IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Chu v. Brammer,*
2025 BCSC 561

Date: 20250327
Docket: S221895
Registry: Vancouver

Between:

Kwok Fan Chu

Plaintiff

And

Terence Robert Brammer and Rosanna Brammer

Defendants

Before: The Honourable Justice Jones

Reasons for Judgment

Counsel for the Plaintiff:	R. Lo
Counsel for the Defendants:	T.C. Greer J. Stephen
Place and Dates of Trial:	Vancouver, B.C. April 15-19 and 22, 2024
Place and Date of Judgment:	Vancouver, B.C. March 27, 2025

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I. Introduction

[1] The plaintiff, Kwok Fan Chu, claims damages for injuries he suffered in a motor vehicle accident on January 20, 2020.

[2] Mr. Chu was driving northbound in the left-turn lane of No. 3 Road approaching the intersection at Westminster Highway in Richmond. Another vehicle came into contact with his vehicle on its right side, which pushed his vehicle into a second impact with a lamppost on his vehicle's left side.

[3] Liability is admitted by the defendants. The issue is the assessment of an award of damages.

II. Agreed Statement of Facts

[4] The parties agree on the following facts:

The Plaintiff

1. The plaintiff's date of birth is February 2, 1957.

2. The plaintiff is married with three daughters. He resides at a single family residence in Richmond, British Columbia. He has resided there since 1993.

The Accident

1. The plaintiff was involved in a motor vehicle accident on January 20, 2020 near the intersection of No. 3 Road and Westminster Highway (the "Accident").

2. At the time of the Accident, the plaintiff was operating a 2014 Nissan Versa (the "Vehicle").

3. As a result of the Accident, the Vehicle was written off on February 10, 2020.

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Medical Service Providers

1. As a result of the Accident, the plaintiff attended or received service from the following medical service providers:

   a. Brian Lam, OT

   b. Dr. Alexander ho Yeung Li

   c. Dr. Jackson Chu

   d. Dr. Kristen Taunton

   e. Ackroyd Physiotherapy Centre

   f. Community Therapists 1998 Inc.

   g. Maxcare Wellness Center Ltd.

   h. PT Healthcare Solutions Corp Atlas Physiotherapy

Special Damages

1. The plaintiff has incurred a total of $6,729.56 in special damages.

Income Tax Returns

1. The plaintiff's income from 2014 to 2022 from the Agreed Statement of Facts is summarized in table form as follows:

Plaintiff's Income Tax Returns								
Year	**Total T4 earnings**	**EI**	**Net rental income**	**Interest and other investment income**	**Taxable capital gains**	**OAS**	**CPP/ QPP**	**TOTAL INCOME**
2014	11,310	9,979	1,508					22,797
2015	6,496	2,904	1,715					11,264
2016			1,135					1,135

2017	11,291		1,512					12,803
2018	35,942		4,112					40,054
2019	36,816							36,816
2020	3,714	6,570						10,284
2021				27	18			45
2022				1,620		1	2,700	4,321

Footnotes (from other evidence at trial):

1. 2014: Red Star Seafood Restaurant from April 16, 2011 to March 16, 2014;
   Hereon Chinese Cuisine Restaurant from March 16, 2014 to May 31, 2014;
   Employment Insurance from June 15, 2014 to February 15, 2015.
2. 2015: Wo Yuen Restaurant.
3. 2016: Year in China in restaurant business.
4. 2017: Sun Wing/Wing Key Restaurant for a short time.
5. 2018 - 2020: Neptune Restaurant starting January 1, 2018, to final day January 19, 2020.

III. Background

A. The Plaintiff's Circumstances Prior to the Accident

[5] For context, the following is a summary of Mr. Chu's evidence of his circumstances before and after the Accident.

[6] Mr. Chu gave his evidence with the assistance of an interpreter who translated Mr. Chu's evidence from Cantonese to English.

[7] Mr. Chu owns a residential property in Richmond he purchased in 2013. The property consists of a main house and a laneway house.

[8] Mr. Chu's two teenage daughters live in the laneway house. Mr. Chu, his wife, and his eldest daughter, Cindy Chu, her husband and two young sons live in the main house.

[9] Mr. Chu was born in China. His highest level of formal education is high school, from which he graduated in 1978. Following high school he worked in sales of electronic parts.

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[10] He immigrated to Canada in 1990.

[11] After his arrival in Canada he worked as a cook in restaurants in Vancouver and the Okanagan before returning to Vancouver.

[12] His evidence is he worked in different restaurants until 2011 when he started working at the Home Sing / Red Star Restaurant in Vancouver. He worked there until 2014, earning monthly income of "over" $1,000 by cheque, and $1,000 cash, then stating "$1,200 or $1,300 by cheque, and $1,500 or $1,600 cash, "something like that".

[13] He did not declare any of the cash on his income tax return because his evidence was that that gave him more money in his pocket that did not have to be taxed.

[14] In 2016, Mr. Chu went to China for a year to work in the restaurant business, but the business lost money. He filed an income tax return in Canada that year declaring no income.

[15] He returned to Canada and went to work in 2018 at the Neptune Chinese Kitchen Restaurant (the "Neptune Restaurant") in downtown Vancouver as the restaurant's head chef.

[16] The Neptune Restaurant was one of a number of franchise restaurants in the Neptune Group.

[17] As head chef, Mr. Chu's evidence is that he was responsible for the whole restaurant operation including all the things concerning the personnel arrangement, hiring/firing, how many people to use and how they should work, and delivery of ingredients.

[18] His cooking included physical work such as bending, stooping, and lifting.

[19] A typical day for Mr. Chu at the Neptune Restaurant was to arrive at 10:30 in the morning and work until the restaurant closed at 9:30 p.m.

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[20] As soon as he arrived at the restaurant in the morning he prepared for the opening of the restaurant for the busy times at lunch from 11:30 – 2:00, and dinner from 5:30 – 8:30 p.m.

[21] During the meal times he was involved in producing the meals. When he was not cooking he was involved in other duties including placing orders to suppliers and making arrangements for scheduling staff.

[22] He worked non-stop, but there was a small room in the restaurant where he could take a rest for 1 – 2 hours a day. When the restaurant became busy the employees would come and wake him up.

[23] When not working he would rest at home. His one day off a week varied according to his work schedule.

[24] As head chef at the Neptune Restaurant, Mr. Chu's evidence was that he was paid $3,000 per month by cheque, and $2,000 by cash, and cash tips varying from $600 - $1,000 per month. He was paid his salary by cheque on the 1st and 15th of each month, and he was paid tips weekly.

[25] He did not report the cash he received on his income tax returns. He knew that it was not right to not report the cash, but he wanted more income.

[26] Prior to the Accident, on October 2, 2019 he visited a medical clinic with a report of back pain making it painful to walk. His evidence was that he was prescribed medicine which he took and a day later he was okay and carried on working.

B. The Accident

[27] On January 20, 2020, at about 10:00 a.m., Mr. Chu was driving to work, northbound on No. 3 Road in Richmond. He was in the left turning lane, intending to turn left to Westminster Highway.

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[28] Mr. Chu's vehicle was hit from the right by the defendants' vehicle which pushed his vehicle into a lamp post to his left.

[29] The air bag deployed and he believes he lost consciousness for a minute. He was unable to open the door of the vehicle. An ambulance and fire truck arrived at the scene. He was removed from the vehicle and transported by ambulance to hospital, treated, and discharged later that day.

C. The Plaintiff's Injuries and Treatment

[30] At the hospital, Mr. Chu recalls not experiencing pain. Later, when he returned home he recalls pain all over his head, back, arms, hands and feet. He was unable to lie down to sleep, he had to be in a sitting position to sleep for many days.

[31] For eight to ten days following the Accident he felt pain all over his body. During that time he was assisted by his wife and his eldest daughter, Cindy. He slept downstairs because it was troublesome to go upstairs. He continues to sleep downstairs.

[32] He visited his family doctor within days of the Accident and reported pain in his lower back, back and neck.

[33] His lower back and back continue to hurt more than other areas of his body.

[34] After the initial period of eight to ten days he was able to start physiotherapy in February 2020, and also acupuncture and massage therapies. When the COVID pandemic started in March he was unable to continue the therapies.

[35] After three to four months his evidence is he noticed shoulder pain when the pain in the lower back and back was less severe, the pain in the neck and shoulders became more prominent. He went to his family doctor to check his shoulders.

[36] His evidence is he experienced pain in his right and left shoulders. He described the shoulder pain as connected to the neck pain. He takes pain medication ten or more times per month.

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[37] On cross-examination he agreed that the first mention of shoulder pain in the clinical records in evidence is September 29, 2020 regarding his right shoulder in the physiotherapy records, with no specific mention of the left shoulder.

[38] He agreed that a referral to acupuncture dated August 8, 2022 refers to neck pain, back pain, right shoulder, right hip/knee pain, with no mention of left shoulder, and also agreed that a similar referral to physiotherapy dated August 10, 2022 refers to neck pain, back pain, right shoulder pain raising above head, and right knee pain worse when squatting/flexing.

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[39] He has also experienced headaches since the Accident, reducing in frequency from five to six time per day to two to three time per day at the time of trial, with slightly less severity from the time of the Accident.

[40] He continues to experience pain in his lower back, with less severity presently than after the Accident.

[41] He has pain in his knees when walking up stairs.

[42] He has experienced some memory loss since the Accident, sometimes forgetting to turn off the stove.

D. The Plaintiff's Circumstances After the Accident

[43] At the time of the Accident, Mr. Chu was working as the head chef at the Neptune Restaurant.

[44] Mr. Chu has not worked since the Accident.

[45] The Neptune Restaurant closed on December 29, 2023.

[46] Mr. Chu's evidence of his average week now involves going for acupuncture and massage on Thursday, with physiotherapy on Friday. He takes public transportation or sometimes drives himself to physiotherapy, which is close by his home in Richmond.

[47] His acupuncture and massage is in Burnaby. Sometimes he drives there, approximately 30 – 35 minutes, and sometimes his wife drives him.

[48] On days he is not receiving treatment, typically he has breakfast before walking or driving his grandsons to school, followed by some exercises on a stationary bike at home, and with dumbbells and elastic stretching, a one hour nap at noon, and in the afternoon more bike exercise.

[49] After the evening meal he takes a 20-30 minute walk in the local neighbourhood, then to bed by 8 or 9, waking up every two hours from the pain, up at 5 or 6 in the morning. He watches television on his cellphone approximately two hours on and off during the day.

[50] On cross-examination, he agreed his injuries have continued to improve from the date of the Accident to 2024.

[51] He is able to drive for a short duration, in part because his evidence is he cannot maintain his concentration, and physically on a longer drive after about half an hour he will feel pain in his hands, arms and shoulders.

[52] He was initially taught how to do exercises at home, that ended a few months before trial, but he continues to do the exercises by himself at home, and those exercises help a lot for helping his muscles get stronger.

[53] He used to go for dim sum with friends, but is unable to use chopsticks. His friends bring food to him, but he loses face with his friends, and he now declines those invitations.

[54] His evidence is he feels useless, a kind of feeling that affects his mood, thinking he used to be capable of everything, now it is totally the opposite. For even simple things like taking the garbage out, his family will not allow him to do that. For anything involving physical strength he feels like a completely wasted person

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[55] He was referred to counselling by his family doctor. He went once, but did not continue because the counsellor or psychiatrist spoke English and Mr. Chu did not understand.

[56] Mr. Chu's daughter Cindy has assisted with practitioners if they do not speak Cantonese and she is available. If they speak Cantonese there is no need for her to accompany him. Mr. Chu's family doctor speaks Cantonese, and he has found Cantonese-speaking practitioners for physiotherapy, massage and acupuncture.

[57] Before the Accident Mr. Chu helped out at home with the housekeeping on his one day off, washing the floor, cleaning up stove surfaces and bathroom areas, and pressure-hosing the concrete surfaces outside, for a total of two hours a week.

[58] Other house work was divided among the family members, and he could make his own bed, he would take out the trash, and cooked dinner on his day off.

[59] After the Accident he continues to be able to make simple dinners. His wife helps him to make his bed and clean the bathroom. His family does not allow him to do anything requiring physical exertion. His wife and daughter help with the housework, no one else does because he said there is no need. He continues to help with his grandchildren.

IV. <u>Witnesses</u>

Plaintiff's witnesses

[60] In addition to the plaintiff's evidence, the plaintiff called the following non-expert witnesses:

a) Sally Zhang, the plaintiff's wife, gave evidence about her marriage to the plaintiff, her work, her observations of the plaintiff before and after the Accident, and her assistance to the plaintiff following the Accident.

b) Cindy Chu, the plaintiff's daughter, gave evidence about the extended family's living accommodations, her observations of her father before and after the Accident, and how she has assisted her father after the Accident.

c) Heung Pak, the plaintiff's former employer, gave evidence about the Neptune Restaurant and the plaintiff's employment there before the Accident.

[61] These witnesses' evidence is summarized as follows.

Sally Zhang

[62] Mr. Chu's wife of 36 years, Sally Zhang, gave evidence with the assistance of a translator.

[63] Ms. Zhang's occupation is a "confinement nanny", which involves assisting new mothers in the first one or two months following the birth of their child. She works six days a week for a daily fee of $350-$380. She typically works for one person for at least one month. Between each job she takes two weeks off.

[64] Following Mr. Chu's Accident she was working for a few days following the Accident, but then made arrangements for her work to allow her to assist Mr. Chu.

[65] She stated that before the Accident he was healthy and going to work every day, with one day off each week.

[66] Before the Accident he had a good temper, which changed to a bad temper after the Accident, and he does not go out to meet friends like he used to.

[67] Before the Accident he was able to do light work outside such as washing the car and cleaning up the garbage bins, but after the Accident he does not do those things, but he can wash his own clothes.

[68] After the Accident, Ms. Zhang helped him to put on his clothing and she cooked for him. Her eldest daughter, Cindy, was on maternity leave and would take Mr. Chu to some medical appointments where translation was needed. If he was going to physiotherapy, Ms. Zhang would take him there.

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Cindy Chu

[69] Cindy Chu is the plaintiff's daughter. She was 35 years old at the time of trial, married, with two children aged four and six. She works as a legal assistant. She lives in her parents' residence in Richmond with her two parents, her husband, her two sons, and her two sisters aged 18 and 20.

[70] Ms. Chu's two sisters presently live in the laneway house. Ms. Chu, her husband and her two boys reside in the main house, using two upstairs bedrooms. Ms. Chu's mother uses a third bedroom upstairs. Her father sleeps in a downstairs bedroom.

[71] Ms. Chu described her father before the Accident as fine, normal and healthy. He worked a lot. She was not aware of any health issues as he did not complain of aches and pains to her. On his day off from work he would go for dim sum or a small walk. She does not recall her father taking vacations before the Accident, other than short road trips.

[72] On his one day off he would cook meals for the family. After the meal he would clean up the kitchen. He would vacuum, but not any deep cleaning. Outside, depending on the season, he would sweep the leaves, and in Spring he would do some power washing on the concrete driveway area.

[73] After the Accident he basically does not do any chores, other than cook light meals. The family cleans up. He does not vacuum or mop, he cannot bend property and the family does not want him doing those type of things. He cannot vacuum the stairs. She tells him not to bother, she will do it on the weekend.

[74] After the Accident, at first he did not cook, but as he recovered he has been able to cook with a lot of kitchen appliances that help him, for example a rice cooker and a steamer. He cooks with accommodations they made like switching to lighter pans to sauté food.

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[75] Ms. Chu describes her father being in a lot of pain in the first week after the Accident, he could not do a lot of things by himself, he could not cook meals, he did not even shower the first couple of days, he could not move freely, and he did not do any chores. For that first week he was just resting on the couch for a majority of the time. He slept on the couch that first week in a kind of slanted upright position.

[76] To Ms. Chu, the plaintiff's physical limitations she is aware of are that he was not able to lift his arms up to a certain height. He is significantly improved, but still at a height he cannot lift until it hurts. He cannot walk for an extended period of time before complaining of numbness or stiffening and pain in his legs and back.

[77] Ms. Chu and her mother assisted the plaintiff shortly after the Accident. Her sisters also helped him during the COVID-19 lockdowns when they were doing school by remote attendance. They would help when they could. Ms. Chu and her mother assisted the plaintiff by reaching for things, preparing meals for him, and helping him with cleaning his bedroom, and his laundry.

[78] Ms. Chu also assisted the plaintiff by translating for him in appointments with any medical practitioners who did not speak Cantonese. During the first year or two Ms. Chu was able to accompany the plaintiff to appointments because she was on maternity leave at the time.

Heung Pak

[79] Heung Pak was an investor and manager of the Neptune Restaurant starting in 2017. He gave evidence with the assistance of a translator.

[80] He hired Mr. Chu in 2018 to work as the head chef at the Neptune restaurant in Vancouver.

[81] Mr. Pak stated that at Mr. Chu's request he was paid $3,000 per month by cheque, and $2,300 to $2,600 cash, which he then corrected, whether because of the translation or otherwise is not clear, to "$2,600 to $3,000 cash for tips, etc.," the remainder of $2,600 to $3,000 paid to him in cash in the form of tips.

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[82] The general office of the Neptune Group paid the $3,000 salary by cheque, while Mr. Pak paid the cash component directly to Mr. Chu, with Mr. Pak stating that Mr. Chu was to be responsible for tax declarations on the cash payment in the form of tips.

