

CANADA / JUDGMENT

Wei v. Ahmad

2025 BCSC 623

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Supreme Court of British Columbia

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2025 BCSC 623 Wei v. Ahmad

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Wei v. Ahmad,

2025 BCSC 623

Date: 20250404

Docket: M179681

Registry: Vancouver

Between:

Ailing Wei

Plaintiff

And

Iftikhar Ahmad

Defendant

Before: The Honourable Justice E. Sigurdson

Reasons for Judgment

Counsel for the Plaintiff:

C.J. Chak

D. Yee

Counsel for the Defendant:

J.P. Hamilton

Place and Dates of Trial:

Vancouver, B.C.

December 2-6 and 9-10, 2024

Place and Date of Judgment:

Vancouver, B.C.

April 4, 2025

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Introduction

[1] The plaintiff, Ms. Ailing Wei, was walking her dog on November 23, 2015. Two vehicles collided near where she was walking, and in the course of this motor vehicle accident ("MVA"), one of the vehicles struck Ms. Wei. As a result, Ms. Wei sustained serious injuries to her knees and experienced other more minor injuries. The injuries to her knees and surrounding tissue have led to ongoing limitations for Ms. Wei and are the principal subject of this trial. Liability for the MVA is conceded by the defendant, Iftikhar Ahmad, and the defendant further accepts that the medical evidence establishes the collision caused the knee injuries as alleged by Ms. Wei.

[2] The issue for determination is damages; that is, what is necessary to put the plaintiff in the position she would have been in but for the accident. Ms. Wei seeks non-pecuniary damages, damages for loss of future income earning capacity, the cost of her future care, loss of housekeeping capacity, and special damages.

[3] I find Ms. Wei is entitled to damages in these amounts:

Future loss of Income-earning capacity:

\$293,150.00

Non-pecuniary damages:

\$150,000.00

Loss of housekeeping capacity:

\$30,000.00

Cost of future care:

\$27,000.00

Special damages:

\$5,679.66

Total:

\$505,829.66

Facts

- [4] Ms. Wei's witnesses included Ms. Wei herself, her husband Mauritz Westerveld, her eldest daughter Jenny Feng, and her friends Lily Luan, Anna Lin, Selina Chang, and Tony Tao. All these witnesses assisted Ms. Wei in one way or another following the MVA.
- [5] I found Ms. Wei to be credible. Her evidence was consistent with the testimony given by friends and family members, and although Ms. Wei's testimony was provided through the filter of a translator, I did not find this limited my ability to assess her credibility. Ms. Wei's self-reporting of her pre-accident condition, her experience of the MVA, and her post-accident recovery and other experiences were not overstated. Her hopes for the future were tempered by the realities of her situation. I did not perceive Ms. Wei to be exaggerating or providing unrealistic portrayals of her circumstances or plans. Her presentation was consistent with the reports of expert witnesses who saw her in a clinical context and found her pleasant, appropriately effortful, and not exaggerating.
- [6] None of the lay witnesses' reliability or credibility were brought into question in these proceedings to any significant degree.
- [7] Experts relied on at trial by Ms. Wei were Dr. Peter Zarkadas, orthopedic surgeon; Dominic Shew, occupational therapist; and Darren Benning, economist, all of whom testified. The plaintiff also relied on an expert opinion by Dr. Hiram Mok, psychiatrist, but he was not called to be cross-examined.
- [8] The defendant called Dr. Randall Lochter, orthopedic surgeon, and he was cross-examined. There were no objections to the qualification of these experts or the admissibility of their evidence.

Pre-MVA

- [9] Ms. Wei was 37 at the time of the MVA. She was a normally active, healthy mother of two, married to her first husband.

- [10] Ms. Wei and her family moved to Canada from China to allow their two daughters to be educated here. She arrived on December 27, 2014. Ms. Wei's language of origin is Mandarin. She speaks English functionally, but described her English reading, writing, and grammar as "not good."
- [11] At the time of the MVA, Ms. Wei was in Canada on a category of visa which permits a parent to accompany a child studying in Canada. She remains in Canada on a visitor's visa to enable her children to continue their education.
- [12] Prior to the MVA, Ms. Wei performed all the cooking and housekeeping, and did the gardening except for mowing the lawn.
- [13] Ms. Wei's church was a source of her social life, and she attended English classes held at her church. She also enjoyed badminton, cycling, and hiking with her family. Prior to the MVA, she was physically active and maintained social activity with her family and friends.
- [14] Ms. Wei was not employed in Canada prior to the MVA. In China, she studied at a vocational college for hotel management and worked in the hotel service industry for five or six years. She and her first husband co-founded a company to sell healthcare products, and Ms. Wei worked in that company. At some point she stopped working until her second daughter was two years old, at which time she took on the operation of a coffee shop. In that context, she learned how to make pastries. The coffee shop wound down after several years, and Ms. Wei then prepared to come to Canada. She did not work for around two years prior to arriving in Canada.

The MVA and Immediate Aftermath

- [15] The MVA occurred on November 28, 2015, at the intersection of 136 Street and 28th Avenue in Surrey, BC. Ms. Wei was walking her yellow Labrador. As she crossed the street, two cars collided. Ms. Wei recalls seeing the collision and vehicle parts flying around and hearing a loud sound. She then became unconscious.
- [16] She gained consciousness at the scene when a bystander attended to her. She recalled her legs were bent, there was a lot of blood, and she did not know where her dog was.
- [17] I do not need to determine the exact mechanism of the MVA and injury. The defendant accepts liability, and it is reasonable and sufficient to conclude that because of the MVA, a vehicle struck Ms. Wei, colliding with her knees.
- [18] Ms. Wei was taken by ambulance to Royal Columbian Hospital. X-rays were taken of her neck and lumbar spine. She received stitches to her knees, and her legs were braced.
- [19] Ms. Wei described intense pain in her knees, specifically the kneecaps. The MVA also caused an injury to her face, which she found very painful. She believed she was in shock immediately after the accident.

