

CANADA / JUDGMENT

Suico v. Liu

2025 BCSC 114

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2025 BCSC 114 Suico v. Liu

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Suico v. Liu,

2025 BCSC 114

Date: 20250124

Docket: M215475

Registry: New Westminster

Between:

Brian Duy Suico

Plaintiff

And

Yang Liu

Defendants

Before: The Honourable Justice Mayer

Reasons for Judgment

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Place and Date of Trial:

Vancouver, B.C.

October 1-4, 7-8 and 10-11, 2024

Place and Date of Judgment:

New Westminster, B.C.

January 24, 2025

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Introduction

- [1] The plaintiff, Brian Suico, seeks damages arising from a low-speed motor vehicle accident which occurred on June 10, 2017, in Vancouver, British Columbia (the "Accident"). The Accident occurred at a traffic light at the intersection of Dunsmuir Street and Howe Street, when the defendant Yang Liu's vehicle attempted to change from the left turn to center lane and the right front corner of her vehicle struck the front left fender of Mr. Suico's vehicle. Liability for the Accident is admitted but the nature of injuries and resulting damages caused by the Accident are in dispute.
- [2] Mr. Suico alleges that as a result of the Accident he sustained various soft tissue injuries and related symptoms or impacts including chronic back and neck pain, myofascial pain syndrome, thoracic outlet syndrome impacting his right arm and hand, chronic headaches, sleep disturbance, weight gain, and adjustment disorder. He seeks non-pecuniary damages, and damages for loss of past and future earning capacity, loss of housekeeping capacity, cost of future care, and special damages.
- [3] Ms. Liu concedes that the Accident caused Mr. Suico to sustain soft tissue injuries and resulting chronic shoulder and neck pain, but contends that Mr. Suico has not proven that there is a causal link between the Accident and thoracic outlet syndrome resulting in pain to Mr. Suico's right arm, chronic headaches, or adjustment disorder. Further, the defendant disputes the quantum of damages sought by Mr. Suico for non-pecuniary damages and cost of future care and that he is entitled to separate a damages award for loss of housekeeping. Finally, the defendant contends that Mr. Suico has failed to prove that the Accident caused past or future loss of income earning capacity.
- [4] The parties have agreed that Mr. Suico is entitled to special damages in the amount of \$8,010.10.

Issues

- [5] The issues for determination in this case include the following:
- 1) What injuries and related symptoms or conditions were caused by the Accident?
 - 2) What non-pecuniary damages should be awarded to Mr. Suico for injuries and symptoms caused by the Accident?
 - 3) What damages, if any, should be awarded to Mr. Suico for past and future loss of income earning capacity?
 - 4) What damages, if any, should be awarded to Mr. Suico for loss of housekeeping capacity?
 - 5) What damages, if any, should be awarded to Mr. Suico for cost of future care?

Background

Prior to the Accident

- [6] Mr. Suico was 30 years old at the time of the Accident. He was born in Montreal and spent most of his early life there before moving to British Columbia where he finished high school. After graduating from high school in 2004, his work included working in the restaurant and retail sectors, as a nightclub promoter, and as a sales representative at Shaw Communications. In 2014, he obtained his real estate license and began working at Sutton Group West Coast Realty in Vancouver ("Sutton Realty"). In 2016, he began working at 1-800-GOT JUNK ("GOT JUNK") to supplement his real estate income. At the time of the Accident, Mr. Suico was working as both a real estate agent and at GOT JUNK.
- [7] Mr. Suico testified that he had embarked on a "fitness journey" in the years leading up to the Accident. Starting in 2013, he began dieting and engaging in various forms of exercise. He took up running and completed 5km and 10km races and eventually a half-marathon in 2016. Between 2013 and the time of Accident his weight dropped from 240 to 165 pounds. Videos made at Mr. Suico 's gym in 2016 and 2017 were shown at trial and show Mr. Suico doing pull-ups and high intensity "caveman" workouts.
- [8] Approximately one year before the Accident, in August 2016, Mr. Suico was involved in a physical altercation resulting from a dispute between his then girlfriend and a person supplying ice for a music festival that his girlfriend was helping to arrange. During the altercation Mr. Suico was thrown or pushed which he testified resulted in back and shoulder pain which resolved in a short period of time. Clinical notes from Mr. Suico 's doctor, Dr. Gee, from August 2016, record that Mr. Suico reported neck, shoulder, upper and lower back pain and sleep disturbance.

The Accident

- [9] The Accident occurred on June 10, 2017, as Mr. Suico was driving westbound on Dunsmuir Street, on the way to meet with friends at a restaurant. It was a sunny day and Mr. Suico had the windows down and was listening to music. As he approached Howe Street in the middle lane and was slowing down to stop for a red light, Ms. Liu's vehicle turned right into his lane from a left turn only lane and struck the front left fender of his vehicle. Mr. Suico testified that he felt a quick movement, which on cross-examination he agreed could be described as a minor collision. He testified that he initially thought that the movement of his vehicle might have been caused by the bass from the music he was listening to and only realized his vehicle had been hit when alerted by the driver of another vehicle.
- [10] Other than describing the quick movement during the Accident, Mr. Suico did not provide any evidence concerning the movement of his body after Ms. Liu's vehicle contacted his.

Mr. Suico's Post-Accident Symptoms

- [11] Mr. Suico testified that following the Accident he began to feel pain in his upper and lower back, neck and soreness, numbness and tingling in his arm and some leg pain. He says that over the next couple of weeks he began to experience sleep disturbance caused by his pain symptoms. He says that his leg pain resolved after a couple of weeks.
- [12] Mr. Suico testified that in the ensuing months his pain symptoms got worse. He says that his right arm was numb, from the shoulder to his hand and his neck was "pulling" all the time. He testified that he began to experience symptoms of depression related to the impact of his symptoms on his ability to exercise and on his work as a realtor. He testified that he sought treatment from medical doctors including a neurologist and received various treatments including physiotherapy and chiropractic and massage therapy.
- [13] Post-Accident clinical records do not record that Mr. Suico reported right arm pain. The clinical notes of Dr. Gee, made on July 12, 2017, two days after the Accident, only record complaints of neck and back pain. Dr. Gee's notes made June 22, 2017, record that Mr. Suico continued to experience lower back pain but that his neck pain was getting better. The first records with respect to right shoulder and hand pain are found in Dr. Gee's clinical notes from August and September 2017 and including reports of right forearm and wrist pain and right shoulder pain, the latter caused by repetitive movements, and numbness and tingling to Mr. Suico's right arm.
- [14] After taking time off work after the Accident, Mr. Suico was able to return to work full time starting July 4, 2017. He stopped working at GOT JUNK shortly afterwards.
- [15] Mr. Suico testified that he began to go to the gym starting around the end of July 2017 and was working out four to five times a week by January 2018. During his cross-examination he confirmed that in February 2018, he reported to his massage therapist that he was doing regular activities and those had not decreased, although he had difficulty shaking hands. In March 2018 Mr. Suico's massage therapist noted that Mr. Suico reported that difficulty shaking hands was his most bothersome symptom. In April 2018, his massage therapist noted that Mr. Suico reported that he felt his strength was "up to 50% globally" and that he was going to the gym at least five times per week.
- [16] Clinical and treatment records indicate that by the fall of 2018 Mr. Suico's symptoms continued to improve with physiotherapy, massage therapy and acupuncture. Mr. Suico stopped attending at massage therapy and physiotherapy treatments in October 2018. In May 2019, Mr. Suico had reported to his family doctor, Dr. Gee, that although he continued to experience symptoms including neck soreness and right arm tingling, acupuncture was helping with his right arm and hand symptoms. He continued to see an acupuncturist until around February 2020

- [17] In February 2019, Mr. Suico took a 25-day vacation travelling to Southeast Asia. In August 2019, he posted a photo of himself on social media and invited people to reach out to him for tips on weight loss. Dr. Gee's clinical notes indicate that Mr. Suico continued to attend at the gym until approximately January 2020.
- [18] Between approximately the end of February 2020 and July 2023, Mr. Suico did not seek any passive treatments for pain related symptoms including massage therapy, acupuncture or physiotherapy.
- [19] Mr. Suico testified that at the time of trial he continues to experience Accident-related symptoms including pain in his neck, back, his right shoulder, his arms, and occasional pain in other parts of his body. He says that he suffers headaches and has sleep problems. Further, Mr. Suico testified that the pain in his right arm is easily aggravated by using his phone for extended periods, lifting, and with cold weather. He says that he continues to have difficulty shaking hands as doing so causes pain, which has affected his confidence in business interactions.
- [20] Mr. Suico also testified that the Accident had caused on-going psychological impacts. He says that while he was at "a great spot" in his life before the Accident, he now has difficulty with his mood, motivation, and is saddened with how his life has changed. He says that since the Accident he has symptoms of depression, has become more socially withdrawn, has become less confident and motivated in his work as a realtor, and has anxiety regarding driving. Mr. Suico has attended counselling and says that while it has helped him a great deal the sessions are emotionally taxing.
- [21] Dr. Gee's records indicate that Mr. Suico did not request a referral for counselling until September 2020 and Mr. Suico agreed during cross-examination that he did not report psychological symptoms prior to this time. Although Mr. Suico testified that in 2022 he was experiencing significant psychological symptoms he did not see a counsellor between June 2021 and September 2022.

Causation

- [22] The first issue to be addressed is what injuries and related symptoms were caused by the Accident. Mr. Suico submits that the Accident caused the following:
- a) Chronic neck pain secondary to soft tissue injury.
 - b) Chronic back pain secondary to soft tissue injury.
 - c) Chronic shoulder, arm, and hand pain and numbness secondary to myofascial pain syndrome and thoracic outlet syndrome, most seriously in the right arms, but also in the left.
 - d) Chronic headache secondary to late whiplash syndrome.

- e) Sleep disturbance.
- f) Weight gain of approximately 45 pounds.
- g) Adjustment disorder, with mixed anxiety and depression symptoms.

Expert Evidence on Causation

[23] A number of expert witnesses were qualified to provide opinion evidence at trial. A summary of their evidence is follows.

