working a full forty-hour work week. He later said he was not sure but then, when asked how many hours he was working before the accident, he replied "forty". He then said he could not recall how many hours he was working just prior to the accident.
- [37] The plaintiff also gave confusing evidence about whether he was working light duties just prior to the subject accident. During his examination-in chief he testified he worked light duties, which consisted of him gathering auto parts rather than having to drive the delivery truck, but his evidence was unclear as to when this was. In cross-examination, he acknowledged that he was still on light or modified duties the month before the 2017 accident, although he also said this was because he had been asked to coach new drivers.
- [38] The evidence of Paul Siu tended to suggest that the plaintiff had fully recovered from his injuries suffered in the prior accidents by the time of the subject accident. In relation to the 2010 accidents, he testified that the plaintiff "rested" for one year following those accidents, and then returned to work. He testified that he observed the plaintiff's health had kind of recovered. In relation to the 2013 accident, he testified that the plaintiff rested for only 20 days and then his health was back to normal. He further testified that in the three months prior to the 2017 accident, the plaintiff's health was fine. He said the plaintiff was leading a normal life. He would go out to walk around the park, engaged in normal social activities, and would come to family events when invited.
- [39] Joanna Tam gave little evidence of the plaintiff's previous accidents and injuries other than she knew the plaintiff had been on and off from work. Concerning the plaintiff's health before the accident, she said he was fine.
- [40] I pause to note that I find the plaintiff was not fine or in normal health prior to the subject accident. The plaintiff was clearly still suffering from the injuries that he had incurred in the prior accidents. More specifically, I find that the plaintiff was suffering from ongoing pain in the shoulders, hip, lower back, knees, legs and neck and was having fatigue issues during the work day that caused him to become sleepy when driving. Additionally, I find that the plaintiff was suffering from a driving phobia. Moreover, I find that these issues were causing

him difficulties with walking and lifting heavy objects and generally with performing his work duties. I further find that, although the plaintiff may have been on light duties at some point in 2017 before the subject accident, he was not on light duties immediately before the accident. The plaintiff's uncontradicted evidence is that light duties consisted of him gathering auto parts at his employer's premises, whereas, at the time the accident occurred, he was performing a delivery. I also find that the plaintiff was working full time prior to the accident, which is corroborated by his income tax returns.

The Subject Accident

- [41] The subject accident occurred during the morning of November 28, 2017. The plaintiff was travelling on highway no.1 in the center lane towards Surrey. He testified that the defendant, who had been in the left lane, suddenly switched to the center lane and hit his vehicle while doing so. The plaintiff's vehicle was pushed into the right lane by the force of the collision. At the time of the collision the vehicles were proceeding at less than the speed limit which was, according to the plaintiff, 80 or 90 km/hr.
- [42] Following the collision, the two vehicles parked on the roadside. Police and ambulance personnel attended at the scene. The plaintiff was asked if he wanted to go to the hospital but, as he did not feel bad, he declined. The plaintiff's vehicle was not driveable so he called a taxi and which took him to his home.
- [43] Photos taken of the plaintiff's vehicle after the accident indicate that his vehicle was damaged on the driver's side from the front head light to the rear tire well. The most significant damage was in the area of the front tire and driver's side door.
- [44] The plaintiff testified that during the collision his body moved both forward and back and left to right. Specifically, he said his left side, head and upper arm made contact with the interior of the vehicle. He said his head hit the headrest, the inner parts of his legs near his knees contacted the steering wheel and his foot contacted the gas pedal or brake pedal. He testified that he was unsure if his head hit the window of the vehicle but then later testified that he believed it did hit the window. He also said he felt as though his heart stopped briefly and that he was in shock.

Post- Accident

Injuries

- [45] During his examination-in-chief, the plaintiff testified that following the accident he had pain in his lower back around the abdomen and discomfort where his head hit the headrest.

- [46] The plaintiff testified that when he got home he felt discomfort and nausea. He took painkillers. That afternoon he attended at a clinic where he saw Dr. Johal. He initially testified that his injuries at that time were more emotional. He later testified that he complained to Dr. Johal of pain in the abdomen, neck and lower back. He said Dr. Johal recommended that he attend for physiotherapy. I address Dr. Johal's notes of this initial visit and others below.
- [47] The plaintiff testified that the day after the accident he had neck pain and discomfort in other parts of his body. He specifically said that the only pain was in his neck but later said there was also pain in his foot when walking. Towards the end of his examination in chief, in response to a leading question, he also testified that the day after the accident he experienced bleeding from his nose and he also believed internally in the areas of his abdomen. He said the nose bleeding lasted for two weeks and the bleeding in the area of the abdomen lasted six months.
- [48] The plaintiff testified he later developed bruises on his shoulder, legs, lower back and foot. His neck also became swollen. In cross-examination he was asked when he first noticed the bruising. He replied that some bruises occurred a short time after the accident and others occurred one or two months later. He testified in cross-examination that the bruising was on his shoulders, thighs, low back and foot.
- [49] The plaintiff testified that he has difficulty walking due to sharp pain in his right leg and that he has to reduce his pace. He believes that he fell a few times due to his leg pain. He later said the difficulty walking was because of discomfort in his legs, knees and lower back. When asked if he had this problem before the accident he replied that he did but it was not as serious. He also later testified that he also experiences pain when sitting "sometimes". He testified that medications, rest and stretching help with the pain.
- [50] The plaintiff testified that the worst injury from the accident was to his lower back and the pain in relation to that injury.
- [51] Concerning his mood, the plaintiff testified that for six to 12 months after the accident he was not happy, stayed at home more and lost interest in doing a lot of things such as walking, eating his favorite foods and exercising. He testified to being depressed and often feeling scared. He said he was so nervous and scared that he could not calm down when going to bed. He then confusingly said that this had occurred often and for many years. Importantly, he testified that his interests got back to normal after two or three years.
- [52] When asked in chief if the accident affected his personality, the plaintiff replied that he now had unstable emotions. He explained that by this he meant he was seriously bothered by the physical pain and could not sleep well. However, he acknowledged having some sleep issues before the accident.

- [53] He testified to having headaches following the accident but when asked if he had headaches before the accident he replied that he did. He said the headaches were more frequent since the accident and he associated them with his neck pain. He also testified that his neck, shoulder and back pain were more severe after the accident than before.

Hong Kong

- [54] The plaintiff had a planned vacation after the accident and travelled to Hong Kong. The plaintiff's evidence of the time spent in Hong Kong was confusing. At first, he testified he was in Hong Kong from December 1 to 20, 2017. However, in cross-examination he was unable to recall the day he left for Hong Kong or the day he returned. He did testify that he left for Hong Kong four days after the accident and returned after New Year's Day.
- [55] During his examination in chief, in response to a leading question, the plaintiff testified that he experienced pain over his entire body while in Hong Kong, that he sought medical treatment there on one or two occasions, and was prescribed pain medications. Although he testified that he spent his time in Hong Kong shopping, dining and visiting relatives, he implied it was not pleasant because he was in pain and on medications. I note that during his examination in chief he gave no indication that his health issues in Hong Kong were due to ailments other than the injuries suffered in the accident.
- [56] However, in cross-examination, the plaintiff admitted that while in Hong Kong he contracted a fever, was diagnosed with an upper respiratory infection and was prescribed medications. He could not recall if the medication was an anti-biotic, although Dr. Johal's clinical notes indicate this was the case. He further clarified in cross-examination that the pain he experienced in Hong Kong was internal stomach pain and some back pain.

Quit Job

- [57] The plaintiff testified that he quit his job after returning from Hong Kong but gave conflicting evidence as to when this was. At one point he said he quit his job within one month following the accident. At another point he said it was a month or two after he returned from Hong Kong that he quit his job. When confronted in-chief about this contradiction, he replied that he could not remember.
- [58] In cross-examination he testified that he thought he quit his job within two to four weeks after returning from Hong Kong. When specifically asked if he decided to quit his job while in Hong Kong, he replied in the negative. He was then taken to his discovery transcript where he had testified that he decided to quit his job while on vacation. He acknowledged giving this answer and that it was true but then inexplicably again testified that it was not until about one month after he returned that he decided to quit.
- [59] In cross-examination, he also testified that he was scheduled to start back at work immediately upon returning from his vacation. When asked why he did not start work immediately, he responded that he was in discomfort and still taking medications. He later

clarified that he had a stomach ache and overall discomfort, the same as he had in Hong Kong, and that this lasted for six weeks. When asked in cross-examination, why he did not ask his employer for different or light duties, after returning from Hong Kong, he replied that he was very ill and could not do that kind of work.

- [60] The plaintiff also acknowledged in cross-examination that, prior to quitting his job, he had attended only a single session of physiotherapy and that no treatment provider had recommended that he take time off from work or stop working.
- [61] Notwithstanding this confusing evidence, it is common ground that the plaintiff did not return to work at any time following the subject accident, regardless of when he made the decision to quit his job.