Medical Evidence of Acute Injury

- [20] As a result of the MVA, Ms. Wei suffered certain acute injuries, the most serious of which were to her knees.
- [21] Dr. Peter Zarkadas was called by Ms. Wei. He was qualified as an expert to provide opinion evidence in the area of orthopedic surgery. He examined Ms. Wei on two occasions; reviewed imaging including X-rays, CT scans, and MRIs; and prepared a medico-legal report. Dr. Zarkadas described both the nature of the injuries and their lasting impacts.
- [22] Dr. Randall Loch, called by the defendant, was qualified as an expert in orthopedic surgery and essentially concurred with the nature of the acute injuries. The area of departure between these two experts concerned the extent of ongoing effects of the injuries, and is discussed below.
- [23] The collision resulted in a laceration on Ms. Wei's left knee, exposing the patellar tendon, though the tendon itself remained intact. This laceration required five sutures to close.
- [24] The medical evidence indicates that Ms. Wei suffered a comminuted patellar fracture in her left knee; that is, her kneecap broke into several pieces, but the pieces were not displaced. She also likely suffered a transverse fracture of the right lower patella, which means that the fracture in her right kneecap was a single horizontal break across the part of the patella closer to the foot.

Ms. Wei's Experience Post-MVA

- [25] The pain from the acute injuries to Ms. Wei's knees persisted for some time. Ms. Wei also experienced headaches and pain to her face for about three weeks following the MVA.
- [26] As a result of her acute injuries, Ms. Wei was unable to substantially care for herself for several months following the MVA. She also wore a brace to stabilize her knee. When wearing the brace to bed it would disrupt her rest, and she testified that for the first few months, she had no sleep. She had difficulty sleeping after the MVA due to nightmares about cars driving quickly and hitting her. She was also frightened by loud sounds, including screeches and sirens, and was scared to cross the road. She experienced a bad temper and low mood.
- [27] Ms. Wei used crutches for about a year. After six months, she was able to get out of bed herself with crutches. After a year, she could get up without crutches.
- [28] For about six months, Ms. Wei required her daughters' help with basic hygiene including toileting, dressing, and washing. During several months, Ms. Wei would deprive herself of water because she would have to wait for her daughter to get home to use the toilet. After a year, she could do these tasks without assistance.

- [29] Following the MVA Ms. Wei was unable to prepare food, do any housekeeping or gardening, and could not drive herself or her daughters to activities. She required assistance with transporting her children to and from school until the summer of 2016.
- [30] During this time, Ms. Wei was supported by friends and paid helpers who assisted with grocery shopping, cleaning, driving her children, and other household tasks. She had support from her mother-in-law for a period of time immediately after the MVA.
- [31] Shortly after the MVA, Ms. Wei found that the family was no longer able to care for their dog. They gave her to a friend, Lily Luan, who cared for the dog for five months. The dog was later adopted by another person. The loss of the family pet was significant for Ms. Wei and her daughters.
- [32] Ms. Wei was unable to drive her daughters to any of their activities such as swimming, taekwon do, English lessons, and skating. They required support from a friend who could drive them to and from school. Because Ms. Wei could not go out and play with them, or take them to extracurricular activities, her daughters were required to stay home.
- [33] Ms. Wei and her first husband divorced about a year following the MVA. They sold their house and Ms. Wei received proceeds of the sale as part of the divorce. Ms. Wei and her daughters moved to a smaller home which they rented. After being single for about five years, Ms. Wei married her present husband, Mauritz Westerveld. Mr. Westerveld is also divorced, having been previously married in South Africa, prior to his emigration to Canada. Ms. Wei and Mr. Westerveld currently reside in a two-bedroom condominium.

Ongoing Injuries and Prognosis

- [34] I here address the ongoing effects and limitations arising from the injuries caused by the MVA, as well as Ms. Wei's prognosis.

Ms. Wei's Experience of Ongoing Limitations

- [35] At trial, Ms. Wei was 46 years old. She and her family testified to their observations of the ongoing effects of Ms. Wei's injuries from the MVA. Ms. Wei's lacerations have healed, leaving her with a permanent scar. While the scar is an ongoing reminder of the traumatic experience of the MVA, it does not give rise to any physical limitations. The fractures to the left and right patella have also healed. However, Ms. Wei continues to experience pain and physical limitations as a result of her injuries.
- [36] Ms. Wei testified she continues to have knee pain when standing or walking for long periods. It causes her pain to squat, limiting her ability to lower herself to clean floors, descend stairs, and climb ladders. She can vacuum but cannot support the weight required to clean the stairs. She is unable to participate in physical recreational activities with her family. Mr. Westerveld described how Ms. Wei is unable to participate in the outdoor sports that her active family enjoys.

- [37] Ms. Wei's evidence was not that her knees are in constant pain, but that it is painful to stand or walk for periods of time and perform certain movements and activities.
- [38] Ms. Wei can do some of the housework and the cooking. Mr. Westerveld and Ms. Feng testified that Ms. Wei can and does prepare homemade meals, and that preparation sometimes takes two hours. They testified that she must take rests in doing this work. She does some of the housekeeping, but is unable to perform tasks requiring her to squat or bend down, including washing the floors and corners of rooms and cleaning the stairs.

Expert Evidence of Chronic Injury

- [39] There were no objections to qualification or admissibility of the expert opinion evidence in this trial. Expert evidence respecting Ms. Wei's chronic injuries and their effect on her capacity was provided by the following witnesses. I include here the experts' recommendations for future treatment and care.