[83] Mr. Pak stated that Mr. Chu worked five to six days per week for nine hours a day.

[84] That Neptune Restaurant location closed down at the end of December 2023 because the tenancy ended. Mr. Pak opened a new restaurant at a different location in April 2024.

Plaintiff's Expert Witnesses

[85] The plaintiff called three expert witnesses, with their evidence broadly summarized as follows:

Nicholas Coleman - economist

[86] Nicholas Coleman is an economist who prepared a loss of earnings report dated January 15, 2024, reviewed below in the analysis on past and future loss of earning capacity.

Dr. John Fuller - orthopaedic specialist

[87] Dr. John Fuller was qualified as an orthopaedic specialist to provide expert opinion evidence regarding musculo – skeletal injuries including the back, neck and leg, and chronic pain syndrome.

[88] Dr. Fuller authored an expert report dated November 30, 2023. He gave evidence at trial about his report and his examination of the plaintiff on November 15, 2023.

[89] Dr. Fuller's diagnosis of the plaintiff is headache, neck pain, low back pain and pain over the patellae/kneecaps, adding: "Shoulder pain with objective evidence on MRI of a torn rotator cuff of the right shoulder."

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[90] In discussing the history, Dr. Fuller refers to the plaintiff having experienced shoulder symptoms, the plaintiff having indicated pain over the area of the rotator cuff, "which is the tip of the shoulder more significant to the right."

[91] Dr. Fuller's prognosis for significant improvement is considered poor, the symptoms will persist, and for practical purposes the plaintiff has reached maximum medical recovery.

[92] He would not anticipate future arthritic changes associated with the Accident, but the development of degenerative change can almost be considered a normal concomitant of aging.

[93] Dr. Fuller's treatment recommendations are that there is no therapeutic modality that will significantly improve or alleviate the plaintiff's symptoms long-term, noting that symptoms are exacerbated by any attempted increase in his activity level, and his presentation suggests a chronic pain syndrome.

[94] Dr. Fuller's references to the plaintiff's work as a chef relate to limitation with both his shoulder and his back, as follows:

> He was hoping to work into his 70s. However, he is incapable of this employment in that his shoulder problems preclude his standing with the arms forward flexed/moved forward away from the midline of the body in order to handle a wok and spatula. He is also somewhat flexed, exacerbating the problem with his back. It is also of note that this job entails standing during the work period. It is also of note that he worked extended hours.

[95] In cross-examination, Dr. Fuller agreed that it was not unusual to see a rotator cuff tear on a 63 year old person, it was not uncommon as a change which is normal in aging. Also, two years after the Accident he agreed that it was difficult to make an inference in relation to the Accident. He would expect a complaint of shoulder pain, if an acute injury, before six months, and agreed it was unusual in the case of the right shoulder that there was no complaint recorded before six months, and for the left shoulder two years.

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Dr. Zohar Waisman - psychiatrist

[96] Dr. Zohar Waisman was qualified to give expert opinion evidence as a forensic psychiatrist regarding mood disorders and chronic pain syndrome.

[97] Dr. Waisman assessed the plaintiff on November 22, 2023 and authored a report dated December 21, 2023.

[98] Dr. Waisman recorded the plaintiff's current symptoms as daily feelings of sadness and depression.

[99] Dr. Waisman's opinion is that the plaintiff meets the criteria for a major depressive disorder, moderate, and non psychotic, based on the plaintiff's report to Dr. Waisman of a depressed mood most of the day, nearly every day, as well as markedly diminished interest and pleasure in all activities. Dr. Waisman states that the plaintiff is caught in a cycle of chronic pain, depression, anxiety and cognitive symptoms that result in stress.

[100] Dr. Waisman's prognosis depends on the plaintiff's progress in treatment and the prognosis for his physical condition.

[101] Dr. Waisman's opinion is that the plaintiff requires weekly psychotherapy for one year, and then as needed. He may benefit from a trial of antidepressants that have been proven in research trials to reduce pain.

[102] Regarding household responsibilities, Dr. Waisman states that the plaintiff reports that since the Accident he returned to light activities, but often lacks the motivation to perform activities of cooking, cleaning, vacuuming, grocery shopping and personal care due to the cumulative effects of chronic pain, depression and anxiety.

[103] In cross-examination, Dr. Waisman stated that his care recommendations for the plaintiff had not yet been initiated, so he was hopeful, but it was hard for him to tell if there would be improvement. He agreed it is possible that his symptoms would

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not be as severe as they are if his recommendations had been followed, but it is hard to tell.

[104] The delay in treatment worsens the prognosis, chronic pain and depression are linked as they reinforce each other, that is they are synergistic; improvement in anxiety and depression could possibly improve his physical conditions as well.

Defendants' witnesses

[105] The defendant called two witnesses:

a) May Ng, an accountant at the Neptune Restaurant Group.

b) Dr. Adam Sidky, an orthopaedic surgeon, who was qualified to give expert opinion evidence in orthopaedic surgery in acute trauma and acute trauma injuries.

[106] These witnesses' evidence is summarized as follows.

May Ng

[107] Ms. Ng has worked for ten years as the company accountant at the Neptune Group, which has over 15 restaurant locations in the Lower Mainland, each location being a different entity with its own books. The Neptune Group is the administrative office, taking care of accounts payable and receivable, and they pay the suppliers and vendors to the restaurants. Ms. Ng does the payroll from paperwork she receives from the restaurant managers.

[108] Ms. Ng confirmed the plaintiff was paid $3,000 per month when he worked at the Neptune Restaurant.

[109] On cross-examination, Ms. Ng stated that each Neptune restaurant is its own legal entity. She stated it was possible that an employee of a restaurant could be paid more than what indicated on the payroll documents she deals with, but that she is not personally aware of such payments.

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Dr. Adam Sidky – orthopaedic surgeon

[110] The defendant called Dr. Adam Sidky, who was qualified as an orthopaedic surgeon to provide an expert opinion regarding acute trauma and acute trauma injuries.

[111] Dr. Sidky evaluated the plaintiff on October 24, 2023 and authored a report dated January 15, 2024.

[112] Dr. Sidky's opinion is that the plaintiff sustained a soft tissue injury to his neck and low back, as well as possibly a soft tissue injury to his shoulders, resulting in some ongoing symptoms of myofascial pain.

[113] Dr. Sidky's report refers to the plaintiff indicating that his symptoms are improving, an excellent prognostic sign at this stage.

[114] Dr. Sidky opines that if the plaintiff continues with his rehabilitation, as well as adding a more involved program of stretching and strengthening exercises for his neck, shoulder, and low back, he may find that his symptoms continue to improve with time.

[115] The plaintiff also described numbness in both of his feet, which Dr. Sidky opined is likely related to his diabetes.

[116] Regarding his shoulder symptoms, Dr. Sidky's opinion is that given the length of time from the Accident until the recorded onset of his symptoms, it is difficult to correlate the Accident with his ongoing shoulder complaints. The MRI of the right shoulder dated December 16, 2021 indicates a tear as well as labral degenerative changes and bursitis. A subsequent MRI dated April 22, 2023 indicates that there were degenerative changes/arthritis and tendonitis, but there is no mention of a rotator cuff tear.

[117] Dr. Sidky notes that rotator cuff tears are a common finding given the plaintiff's age, and frequently found in asymptomatic individuals on MRI.

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[118] Dr. Sidky's opinion is that it is not likely that the rotator cuff tear was caused by the Accident, but he concludes by stating it is impossible to say with 100% accuracy.

[119] Dr. Sidky's recommendations for treatment are to encourage the plaintiff to continue to take part in his home-based program of stretching and strengthening exercises, particularly for the neck, shoulder and low back/core.

[120] Dr. Sidky would not restrict the plaintiff from taking part in any of his work-related activities, but it may be difficult for him to return to prior functionality given the length of time off.

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V. Credibility and Reliability

[121] Credibility and reliability are separate concepts. Credibility relates to honesty and the willingness of a witness to speak truthfully. Reliability relates to the ability of a witness to accurately observe, recall and recount the events in issue: see *Mand v. Cheema*, 2024 BCSC 1701.

[122] The factors to be considered when assessing credibility were summarized by Justice Dillon in *Bradshaw v. Stenner*, 2010 BCSC 1398 at para. 186, aff'd 2012 BCCA 296, as follows:

> Credibility involves an assessment of the trustworthiness of a witness' testimony based upon the veracity or sincerity of a witness and the accuracy of the evidence that the witness provides (*Raymond v. Bosanquet (Township)* (1919), 59 S.C.R. 452, 50 D.L.R. 560 (S.C.C.)). The art of assessment involves examination of various factors such as the ability and opportunity to observe events, the firmness of his memory, the ability to resist the influence of interest to modify his recollection, whether the witness' evidence harmonizes with independent evidence that has been accepted, whether the witness changes his testimony during direct and cross-examination, whether the witness' testimony seems unreasonable, impossible, or unlikely, whether a witness has a motive to lie, and the demeanour of a witness generally (*Wallace v. Davis*, [1926] 31 O.W.N. 202 (Ont. H.C.); *Faryna v. Chorny*, [1952] 2 D.L.R. 152 (BCCA) [*Faryna*]; *R. v. S.(R.D.)*, [1997] 3 S.C.R. 484 at para.128 (S.C.C.)). Ultimately, the validity of the evidence depends on whether the evidence is consistent with the probabilities affecting the case as a whole and shown to be in existence at the time (*Faryna* at para. 356).

[123] Regarding the non-expert witnesses, my view of three of the non-expert witnesses called by the parties, the plaintiff's daughter, Cindy Chu; his wife, Ms. Zhang; and the accountant for the Neptune Group, Mary Ng, is that they were credible and reliable witnesses.

[124] Ms. Ng's evidence was focussed on the relationship between the Neptune Restaurant and the office of the Neptune Group, the payroll accounting of the Neptune Restaurant done by the Neptune Group office, and the documents referring to the $3,000 monthly income paid to the plaintiff from the office of the Neptune Group. Ms. Ng's evidence was consistent with the evidence of the plaintiff and Mr. Pak on these points.

[125] Cindy Chu and Ms. Zhang both gave evidence in a forthright manner. Their evidence was generally consistent with each other regarding their description of the plaintiff before and after the Accident.

[126] Another non-expert witness called by the plaintiff, Stanley Pak, was the plaintiff's employer when he worked at the Neptune Restaurant. Mr. Pak gave evidence regarding the plaintiff's income, intended to support the plaintiff's evidence regarding the cash income he alleges he received, but did not report on his tax return, nor document it in any other way.

[127] Mr. Pak's evidence regarding the cash income, as described in more detail below, suffered from some inconsistencies with the plaintiff's description of the purported cash income, including a lack of detail regarding how the amount of tips was determined, what amount of tips was ever paid within the range of $600 and $1,000, and how there could be an agreement on the range of tips to be received by the plaintiff before he started working at the restaurant, given that tips by their nature vary from customer to customer and day to day at the restaurant.

[128] As noted below in more detail, Mr. Pak's evidence about his and the plaintiff's respective roles at the restaurant differed.

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[129] As a result, I treat Mr. Pak's evidence with caution, specifically regarding the cash income alleged to have been received by the plaintiff.

[130] The plaintiff's credibility is negatively affected by his failure to report any cash income he received on his tax returns when he worked at the Red Star Restaurant, and more recently at the Neptune Restaurant, admittedly doing so to have more money in his pocket and pay less tax.

[131] I agree with the defendants' submissions that the plaintiff was not a reliable historian, with an example being his evidence he reported his shoulder pain to his doctor 3-4 months after the Accident, followed by an MRI of the shoulder, when the MRI was requested October 15, 2021 and performed December 16, 2021, over a year and a half after the Accident, and the first record of a complaint of right shoulder pain was in the massage treatment records on September 29, 2020, nine months after the Accident; however, there is a reference to his report to his physician shortly after the Accident about pain in his upper limbs, and the COVID-19 pandemic shutdown commencing in March 2020 appears to have interrupted personal visits to his physician for a number of months.

[132] The plaintiff's recollection of the restaurants he had worked at and when were not closely consistent with his employment record.

[133] One inconsistency in his evidence was that he stated he did not take an afternoon nap prior to the Accident, however he also testified that he took afternoon naps in a small room at work at the Neptune Restaurant before the Accident.

[134] The plaintiff also appeared to exaggerate his responsibilities at the Neptune Restaurant, describing being responsible for the whole operation, with his employer not being hands on and entrusting him with all the work including all the things concerning the personnel arrangement, hiring/firing, how many people to use and how they should work, and delivery of ingredients.

[135] His employer, Mr. Pak, described his own role as investor and manager of the restaurant, responsible for the day to day arrangement of personnel and goods

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coming or going out, with the plaintiff first of all a chef, also responsible for managing people and food in the kitchen.

[136] I am mindful of the Court of Appeal's recent decision in *McGlue v. Girvan*, 2024 BCCA 208 at paras. 47–50, citing *Mariano v. Campbell*, 2010 BCCA 410, referring to the need to take care in cases where there is limited objective evidence of continuing injury, the correct approach being that "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 normal recovery period, but the plaintiff's own evidence, if consistent with the surrounding circumstances, may nevertheless suffice for the purpose."

[137] Here, the evidence of the plaintiff's daughter and wife also support the finding that the plaintiff is suffering from a back injury and shoulder injury causing him ongoing pain.

[138] The plaintiff's eldest daughter, Cindy Chu, described her father being in a lot of pain after the Accident, not being able to lift his arms up to a certain height, not really able to really walk for an extended period of time, and he complains about his legs and his back. He is a little more irritable, not as outgoing as he was before the Accident, and not as social.

[139] The plaintiff's wife, Ms. Zhang, described him doing light work around the house including washing the car, cleaning up garbage bins, but unable to do those things after the Accident, most obvious not able to wash vehicle, also he has a very bad temper, starting a fight for very small things, making her frustrated. She contrasted his mood before the Accident, which she described as very good, and he was not easy to fly into a rage and have a temper tantrum; also he would meet friends for dim sum, but no longer does that, he just stays home and does not go out. She also referred to his memory being very bad. She has to help him with grocery shopping. She described the most important thing to her was that before the Accident they had a husband/wife life, but after the Accident no more because of his physical condition.

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[140] None of the experts express concern that the plaintiff is malingering or the symptoms he reports are the result of anything other than the injuries he suffered in the Accident, other than the issue with respect to his shoulder pain which is more the subject of medical opinion rather than credibility, and some numbness in his legs which may be related to diabetes.

[141] Considering the above, although the plaintiff has some reliability issues as a weak historian, and credibility issues, particularly relating to his evidence of his income, I consider the plaintiff's evidence of his back injury and ongoing pain, with the other witnesses' evidence, to be convincing of continuing pain, specifically but not limited to lower back pain.

VI. <u>Analysis</u>

[142] The defendants admit liability for the Accident, but disagree on damages.

[143] The damages claimed by Mr. Chu are non-pecuniary damages, past and future loss of earning capacity, future cost of care including housekeeping capacity, an "in trust" award for Mr. Chu's wife and eldest daughter, and special damages.

Issue #1 - Causation

[144] The primary test for causation asks: but-for the defendants' 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 defendants' conduct is present: *Resurfice Corp. v. Hanke*, 2007 SCC 7 at paras. 21–23.

[145] 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 defendants' 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). 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

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crumbling skull rule): *Athey v. Leonati*, [1996] 3 S.C.R. 458, 1996 CanLII 183 at paras. 32–35.

[146] In *Sarginson v. Nordquist*, 2019 BCSC 1386, Justice Winteringham (as she then was), summarized the principles of causation as follows:

> [43] As previously noted, although the defendant has admitted liability, the defendant defends Ms. Sarginson's claims for damages on the basis that they are excessive and (except for the wrist injury) the issues now affecting her are not causally connected to the accident.
>
> [44] Ms. Sarginson must establish on a balance of probabilities that the defendants' negligence caused or materially contributed to each of the injuries she sustained in the accident. In order to establish causation, Ms. Sarginson must prove on a balance of probabilities that but for the accident, she would not have suffered the injuries of which she now complains.
>
> [45] The defendants' negligence need not be the sole cause of the injury so long as it is part of the cause beyond the range of *de minimus*. The tortfeasor must take their victim as the tortfeasor finds the victim and is liable even if other causal factors for which the defendant is not responsible result in the victim's losses being more severe than they would be for the average person (known as the "thin-skull" principle). At the same time, the tortfeasor need not put the victim in a better position than the victim would have been in and need not compensate the victim for the effects of a pre-existing condition that the victim would have experienced in any event. Causation need not be determined by scientific precision: *Athey v. Leonati*, 1996 CanLII 183 (SCC), [1996] 3 S.C.R. 458 at paras. 13–17 [*Athey*]; *Farrant v. Laktin*, 2011 BCCA 336 at para. 9.
>
> [46] The "but-for" test recognizes that compensation for negligent conduct should only be made where a substantial connection between the injury and the defendants' conduct is present: *Resurfice Corp. v. Hanke*, 2007 SCC 7 at paras. 21–23.
>
> [47] 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 at para. 78:
>
>> Even though there may be several tortious and non-tortious causes of injury, so long as the defendants' 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* …
>
> [48] 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 defendants' negligence, no better or worse. 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.