Dr. Raphael Chow

- [24] Dr. Raphael Chow is a physiatrist and is qualified to practice in British Columbia and Ontario. Dr. Chow preformed an assessment on Mr. Suico on February 15, 2023, and prepared a report dated February 27, 2023.
- [25] In his report, Dr. Chow concluded that as a result of the Accident Mr. Suico sustained soft tissue injury to his cervical, thoracic, and lumbar spine which has resulted in ongoing neck and back pain. He also concluded that the Accident caused right upper extremity pain and paresthesia associated with thoracic outlet syndrome and myofascial pain syndrome.
- [26] Dr. Chow's "diagnostic impression" was that Mr. Suico's chronic pain, headache, psychological, cognitive and sleep issues were caused by the Accident and were consistent with late whiplash syndrome.
- [27] Dr. Chow noted in his report that Mr. Suico had pre-existing neck and back pain which in his opinion was aggravated by the Accident. He also noted, inaccurately, that prior to the Accident Mr. Suico had not reported right upper extremity symptoms.
- [28] Dr. Chow noted that in terms of functional status, Mr. Suico had not returned to his pre-accident level. Dr. Chow concluded that Mr. Suico had an impairment in his cervical, thoracic, and lumbar spine, and right shoulder girdle which lacked resiliency and tolerance to excessive loading. Dr. Chow's opinion was that Mr. Suico could perform light physical demand tasks and jobs, but was limited in terms of sitting, standing, walking, bending, twisting, reaching, and driving tasks. Dr. Chow concluded that Mr. Suico could meet the demands of his job as a real estate agent, but would be limited in driving and postural tasks and would likely require housekeeping assistance. Dr. Chow noted that while Mr. Suico had psychological, sleep, and cognitive problems, he would defer to the appropriate expert for their opinion on these symptoms. Dr. Chow made a number of recommendations for treatment.
- [29] Dr. Chow noted that most soft tissue accident-related conditions resolve within the first two to three years. Given that it had been more than five and a half years since the Accident, Dr. Chow concluded that it was unlikely he will experience complete resolution of symptoms or achieve full recovery.

[30] In Dr. Chow's opinion Mr. Suico is able to continue working as a realtor.

Dr. Zohar Waisman

[31] Dr. Zohar Waisman is a psychiatrist licensed to practice medicine in British Columbia, Ontario, and Nova Scotia. Dr. Waisman performed an assessment of Mr. Suico virtually for one hour on March 22, 2023.

[32] Dr. Waisman's opinion is that as a result of the Accident, Mr. Suico suffers from an "Adjustment Disorder with mixed anxiety and depressed symptoms". In his view, Mr. Suico is caught in a cycle of chronic pain, depression, anxiety and cognitive symptoms that result in stress, and suffers from an impairment in his ability to regulate his emotions.

[33] Dr. Waisman's report sets out his conclusion that due to Mr. Suico's chronic pain and depression, Mr. Suico lacks the motivation to perform activities of daily living, has reduced the frequency of his gym visits by 50%, and is not as social. Dr. Waisman's prognosis with respect to potential improvement of Mr. Suico's symptoms is guarded and depends on the prognosis for improvement of his physical conditions.

Dr. Anthony Salvian

[34] Dr. Anthony Salvian is a vascular surgeon qualified to practice in British Columbia. Dr. Salvian performed an assessment on Mr. Suico on April 8, 2024. His independent medical examination report of June 19, 2024, is based on his assessment and a review of Mr. Suico's medical records.

[35] Dr. Salvian concluded that Mr. Suico's neck, upper back and shoulder pain are mainly due to soft tissue injury with resultant chronic myofascial pain syndrome with positive trigger points. He also concluded that Mr. Suico's complaints of ongoing numbness, tingling, and pain, in particular in his right forearm and fingers, were mainly due to post traumatic thoracic outlet syndrome.

[36] In terms of causation, Dr. Salvian's opinion is that Mr. Suico sustained a whiplash injury from the Accident which caused severe chronic myofascial pain syndrome. At trial he testified that a whiplash injury requires movement of the head going forward or backwards, side to side or rotational movement which may occur even at speeds as low as 8 km/h. It is Dr. Salvian's opinion that Mr. Suico went on to develop thoracic outlet syndrome because of the injuries caused in the Accident including whiplash. In Dr. Salvian's opinion Mr. Suico would not have developed these conditions absent the Accident. During his cross-examination he disagreed that the August 2016 assault on Mr. Suico contributed to these symptoms, as in his understanding Mr. Suico's assault-related symptoms had resolved by January 2017.

- [37] Dr. Salvian's opinion is that it is likely that Mr. Suico 's neck pain, shoulder pain, back pain, and headaches will wax and wane depending on his activity and treatments. He noted that in his experience and the literature, those with a diagnosis of myofascial pain syndrome with positive trigger points are unlikely to ever be pain free. Further, Dr. Salvian concluded Mr. Suico is at risk of exacerbating his thoracic outlet syndrome which could occur with further trauma or through daily activities.
- [38] Dr. Salvian recommended that Mr. Suico be seen by a rehabilitation specialist who has expertise in the management of chronic myofascial pain, that he obtain a gym/pool pass, and have sessions with a personal trainer or kinesiologist to develop an appropriate exercise program.
- [39] Dr. Salvian's opinion is that Mr. Suico can continue to work as a realtor since he can organize his schedule to allow time for stretching and moving around.

Dr. Sami Zaki

- [40] Doctor Sami Zaki is a physiatrist licensed to practice in British Columbia. Doctor. Zaki assessed Mr. Suico on June 1, 2023, on behalf of Ms. Liu and prepared a report dated June 29, 2023.
- [41] In his report, Dr. Zaki diagnosed Mr. Suico with: (1) Whiplash Associated Disorder type II of the neck, shoulder and thoracic area; (2) resolving mechanical lower back pain; (3) bilateral knee pain from soft tissue - which had resolved; and (4) right upper extremity soft neurological symptoms which may be referred symptoms from neck and shoulder soft tissue injury. Dr. Zaki stated that there were no clinical findings to suggest focal neurological impairment, neuropathy, radiculopathy or myopathy.
- [42] Dr. Zaki noted in his report that he had not reviewed records pre-dating the Accident. He explained in his report that he relied only on post-Accident records concerning neck and back pain, in forming his opinion concerning the cause of Mr. Suico's symptoms.
- [43] Dr. Zaki noted in his report that he did not see "much mention" of chronic headaches in Mr. Suico's medical records from his family physician. He also noted that Mr. Suico advised that he had only paid attention to headaches about three months prior to his assessment with Dr. Zaki (around April 2023) and that the headaches did not seem to be typical of migraines or cervicogenic headaches. In his report Dr. Zaki concluded that there was not a clear cause and effect relationship between the Accident and Mr. Suico's reported headaches. During his cross-examination Dr. Zaki confirmed that he had not seen references in Mr. Suico's medical records to his experiencing headaches starting shortly after the Accident.
- [44] Dr. Zaki found that the fact Mr. Suico had continued to be employed in his same work since the Accident suggested a good prognosis for him to continue in his current employment. Dr. Zaki stated that Mr. Suico 's duration of symptoms since the Accident, and the tendency for more widespread symptoms, indicated a chronic pain syndrome where an individual

becomes hyper focused on pain and suggested education and reassurance. Further, Dr. Zaki noted that Mr. Suico's high level of anxiety, depression, low mood and motivation, were all negatively impactful on degree of pain and needed to be addressed. Dr. Zaki suggested that Mr. Suico's function would improve, and his level of pain would be reduced, if he were to go through more active rehabilitation and address his mood and anxiety issues. Dr. Zaki suggested that medication may be helpful for the chronic pain and mood.

- [45] Dr. Zaki suggested that Mr. Suico be referred to a pain specialist or a physical medicine and rehabilitation specialist to consider dry needling or trigger point injections. Further, Dr. Zaki suggested that Mr. Suico return to physio and active rehabilitations. Finally, Dr. Zaki suggested that Mr. Suico be prescribed appropriate medication for chronic pain.
- [46] In terms of causation, Dr. Zaki did note the 2016 assault but relied on Mr. Suico's statement that there were no ongoing symptoms or limitations at the time of the Accident. Dr. Zaki stated that he did not see a clear cause and effect relationship between the Accident and the headaches since the headaches were only recently reported. Dr. Zaki stated that there was no indication Mr. Suico would have had an impairment or disability in the absence of the Accident.

Analysis - Causation

Legal Overview

- [47] Except in the special circumstances discussed below, the plaintiff must establish on a balance of probabilities that the defendant's negligence caused an injury. The defendant's negligence does not have to be the sole cause of the injury so long as it is a necessary cause: *Emil Anderson Maintenance Co. Ltd. v. Taylor*, 2024 BCCA 156 at para. 130. Causation need not be determined by scientific precision: *Athey v. Leonati*, [1996] 3 S.C.R. 458, 1996 CanLII 183 at paras. 13-17 [Athey]; *Farrant v. Laktin*, 2011 BCCA 336 at para. 9.
- [48] 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 between the injury and the defendant's conduct is present: *Resurface Corp. v. Hanke*, 2007 SCC 7 at paras. 21-23; *Zenone v. Knight*, 2024 BCCA 200 at para. 55.
- [49] In special circumstances, the "but-for" test proves unworkable, and the law has applied a "material contribution" test. As Chief Justice McLachlin wrote in *Clements v. Clements*, 2012 SCC 32 at para. 46:

Exceptionally, a plaintiff may succeed by showing that the defendant's conduct materially contributed to risk of the plaintiff's injury, where (a) the plaintiff has established that her loss would not have occurred "but for" the negligence of two or more tortfeasors, each possibly in fact responsible for the loss; and (b) the plaintiff, through no fault of her own, is unable to show that any one of the possible tortfeasors in fact was the necessary or "but for" cause of her injury,

because each can point to one another as the possible "but for" cause of the injury, defeating a finding of causation on a balance of probabilities against anyone.

[50] Causation must be established on a balance of probabilities before damages are assessed. As McLachlin C.J.C. stated in *Blackwater v. Plint*, 2005 SCC 58:

78 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*.

[51] The most basic principle of tort law is that the plaintiff must be placed in the position he or she would have been if not for the defendant's negligence, no better or worse. Tortfeasors must take their victims as they find them, even if the plaintiff's injuries are more severe than they would be for a normal person (the "thin skull" rule). A defendant is fully liable for the unexpectedly severe injuries of the thin skull plaintiff because liability cannot be apportioned between causes: *Dornan v. Silva*, 2021 BCCA 228 [Dornan] at para. 41. However, the defendant need not compensate the plaintiff for any debilitating effects of a pre-existing condition which the plaintiff would have experienced anyway (the "crumbling skull" rule): *Athey* at paras. 32-35. A judge cannot assume a connection between the force of the impact and the severity of injury: *Greenway-Brown v. MacKenzie*, 2019 BCCA 137 at paras. 23-30.