Dr. Peter Zarkadas, Orthopaedic Surgeon

- [40] Dr. Zarkadas opined that Ms. Wei has been left with a permanent partial disability in both knees. His opinion is that Ms. Wei's chronic injury prevents her from being able to endure prolonged standing or walking, squatting, and heavy lifting or carrying. Additionally, he opined that the residual bilateral patellar tendinopathy (or ongoing pain and inflammation in the tendons connected to both kneecaps) secondary to the impact to and fracture of her knees is chronic. In other words, it will never fully resolve. The ongoing pain Ms. Wei experiences in both knees is due to the thickening of the patellar tendon.
- [41] Ms. Wei does not report pain at rest, and her pain is self-reported as 4 to 5 out of 10 at its worst. She does not regularly take pain medication. Ms. Wei reported to Dr. Zarkadas that she feels her improvement has plateaued.

Dr. Randall Loch, Orthopaedic Surgeon

- [42] Dr. Loch, the expert called by the defendant, opined that Ms. Wei's clinical presentation, the medical reports, and expectations he holds of the type of injury sustained all support permanent chronic inflammatory tissue in both knees. This conclusion is in essential agreement with Dr. Zarkadas's opinion respecting Ms. Wei's diagnosis and prognosis.
- [43] Dr. Loch opined that the soft tissue injuries reasonably support pain tolerance for "intermittent light housekeeping chores" and that there was no medical restriction to carrying out such activities with appropriate pain coping strategies such as pacing and body posture adjustments. Similarly, recreational activities could be carried out with appropriate pain coping strategies.
- [44] Dr. Loch was of the opinion that Ms. Wei had reached maximum medical recovery, and her reported discomfort will continue.

Dr. Hiram Mok, Psychiatrist

- [45] Dr. Mok was retained by Ms. Wei to provide expert opinion on Ms. Wei's injuries, particularly psychological symptoms, her prognosis, and what future care may be required. Dr. Mok was not cross-examined. His report, authored in 2023, concluded that Ms. Wei suffered chronic post-traumatic stress disorder and major depressive disorder with anxious distress because of the MVA, and rated her experience of these disorders as mild to moderate.
- [46] Dr. Mok opined that Ms. Wei, being (in his words) a "traditional Chinese lady," has not had the capacity to bring forward her emotional concerns and difficulties with her physician, which has delayed the necessary treatment of her major depressive disorder and post-traumatic stress disorder.
- [47] Dr. Mok deferred to other specialists in relation to physical prognosis. Dr. Mok connected Ms. Wei's pain management to her psychological issues, and recommended that she see a specialist in rehabilitation. He also recommended treatment with an antidepressant through her physician. Dr. Mok's recommendation for individual cognitive behavioural psychotherapy through a Mandarin-speaking psychologist for 12 one-hour sessions was not ultimately costed, and damages for that form of care were not sought by Ms. Wei. I note that Dr. Mok assessed the prognosis for Ms. Wei's psychological injuries as "guarded." Dr. Mok did not opine on any effect Ms. Wei's psychological injuries may have on her career goals or ability to perform her work or enjoy recreational activities.

Summary of Injuries

- [48] I conclude that Ms. Wei's soft tissue injury is ongoing and permanent. There was general agreement that the chronic injury poses some limitation on Ms. Wei's ability to stand or walk for prolonged periods. I accept that her ability to squat and lower herself is impaired by pain. Although she can complete a squatting movement, the pain resulting from doing so restricts her from carrying it out. Ms. Wei's ability to stand and walk for long periods is also impaired by her injury.
- [49] The functional limitations Ms. Wei is experiencing are caused by the injury she sustained in the MVA. They impair her ability to participate in activities she previously enjoyed and will impair her ability to work full-time, particularly in circumstances where her need to take seated breaks cannot be accommodated. Although she is not in constant pain, her injuries give rise to a permanent partial disability, which creates limitations in several spheres of her life.
- [50] While Ms. Wei does not seek cost of future care for psychological issues, I consider in my assessment of non-pecuniary damages that her enjoyment of life is affected to some extent by her diagnosed post-traumatic stress disorder and depressive disorder, from which she experiences mild-moderate symptoms, and for which she has a guarded prognosis.

Recommendations for ongoing treatment and support

Dr. Zarkadas

- [51] Dr. Zarkadas recommended active rehabilitation under the guidance of a kinesiologist for one hour a week for a year, to increase quadricep strength and flexibility. Dr. Zarkadas further recommended participation in exercise programs including pool-based exercise and cycling, which place modest demands on the patella. He further suggested Tai Chi with an instructor qualified to address patellar injury limitations.

Dr. Locht

- [52] Dr. Locht did not recommend any further treatment other than application of an anti-inflammatory and analgesic cream, and more frequent use of ibuprofen. He was of the view that Ms. Wei should be encouraged to continue a home exercise program. Dr. Locht opined that if Ms. Wei's activities become more physically demanding and her symptoms increase, then additional pain reduction strategies should be considered, including assessment by sports medicine, which may provide additional recommendations.

Dominic Shew, Occupational Therapist

- [53] Mr. Shew provided a functional/work capacity evaluation report and cost of housekeeping report. Mr. Shew relied on Dr. Zarkadas's diagnoses of Ms. Wei's physical injuries, and opined on the practical implications of Ms. Wei's chronic injury.
- [54] Mr. Shew's testing indicated that Ms. Wei was limited in tasks requiring vertical reaching with her left upper body and tasks requiring repetitive squatting, prolonged crouching, repetitive bending, repetitive walking, ascending and descending stairs, prolonged standing, lifting, and carrying due to the stress and positioning of her lower extremities.
- [55] Mr. Shew opined that Ms. Wei has the capacity to manage all her basic activities of daily living ("ADLs"). He also anticipated that she could engage in lighter day-to-day household activities and housework, as long as she breaks up activities to manage her symptoms. Activities involving heavier demands and that stress her lower extremities (such as prolonged crouching, repetitive squatting) and her left upper body will likely aggravate her symptoms.
- [56] Mr. Shew made a range of recommendations:
- Kinesiology: remaining active may assist in reducing flareups, and having professional assistance with an exercise program can avoid risk of injury or aggravation of symptoms.
 - Physiotherapy: to assist in identifying difficulties, providing specific recommendations and education, and assist in managing symptoms during flareups.

