

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Wong v. Tran*,
2023 BCSC 1230

Date: 20230718
Docket: M180915
Registry: Vancouver

Between:

Raymond Chi Hung Wong

Plaintiff

And

**Joseph Tran, Thi Noi Tran, Ruey Chao
and Ginger Mei-Chin K. Chao**

Defendants

Subject to Rule 15-1

Before: The Honourable Mr. Justice Coval

Reasons for Judgment

Counsel for the Plaintiff:

S.W.M. Leung

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Place and Dates of Trial:

Vancouver, B.C.
May 1–5, 2023

Place and Date of Judgment:

Vancouver, B.C.
July 18, 2023

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I. INTRODUCTION

[1] On August 6, 2017, Mr. Wong was injured in a motor vehicle accident at the intersection of Renfrew Street and Grandview Highway in Vancouver. The Insurance Corporation of British Columbia admits liability on behalf of the defendants.

[2] Mr. Wong is a 66-year-old carpenter. He lives with his wife and two children in Surrey, B.C. The defendants concede that he suffered soft tissue injuries in the accident to his neck, back and right leg. They dispute, however, the impact of these injuries on his daily life, activities and earning capacity.

[3] In round numbers, Mr. Wong seeks \$485,000 for his pain and suffering, loss of earning capacity, future care and out-of-pocket expenses. The defendants argue that his damages are approximately \$130,000, which they seek to reduce by 20% for failure to mitigate, or cap at \$100,000 under R. 15-1(1)(a) of the *Supreme Court Civil Rules*, which governs fast track actions.

[4] For the reasons that follow, Mr. Wong’s damages are assessed at \$411,522.73. Under R. 15-1(3), I find it is in the interests of justice to award his damages as assessed rather than limit them to \$100,000.

II. FACTS

A. Personal History

[5] Mr. Wong was born and raised in Hong Kong. At age 15, he started going to school at night so that he could train during the day as a carpenter and construction worker at his father’s construction company. In 1975, right after graduating from high school, he immigrated to Canada.

[6] Over the next 14 years, he worked as a carpenter and labourer for construction companies in the Lower Mainland. From around 1989–92, he returned to Hong Kong. In association with one of the construction companies he had worked for in Canada, he looked for business opportunities in Hong Kong and elsewhere in China.

[7] In around 1992, Mr. Wong returned to the Lower Mainland. He worked as a self-employed carpenter and general subcontractor in construction for around five years before returning to Hong Kong once again. In around 1996–97, he worked in construction at the Hong Kong airport.

[8] In 1998, while traveling in China, Mr. Wong met his wife, Chun Lai Yam. They married in 2002, and have a daughter born in 2003 and a son born in 2009.

[9] From around 1998 until his accident in 2017, Mr. Wong was back in the Lower Mainland working as a self-employed subcontractor in carpentry and construction. He also worked seasonally as a cook in a Vancouver Parks Board concession stand operated by a friend. Until 2016, Ms. Lai and their children remained in Hong Kong where he visited them. In 2016, his family moved to Surrey to be with him here.

[10] In spring 2017, just a few months before the accident, Mr. Wong answered an advertisement in a local Chinese newspaper and was hired by Flagship Construction & Building Envelope Restoration Ltd. He quickly demonstrated his carpentry skills to Flagship’s owner, Paul Chan, and was hired as a full-time employee at \$30/hour. Mr. Wong described his work at Flagship as physically demanding, including climbing scaffolds and carrying boards of 30–80 lbs.

[11] Mr. Chan testified for Mr. Wong at trial. He is a professionally certified carpenter with over 30 years of experience in the local construction industry. Mr. Chan testified that, in the spring of 2017, he advertised for an experienced carpenter because Flagship was busy with a large building envelope and balcony restoration project. After seeing Mr. Wong work for a few days, Mr. Chan hired him. Mr. Chan also checked his construction background through some common connections at another construction company where Mr. Wong had worked in the 1980s.

[12] Mr. Chan testified that he was pleased with Mr. Wong’s work and quickly promoted him to “lead-hand”. He said that, if Mr. Wong had not left Flagship due to

the accident, he would likely have made him his site supervisor. He testified that Flagship has remained busy since 2017, and the carpenter who replaced Mr. Wong after the accident still works for Flagship.

B. The Accident

[13] In the accident, the defendants' two vehicles collided in the Renfrew Street and Grandview Highway intersection, causing one of the vehicles to strike Mr. Wong's vehicle. Mr. Wong's vehicle was rendered a total loss.