Psychological Injury

[52] Justice Lambert summarized the principles to be applied in assessing claims of psychological injury in *Yoshikawa v. Yu*, 21 B.C.L.R. (3d) 318, 1996 CanLII 3104 (C.A.):

12. It is important to understand what is established and what is not established by the decision in *Maslen v. Rubenstein*. I propose to set out a number of principles extracted from the reasons of Mr. Justice Taylor, for the Court, in the *Maslen* case. The first point is a preliminary point and appears in *Maslen* at p. 133 under the heading "(a) The Background":
 1. The plaintiff must establish that the pain, discomfort or weakness is "real" in the sense that the victim genuinely experiences it.

The remaining ten points are drawn from the part of the reasons headed "(b) The Basic Principles" at pp. 134 to 137:

2. The plaintiff must establish that his or her psychological problems have their cause in the defendant's unlawful act.
3. The plaintiff's psychological problems do not have their cause in the defendant's unlawful act if they arise from a desire on the plaintiff's part for such things as care, sympathy, relaxation or compensation.

4. The plaintiff's psychological problems do not have their cause in the defendant's unlawful wrongful act if the plaintiff could be expected to overcome them by his or her own inherent resources, or "will-power".
5. If psychological problems exist, or continue, because the plaintiff for some reason wishes to have them, or does not wish to end, their existence or continuation must be said to have a subjective, or internal, cause. (NOTE: I consider that this proposition must deal with the conscious mind, otherwise it seems to me to beg the question; see my first observation, later in this Part of these reasons.)
6. If a court could not say whether the plaintiff really desired to be free of the psychological problems, the plaintiff would not have established his or her case on the critical issue of causation.
7. Any question of mitigation, or failure to mitigate, arises only after causation has been established.
8. It is not sufficient to ask whether a psychological condition such as "chronic, benign pain syndrome" is "compensable". Such a psychological condition may be compensable or it may not. The identification of the symptoms as "chronic benign pain syndrome" does not resolve the questions of legal liability or the question of assessment of damages.
9. It is unlikely that medical practitioners can answer, as matters of expert opinion, the ultimate questions on which these cases often turn.
10. Mr. Justice Spencer, at trial in the Maslen case, put the overall test quite correctly in these words:

[C]hronic benign pain syndrome will attract damages ... where the plaintiff's condition is caused by the defendant and is not something within her control to prevent. If it is true of a chronic benign pain syndrome, then it will be true also of other psychologically-caused suffering where the psychological mechanism, whatever it is, is beyond the plaintiff's power to control and was set in motion by the defendant's fault.

11. There must be evidence of a "convincing" nature to overcome the improbability that pain will continue, in the absence of objective symptoms, well beyond the recovery period, but the plaintiff's own evidence, if consistent with the surrounding circumstances, may nevertheless suffice for the purpose.

...

13. I am sure Mr. Justice Taylor did not consider that the "basic" principles which he set out exhausted all the possibilities for the application of principle to the difficult problems in these cases. The general principles which apply in relation to causation in law will apply to psychological injury as they apply to physical injury.

- [53] The concept of "reasonable foreseeability" is subject to a qualification when the injury is psychiatric in nature. As Justice Bennett stated in *Hussack v. Chilliwack School District No. 33*, 2011 BCCA 258:
- [74] where the psychiatric injury is consequential to the physical injury for which the defendant is responsible, the defendant is also responsible for the psychiatric injury even if this injury was unforeseeable. See *White v. Chief Constable of South Yorkshire Police*, [1999] 2 A.C. 455 at 470, *Varga v. John Labbatt*, 1956 CanLII 436 (ON SC), [1956] O.R. 1007, 6 D.L.R. (2d) 336 (H.C.); *Yoshikawa v. Yu* (1996) 1996 CanLII 3104 (BC CA), 21 B.C.L.R. (3d) 318, 73 B.C.A.C. (C.A.); *Edwards v. Marsden*, 2004 BCSC 590; *Samuel v. Levi*, 2008 BCSC 1447.

Mr. Suico 's Position on Causation

- [54] Mr. Suico relies on the expert evidence of Dr. Chow and Dr. Salvian regarding the causation of his various soft tissue injuries and in particular their testimony that a whiplash injury can result from low-velocity collisions, at speeds as slow as 8 kilometers per hour.
- [55] Mr. Suico says that the court can infer that a whiplash motion occurred to his body during the Accident based on the evidence and expert evidence presented. This includes his testimony that he felt some movement when the Accident occurred, felt pain when he exited the vehicle, and that the pain worsened over the evening and his evidence that less than 48 hours later he visited Dr. Gee's office and reported neck and back pain. Mr. Suico says that subsequent visits to Dr. Gee and a physiotherapist further support for his reported symptoms. He submits that "it is only logical to conclude that [he] was in the unlucky 10-20% of occupants that Dr. Chow explained could be injured in a low-speed collision".

The Defendant's Position on Causation

- [56] As set out earlier Ms. Liu does not dispute that the Accident resulted in Mr. Suico sustaining soft tissue injuries resulting in chronic back, neck and shoulder pain.
- [57] Ms. Liu accepts Dr. Chow and Dr. Salvian's diagnosis of thoracic outlet syndrome, but submits that the causal link between the Accident and this condition, which Mr. Suico contends is the cause of pain and tingling to his right arm and hand, has not been proven on a balance of probabilities. She contends that the evidence of Dr. Salvian suggests that there could be an alternate cause, that being repetitive strain injury from weightlifting. She points to Dr. Salvian and Dr. Chow's testimony that injury may result from vehicle collisions occurring at speeds as low as 8 kilometers per hour, but says in this case Mr. Suico provided no evidence at trial regarding what speed vehicle were travelling at the time of the Accident. As well Ms. Liu contends that even if this Court finds that thoracic outlet syndrome was caused by the Accident, there is a chance that Mr. Suico would have developed it in any event which should be taken into account when calculating damages.

- [58] Ms. Liu accepts that immediately following the Accident Mr. Suico experienced headaches associated with a whiplash associated disorder but argues that his current headache symptoms are not causally related to the Accident. For this, Ms. Liu relies on Dr. Zaki's evidence. She challenges Dr. Chow's evidence regarding the cause of Mr. Suico's current headache symptoms because, in her submission, Dr. Chow did not explain his conclusion on causation. She submits that in any event, Dr. Chow's evidence is that the headaches are relatively mild and no treatment is necessary.
- [59] Ms. Liu disputes Dr. Waisman's opinion that the Accident caused Mr. Suico's adjustment disorder on the basis that Dr. Waisman's diagnosis is based on incomplete facts and therefore lacking an evidentiary underpinning.

Factual Findings - Accident-Related Injuries, Symptoms and Other Impacts:

Chronic Neck and Back Pain

- [60] It is not disputed, and I find, that Mr. Suico sustained soft tissue injuries in the Accident resulting in chronic neck and back pain.

Thoracic Outlet Syndrome

- [61] For the reasons set out below, I do not find that Mr. Suico has proven on a balance of probabilities that the Accident caused thoracic outlet syndrome, resulting in the pain and other symptoms Mr. Suico says he continues to experience in his right arm and hand, and experienced to a lesser degree in his left arm.
- [62] With respect to how motor vehicle accidents may cause whiplash leading to thoracic outlet syndrome both Dr. Salvian and Dr. Chow testified, in summary, that this may occur where a collision results in a jarring of the neck and back. Dr. Salvian agreed during his cross-examination that if there is no evidence of neck flexion or rotation and no immediate whiplash symptoms then a person has probably not sustained accident-related whiplash. Both Dr. Chow and Dr. Salvian testified that research has shown that 8 km/hr is the minimum speed required for soft tissue injuries to result from a motor vehicle accident - for approximately 10% of accident victims. It is apparent that both Dr. Chow and Dr. Salvian assumed that both the speed and resulting movement factors were present in the Accident.
- [63] The evidence at trial does not establish that the Accident involved Ms. Liu's vehicle colliding with Mr. Suico's vehicle when either vehicle was travelling at a speed of 8 km/hr or more but rather suggests a very low speed, perhaps glancing contact between the vehicles. This evidence includes Mr. Suico's evidence that he initially thought the bass from the music he was playing caused his car to move, the fact that he had to be told by another driver that his vehicle had been contacted by Ms. Liu's and the nature of the damage to his vehicle shown on photographs tendered at trial. It is simply not possible for this Court to determine what speed Ms. Liu's vehicle was travelling at when it contacted Mr. Suico's vehicle.

- [64] As well, there is simply no evidence that as a result of the Accident Mr. Suico's head and neck moved in a manner which would result in whiplash and resulting thoracic outlet syndrome impacting his right arm and hand. Mr. Suico's evidence concerning the nature of the collision suggests movement of his body akin to a vibration - which I note is how he described the Accident feeling during his assessment by Dr. Zaki.
- [65] Dr. Chow also seemed to base his opinion on the cause of thoracic outlet syndrome, in part, to a lack of previous reports of right arm pain by Mr. Suico. During his cross-examination Dr. Chow testified that when he wrote his report he was not aware that Mr. Suico reported right sided, shoulder to hand pain to a physiotherapist on August 8, 2016, shortly after the 2016 assault. This has an impact on weight to be given to Dr. Chow's opinion given that one of his factual assumptions, a lack of previously reported right arm symptoms, was shown to be incorrect.
- [66] There are reasons why Dr. Salvian's opinion that the Accident caused thoracic outlet syndrome should be given little weight. During his cross-examination Dr. Salvian was unreasonably reluctant to consider other possible non-Accident-related causes for his diagnosis of thoracic outlet syndrome when taken to Mr. Suico's medical records which suggested some similar pre-existing symptoms. He did agree during cross-examination that he had not seen a note in Mr. Suico's medical records that he had been diagnosed with whiplash after the 2016 assault and that this note was relevant. When taken to notes from Mr. Suico's chiropractor made approximately one month prior to the Accident, noting that Mr. Suico had described pain to his neck and mid back, despite Dr. Salvian's assumption that Mr. Suico had not experienced whiplash symptoms before the Accident, he somewhat surprisingly testified that this did not impact his opinion that the Accident caused whiplash.
- [67] During his cross-examination Dr. Salvian was taken to a scholarly article written by Christo and McGreevy in 2010, which he had appended to his expert report. In this article the authors stated that "athletes who use repetitive overhead arm motion in their sport [including weightlifters] may also develop [thoracic outlet syndrome] though less frequently". Dr. Salvian agreed that certain repetitive sports can bring on the symptoms of thoracic outlet syndrome including pull ups and pull downs - both exercises which Mr. Suico performed before the Accident. Paradoxically, when asked later during his cross-examination, assuming that Mr. Suico had done pull ups repeatedly over the years, whether this may have caused Mr. Suico's thoracic outlet syndrome, Dr. Salvian abruptly responded "no, no chance".
- [68] In my view, during his testimony Dr. Salvian was being overly argumentative with respect to whether Mr. Suico's pre-Accident exercise regime, which I find was intensive, may have caused thoracic outlet syndrome and Mr. Suico's related right arm and hand pain and tingling. In general, I am left with the impression that Dr. Salvian lost objectivity when confronted with evidence which did not support the assumptions underpinning the opinions set out in his expert report and took on the role of advocate at trial.