- c) Occupational therapy: to guide Ms. Wei in improving her general routine, provide education about appropriate strategies and potential aids or assistive devices.
- d) Equipment: fatigue mat and footwear are recommended to reduce stress on the body.
- e) Housekeeping: Ms. Wei would benefit from two to three hours every two weeks to assist with deeper cleaning.

The Law on Assessing Damages in Tort

- [57] At the heart of tort law is the principle that a plaintiff must be placed in the position they would have been in, if not for the defendant's negligence. The quantum of damages must reflect that principle and attempt, to the extent money can do so, to restore the plaintiff for those losses caused by the defendant's negligence: *Athey v. Leonati*, [1996] 3 S.C.R. 458, 1996 CanLII 183 (S.C.C.), at paras. 17, 19-20, 24, 34-35; and *Blackwater v. Plint*, 2005 SCC 58 at para. 78.
- [58] There is no dispute that the collision between a vehicle and Ms. Wei's knees resulted in her physical injuries. Nor is there dispute that immediately following the MVA, Ms. Wei was significantly impaired in her ability to carry out ADLs for several months. She was limited in some essential aspects of daily living for up to a year. Ms. Wei experienced psychological distress immediately following the MVA and the traumatic effects of the MVA and her injuries have persisted for some time.
- [59] Ms. Wei has sustained a permanent partial disability from the MVA which limits her ability to participate in activities she previously enjoyed. It also limits her ability to stand and walk for prolonged periods, and to squat and crouch, which restrict her ability to perform housework, and limit the options available to her for employment and the amount she will be able to work.

Future Loss of Income-Earning Capacity

- [60] The plaintiff does not claim any past loss of income; the focus of the claim relates to future loss of income-earning capacity. An issue this Court must determine relating to future loss of income-earning capacity is the impact of the fact that at the time of trial, Ms. Wei was not a permanent resident of Canada. She also did not have a work permit, had not been employed in Canada prior to the MVA, and the timing of her ability to commence her intended work was uncertain.
- [61] The central task before the Court in considering damages for future loss of income-earning capacity is to compare Ms. Wei's likely future working life without the injury to her likely future working life with the injury: *Davies v. Penner*, 2023 BCCA 300 at para. 25; *Rab v. Prescott*, 2021 BCCA 345 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 at para. 14.

- [62] The Court of Appeal has identified a three-step process for assessing damages for loss of future earning capacity 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 v. Silva*, 2021 BCCA 228 at paras 93-95.
- [63] The first step in Rab can be met in clear cases where there is evidence of an interrupted existing income stream, as well as in less straightforward cases involving evidence of continuing deficits which expose the plaintiff to future problems, but where the pecuniary loss on its face is not a foregone conclusion and is more difficult to calculate: Rab at paras. 29-30.
- [64] The second step 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. The Court then evaluates the likelihood the loss of capacity 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.
- [65] At the third step, there are two possible approaches to assessing the value of the 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. The approach taken to the assessment of loss must be based on the evidence: Rab at para. 75.
- [66] In summary, the practical effect of Rab is that a trial judge is required to determine whether, on a balance of probabilities, a plaintiff has injuries that will continue into the future. If they do, the Court must determine if there is a real and substantial possibility that those injuries will impair the plaintiff's ability to work in the future. If all of this is established, the trial judge must assess damages for loss of future income capacity, choosing an appropriate valuation approach and considering the likelihood of the loss caused by the plaintiff's impairment.

Facts

[67] I have described Ms. Wei's work history above. To reiterate, this history includes that she:

- a) has not worked outside the home during her time in Canada;
- b) was educated and worked in hospitality management in China;
- c) worked in a company co-founded with her first husband selling health care products; and
- d) operated a coffee shop for three years in China.

[68] Ms. Wei also testified about her desire to work. She feels she needs to earn an income, help pay for the mortgage, and find occupation other than caring for her children when they are grown up. Other witnesses reflected Ms. Wei's commitment to enter the workforce. Mr. Westerveld agreed she should work outside of the home, and this would benefit her and improve her well-being and their family's financial situation. While Mr. Westerveld stated he would prefer she work part-time, it was not necessary to their economic situation that she work. Although he was not persuaded she had the capacity to work full-time, he said he would support her if she wanted to do so.

[69] Ms. Wei expressed her interest in working at T&T Supermarket. This job would allow her to be in a workplace and community with other Mandarin-speakers. Additionally, it would be an entry-level position where she can use some of the skills related to her past work experience in China.

[70] On the evidence before me, given her experience and abilities, I conclude it is more realistic that Ms. Wei could work in the bakery department rather than as a stocker. There is nothing in the evidence to say it was more likely she would have worked as a stocker than in the bakery absent the MVA. It is also plausible she could work as a cashier, with reasonable accommodation of her need to be seated for periods of time. These positions are expected to start at least at a minimum wage level, with small annual increases.

[71] It is also consistent with the evidence that Ms. Wei could, with ongoing improvement of her English skills, work in a clerical position particularly where other staff members spoke Mandarin or where her work was engaged with a Mandarin-speaking community. However, there is no significant evidence before me describing such positions or whether they are reasonably available to Ms. Wei, so I base my assessment on the real possibility that Ms. Wei could attain a position as an employee at T&T Supermarket (or similar establishment), working in a bakery position.