[14] Mr. Wong was taken by ambulance to Burnaby General Hospital. He had pain in his right leg, a headache and dizziness. After a few hours of observation, he was released with pain medication and advised to be off work and visit his family doctor.

C. After the Accident

[15] Mr. Wong testified that, over the next few weeks, he had pain from his chest and neck into his shoulders and lower back, and pain and tightness in his right leg. In the following months, the pain became more severe. On the advice of his family doctor, he tried physiotherapy, active rehabilitation, acupuncture, massage and trigger-point injections. He found the injections terribly painful.

[16] In around August 2018, his neck and upper-back pain improved from acupuncture therapy and the neck injections. In February 2020, further injections helped his lower back but not his right leg.

D. Current Condition

[17] Mr. Wong testified to still suffering from persistent pain from the accident.

[18] He described the pain in his right leg as nearly constant, with associated tightness, numbness and spasms down to his toes. His neck and lower back pain still flare occasionally. These problems deprive him of sound sleep, as he must constantly change positions, and the leg spasms and numbness also wake him up. Poor sleep exacerbates his discomfort during the day. Ms. Lai testified that

Mr. Wong's leg spasms and numbness wake her up two or three nights a week, and she often gave him massages.

[19] Of the therapies he has tried, Mr. Wong described acupuncture as the most beneficial, providing temporary relief for his neck, lower back, and leg, and helping his sleep. Currently, he does light stretches and exercises at home, often with the assistance of his wife.

[20] Mr. Wong testified that his difficulties are exacerbated by sitting, standing, weight-bearing and walking. His pain will not allow him to walk for more than 20 minutes or sit in the same position for long, and it is exacerbated by squatting or twisting to lift things.

[21] Mr. Wong said his injuries have prevented him from returning to work. He cannot manage the squatting, climbing, lifting and other physical demands of construction work. He attempted one return to Flagship but gave up after a few hours due to the pain. He returned to his seasonal concession-stand job in 2019, but that job disappeared in 2020 due to the COVID-19 pandemic.

[22] Ms. Lai testified that, as a new immigrant in 2016, she felt helpless when Mr. Wong could no longer work due to the accident. She worked in the home taking care of her family, until 2019 when she obtained her Canadian work permit. Since then she has worked as a housecleaner to help support the family.

[23] Mr. Wong testified that, before the accident, he enjoyed fishing, skiing, hiking, swimming and golf. He usually did these things with his children on the weekends and short family trips. He has not resumed these activities since the accident because of his physical discomfort and limitations and the family's financial constraints. Ms. Lai testified that he does not take the children for recreational activities like he used to. She testified to his frequent bad temper and irritability towards her and the children since the accident.

[24] In terms of helping around the home, both Mr. Wong and Ms. Lai testified that, since the accident, he no longer takes care of the yard work and general home

repair and maintenance. In 2021, the family moved into a townhouse where the strata management company took care of most such tasks.

III. MEDICAL EVIDENCE

[25] Mr. Wong relied on the medical report and testimony of Dr. David Flaschner, a specialist in Physical Medicine and Rehabilitation at the Aspen Pain Clinic in Calgary, Alberta. Dr. Flaschner is also a Clinical Lecturer at the University of Calgary.

[26] Dr. Flaschner examined Mr. Wong on December 13, 2022. He reviewed his medical records, took his medical history and performed a physical examination. I accept his opinions about Mr. Wong injuries, which were presented in a clear, objective way, and not contested by the defendants.

[27] Dr. Flaschner diagnosed Mr. Wong with ongoing sprain/strain injuries in his neck and shoulder area and lower back, and associated nerve root compression and irritation from those areas referring down his right leg into his foot. He found no evidence of any prior symptoms in his neck, back or legs and ruled out diabetes as the cause of the nerve irritation in his leg.

[28] Dr. Flaschner's opinion was that Mr. Wong's pain and associated difficulties were "more likely than not" a direct consequence of injuries sustained in the accident. In his opinion, this picture made medical sense:

Mr. Wong's reported limitations are consistent with the injuries described above. Given the chronic sprains/strains there is an expectation that heavier lifting, carrying, repetitive bending, reaching and prolonged static postures may exacerbate pain.

[29] Regarding future improvement, Dr. Flaschner's prognosis was pessimistic because of the ongoing symptoms so long after the accident. His report said:

Mr. Wong is now presenting greater than five years post injury. He will have reached maximal medical improvement for the injuries sustained August 6, 2017. The ongoing symptoms will be expected to require long-term management.