- [69] In summary, I am not satisfied that Mr. Suico has proven that the Accident caused whiplash and/or thoracic outlet syndrome resulting in pain and tingling sensations in his right arm. As a result, I do not find that related impacts, including Mr. Suico 's difficulty shaking hands and any related psychological impacts, were caused by the Accident.

Chronic headaches

- [70] With respect to the cause of Mr. Suico's headaches, there was some evidence at trial that Mr. Suico began to experience headaches after the Accident. Mr. Suico's evidence at trial was that after the Accident his headaches would come and go and he only started to experience migraines approximately one month before trial.
- [71] Although Dr. Chow's opinion is that Mr. Suico suffers from chronic cervicogenic headaches his report does not set out how he came to this conclusion. In any case Dr. Chow's report does not suggest that Mr. Suico's headache symptoms are significant or debilitating. I note that Dr. Chow recorded that Mr. Suico reported low grade headaches, lasting for a few minutes occurring randomly, perhaps twice a month. Dr. Zaki concluded that Mr. Suico's current complaint of headaches did not have appear to have any temporal or causal relationship with the Accident.
- [72] I conclude that after the Accident Mr. Suico experienced and continues to experience relatively minor and infrequent headaches, which I find result from his Accident-related injuries. I am not satisfied that Mr. Suico suffers from chronic headaches or migraines which are caused by the Accident.

Sleep disturbance and Weight Gain.

- [73] None of the medical experts provided opinion evidence concerning the cause of Mr. Suico's reported sleep disturbance or weight gain.
- [74] Mr. Suico testified that after the Accident he suffered from disturbed sleep caused by pain. I am satisfied that this Accident caused this symptom - although it is unclear how long his Accident-related symptoms continued to cause sleep disturbance.
- [75] A note made by Mr. Suico's physiotherapist on May 9, 2018, records that Mr. Suico reported having major sleep issues at that time, that he had difficulty breathing while sleeping, and that he was sick and dealing with allergies. During his cross-examination Mr. Suico testified that he has undergone testing for sleep apnea, but could not recall if this testing occurred before or after the Accident. Mr. Suico agreed that at this time his sleep is impacted by aching, headaches and stress. He testified that he currently gets 6-7 hours sleep most nights.
- [76] I am satisfied that Mr. Suico continues to suffer from some minor sleep disturbance, partially but not entirely caused by symptoms arising from the Accident.

- [77] With respect to weight gain, Mr. Suico testified before the Accident he was attending at the gym more frequently and did so less so afterwards. He submits, in summary, that as a result of his reduced physical activity he gained approximately 40 lbs after the Accident. It is not clear to me when Mr. Suico began to gain weight.
- [78] The evidence adduced during Mr. Suico's cross-examination indicates that by approximately April 2018 he was going to gym at least five times per week and that after that time he was running and had offered to assist others in their weight loss journeys. I note that the onset of the COVID-19 pandemic in or around March 2020 resulted in the closure of gyms.
- [79] I am not satisfied that the entirety of Mr. Suico 's weight gain can be attributed to his Accident-related injuries and symptoms. I accept that his pain symptoms resulted in a reduced ability to exercise to the same intensity as he had before partially contributing to his post-Accident weight gain.

Adjustment Disorder

- [80] Mr. Suico relies upon Dr. Waisman's diagnosis of adjustment disorder with mixed symptoms of anxiety and depression as proof that he suffers from this condition. He does not allege that suffers from depression.
- [81] Ms. Liu contends that little weight should be placed on Dr. Waisman's opinion with respect to adjustment disorder for the following reasons:
- a) Dr. Waisman conducted a short one-hour virtual assessment of Mr. Suico; and
 - b) Dr. Waisman concluded that Mr. Suico's adjustment disorder was triggered by chronic pain which developed after Mr. Suico increased his activity levels following the COVID-19 pandemic and that in coming to this conclusion, Dr. Waisman relied upon information contained within a report prepared by Dr. Lui, which was not placed into evidence at trial.
- [82] During submissions counsel for Ms. Liu acknowledged that Mr. Suico experienced psychological symptoms, primarily those related to mood, after the Accident. She disputes that the Accident directly caused these symptoms, but concedes that those may have been exacerbated by his Accident-related pain symptoms.
- [83] In my view, it is not necessary to determine the nature and cause of Mr. Suico's Accident-related psychological conditions resulting from the Accident with scientific precision.
- [84] I am satisfied that as a result of the Accident, and in particular his neck and back pain which became chronic at some point after the Accident, that Mr. Suico suffers from an adjustment disorder with mixed symptoms of depression and anxiety.

Summary on Causation:

- [85] I find that the Accident caused the following conditions, symptoms and impacts to Mr. Suico :

- a) soft tissue injuries resulting in chronic neck and back pain;
- b) relatively minor infrequent headaches;
- c) minor sleep disturbance and some weight gain; and
- d) an adjustment disorder with mixed symptoms of depression and anxiety.

Damages

Duty to Mitigate

- [86] 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.
- [87] 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. Whether the plaintiff acted reasonably is a factual question and it involves a consideration of all of the circumstances: *Gilbert v. Bottle*, 2011 BCSC 1389 [Gilbert] at para. 202.
- [88] *Chiu v. Chiu*, 2002 BCCA 618, sets out the test for failure to mitigate by not pursuing recommended treatment:
- [57] The onus is on the defendant to prove that the plaintiff could have avoided all or a portion of his loss. In a personal injury case in which the plaintiff has not pursued a course of medical treatment recommended to him by doctors, the defendant must prove two things: (1) that the plaintiff acted unreasonably in eschewing the recommended treatment, and (2) the extent, if any, to which the plaintiff's damages would have been reduced had he acted reasonably
- [89] A defendant bears the onus of proving both branches of the Chiu test on a balance of probabilities: *Haug v. Funk*, 2023 BCCA 110 at paras. 55 and 61.
- [90] During submissions Ms. Liu conceded that there was no evidence before this Court that Mr. Suico could have mitigated his losses had he acted differently. As a result, there is no basis to reduce any damages award for a failure to mitigate.

Non-Pecuniary Damages

- [91] Non-pecuniary damages are awarded to compensate the plaintiff for pain, suffering, loss of enjoyment of life, and loss of amenities: *Langford (City) v. Matthews*, 2024 BCCA 214 at para. 44, [Langford (City)]. 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 and damage awards in each case will vary to meet the specific circumstances of that case: *Howes v. Liu*, 2023 BCCA 316 at para. 26.

- [92] In *Stapley v. Hejslet*, 2006 BCCA 34, at para. 46, the Court of Appeal listed the following factors to be considered when assessing non-pecuniary damages: age of the plaintiff; nature of the injury; severity and duration of pain; disability; emotional suffering; and loss or impairment of life.
- [93] An award for non-pecuniary damages is determined by a functional approach that depends not only on the gravity of an injury but also on the plaintiff's circumstances: *McCliggot v. Elliott*, 2022 BCCA 315 at para. 44; *Langford (City)* at para. 44. Assessment of non-pecuniary damages is necessarily influenced by the individual plaintiff's personal experiences in dealing with his or her injuries and their consequences, and the plaintiff's ability to articulate that experience: *Dilello v. Montgomery*, 2005 BCCA 56 at para. 25.

Position of the Parties

- [94] Mr. Suico submits that a non-pecuniary award of \$170,000 is appropriate. He submits that prior to the Accident he was 30 years old and had made "a happy life for himself". He had made significant progress in his physical fitness goals and his career in real estate was "growing well". Mr. Suico says that the Accident caused profound changes in his life. He developed chronic pain, fell away "from the fitness journey that had changed his life", became socially withdrawn, and regrets not achieving as much in his career as he had initially hoped.
- [95] In assessing quantum of non-pecuniary damages, Mr. Suico relies on three motor vehicle accident cases in particular:
- a) In *Easton v. Wolovets*, 2015 BCSC 210, the plaintiff was 33 years old at the time of trial. The plaintiff had chronic myofascial pain, thoracic outlet syndrome, depression, and anxiety in vehicles. Further, the plaintiff lost the ability to participate in several outdoor pastimes and had partial disability from his work, but there is no indication he suffered from headaches. The plaintiff was awarded non-pecuniary damages of \$125,000. Mr. Suico submits that adjusting the award for inflation, the award represents \$158,800 in 2024 dollars.
 - b) In *Winick v. Goddard*, 2020 BCSC 4, the plaintiff was 26 years old at the time of trial. The plaintiff had soft tissue injuries to her neck and back, thoracic outlet syndrome, headaches, and suffered occasional radiating pain in her legs. The plaintiff had to stop swimming but was able to continue hiking and skiing. The plaintiff was awarded non-pecuniary damages of \$110,000. Mr. Suico says that this represents \$129,900 in 2024 dollars.
 - c) In *De Fazio v McClelland*, 2020 BCSC 704, the plaintiff was 31 at the time of trial. She suffered myofascial pain to her neck, back, and shoulders; headaches; and thoracic outlet syndrome. The plaintiff was awarded non-pecuniary damages of \$110,000. Mr. Suico says that this represents \$129,900 in 2024 dollars.

[96] Mr. Suico says that his circumstances are most similar to the plaintiff in Easton because while the plaintiffs in Winick and De Fazio suffered similar injuries, it appears that the accidents caused less of an impact on their lives. In addition, Mr. Suico argues that he gained weight after the Accident which is not something noted for any of the other plaintiffs. Mr. Suico says that although there is limited caselaw considering the impact of weight gain on a non-pecuniary award, this should be considered and is something that can be measured since "[m]any people will spend thousands of dollars on fitness programs and diet plans in their efforts to lose weight".

[97] Ms. Liu relies on a number of authorities in which active plaintiffs sustained soft tissue injuries resulting in chronic pain primarily to the neck and back and some related symptoms including headaches and mood alteration. Of the cases referred to by Ms. Liu I find that the following involves circumstances comparable to those of Mr. Suico :

- a) In *Avishek v. ICBC*, 2023 BCSC 1856 the male plaintiff was 35 years old at the time of the accident, and 40 at trial. He was physically fit with no injuries. He had an active social life and enjoyed hiking, skiing, and playing football and hockey.