[72] At the time of trial, Ms. Wei had not received permanent residency status or a permit to work in Canada. She and Mr. Westerveld have a reasonable expectation that she will attain permanent residency, given her sponsorship by him, a Canadian citizen.

[73] Ms. Wei testified she passed the medical examination as part of the process to obtain permanent residency, while Mr. Westerveld advised the process had been extended so he could provide documentation from South Africa verifying divorce from his former spouse. There was no real challenge to any of this evidence or introduction of any evidence to suggest Ms. Wei is unlikely for any reason to be eligible for permanent residency.

Positions of the Parties

- [74] Ms. Wei submits that her ongoing patellar tendonitis and knee pain will not resolve and will limit her from any vocation requiring prolonged standing, walking, squatting, heavy lifting, or carrying. This long-term health issue will affect her ability to gain meaningful employment, satisfying the first step in Rab.
- [75] Having established a long-term loss of capacity, Ms. Wei says this will affect her ability to earn income. In other words, she says her ability to work full-time will be limited by her loss of capacity to stand, walk, bend, squat, lift, and carry. Therefore, she submits, step two of Rab is met.
- [76] Ms. Wei argues that the appropriate approach to value the possible future loss of income-earning capacity is the capital asset approach, because no loss of income has occurred at the time of trial.
- [77] She further submits that the appropriate comparison is between her probable future as a full-time baker or stocker at T&T with her probable post-accident earning capacity as part-time baker or stocker at T&T at 40% of full-time. Accordingly, she says the appropriate damages should be measured as a 60% loss of her capital asset, less any applicable contingencies.
- [78] Based on the economic model generated by Mr. Benning, including applicable contingencies, Ms. Wei requests \$351,776.40 for future loss of income-earning capacity.
- [79] The defendant concedes the first step in the analysis: that Ms. Wei's capital asset (or capacity to earn income) has been affected by the MVA.
- [80] However, the defendant argues there are serious questions about whether Ms. Wei passes the second step, being the real and substantial possibility there will be a pecuniary loss. In particular, the defendant argues Ms. Wei must establish:
- a) a real and substantial possibility she will obtain permanent residency (and a work permit);
 - b) she will work less than full-time; and
 - c) this part-time work would have been less than the amount Ms. Wei would have worked absent the MVA.
- [81] The defendant relies on the following statement of facts to argue that it is questionable whether Ms. Wei will suffer a loss:

- a) her application for permanent residency remains uncertain, as her application is pending receipt of her husband's divorce certificate;
- b) she has not worked for ten years since being in Canada, and did not work for two years leading up to her arrival; and
- c) her husband testified it was not necessary for her to work for financial reasons, and he would not allow her to work full-time (as noted above, this assertion is not consistent with the evidence of Mr. Westerveld, who testified he would support Ms. Wei if she wanted to work full-time).

[82] The defendant submits that if Ms. Wei can overcome step two, the appropriate approach is the capital asset approach. The defendant proposes a capital asset approach based on one or more years of income and submits that the appropriate award would be one to two years full-time minimum wage income, being approximately from \$37,500 to \$75,000.

Conclusion

[83] The present case is in the "less straightforward" category contemplated in Rab: Ms. Wei does not claim past loss of income nor was there an established level of income at the time of the MVA disrupted due to her injuries. Instead, her claim describes the position she would have been in absent the MVA, at a future point when she was entitled to and ready to start working again in Canada.

[84] I find, and the parties agree, that Ms. Wei meets the first step in Rab: that a potential future event could lead to a loss of capacity. Ms. Wei has established she sustained a chronic injury or permanent partial disability which limits her capacity to work.

[85] I conclude that the second step in Rab is also met; there is a real and substantial possibility the potential future event will cause a pecuniary loss. While there is always some uncertainty respecting whether immigration applications will be successful, I conclude that, on a balance of probabilities, Ms. Wei can be anticipated to attain permanent residency and permission to work, and that this process is likely to be completed within a year.

[86] I also conclude that Ms. Wei has the intention and motivation to work. I am persuaded that Ms. Wei, but for the MVA, would eventually have worked full-time, once permitted to work in Canada. She was educated in hotel management, had experience in a commercial enterprise and a small business, and is motivated to find both self-sufficiency and meaning through work. Accordingly, I conclude there is a real and substantial possibility that the future event in question will cause a pecuniary loss because her disability will affect her ability to earn income.

[87] The third step of Rab requires an assessment of the value of the possible future loss, which must include assessing the relative likelihood of the possibility occurring. The ultimate award is a matter of judgment as opposed to purely mathematical calculation: Rosvold v. Dunlop, 2001 BCCA 1 at para. 18. The goal is, to the extent possible, to put Ms. Wei in the

position she would have been in but for the injuries caused by the defendant's negligence: *Lines v. W & D Logging Co. Ltd.*, 2009 BCCA 106 at para. 185. The assessment includes consideration of general contingencies as well as any specific contingencies relied on by the plaintiff or defendant: *Hartman v. MMS Homes Ltd.*, 2023 BCCA 400 at para. 71; *Dornan v. Silva*, 2021 BCCA 228 at paras. 92-95.

- [88] I have concluded that Ms. Wei meets the considerations set out in *Brown v. Golaiy*, 26 B.C.L.R. (3d) 353 at 356 (S.C.), 1985 CanLII 149 (B.C.S.C.) and that her loss of future earning capacity should be remedied on a capital asset basis. Ms. Wei:
- 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 herself as a person capable of earning income in a competitive labour market.

See also: *Ploskon-Ciesla* at para. 13.

- [89] There are a number of methods available for assessment of a loss on a capital asset model:
- 1) postulate a minimum annual income loss for the total remaining years of work and calculate the present value of that sum;
 - 2) award the plaintiff the value of their entire annual income for one or more years; or
 - 3) award the present value of a nominal percentage loss of income per year.