Treatments

- [62] The plaintiff testified that after he returned from Hong Kong he continued to periodically attend for treatments at Simply Wellness Clinic and for physiotherapy at Main Street Physio. The plaintiff testified that he eventually stopped attending appointments at the clinic as Dr. Johal told him that he did not need to continue.
- [63] The plaintiff testified he attended approximately nine sessions of physiotherapy where he was taught stretching exercises by the physiotherapist and was urged to purchase a rubber band and a ball as aids. He testified that he stopped going to physiotherapy as the physiotherapist told him he could do the exercises at home. However, in cross-examination, the plaintiff testified that he stopped his physiotherapy sessions because he had severe headaches and neck ache and the treatments, poses and positions were not comfortable.
- [64] I pause to note that I do not accept the plaintiff's evidence that Dr. Johal told him he did not need to continue treatments and I do not accept that the physiotherapist told him he did not need to continue physiotherapy.

Clinical Records

- [65] The clinical records before me indicate that, following the accident, the plaintiff attended at Simply Wellness Clinic for medical treatment during the period from November 28, 2017 to October 9, 2019 and Main Street Physio for physiotherapy during the period from December 1, 2017 to June 12, 2018.
- [66] The clinical records of Simply Wellness disclose:
- a) On November 28, 2017, the plaintiff attended to see Dr. Kevin Johal. Dr. Johal's clinical notes indicate that the plaintiff's complaints were of neck tightness and lower back pain. Dr. Johal recommended over-the-counter medications and heat or ice therapy for pain, and physiotherapy and massage therapy;

- b) On January 17, 2018, the plaintiff again attended to see Dr. Johal. The clinical notes indicate he was experiencing pain in his back, tension in the shoulder and arm, and pain in lower legs making it difficult to walk. The plaintiff also complained of occasional difficulty with breathing and abdominal discomfort. Dr. Johal prescribed cyclobenzaprine for muscle tension and recommended continued physiotherapy;
- c) On April 2, 2018, Dr. Johal noted that the plaintiff's pain was somewhat improved but that there was still generalized pain. He also noted complaints of once weekly nasal bleeding. He assessed the plaintiff as having a neck sprain and recommended continued physiotherapy and massage therapy. He added prescriptions for diclofenac (topical cream) and naproxen (pain killer);
- d) On April 12, 2018, Dr. Johal prepared a medical report for ICBC. In this report he identified the plaintiff's initial complaints as neck pain and lower back stiffness and his initial objective findings as "stiffness w/ full ROM on lumbar spine";
- e) On May 1, 2018, Dr. Johal noted increased complaints of pain in the lower back, neck and arm and complaints of headaches. Dr. Johal found no significant tenderness to cervical neck or lumbar spine and improvement to the range of motion of the neck. He recommended that, in addition to continuing with physiotherapy, the plaintiff needed to start massage therapy and heat therapy. He also suggested a referral to physiatry. He further recommended the plaintiff continue taking naproxen;
- f) On July 17, 2018 the plaintiff was seen by Dr. Ramesh Kamath. Dr. Kamath records the plaintiff continued to have neck pain as well as pain and tingling in the right arm and pain in the back and left hip. Dr. Kamath's objective findings were no localised tenderness, taut neck muscles, reduced right lateral flexion and fair lumbar ROM. He recommended physiotherapy and prescribed naproxen;
- g) On December 10, 2018, the plaintiff was again seen by Dr. Kamath. This time Dr. Kamath noted the complaints to be right hip pain, pain on the back of the scalp, pain in the neck and left shoulder, headaches and dizziness, and a rash on the shoulders and knees. Dr. Kamath's objective findings were: a vesicular rash on the scalp; mild swelling of the left shoulder, and fair ROM. Dr. Kamath prescribed medicine for the rash;
- h) On March 8, 2019, the plaintiff was seen by Dr. Johal who noted complaints of pain in the lower back and right leg and tightness and in the shoulder. He also noted that the plaintiff had stopped using naproxen and oral analgesics and was using topical Voltaren for pain. He recommended the plaintiff continue to do stretching exercises at home and apply Menthol topically for pain. He also contemplated a referral to a physiatrist;
- i) On October 7, 2019, the plaintiff was seen by Dr. Jacqueline Swirsky. She noted complaints of aches and pain to the shoulder, back, neck, knees and feet and of constant right sided headaches. Upon physical examination, she observed lumbar extension causes pain and noted no obvious swelling or erythema of hands, knees or feet; and

- j) On October 9, 2019, the plaintiff was seen by Dr. Tamara Krivokapic. She wrote the plaintiff complained of pain all over his body.
- [67] The records of Main Street Physio disclose that on December 1, 2017, the plaintiff attended for an assessment. The clinical notes and Initial Assessment Report to ICBC indicate that he complained of pain in his left hand, left arm, shoulders, and back as well as occasional knee pain, ankle discomfort and numbness in his right toe. The report also noted that the plaintiff was scheduled to be overseas on vacation and a reassessment would be required on his return. A second assessment did occur on March 6, 2018. As well the plaintiff attended physiotherapy sessions on March 13, 20 and 29, April 5 and 19, May 1 and 15, and June 12, 2018.
- [68] In summary, the above clinical records indicate that for at least approximately two years following the subject accident the plaintiff was in more or less constant pain, primarily involving the shoulders, neck and back, although other body parts were also implicated. In addition, there were some complaints of headaches, which were said to be "constant" on one occasion.
- [69] The plaintiff attended no treatments from approximately October 9, 2019 until April 2021, when he commenced acupuncture treatments. His PharmaNet records also indicate that he filled no prescriptions between March 8, 2019 and September 22, 2021.
- [70] I pause to note that the cessation of treatments in October 2019 was approximately two years after the subject accident and roughly coincides with the plaintiff's evidence that his interests got back to normal after two or three years. In my view, this is important and more than mere coincidence. It supports an inference that the plaintiff had largely recovered from his new injuries and aggravations of previous injuries within about two years of the accident.
- [71] The plaintiff commenced acupuncture treatments on April 7, 2021. At first, he testified that he attended for acupuncture treatments at the urging of his sister. However, in Re-Direct examination, he testified that Dr. Johal recommended acupuncture treatments.
- [72] I do not accept the plaintiff's evidence that Dr. Johal recommended acupuncture treatments. There is nothing in the clinical notes to indicate that Dr. Johal made such a recommendation and Joanna Tam confirmed in her evidence that she was the person who encouraged him to see a Chinese doctor.
- [73] In total, the plaintiff attended three acupuncture treatments from April 7, 2021 to October 27, 2021. In cross-examination he testified that the acupuncture treatments were somewhat successful. He said that the sharp pain he had experienced around his hips stopped after the third appointment. He testified that he still has some pain but it is not constant and not a sharp pain. He further testified that, as a consequence of this reduction in pain, his ability to walk, climb stairs and bend improved.

- [74] As of the date of the trial, the plaintiff had not returned for further acupuncture treatments or for any treatments of any kind. He testified that he had an appointment for acupuncture scheduled for March 23, 2022 but he forgot about it. He testified that he has not yet scheduled a further appointment.
- [75] The evidence of Joanna Tam provides an explanation for the limited treatments the plaintiff has received. During her examination-in-chief, she testified that she tried to help the plaintiff by offering to drive him to see a Chinese medicine doctor but he refused her help saying he did not believe in doctors. She testified he was trying to cure himself. I accept Ms. Tam's evidence. It is consistent with the plaintiff not having attended massage therapy sessions, although recommended by Dr. Johal. It is also consistent with the plaintiff stopping his physiotherapy sessions, and, as will be seen, it is consistent with the plaintiff's failure to see a physiotherapist or chiropractor, as recommended by Dr. Wee.
- [76] The plaintiff testified to various self-help treatments he administered to address his injuries and pain. These included using an ointment for pain, massaging his back, taking painkillers, and putting an icepack on his head for headaches. When asked if these treatments were something he was doing before the accident, he replied that they were "in part". When asked how the treatments had changed since the accident, he replied that not much had changed. When asked to explain what he meant when he said "part" of the treatments had changed, he said that he now has to treat his leg and right foot, which he did not need to do before the accident, and that the frequency of the treatments increased.
- [77] Again, in my view, the fact that, from approximately late 2019, the plaintiff practiced essentially the same self-help treatments as he did before the accident supports an inference that his level of pain and discomfort had roughly returned to his pre-accident state by late 2019.

Dr. Joy Wee

- [78] The only expert to testify at the trial was Dr. Joy Wee, a physiatrist, who was retained by the plaintiff. She assessed the plaintiff on June 7, 2019 and prepared a report dated June 10, 2019. She also prepared a second report dated December 17, 2021.
- [79] At the hearing, the defendant objected to Dr. Wee's second report on the basis of s.12.1(2)(b) (ii) of the Evidence Act, R.S.B.C. 1996, c. 124 [Evidence Act], which limits the plaintiff to a single expert report. After hearing argument, I allowed the second report on the grounds that it was a supplementary report required by Rule 11-6(6) and exempt from the limit on the number of expert reports pursuant to s.3(3) of the Expert Evidence Regulation, B.C. Reg. 210/2020. Additionally, if necessary, I would have allowed the report under s.12.1(6)(b) of the Evidence Act.