For employment, Mr. Wong would best be suited to sedentary to light level work that allows for frequent changes in position and posture throughout the day.

[30] Dr. Flaschner recommended an active rehabilitation program for exercises, strength and fitness, which can “typically be learned over the course of six to eight weeks with two to three sessions per week”. For temporary relief of symptoms, he recommended manual therapies, such as physiotherapy, chiropractic, massage and acupuncture.

IV. DAMAGES ANALYSIS

A. Pain and Suffering

[31] Mr. Wong seeks \$120,000 for non-pecuniary damages. The defendants argue for \$70,000–75,000.

[32] Damages for pain and suffering must be fair and reasonable between the parties and measured against awards made in comparable cases. Under the leading case of *Stapley v. Hejslet*, 2006 BCCA 34, para. 46, leave to appeal ref'd [2006] S.C.C.A. No. 100, the key considerations include: age, nature of the injury, severity and duration of pain and disability, emotional suffering, and impairment of life, lifestyle, relationships, and physical and mental abilities.

[33] The defendants accept that Mr. Wong’s neck, back and leg problems were caused by the accident. As mentioned, they did not contest Dr. Flaschner’s diagnosis and prognosis. In my view, these admissions were fully supported by the evidence, and there was no evidence to the contrary. They argued, however, that Mr. Wong’s situation must have “substantially improved” based on his treatment records, showing: from October 2018 to March 2020, he ceased treatment; from March 2020 to July 2021, he received acupuncture (with some breaks due to COVID-19); and, after July 2021 he received no treatment.

[34] I do not accept the defendants’ argument.

[35] I found Mr. Wong and Ms. Lai to be straightforward, credible, reliable witnesses. Nothing inconsistent, unreasonable or artificially self-serving emerged in their testimony. No evidence was called that effectively challenged their version of events. I therefore accept their evidence about his persistent pain and associated difficulties. It is supported by Dr. Flaschner's diagnosis and explanation of these ongoing difficulties which I have quoted above.

[36] I also find that Mr. Wong's history of medical treatment is consistent with how he and his wife describe his situation, and does not demonstrate substantial improvement as argued by the defendants. Broadly speaking, in 2017, he did regular physiotherapy but found the benefits reduced over time. In 2018, he did acupuncture, active rehabilitation and trigger-point injections on his neck. In 2019, he felt improvement in his neck and chest from the injections, but found them very painful, and so took a break from treatments. In 2020, he did acupuncture and, despite the pain of the trigger-point injections, took another round of injections for his hip and lower back. Since 2021, he has followed his own program of walking, stretching and light exercises, consistent with his family doctor telling him that it was acceptable to do recommended exercises on his own. This self-directed approach to light exercise was endorsed by Dr. Flaschner in his evidence.

[37] I therefore find that the accident caused Mr. Wong the following difficulties:

- a) Chest pain until 2018, which benefitted from acupuncture and now rarely recurs;
- b) Lower back pain, which improved from trigger-point injections but still flares occasionally, as does the pain in his neck, shoulders and upper back;
- c) Persistent pain, spasm and numbness in his right leg down to his toes;
- d) Frequent sleep disruption from pain or spasm, which makes his overall pain worse;
- e) Limitation to around 30 minutes of walking, and the need to avoid bending, twisting, heavy lifting, or too much weight-bearing on his right leg;

- f) Significant curtailment of the recreational and family activities that he enjoyed, such as fishing, skiing, hiking, swimming, and golf. Before the accident, he did these things most often with his children on weekends and occasional short family trips. He has not resumed these activities much, if at all, since the accident because of his physical discomfort and limitations and financial constraints from not working; and
- g) Ongoing unhappiness and frustration from his post-accident situation.

[38] In my view, the plaintiff's cases resemble Mr. Wong's situation in terms of the nature of the injury, severity and duration of pain and disability, and the effect on his daily life and activities. But they are somewhat worse situations in terms of the *Stapley* factors.

[39] *Lavoie v. Purwonegoro*, 2021 BCSC 1511, awarded \$135,000 to a 42-year-old plaintiff who suffered from chronic myofascial pain with numbness in her arm which affected her sleep. She had not returned to any type of employment at the time of trial. In my view, the features that make her situation worse than Mr. Wong's are that she was only 37 at the time of her accident and had a newborn child. The Court found that "[s]he has been and will be unable to be an active, fully engaged parent" (para. 101). She also suffered headaches that were severe and long-lasting.