[90] The evidence before me supports an approach based on the present value of a nominal percentage loss of annual income. This evidence includes an expert economic analysis setting out a present value calculation on the basis of a likely scenario, and on which I can ground an assessment.

[91] Based on Ms. Wei's evidence of her experience, and the evidence of Ms. Chang that most employees of T&T are Chinese or from other Asian countries, Ms. Wei appears to meet, or is capable of meeting, the basic qualifications necessary to work at T&T Supermarket in the bakery department wrapping goods and serving customers. These qualifications include her fluency in Mandarin, a language shared by a significant proportion of the store's clientele. Ms. Wei also has college education and business experience which likely exceed the qualifications required for her intended role as T&T Supermarket staff.

[92] I further conclude, as expressed above, Ms. Wei is more likely than not to attain the required permission to work in Canada within a reasonable period of time. While Mr. Benning agreed it was unusual to prepare a report in respect of a plaintiff who does not yet have permission to work, he also noted there are many cases in which he had provided an opinion

calculating the value of future income loss where the plaintiff will never work again because of catastrophic injury. I have concluded it is more likely than not that Ms. Wei will be permitted to be employed in Canada. The relative likelihood that Ms. Wei will be unable to work full time and therefore experience a loss of her capital asset as a result of her confirmed permanent partial disability is high. The fact that this is an unusual scenario does not present a separate contingency in this case that acts to discount the damages that should aim to make her whole, as near as is possible to do. The proper consideration is the relative likelihood of the loss occurring, not whether the case is unusual. I have determined the loss is very likely.

- [93] I am of the view that it is reasonable to assess future income loss on the basis of a scenario in which Ms. Wei gains employment in the near future. This will endeavour to put her in the position she would have been in but for the MVA.
- [94] In valuing the possible future loss of income-earning capacity, I note Ms. Wei has advanced a modest, approaching minimum wage-based claim for valuation of the capital asset representing what would be lost due to the MVA. She has not asked the Court to compare what she might have earned working in hotel management or a business selling health products, or operating a coffee shop, areas in which she does have education and experience and some of which would attract a likely higher rate of income.
- [95] I conclude Ms. Wei's capital asset loss should be valued based on a 50% loss of full-time income. Ms. Wei's evidence was consistent in that she thought she could work part-time, but it was not particularly clear what schedule would be feasible for her given her chronic tendinopathy. A 50% benchmark for the loss is a reasonable proxy in this assessment.
- [96] The economic valuations were calculated by Mr. Benning for the present value of Ms. Wei's future income if she worked full-time from February 1, 2025 to retirement at age 65. To account for the likelihood that Ms. Wei's permanent residency and work permit may not be issued for several months from the trial, Ms. Wei submitted that the assessment could be made as of June 1, 2025 and provided calculations reducing the total value of the capital asset accordingly. I agree that is a fair approximation.
- [97] Mr. Benning calculated the future income for a grocery stocker, baker, and minimum wage employee generally. In doing so, he applied discounts for involuntary labour market contingencies, including non-participation in the labour force, unemployment rates, and part-time work. Adjusted for a start date of June 1, 2025, working up to age 65, the estimated total present value of the Plaintiff's future full-time income without the MVA, in the three scenarios based on Mr. Benning's calculations is as follows:
- a) as a grocery stocker: \$659,325;
 - b) as a baker: \$586,294; and
 - c) in a minimum wage position (starting at \$17.40 per hour): \$515,540.

[98] It is my assessment that Mr. Benning's calculation estimating the present value of the plaintiff's income employed as a baker provides the best approximation of the lost capital asset in this case. This is due to Ms. Wei's experience, her inclination, and accordingly, the relative likelihood of the baker scenario in her specific circumstances. Therefore, I accept Mr. Benning's calculations based on the valuation of the income attributable to a baker, which were not opposed by the defendant. In valuing the capital asset, I assess Ms. Wei's loss at 50% of the total present value of her capital asset up to age 65, rounded to the nearest \$10, to be \$293,150.

Non-Pecuniary Damages

[99] Non-pecuniary damages compensate a plaintiff for pain, suffering, loss of enjoyment of life, and loss of amenities: *Langford (City) v. Matthews*, 2024 BCCA 214 at para. 44 [Matthews]. The factors set out in *Stapley v. Hejslet*, 2006 BCCA 34 at para. 46 include:

[46] []

- a) age of the plaintiff;
 - b) nature of the injury;
 - c) severity and duration of pain;
 - d) disability;
 - e) emotional suffering; and
 - f) loss or impairment of life;
- []
- g) impairment of family, marital and social relationships;
 - h) impairment of physical and mental abilities;
 - i) loss of lifestyle; and
 - j) the plaintiff's stoicism (as a factor that should not, generally speaking, penalize the plaintiff: *Giang v. Clayton*, [2005] B.C.J. No. 163 (QL), 2005 BCCA 54).

[100] Non-pecuniary damages are assessed on a functional approach, addressing the effect of the injury on the plaintiff's life, and considering both the gravity of an injury and the plaintiff's circumstances: *McCliggot v. Elliott*, 2022 BCCA 315 at para. 44; *Matthews* at para. 44; *Dilello v. Montgomery*, 2005 BCCA 56 at para. 25.