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> [49] In *Rabiee v. Rendleman*, 2015 BCSC 595, the defendants took issue with the lack of objective evidence supporting the plaintiff's injuries. As such, Justice Sharma considered the standard of proof regarding subjective and objective evidence of injury and confirmed that the standard of proof remains unchanged, stating:
>
> > [65] I do not take these quotes to mean that a stricter standard of proof applies where the main evidence about injury comes from a plaintiff's subjective reports to doctors and testimony in court. The standard of proof does not change and it does not matter if the evidence is "objective" or "subjective". In fact, after considering the above quotation, the Court of Appeal in *Butler v. Blaylock*, [1983] B. C. J. No. 1490 (B.C.C.A.) clarified: "It is not the law that if a plaintiff cannot show objective evidence of continuing injury that he cannot recover. If the pain suffered by the plaintiff is real and continuing and resulted from the injuries suffered in the accident, the plaintiff is entitled to recover damages. "
> >
> > [66] The key consideration is whether the evidence, as a whole, establishes that the plaintiff's injuries were caused by the defendants' negligence on a balance of probabilities. I have concluded that Ms. Rabiee has met that burden. Thus, the fact that the evidence of her injuries is based largely on subjective reports does not detract from the application of the *Stapley* factors.
> >
> > [Emphasis added.]

[147] Here, the defendants concede that the plaintiff's neck pain and low back pain were caused by the Accident; however, the defendants dispute the plaintiff's prognosis, and submit that the plaintiff has not proven that his shoulder tear and/or shoulder pain were caused by the Accident. The defendants submit that the plaintiff's right shoulder tear was pre-existing the Accident and that the pain later associated with the shoulders/tears did not arise from the Accident.

[148] One of the difficulties of the defendants' submission that the plaintiff's report of shoulder issues is not recorded in any medical documentation until September 29, 2020 (in the massage records), is that the Accident occurred on January 20, 2020, approximately seven weeks before the COVID-19 pandemic shutdown occurred in mid-March 2020, which resulted in limited medical documentation between mid-March 2020 and August 2020.

[149] Dr. Chu's record of the plaintiff's first recorded visit on February 7, 2020, within three weeks of the Accident, indicates that Dr. Chu completed a GP Extended

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Medical Report for ICBC (the "GP Report"), which includes reference to pain in the plaintiff's "upper limbs", without any further detail; the phrase "upper limbs" potentially encompassing the shoulders.

[150] Dr. Chu's notation of the "key subjective findings" on the GP Report, recording the plaintiff's report of pain, including the upper limbs, is as follows:

> Experiencing generalized pains from neck, chest, abdo, back, upper limbs, lower limbs.

[151] The impact of the COVID-19 pandemic shutdown is reflected in the plaintiff's physician's records – Dr. Chu's clinical records refer to visits by the plaintiff on February 7 and March 9, 2020, followed by no visits until August 21, 2020, other than a record of a June 24, 2020 "telehealth" consultation referring to eczema. The August 21, 2020 record refers to ongoing right and left lower leg pain, soft tissue injuries, mechanical injuries, back. There is also a reference to an MRI, which appears to relate to his liver.

[152] Following the August 21, 2020 visit, there is a series of another seven "telehealth" records, the first on November 6, 2020 and the seventh on April 4, 2021. All of the telehealth records do not reference pain, but deal with other issues such as diabetes, liver and eczema. There are also references in these records to CT scans and MRIs.

[153] Dr. Chu's record of a telehealth consultation on April 26, 2021 appears to have been prompted by an "ICBC follow up", that telehealth report referring to the plaintiff's current symptoms as neck pain, back pain, right shoulder pain raising above head, and right knee pain worse when squatting/flexing.

[154] I infer that the focus on the plaintiff's symptoms from the Accident on this telehealth consultation, as contrasted with the previous six telehealth consultations, was a result of the consultation being specifically related to the ICBC follow up.

[155] The impact of the COVID-19 shutdown on the recording of the plaintiff's injuries is also reflected in the plaintiff's massage records, which do not commence

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until August 18, 2020, referring to low back pain for six visits until the September 29, 2020 visit where the right shoulder notation is made.

[156] I note that each of the records of the six massage visits preceding the August 18, 2020 visit include, under the “subjective” heading, the exact same entries, as follows:

> MVA, side compact
> Pain on low back (R is work) → R leg and numbness on too
> Hypo-trophy on R Q4

[157] This gives the appearance of a “cut and paste” approach to recording the subjective reports, rather than a focus on an accurate recording of the specific subjective reports of the plaintiff on each visit.

[158] For the September 29 and October 6, 2020 visits, the subjective report is recorded as including the right shoulder pain, that is: “MVA, side compact” and “pain on R shoulder”, but the manual therapy section of the report repeats the exact wording of the previous six visits: “R. low back, R post thigh, R post leg”, which brings into question the accuracy of the massage therapy records in terms of the record of the subjective reports by the plaintiff, and what massage therapy was administered.

[159] The plaintiff’s evidence of his initial reports of pain all over his body, but worse in his lower back and back, with the neck and shoulder becoming more obvious as the back pain improved a little, is consistent with the records noted above in which he reported to Dr. Chu on February 7, 2020 that he had pain all over, including his upper limbs. The COVID-19 pandemic shutdown occurred in March, he commenced massage on August 18, 2020 focused on the pain in his low back, followed by reference to his right shoulder on September 29, 2020, and the ICBC follow-up with Dr. Chu on April 26, 2021 focussing on his injuries from the Accident, including the right shoulder.

[160] The evidence of the plaintiff’s daughter, Cindy Chu, also supports the plaintiff’s evidence of having suffered a shoulder injury from the Accident. Ms. Chu’s

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evidence was that she was at home on maternity leave when the Accident occurred. She observed his physical limitations after the Accident including difficulty raising his arms, as follows:

- At home after the Accident he was not able to take off his clothes, he could not lift his arms for clothing.
- He was not able to lift his arms up, that's the major one up to a certain height, and even now he can't really lift it up to a certain height, it's significantly improved, but there's, I don't know how high, but there's a certain height that he's able to lift before it hurts.
- A few times after the Accident he would attempt chores, like a few times he would attempt, we have some cabinets that are kind of high to reach for the pans, we moved them lower because it kind of hurt because he couldn't access them.

[161] These quotes from Ms. Chu's evidence provide support for the plaintiff's evidence that he suffered a shoulder injury in the Accident.

[162] There is objective evidence of injury to the plaintiff's right shoulder in the MRIs, although the MRIs were not taken until well after the Accident, there is the plaintiff's subjective evidence of his report to Dr. Chu within three weeks of the Accident about pain in his upper limbs, and there is his daughter's evidence of the difficulties he faced following the Accident, including having difficulty lifting his arms for clothing, he could not lift his arms above a certain height and he could not reach the pans in high cabinets at his residence.

[163] Dr. Sidky's opinion is that Mr. Chu sustained a soft tissue injury to his neck, back, as well as possibly a soft tissue injury to his shoulders. Dr. Sidky notes Mr. Chu indicated he noted his shoulder symptom approximately three or four months following the Accident. He also notes that rotator cuff tears are a common finding in an individual of Mr. Chu's age and are frequently found in asymptomatic individuals on MRI. Dr. Sidky concludes that it is not likely that the rotator cuff tears were caused by the Accident, however, he states it is impossible to say with 100% accuracy.

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[164] Dr. Sidky stated in cross examination that if a person has pain in multiple locations, then you generally focus on areas that tend to be more of an issue, but if you have an acute injury you would not ignore it for a period of months.

[165] I note that Mr. Chu's reports of pain following the Accident were of pain all over, with a focus on his back and neck. As the back pain improved, his evidence is that he became more aware of the neck and shoulder pain.

[166] Dr. Fuller's opinion regarding the plaintiff's right shoulder refers to spontaneous tears of the rotator cuff found on MRI in the older age group, similar to Dr. Sidky, but Dr. Fuller opines that "there is a relatively clear temporal relationship between the onset of his neck and shoulder symptoms" and the Accident.

[167] Dr. Fuller's report includes a diagnosis of chronic pain syndrome. In Dr. Fuller's opinion, "there is no therapeutic modality that will significantly improve or alleviate this patient's symptoms with particular reference to the long-term perspective."

[168] The defendants cite *Kovac v. Moscone*, 2012 BCSC 845 and *Edmondson v. Payer*, 2011 BCSC 118 aff'd 2012 BCCA 114, regarding the weight of evidence to be attributed to the absence of a clinical record.

[169] Here, the defendants' submissions about the absence of a reference in the clinical records to shoulder pain lose some impact when considering the plaintiff's initial report to Dr. Chu about the pain he was experiencing including his "upper limbs"; the plaintiff's focus in the initial period following the Accident was on the pain in his neck and his back; the COVID-19 interregnum interrupting medical appointments and records; and his daughter's evidence that from the time of the Accident her father was experiencing difficulties with clothing himself, raising his arms and reaching high cabinets, symptoms consistent with a shoulder injury.

[170] The defendants also submit that the plaintiff agreed that as of August 2022 the plaintiff was not complaining of left shoulder pain, although the plaintiff's evidence was somewhat inconsistent relating to his left shoulder. His initial evidence

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regarding shoulder pain was focussed on his right shoulder, and his evidence in direct examination about his left shoulder was in answer to a leading question before he had mentioned his left shoulder.

[171] Ultimately, in cross-examination the plaintiff agreed with the proposition put to him that as of August 2022 he was still not complaining of left shoulder pain. I find that the plaintiff has not proven on a balance of probabilities that his left shoulder suffered an acute injury in the Accident.

[172] Considering all of the evidence, including the plaintiff's evidence, Cindy Chu's evidence, the expert opinion evidence, and the clinical records and the other witnesses' evidence above, I find that Mr. Chu has established, on a balance of probabilities, that the defendants' negligence caused or materially contributed to his neck injury, back injury, right shoulder injury, and knee injuries which I find he sustained in the Accident. But for the Accident, the plaintiff would not have suffered these injuries of which he now complains.

[173] As a result of the chronic pain experienced by the plaintiff from the injuries he suffered in the Accident, he has developed, on the basis of Dr. Waisman's opinion, a major depressive disorder, moderate and non-psychotic.

[174] Regarding the plaintiff's right shoulder, it is possible that the plaintiff had a pre-existing rotator cuff injury, or was developing degenerative conditions in his shoulder, in that sense a potential application of either the "thin skull principle" or the "crumbling skull principle": see *Sarginson* above; however, I am satisfied that the plaintiff has proven on a balance of probabilities that he had no symptoms of shoulder injuries at the time of the Accident, he suffered a right shoulder injury in the Accident which has caused the plaintiff loss for which the defendants are responsible.

[175] I also find that although there has been some improvement in the plaintiff's condition over time, I find that he continues to suffer from the effects of the Accident,

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that is, chronic pain, and some ongoing disability in terms of his ability to work, specifically relating to his lower back injury and right shoulder injury.

[176] While there may be some further improvement in the plaintiff's condition, with Dr. Sidky's more optimistic opinion that with further active rehabilitation his symptoms may see some improvement, which I accept, I also accept Dr. Fuller's prognosis, which I do not consider inconsistent with Dr. Sidky's opinion, that a significant improvement in the plaintiff's residual symptoms is considered poor, and his symptoms will persist.

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Issue #2 – Non-pecuniary damages

Legal Principles

[177] A non-exhaustive list of common factors to be considered in assessing non-pecuniary damages was set out in *Stapley v. Hejslet*, 2006 BCCA 34 at para. 46, which include: the age of the plaintiff; the nature of the injury; the severity and duration of the pain; the degree of disability; emotional suffering; any loss or impairment to life, family, marital or social relationships or physical and mental abilities; and loss of lifestyle. In addition, a plaintiff's stoicism should not generally be used against them.

[178] The purpose of non-pecuniary damages is to put a plaintiff in the same position they would have been had it not been for the defendants' negligence. Awards will have to vary in each case to meet the specific needs and circumstances of each individual. As stated in *Lindal v. Lindal*, [1981] 2 S.C.R. 629, 1981 CanLII 35 at 637, the amount of an award for non-pecuniary damages is not dependent solely on the seriousness of the injury, but must take into account its ability to ameliorate the condition of the victim given their particular circumstances.

[179] Courts also have a duty to approach the issue in a reasonable manner, remembering that one cannot provide a complete or perfect compensation but make sure that the award is moderate and fair to both parties*: Andrews v. Grand & Toy Alberta Ltd.*, [1978] 2 S.C.R. 229, 1978 CanLII 1 at 242.

[180] Non-pecuniary damages are meant to compensate the plaintiff for pain and suffering, loss of enjoyment of life, or loss of amenities. The issue is what, based on the evidence, is needed to put the plaintiff in the position they would have been but for the defendants' negligence: *Krangle (Guardian ad litem of) v. Brisco*, 2002 SCC 9 at para. 22. While similar cases can be helpful, they only can serve as a rough guide as each case depends on its unique facts: *Trites v. Penner*, 2010 BCSC 882 at para. 189; and *Boal v. Parilla*, 2022 BCSC 2075 at para. 131.

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Plaintiff's Position on Non-Pecuniary Damages

[181] The plaintiff submits that before the Accident he had no functional limitations, either physically or mentally. He derived pleasure from his work, which he intended to do until retirement. Although he had no hobbies other than walking, he would at least meet with friends for dim sum during days when he was not working.

[182] As a result of the Accident, the plaintiff could not return to work at all because of various limitations, including chronic pain and mood disorders.

[183] Finally, the Accident affected not just the plaintiff, as his wife testified that they stopped having a husband and wife relationship after the Accident. Her view of the plaintiff also changed, as she testified that she was "disappointed" because her husband is no longer the financially capable person that she married.

[184] The plaintiff refers to the following cases in submitting that a reasonable range for the plaintiff's non-pecuniary damages is $200,000 to $230,000.

a) ***Khashei v. Pirro***, 2020 BCSC 1048, in which the plaintiff was a 29-year-old steel fabricator (32 years old at time of trial) who suffered injuries when his stopped vehicle was struck from behind. He complained of neck pain, back pain, and headache. He soon complained of severe neck and lower back pain. Due to his pain, he asked his full-time employer to extend his parental leave by a month, and he also did not return to his part-time job for a month. While he focused on recovering from his injuries, his symptoms worsened. He was referred to a CT scan

and diagnosed with a disc prolapse and central canal stenosis in his lumbar spine. An MRI confirmed the disprolapse and central canal stenosis. He continued to complain of severe back pain with some occasional "electric shock" pain in his back. Mr. Khasheiv's employer decided that his injury made him a safety risk at his job as a steel fabricator, and 16 months after the collision, he was told he could not continue at his job. Mr. Khasheiv was crushed at the loss of his job. He was diagnosed as suffering from depression. His severely reduced finances and depression put a lot of strain on his family. He underwent spinal laminectomy surgery. Mr. Khasheiv's back pain was temporarily improved but later worsened. His emotional state also worsened. He complained of ongoing back pain and emotional difficulties, as well as ongoing neck pain and headaches. He was diagnosed with persistent somatic symptom disorder, moderately severe post-traumatic stress disorder, severe generalized anxiety disorder, and moderately severe major depressive disorder. There were uncertain prospects for pain relief going forward. He has gone from taking great pride in his role as a provider for his family and a loving husband and father, to being dependent on social assistance, and relying on his wife to run the household. While improvement was hoped for as plaintiff continued to recover from the second surgery, his symptoms were not expected to ever fully resolve. The Court awarded $200,000 in non-pecuniary damages ($233,967.79 adjusted for inflation).

b) ***St. Jules v. Cawley***, 2021 BCSC 1775 in which the plaintiff was a 45-year-old part-time care aide (51 years old at time of trial) who suffered injuries when her vehicle was struck from behind. After the collision she had pain in her neck and upper back, as well as headaches. Her symptoms continued, developing into a Somatic Symptom Disorder. Her mood was impacted, and she was diagnosed as suffering from Generalized Anxiety Disorder and recurrent Major Depressive Disorder. She stopped working as a care aide two years after the collision after

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assisting a fainting patient aggravated her collision-related injuries. After she stopped working, she became more depressed and anxious. Ms. St. Jules was described as being a different person as a result of her collision-related injuries. Prior to the collision, Ms. St. Jules' pre-existing anxiety and depression were sufficiently controlled to the point that they did not disable her from working at the job she enjoyed or adversely affected her otherwise happy marriage, or her social and family connections generally, and her damages would not be reduced due to her pre-existing conditions. Her ongoing pain was significant, continuing to disable her from employment and substantially contributing to the dissolution of her happy marriage. The Court awarded $200,000 in non-pecuniary damages ($228,939.83 adjusted for inflation).

c) ***Gabert v. Krist***, 2018 BCSC 2109, in which the plaintiff was 65 years old (71 years old at the time of trial) who suffered injuries when the vehicle in which she was a passenger was struck from behind. She suffered soft tissue injuries to her neck. She developed headaches and suffered from nausea and dizziness. Her headaches were debilitating. She suffered from tinnitus and vertigo. She developed chronic fatigue. She suffered significant sleep interruption. Her pain did not resolve. Prior to the collision, Ms. Gabert was a healthy and happy retiree who had a full life constituted of a loving spouse, daughters, and grandchildren. She was the family matriarch, who everyone relied on for her strength and guidance, and had an extensive social network. She was active, strong, independent, and ready to embrace all that her golden years had in store for her. As a result of the collision, her future was dramatically altered. She was left suffering from chronic fatigue syndrome, fibromyalgia with constant pain, and relentless tinnitus and headaches, all of which had a debilitating and life-altering impact on her emotional and physical well-being. She was no longer the high-functioning senior she was. Her once active social life and recreational life were no more. She was sad and frustrated at the impact on her life. Rather than

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enjoying her golden years as planned, her days had been occupied with attending multiple and varied therapies that had produced only temporary relief. Her conditions proved to be chronic, persistent, and debilitating many years after the collision, and her prognosis is poor. The Court awarded $160,000 in non-pecuniary damages ($192,385.25 adjusted for inflation).