As a result of the accident, the plaintiff was found to suffer from chronic painful diffuse myofascial injuries to his back and neck. The Court found that these injuries were permanent and made him less capable of functioning. As a result of the injuries, the plaintiff was also found to suffer from low mood, which was recognized as causing a vicious cycle with his pain. The plaintiff was no longer as lively, and completely lost touch with his friends. Although he was able to continue to work, he did so with pain.

The plaintiff was awarded non-pecuniary damages of \$80,000

- b) In *Henry v. Fontaine*, 2022 BCSC 930, the male plaintiff was 27 years old at the time of the accident, and 32 at trial. Before the accident he was in good health, active, and worked long hours.

As a result of the accident, he was found to suffer from whiplash associated disorder which became chronic, a facet injury to his neck, a left-shoulder rotator cuff impingement, a mood disorder, and headaches. Although he continued to engage in the same activities as before, they were no longer as enjoyable to him. He missed little work, and did not request accommodations.

The plaintiff was awarded non-pecuniary damages of \$80,000 (\$84,823.07 in 2024 dollars)

- [98] Ms. Liu submits that non-pecuniary damages should be assessed at \$85,000. She acknowledges that Mr. Suico continues to experience ongoing neck and back pain caused by the Accident, but contends that these symptoms have not impacted his ability to travel, remain involved in the real estate community, network and mentor other real estate agents, and to remain a key supporting figure in his siblings' lives. Ms. Liu notes that Mr. Suico has remained gainfully employed in his career of choice - being a realtor.
- [99] Ms. Liu accepts that Mr. Suico has found it more difficult to exercise which has resulted in weight gain and impacted his sense of self worth. In terms of the weight gain, she notes that there is no evidence as to when Mr. Suico began gaining weight and no medical evidence attributing the weight gain to the Accident.
- [100] Further, Ms. Liu points to a lack of evidence regarding Mr. Suico's change in mood and social habits. In terms of mood, other than Mr. Suico's self-reporting, she says that only two witnesses provided relevant evidence. First, his sister Rithchellyn Suico stated that Mr. Suico was short tempered with her about failing to clean up. Second, Mr. Diaz described Mr. Suico as "less go-gettery" and less enthusiastic over the past few years. Ms. Liu notes that Mr. Diaz did not know Mr. Suico before the Accident and is therefore unable to comment on the impact of Accident on his level of enthusiasm.
- [101] In terms of social habits, Ms. Liu says there is evidence that Mr. Suico continues to enjoy social outings and points to Mr. Suico's social media posts about trips in 2018 and 2019. Further, the defendant highlights Mr. Diaz's evidence that Mr. Suico is "one of the most active" in a real estate group they are part of, and that Mr. Suico is a "relatable guy" who is "getting better at marketing himself". Ms. Liu also points to Mr. Suico's mentorship of another agent, Mr. On.
- [102] Ms. Liu submits that there is potential for significant improvement in Mr. Suico's condition. This includes treatment options not yet pursued including kinesiology and medication.

Analysis - Non-Pecuniary Damages

- [103] In this case Mr. Suico is still relatively young which hopefully means that the impact of his Accident-related symptoms on his quality of life will diminish over time.
- [104] As a result of the Accident Mr. Suico sustained soft tissue injuries which resulted in pain. I find that Mr. Suico's post-Accident level of pain, from injuries which I accept were caused by the Accident, decreased in the months following the Accident to a low-moderate level and have persisted at a lower level since that time. I accept Dr. Chow's opinion that it was unlikely that Mr. Suico will experience a complete resolution of his pain symptoms, which is consistent with the opinion of Dr. Zaki. I note that Dr. Zaki is hopeful that with treatment Mr. Suico's pain symptoms will improve.

- [105] Both Dr. Chow and Dr. Zaki conclude that Mr. Suico is able to continue to work as a realtor. Dr. Chow's opinion is that he can pace his work-related activities and rest as needed.
- [106] Dr. Zaki's opinion is that Mr. Suico is not limited in his ability to perform household chores but lacks the motivation to do so, which is consistent with the opinion of Dr. Waisman. Dr. Chow's opinion is that Mr. Suico will likely require some assistance in performing household tasks. I conclude that Mr. Suico has lost some capacity to perform household tasks which I will consider in determining the amount to be awarded for non-pecuniary damages.
- [107] I find that Mr. Suico 's adjustment disorder has resulted in his focussing excessively on his pain symptoms which has resulted in emotional suffering.
- [108] I do not find that this emotional suffering has resulted in as severe a change in his quality of life as he contends.
- [109] With respect to his family or other relationships, as Ms. Liu submits, the only evidence in this respect comes from his sister, Ms. Suico, who testified that he occasionally is more irritable. As well, the evidence at trial establishes that after the Accident Mr. Suico continued to engage in social activities including remaining actively involved in the real estate community - including networking with and mentoring other real estate agents.
- [110] I accept that as a result of pain caused by his Accident-related injuries Mr. Suico finds it more difficult to exercise which resulted in some weight gain.
- [111] I do not find that circumstances of the plaintiffs in the authorities relied upon by Mr. Suico are comparable to his. In each of the cases he cited the plaintiff suffers from accident-related thoracic outlet syndrome. In two of those cases the plaintiff was prevented from participating in a sporting activity they once enjoyed. I find that Mr. Suico 's circumstances are more analogous to those set out in the decisions cited by Ms. Liu.
- [112] In summary, I do not find that the evidence supports Mr. Suico 's submission that the Accident caused profound changes in his life. Although he continues to suffer pain and related psychological symptoms he has not completely abandoned his fitness journey, has not ceased to socialize with friends and colleagues or to travel and continues to work in his chosen profession.
- [113] I find that an appropriate award of non-pecuniary damages in this case to be \$85,000.

Past Loss of Earning Capacity

- [114] Compensation for past loss of earning capacity is to be based on what the plaintiff would have earned but for the injury that was sustained: *Hartman v. MMS Homes Ltd.*, 2023 BCCA 400 at para. 64 citing *Rowe v. Bobell Express Ltd.*, 2005 BCCA 141 at para. 30; *M.B. v. British Columbia*, 2003 SCC 53 at para. 49.

- [115] 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 in the ordinary course the court must deduct the amount of income tax payable from lost gross earnings: *Hudniuk v. Warkentin*, 2003 BCSC 62 at para. 42. The trial judge has a discretion to determine what period or periods of time are appropriate for the determination of net income loss. In exercising this discretion, the trial judge should keep in mind that the plaintiff is to be put back in the position he or she would have been if the accident had not occurred: *Lines v. W & D Logging Co. Ltd.*, 2009 BCCA 106 at paras. 181-186.
- [116] The burden of proof of actual past events is a balance of probabilities. An assessment of loss of both past and future earning capacity involves consideration of hypothetical events. The plaintiff is not required to prove these hypothetical events on a balance of probabilities. The future or hypothetical possibility will be taken into consideration as long as it is a real and substantial possibility and not mere speculation: *Athey* at para. 27; *Dornan* at para. 94.
- [117] The burden of proof is on the plaintiff to prove on a balance of probabilities those facts that show that the injuries they sustained as a result of an accident impaired their ability to earn that income. The principles are as follows:
- (a) A causal connection must be established, on a balance of probabilities, between the accident and the pecuniary loss claimed;
 - (b) The assessment of the loss of income involves a consideration of hypothetical events;
 - (c) The hypothetical events need not be proven on a balance of probabilities;
 - (d) A hypothetical possibility will be considered as long as it is established there is a real and substantial possibility, and not mere speculation;
 - (e) Once the hypothetical possibility is established, the court must consider the likelihood of the event occurring in determining the measure of damages; and
 - (f) The trial judge must determine what approach to use to quantify the loss.

Grewal v. Naumann, 2017 BCCA 158 at para. 48 (Goepel J.A. in dissent, but not on this point) and *Smith v. Knudsen*, 2004 BCCA 613 [Smith] at paras. 36-37.

Position of the Parties

- [118] Following the Accident, Mr. Suico missed 16 days of work at 1-800-GOT-JUNK. The parties agree that Mr. Suico is entitled to recover these lost wages but disagree on quantum. Mr. Suico submits that these 16 days represent a pre-tax income loss of \$2,800. The defendant submits that Mr. Suico is entitled to recover \$1,615.39, which I assume is an after-tax amount.

- [119] In addition, Mr. Suico says he is entitled to additional compensation for earnings he would have made as a realtor with Sutton Realty had the Accident not occurred. Mr. Suico says at the time of the Accident his real estate career was growing and he was on track to have a successful career. Because of the Accident, Ms. Suico submits that he had to work at a reduced capacity, lacked the motivation to grow his client base, and lost sales. He says that because repeat business and referrals from past clients are an important part of a realtor's business these losses "will have a snowball effect for the rest of his career".
- [120] Mr. Suico 's earnings as a realtor rose from \$16,500 when he started in 2014 to \$63,000 in 2017, the year of the Accident. His earnings as a realtor continued to increase with some fluctuation in the following years, as follows: \$96,000 in 2018; \$76,900 in 2019, \$73,000 in 2020, \$134,000 in 2021, \$118,000 in 2022, \$111,000 in 2023. He estimates he will earn \$159,000 in 2024.
- [121] Mr. Suico submits, without evidence, that the increase in his income as a realtor since 2017 results from an increase in property values, as opposed to an increase in the number of property transactions. He says that he only closes on average 11-12 transactions per year but submits, again without evidence, that "other realtors of similar skill and experience are able to close more".
- [122] In closing submissions Mr. Suico submitted that but for the Accident he would have been able to work an additional two days per week as a realtor. He submits that but for this loss of capacity he would have been able to close an additional four transactions per year, earning \$12,000 per transaction in the seven years since the Accident, or \$48,000 per year. Therefore, Mr. Suico submits his total loss of real estate earnings in the seven-year period since the Accident total \$336,000. He submits that, combined with his losses from GOT JUNK of \$2,800, this results in loss of past income of \$338,800, before deductions for income tax.
- [123] Ms. Liu submits that Mr. Suico has failed to adduce sufficient evidence to demonstrate a causal relationship between the Accident and any real estate earnings loss. She contends that to show a causal relationship Mr. Suico was required to adduce evidence establishing that he had the opportunity to sell real estate to the demographic he was targeting, that there were available properties the demographic was interested in, but that he was not able to make the sales because of the physical or psychological impacts of the Accident. Ms. Liu submits that Mr. Suico failed to discharge this burden.
- [124] Ms. Liu points to four areas in particular where she says Mr. Suico has failed to adduce sufficient evidence on causation. First, there is no evidence as to the sales of other Sutton Realty employees or real estate agents "of a similar vintage" during the years in question. Second, there is limited evidence as to Mr. Suico's potential customers during this period. She submits that the only evidence in this area was from Mr. Mabatan who bought a condo from Mr. Suico and that the evidence does not establish Mr. Mabatan would choose another realtor to assist with a later transaction due to any deficiencies in Mr. Suico's service caused

by the Accident. Third, she submits there is no evidence that Mr. Suico reported to his brokerage that he was struggling due to the Accident. Finally, she submits that there is no evidence of any lost transactions due to the Accident beyond Mr. Suico's speculation about why certain people did not respond to him.