[80] In her first report, Dr. Wee purported to describe the plaintiff's "presenting complaints". However, from the narrative that follows it is far from clear that all of the complaints outlined were as of the date of her examination of the plaintiff. The only complaints that seem to be as of the date of her examination, June 7, 2019, were:

- a) Pain in the neck when stretching, which caused the plaintiff to wake once nightly;
- b) Tugging at the chest, like a heart attack;
- c) Feeling down and sleepy;
- d) Difficulty remembering names;
- e) Symptoms all over the body on a daily basis including the head, ears, hearing, neck shoulders, ribs, hips, knees and ankles. Such symptoms were generally intermittent and were generally worse at the end of the day;
- f) Poor control when handling things;
- g) Tenderness to the lower abdomen; and
- h) Anxiety.

[81] The findings of Dr. Wee on her physical examination of plaintiff conducted on June 7, 2019, were:

- a) Neck movements were not painful and side bends were limited in both directions;
- b) No signs of nerve to the hands being pinched;
- c) The plaintiff was tender,
 - i. over right neck (cervical paraspinal) and left upper back (thoracic paraspinal) muscles,
 - ii. at the chest, specifically at the joints between the breastbone and ribs (sternocostal joints) on both sides,
 - iii. at the left lower ribs at the back,
 - iv. at the joint between his breastbone and his right collar bone, although bringing his right arm across his chest was not painful, and
 - v. at his right foot (1st metatarsal ray);
- d) He had tight muscles at the back of his thighs (hamstrings) when raising his legs;
- e) Shoulder and back movements were normal;
- f) There were no signs of the nerves to the hands being pinched;
- g) The pelvis was significantly misaligned, with the right pelvis higher than the left by 2 inches in the seated position and by 1 cm when standing.

[82] Dr. Wee provided a generalized opinion and several more specific opinions. Her generalized opinion was that the plaintiff "may" have incurred an injury and some aggravation of prior symptoms in the accident. She expressed this opinion as follows:

Based on my assessment of Mr. Siu and the specific facts listed, it is my opinion that Mr. Siu may have incurred injury and some aggravation of prior symptoms from the motor vehicle collision (MVC) of 28 November 2017.

[83] Dr. Wee's more specific opinions were:

- a) The plaintiff had clear signs and symptoms of myofascial pain syndrome of the neck and back that were "probably directly aggravated by the subject MVC". The prognosis for this injury was guarded due to his low tolerance of stretch discomfort;
- b) The plaintiff clearly demonstrated pelvic misalignment for which the prognosis depended on treatment;
- c) The plaintiff had a contusion to the right foot, for which the prognosis was longer term tenderness, possibly for years;
- d) There was tenderness and signs of costochondritis and inflammation of the right sternoclavicular joint of the chest, which were likely due to the subject accident. The prognosis was that this injury would resolve with adequate treatment, although this may take a couple of years;
- e) The plaintiff had impaired sleep due to pain. The prognosis for impaired sleep was dependent on improvement of the inflammation of the joints in the chest;
- f) The plaintiff exhibited post concussive symptoms of being in shock with anxiety, headaches, poor memory, problems with ears and dizziness. These symptoms were likely a direct result of the accident and did not improve as expected; and
- g) Examination findings were not completely consistent with the plaintiff's report of worsening pain in the whole body and there was a possibility of development of chronic pain syndrome.

[84] Dr. Wee noted that contusions or bruising of the left shoulder and armpit, left outer pelvis and knee had resolved by the time of her assessment.

[85] Concerning causation, Dr. Wee opined:

- a) The plaintiff was "likely predisposed" to easy aggravation of past symptoms of head trauma;
- b) The subject accident "likely aggravated his head and back"; and
- c) The pelvic misalignment, injury to the right foot and the inflammation of the breastbone joints "would not likely have been sustained had he not been involved in the subject [accident]".

- [86] Dr. Wee was unsure if the plaintiff had developed chronic pain syndrome but stated that "if he has developed chronic pain syndrome, Mr. Siu may be impacted over the longer term, likely years and possibly permanently".
- [87] Dr. Wee declined to comment on the prognosis for psychological conditions, deferring to psychology.
- [88] Concerning the plaintiff's ability to work and his level of disability, Dr. Wee noted that sitting tolerances would be poor due to the pelvic misalignment but believed the plaintiff would be able to return to light duties once this was addressed. She opined that any disability from his muscle strain would be temporary and last about one year. She allowed for the possibility that there could be a longer period of disability, if he developed chronic pain syndrome. She also opined that whether permanent disability would result from the plaintiff's pelvic misalignment was dependent upon his response to pelvic manipulation. She opined that if pelvic misalignment was recurrent, he would likely have recurrent short-term temporary disability.
- [89] Concerning future treatments, Dr. Wee recommended:
- a) Occupational therapy assessments of thinking and memory to determine if referral to neuropsychology was required;
 - b) Counseling for mood issues;
 - c) Referral to a chiropractor for pelvic manipulation;
 - d) Regular ice application and anti-inflammatory medications for the chest joints. Corticosteroid injection could also be considered;
 - e) Daily heat, stretching, self-massage and dry needling for muscular strain;
 - f) Massage therapy may be helpful;
 - g) Working with a kinesiologist on conditioning and strength once pain is under control;
 - h) If symptoms of dizziness occur at higher intensity exercise, working with a neurophysiotherapist may be helpful;
 - i) If pain continues to significantly impair participation in activities, involvement in a chronic pain program would be advised;
 - j) Cognitive behavioural therapy may be helpful in pain management; and
 - k) A functional capacity evaluation may be helpful to guide vocational counselling.
- [90] Dr. Wee's second report was prepared after she received additional medical records. In her second report, Dr. Wee amended her original opinion regarding concussion. In the second opinion, she opined that the post concussive symptoms were "perhaps" aggravated by the subject accident but not caused by the subject accident. She wrote:

post-concussive symptoms of headache, poor memory, dizziness and mood, which were not likely caused by the subject MVC, but perhaps aggravated by this incident.

[91] Dr. Wee was extensively cross-examined by the defendant. In my view, the only significant points from her cross-examination were:

- a) When she used of the word "may" in her report she meant "possible";
- b) She thought it was possible the plaintiff had chronic pain syndrome and it was possible that was from the accident';
- c) She explained the mechanism of injury for the pelvic misalignment and the right foot pain;
- d) Her opinion that the plaintiff was partially disabled was based on what he told her as she did not do a functional capacity evaluation; and
- e) If the plaintiff did not receive the recommended treatments, his symptoms would continue.

[92] The defendant submits that the opinions of Dr. Wee should be given no weight on the grounds that the opinions are largely based on the plaintiff's subjective complaints which minimized his prior injuries and exaggerated his current injuries and limitations. I do not agree. Dr. Wee did not solely or excessively rely on the plaintiff's complaints. She consulted prior medical records and conducted her own examination. Her opinions are deserving of weight. However, this is not to say that I accept all of her opinions.

[93] I accept the following opinions of Dr. Wee, which were not undermined on cross-examination:

- a) The subject accident aggravated the plaintiff's pre-existing myofascial pain of the neck and back; and
- b) The subject accident caused the pelvic misalignment, the costochondritis and inflammation of the right sternoclavicular joint of the chest and the ongoing right foot pain.

[94] In relation to her opinion on aggravation of pre-existing myofascial pain, I would note that, although I accept this opinion, it does not go far enough. The evidence before me has established the ongoing pain was not limited to the plaintiff's neck and back. Dr. Wee appears to have limited her opinion to the neck and back because it was only in these areas that she found clear signs of pain.

[95] I do not accept Dr. Wee's opinion that the subject accident alone caused the plaintiff's symptoms of sleep impairment. The plaintiff testified before me that he suffered from some sleep impairment prior to the accident. Additionally, he testified to wanting to fall asleep while driving, which is likely related to fatigue and lack of sleep. I accept only that the subject accident aggravated the plaintiff's pre-existing sleep and fatigue issues.

- [96] Concerning the post-concussive symptoms, of anxiety, headaches, poor memory, dizziness, and mood, Dr. Wee's opinion on the cause of these symptoms changed. She initially said they were caused by the subject accident but then changed her opinion to state they were "perhaps aggravated by" the subject accident. In my view, the use of the word "perhaps" is not sufficiently definitive. Moreover, Dr. Wee has not explained how anxiety, poor memory and dizziness are related to the accident. I hasten to add, however, that I do not necessarily reject that the plaintiff suffered from low mood or an aggravation of his pre-existing headaches, as a result of the accident. Dr. Wee made comments in her report about the plaintiff having low mood and recommended counselling.
- [97] I would also note that Dr. Wee did not opine that the plaintiff had chronic pain syndrome. She merely opined that there was a possibility of him developing chronic pain syndrome, if he did not receive proper treatment.
- [98] Finally, I accept Dr. Wee's opinion that the plaintiff suffers from a temporary disability in relation to his ability to work of at least one year. Given she did not conclude he had chronic pain syndrome and that she essentially acknowledged the pelvic misalignment was treatable, I do not find any support in her opinion that the plaintiff is permanently disabled.