Defendants' Position on Non-Pecuniary Damages

[185] The defendants rely on the following cases for an award for non-pecuniary damages:

a) ***Lourenco v. Pham***, 2013 BCSC 2090, in which the 22-year-old female plaintiff was struck by the defendants' vehicle while walking in a crosswalk. She suffered soft tissue injuries and pain in her neck, back, elbows, knees and buttocks. Her neck and back pain continued three and a half years after the accident. She was diagnosed with chronic pain. The non-pecuniary award was $50,000 (adjusted for inflation: $65,000).

b) ***Abraha v. Suri,*** 2019 BCSC 1855, in which the 51-year-old plaintiff sustained soft tissue injuries her neck and back, as well as developed depression, anxiety, and memory problems as a result of the accident. The Court determined that the plaintiff's physical and psychological condition was significant from her pre-accident state. Her prognosis was guarded. The plaintiff was awarded $70,000 in non-pecuniary damages (adjusted for inflation: $82,000).

c) ***Bhumrah v. McLeary***, 2021 BCSC 560, in which the 32-year-old plaintiff sustained soft tissue injuries to the neck, shoulder blade, lower back and hip, as well as depression as a result of the accident. The plaintiff's hip and low back pain improved prior to the trial. The Court found that there was a real and substantial possibility that the plaintiff's pain and limitations from the accident would impair his ability to perform

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his job as a commercial transport mechanic or to work at a job that exceeds his assessed strength category, but there was also a possibility he would achieve his career goal of moving into management. The plaintiff was awarded $80,000 in non-pecuniary damages (adjusted for inflation: $90,000).

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[186] The defendants submit that a suitable range for non-pecuniary damages is $65,000 to $85,000.

Analysis of non-pecuniary damages

[187] In my view, the cases referred to by the plaintiff involve cases in which the plaintiffs suffered more significant injuries which had a greater negative impact on their lives compared to the plaintiff in the case at bar.

[188] The defendants' cases have similar injuries, but the plaintiffs are much younger than the plaintiff here. I agree with the plaintiff that in the cases cited by the defendants, those plaintiffs appear to have suffered less vocational impairment than the plaintiff here.

[189] In the *St. Jules* case cited by the plaintiff, the Court commented on the difficulty in comparing cases, as follows:

> [90] The range represented by the authorities cited by both parties shows the difficulty in trying to reconcile the claims of a plaintiff with past awards to similarly situated plaintiffs. Setting aside the defence authorities dealing with injuries with chances of recovery, the range here is between $125,000 (*Iampietro*) and $264,546 (*Courdin* adjusted to 2021). This perhaps indicates why the authorities can be a rough guide at best, used for keeping the decision at hand within reason.

[190] The range here is even greater: between $65,000 (*Laurenco* adjusted) and $233,967.79 (*Khasheiv* adjusted).

[191] Referring to the *Stapley* factors, the plaintiff is 67 years old at trial, he suffered injuries including neck, right shoulder, back and knee pain; headaches; depressed mood most of the day, nearly every day, as well as markedly diminished interest and pleasure in all activities. He has ongoing pain, but his symptoms have been

improving and there is some cautious optimism expressed by Dr. Sidky that if the plaintiff continues with his rehabilitation, as well as adding a more involved program of stretching and strengthening exercises for his neck, shoulder, and low back, he may find that his symptoms continue to improve with time.

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[192] Dr. Waisman diagnoses a major depressive disorder, moderate, and non psychotic, based on the plaintiff's report of a depressed mood most of the day, nearly every day, as well as markedly diminished interest and pleasure in all activities. Dr. Waisman states that the plaintiff is caught in a cycle of chronic pain, depression, anxiety and cognitive symptoms that result in stress.

[193] The plaintiff, his wife and daughter gave evidence of how his lifestyle has been significantly impaired, as summarized above.

[194] I consider the case of *Popove v. Attisha*, 2019 BCSC 1587, to be of some assistance in consideration of the *Stapley* factors in assessing the quantum of an award for non-pecuniary damages to meet the specific needs and circumstances of the plaintiff, to compensate him for his pain and suffering and loss of enjoyment of life, for an award that is moderate and fair to both parties.

[195] In *Popove*, the plaintiff was a 68 year retired woman. Four years after the accident her evidence was that she hurts all the time and she still experienced neck, shoulder, back, and leg pain and had periodic headaches two to three times a month. She continued to experience sleep disturbances due to the pain. She is more emotional, tears easily and is short-tempered and impatient.

[196] The Court found that since the motor vehicle accident, the plaintiff's activities have been significantly curtailed, and she experienced constant pain in her neck and shoulders and the pain ranges from mid to high. The plaintiff was awarded $120,000 for non-pecuniary damages. Adjusted for inflation that figure is approximately $139,000.

[197] I have also considered in this analysis the plaintiff's claim for housekeeping, that issue discussed in more detail below, concluding that the claim for

housekeeping should not be a segregated pecuniary head of damage, but addressed as part of this assessment of non-pecuniary loss. As a result, I have taken into account in the analysis of the non-pecuniary award the evidence, submissions and analysis in the housekeeping section below.

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[198] Considering the *Stapley* factors, the cases referred to by the parties, and the *Popove* case which I find to be of some assistance, I consider $140,000 to be a fair and reasonable figure to be awarded for non-pecuniary damages.

Issue #3 – Past loss of income earning capacity

[199] One of the more difficult issues in this case is the assessment of damages for loss of earning capacity. For the most part the difficulty is that the plaintiff's claim is based on his evidence that he was paid up to 50 percent of his income in cash, which he did not report on his income tax returns, and there is no other evidence of the cash components of his income other than his own evidence at trial, and the evidence of the manager of the Neptune Restaurant, Heung Pak.

Legal Principles

Past Loss of Capacity to Earn Income

[200] In *Brill v. Forsyth*, 2024 BCSC 124, Justice Warren summarized the principles regarding an assessment of a claim for past loss of capacity to earn income as follows:

> [136] A claim for past loss of income-earning capacity is based on the value of the work the injured plaintiff would have performed but was unable to perform because of their injury: *Rowe v. Bobell Express Ltd.*, 2005 BCCA 141 at para. 30.
>
> [137] A common method of assessing this value is to project the income the plaintiff would have earned in the period between the injury and the trial had the injury not occurred, and to award the difference between the projected income and the actual income the plaintiff did earn or was capable of earning during that period, while taking into account all realistic contingencies.

[201] The test to be applied was discussed in *Rousta v. MacKay*, 2018 BCCA 29 as follows:

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[14] The test to be applied to *hypothetical events*, past and future, is whether there is a real and substantial possibility that the events in question would occur.

[15] In *Grewal v. Naumann*, 2017 BCCA 158, the Court described the principles underlying this approach as follows:

> [42] The trial judge commenced his analysis by setting out the principles that govern awards concerning past loss of opportunity and diminished earning capacity:
>
>> [134] The essential purpose of an award for past loss of opportunity and diminished earning capacity is to provide the plaintiff with full compensation for all of his pecuniary losses, subject to rules of remoteness and mitigation: *Andrews v. Grand & Toy Alberta Ltd.*, (1978), 1978 CanLII 1 (SCC), 83 D.L.R. (3d) 452, [1978] 2 S.C.R. 229, [1978] 1 W.W.R. 577, 8 A.R. 182, 3 C.C.L.T. 225, 19 N.R. 50. It is to restore, as best as is possible with a monetary award, an injured plaintiff to the same position he or she would have been in had the negligence not occurred. It is the difference between the plaintiff's original position just before occurrence of the negligent act or omission, and the injured position after and as a result of such act or omission, that comprises the plaintiff's loss: *Athey v. Leonati*, 1996 CanLII 183 (SCC), [1996] 3 S.C.R. 458 at paras. 34-35.
>>
>> [135] As an initial threshold issue, <u>the plaintiff must demonstrate both impairment to his or her earning capacity and that, in this case, there is a real and substantial possibility that the diminishment in earning capacity will result in a pecuniary loss</u>. It is not to be an exercise in the abstract though at the same time is described in *Andrews v. Grand & Toy Alberta Ltd.*, as "gazing deeply into the crystal ball". If established, <u>quantification of the loss can be by either an earnings approach or a capital asset approach</u>: *Perren v. Lalari*, 2010 BCCA 140 at para. 32.
>>
>> [136] In *Brown v. Golaiy*, (1985), 1985 CanLII 149 (BC SC), 26 B.C.L.R. (3d) 353 (S.C.), Finch J. as he then was stated:
>>
>>> The means by which the value of the lost, or impaired, asset is to be assessed varies of course from case to case. Some of the considerations to take into account in making that assessment include whether:
>>>
>>> 1. the plaintiff has been rendered less capable overall from earning income from all types of employment;

> > 2. the plaintiff is less marketable or attractive as an employee to potential employers;
> >
> > 3. the plaintiff has lost the ability to take advantage of all job opportunities which might otherwise have been open to him, had he not been injured; and
> >
> > 4. the plaintiff is less valuable to himself as a person capable of earning income in a competitive labour market.
>
> [137] Under any approach to assessing damages, the court is to make an assessment as opposed to applying a mechanical mathematical or statistical exercise.
>
> [138] Ultimately, the court must base its decision on what is fair and reasonable in all the circumstances: *Parypa v. Wickware*, 1999 BCCA 88.
>
> [Emphasis added.]

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Unreported income

[202] This Court has addressed on a number of occasions the issue of the assessment of earnings based on unreported income.

[203] In *Tougas v. Mostat*, 2020 BCSC 1281, Justice Ball reviewed case law concerning an assessment of past wage loss where the plaintiff had not reported tip income, as follows:

> [170] In order to assess the past wage loss of the plaintiff, the court is required to determine what amount the plaintiff would have, not could have, earned but for the injury that was sustained: *Rowe v. Bobell Express Ltd.*, 2005 BCCA 141 at para. 30; *M.B. v. British Columbia*, 2003 SCC 53 at para. 49.
>
> [171] The defendants and third party made submissions that because Ms. Tougas admitted she had not included tips in her reported income, tip income could not be included in the calculation of income. No legal authority was offered to support that submission.
>
> [172] In *Wepruk v. McGarva*, 2006 BCCA 107 at paras. 18–19, the Court of Appeal noted that it is difficult, but not impossible, to prove loss of earning capacity without tax returns or other supporting documents.
>
> [173] In *Welygan v. Willms*, 2013 BCSC 219, the Court provided a helpful discussion on unreported tips:
>
> > 397 Undeclared tips is a commonplace occurrence for young people working in the food service industry, although it makes it more difficult to determine the plaintiff's actual pre-accident income when the only evidence of the value of the tips comes from her "estimate" at trial, unsubstantiated by any written record.

> …
>
> 399 I am unable to assess her pre-trial loss of income claim on any other basis than her history of earnings from the food service industry, using her income tax information, and adding a somewhat arbitrary amount for tips that I will accept she was receiving but not reporting, for the time period in which I conclude she was incapable of returning to that work because of injuries related to the accident.
>
> [174] In short, the courts will not always accept a claim for tips, but the plaintiff's evidence can be enough, as long as the plaintiff does not have significant credibility problems. In the case at bar, the claim for tips is consistent with the evidence of practice in the bar and food service business, the payment of tips to bar servers is well-known enough to be given judicial notice, and supported by the evidence of other witnesses in this case. There is no reason based on credibility to not include tips in the income loss calculation in this case.
>
> [175] In *Bain v. Nanji*, 2000 BCSC 103, the defendant argued that the plaintiff not declaring tips for tax purposes should prevent her from recovery (they did not seem to deny that she earned the tips). The Court rejected this argument at para. 44. The Court also went on to estimate the amount of tips received, rejecting plaintiff's evidence as too high, but accepting a lower amount of tips received. A similar approach was taken in *Simmavong v. Haddock*, 2012 BCSC 473 at paras. 92–94. In *Lowe v. Johnson*, 2019 BCSC 1283, the Court included undeclared tips being included in income, based on evidence of witnesses at trial, including a former manager of the plaintiff.
>
> [176] The evidence concerning the payment of tips to a bartender/server was given by Ms. Tougas, Ms. Dickman and Mr. Levesque. The evidence of these three witnesses was consistent and not challenged during cross-examination on the practice of tipping servers or on the estimates of the quantum of tips. The amount of tips cited above were correctly quoted in the reports of Mr. Lakhani and in the submissions of the plaintiff's counsel.
>
> [Emphasis added.]

[204] In *Lowe v. Johnson*, 2019 BCSC 1283, Justice Morelatto summarized the basic principle behind undeclared tip income, as follows:

> [109] … our Court of Appeal has found that undeclared income in the form of tips may be recoverable providing some corroborating evidence exists beyond the bare assertion of the plaintiff: *Iannone v. Hoogenradd* (1992), 1997 CanLII 2007 (BC CA), 33 B.C.L.R. (3d) 254, leave to appeal dismissed [1992] S.C.C.A. No. 185; see also *Hartman v. Dias*, 2006 BCSC 478 at para. 8; *Chaundry v. John Doe*, 2017 BCSC 1895.

[205] It appears that the plaintiff's testimony, on its own, will rarely be enough to discharge the plaintiff's burden of establishing their past income on a balance of probabilities: see e.g. *Monga v. Smith*, 2021 BCSC 1430 at paras. 52, 236; *Cantrill*

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v. Taylor, 2021 BCSC 764 at paras. 14, 16; *Moini v. Liang*, 2016 BCSC 702 at para. 74.

[206] There are many cases in which plaintiffs have successfully established their past undeclared income when the testimony of their family members, clients, coworkers, or supervisors support their claim: see e.g. *Firman v. Asadi*, 2019 BCSC 270 at paras. 95 and 189; *Revak v. Rosenberger*, 2017 BCSC 2370 at paras. 12 and 19.

[207] The court has accepted that plaintiffs may establish their past undeclared income where there are business records—such as business calendars or diaries—to support the plaintiff's own testimony: see e.g. *Brown v. Ponton*, 2022 BCSC 2248 at para. 102; *Smith v. Law*, 2021 BCSC 1789 at para. 239; *Kan v. McGill*, 2021 BCSC 843 at paras. 75, 77, 90–91. However, where these records are contradictory or incomplete, they may hurt the plaintiff's claim: see e.g. *Baughan v. Baughan*, 2023 BCSC 938 at para. 20.

[208] In *Baughan*, Justice Edelmann also addressed the issue of undeclared income, as follows:

> [19] There are significant challenges in trying to assess the extent of Mr. Baughan's actual income in the years since 2014, as he says he falsely inflated his expenses to reduce his income on his tax returns. The challenges this creates for him were aptly summarized in *Moini v. Liang*, 2016 BCSC 702:
>
> [73] Mr. Moini has created difficulty for himself in the prosecution of this case by filing false income tax returns. Failure to report income on tax returns does not preclude an award based on actual income, although it does present the plaintiff with challenges of proof of what the actual income was: *Iannone v. Hoogenraad* (1992), 1992 CanLII 1630 (BCCA), 66 B.C.L.R. (2d) 106 (C.A.). Mr. Moini filed false returns so as to benefit himself financially. He has the burden of marshalling clear, convincing and cogent evidence of loss. I have the task of scrutinizing the evidence with care. In some cases, a claimant's word on oath is sufficient to discharge the burden of proof of loss. But when, as here, there is a demonstrated track record over a number of years of a willingness to lie to the tax authorities for financial gain, a claimant like Mr. Moini is hard-pressed to clear the hurdle.
>
> [Emphasis added.]

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[209] In *Revak*, the Court comments as follows on the plaintiff having failed to file any tax returns for a number of years, then bringing his filings up to date, but significantly under-reporting his actual earnings to minimize tax:

> [15] Mr. Revak's history in this regard does him no credit and is a serious deficit to his case for lost income and future loss of earning capacity. Notwithstanding this feature of the case, which reflects badly on Mr. Revak's credibility, it is not the court's function to punitively discount any credible evidence that Mr. Revak earned more than he declared or to similarly discount evidence that he would have been capable of earning more than he declared into the future: *Iannone v. Hoogenraad*, 66 B.C.L.R. (2d) 106 at paras. 5-6, 1992 CanLII 1630 (B.C.C.A.).

[210] With these principles in mind, the plaintiff's and defendants' positions on past loss of capacity to earn income are as follows.

Plaintiff's position

[211] The plaintiff claims past wage loss, and future loss of capacity at the full $6,000 per month.

[212] The plaintiff submits that it should be undisputed he was rendered incapable of returning to work as a head chef at the Neptune Restaurant due to the Accident.