[125] Ms. Liu submits that even if this Court finds there is a causal link between the Accident and past ability to earn income, Mr. Suico has not demonstrated that there is a real and substantial possibility that any hypothetical referrals would have resulted in Mr. Suico completing more real estate transactions. In particular, Ms. Liu submits that there is no evidence about the sales volume for Mr. Suico 's brokerage, or for realtors targeting a similar market and demographic, for the years 2017-2021 and 2023. She says that while there is evidence for 2022 and 2024, it is insufficient to draw an inference about what Mr. Suico could have earned in these years absent the Accident.

[126] Ms. Liu contends that Mr. Suico did not give clear evidence about what prevented him from closing real estate transactions during the years in question. Ms. Liu acknowledges Mr. Suico 's evidence that he had trouble sleeping, being socially active, spent time pursuing treatment, and was "giving away buyers he can't help", but says this evidence lacks details about when and how these various issues affected him and over what period of time. As well, Ms. Liu contends that Mr. Suico has failed to provide sufficient evidence regarding his business plan, his target clientele, and that their properties of interest were available. She submits that Mr. Suico is asking the Court to infer that he would have completed more real estate transactions without providing a factual foundation to support this inference - which amounts to inviting the Court to speculate about his without Accident pre-trial earnings potential.

Analysis - Past Loss of Income Earning Capacity

[127] The first question to be answered is whether Mr. Suico has proven on a balance of probabilities that the injuries he sustained in the Accident caused or contributed to the loss for which damages were sought: Smith at para. 26. In this case, that requires Mr. Suico to show that his proven Accident-related injuries and symptoms resulted in a reduced ability on his part to work as a realtor.

[128] If I accept that Mr. Suico suffered such a loss of capacity the next task is to determine, by an analysis of hypothetical possibilities, what his potential without-Accident earnings may have been: Smith at para. 29.

Causation

[129] There is limited expert evidence regarding a reduction in Mr. Suico's capacity to work as a realtor after the Accident. None of the experts who testified at trial suggested that Mr. Suico was unable to work as a realtor after the Accident. Dr. Chow's statement that "it was not unreasonable that [Mr. Suico] was not able to work soon after the accident" suggests a

short-term reduction in Mr. Suico's capacity [underline added]. Dr. Waisman provided an opinion that "since the accident he has been fragile and vulnerable to the effects of stress" but did not state that this resulted in a post-Accident loss of capacity.

- [130] Mr. Suico 's evidence at trial with respect to the impact of his Accident-related injuries and symptoms on his ability to work as a realtor was also limited. He testified that after the Accident he took time of work from GOT JUNK (the parties agree to 16 days lost work from this job), but was able to do some work as a realtor. He testified that he suffered from a reduction in sleep after the Accident, reducing his sleep to between six and seven hours per night. He testified that his physical symptoms reduced his ability to perform certain functions he did before the Accident including conducting door knocking marketing activities, taking listings requiring him to drive longer distances and participating in or attending as many open houses. He testified that as a result of his pain symptoms he takes breaks. I compare this testimony with the evidence at trial establishing that after the Accident Mr. Suico travelled more than he did before including travelling in 2018 and 2019 to Seattle, Las Vegas, California and for one month to Southeast Asia.
- [131] Although Mr. Suico submits that he lost time, which he would otherwise have committed to work as a realtor, to attend at medical treatments, the evidence at trial does not bear this submission out. Between October 2018 and July 2023, Mr. Suico did not attend at any RMT or physiotherapy treatments. Between October 2018 and February 2020, he only attended at 17 acupuncture treatments. He did not start seeing a counsellor until September 2020, attended at 21 counselling sessions until June 2021 and did not see his counsellor again until September 2022, when he saw his counsellor three times and then not again until July 2023.
- [132] I do not find that Mr. Suico 's testimony that the psychological impacts of his Accident-related symptoms caused him to become introverted to the extent that this has impacted his ability to earn income as a realtor. During his cross-examination Mr. Suico agreed that he remained passionate about his job as a realtor and retained his "all-in attitude".
- [133] With respect to any loss of income resulting from Mr. Suico's right arm and hand symptoms, as set out above I do not find that these symptoms were caused by the Accident. As a result, I do not attribute any causal link to these symptoms and a reduction in Mr. Suico 's post-Accident earning capacity.
- [134] The evidence of Mr. Suico's managing broker at Sutton Realty, Mr. Or, does not suggest that after the Accident Mr. Suico was struggling or that his injuries or symptoms resulted in a loss of capacity to work as a realtor. Mr. Or's testimony at trial indicates that the subject of the Accident only came up once, when Mr. Or went to shake Mr. Suico's hand. I find it noteworthy that several years after the Accident Mr. Or remained impressed by Mr. Suico's abilities as a realtor and sought to recruit him to his new brokerage. As well, the evidence from Mr. Suico 's fellow realtors does not indicate that that Mr. Suico 's ability to function as a realtor was impacted by the Accident. Ronn Diaz testified that Mr. Suico was an enthusiastic realtor and Nelson On testified that he acted as a mentor, after the Accident.

[135] In summary, Mr. Suico has not provided sufficient evidence at trial that as a result of his Accident-related symptoms he lost real estate business beyond speculating at trial why certain clients did not contact him with further business. I am not satisfied, on a balance of probabilities, that his proven Accident-related impacts resulted in a decrease in his ability to obtain listings or close sales.

Hypothetical Possibility Analysis

[136] Even if I was to find that Mr. Suico 's Accident-related injuries resulted in a past loss of income earning capacity, which I do not find is the case, I do not find that Mr. Suico has demonstrated a hypothetical possibility that he would have completed the number of real estate transactions he hoped to complete.

[137] As set out earlier, Mr. Suico submits that absent the Accident he could have completed an average of four additional real estate transactions per year in each of the past seven years. He invites this Court to find that because he was a motivated realtor before the Accident that he would have closed between approximately 15 and 17 real estate transactions per year over the last seven years, instead of his actual average of 11 or 12 transactions per year, if the Accident had not occurred.

[138] To accept this submission this Court must be satisfied that there is a real and substantial possibility that absent the Accident Mr. Suico would have been able to reach his intended goal in each of these years. The burden of proving a real and substantial possibility, although lower than proof on a balance of probabilities, remains on Mr. Suico .

[139] Mr. Suico 's testimony that he planned to close this number of transactions does not establish a real and substantial possibility that he would achieve this goal. Mr. Or testified that only 10% of realtors achieve "Medallion" status, which at this time is achieved by closing 20-25 real estate transactions in a year, although this varies from year to year. This evidence establishes that in general, the vast majority, 90% of realtors, do not achieve medallion status. As well, Mr. Or testified that realtors at Sutton Realty would be encouraged to target medallion status between their fifth and tenth year being a realtor. Mr. Suico has only have been a realtor for ten years in 2024 - and according to his testimony was on track to achieve Medallion status in that year.

[140] There was no evidence called at trial establishing what percentage of realtors in Mr. Suico's brokerage, Sutton Realty, completed the 15-17 transactions Mr. Suico says he could have completed absent the Accident - or from other comparable brokerages. This type of evidence, if tendered, would have assisted in determining whether there was a real and substantial possibility that Mr. Suico could have achieved this transaction volume.

[141] I do not consider that evidence of Mr. On or Mr. Diaz regarding their sales volumes to be helpful. Mr. Diaz testified that he closed 23 real estate transactions in 2022, but there is no evidence regarding the value of those transactions or how much Mr. Diaz earned in commissions that year. Mr. On testified that he has earned \$265,000 in gross commissions in

2024 but again, it is not known how many transactions he closed and the value of those transactions. As well, with respect to Mr. On, the evidence indicates that he had significant previous experience in commercial banking and residential mortgages which may explain his higher earnings in 2024.

Conclusion on Damages for Past Loss of Income Earning Capacity

[142] Aside from losses resulting from his inability to work at GOT JUNK for a 16-day period following the Accident, which I assess at \$1,615.39, I am not satisfied that Mr. Suico has proven that he is entitled to damages for past loss of income earning capacity.

Loss of Future Earning Capacity

[143] The central task before the court in considering damages for loss of future earning capacity is to compare the likely future of the plaintiff's working life without the injury to their likely future working life with the injury: *Davies v. Penner*, 2023 BCCA 300 [Davies] at para. 25; *Rab v. Prescott*, 2021 BCCA 345 [Rab] at para. 65. A plaintiff is not entitled to an award for loss of earning capacity in the absence of any real and substantial possibility of a future event leading to income loss: *Ploskon-Ciesla v. Brophy*, 2022 BCCA 217 [Ploskon-Ciesla] at para. 14.

[144] In a trilogy of decisions in 2021 the Court of Appeal set out the proper approach to assessing a claim for damages for loss of future earning capacity: *Dornan*; *Rab*; and *Lo v. Vos*, 2021 BCCA 421. The Court identified a three-step process for assessing damages, described in *Rab* as follows:

[47] a three-step process emerges for considering claims for loss of future earning capacity, particularly where the evidence indicates no loss of income at the time of trial. The first is evidentiary: whether the evidence discloses a potential future event that could lead to a loss of capacity (e.g., chronic injury, future surgery or risk of arthritis, giving rise to the sort of considerations discussed in [*Brown v. Golaiy*, 26 B.C.L.R. (3d) 353, 1985 CanLII 149 (S.C.)]). The second is whether, on the evidence, there is a real and substantial possibility that the future event in question will cause a pecuniary loss. If such a real and substantial possibility exists, the third step is to assess the value of that possible future loss, which step must include assessing the relative likelihood of the possibility occurring--see the discussion in *Dornan* at paras 93-95.

[145] In conducting the first step from *Rab* the evidentiary requirements will vary depending on the type of case. There are, broadly, two types of cases involving the loss of future earning capacity: (1) more straightforward cases, for example, when an accident causes injuries that render a plaintiff unable to work at the time of trial and for the foreseeable future and (2) less straightforward cases, for example, those in which a plaintiff's injuries have led to continuing deficits or exposed them to future problems, but the plaintiff's income at trial is similar to what it was at the time of the accident: paras. 29-30.