Effects of the Injuries

- [99] As of the date of the trial, the plaintiff testified that his overall health since the accident had improved in some ways but gotten worse in others. However, in cross-examination when asked if his condition improved at any point, he replied that his symptoms were not as serious now. He admitted that his ability to walk, climb stairs and bend had improved. He also said he had less pain after receiving the acupuncture treatments in 2021, which I note is after he was assessed by Dr. Wee.
- [100] The plaintiff testified to the effects of his injuries on his ability to work, drive and his general enjoyment of life.

Work

- [101] The plaintiff testified that he wants to work but has not worked since the day of the accident. He said he does not work because of health problems. When asked during his examination-in-chief to be more specific, he testified to having "bodily pain" in his legs, arms and lower back. He also said he was depressed and that he felt scared. He said that he has felt this way for many years. He testified his depression was due to his feeling pain. He testified that the subject accident intensified his worries such that he now has more intense emotional instability.
- [102] The plaintiff testified that he did not think he would be able to carry heavy objects.

[103] In cross-examination, he admitted that he did not request light duties or reduced hours from his employer before quitting. He also admitted he had not looked for any other work since the accident but then testified that in the past three or four months, he did look on the internet for a job. He said that he believed he was sufficiently recovered to do some type of work but said he could not find a job posting that he thought was suitable. Upon further questioning, he testified that the job he wanted to do was a mechanical project that involved using a force to generate electricity and then using the electricity to produce a force.

Driving

[104] The plaintiff testified that before the accident he drove approximately 100,000 (he did not specify miles or kilometres) and now he drives about 100. He testified that he no longer feels comfortable driving, that he has blurry eyes and that he feels emotionally unstable when driving. When asked in chief if he had experienced this emotional instability before the accident, he replied that he had. He later testified that the emotional instability was more intense after the accident. He said he felt sad and unlucky.

[105] When asked about his pain when driving, he replied that he has pain around the neck and when he sits. He also testified to getting headaches when driving on a rough road and to having discomfort when turning his head left or right. He testified he had no other concerns about being able to return to his previous job but then, in answer to a leading question, testified that he did not think he would be able to carry heavy objects. He testified that he experiences discomfort when he has to pick up things.

[106] In cross-examination, he admitted that he has continued to drive his car since the accident to go to appointments, to meet with his relatives and to go places that he wants to go. He specifically acknowledged that at least once per month he drives to his sister's house which is 30km from his residence.

Socializing and Other

[107] The plaintiff testified that after the accident he lost interest in things he enjoyed before the accident, namely, walking around, eating his favorite foods, and exercising at home. He said that his interest in these things did not go back to normal for two or three years.

[108] The plaintiff testified that he enjoyed woodworking prior to the accident. However, he did not testify that his injuries prevented him from engaging in this hobby or that he had even stopped engaging in the hobby. The plaintiff's brother, Paul Siu, testified that since the accident the plaintiff completely stopped his woodworking hobby but, as the plaintiff did not so testify, I do not accept Paul Siu's evidence of this.

[109] The plaintiff testified that prior to the accident he enjoyed doing research at home and going to the library. During his examination-in-chief he did not testify that his injuries affected these interests. In fact, he testified that after the accident he went to the library more often because he was not working. However, in cross-examination, he testified that

for the year after the accident he did not go to the library. Interestingly, in cross-examination he acknowledged that he walked to the libraries, which were more than 20 minutes from his home.

- [110] The plaintiff testified that prior to the accident he would see his siblings and extended family several times per month. He testified that the frequency of these social interactions had reduced since the accident. However, he confusingly later testified that, since the accident, he drove his car several times per month to see his relatives.
- [111] Paul Siu and Joanna Tam also testified to the effects of the injuries.
- [112] Paul Siu testified that the plaintiff socialized less after the accident. However, in cross-examination he admitted that in the past year he saw the plaintiff two to three times per month whereas, in the year before the subject accident, he saw the plaintiff only four or five times. He also acknowledged that there had been few family parties because of the COVID-19 pandemic.
- [113] Joanna Tam testified that the plaintiff did not attend family gatherings as frequently as before the accident. However, she also acknowledged that the COVID-19 pandemic affected the frequency of family gatherings and that after COVID-19 restrictions were lifted there were concerns among family members about the plaintiff not being vaccinated.

Causation

Legal Principles

- [114] The plaintiff must establish on a balance of probabilities that the defendant's negligence caused or materially contributed to an injury. The defendant's negligence need not be the sole cause of the injury so long as it is part of the cause beyond the range of *de minimus*. Causation need not be determined by scientific precision: *Athey v. Leonati*, [1996] 3 S.C.R. 458 at paras. 13-17 [*Athey*]; *Farrant v. Laktin*, 2011 BCCA 336 at para. 9.
- [115] The primary test for causation asks: but-for the defendant's negligence, would the plaintiff have suffered the injury? The "but-for" test recognizes that compensation for negligent conduct should only be made where a substantial connection exists between the injury and the defendant's conduct: *Resurface Corp. v. Hanke*, 2007 SCC 7 at paras. 21-23.

Divisible/Indivisible Injuries

- [116] Many of the injuries alleged to be suffered by the plaintiff in the subject accident are similar to the injuries sustained in the 2010 and 2013 accidents. This gives rise to an issue of whether the injuries sustained in the subject accident are divisible or indivisible from the injuries sustained in the prior accidents, which is a matter of causation: *Athey*, at para. 24. Indivisible injuries are those that cannot be separated or have liability attributed to the constituent causes. Divisible injuries, in contrast, are those capable of being separated out and having their damages assessed independently: *Bradley v. Groves*, 2010 BCCA 361, paras.

19-20 [Bradley].

- [117] The distinction between divisible and indivisible injuries was summarized by Justice Marzari in *Conarro v. Tallack*, 2020 BCSC 626, at paras. 131-132:
- [131] Whether injuries are divisible or indivisible is a question of fact. If the trier of fact can determine the extent to which each defendant caused or contributed to the plaintiff's injuries on the available evidence, the injuries are divisible.
- [132] The principle of divisibility can apply most obviously to injuries to different parts of the body. Divisibility may also be possible where injuries are to the same part of the body where the evidence is sufficient to establish distinct causes of each aspect of the injury: *Khudabux v. McClary*, 2018 BCCA 234 at para. 34; *Deol v. Sheikh*, 2016 BCSC 2404 at para. 19; *Fleming v. McAllister*, 2017 BCSC 753. It can also be possible in relation to sequential injuries, where the evidence is sufficient to establish a baseline: *Uppal v. Judge*, 2016 BCSC 642 at para. 86; *Dunne v. Sharma*, 2014 BCSC 1106 at para. 99. Finally, even where a physical injury is indivisible, specific heads of damages may still be divisible where the evidence permits such a division: *Scoates v. Dermott*, 2012 BCSC 485 at paras. 164-169; *Rajan v. Hudon*, 2014 BCSC 1678; *Lakatos v. Lakatos*, 2017 BCSC 1990.

(See also *Bradley*, paras. 19-20)

- [118] The parties are in agreement that I should treat the injuries suffered in the subject accident as divisible from the injuries suffered in the prior accidents. They refer me to *Glytyiuk v. Krause*, 2021 BCSC 2056 [*Glytyiuk*], where the plaintiff had suffered injuries similar to ones suffered in an earlier accident and the parties raised the issue of whether the injuries were divisible or indivisible. Justice Hori found it was unnecessary to address the issue. At para. 111 he wrote:
- [111] The parties addressed whether the injuries sustained by the plaintiff from the 2014 Accident and the 2017 Accident were divisible or indivisible. However, in the context of this case I find that it is not necessary to decide this question because:
- a) There is only one tortfeasor before the court in this action so I need not apportion damages between separate tortfeasors; and
 - b) In assessing damages, *Athey* compels me to restore the plaintiff to his original position as it was immediately before the 2017 Accident.

In these circumstances, whether the injuries are divisible or indivisible is of no consequence to the issues I must decide in this case.

- [119] I was also referred to *Deol v. Sheikh*, 2016 BCSC 2404 [*Deol*], where the plaintiff was involved in two motor vehicle accidents and had received a settlement from the first action. At para. 218, Justice Griffin (as she then was) observed that there were two possible approaches open to her in relation to the assessment of damages; to assess the degree to which the plaintiff's chronic pain condition from the first accident was made worse by the second accident or, to

make a global assessment of damages for the plaintiff's chronic pain condition and then deduct the amount of the settlement received in the first accident. She held the first approach was most appropriate as it was possible to assess the degree to which the injury was made worse by the second accident.

[158] The evidence in this case makes it possible to consider the position that Ms. Deol was in before the 2012 Accident, and to compare her post-2012 Accident to that position, and to assess damages based on a change in her position.

[159] I find that Ms. Deol's injuries sustained in the 2012 Accident are divisible from the injuries sustained in the 2006 Accident.

[120] In my view, as in *Gylytiuk and Deol*, there is only one tortfeasor before me and the facts are sufficient for me to determine the degree to which the plaintiff's pre-existing injuries were worsened by the subject accident. Accordingly, I intend to proceed as the parties have suggested and will treat the injuries suffered in the subject accident as divisible from the injuries suffered in the prior accidents.