[213] The plaintiff submits that the accountant at the Neptune Group head office, May Ng, who dealt with payroll, gave evidence about the plaintiff's income of $3,000 monthly.

[214] The plaintiff submits that instead of the approximately $36,000 he reported to the Canada Revenue Agency as his annual income in 2018 and 2019, his actual income earning capacity was double that amount, as approximately half of his past income from Neptune was in the form of undeclared cash payments.

[215] The plaintiff submits that his evidence regarding his income is corroborated by Mr. Pak, his employer. Although there is some inconsistency with how the two characterized the cash payments from Mr. Pak, the plaintiff submits what is clear is that the plaintiff could earn between $5,600 to $6,000 a month working as a head chef before the Accident.

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[216] The plaintiff submits that Ms. Ng's evidence also supports the plaintiff's testimony, as she acknowledged that it is possible for individual Neptune restaurants to pay additional cash salaries to employees without involving the Neptune Restaurant Group.

[217] The plaintiff submits that the estimated value of the plaintiff's net of tax, absent-accident earnings over the period from January 20, 2020 to the date of trial, April 15, 2024 is calculated to be $240,183.00 according to the report of the expert economist called by the plaintiff, Nicholas Coleman.

[218] The Plaintiff submits that the number is reasonable after deducting the employment insurance benefit he received for a brief period in 2020 after the Accident, which totaled $6,570.00.

[219] The Plaintiff therefore seeks $233,613.00 in past loss of earning capacity.

Defendants' position

[220] The defendants submit that the plaintiff's shoulders limit him vocationally and that those shoulder complaints and limitations were not caused by the Accident.

[221] The plaintiff's evidence was that his shoulder pain prevents him from lifting and reaching. Ms. Chu gave evidence that the family has made changes around the kitchen for the plaintiff to allow him to cook such as moving items to lower cupboards and using lighter pots and pans.

[222] Mr. Chu testified that in the kitchen at the restaurant he was required to reach and lift heavy items.

[223] The defendants concede that for the period immediately following the Accident the plaintiff was off work due to low back pain and neck pain as a result of the Accident. However, the defendants submit that as of October 15, 2021, when the plaintiff's right shoulder pain is such that his family physician is referring him for an MRI, he would have been off work for his right shoulder pain regardless of whether the Accident occurred or not.

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[224] As a result, the defendants submit that the plaintiff is only entitled to wage loss for a period from January 20, 2020 to October 15, 2021.

[225] The defendants also submit that the plaintiff has not met the burden of proof with respect to any cash income and therefore the plaintiff's proven $3,000 in cheque income should be used when determining the plaintiff's wage loss claim.

[226] In addition, the plaintiff received $6,570 in employment insurance benefits immediately following the Accident.

[227] Therefore, the defendants submit the plaintiff is entitled to $3,000 x 21 months minus $6,570 in employment insurance, for a total award of $56,430 gross, and $43,062 net for past loss of income earning capacity.

Analysis of past loss of income earning capacity

[228] As summarized above, for an award for past loss of income earning capacity, the plaintiff must demonstrate both impairment to his or her earning capacity and that, in this case, there is a real and substantial possibility that the diminishment in earning capacity will result in a pecuniary loss. If established, the question is the quantification of the loss.

[229] The plaintiff's evidence at trial regarding his injuries and his ability to work is summarized as follows:

- Following the Accident, when the pain in the lower back and back was less severe, the pain in the neck and shoulder became more prominent. He described experiencing pain in his lower back, back and neck.

- Regarding the plaintiff's ability to work, his evidence at trial was that he wished he could work, but when he sought a letter from his doctor, his doctor told him that he was unsuited to do such work.

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- The plaintiff's evidence is that he has not sought other work because he was very aware of his physical and mental energy to do the work, which is with reference to his own reports of diminished physical and mental energy.

[230] Regarding the right shoulder, I have made the finding above regarding the Accident causing the right shoulder injury.

[231] Other than the expert opinion evidence at trial, there was no vocational or occupational clinical records or assessment in evidence, despite references in both Dr. Sidky and Dr. Fuller's expert reports of having reviewed at least 11 occupational therapy reports dated 2020 – 2023, and clinical records of the occupational therapist.

[232] Dr. Sidky's references to work capacity are as follow:

> Mr. Chu was formerly employed as a chef in a restaurant. Following the January 20, 2020 accident, he had not returned back to work. Given the length of time from the accident and the lack of work, it would be difficult for Mr. Chu to return back to the type of work that he was involved in previously, and in particular because he has some increased complaints relating to overhead activities. Based on the injuries sustained in the accident, I would not restrict Mr. Chu from taking part in any of his work-related activities. However, as noted above, from the length of time off from the accident, it may be difficult for Mr. Chu to return back to his prior functionality.

[233] To paraphrase Dr. Sidky, the plaintiff is not restricted from taking part in his work-related activities as a result of the Accident, but given the length of time since the Accident and the lack or work, it would be difficult for him to return, and "because he has some increased complaints relating to overhead activities"; however, Dr. Sidky does not specify what he means by "increased complaints relating to overhead activities."

[234] Dr. Sidky's report earlier refers to a GP reassessment medical report dated June 25, 2021, quoting: "neck pain – back pain – right shoulder pain raising above head – right knee pain worse when squatting/flexing"; and also the following quote: "Due to symptoms above, he cannot work at the moment due to the demands of working in the kitchen. "

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[235] Dr. Sidky agreed on cross-examination that if a person were to experience multiple pain sites they may not mention all of them because they may focus on areas that are more of an issue; however, despite that initial focus on localized areas of pain, if the patient has suffered an acute injury he would expect the area of pain to be generally discussed.

[236] Dr. Fuller's report refers to the plaintiff's back pain being described as constant and varying in intensity and exacerbated by activity.

[237] Dr. Fuller's report includes a diagnosis of chronic pain syndrome. In Dr. Fuller's opinion, "there is no therapeutic modality that will significantly improve or alleviate this patient's symptoms with particular reference to the long-term perspective."

[238] In addition to Dr. Fuller's comments about the impact of work exacerbating the plaintiff's back pain noted above, he also refers to the plaintiff's shoulder problem, and back pain affecting his ability to work, as follows:

> He was hoping to work into his 70s. However, he is incapable of this employment in that his shoulder problem precludes his standing with the arms forward flexed/moved forward away from the midline of the body in order to handle a wok and spatula. He is also somewhat flexed, exacerbating the problem with his back. It is also of note that this job entails standing during the work period. It is also of note that he worked extended hours.

[239] Dr. Fuller's opinion regarding the plaintiff's right shoulder refers to spontaneous tears of the rotator cuff found on MRI in the older age group, but opines that "there is a relatively clear temporal relationship between the onset of his neck and shoulder symptoms" and the Accident.

[240] Based on the above review of the evidence, which I find provides support for the plaintiff's evidence that he has been unable to work as head chef at the Neptune Restaurant after the Accident, I find that the plaintiff has proven on a balance of probabilities that as a result of his injuries from the Accident he suffered an impairment to his earning capacity following the Accident, and that the impairment to his earning capacity resulted in a pecuniary loss following the Accident.

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[241] Regarding the quantum of the pecuniary loss, there is no disagreement that the plaintiff was earning a total of $3,000 per month paid by him by cheque each month.

[242] Where the parties part ways, and what is a difficult issue for the assessment of past and future lost of income earning capacity, is that the plaintiff alleges he was paid an additional $2,000 per month in cash as part of his salary, and an additional $600 - $1,000 per month in cash for tips.

[243] The plaintiff stated that he was paid his salary every month, on the 1st and 15th of the month by cheque, and cash tips were paid weekly.

[244] The plaintiff gave evidence of those figures, alleging that when he went to work at the Neptune Restaurant in downtown Vancouver, that was the agreement he reached with the manager, Mr. Pak, regarding his income.

[245] The $3,000 per month payment by cheque is supported by Mr. Chu's tax returns; however, for the cash portion of his alleged income, there was no documentary evidence adduced at trial to support the cash figures, that is, there were no notes, no receipts, no bank statements, no personal financial records, and no restaurant business records.

[246] The plaintiff submits that Mr. Pak's evidence corroborates Mr. Chu's evidence concerning the agreement to pay the amount of cash.

[247] While I agree that there was some similarity between the plaintiff's and Mr. Pak's evidence regarding the plaintiff's pay structure, there were some inconsistencies between the plaintiff's evidence and Mr. Pak's evidence about the alleged agreement and the cash payments.

[248] Mr. Pak's evidence about the plaintiff's income is summarized as follows:

- Mr. Pak stated: "According to his [plaintiff] request he was paid $3,000 by cheque, and between $2,300 and $2,600 cash [interjection by Mr. Pak]; correction, it is $2,600 to $3,000 for tips etcetera." Mr. Pak's interjection was

followed by the interpreter stating "between $2,600 to $3,000 for tips etcetera," but it is not clear if the correction followed an error in translation by the translator, or by Mr. Pak changing his evidence from the lower to the higher figures.

- When asked how the balance of the plaintiff's salary other than the $3,000 cheque was paid if not by cheque, Mr. Pak responded: "The remainder of $2,600 to $3,000 was paid to him in cash in the form of tips that was paid to him."
- Mr. Pak was responsible for the payment of the cash, and stated that: "From the very beginning, the cash payment was in the form of tips, but in terms of dealing with the tax declaration, you [the plaintiff] would be dealing with that."
- In cross-examination, Mr. Pak stated that the plaintiff negotiated for his salary to be $3,000 by cheque, $2,600 to $3,000 in cash, as follows: "Yes, I told him, this cash that I am giving you is in the form of tips, but you are the one responsible for income tax issues."
- When it was put to Mr. Pak that the plaintiff's evidence was that his tip income was $600 - $1,000 paid out on a weekly basis, he agreed, in less than convincing fashion, as follows: "Yes, that should be it, ya."
- When asked where the extra $2,000 in cash was from, Mr. Pak answered, again in somewhat vague terms: "Regardless who would be paying that amount of tips, anyhow, I would be paying that amount every month in cash to him."
- When followed up with a question of the $2,000 cash not being a part of salary, and not part of tips, Mr. Pak stated: "It was our commitment from the very beginning."
- Mr. Pak agreed there was no documentation of the cash payment given to the plaintiff.

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- In cross-examination, Mr. Pak agreed that tips are determined by the amount of the gratuity left by the customer at the end of the meal, and he did not explain how the plaintiff could have negotiated the amount of tips in advance of employment at the Neptune Restaurant, other than to say that it was at the plaintiff's request.

[249] Regarding the correction in Mr. Pak's answer about the amount of the cash, that is, $2,300 and $2,600 cash, corrected to $2,600 to $3,000 for "tips etcetera", I do not consider that correction to be a factor in the consideration of credibility relating to the plaintiff or Mr. Pak, as this is an example of what Madam Justice Griffin in *Fu v. Zhu,* 2018 BCSC 9 referred to as "nuances that might be lost in translation, both in terms of the translation of the question to the witness and in the answer": at para. 40. Here, it is not clear if Mr. Pak changed the amount of cash in his answer, or if he corrected the translator.

[250] The plaintiff also submits that the evidence of May Ng, the Neptune Group's accountant, corroborates the plaintiff's receipt of income by cash; however, in my view that overstates Ms. Ng's evidence because she had no knowledge of the plaintiff's receipt of cash as a component of his income. She answered affirmatively to a leading question in cross-examination that it is possible that an employee could be paid more than represented in the payroll documents, but she had no knowledge of payments made personally between the owners and employees of individual restaurants.

[251] Ms. Ng gave evidence that she had worked as an accountant for the Neptune Group for ten years.

[252] The Neptune Group had over 15 locations in the Lower Mainland.

[253] In Ms. Ng's position at the Neptune Group's central office, she administers the payment of the cheque portion of employees' salaries from payroll information received from individual restaurant managers.

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[254] I also note that she may have had evidence about what other restaurants in the Neptune Group pay their head chefs, but she was not asked that question.

[255] The Neptune Group's records provide evidence of the $3,000 monthly salary paid by cheque, but no evidence regarding cash payments to the plaintiff.

[256] The plaintiff reported only the $3,000 per month to the Canada Revenue Agency as income on his income tax returns.

[257] He acknowledged that he knew it was wrong to not report that income. He did it because he wanted more income. He admitted to misrepresenting his income when it was a financial benefit to him.

[258] Another issue about both the plaintiff's and Mr. Pak's evidence is that neither of them gave any evidence about the details regarding the payment of the tips payment other than a range of $600 - $1000 monthly. For example, there was no explanation about what the actual tips were in any given month, or the basis upon which the weekly tips over the course of a month would equal $600 or $1,000, or any number in between those two figures.

[259] Neither the plaintiff nor Mr. Pak explained how the monthly tips between $600 and $1,000 would be calculated, for example, whether the plaintiff received a percentage or share of a staff tip pool, or a percentage of the restaurant's sales receipts, or some other measure.

[260] Relevant to the issue of the amount of the plaintiff's receipt of cash, and also relevant to Mr. Pak's credibility, is that there was also no evidence regarding the amount of cash received by the restaurant each month, whether in tips, or in cash receipts, that would support a cash payment to the plaintiff of $2,000 monthly, or how that undocumented monthly cash payment of $2,000 impacted Mr. Pak, if at all, in terms of the individual restaurant accounting and/or the Neptune Group accounting of the restaurant's business.

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[261] There was also no evidence about the salary range of head chefs at other restaurants in downtown Vancouver, or specifically what head chefs at other restaurants in the Neptune Group earn, despite the plaintiff having called May Ng, the account, who testified she does payroll for the restaurants in the Neptune Group, which consisted of 15 restaurants in the Lower Mainland at the time.

[262] As the case authorities demonstrate, in circumstances where a plaintiff claims an award for a loss of capacity to earn income, where the plaintiff has not included tips in their reported income, it is difficult, but not impossible, to prove loss of earning capacity without tax returns or other supporting documents; however, it will be a difficult burden to marshall clear, convincing and cogent evidence of loss.

[263] Here, I do not consider the plaintiff's and Mr. Pak's evidence to be clear, convincing and cogent evidence of the plaintiff's monthly income including $2,000 cash over and above the $3,000 income he received by cheque.

[264] Regarding tips, I can take judicial notice that it is common for serving staff and support staff in the food service industry to receive a portion of their income in tips from customers, and as recognized in the case law: see *Tougas* at paras.172–176.

[265] On that basis, I can accept that the plaintiff would receive tips at Neptune Restaurant, but there was no evidence of any distribution scheme at the Neptune Restaurant, only that Mr. Pak had agreed to pay the plaintiff cash in the form of "tips etcetera", and the quantum would be between $600 - $1000, with no evidence about how the amount of tip income would be determined within that range for any given month.

[266] Given the lack of detail in the evidence of what the plaintiff's income was in tips other than a general range of $600 - $1,000, I find the appropriate figure to be at the low end of the range of $600-$1,000, which is $600 per month.

[267] Although the plaintiff submits that it is clear that the plaintiff could earn between $5,600 to $6,000 a month working as a head chef before the Accident, I

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find that based on the analysis above the plaintiff's earning are anything but clear. There was no evidence of what a head chef earns at a Vancouver restaurant, other than the plaintiff's and Mr. Pak's evidence which in some respects was inconsistent and unclear, and there was no documentary record of anything other than the $3,000 that the plaintiff received monthly, half of that amount on the 1st and 15th of the month.

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[268] As I have found above, the plaintiff's earnings were $3,000 by cheque each month, and $600 in the form of tips, for a total of $3,600 per month.

[269] The plaintiff submits that the appropriate award for past loss of earning capacity is $240,183.00, as calculated by the plaintiff's expert Nicholas Coleman, from January 20, 2020 to the date of trial, April 15, 2024 which assumes a disability discount and deductions for employment insurance and taxes.

[270] The defendant submits the calculation is $3,000 x 21 months for the period January 20, 2020 to October 15, 2021, ending on that date on account of the plaintiff's right shoulder limitations, minus $6,570 paid to the plaintiff in employment insurance for a total of $56,430 gross and $43,062 net.

[271] In my view the appropriate figure is the monthly income assessed above at $3,600 monthly. For the same period used by Mr. Coleman's report, $3,600 monthly equals approximately $182,500 gross.

[272] Reducing the gross by taking into account a similar reduction for disability allowance, employment insurance and taxes, equals approximately $142,000 net.

[273] Subtracting the employment benefits received by the plaintiff in the amount of $6,570 results in a total award for past loss of earning capacity of $135,430, which in all the circumstances of this case I consider to be a fair and reasonable award.

Issue #4 – Future loss of income earning capacity

[274] The plaintiff seeks damages for future loss of income earning capacity.