Facts

- [101] Ms. Wei's enjoyment of life has been disrupted by the MVA, both immediately following the accident and on an ongoing basis due to her chronic injury. She was deeply reliant on her daughters for personal care, including tasks of an intimate nature, which she found distressing and uncomfortable. She suffered from pain and lack of sleep for a period following the MVA. She was unable to participate in a social life or in her church.
- [102] Additionally, her family experienced collateral damage, which clearly caused Ms. Wei to suffer: her daughters could not participate in activities they were registered and participating in and were enjoying. Their mobility was restricted because their mother's was limited by her injuries. They were confined to home and less stimulating activities for a period of time. This harmed familial relations. The family was unable to care for their beloved dog and had to re-home their pet. It is understandable that in the period following the MVA, Ms. Wei experienced mood and emotional difficulties and was not her usually positive self. These immediate experiences give rise to compensable harm.
- [103] The longer-term impacts on Ms. Wei also support a finding that she continues to experience loss of enjoyment of life and endures ongoing pain. She continues to be unable to participate in family activities involving physical activity. She experiences pain when undertaking certain activities, including those requiring standing and walking. She is unable to dress how she prefers: her knee pain is exacerbated by cold so she cannot wear skirts, and the instability of her knees makes her unable to wear high-heeled shoes. She is left feeling less feminine, and less like herself. She has experienced some psychological suffering in the long-term, including feeling depressed because her knees do not appear to be improving. Her psychological distress has been at a manageable level, and she is seeking helpful treatment. Ms. Wei's evidence about the ongoing negative effect of the MVA on her emotional state was understated but reasonable and credible.

Positions of the Parties

- [104] The defendant does not oppose an award that compensates Ms. Wei for non-pecuniary damages.
- [105] To provide comparable awards, Ms. Wei relies on:
- a) *Parmar v. Rink*, 2019 BCSC 1626: where a 41-year-old plaintiff was struck as a pedestrian resulting in fractures requiring surgery. She relied on aid from family for ADLs after the accident. She continued to have pain after the fractures healed, and the pain was likely chronic. She received an award of \$200,000 in 2019. Factors relied on in support of the non-pecuniary assessment included: inability to perform previous duties and requiring breaks to do housework; effect on her mood including irritability and depression; effect on her ability to practice her faith and carry out her social life.

- b) Kim v. Lin, 2016 BCSC 2405: where a 27-year-old plaintiff was awarded damages for soft-tissue injuries, with a psychiatric component. She received an award of \$175,000 in 2016. Factors relied on in support of the non-pecuniary assessment included: she lost the ability to care for her children and husband; she was unable to pursue English learning to transfer her work skills to Canada; she was unable to maintain her previous housekeeping capacity; her ability to enjoy family life was significantly affected, including great strains on her marriage.
- c) Gulati v. Chan, 2015 BCSC 431: where a 53-year-old plaintiff was struck as a pedestrian and suffered a range of serious injuries including soft-tissue and a broken bone. She further experienced headaches, depression, and PTSD among other injuries. The chronic injuries included knee pain and osteoarthritis as well as depression. She was awarded \$150,000 in 2015 subject to a contingency deduction.

[106] Ms. Wei seeks an award of \$225,000 for non-pecuniary damages.

[107] The defendant relies on:

- a) Bernatchez v Chisholm, 2022 BCSC 105: where a plaintiff sustained a knee injury in an MVA after which he required surgery, was bedridden for two weeks, and unable to put pressure on his leg for six weeks. His knee injury impacted every aspect of his life and took a toll on those around him. He was no longer able to participate in physical activities he enjoyed before and was limited in his ability to do housework. His injury resulted in chronic pain. The court awarded Mr. Bernatchez \$110,000 in 2022.

[108] The defendant submits an award of \$80,000 would be appropriate, but that it should be no more than \$110,000 based on Bernatchez. The defendant does not suggest that Ms. Wei has failed to mitigate these losses.

Conclusion

[109] I have considered the factors set out in Stapley, in particular Ms. Wei's relatively young age at the time of the injury, the permanence of her injury, the severity of the pain immediately after the MVA and the ongoing moderate but disruptive nature of the pain, the ongoing psychological issues she is managing, and the ways in which the MVA has limited her social, economic, family, and physical activities.

[110] The circumstances in the cases relied on by the parties are not identical to those before me. However, they set out a fairly close range of scenarios that provide some reasonable benchmarks for comparative assessment and an acceptable scope for a non-pecuniary award. I agree that an award within the range demonstrated in these comparable cases is appropriate.

[111] In this case, where Ms. Wei experienced severe pain and disability immediately after the MVA, and is likely to have chronic partial disability in both knees into the future, the physical effects are significant. The depression Ms. Wei experienced immediately after the

MVA, and which is an ongoing issue but not a disabling one, is a factor meriting compensation. The social and familial effects of the MVA have also had acute and chronic aspects, which continue to affect Ms. Wei's life and ability to enjoy her time with her daughters and husband. The fact that she has a generally positive disposition does not suggest that Ms. Wei has not been significantly affected by the MVA; her stoicism should neither discount nor augment her award. I conclude that Ms. Wei, though depressed by her lack of physical improvement, has not frustrated her progress and intends to do what she can to improve.

[112] I find that \$150,000 for non-pecuniary damages is a fair and reasonable award in all of the circumstances.

Loss of Housekeeping Capacity

[113] I consider that it is appropriate to augment the 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.

[114] In *Kim v. Lin*, 2018 BCCA 77 at paras. 33-37, the Court of Appeal outlined the principles underlying awards for loss of housekeeping, emphasizing the requirement that awards for this type of claim must be commensurate with the loss in issue: "So long as the award is justified on the basis of evidence of the plaintiff's incapacity it will be commensurate with the plaintiff's loss."

[115] Ms. Wei seeks damages for loss of housekeeping capacity in the range of \$48,919.20 (to age 70) to \$61,123.92 (to age 80), based on Mr. Shew's estimate for assistance with two to three hours of housekeeping every two weeks. The defendant argues that the Court should include an award that recognizes Ms. Wei will experience pain in performing house work, but can do it.