Submissions of the Parties

[121] The plaintiff submits that the injuries arising from the subject accident include:

- a) low back pain,
- b) pelvic malalignment and hip pain,
- c) bruising and tenderness in his right foot and leg,
- d) joint inflammation at multiple points on his chest,
- e) fatigue,
- f) headaches,
- g) low mood and anxiety, and
- h) aggravation of muscular pain in his neck and upper back.

[122] The plaintiff submits that the only pre-existing injury was pain to the neck and upper back, that this pain was only occasional and that he was otherwise in relatively stable health.

[123] The defendant submits that the pre-existing injuries included neck pain, lower back pain, bilateral shoulder pain, and headaches. The defendant further noted that that the plaintiff involuntarily wanted to fall asleep when driving.

Discussion

- [124] I will first provide my findings of the injuries and symptoms suffered by the plaintiff subsequent to the subject accident. I will then address which injuries were new and which pre-existed the accident. With respect to the pre-existing injuries, I will then address which were worsened by the accident.
- [125] Based on the totality of the evidence, but particularly the report and evidence of Dr. Wee, I find that the plaintiff suffered from the following injuries and symptoms following the subject accident:
- a) Soft tissue injuries to the neck, shoulders, back, hip, arms and legs with myofascial pain;
 - b) Pelvic misalignment;
 - c) Costochondritis and inflammation of the right sternoclavicular joint of the chest;
 - d) Right foot pain;
 - e) Impaired sleep due to pain.
 - f) Headaches;
 - g) Fatigue;
 - h) Low mood; and
 - i) Anxiety.
- [126] Of the above injuries, the pelvic misalignment, inflammation of the right sternoclavicular joint, and right foot pain are all new injuries. There is no or minimal evidence that the plaintiff suffered from these injuries prior to the subject accident and Dr. Wee opined that they "would not likely have been sustained had he not been involved in the subject [accident]". I note that the plaintiff had suffered some foot pain in 2016 but that seems to have been in relation to the left foot not the right. I further note that Dr. Wee opined that impaired sleep was a consequence of the accident and not an aggravation of prior symptoms. However, the evidence of the plaintiff before me was that he suffered some sleep problems prior to the accident.
- [127] Concerning the alleged injuries of low mood, I accept that the plaintiff suffered a depressed mood following the subject accident and did not suffer from a such condition prior to the accident. He did not expressly speak of depression but he did testify to having "bad emotions" and feeling sad or unhappy immediately after the accident. He testified that these feelings improved somewhat with time but gave contradictory evidence of when the improvement occurred. At one point he testified that he was unhappy and lost interest in doing things for six to 12 months. He later testified that his interests got back to normal after two or three years. However, Dr. Wee, who assessed the plaintiff on June 7, 2019, implicitly recognized the plaintiff was having mood issues as of the date of her assessment, which was

approximately 18 months after the subject accident. Doing the best I can with this evidence, I find that the plaintiff's mood issues resolved approximately two years after the accident

- [128] Concerning the allegations of anxiety, I do not accept that the plaintiff suffered from increased anxiety following the accident. In his testimony, he did not expressly testify to being anxious and it is not possible to assess any anxiety symptoms separate and apart from his driving phobia and low mood.
- [129] Turning to the pre-existing injuries and symptoms of the plaintiff, Dr. Wee opined that the plaintiff had pre-existing myofascial pain of the neck and back which was aggravated by the subject accident. I have accepted this opinion but have noted that it does not address all of the plaintiff's pre-existing injuries. The plaintiff testified to having multiple symptoms and injuries at the time of and immediately prior to the collision. Based primarily on the plaintiff's own evidence, I find that he was suffering from the following pre-existing injuries and symptoms, at the time of and immediately prior to the subject accident:
- a) Pain in the shoulders, hip, lower back, knees, legs and neck. These injuries caused the plaintiff difficulties when walking and lifting heavy objects and were treated by him using a topical ointment, the same type of treatment he seemed to prefer for his pain following the subject accident;
 - b) Fatigue which manifested while the plaintiff was driving and which, in the months before the subject accident, had worsened and become serious enough that the plaintiff was at least contemplating taking time off from work;
 - c) Driving phobia, which had improved only "a little bit" after two or three years;
 - d) Impaired sleep; and
 - e) Periodic headaches.
- [130] I find that the aforesaid injuries, with the exception of the driving phobia, were aggravated and worsened by the subject accident. The plaintiff testified, and I accept, that his level of pain increased following the accident. I also accept his testimony that the frequency of his headaches increased after the accident and that they were associated with his neck pain. Although the plaintiff did not specifically address fatigue, he did testify to being generally tired and not wanting to do things. I accept this as evidence of increased fatigue following the accident.
- [131] In relation to the plaintiff's driving phobia, I do not accept that there was any aggravation of this phobia. The plaintiff did not testify to an increase in his driving phobia after the accident and did testify that he drove his car when he needed to, such as to go to appointments, to meet his relatives or generally to go the places he wants. He testified that he did not drive as much but, significantly, he was not working so did not need to drive as much.

[132] Therefore, in summary, I find that the following injuries and aggravations of injuries were caused by the subject accident in the sense that, but for the subject accident, they would not have been incurred:

- a) Pelvic misalignment;
- b) Costochondritis and inflammation of the right sternoclavicular joint of the chest;
- c) Right foot pain;
- d) Low mood;
- e) Aggravation of impaired sleep;
- f) Aggravation of pre-existing soft tissue injuries to the neck, shoulders, back, hip, arms and legs with myofascial pain;
- g) Aggravation of pre-existing Headaches; and
- h) Aggravation of pre-existing Fatigue.

Assessment of Damages

Legal Principles

[133] The assessment of damages involves a determination of the plaintiff's pre-accident or original position and his post-accident or injured position. The plaintiff's compensable loss is the difference between these two positions: *Athey*, para. 32.

[134] It is in the assessment of damages, in particular in the determination of the plaintiff's original position, that the court takes into account pre-existing conditions. The so called "thin skull" and "crumbling skull" doctrines both involve such pre-existing conditions.

[135] The "thin skull" rule is that the defendant is liable for injuries caused even though those injuries are more serious because of a pre-existing condition: *Athey*, para. 34. However, the defendant is not liable for injuries that would have occurred in any event because of the pre-existing condition: *Dornan v. Silva*, 2021 BCCA 228, at para. 44 [*Dornan*].

[136] The "crumbling skull" doctrine similarly recognizes the pre-existing conditions are inherent in the plaintiff's original position and the defendant need not compensate a plaintiff for the debilitating effects of such pre-existing conditions. The defendant must, however, compensate the plaintiff for any additional injury. Moreover, if there is a measurable risk that the pre-existing condition would have detrimentally affected the plaintiff in the future in the absence of the tort, this can also be taken into account in reducing the overall award: *Athey*, para. 35; *Dornan*, at paras. 45-46.

[137] These various principles were summarized by McLachlin, C.J.C. in *Blackwater v. Plint*, 2005 SCC 58, at paras. 78-81:

78 It is important to distinguish between causation as the source of the loss and the rules of damage assessment in tort. The rules of causation consider generally whether "but for" the defendant's acts, the plaintiff's damages would have been incurred on a balance of probabilities. Even though there may be several tortious and non-tortious causes of injury, so long as the defendant's act is a cause of the plaintiff's damage, the defendant is fully liable for that damage. The rules of damages then consider what the original position of the plaintiff would have been. The governing principle is that the defendant need not put the plaintiff in a better position than his original position and should not compensate the plaintiff for any damages he would have suffered anyway: *Athey*

79 At the same time, the defendant takes his victim as he finds him -- the thin skull rule. Here the victim suffered trauma before coming to AIRS. The question then becomes: What was the effect of the sexual assault on him, in his already damaged condition? The damages are damages caused by the sexual assaults, not the prior condition. However, it is necessary to consider the prior condition to determine what loss was caused by the assaults. Therefore, to the extent that the evidence shows that the effect of the sexual assaults would have been greater because of his pre-existing injury, that pre-existing condition can be taken into account in assessing damages.

80 Where a second wrongful act or contributory negligence of the plaintiff occurs after or along with the first wrongful act, yet another scenario, sometimes called the "crumbling skull" scenario, may arise. Each tortfeasor is entitled to have the consequences of the acts of the other tortfeasor taken into account. The defendant must compensate for the damages it actually caused but need not compensate for the debilitating effects of the other wrongful act that would have occurred anyway. This means that the damages of the tortfeasor may be reduced by reason of other contributing causes: *Athey*, at paras. 32-36.

81 All these scenarios flow from the basic principle that damages must seek to put the plaintiff in the position he or she would have been in but for the tort for which the defendant is liable.

[138] The determination of whether a pre-existing condition would have affected the plaintiff in the future had the tort not occurred involves a hypothetical. There must be a real and substantial possibility, or a measurable risk, that the event (i.e. a deterioration in the plaintiff's pre-existing condition in the absence of the tort) will occur, or would have occurred, before the court will take it into account. Mere speculation is not enough. Moreover, it is not necessary that the real and substantial possibility or measurable risk arise solely from the plaintiff's pre-existing condition. An external event in combination with the pre-existing condition can give rise to a measurable risk. Once it is determined that there is measurable risk, the task of the court is to then assess the relative likelihood of the event occurring in accordance with the evidence and to adjust the damages accordingly; *Dornan*, at paras. 62-4, 75-77 and 133.