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Legal Principles

[275] In *August-Mansfield v. Yun*, 2023 BCSC 1633, Justice Brongers summarized the assessment of a claim for future loss of earning capacity, as follows:

> [68] Assessing a plaintiff's prospective loss of earning capacity requires an examination of two hypothetical futures: one in which a plaintiff is assumed to be living with the aftermath of the injuries caused by a defendant, and another in which a plaintiff is assumed to be living as if these injuries had never been sustained. As stated by our Court of Appeal in *Gregory v. Insurance Corporation of British Columbia,* 2011 BCCA 144 at para. 32:
>
> > … An award for future loss of earning capacity thus represents compensation for a pecuniary loss. It is true that the award is an assessment, not a mathematical calculation. Nevertheless, the award involves a comparison between the likely future of the plaintiff if the accident had not happened and the plaintiff's likely future after the accident has happened: *Rosvold v. Dunlop*, 2001 BCCA 1 at para. 11; *Ryder v. Paquette*, [1995] B.C.J. No. 644 (C.A.) at para. 8. …
>
> [69] The Court of Appeal prescribed a three-step test for assessing future loss of earning capacity in a trilogy of cases decided in 2021 indexed as: *Dornan v. Silva,* 2021 BCCA 228; *Rab v. Prescott,* 2021 BCCA 345 [*Rab*]; and *Lo v. Vos,* 2021 BCCA 421. The questions to be asked at these three steps were summarized in *Rab* at para. 47 as follows:
>
> > Is there a potential future event that could lead to a loss of earning capacity?
> >
> > Is there a real and substantial possibility that the future event in question will cause a pecuniary loss?
> >
> > If there is a such a possibility, what is its value? Included in this step is what is the relative likelihood of the possible future loss occurring? (*Ploskon-Ciesla v. Brophy*, 2022 BCCA 217 at paras. 33 and 47-48.
>
> [70] Valuation of the loss can be done using either the "earnings approach" or the "capital asset approach": *Brown v. Golaiy* (1985), 1985 CanLII 149 (BC SC), 26 B.C.L.R. (3d) 353 (S.C.) [*Brown*] at para. 7; *Perren v. Lalari,* 2010 BCCA 140 at paras. 11–12. The earnings approach involves a calculation of the present value of a plaintiff's annual loss of income over the remaining years of employment, and is more appropriate when the loss is more easily measurable: *Westbroek v. Brizuela,* 2014 BCCA 48. The capital asset approach involves consideration of a person's lost ability to work in a certain position in their field of work as the loss of an income earning asset, and is more appropriate where the loss is less easily measurable: *Park v. Targonski,* 2017 BCCA 134 at para. 123. Under either approach, the plaintiff must prove that there is a real and substantial possibility of various future events leading to an income loss (*Perren* at para. 33), and damages are assessed, not calculated (*Rosvold v. Dunlop,* 2001 BCCA 1 at para. 18).
>
> [Emphasis added.]

[276] As a result, to receive compensation for loss of future earning capacity, a plaintiff must demonstrate impairment to their earning capacity and a real and substantial possibility that the impairment will result in a pecuniary loss in the future.

[277] The third step of the assessment of the loss includes a determination of the relative likelihood of the future loss occurring and whether any contingencies apply, and whether the award should be reduced to account for the relative likelihood that the future event will not occur: see *Haynes* at para. 136.

Plaintiff's Position on Future Loss of Earning Capacity

[278] The plaintiff submits that the evidence of chronic pain in his back and shoulders establishes a potential future event that could damage his capacity to earn income, and there is a real and substantial possibility that the future event will cause a pecuniary loss.

[279] The plaintiff's submits that his job was fast-paced and required long and intense hours working in an enclosed environment in which he was required to regularly bend, stoop, lift, and reach. Because of his physical and mental limitations due to injuries sustained as a result of the Accident, the Plaintiff likely will never return to work as a head chef in a restaurant.

[280] I note that the plaintiff described the work as very busy, not fast-paced or intense.

[281] The plaintiff submits that given the plaintiff's age, lack of education, and language barrier, he is unlikely to find any kind of employment that could accommodate his physical and mental limitations.

[282] Regarding the closure of the Neptune Restaurant in December 2023, the plaintiff submits he could have found comparable employment, pointing to Mr. Pak's evidence that the plaintiff possessed all the qualities one would look for in a head chef, including having good cooking skill, being passionate, taking leadership, and seeing business the same way as the owner.

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[283] The plaintiff submits that the earnings approach is appropriate in this case, given that plaintiff had a stable, albeit underreported, annual income before the Accident.

[284] The plaintiff's expert, Mr. Coleman, assumed absent-Accident income of $74,288 annually based on monthly income of $3,000 by cheque, $2,000 cash and $1,000 tips, the latter tip figure adjusted for inflation to $14,288 annually.

[285] Regarding retirement, the plaintiff submits that three numbers are possible: 70, 73, or 75.

[286] The plaintiff's age will be 70 when his youngest daughter graduates from university, assuming she completes a four year program.

[287] Based on a retirement age of 70, Mr. Coleman estimates the plaintiff's present value of his future earning capacity in the absence of the Accident to be $189,954.42.

[288] The second possible retirement age is 73. The plaintiff refers to his evidence that he felt he could have worked for another ten years, and that he wanted to work not just until his daughters have finished their education, but until they have become economically self-sufficient. The plaintiff also refers to Mr. Pak's evidence on this point about the plaintiff having referred to his daughters regarding his retirement.

[289] If 73 is the age of retirement, Mr. Coleman's estimated present value of the plaintiff's future earning capacity in the absence of the Accident is $375,302.98.

[290] A third possible age of retirement is 75, which the plaintiff submits is the age given by the plaintiff at trial when he was asked about when he had intended to retire before the Accident.

[291] Mr. Coleman's estimate of the present value of the plaintiff's future earning capacity in the absence of the Accident to age 75 is $487,923.58.

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[292] The plaintiff submits that based on these three assessments for retirement at age 70, 73 and 75, respectively, a reasonable range for the plaintiff's loss of future earning capacity is between $189,954.42 and $487,923.58.

[293] The plaintiff submits that taking into account potential negative contingencies such as potential closure of restaurants resulting in unemployment for brief periods of time, the plaintiff seeks an award of $350,000 for his loss of future income earning capacity as a result of the Accident.

Defendants' Position on Future Loss of Earning Capacity

[294] The defendants submit that the plaintiff's shoulder issues do not stem from the Accident and presently prohibit the plaintiff from working. As such, they submit there is no loss of future earning capacity because the plaintiff would be off work due to shoulder regardless of the Accident occurring.

[295] If the Court determines the right shoulder was related to the Accident, then the defendants submit the plaintiff's loss of earning capacity is limited by other contingencies.

[296] In this action, the plaintiff's previous employer, Neptune Restaurant, closed December 29, 2023. Therefore, the plaintiff would not have continued working at Neptune Restaurant and his income would be unknown from December 29, 2023 moving forward. Given this, the defendants submit that the capital asset approach is more appropriate in this case.

[297] The plaintiff provided evidence that he planned on working until his daughters finished school. His youngest daughter is in the end of her first year at SFU and his second daughter is presently in her second year at UBC. The plaintiff is presently 67 years old and therefore his youngest daughter would finish school when the plaintiff is 70.

[298] Given the above the defendants submit the plaintiff planned to retire at age 70.

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[299] The plaintiff's employment history prior to working at Neptune Restaurant depicts that the plaintiff's employment history has not been stable and, based on reported income, that full-time work is not the norm for the plaintiff.

[300] The defendants submit that Neptune Restaurant and fulltime stable work was the exception in the plaintiff's employment history.

[301] The defendants submit that given the above considerations, as of December 29, 2023 the plaintiff would have been unemployed and looking for work with the following health issues ongoing: high blood pressure; high cholesterol; diabetes, as well as tingling in the feet, which Dr. Sidky opines likely arises from the diabetes; and left shoulder pain sitting at a 4/10 on his pain scale.

[302] The defendants submit that given his ongoing physical issues, particularly the shoulder and tingling in the feet, the plaintiff has not proved he would be capable of working on a fulltime basis in a physical job such as head chef.

[303] The defendants submit that the Court should be using the plaintiff's pre-Neptune Restaurant income, which, it is submitted, is a more accurate reflection of the plaintiff's plausible employment future when factoring in his earning capacity, or his annual capital asset, from December 29, 2023 onward.

[304] Using the plaintiff's pre-Neptune earnings, the defendants submit that following the closure of Neptune Restaurant the plaintiff would have earned $15,000 to $20,000 annually, accounting for inflation, the rise in minimum wage, and the plaintiff's additional experience.

[305] Using Mr. Coleman's multiplies, the defendants submit that the appropriate range for an award for future loss of earning capacity at $15,000 - $20,000 annually, is $38,355 to $51,140.

Analysis of Future Loss of Earning Capacity

[306] An award for future loss of earning capacity represents compensation for a pecuniary loss. The analysis is an assessment, not a mathematical calculation.

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Nevertheless, the award involves a comparison between the likely future of Mr. Chu if the Accident had not happened and Mr. Chu's likely future after the Accident happened, which necessarily involves an assessment of Mr. Chu's potential earning but for the Accident.

[307] The three-step test for assessing future loss of earning capacity is:

1. Is there a potential future event that could lead to a loss of earning capacity?

2. Is there a real and substantial possibility that the future event in question will cause a pecuniary loss?

3. If there is a such a possibility, what is its value? At this stage consideration must also include the relative likelihood of the future loss occurring and whether any contingencies apply.

Rab v. Prescott, 2021 BCCA 345 at para. 47

[308] Mr. Chu's injury to his back, neck and right shoulder from the Accident, resulting in chronic pain which may improve, but is unlikely to heal completely, has resulted in a loss of earning capacity.

[309] It is apparent from the analysis of the evidence above and the findings of fact regarding the plaintiff's injuries, that there is a real and substantial possibility that the effect of these injuries on Mr. Chu's ability to work will cause a pecuniary loss.

[310] I am mindful of the need to consider an award for the future loss of capacity to earn income based on what is fair and reasonable in all the circumstances: *Parypa v. Wickware*, 1999 BCCA 88 at paras. 62–70.

[311] Mr. Chu had an established work history at the Neptune Restaurant and he planned to continue to work as a head chef at the Neptune Restaurant. In my view the analysis of the loss of the capital asset should be on the earnings approach, an assessment of the likely future of the plaintiff's working life without the Accident as

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compared to his likely future working life after the Accident: See *Rab* at paras. 64–65, citing *Gregory v. Insurance Corporation of British Columbia*, 2011 BCCA 144 at para. 32, and *Pololos v. Cinnamon-Lopez*, 2016 BCSC 81 at para. 133.

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Full time "without Accident" earnings

[312] The starting point is to assess the total earnings that Mr. Chu could have earned but for the Accident.

[313] I consider it a real and substantial possibility that the annual without accident full time earnings of Mr. Chu as head chef at the Neptune Restaurant for the assessment of Mr. Chu's loss of future earning capacity to be $3,600 monthly, $43,200 annually, with the relative likelihood of that figure on the compensable loss to be high.

[314] The next consideration is whether any contingencies apply.

[315] Mr. Coleman's report includes two tables for the calculation of the present value of future earnings, one that includes the prescribed discount rate for wage-related amounts (wage inflation and return on investment) and mortality statistics (Table 1), and a second table which adds on a contingency for potential disability (Table 2). These tables including the discount rate for wage-related amounts, mortality statistics and potential disability reflect the general contingencies to be taken into account in assessing the plaintiff's future loss of capacity.

[316] A second contingency consideration is any specific contingencies that may apply to Mr. Chu. The medical records provide evidence that Mr. Chu has high blood pressure, high cholesterol, and diabetes. The possibility that one or more of these medical issues, as negative contingencies may have shortened Mr. Chu's capacity to earn income, appear to have been taken into account in Mr. Coleman's inclusion of the contingency for disability in Table 2.

[317] Another potential specific contingency is related to the Neptune Restaurant having closed on December 29, 2023. At that time, Mr. Chu was off work as a result

of the injuries he suffered in the Accident. But for the Accident, the question is whether he would have been able to find work at another restaurant after Neptune Restaurant closed.

[318] Mr. Chu's employer, Mr. Pak, gave evidence that he was opening a new restaurant which was all set to open two days after he gave evidence at trial – April 20, 2024.

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[319] Mr. Pak's evidence is that he would continue to employ Mr. Chu at the Neptune Restaurant as long as the restaurant continued to operate, and he hoped he would recover early and return to work.

[320] Mr. Pak was not specifically asked if he would hire Mr. Chu at Mr. Pak's new restaurant; however, his evidence was that he hoped Mr. Chu would return to work.

[321] Mr. Pak spoke favourably about Mr. Chu as a trusted employee, praising his skills as a head chef, including his work as a chef, and managing people and food in the kitchen.

[322] Based on Mr. Pak's evidence, despite the absence of a specific question about hiring Mr. Chu at his new restaurant, I consider it a real and substantial possibility that but for the Accident, it is likely that Mr. Chu would have continued to work with Mr. Pak at his new restaurant, which was set to open less than four months after the Neptune Restaurant closed, and would have likely required Mr. Chu to work in advance of the opening date, so any period of employment lost by Mr. Chu on account of the Neptune Restaurant closing would appear to have been nominal, and I find that it does not affect the assessment of Mr. Chu's capacity to earn income.

[323] Another potential specific contingency relating to Mr. Chu is the possibility that his medical condition improves and he is able to return to work, not necessarily full-time as a head chef, but in a less stressful and less physically demanding role as such as a cook in a restaurant; however, given Dr. Fuller's opinion of chronic pain and inability to return to work, Mr. Chu's age and some limitation in his prospects

based on language in that he does not speak English, I do not consider it a real and substantial possibility that he will return to work, even if he sees some improvement in his medical condition.

[324] The last specific contingency to consider is Mr. Chu's age of retirement.

[325] At the time of trial he was aged 67. A number of different ages for Mr. Chu's potential retirement appear in the evidence, with no consistency.

[326] The defendants refer to Mr. Pak's evidence, however, I give that evidence little weight because when Mr. Pak was asked if Mr. Chu discussed his retirement plans, Mr. Pak's response was that Mr. Chu mentioned his children were still young, and he "guessed" that it would be when his children graduated or became independent.

[327] Mr. Chu's evidence at trial was that he would work at least until his daughters' graduation, then he referred to age 75.

[328] He later stated that when he chatted with his boss, Mr. Pak, he said he had two daughters in school, he would wait until they finish, then slow down work, depending on his health.

[329] Dr. Fuller's report refers to Mr. Chu telling him he wished to work into his 70s.

[330] The defendants' submissions refer to age 70, 73 and age 75.

[331] Although there is no consistency in the evidence regarding the age of retirement, there is consistency with reference to the time of his daughters' graduation, which is assumed to be in three years based on Mr. Chu's youngest daughter being in first year university at the time of trial. Mr. Chu will be aged 70 if his youngest daughter finishes a four year program three years from the date of trial.

[332] Mr. Chu also referred to continuing to work beyond that time, but slowing down at that point, which is consistent with his evidence of working into his 70s, and consideration of realistic expectations about his health and abilities as he ages.

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[333] The assessment of a future loss of capacity to earn income needs to what is fair and reasonable in all the circumstances: *Parypa* at paras. 62–70.

[334] Considering all the evidence regarding Mr. Chu's potential age of retirement, in my view there is a real and substantial possibility that Mr. Chu will suffer a pecuniary loss as a result of his injuries from the Accident, to a high degree of likelihood, based on him continuing to work full-time as a head chef until age 70, at which time he will likely slow down and work less than full-time.

[335] Mr. Chu gave no evidence about what he meant by "slow down".

[336] I consider it a real and substantial possibility that at age 70, Mr. Chu's "slow down" is likely to result in him working at something greater than half time; however, by age 73 the slow down in work effort is likely to result in him working at something less than half time.

[337] As a result, I consider that using an average of half time work as Mr. Chu's slow down from full time to retirement over the course of his work at ages 70-73 is a fair and reasonable estimate upon which an award for Mr. Chu's future loss of earning capacity can be assessed for those years, with age 73 as the age of retirement being the approximate midpoint, on the high side, of the range for retirement at age 70, 73 or 75.

[338] Using Mr. Coleman's multipliers in Table 2, full-time to age 70 at $43,200 annually, multiplied by the multiplier of 2.557 equals $110,462.40.

[339] From age 70 to 73, the multiplier is 2.496, multiplied by 50 percent income annually at $21,600 equals $53,913.60.

[340] The total award for future loss of earning capacity to age 73 is thus $164,376.

[341] As a result, having considered all the relevant factors, I consider $164,376 assessed for Mr. Chu's future loss of earning capacity to be a fair and reasonable award.

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Issue #5 – House-keeping

Legal Principles

[342] The legal principles applicable to a claim for the loss of housekeeping capacity were recently considered in some detail in *McKee v. Hicks*, 2023 BCCA 109.

[343] Two key points are: first, the loss of housekeeping capacity is the plaintiff's, and not a loss of a family member or friend who assists the plaintiff. Second, such a claim may be addressed as part of the non-pecuniary loss, or as a segregated pecuniary head of damage. The Court of Appeal in *McKee* addressed these points as follows:

> [98] In *Liu v. Bains*, 2016 BCCA 374, the Court cited para. 63 of Justice Huddart's judgment at para. 25, and said:
>
>> [26] It lies in the trial judge's discretion whether to address such a claim as part of the non-pecuniary loss or as a segregated pecuniary head of damage. In *McTavish* at paras. 68-69, the Court suggested that treating loss of housekeeping capacity as non-pecuniary loss may be best suited to cases in which the plaintiff is still able to perform household tasks with difficulty or decides they need not be done, while remuneration in pecuniary terms is preferable where family members gratuitously perform the lost services, thereby avoiding necessary replacement costs.
>>
>> [Emphasis in original.]