[40] *Herd v. Saroya*, 2021 BCSC 1267, awarded \$110,000 to a 38-year-old plaintiff with two teenage daughters. She suffered from chronic pain down her left arm, causing numbness and tingling in her fingers and sleep disruption. She was a housekeeper who wanted to become a care aide or nurse. She was significantly younger than Mr. Wong and her situation was worse. In addition to her neck and shoulder problems, the shooting pain and numbness down her dominant arm made her reliant on others for simple tasks like setting a table or reaching into a cupboard for a glass.

[41] In *Beaton v. Perkes*, 2016 BCSC 2276, a 56-year-old laundry technician was awarded \$110,000. Her job was labour-intensive, requiring the handling of heavy bins and linens. She was off work for a finite period after her accident but still struggled with her work duties at time of trial. Her condition was worse than Mr. Wong's in that, in addition to chronic pain in her neck and back, she had chronic

headaches and was disabled to the extent that she needed help getting out of bed in the morning. She struggled with ongoing depression and described herself as unable to do anything and a “failure”.

[42] In *Carver v. Or*, 2017 BCSC 1496, the plaintiff was awarded \$115,000, reduced from \$130,000 to account for some pre-existing back problems. A 62-year-old machinist, he suffered from chronic back pain radiating down both legs. He was found to have no residual earning capacity after the accident. His situation appears worse than Mr. Wong’s in that, due to his injuries, he could only walk four or five minutes with a cane before needing to rest and had gained 40–60 lbs.

[43] Turning to the defendants’ cases, I will not consider *Trites v. Penner*, 2010 BCSC 882, as it was decided more than a decade before trial. The Court of Appeal has said that cases of this vintage are no longer appropriate comparators because awards for non-pecuniary damages have increased faster than inflation over the years (see *Callow v. Van Hoek-Patterson*, 2023 BCCA 92, paras. 17–18).

[44] In *Parmar v. Stokes*, 2022 BCSC 252, the plaintiff was 39 at the time of the accident. She worked as a hospital administrator and had three young children. She was awarded \$75,000 for moderate soft tissue injuries to her lower and middle back and neck, with only the lower back unresolved by trial. Ms. Parmar’s situation was better than Mr. Wong’s in terms of the *Stapley* factors. The Court found that, though her injuries impacted her recreational pursuits, she was able to run five times a week while on vacation and participate in many of her pre-accident activities with only minor limitations to duration and frequency. She was also capable of working four days per week with limited modifications and accommodations.

[45] In *Thabrakay v. Cecchin*, 2021 BCSC 1413, the plaintiff received \$70,000 for mild, chronic soft tissue injuries to her neck and back and headaches. She was 33 at the time of the accident, with three children and a fourth on the way. In addition to raising her family, she had worked as a labourer in greenhouses and furniture manufacturing. Her pain was less severe than Mr. Wong’s, described as mild chronic pain that prevented pain-free living. She was able to continue work part-time, as a

labourer in jobs that were not too taxing and with accommodations such as extended breaks.

[46] For the reasons I have given in the summaries above, Mr. Wong's situation falls roughly in the middle of the cases relied on by the parties. Using these cases as guidance and endeavouring to be fair to both sides, Mr. Wong is awarded \$100,000.

B. Loss of Income Earning Capacity

[47] Mr. Wong seeks around \$350,000. The defendants counter at around \$39,000.

[48] In Mr. Wong's evidence and final submissions, he claimed that, without the accident, he most likely would have worked for Flagship full-time for the past six years, starting at \$30/hour, and then \$35/hour by 2018 and \$40/hour fairly soon thereafter. His seasonal concession stand job might have added modest additional income. His evidence was that, in 2017 when the accident happened, he had no retirement plans and still had young children to support.

[49] As I understood it, his rough calculation was that he would have earned approximately \$60,000 annually (around 35 hours/week at \$35/hour for 48 weeks/year), for around six years.

[50] The defendants' argument focuses on Mr. Wong's tax returns. They take \$19,015 (his average annual income for the three years pre-accident), and subtract \$11,149 (his average annual income for the five years since the accident). This leaves an average loss of \$7,866 per year. They multiply that average annual loss by five years to arrive at total damages of \$39,300.

1. Past Loss

[51] Past loss of earning capacity compensates for the value of the work that Mr. Wong would have performed, from the time of his accident until trial, but could not because of his injuries from the accident.