Submissions

- [139] The plaintiff submits that he is a classic example of a thin skull plaintiff. He submits his prior injuries made him more susceptible to worsened injuries from the subject accident. The plaintiff relies specifically on the alleged evidence of Dr. Wee that the plaintiff "had muscle strain in the past which left him predisposed for more serious future injuries, such as aggravation of pre-existing strains, extended durations of aggravation or re-occurring strain, and lower stretch tolerance".
- [140] I agree with the plaintiff that, to the extent the plaintiff's injuries are more serious than would be expected, this is because his prior injuries pre-disposed him to more serious injuries in the future. However, the parties are agreed that I am to assess the damages on the basis that they are divisible. In these circumstances, the plaintiff's pre-existing conditions are only relevant to the extent that they would have affected the plaintiff in the future, a hypothetical event. Such a hypothetical event is whether, if the accident had not occurred, the plaintiff would have ceased employment because of his lingering pre-existing injuries. As will be seen, I have determined that the plaintiff would not have ceased his employment if the accident had not occurred.

Non-pecuniary Damages

- [141] The factors to be considered when assessing general damages for pain and suffering are set out in *Stapley v. Hejslet*, 2006 BCCA 34 at para. 46 [Stapley].
- [46] The inexhaustive list of common factors cited in *Boyd v. Harris* (2004), 237 D.L.R. (4th) 193] 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).

- [142] The compensation awarded should be fair to all parties, and fairness is measured against awards made in comparable cases. Such cases, though helpful, serve only as a rough guide. Each case depends on its own unique facts: *Trites v. Penner*, 2010 BCSC 882 at paras. 188-189.
- [143] The plaintiff seeks an award of \$100,000 for non-pecuniary damages. The defendant submits that the award for non-pecuniary damages should be in the range of \$10,000-\$15,000. Both parties have referred me to cases they say support their respective positions. I will address these cases but will first consider the various Stapley factors.

The Stapley Factors

Age of the plaintiff

- [144] The plaintiff was 55 years of age at the time of the accident and 60 years of age at the date of the trial.

Nature of the injury

- [145] I have addressed the nature of the injuries suffered by the plaintiff. In summary, the injuries and aggravations of injuries were: pelvic misalignment; costochondritis and inflammation of the right sternoclavicular joint of the chest; right foot pain; low mood; aggravation of impaired sleep due to pain; aggravation of pre-existing soft tissue injuries to the neck, shoulders, back, hip, arms and legs with myofascial pain; aggravation of pre-existing headaches; and aggravation of pre-existing fatigue. Of the various injuries suffered, the plaintiff testified that the most severe injury was pain in relation to the low back.

Severity and duration of pain

- [146] Considering all of the evidence, I accept that for a period of approximately two years following the accident, the plaintiff experienced a significant increase in pain as a consequence of the injuries suffered in the subject accident. However, by the end of 2019, there had been an improvement in the pain and an overall improvement in the plaintiff's health. This improvement is reflected in the fact that he ceased medical treatments in late 2019 and his interests were back to normal after two or three years. Moreover, there was further improvement in the plaintiff's pain after attending three acupuncture sessions in 2021, as was admitted by the plaintiff.

Disability

- [147] I accept the plaintiff's evidence that he was disabled and unable to work for a period of time following the subject accident. His employment history is not indicative of a malingerer. He has worked hard his entire life. He only took time off from work when absolutely necessary, such as when injured in the prior accidents. Moreover, although he was experiencing pain and fatigue in the months before the subject accident, he nevertheless continued to work full time.
- [148] Additionally, the plaintiff immediately attended for medical treatment following the accident and continued medical treatment for a period of approximately two years. He did this despite the fact that he distrusts doctors, as testified to Joanna Tam. That he overcame this distrust and attended for medical treatments is indicative of the extent of his pain and disability.
- [149] However, I do not accept that the plaintiff has an ongoing disability that continues to prevent him from working. I am of this view for several reasons:
- a) First, the plaintiff continues to experience some pain and has difficulties with walking, bending and lifting but he suffered from these symptoms and limitations before the subject accident and was able to work;
 - b) Second, Dr. Wee's opinion in relation to the plaintiff's disability was that any disability from his muscle strain would be temporary and last about one year. She allowed for the possibility that there could be a longer period of disability, if he developed chronic pain syndrome, but he has not developed chronic pain syndrome. She also opined that his pelvic misalignment was not necessarily a permanent disability but dependent upon treatment and that any recurrences would like result only in short-term temporary disability.
 - c) Third, Dr. Wee also opined, in relation to the plaintiff's ability to work, that as of the date of her assessment, his sitting tolerances would be poor due to the pelvic misalignment. However, during his examination-in-chief, when asked about pain when sitting, the plaintiff replied that he only sometimes experiences such pain. He also testified that Tylenol, ointments and stretching helped with the pain. Overall, I did not get the impression that pain while sitting was a particularly significant problem for the plaintiff; and
 - d) Fourth, the plaintiff testified in cross-examination that in the three or four months before the commencement of the trial he had looked for a job on the internet. He further testified in cross-examination that he felt he had recovered enough to work.

[150] Considering all the evidence, I find that any added disability suffered by the plaintiff as a consequence of the subject accident had resolved within approximately two years of the date of the subject accident. He was then, and is now, at approximately the same level of disability as he was immediately prior to the accident. That is to say, from approximately two years after the subject accident, the plaintiff was capable of working at his old job or at a similar job.

Emotional suffering

[151] I have accepted that the plaintiff suffered from low mood for approximately two years after the subject accident. However, it is important to note that the plaintiff has not been diagnosed with clinical depression and I have not found that he suffers from clinical depression. The low mood from which he suffered consisted of feelings of being sad and unhappy.

Loss or impairment of life

[152] There has been minimal, if any, permanent loss of impairment of life as a consequence of the injuries suffered in the subject accident. For a period of approximately two years following the accident the plaintiff was sad and unhappy and lost interest in doing some of the things he enjoyed. However, his main hobby appeared to be woodworking which he never testified to having stopped doing. Moreover, the other things he mentioned such as walking and going to the library, he was able to resume within approximately one year of the accident.

Impairment of relationships

[153] The plaintiff submits that his social life is limited to his family and that because of the accident he does not see or socialize with his family as often as he did before the accident. I accept that the plaintiff's social life largely revolved around his family but I do not accept that his injuries had a significant or long-lasting affect on his family relationships.

[154] Although the plaintiff submits that he saw his family less after the accident and did at one point so testify, he gave other evidence indicating this was not the case. Specifically, he testified that he saw his family several times per month before the accident and also testified that he drove his car to see his family several times per month after the accident. Thus, on his own evidence, it is far from clear that his socializing with family was reduced because of the injuries suffered in the accident. Additionally, the limited evidence of Paul Siu tended to indicate that he and the plaintiff were together more often after the accident than before. Moreover, the plaintiff's evidence failed to address how the COVID-19 pandemic affected his interactions with his family. The evidence of Joanna Tam was that there were fewer family social occasions with the onset of the COVID-19 pandemic. Her evidence also strongly suggested that, once COVID-19 restrictions were lifted, the plaintiff was not invited to family functions because he was not vaccinated.

[155] In the circumstances, the plaintiff simply has not proven on a balance of probabilities that his family relationships were affected by the injuries suffered in the subject accident.

Impairment of physical and mental abilities

[156] I accept that the plaintiff has some difficulty walking, bending and lifting heavy objects. However, he had such limitations before the accident. The worsening of these difficulties as a consequence of the subject accident was minor and within approximately two years he was at his pre-accident levels.

Loss of lifestyle

[157] Finally, I do not accept that there has been any loss of lifestyle as a consequence of the accident. The plaintiff essentially does the same things now as he did before the accident and lives essentially the same mostly solitary lifestyle that he lived prior to the accident.