[344] At para. 101, *McKee* then refers to *Kim v. Lin*, 2018 BCCA 77 at paras. 27–37, where the "Court again grappled with the somewhat vexing issue of when a pecuniary award should be made for a loss of housekeeping capacity," including the following at para. 30 of *Kim*, quoted from Jamie Cassels & Elizabeth Adjin-Tettey, *Remedies: The Law of Damages*, 3d ed (Toronto: Irwin Law Inc., 2014) at 187–188:

> Where the plaintiff continues to perform the tasks but with difficulty, requires more time to complete tasks, or manages to get by without doing or intending to do these tasks, the loss may be compensated for as part of non-pecuniary damages for pain and suffering and loss of amenity. Specifically, compensation is intended for the plaintiff's pain in persevering with housework, loss of satisfaction in not contributing to the upkeep of one's home, and/or for having to live with a disordered and perhaps not a well-functioning home. There may be a fine line between situations of diminished capacity to perform tasks

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> and when the plaintiff completes tasks with difficulty. Care needs to be taken in making these distinctions to ensure fairness to both plaintiff and defendant. A pecuniary award may be appropriate where the evidence indicates that a reasonable person in the plaintiff's circumstances should not be expected to continue to perform the tasks in question due to their injuries. Such a position avoids prejudicing plaintiffs who are stoic, or are unable to benefit from gratuitous services or afford to hire replacement services prior to trial.
>
> [Footnotes omitted in *Kim*. Emphasis in original.]

[345] *McKee* concludes:

> [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.

[346] With these principles in mind, the parties' positions and the analysis on the claim for loss of housekeeping capacity are as follows.

Plaintiff's position on loss of housekeeping capacity

[347] The plaintiff submits that his loss of housekeeping capacity in this case warrants a separate pecuniary damages award.

[348] The plaintiff testified that he was responsible for the following indoor and outdoor housekeeping duties on the property before the Accident:

a) making his own bed;

b) taking out trash;

c) cooking dinner for the family on days when he was not working;

d) cleaning the kitchen and bathroom, including scrubbing toilet and shower;

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e) doing his own laundry;

f) washing of family vehicles; and

g) seasonal power washing of the backyard.

[349] The plaintiff further testified that he spent approximately two hours a week doing the above housekeeping duties.

[350] As a result of the injuries suffered during the Accident, the Plaintiff's evidence is he is now only able to put his clothes in the laundry machine and do simple cooking, such as making rice, boiling vegetables, and steaming food.

[351] Ms. Zhang testified that other than family vehicles washing, which is now done outside at car washing facilities, the rest of the family shares the balance of housekeeping duties that were done by Mr. Chu before the Accident.

[352] For past loss of housekeeping capacity, the Plaintiff submits the appropriate method of calculation is to multiply the total number of hours that he could have worked from date of Accident until trial by the current hourly rate, relying on *Howes v. Liu*, 2023 BCCA 316 for a proposed rate of $35 per hour for two hours per week, the past loss of housekeeping duties being $70 x 221 weeks = $15,470.00.

[353] For future loss of housekeeping capacity, counsel refers to a "present value" to age 75 in 2032, before contingencies being $70 x 407 weeks = $28,490, for a total or $43,960, the plaintiff seeking $40,000 as the award for his loss of past and future housekeeping capacities.

[354] I note the claim for future loss of housekeeping is not based on multipliers resulting in a "present value". The plaintiff's calculation does not apply any discount for the future stream of payments to arrive at a present discounted value, which is the proper approach.

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Defendants' position on loss of housekeeping capacity

[355] The defendants submit that prior to the Accident, the plaintiff, by his own evidence, did not do much around the home. The plaintiff described doing minimal housework, with his daughters and wife doing the majority. He testified that his two weekly hours of pre-Accident housework included:

a) Outside the home, he would wash the concrete surfaces around the home; and

b) Inside the home, he would cook the one dinner, clean up the stove surfaces, take out the trash and clean bathroom and kitchen surfaces.

[356] The defendants submit that the evidence of the plaintiff's housekeeping demonstrates he did a limited amount of work around the house, as follows:

- The plaintiff denied vacuuming or mopping the floors prior to the Accident; any household work or cooking the plaintiff did prior to the Accident occurred on his one day off per week; and the plaintiff admitted primarily resting on his day off.

- The plaintiff's daughter, Ms. Chu, denied that the plaintiff did any deep cleaning around the home. This evidence was confirmed by Mrs. Zhang who described the plaintiff's pre-accident housework as "light work" such as taking out the trash or washing the car.

[357] The defendants submit that since the Accident, the plaintiff still cooks meals for his family. He has, in both his evidence and that of his daughter's, increased the frequency of the meals he now cooks. The plaintiff also helps with taking his grandchildren to school on a daily basis. The remaining chores the plaintiff did (tidying the kitchen post dinner once a week, making the bed, taking out the trash, and washing the pavement outside on a season basis), were taken on by the plaintiff's daughters.

[358] The defendants cite *Ali v. Stacey*, 2020 BCSC 465; *Riley v. Ritsco*, 2018 BCCA 366; and *Travis v. Kwon*, 2009 BCSC 63 regarding relevant principles

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including: whether the loss should be considered as pecuniary or non-pecuniary; whether the plaintiff is paying for services, or family members or friends are providing equivalent services gratuitously which would otherwise have been paid for; whether the services are considering an unreasonable burden for family members; and where the loss is considered as non-pecuniary, in the absence of special circumstances, it is compensated as a part of a general award of non-pecuniary damages.

[359] The defendants submit that prior to the Accident, the plaintiff's responsibilities within the household were limited. He contributed the bare minimum one day per week, only for a maximum of 2 hours, and after the Accident he continues to contribute to work around the house, with plaintiff's family having taken on a minimal amount of household chores, not beyond what one would normally expect of a family member, and not meeting the criteria of "special circumstances" as in Riley, "special circumstances" being something that one would have to hire outside help to perform.

Analysis - Housekeeping

[360] The plaintiff gave evidence that he helped out with housekeeping on his one day off, washing the floor, and outside the house using a high pressure hose to clean the concrete surfaces. Inside he would wash the floor, clean up stove surfaces and the bathroom areas, "that's it", for approximately two hours.

[361] In direct examination, when he was asked leading questions about specific tasks, he agreed that he made his own bed, took out the trash, and cooked dinner on his day off. He also assisted with his grandchildren on his day off.

[362] After the Accident, his wife helps him with making his bed, and his daughter and his wife help with the cleaning.

[363] For some of the housekeeping requiring physical strength, his family does not allow him to do it. No one other than the family members in the household assist with the housework.

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[364] He continues to assist caring for his grandchildren.

[365] Mr. Chu's wife gave evidence that before the Accident he was able to do light work outside the house like washing the car and cleaning up the garbage bins, and after the Accident he was unable to do that. She also stated that after the Accident he has washed his own clothes by putting them in the washing machine.

[366] Mr. Chu's daughter, Cindy, gave evidence that before the Accident on her father's one day off he would cook a meal for them, and after the meal he would clean up the kitchen, if crumbs he would vacuum, not any deep cleaning, only on the one day off. Outside, depending on the season he would sweep leaves and do some power washing on the concrete driveway area. After the Accident they switched to lighter pans to sauté, and he is able to make meals by cooking with the accommodations they made to the kitchen. At first he was not able to lift his arms up, it has significantly improved, but there is a certain height that he is able to lift before it hurts.

[367] It lies in the Court's discretion whether to address such a claim as part of the non-pecuniary loss or as a segregated pecuniary head of damage: *Liu v. Bains*, 2016 BCCA 374 at para. 26.

[368] I have considered Mr. Chu's injuries and his corresponding physical and mental limitations in assessing general damages, including those which impair his ability to perform domestic chores: *Riley* at paras. 96–103; and *Liu* at paras. 16–34.

[369] I find that Mr. Chu is not incapacitated from doing routine light housework or cooking. Although there are a limited number of physical tasks that he did before the Accident for which there is evidence that he is unable to do now, such as some of the outside work, and more physical inside work, the housekeeping he did before the Accident was for the most part limited to light cleaning duties and cooking one meal a week, tasks which I find based on the evidence he can continue to do, or he can do with some limited assistance.

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[370] For those limited physical tasks that he is unable to do since the Accident, or for which he requires some assistance, there was no evidence of anyone being hired to do any of those tasks, and for those tasks that his family members either do for him, or assist him, I find that his family members are not taking on an unreasonable burden, and it is not reasonable to expect the defendants to pay to have someone perform those tasks that can and should reasonably be taken on by members of the family.

[371] As a result, I decline to award a separate amount for diminution of housekeeping capacity. The figure that I have proposed for non-pecuniary loss, above, takes into account all of the general damages Mr. Chu has suffered and will suffer. I find that it should not be augmented by a segregated award for loss of housekeeping capacity.

Issue #6 – In-trust claim

[372] The plaintiff claims an in-trust award for the time he alleges his wife and eldest daughter cared for him following the Accident.

Legal Principles

[373] The principles regarding compensation for "in trust" claims were reviewed in *Baughan*, specifically with respect to a claim for translating and other care by a niece for her uncle over the course of several years:

> [41] … The principles to be applied in determining "in trust" claims are well established, and were summarized in *Bystedt v. Hay,* 2001 BCSC 1735, aff'd 2004 BCCA 124:
>
> > [180] …
> >
> > > (a) The services provided must replace services necessary for the care of the plaintiff as a result of a plaintiff's injuries;
> > >
> > > (b) If the services are rendered by a family member, they must be over and above what would be expected from the family relationship;
> > >
> > > (c) the maximum value of such services is the cost of obtaining the services outside the family;

> (d) where the opportunity cost to the care-giving family member is lower than the cost of obtaining the services independently, the court will award the lower amount;
>
> (e) quantification should reflect the true and reasonable value of the services performed, taking into account the time, quality and nature of those services; and,
>
> (f) the family members providing the services need not forego other income and there need not be payment for the services rendered.
>
> [Emphasis added.]
>
> [42] I am satisfied that the services provided by Ms. Baughan went well beyond those that would be expected in relation to an uncle, in particular given the number of appointments Mr. Baughan has had to attend over the course of several years. Beyond translation, Ms. Baughan also assisted her uncle during his recovery from surgery and at other times. Although there is not evidence before me of the cost of translation if Ms. Baughan had not been available, I accept that it would have been significant. While Ms. Baughan is not a professional interpreter, I accept that she provided diligent and accurate interpretation which was necessary for Mr. Baughan to get treatment for his injuries. Taking the overall circumstances into consideration, I find that $5,000 reflects the value of the services provided in a manner that is fair to both parties.

[374] The same *Bystedt* principles were cited in *Popove* which provides an overview of the general principles to be applied when an in-trust award for damages is claimed:

> [57] Claims for household duties and other services rendered by immediate family members are allowable where the plaintiff demonstrates the need for such services as a consequence of the injuries sustained. The plaintiff must satisfy the Court, on a balance of probabilities, that the family member providing the services suffered a direct pecuniary loss (because of the time and effort put into those services) *or* that the family member's efforts replaced housekeeping expenses that would have otherwise have been incurred: *Star v. Ellis*, 2008 BCCA 164 at para. 17.
>
> [Emphasis added.]

Plaintiff's position on in-trust claim

[375] The plaintiff's position on an in-trust claim is that the plaintiff's evidence was that his spouse and daughter both spent considerable time taking care of him after the Accident.

[376] Ms. Chu's evidence was that she drove the plaintiff to medical appointments and treatments necessitated by the Accident, and she also translated for him.

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[377] Both Ms. Zhang and Ms. Chu, who was home at the time of the Accident during her maternity leave, helped to look after the plaintiff after the Accident.

[378] Ms. Zhang's evidence was that, after the Accident, she drove, cleaned, and prepared meals for the plaintiff. She stopped taking on work as a confinement nanny from potential clients for approximately two months, as she felt the plaintiff needed her care during that period.

[379] The plaintiff submits the care provided by both Ms. Chu and Ms. Zhang went above and beyond non-compensable assistance provided by family members. They were necessary services not limited to the plaintiff's day-to-day functioning.

[380] The plaintiff seeks $30,000 for an in-trust claim.

Defendants' position on in-trust claim

[381] The defendants acknowledge that claims for household duties, nursing, and other services rendered by the plaintiff's family are allowed when the plaintiff establishes the need for such services as a result of injuries sustained in a motor vehicle accident.

[382] The defendants cite *Dykeman v. Porohowski,* 2010 BCCA 36, where at para. 29 the Court referred to two questions: was the nature of the services simply part of the usual "give and take" between family members, or did they go "above and beyond" that level?; and, were the services necessitated by the plaintiff's injuries or would they have been provided in any event?

[383] The defendants submit that here, the plaintiff has failed to prove that Mrs. Zhang suffered any financial loss as a result of the Accident; that her efforts resulted in replacing expenses that would have otherwise been incurred; and that the services were anything outside the usual "give and take" between spouses.

[384] There is no evidence before the Court to indicate that Mrs. Zhang would have been working in the two months following the Accident if not for the plaintiff's injuries. There is no evidence to indicate whether she had contracts lined up for that time

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period or whether she turned down contracts during that time period. Mrs. Zhang's evidence was that her contracts were based on referral and word of mouth. But there is no evidence that even provides a rough estimate on how many months out of the year she usual worked.

[385] In addition, there is no evidence to suggest that the services provided by Mrs. Zhang were anything outside of what a spouse would usually do.

Analysis – in-trust claim

[386] Here, the plaintiff claims an in-trust award for the assistance his wife and daughter provided to him after the Accident.

[387] Cindy Chu, the plaintiff's daughter, gave evidence that she was on maternity leave at home when the Accident occurred.

[388] By referring to Ms. Chu being on maternity leave, I do not mean to imply that she had additional spare time to assist her father. Although there was no evidence of her schedule, I can infer that she was already very busy with two young children, one of whom was a newborn.

[389] Ms. Chu's evidence is that she drove the plaintiff to some medical appointments and provided translation services for those medical appointments for which the medical practitioner spoke English; however, there were no details in her evidence regarding how many such appointments she drove him to, or that required her translation assistance, other than for the plaintiff's three visits to Dr. K. Taunton, an orthopaedic and sports medicine specialist. Ms. Chu stated she accompanied the plaintiff to all visits with Dr. Taunton, other than the last one her sister went to because Ms. Chu could not.

[390] There was evidence that the plaintiff's family doctor and physiotherapist, masseuse and acupuncturist all spoke Cantonese.

[391] Before the Accident, Ms. Chu's evidence is that she assisted Mr. Chu 99 percent of the time with his translating needs, so nothing appears to have changed

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following the Accident, except that an inference can be drawn that there were some more appointments following the Accident than before the Accident.

[392] There was no evidence of the cost of the type of household assistance provided by Ms. Zhang and Ms. Chu, other than the day to day care for him which would be expected of family members, not over and above what would be expected from the family relationship, with the exception of the pecuniary loss claimed by Ms. Zhang for her taking off work following the Accident.

[393] In my view, the plaintiff has not proven on a balance of probabilities that the care provided to the plaintiff by Ms. Chu went above and beyond non-compensable assistance provided by family members, and were limited to the plaintiff's day-to-day functioning, including translation services for which Ms. Chu had provided to Mr. Chu before the Accident.

[394] Regarding Ms. Zhang's assistance to Mr. Chu, there was limited evidence of Ms. Zhang's actual economic loss, other than her evidence she was off work for two months from a few days after the Accident, and she assisted him by cooking for him and taking him to the doctor.

[395] Ms. Zhang's evidence of her work schedule was that she would work for a minimum of a month or 26 days, generally six days a week, and take an interval for herself of two weeks between contracts. Her daily fee is $350-$380.

[396] Ms. Zhang's evidence of the work she missed as a result of caring for the plaintiff was limited in that she did not provide evidence of where she was in the timing of the contract she left to care for the plaintiff, nor whether she had another contract lined up at any specific time after the Accident. There were no records in evidence of Ms. Zhang's income, or her clients or appointments.

[397] As a result, there are a number of variables. There were limited details in evidence about how much of that two month period she would have been working. For example, if she was on a contract at the time of the Accident she could have

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been at the beginning, or in the middle, or at the end of a one month or longer contract.

[398] She would have either worked for one to two months on one contract, or she would have finished one contract, taken two weeks off, then worked one to two months. If one month, then there was likely a two week break between contracts.

[399] As a result, it is possible that she would have taken one, or possibly a second two week break within that two month period. Assuming eight weeks in the two month period, she might have worked as little as four weeks, or as much as eight weeks of that two month period; however, with the very limited evidence of the work that she actually missed, a conservative estimate of four weeks, assuming 6 day weeks, and an average daily rate of $365, an approximate assessment of her income loss is 4x6x$365, or $8,760 gross, or approximately $7,000 net, which I consider to be a fair and reasonable award for Ms. Zhang's pecuniary loss as an in-trust award.

Issue #7 – Future cost of care

Introduction

[400] The plaintiff claims an award for future cost of care for expenses for physiotherapy, massage, acupuncture, and psychotherapy.

[401] The parties disagree on the scope of the care, and consequently the amount of the award for such care.