- [146] Mr. Suico's circumstances are not equivalent to the more straightforward cases described in Rab, given that at the time of trial Mr. Suico continued to work as a realtor and was earning more in that profession than he was at the time of the Accident. Accordingly, relevant evidence in the first stage of the analysis in this case includes any evidence establishing that Mr. Suico's Accident-related injuries may expose him to future problems.
- [147] The second step of the analysis set out in Rab requires the plaintiff to prove there is a real and substantial possibility that the future event in question will give rise to pecuniary loss. Here, after determining that the plaintiff may suffer a loss of capacity, the court evaluates the likelihood that it will affect the plaintiff's ability to earn income. The standard of proof "is a lower threshold than a balance of probabilities but a higher threshold than that of something that is only possible and speculative": Gao v. Dietrich, 2018 BCCA 372 at para. 34; Ploskon-Ciesla at para. 15.
- [148] At the third step - the valuation stage - there are two possible approaches to assessing loss of future earning capacity, being the earnings approach and the capital asset approach: Davies at para. 28; Perren v. Lalari, 2010 BCCA 140 at para. 32. The earnings approach will generally be more useful when the loss is easily measurable: Lamarque v. Rouse, 2023 BCCA 392 at para. 38; Perren at para. 32. Where the loss "is not measurable in a pecuniary way", the capital asset approach is more appropriate: Perren at para. 12.
- [149] The earnings approach involves a form of math-oriented methodology that can include: (1) postulating a minimum annual income loss for the plaintiff's remaining years of work, multiplying the annual projected loss by the number of remaining years and calculating a present value; or, (2) awarding the plaintiff's entire annual income for a year or two: Pallos v. Insurance Corp. of British Columbia, 100 B.C.L.R. (2d) 260, 1995 CanLII 2871 at para. 43 (C.A.); Ng v. Corness, 2023 BCCA 185 at para. 18; Gilbert at para. 233.
- [150] The capital asset approach involves consideration of the factors described in Brown v. Golaiy, 26 B.C.L.R. (3d) 353 at 356, 1985 CanLII 149 (S.C.), including whether the plaintiff (1) has been rendered less capable overall of earning income from all types of employment; (2) is less marketable or attractive as a potential employee; (3) has lost the ability to take advantage of all job opportunities that might otherwise have been open; and (4) is less valuable to himself as a person capable of earning income in a competitive labour market: see also Ploskon-Ciesla at para. 13. Though the capital asset approach is not a "mathematical calculation", the trial judge must still explain the factual basis of the award: Dornan at paras. 151, 158; Morgan v. Galbraith, 2013 BCCA 305 at para. 56.

Position of the Parties

- [151] Mr. Suico submits that his loss of future earning capacity should be assessed, applying an earnings approach, by considering three potential scenarios:

- a) Scenario #1 - the "middle track career". In this scenario, Mr. Suico would see a gradual increase in business over his career. He would now be closing an average of 19 transactions per year and performing consistently until age 70. Mr. Suico calculates lifetime earnings under this scenario at of \$6,392,113 using a CIVJI multiplier of 25.8790. Mr. Suico submits that absent the Accident, the likelihood of this scenario is 50%.
 - b) Scenario #2 - the "building my empire career". In this scenario, Mr. Suico would have achieved a high level of success in his career either as a solo realtor or as the head of a team. Mr. Suico would be earning an average of \$299,000 per year totalling lifetime earnings of \$7,737,821. Mr. Suico submits that the likelihood of this scenario is 25%.
 - c) Scenario #3 - the "modestly successful career". In this scenario, Mr. Suico would have had a lower level of success closing an average of 16 transactions per year with lifetime earnings of \$5,382,382. Mr. Suico submits that the likelihood of this scenario is 25%.
- [152] Mr. Suico submits that his residual earning capacity is \$150,000 which results in lifetime earnings of \$3,881,850 to the age of 70. He submits that this lifetime with-Accident earnings amount should be deducted from product derived from the three scenarios describe above[1], resulting a damages award for loss of future income earning capacity of \$2,594,257.25.
- [153] Mr. Suico submits that a general contingency deduction of 15% is appropriate which would reduce the award to \$2,200,000. Mr. Suico argues that while there is a risk that he might have developed thoracic outlet syndrome absent the Accident, this negative contingency has to be balanced against the positive contingency of his excellent fitness and health prior to the Accident which would have given him health advantages over the general population.
- [154] Ms. Liu submits that Mr. Suico has failed to address the first two steps in the Rab test. Specifically, Mr. Suico has failed to prove that there is a real and substantial possibility of a future event which could lead to a loss of capacity and cause a pecuniary loss. She says that all of the medical experts agree that Mr. Suico is capable of continuing his career as a real estate agent. Further, the defendant submits that Mr. Suico 's scenarios do not constitute real and substantial possibilities and instead are merely "speculation with no evidentiary foundation".
- [155] Alternatively, Ms. Liu submits that if the Rab test has been met, a modest award should be made because there is a low likelihood that the injuries from the Accident will cause a pecuniary loss. She contends that Mr. Suico has failed to lead evidence to show a difference between his pre-Accident and post-Accident career trajectories. She submits that any award for future loss of income earning capacity should be determined applying a loss of capital asset approach and suggests damages of no more than \$150,000 should be awarded - based on one years' earnings.

Analysis - Loss of Future Income Earning Capacity

- [156] In his closing submissions Mr. Suico did not set out his argument concerning the first step described in Rab to be carried out in a less straightforward case such as this, where a plaintiff's income at trial is similar to what it was at the time of the accident. That is, Mr. Suico did not set out what evidence discloses a potential future event that could lead to a loss of capacity and did not set out whether there is a real and substantial possibility that such future event will cause a pecuniary loss. Instead Mr. Suico launched into third step, being an assessment of damages made using the earnings approach and based on potential hypothetical future earnings scenarios.
- [157] Although Mr. Suico suffers from chronic neck and back pain which is caused by the Accident this does not satisfy the first step in the Rab analysis. As set out by the Court of Appeal in Davies:
- [44] the fact that a claimant experiences chronic pain does not, on its own, satisfy the first step in the Rab analysis. There is no "common sense" inference that can be drawn from the mere existence of chronic pain. It is only possible for a judge to draw an inference based on all of the medical and lay evidence about the nature and extent of a claimant's injuries, the claimant's circumstances, and the impact that work has on their ability to function.
- [158] In my view, Mr. Suico 's evidence does not establish a future event which could lead to a loss of capacity, which is fatal to his claim for damages for loss of future income earning capacity.
- [159] The evidence at trial establishes that it was Mr. Suico 's intention before the Accident, and it remains his intention, to continue to work as a real estate agent for the rest of his working his life. Mr. Suico continues to work as a realtor and has increased the number of real estate transactions he completed each year. As a result, the question is whether there is any evidence suggesting that he may suffer a reduced capacity to do so in the future.
- [160] With respect to Mr. Suico 's prognosis, despite some differences in diagnosis none of the medical experts who testified at trial considered that Mr. Suico was incapable of continuing to work as a real estate agent going forward, or at risk of not being able to do so to the extent he is now, as a result of his Accident-related symptoms. Dr. Chow indicated that Mr. Suico is capable of working as a real estate agent, that his job involves sedentary to light physical tasks and that Mr. Suico can pace his activities and rest as needed - although he does not state in his report that rest or pacing is required. Dr. Zaki concluded that Mr. Suico 's prognosis was good and that he is capable of continuing to work as a real estate agent and should be encouraged to do so. Dr. Salvian concluded that Mr. Suico can work as a realtor as the job requirements are not overly physical, and that he can organize his time and schedule to stretch and move as needed. Dr. Waisman did not express any opinion with respect to the degree of any psychological disability and any present or future work limitations arising from such disability.

- [161] As set out earlier, during his cross-examination Mr. Suico testified that he remains "all-in" in his efforts to excel as a realtor, despite his chronic pain symptoms. The circumstances of this case are not comparable to those in other cases in which damages for loss of future income earning capacity were awarded to plaintiffs suffering from chronic pain. For example, in *Davies* the trial judge found it possible that the respondent may be unable to work as a bus driver due to continuing pain as she gets older: see *Davies*, at para. 47. Nor are the circumstances similar to those in *Li v. Dong*, 2023 BCSC 472, in which the trial judge found it possible that Mr. Li's strength and resilience may diminish to the point where his pain symptoms would make it reasonable for him to retire early: at para. 186.
- [162] Even if I was to find that Mr. Suico had shown a real and substantial probability of a future event resulting in a loss of capacity to work as a realtor I would not find that he has proven, with admissible evidence, that there is a real and substantial possibility that this would result in a reduction in the amount of real estate transactions he could complete. His hypothetical that he would have concluded between 20 and 50 real estate transactions per year until he reached the age seventy, is without evidentiary foundation - both in terms of potential annual sales volumes, earnings per transaction and the period over which Mr. Suico might achieve such high volumes.
- [163] As a result, I award no amount for loss of future income earning capacity.

Loss of Housekeeping Capacity

- [164] In some circumstances, it may be appropriate to augment a non-pecuniary award with an award for loss of housekeeping capacity. The Court of Appeal provided guidance on whether a discrete award should be made in *McKee v. Hicks*, 2023 BCCA 109:
- [112] To sum up, pecuniary awards are typically made where a reasonable person in the plaintiff's circumstances would be unable to perform usual and necessary household work. In such cases, the trial judge retains the discretion to address the plaintiff's loss in the award of non-pecuniary damages. On the other hand, pecuniary awards are not appropriate where a plaintiff can perform usual and necessary household work, but with some difficulty or frustration in doing so. In such cases, non-pecuniary awards are typically augmented to properly and fully reflect the plaintiff's pain, suffering and loss of amenities.

See also *Kim v. Lin*, 2018 BCCA 77 at para. 33.

- [165] Whether a court chooses a distinct award or one that is included in the general non-pecuniary award, it is important to do so with an eye to the differing rationales behind them: *Kim* at para. 34.

Position of the Parties

[166] Mr. Suico notes that both Dr. Salvian and Dr. Chow recommend that he receive housekeeping support. He submits that he should be awarded \$15,000 for loss of housekeeping capacity. Mr. Suico currently hires cleaning assistance every 2 months for heavier cleaning tasks. The cost of \$120 is currently split with his roommate, but he says it is likely he will be able to move into his own home in the future and will have to pay the full cost himself. Given this, he calculates his future cleaning costs as \$720 a year, for a total cost of approximately \$15,000 by the time he turns 65.