Comparable Cases

[158] The plaintiff refers me to the following cases as justifying an award of \$100,000:

- a) Jackson v. Davis, 2021 BCSC 380, where Justice Baker awarded a 24-year-old plaintiff \$100,000 in non-pecuniary damages. The plaintiff was found to have suffered a personality change and her activities were far more limited after the accident;
- b) Monga v. Smith, 2021 BCSC 1430, where Justice Davies found the 29-year-old plaintiff to have suffered a change in demeanor and all aspects of her life were detrimentally affected by the accident. She was awarded \$105,000 in non-pecuniary damages;
- c) Kaler v. Lee, 2016 BCSC 1125, where Justice Fleming awarded a 57-year-old plaintiff \$120,000 in non-pecuniary damages. The plaintiff's injuries included a chronic pain condition and mild psychological and cognitive symptoms. As a result of her injuries and symptoms, her quality of life was found to have deteriorated quite dramatically;
- d) Tolea v. Huang, 2021 BCSC 260, where Justice Majawa awarded a 37-year-old plaintiff \$150,000 in non-pecuniary damages. The plaintiff's injuries included a pelvic misalignment, neck and back pain, headaches, poor sleep, major depressive disorder, generalized anxiety disorder and somatic symptom disorder (chronic pain). The plaintiff was no longer able to participate in many of the leisure activities that he did before the accident and his psychological conditions continued to have a significant impact on all facets of his life including his relationship with his spouse and child;

- e) *Redmond v. Krider*, 2015 BCSC 178, where Justice Maisonville awarded \$150,000 in non-pecuniary damages to a 47-year-old plaintiff. The plaintiff's injuries included soft tissue injuries to the neck, back and shoulders, sacroiliac strain, ongoing cervicogenic headaches, fibromyalgia, and adjustment disorder with depressive symptoms and anxiety, including persistent somatic symptom disorder of moderate severity (chronic pain) and reduced cognitive ability; and
- f) *Cantin v. Petersen*, 2012 BCSC 549, where Justice Bruce awarded \$150,000 in non-pecuniary damages to the plaintiff. The injuries suffered included soft tissue injuries and serious chronic pain. As a result of these injuries, the plaintiff was limited to very short walks and light exercise, was unable to carry out household chores without pain, was unable to drive except very short distances, and had no social or family life.

[159] The defendant refers me to the following cases in justification of an award of \$10,000-\$15,000:

- a) *Bains v. Park*, 2014 BCSC 1818, where Justice Joyce awarded the 49-year-old plaintiff \$15,000 in non-pecuniary damages, which was reduced by 10% on account of pre-existing injuries. The plaintiff's injuries consisted of soft tissue injuries to the neck, back and knee, headaches and some chest pain. The plaintiff fully recovered to her pre-accident state within approximately one year;
- b) *Zhibawi v. Anslow*, 2015 BCSC 1824, where Justice Williams awarded the plaintiff \$14,000 in non-pecuniary damages. The injuries consisted of mild to moderate soft tissue injury with some neck and back discomfort. As a consequence of these injuries, the plaintiff lost two weeks of work. The bulk of the injuries had resolved within six months;
- c) *Rosso v. Balubal*, 2014 BCSC 1786, where Griffin J., as she then was, found the plaintiff to have suffered some soft tissue injuries, minor headaches, anxiety while driving and ongoing mild neck and back pain which was manageable with regular exercise. As a consequence of these injuries, it was found that there was some loss of enjoyment of life. The plaintiff was awarded \$20,000 in non-pecuniary damages;
- d) *Dorsey v. Bhindi*, 2016 BCSC 499, where Justice Warren awarded the 51-year-old plaintiff \$25,000 in non-pecuniary damages. The plaintiff was found to have suffered an aggravation of pre-existing neck and back symptoms that gradually improved and returned to its pre-accident state within 18 months.
- e) *Chagnon v. Clover Trading Co. Ltd.*, 2019 BCSC 2397, where the plaintiff suffered severe back pain and neck pain. Justice Francis found that the plaintiff's injuries were serious and impacted her enjoyment of life for more than three years after the accident but had mostly resolved by the time of trial. The plaintiff was awarded \$30,000 in non-pecuniary damages;

- f) *Chapman v. Zilm*, 2020 BCSC 695, where Justice Baird awarded the 36-year-old plaintiff \$30,000 in non-pecuniary damages. The plaintiff's injury of left posterior neck pain was minor, but persistent and enduring. The plaintiff was able to continue with his pre-accident recreational activities, although with some decrease in intensity; and
- g) *Ford v. Lin*, 2021 BCSC 456, where Justice Fitzpatrick found the 64-year-old plaintiff had suffered soft tissue injuries causing an aggravation of pre-existing headaches and neck, shoulder and upper back pain which substantially resolved by approximately one year after the accident. The plaintiff was awarded \$30,000 in non-pecuniary damages.

[160] In my view, the cases to which I have been referred by the plaintiff all concern much more serious injuries and the effects of those injuries were more severe than in the matter before me. Similarly, the cases to which I have been referred by the defendant involve less serious injuries or the effects of those injuries were less severe than in the matter before me.

[161] Bearing in mind that each case depends on its own facts and that any award should be fair to all parties, I am of the opinion that a fair award for non-pecuniary damages in the circumstances of this case is \$60,000.

Loss of Earning Capacity

Legal Principles

[162] The pecuniary loss suffered by a plaintiff as a consequence of a motor vehicle accident, sometimes referred to as a loss of income claim, is addressed with an award of damages for loss of earnings capacity. The award is divided into two parts: past loss of earning capacity and future loss of earning capacity. The purpose of both awards is to restore an injured plaintiff to the position they would have been in if the accident had not occurred. *Lines v. W & D Logging Co. Ltd.*, 2009 BCCA 106, at para. 185; *Rowe v. Bobell Express Ltd.*, 2005 BCCA 141 at para. 30; *M.B. v. British Columbia*, 2003 SCC 53, at para. 49.

[163] In *Rab v. Prescott*, 2021 BCCA 345, at paras. 47-48 [Rab], it was clarified that there are three steps involved in the analysis of a loss of capacity claim: (1) Is there a potential future event that could lead to a loss of capacity; (2) Is there a real and substantial possibility that the future event in question will cause a pecuniary loss; and (3) What is the value of that loss, which must include an assessment of the likelihood of that event occurring. Steps 1 and 2 of the analysis go to entitlement to an award. Step 3 goes to the valuation of the award.

[164] An award for loss of earning capacity, whether past or future, is appropriate where the plaintiff establishes a real and substantial possibility that there has been a diminishment in earning capacity resulting in a pecuniary loss. The standard of proof, whether for past or future loss of earning capacity, is "a real and substantial possibility", not a balance of probabilities: *Smith v. Knudsen*, 2004 BCCA 613, para. 5; *Grewal v. Naumann*, 2017 BCCA 158, paras. 43-48.

- [165] A real and substantial possibility is a measurable risk as opposed to mere speculation: Dornan, para. 63.
- [166] The existence of a real and substantial possibility of an event giving rise to an income loss may be obvious, such as where the plaintiff is unable to work at the time of trial due to injuries suffered in the accident; however, in other cases the assessment is more difficult, such as where the plaintiff is employed at trial and is earning at or near his or her pre-accident income but has continuing deficits or is exposed to future problems: Rab, paras. 28-29.
- [167] Loss of capacity can be the event that gives rise to a possibility of a future income loss but is not sufficient in and of itself: Rab, at paras. 47-48.
- [168] Some of the factors that go to entitlement are: (i) whether the plaintiff has been rendered less capable overall of earning income from all types of employment; (ii) whether the plaintiff is less marketable or attractive as a potential employee; (iii) whether the plaintiff has lost the ability to take advantage of all job opportunities that might otherwise have been open; and (iv) whether the plaintiff is less valuable to himself as a person capable of earning income in a competitive labour market: Rab, paras. 35-36; Brown v. Golaiy, (1985), 26 B.C.L.R. (3d) 353 [Brown].
- [169] Once entitlement is established, which is to say once the plaintiff establishes a real and substantial possibility of a diminishment in earning capacity, the loss is quantified using either the earnings approach or the capital asset approach. The appropriate means of assessment will vary from case to case: Brown; Pallos v. Insurance Co. of British Columbia (1995), 100 B.C.L.R. (2d) 260 (C.A.); Pett v. Pett, 2009 BCCA 232. The earnings approach is more appropriate where the loss is measurable. The earnings approach involves a calculation of the present value of the plaintiff's annual loss of income over the remaining years of employment.
- [170] The capital asset approach is appropriate where the loss is not easily measurable: Perren v. Lalari, 2010 BCCA 140, at para. 32. Cases where the plaintiff is employed at trial and is earning at or near his or her pre-accident income but has continuing deficits, or is exposed to future problems because of accident caused injuries, lend themselves to the capital asset approach: Rab, para. 29. The amount of the award can be based on the plaintiff's annual income for one or more years. The income used in the assessment must be relevant to the plaintiff's pre and post accident circumstances.
- [171] Under either the earnings approach or the capital asset approach, damages are assessed, not calculated: Rosvold v. Dunlop, 2001 BCCA 1 at para. 18. The assessment involves a consideration of hypothetical events and contingencies, both positive and negative. Hypothetical events need not be proven on a balance of probabilities but, provided they are not speculative, are given weight according to their relative likelihood: Athey, at para. 27; Morlan v. Barrett, 2012 BCCA 66 at para. 38. In Rab, the Court of Appeal has clarified that when utilizing the capital asset approach the Court must similarly provide a rational or

principled basis for valuing the loss: Rab, paras. 72-75.

[172] The final stage of the assessment involves a consideration of the overall fairness and reasonableness of the award: Parypa v. Wickware, 1999 BCCA 88.

[173] Pursuant to s. 98 of the Insurance (Vehicle) Act, R.S.B.C. 1996, c. 231, a plaintiff is entitled to recover damages for only his or her past net income loss. This means that for past loss of income, the amount of income tax payable must be deducted from the gross earnings lost: Hudniuk v. Warkentin, 2003 BCSC 62.