[52] He must establish, on a balance of probabilities, a causal connection between his injuries and the loss claimed. Mere speculation is insufficient. Just as with future loss of earning capacity, if he establishes a real and substantial likelihood of a particular loss, then damages are based on an assessment of its likelihood (*Cochran v. Bliskis*, 2023 BCSC 710).

[53] Mr. Wong's tax returns showed his income from his concession stand work, which was seasonal (April to October) and weather-dependent. They did not show his construction income. He testified that his annual construction income before the accident was around \$40,000–50,000. He testified that, until Flagship, he was always paid for this work in cash and never declared it.

[54] This failure to declare his construction income raises obvious credibility and reliability issues regarding Mr. Wong's evidence. These concerns are diminished, however, because his claim for past loss is based, not on his alleged history of past income, but on his lost opportunity to continue working for Flagship.

[55] The defendants argue that Mr. Wong and Mr. Chan's evidence about his work at Flagship should not be accepted. They base this on a discrepancy in the documentary evidence about when Mr. Wong started with Flagship. The discrepancy arose from a handwritten timesheet that showed Mr. Wong working for Flagship in March and April 2017. It was written by Mr. Wong, but also had some notes and a signature on it from Mr. Chan. By contrast, there was a Statement of Earnings prepared and signed by Mr. Chan which indicated a start date of June 14, 2017. Mr. Chan testified the Statement was based on Flagship's payroll records and he could not explain the discrepancy with the timesheet. He could not recall what might have occurred regarding the March and April 2017 work, but denied the possible explanation that Mr. Wong was initially paid in cash and so it was not recorded in the payroll records.

[56] I do not accept the defendants' position that, based on this, I should find that Mr. Wong's Flagship employment was fabricated by him and Mr. Chan.

[57] I found Mr. Chan a credible witness and I accept his evidence, which was clear, consistent and reasonable. There was nothing to suggest he had any relationship with Mr. Wong other than as his employer in 2017. He did not go out of his way to try to help Mr. Wong's case, but testified in a brief, objective, factually specific manner. For example, he would not confirm Mr. Wong's evidence that he tried returning to Flagship after the accident but could not deal with the pain. Mr. Chan said he did not recall this happening. He did not try to manufacture an explanation for the timesheet confusion to assist Mr. Wong, but instead said he could not explain it. In my view, he was genuinely unsure why Mr. Wong had a timesheet from March and April 2017 that did not accord with his payroll records.

[58] These events occurred years ago. Memories have faded. It may be that Mr. Chan paid Mr. Wong in cash for the first month or there may be some other explanation. What occurred is unclear, but it does not support a finding that Messrs. Wong and Chan fabricated Mr. Wong's employment at Flagship.

[59] Based on accepting Mr. Wong and Mr. Chan's evidence about his work at Flagship, I find that the accident caused financial loss to Mr. Wong. The most likely "without accident" scenario is that he would have worked for Flagship from 2017 well into the future.

[60] I accept Mr. Chan's evidence that, as an experienced, certified carpenter, he quickly assessed Mr. Wong as capable and a good fit at Flagship. I accept that Mr. Chan promoted him to lead-hand and that Mr. Chan expected he would likely become his site supervisor at a market rate of at least \$40 per hour. I accept that, since 2017, Flagship has remained busy and so could have provided continued employment to Mr. Wong over these six years. I accept Mr. Wong's evidence, supported by that of his wife and Dr. Flaschner, that he has been unable to return to Flagship since the accident because the work is too physical for his injuries. I accept that he tried to do this once, but it was too much.

[61] The defendants argue it is unreasonable to find that, after so many years of being self-employed and working for cash, Mr. Wong would have become a long-

term employee at Flagship. Another way of making this point is to say that Mr. Wong seeks damages based on the “income approach” for working at Flagship but without a stable history of such pre-accident earnings.

[62] I agree that working for six years as a payroll employee at Flagship would have been a marked departure from Mr. Wong’s long-established work history. Nevertheless, based on the evidence of Mr. Wong and Mr. Chan, I find that he had found a good situation with Flagship and Mr. Chan thought highly of his work. Therefore, the most likely “without accident” scenario is that he would have stayed with Flagship as a long-term employee, and so an income-based approach based on working at Flagship is appropriate.

[63] In terms of contingencies, I find that the negative and positive contingencies regarding Mr. Wong’s continued employment at Flagship from 2017 until trial balance each other out. On the negative side, the main contingencies are that he might have chosen to stop working or reduce his hours. I find these unlikely because I accept his evidence that, at the time of the accident, he did not plan to retire soon due to his financial position. This is supported by Ms. Lai’s evidence that, when he stopped working, she needed to work as a housecleaner to support the family. Another negative contingency is that he might have been laid off. But that is also unlikely given Mr. Chan’s evidence about Flagship remaining busy and retaining the worker who replaced him. Another negative contingency is that he might have been injured.