[167] Ms. Liu contends that no amount should be awarded for loss of housekeeping capacity.

Analysis - Loss of Housekeeping Capacity

[168] I note that Dr. Chow only stated as follows with respect to housekeeping "[Mr. Suico] will require some assistance in housekeeping tasks since the accident". Dr. Chow does not set out how long such support will be required and for what purposes. He notes in his report that Mr. Suico performs housework such as laundry, making beds, cleaning and grocery shopping but with pain. Dr. Salvian's opinion is that Mr. Suico needs assistance with heavy seasonal housework such as wall and window washing, painting, raking, shovelling or hoeing - although I note that there is no evidence that Mr. Suico currently carries out any of these tasks. Dr. Salvian also notes that Mr. Suico should avoid overhead cupboards and shelving and avoid carrying heavy items. It is unclear in either of these expert reports what physical injuries result in these requirements.

[169] In his cost of future care report Russell McNeil, who assessed Mr. Suico on June 6, 2023, stated that Mr. Suico had the capacity to perform household chores (cooking and cleaning) although would need to pace himself to manage pain.

[170] In my view, the evidence does not establish that Mr. Suico's Accident-related injuries and symptoms have resulted in a situation where he is unable to perform his current housekeeping duties - but rather, that he performs such duties with pain or with the assistance of friends/girlfriends or family. This is not dissimilar to Mr. Suico's situation before the Accident. As a result, I do not find that it appropriate to award any damages under this head. I consider that Mr. Suico has been compensated for any pain he experiences performing household duties in the award I have made for non-pecuniary damages.

Costs of Future Care

[171] A plaintiff is entitled to compensation for the costs of future care based on what is medically necessary to restore the plaintiff to a position as though the accident had not occurred. 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 available medical evidence to preserve and promote the

plaintiff's mental and physical health: *Milina v. Bartsch*, 49 B.C.L.R. (2d) 33, 1985 CanLII 179 (S.C.) [Milina]; *Quigley v. Cymbalisty*, 2021 BCCA 33 at para. 43.

- [172] The test for determining the appropriate award under the heading of cost of future care is an objective one based on medical evidence, and it must be fair to both parties: *Pang v. Nowakowski*, 2021 BCCA 478 [Pang] at para. 58. For an award of future care: (1) there must be a medical justification for claims for cost of future care; and, (2) the claims must be reasonable: *Milina* at 84; *Tsalamandris v. McLeod*, 2012 BCCA 239 at paras. 62-63; *McGuigan Estate v. Pevach*, 2024 BCCA 106 at para. 92 citing *Paur v. Providence Health Care*, 2017 BCCA 161 [Paur] at para. 109. Future care costs are "justified" if they are both medically necessary and likely to be incurred by the plaintiff: *Peters v. Taylor*, 2023 BCCA 391 at para. 7 citing *Warick v. Diwell*, 2017 BCSC 68 at paras. 203-209.
- [173] An award of damages for costs of future care is partly prediction and prophecy: *Pang* at para. 58. In *Pang* at para. 57, Justice Voith identified three additional considerations of which the court must be satisfied in this analysis: (1) that the plaintiff would, in fact, make use of the particular care item; (2) that the care item is one that was made necessary by the injury in question and that it is not an expense the plaintiff would, in any event, have incurred; and, (3) that there is no significant overlap in the various care items sought.
- [174] It is not necessary that a medical expert testify to the medical necessity of each and every item of care that is claimed: *Paur* at para. 109.
- [175] The extent, if any, to which a future care costs award should be adjusted for contingencies depends on the specific care needs of the plaintiff. In some cases, negative contingencies are offset by positive contingencies and, therefore, a contingency adjustment is not required. In other cases, however, the award is reduced based on the prospect of improvement in the plaintiff's condition or increased based on the prospect that additional care will be required. Each case falls to be determined on its particular facts: *Gilbert* at para. 253.
- [176] An assessment of damages for cost of future care is not a precise accounting exercise: *Krangle (Guardian ad litem of) v. Brisco*, 2002 SCC 9 at para. 21; *Pang* at para. 58.

Position of the Parties

- [177] Mr. Suico relies on the recommendations of Mr. McNeil, whose report and testimony was accepted as evidence at trial. Based on the cost estimates for various care items set out in Mr. McNeill's report, Mr. Suico seeks a total award of \$72,000 for pain management equipment, gym membership, passive and active treatments, counselling and travel costs.
- [178] Ms. Liu concedes that an award for cost of future care is appropriate but challenges the quantum. She submits that an total award of \$16,000 would be appropriate.

Analysis - Cost of Future Care

[179] Mr. McNeil assessed Mr. Suico on June 6, 2023, and prepared a cost of future care report dated July 19, 2023. In addition to his assessment, Mr. McNeil based his recommendation on cost of future care on the medical reports of Dr. Beckman, Dr. Chow, and Dr. Waisman.

[180] Of the future care cost recommendations made by Mr. McNeil, the following are agreed to by Ms. Liu, which I find are medically justified and reasonable:

- a) pain management devices:
 - i. a heat pad: initial cost of \$69.99, to be replaced every 3 years* for a total of \$496;
 - ii. a body pillow: initial cost of \$49.99 to be replaced every 2 years* for a total cost of \$531.93; and
 - iii. a TENS unit: initial cost of \$45 to be replaced every five years for a total cost of \$287.30.
- b) ergonomical devices to manage pain and assist productivity:
 - i. a height adjustable desk \$929;
 - ii. a height adjustable keyboard tray \$199;
 - iii. a height adjustable computer monitor arm \$169; and
 - iv. a footrest \$55.95.
- c) 48 counselling sessions over a one-year period for a total cost of \$10,800.

[181] Mr. McNeil recommends that Mr. Suico receive passive therapies including massage therapy, physiotherapy and acupuncture and has provided an annual cost estimate for all of these therapies, assuming such treatments are provided twelve times per year, totalling \$3,840. Mr. McNeil deferred to medical specialists for the number and frequency of these sessions. In addition, Mr. McNeil recommends that Mr. Suico attend at 24 sessions with a kinesiologist at a total cost of \$2,136 but again deferred to medical specialists for the number and frequency of these sessions. Finally, Mr. McNeil recommends that Mr. Suico attend at 6 sessions with an occupational therapist at a cost of \$1,512.

[182] In addition to these passive therapies Mr. McNeil recommends that Mr. Suico obtain a gym membership annually, for a total cost of \$9,897.72.

[183] Mr. Suico also seeks \$3,000 for the cost of travelling to and from various treaters and \$2,000 for pain medication. He has not provided an evidentiary foundation for these costs but submits, in my understanding, that it appropriate to make this award given that these types of costs have already been agreed to as special damages.

[184] Ms. Liu submits that three years is an appropriate duration for acupuncture treatments. She contends that a lifetime duration for kinesiology, massage therapy, and physiotherapy treatments are excessive or have no medical justification. She contends that the evidence suggests that an award for kinesiology is unreasonable given the evidence suggests that Mr.

Suico is very familiar with exercising in a gym environment. With respect to massage therapy and physiotherapy, she submits that Mr. Suico's evidence suggests that he has used these therapies irregularly and with mixed results. She contends that no amount should be awarded for the cost of a gym membership as this is an expense which Mr. Suico already incurred prior to the Accident and there is no evidence that he ever intended to stop going to the gym. Ms. Liu did not make any submissions with respect to the costs claimed by Mr. Suico for occupational therapy, travel expense or pain medication.

[185] Dr. Chow's report suggests that Mr. Suico obtain the disputed passive treatments referred to immediately above but did not recommend durations. I accept that these treatments are medically justified but given the lack of evidence with respect to how long the treatments will be beneficial and some uncertainty regarding whether they will be sought by Mr. Suico, I decline to award costs of these treatments for life. I conclude that the following costs would be appropriate:

- a) Occupational therapy: \$1,512 for the cost of 6 sessions, including travel;
- b) Massage therapy: \$3,960 for the cost of 12 sessions per year for three years;
- c) Physiotherapy: \$4,320 for the cost of 12 sessions per year for three years; and
- d) Acupuncture: \$3,240 for the cost of 12 sessions per year for three years;

[186] I agree with the submissions of Ms. Liu concerning the requirement for kinesiology and make no award for such costs. I add that in my view there is significant overlap in the goals to be obtained from both kinesiology and physiotherapy. As well, given it is likely that Mr. Suico would likely have continued to attend at the gym, even if the Accident had not occurred, I decline to make any award for the cost of obtaining a gym membership.

[187] I find that it is likely that Mr. Suico will incur travel costs to attend at various therapy sessions and find that \$1,000 is a reasonable award for such costs, given my findings with respect to the period of time over which these therapies are to be provided. In addition, I find that \$1,000 is a reasonable award for the cost of pain medication.

Summary - Cost of Future Care

[188] In summary, I conclude that reasonable future care costs include the following:

- a) Pain management and ergonomic devices: \$2,668
- b) Counselling: \$10,800
- c) Therapies: \$13,032
- d) Travel cost: \$1,000
- e) Pain medication: \$1,000

TOTAL: \$28,500.

[189] As set out earlier an award for cost of future care involves an assessment and is not intended to be a purely mathematical exercise. In assessing an appropriate award for the cost of future care I am conscious of the fact that the recommendations made by medical experts, understandably, did not apportion costs amongst Mr. Suico's various pain and psychological symptoms. For the purposes of this assessment I consider it appropriate to reduce the amount I have calculated, by approximately 10% - to reflect the portion of the cost of treatments arising from Mr. Suico 's right arm symptoms, which I have found were not caused by the Accident.

[190] I award Mr. Suico \$25,000 for costs of future care.

Special Damages

[191] It is well-established that an injured person is entitled to recover the reasonable out-of-pocket expenses he or she incurred as a result of an accident. This is grounded in the fundamental governing principle that an injured person is to be restored to the position he or she would have been in had the accident not occurred: *X. v. Y.*, 2011 BCSC 944 at para. 281; *Milina* at 78.

[192] The parties agree that special damages should be assessed at \$8,010. I award this amount.

Summary

[193] In summary, damages are awarded to Mr. Suico as follows:

Non-Pecuniary Damages

\$85,000

Past Loss of Income Earning Capacity

\$1,615

Costs of Future Care:

\$25,000

Special Damages:

\$8,010

TOTAL:

\$119,625.00

[194] If the parties are unable to agree on costs, they are at liberty to request a further hearing date before me to make submissions with respect to costs.

"Mayer J."

[1] $(\$6,392,113 \times .5) + (\$7,737,821 \times .25) + (\$5,382,382 \times .25) = \$6,476,107$

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