[116] In this case, the evidence is that Ms. Wei's injuries cause her pain in carrying out certain necessary housekeeping tasks, including deep cleaning, cleaning floors, corners and low surfaces, cleaning windows or surfaces requiring stepping up or climbing, and cleaning stairs. Ms. Wei is no longer able to complete those tasks regularly, or can only do so with significant difficulty, pain, and frustration. Mr. Shew was of the view Ms. Wei would be assisted by two to three hours of housekeeping support every two weeks.

- [117] I would depart from this estimate somewhat because, in my assessment, the housekeeping limitations and frustrations imposed on Ms. Wei by her injuries are discrete--restricting her from carrying out specific activities, but not all aspects of housekeeping.
- [118] I nevertheless recognize Ms. Wei's loss of amenities in this regard. I do not agree with the defendant that it would be unseemly to make an award that suggests Ms. Wei should have assistance with cleaning her floors when she can physically perform the task herself. She is unable to do so without pain: this is a consequence of the MVA for which Ms. Wei is to be compensated. It is also not unreasonable for Ms. Wei to suggest that a reasonable standard of cleanliness would include cleaning floors every other week.
- [119] Based on Ms. Wei's circumstances, I am of the view that an award approximating the cost of three hours of housekeeping support every month is appropriate. Ms. Wei, relying on Mr. Shew and Mr. Benning, costed out six hours a month of housekeeping assistance to have a present value of \$61,123.92. I conclude that based on the cost estimated for three hours per month of housekeeping, Ms. Wei's non-pecuniary damages should be augmented by \$30,000.

Cost of Future Care

- [120] A plaintiff is entitled to compensation for the cost of future care based on what is medically necessary, on the available evidence, to restore a plaintiff to a position as though the accident had not occurred. The award should reflect a reasonable expectation of what is required to put a plaintiff in the position they would have been in but for the accident: *Nguyen v. Elberg*, 2025 BCSC 144 at para. 79. 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 v. Nowakowski*, 2021 BCCA 478 at para. 58.

Positions of the Parties

- [121] The recommendations for future treatment and support made by expert witnesses are summarized above. Ms. Wei's claim for damages includes several future care items recommended by Dr. Zarkadas and Mr. Shew. These include the following items in these amounts:
- a) Kinesiology for 1 year: \$2,577;
 - b) Fitness membership for 1 year: \$540;
 - c) Physiotherapy for 1 year: \$1,088
 - d) Occupational therapy for 1 year: \$1,247;
 - e) Travel (to seek therapies): \$374;
 - f) Intermittent future physiotherapy or massage therapy to age 80, 12 times per year: \$30,164.40; and

g) Supportive Footwear (differential cost to regular footwear) annually to age 65: \$1,148.

[122] The costliest of these items is intermittent treatment by a physio or massage therapist, which Ms. Wei seeks annually for 12 sessions a year to age 80. This annual cost of \$1,296 is calculated to have a present value of \$30,164.40. The total value of all future care items sought is \$37,138.50.

[123] The defendant submits that Ms. Wei should receive \$5,000 to \$6,000 for cost of future care on the basis that Dr. Zarkadas recommended an exercise program under the care of a kinesiologist. The defendant submits that Mr. Shew's additional recommendations are based on his experience with other clients and would not address Ms. Wei's injuries, so they should be disregarded.

Conclusion

[124] I disagree with the defendant's argument that Mr. Shew's recommendations should be disregarded. Mr. Shew's recommendations are founded on his expert assessment of Ms. Wei's capacity and her clinical presentation combined with Dr. Zarkadas's medical diagnosis and prognosis. It is not necessary that there be a precise match between the recommendations made by the physician and the specific items recommended by an occupational therapist; rather, the recommendations for future care need to be supported by medical evidence.

[125] The medical evidence here includes that Ms. Wei has a permanent partial disability, from which she will continue to experience pain because of chronic tendinopathy. While the medical opinions suggest she has plateaued in her recovery, I do not understand this to mean there is nothing to be done to minimize her discomfort or address flare-ups. It is reasonable for a patient with a chronic injury to seek to ameliorate (if possible) the painful effects of tendonitis and to do what can reasonably be done to improve mobility and prevent deterioration. While I do not find that 12 sessions of physiotherapy per year is warranted on the medical evidence, I am, nevertheless, persuaded that the cost of future care award should account for Ms. Wei's ability to improve or at least maintain her chronic injury with the assistance of professional specialists such as physiotherapy and massage therapy.

[126] I conclude that each of the categories of future care is supported on the basis of the combined recommendations of Dr. Zarkadas and Mr. Shew. These are not overstated amounts, and represent a reasonable estimate of steps that would benefit Ms. Wei and assist her to enhance or at least maintain her physical capacity and adapt to the reality of her post-MVA abilities. This is appropriate in the context of an award that should aim to put Ms. Wei in as close a position as possible to what her condition would be anticipated to be absent the MVA.

[127] I am basing my award for cost of future care on Ms. Wei's calculation for each of the items requested, less approximately one-third of the cost proposed for annual physiotherapy or massage therapy. I award the total damages in this category in the amount of \$27,000.

Special Damages

[128] An injured person is entitled to recover the reasonable out-of-pocket expenses they incurred as a result of an accident, because 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 v. Bartsch*, 49 B.C.L.R. (2d) 33 (S.C.) at 78, 1985 CanLII 179 (BC SC).

[129] The parties agreed on outstanding special damages in the amount of \$5,679.66 and advised the Court of the same. I award the agreed upon amount.

Summary

[130] In summary, damages are awarded as follows:

Future loss of Income-earning capacity:

\$293,150.00

Non-pecuniary damages:

\$150,000.00

Loss of housekeeping capacity:

\$30,000.00

Cost of future care:

\$27,000.00

Special damages:

\$5,679.66

Total:

\$505,829.66

Costs

[131] If the parties are unable to agree on costs, they may speak to the issue before me. Written submissions on costs of no more than five pages may be filed prior to any hearing on costs.

"E. Sigurdson J."

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