Discussion

[174] The plaintiff seeks an award of \$54,000 for past and future loss of earning capacity. The defendant submits that the plaintiff has suffered no loss of income as a consequence of the injuries suffered in the accident. More particularly, the defendant submits that the plaintiff decided to retire prior to going to Hong Kong and that he was simply not interested in working anymore.

[175] I do not accept the defendant's submissions which read far too much into the plaintiff's evidence. It is true that the plaintiff contemplated taking time off from work prior to the subject accident because of his various difficulties. However, he did not follow through on that. He continued working right up until the time of the accident. Moreover, as I have indicated above, the plaintiff had a history of working hard his entire life except when unable to do so by reason of injury. He was not a malingerer. He also needed to work as he has minimal savings. There was not, in my view, a real and substantial possibility that the plaintiff would have quit his job in early 2018 if the accident had not occurred.

[176] I have found that because of the injuries suffered in the accident, the plaintiff was disabled from working for a period of approximately two years. I have found that any added disability suffered by the plaintiff as a consequence of the subject accident had resolved within approximately two years of the date of the subject accident. He was then, and is now, at approximately the same level of disability as he was immediately prior to the accident.

[177] These findings support entitlement to an award for loss of earning capacity of two years income. The plaintiff's gross employment income in 2017 was \$27,634. His net income was approximately \$25,000. His loss would therefore be \$50,000.

[178] Another way of calculating the plaintiff's loss of income earning capacity is by posing the question: If the accident had not occurred, what is the likelihood the plaintiff would have retired before reaching the age of 65? The plaintiff essentially puts the likelihood of this contingency at roughly 80%. In his written submissions, the plaintiff writes:

186. If Mr. Siu would have worked as a delivery driver until age 65, then his lost income from the date of the Collision to retirement would be about \$250,000, based on a loss of 10 years of his annual net income (about 4.5 years from Collision to trial, and 5 years following trial).

187. Mr. Siu seeks an award for loss of past income loss of \$54,000, justified as roughly two years of lost income, net of taxes. This award would reflect the fact that he has not tried to work (due to his pain) since the Collision. This award would also reflect the diminishment in Mr. Siu's ability to work and his employability.

[179] In my view, given the significant health problems the plaintiff was experiencing immediately prior to the subject accident, and the difficulties these health issues were causing him at work, applying an 80% contingency is reasonable for this hypothetical event. The result is that the plaintiff's loss is approximately equal to \$50,000 (0.20 x \$250,000).

[180] I therefore award \$50,000 in loss of income earning capacity, which amount, in my view, is fair and reasonable.

Special Damages

[181] The parties are agreed the special damages are \$775.61.

Costs of Future Care

[182] The plaintiff is entitled to compensation for the costs of future care based on what is reasonably necessary to restore him to his pre-accident condition in so far as that is possible. When full restoration cannot be achieved, the court must strive to assure full compensation through the provision of adequate future care. The award is to be based on what is reasonably necessary on the medical evidence to preserve and promote the plaintiff's mental and physical health: *Milina v. Bartsch* (1985), 49 B.C.L.R. (2d) 33 (S.C.) [Milina]; *Williams v. Low*, 2000 BCSC 345; *Spehar v. Beazley*, 2002 BCSC 1104; *Gignac v. Rozylo*, 2012 BCCA 351, at paras. 29-30.

[183] There must be both medical justification for the costs and the award must be reasonable: *Milina*, at 84; *Tsalamandris v. McLeod*, 2012 BCCA 239, at paras. 62-63.

[184] Future care costs are "justified" if they are both medically necessary and likely to be incurred by the plaintiff. The award is thus a matter of prediction as to what will happen in future. If a plaintiff has not used a particular item or service in the past it may be inappropriate to include its cost in a future care award. However, if the evidence shows that previously rejected services will not be rejected in the future, the plaintiff can recover for such services: *Izony v. Weidlich*, 2006 BCSC 1315, at para. 74; *O'Connell v. Yung*, 2012 BCCA 57, at paras. 55, 60, 68-70.

[185] The plaintiff seeks an award of \$5,000 for the costs of future care, broken down as follows:

- a) 10 sessions of occupational therapy (\$1,150.00)
- b) 10 sessions of counselling (\$1,230)
- c) 10 sessions of chiropractic or occupational therapy to address pelvic misalignment (\$810.00)

- d) 10 sessions of acupuncture (\$950)
- e) Topical and over-the-counter medicines (\$1,000)

[186] The defendant denies that an award for costs of future care is warranted.

[187] In support of the claim for costs of future care, the plaintiff relies on the report of Dr. Wee and her recommendations for the following future care:

- a) Occupational therapist to determine if there are concerns regarding Mr. Siu's thinking and memory, in his own language, and if so, the OT could provide strategies that would facilitate return to work if possible;
- b) Psychologist for optimization of his mood and sleep. If pain persists, then cognitive behavioral therapy through psychology for pain management;
- c) Pelvic manipulation through a chiropractor or physiotherapist;
- d) Ice applications and anti-inflammatory medication for joint inflammation;
- e) Daily heat, stretching and self-massage for muscular strain, in conjunction with dry needling if tolerated;
- f) Massage therapy for muscular strain;
- g) Kinesiology for conditioning and strengthening, once pain is under better control, and to gradually increase aerobic exercise.

[188] Dr. Wee's recommendations establish the first criteria for the recovery of future care costs, that being medical necessity. The second criteria is more problematic. The second criteria is that the costs are likely to be incurred by the plaintiff. I find that this criteria is not met. The plaintiff has shown a propensity to avoid medical treatments and to not follow through on recommendations made by his doctors. For example, Dr. Johal repeatedly recommended the plaintiff get massage therapy but the plaintiff never did so. Dr. Wee also recommended massage therapy and kinesiology in June 2019 but the plaintiff never made arrangements for such therapies. Additionally, the plaintiff only attended acupuncture at the urging of Joanna Tam and, despite the fact that acupuncture offered him some relief, he has attended only three sessions. Finally, as indicated, Joanna Tam testified that she tried to help the plaintiff by offering to drive him to see a Chinese medicine doctor but he refused her help saying he did not believe in doctors.

[189] I appreciate that the plaintiff has testified that he will seek treatment in the future. However, given his past and the fact that other than the acupuncture sessions, he has essentially sought no treatment since 2019, I am simply not satisfied that he will attend any future treatments.

[190] Accordingly, I decline to award any amount for the costs of future care.

Mitigation

- [191] The defendant submits that the plaintiff has failed to mitigate his losses. In particular, the defendant submits that the plaintiff failed to mitigate in that he did not follow recommended treatments and that his damages should be reduced by 20%.
- [192] The plaintiff submits that the defendant has not met the onus of proving a failure to mitigate. In particular, in relation to obtaining treatment for his injuries, the plaintiff submits that he did the best he could taking into account his social, linguistic, economic, and medical limitations.
- [193] A plaintiff has an obligation to take all reasonable measures to reduce his or her damages, including undergoing treatment to alleviate or cure injuries: *Danicek v. Alexander Holburn Beaudin & Lang*, 2010 BCSC 1111 at para. 234; *Stevens v Creusot*, 2019 BCSC 1781 at para. 200.
- [194] Once the plaintiff has proved the defendant's liability for his or her injuries, the defendant must prove that the plaintiff acted unreasonably and that reasonable conduct would have reduced or eliminated the loss. In particular, the defendant must prove both that the plaintiff acted unreasonably in eschewing the recommended treatment, and the extent, if any, to which the plaintiff's damages would have been reduced had he acted reasonably: *Chiu v. Chiu*, 2002 BCCA 618 at para. 57; *Wahl v. Sidhu*, 2012 BCCA 111 at para. 32; and *Morgan v. Galbraith*, 2013 BCCA 305 at para. 78.
- [195] Whether the plaintiff acted reasonably is a factual question that involves a consideration of all of the circumstances: *Gilbert v. Bottle*, 2011 BCSC 1389 at para. 202.
- [196] I have no difficulty in finding that the plaintiff has failed to act reasonably in seeking appropriate treatment for his injuries. However, in my view, the defendant has failed to prove the extent, if any, to which the plaintiff's damages would have been reduced had he acted reasonably. The defendant has offered no evidence, expert or otherwise, of the extent to which the plaintiff's damages would have been reduced had he followed appropriate treatment. The defendant submits that I may infer from Dr. Wee's evidence that the damages would have been reduced if appropriate treatment had been sought. I do not agree that it is appropriate or possible to make any such inference. It is the defendant's onus to prove the extent to which damages would have been reduced. The defendant has not met this onus.

Order

- [197] Accordingly, the defendants are liable to the plaintiff for the following amounts:
- a) General damages in the amount of \$60,000;
 - b) Damages for past loss of earning capacity in the amount of \$50,000; and
 - c) Special damages in the amount of \$775.61.

[198] All other claims are dismissed.

[199] The parties are given liberty to speak to me on the matter of costs, if necessary.

"Giaschi J."

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.bccourts.ca/jdb-txt/sc/22/18/2022BCSC1876cor1.htm>

CASE PAGE <https://chat.esheria.ai/case-law/canada/siu-v-regehr-2022>

Prepared on 29 October 2026 · Esheria