Legal Principles

[402] The legal principles applicable to an assessment of a cost of future care claim are summarized in Justice Adair's judgment in *Golkar-Karimabadi v. Bush,* 2021 BCSC 990, as follows:

> [107] An award for cost of care is based on what is reasonably necessary, on medical evidence, to promote the mental and physical health of the claimant. The award must (1) have medical justification, and (2) be reasonable. The medical necessity of future care costs may be established by a health care professional other than a physician, such as an occupational

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> therapist, if there is a link between a physician's assessment of pain, disability and recommended treatment, and the health care professional's recommended care item. See *Gao v. Dietrich*, 2018 BCCA 372, at paras. 69-70. No award is appropriate for costs that a plaintiff would have incurred in any event: *Shapiro v. Dailey*, 2012 BCCA 128, at paras. 51-55. Moreover, future care costs must be likely to be incurred by the plaintiff. The onus is on the plaintiff to show that there is a reasonable likelihood that she will use the suggested services: see *Lo v. Matsumoto*, 2015 BCCA 84, at para. 20.
>
> [Emphasis added.]

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[403] In considering a cost of future claim, the Court is concerned in ensuring that the plaintiff is provided with adequate future care for which the plaintiff has objectively demonstrated need based on the evidence tendered: *Andrews* at 261; and *Gregory* at para. 39.

[404] 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 v. Bottle*, 2011 BCSC 1389 at para. 253.

[405] An assessment of damages for cost of future care is not a precise accounting exercise: *Krangle* at para. 21.

Plaintiff's position on the cost of future care

[406] The plaintiff alleges that as a result of his injuries he requires the following future care: massage therapy; acupuncture; physiotherapy; and psychotherapy.

[407] The plaintiff submits that although the Plaintiff's weekly sessions of acupuncture, massage, and physiotherapy will not cure or resolve his pain and symptoms, they provide temporary relief. The plaintiff testified that other than the COVID-19 lock-down period, he has attended all his treatment sessions.

[408] The plaintiff claims weekly sessions of acupuncture, massage, and physiotherapy, costing approximately $300 per week to age 75. That would be $122,100.00, not discounted to a present value of a future stream of payments.

[409] The plaintiff submits that he will likely benefit from exercising in a public gym setting rather than secluding himself at home, claiming a $300 annual pass at South Arm Community Centre to age 75 equals $2,400.00.

[410] The plaintiff also relies on Dr. Waisman's recommendation of weekly psychotherapy for one year, then as needed, estimated to cost $200 per session at $400 per week, the annual being $20,800.

[411] The plaintiff also seeks the cost of painkiller pills, which he testified to currently take ten a month on average, without any estimate of the cost of such medication.

[412] In total, the plaintiff seeks $145,300 for his cost of future care claim.

Defendants' position on claim for cost of future care

[413] The defendants cite *Chai v. Greenwood*, 2020 BCSC 1294 at para. 135 for the three requirements for an award for future cost of care being reasonableness; evidence the plaintiff will use the service; and an evidentiary link between the claim and treatment of an injury or disability caused by the accident.

[414] The defendants also cite *Ho v. Dosanjh*, 2010 BCSC 845 at para. 19, for the principle that treatment providing temporary period relief, but little to no additional improvement, is not compensable for the duration of the plaintiff's life, and the loss was considered in the award of non-pecuniary damages.

[415] Similarly, the defendants cite *Milina v. Bartsch*, 1985 Carswell BC 13, 1985 CanLII 179 (S.C.) for the principle that medically justified costs are recoverable, not costs that solely make the plaintiff's life more bearable or enjoyable.

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[416] The defendants submit that the plaintiff's claim for massage, physiotherapy and acupuncture is not compensable because there is no evidence of a medical justification for the treatments.

[417] The defendants refer to Dr. Fuller's report where he states that: "it would be my opinion that there is no therapeutic modality that will significantly improve or alleviate this patient's symptoms with particular reference to the long-term perspective."

[418] The defendants also refer to Dr. Sidky's report where he refers to rehabilitation, as follows:

> If he continues with his rehabilitation, as well as adds a more involved program of stretching and strengthening exercises of his neck, shoulders, and low back, he may find that his symptoms continue to improve with time.

[419] The defendants refer also to Dr. Sidky's testimony encouraging rehabilitation focussing on Mr. Chu's home-based exercise program.

[420] The defendants submit the plaintiff is already set up with the equipment needed for a home-based exercise as it was his evidence that he has a bike, weights, and bands that have already been provided to him.

[421] The defendants refer to Dr. Waisman's recommendation for weekly psychotherapy for one year. They cite *Gignac v. ICBC*, 2012 BCCA 351 at para. 54, where Justice Kirkpatrick did not include counselling fees in the future care costs, despite the clear evidence that it would be of considerable assistance to the plaintiff because the plaintiff was only "considering" going to counseling.

[422] Here, the defendants submit that the plaintiff never reported his psychiatric symptoms to any physician nor did he make efforts to see a mental health provider. When questioned why, his response was that all counsellors spoke English.

[423] The defendants submit the plaintiff chose not to pursue mental health treatment and that there is no evidence to suggest he would attend mental health treatments if it was provided to him.

Analysis of claim for future cost of care

[424] The plaintiff's claim for future cost of care is analyzed on the basis of the claim for continuing massage, physiotherapy and acupuncture treatments; a gym pass; psychotherapy; and pain medication.

Massage, physiotherapy and acupuncture

[425] The plaintiff's submissions on future care costs submit that the plaintiff should be awarded an amount necessary to provide the plaintiff with weekly sessions of massage, physiotherapy and acupuncture for 407 weeks to age 75 at approximately $100 per session, for a total of $122,100.00; however, there are both evidentiary and substantive difficulties with this submission.

[426] The evidentiary difficulties with this claim are as follows:

a) There was no evidence about the cost of the treatments, and the amount claimed in counsel's submission.

b) The plaintiff gave evidence that his "average" week now is that he goes for acupuncture and massage therapies on Thursday, and physiotherapy on Friday, but otherwise, the evidence regarding this treatment is scant. The plaintiff's evidence is that the treatments help him, but other than that there is a dearth of recent medical documentation in evidence, that is, the majority of the medical records are dated in 2020, with some of Dr. Chu's clinical records in 2021, a referral note for acupuncture dated August 8, 2022 with no frequency or end date indicated, and referral notes for physiotherapy and massage dated August 10, 2022 with no frequency or end date indicated, nor any clinical records relating to any such treatment following those referral notes. As a result, the limited records do not provide evidence of a medical justification for the treatments.

c) There are some massage and physiotherapy clinical records in evidence, as follows:

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i. massage clinical records noting weekly treatments from August 18 to October 6, 2020, each referring to pain on low back, right side worse, right leg and numbness on foot, with hypo-trophy on R Q4, the record on September 29, 2020 with a single reference to pain on right shoulder;

ii. physiotherapy records with evidence of ten sessions from February 4 – March 12, 2020, and one session on July 16, 2020;

iii. no acupuncture records.

d) Dr. Fuller's report dated November 30, 2023, under the heading "Treatment" states the following:

> He continued to receive weekly physiotherapy, massage therapy and acupuncture. The sensation of cold in his feet had improved with the acupuncture. The benefit of his treatment could last from two hours to 2 days which he felt could be helpful.

The difficulty with this isolated statement is that there is no time frame reference for the reported weekly treatments, nor to the source of the information, although the reference to "he felt could be helpful" is obviously to the plaintiff.

e) A future care award is assessed as a present value of a stream of periodic payments, not a gross value for the cost of a treatment multiplied by the number of treatments over time. The plaintiff adduced no evidence of any such present value.

f) The plaintiff adduced no evidence of the cost of an individual treatment, counsel submitting the Court can take judicial notice of that fact that each treatment would cost approximately $100; however, I decline to take judicial notice of the cost of treatment because the threshold for judicial notice is: (1) so notorious or generally accepted as not to be the subject of debate among reasonable persons; or (2) capable of immediate and accurate demonstration

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by resort to readily accessible sources of indisputable accuracy: see *R. v. Find*, 2001 SCC 32 at para. 48. That is not the case here.

g) Dr. Fuller and Dr. Waisman both append to their report a list of documents which they state in their report they reviewed for the purpose of preparing their opinions; however, some of the documents listed were not in evidence at trial, for example, a number of occupational therapy reassessment reports dated 2020 through 2023; the clinical records of Dr. K. Taunton; and clinical records of Community Therapists dated August 31, 2020 to January 26, 2022.

While these documents may have assisted in assessing the plaintiff's claim, I can obviously make nothing of them in their absence. Similarly, and as noted above regarding how clinical records relating to physiotherapy, massage and acupuncture might have provided some support for the claim, the occupational therapy reassessment reports might have been useful in assessing the plaintiff's claim, but they were not in evidence.

[427] The substantive difficulty with the plaintiff's claim for future cost of care is that there is very limited expert medical evidence supporting the need for such care. I refer again to the quote from *Golkar-Karimabadi* at para. 107, above, that an award is based on what is reasonably necessary on medical evidence, that is, there must be a medical justification, and be reasonable. What is medically justified must be established by a health care professional other than a physician, if there is a link between a physician's assessment of pain, disability and recommended treatment, and the health care professional's recommended care item.

[428] Here, the only medical support for these weekly treatments is the plaintiff's physician's referral notes in August 2022 for physiotherapy, massage and acupuncture, each with the identical details referring to the assessment and treatment of neck pain, back pain, right shoulder pain and right knee pain, with nothing further other than a start date and no end date.

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[429] As noted above, Dr. Fuller's opinion regarding future treatment is that "there is no therapeutic modality that will significantly improve or alleviate this patient's symptoms with particular reference to the long-term perspective"; and, in term of prognosis, Dr. Fuller states: "it would be my opinion that symptoms will persist and for practical purposes he has reached maximum medical recovery."

[430] The plaintiff's evidence is that the treatments provide some temporary relief. In *Ho*, referenced above, treatment providing temporary period relief, but little to no additional improvement, is not compensable for the duration of the plaintiff's life.

[431] Similarly, medically justified costs are recoverable, not costs that solely make the plaintiff's life more bearable or enjoyable: see *Milina*.

[432] As a result, I find that the plaintiff has not proven on a balance of probabilities the claim for future care costs of weekly massage, physiotherapy and acupuncture treatments.

Gym pass / Home instruction

[433] The plaintiff claims the cost of annual gym pass at South Arm Community Centre at $300 per year for eight years to age 75 for a total of $2,400.

[434] Similar to the massage, physiotherapy and acupuncture costs claimed above, there was no evidence at trial regarding the cost of a gym pass, only counsel's submission. Also, the claimed amount is not for the present value of a future stream of periodic payments, it is a lump sum, which is a rough measure of assessing damages, but overstates the claim compared to a present value analysis of the annual cost for an number of years.

[435] Dr. Sidky's report refers to the plaintiff having described some ongoing improvement, and his report states that if the plaintiff continues with his rehabilitation, as well as adds a more involved program of stretching and strengthening exercises for his neck, shoulders, and low back, he may find that his symptoms continue to improve with time.

[436] In cross-examination, Dr. Sidky was asked to clarify what he meant by “rehabilitation”, to which he responded that the plaintiff should be trying to get more home-based strengthening exercises. When asked about home exercises, and gym, he responded that the gym has heavier and specialized equipment compared to the home, but exercising at home is easier and because you are at home there is better compliance and results.

[437] The plaintiff gave evidence that he has been assisted at home by being taught exercises to do at home with specific equipment such as a bike, dumbbells and elastic bands. He understands that the exercises are intended to make his muscles stronger. His evidence is that the exercises are helpful a lot.

[438] The only other reference to a gym was when Mr. Chu’s eldest daughter, Cindy Chu, recalled her father meeting an occupational therapist at home and then at a community gym, without details. There was no evidence from the plaintiff that he would exercise in a public gym, or make use of a pass, consequently there is no support or evidence for counsel’s submission that the plaintiff will likely benefit from exercising in a public gym setting rather than “secluding” himself at home.

[439] I find that the plaintiff has not proven on a balance of probabilities the claim for a gym pass; however, the plaintiff referred in his evidence to having had someone attend at his residence to teach him exercises for a period of time. Dr. Sidky’s report also refers to the plaintiff having told him about being taught some exercises, and that he was seeing a trainer twice per week.

[440] Dr. Sidky recommends that the plaintiff continue to take part in his home-based program of stretching and strengthening exercises, which Dr. Sidky believed to be focused on lower extremity exercises, not involving any exercises of his neck, shoulders, or low back/core.

[441] As a result, Dr. Sidky recommends that the plaintiff be taught an appropriate home-based program involving these types of exercises, which he can then continue to take part in independently.

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[442] In my view, to allow for an enhanced opportunity for the plaintiff to move towards an independent exercise regime incorporating the types of exercises recommended by Dr. Sidky, and, since Mr. Chu has already received training about exercising at home, in the absence of any evidence led by the parties regarding the cost of rehabilitation or training, I estimate as a somewhat arbitrary amount that $100 for one session of training results in a total of $600 for six sessions, which will provide Mr. Chu with some additional training on suitable exercises in addition to the exercises he is already doing.

Psychotherapy

[443] Dr. Waisman's psychiatric diagnosis of the plaintiff is that he suffers from a major depressive disorder, moderate, and non psychotic.

[444] Dr Waisman's report refers to the plaintiff being caught in a cycle of chronic pain, depression, anxiety and cognitive symptoms that result in stress.

[445] Dr. Waisman recommends weekly psychotherapy for one year and then as needed.

[446] When describing his mood, the plaintiff's evidence was that he felt useless, like a completely wasted person, which has not improved.

[447] The plaintiff's daughter, Cindy Chu, described her father being not as sharp as he was before the Accident, more easily confused, taking longer for comprehension, and forgetful. She also described him as a little more irritable and not as social.

[448] The difficulty with this claim is that there was no evidence at trial that the plaintiff would pursue counselling, having only tried it one and not having continued because the person he saw spoke English.

[449] Given Dr. Waisman's opinion of the cycle of pain and depression, and the potential benefits of psychotherapy, it would appear useful for the plaintiff to have made an effort to attend some counselling sessions. The plaintiff has a Cantonese-

speaking family doctor, masseuse, physiotherapist and acupuncturist. There was no evidence that the plaintiff has made any effort to find a Cantonese-speaking psychiatrist or counsellor, nor was there any evidence that the plaintiff has any interest or intention in pursuing such treatment.

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[450] There was no evidence at trial regarding the cost of such treatment. Plaintiff's counsel made submissions that a session of cognitive behaviour therapy and pain management counselling is approximately $200 each, and a total of $20,800 for one year.

[451] Psychotherapy is medically justified based on Dr. Waisman's opinion and recommendations. The claim appears reasonable and there is an evidentiary link between the claim and treatment of an injury caused by the Accident; however, there is no evidence that the plaintiff is interested or motivated to attend such counselling, or that he will actually make any effort to attend such counselling.

[452] As a result, although it appears that psychotherapy could be of benefit to the plaintiff, I find that the plaintiff has failed to prove his claim for psychotherapy on a balance of probabilities.

Medication

[453] The plaintiff claims painkiller medication based on the plaintiff's evidence that he presently takes on average 10 pills each month.

[454] The plaintiff gave no evidence about the cost of such painkiller medication; however, based on the plaintiff's evidence of continuing pain, and Dr. Fuller's opinion regarding a chronic pain condition, I consider it appropriate to award a sum for over-the-counter painkillers such as Tylenol or Advil.

[455] Although somewhat arbitrary, I consider $20 for 100 pills could supply the plaintiff for one year. Assuming 10 years the cost is $200.

[456] Given the nominal effect of the use of multipliers for a present value figure for this future care cost, I consider the amount assessed to be fair and reasonable.

Conclusion – future care costs

[457] Based on the reasons above, I find that the plaintiff has not proven on a balance of probabilities his claim for physiotherapy, massage, acupuncture treatments because, while they provide some temporary periodic relief, they are not medically justified and on that basis not reasonable for long term compensation.

[458] I also find that the plaintiff has not proven on a balance of probabilities his claim for a gym pass. Home-based active rehabilitation is justified, but there is no evidence the plaintiff would use a gym pass, or that it is medically justified and reasonable.

[459] I find the plaintiff has not proven on a balance of probabilities that the plaintiff is entitled to an award for the cost of psychotherapy treatments.

[460] As a result, the award for the plaintiff's claim for future care costs is $600 for home-based exercise training, and $200 for pain medication, for a total of $800, which I consider in all the circumstances to be a fair and reasonable award.

Issue #8 – Special damages

[461] The parties agree that the Plaintiff's out-of-pocket expenses resulting from the Accident total $6,729.56 under the special damages heading of damages, and that amount is awarded for special damages.

VII. Conclusion

[462] In summary the plaintiff is awarded, and entitled to judgment against the defendants, the following damages:

a) Non-pecuniary damages: $140,000.00

b) Past loss of earning capacity: $135,430.00

c) Future loss of earning capacity: $164,376.00

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d)	Future care costs:	$ 800.00
e)	Loss of housekeeping capacity:	$ 0.00
f)	In-trust claim:	$ 7,000.00
g)	Special damages as agreed:	$ 6,729.56
Total:		**$454,335.56**

VIII. Costs

[463] If the parties are unable to agree on the appropriate order, including in relation to costs, they may arrange to make submissions on the matter before me between 9:00 and 10:00 on a date to be scheduled by the parties within 60 days of the issuance of these reasons, with written submissions to be submitted by the plaintiff no later than 10 days before the date of the hearing, and the defendants' response no later than 3 days before the hearing.

"Jones J."

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