[64] For positive contingencies, if laid off, he might have used his employment at Flagship to find a similar job. He might have worked at Flagship (or some other job) beyond age 66 in construction or something like the concession stand job. He might also have augmented his income while at Flagship by working at the concession stand job, though I think this is unlikely given the demands of working at Flagship full-time and COVID-19 bringing his friend’s concession stand business to an end.

[65] In sum, I find the most likely “without accident” scenario to be Mr. Wong earning around \$60,000 annually from Flagship from August 2017 until this trial or

shortly thereafter. I find that the material positive and negative contingencies around that scenario generally balance each other out. I therefore agree with Mr. Wong that \$350,000 of pre-tax income is a reasonable estimate of what he would have earned at Flagship without the accident.

[66] From this \$350,000 must be subtracted any of his actual “with accident” earnings that he would not have made if he had been working for Flagship since the accident. The parties did not make submissions on how to estimate this and the evidence is vague.

[67] In evidence are his Canada Revenue Agency Statements of Remuneration Paid for 2017–2020, and Notices of Assessment for 2020–2022. The latter do not break down the source of income. Mr. Wong did refer in his evidence to Canada Emergency Response Benefit payments in those years. He might also have obtained employment insurance benefits, as he did in prior years, or government pension plan payments.

[68] His 2017 earnings of \$16,316 appear to be pre-accident earnings from Flagship and the concession stand. In 2018, he had no earnings. Thus, the relevant years for his post-accident earnings are 2019–2022. The tax documents show total income of:

2019: \$14,154 (from the concession stand)

2020: \$20,226 (source unspecified)

2021: \$5,051 (source unspecified)

2022: \$17,530 (source unspecified)

[69] Doing the best I can with this evidence, it seems that the only employment income in these years was in 2019. In his evidence, Mr. Wong claimed he would have earned this 2019 income at the concession stand in 2019 even if working full-time for Flagship. I find it more likely than not, given his long history of work for his friend at the stand, that he would have done some of this work, but not very much given the demands of working full-time at Flagship. I therefore find that “without

accident” Mr. Wong would have only earned around \$5,000 from the concession stand in 2019 and the rest of his actual 2019 earnings must be subtracted from his award because he would not have earned them on top of his Flagship salary.

[70] For 2020-2022, as best I can tell from the tax documents, the income in these years was for some combination of employment insurance, CERB payments and perhaps government pension plan. I therefore find that Mr. Wong would not have earned this “with accident” income had he been working full-time at Flagship and so it should be deducted from his award.

[71] In sum, I find that: (a) \$350,000 is a reasonable estimate of Mr. Wong’s “without accident” income; and (b) he earned \$51,781 “with accident” that he would not have earned without the accident which must be deducted.

[72] I therefore estimate his past loss of income earning capacity at \$298,000.

2. Future Loss

[73] Mr. Wong did not seek damages for future loss of income earning capacity, except perhaps in that his \$350,000 calculation was based on six years at Flagship, a time period which extends a few months beyond the close of evidence at trial.

[74] I agree with this approach. Given the physical demands of working at Flagship, Mr. Wong was unlikely to continue beyond 66 years old. To the extent there is some reasonable possibility he might have continued to work after 66, I took this into account as a positive contingency when assessing his past loss of income.

[75] In sum, no additional award for future loss of earning capacity was sought or is warranted.

C. Failure to Mitigate

[76] The defendants seek to reduce Mr. Wong’s damages by 20% for failing to mitigate his losses by seeking additional medical treatment and alternative employment.

[77] To succeed, they must prove that Mr. Wong eschewed these steps unreasonably and they would have reduced his damages. That they merely might have made a difference is insufficient (*Rhodes v. Surrey (City)*, 2018 BCCA 281, para. 66).

[78] Regarding medical treatment, the defendants argue Mr. Wong: (a) ceased treatments from October 2018 to March 2020 and after July 2021; and (b) received treatment in only 18 of the 69 months since the accident.

[79] I find that the defendants do not meet their burden of proof on these mitigation arguments.

[80] Regarding (a), I accepted above Mr. Wong's description of his approach to treatment since the accident. I see nothing unreasonable in his approach and the defendants have no evidence suggesting otherwise.

[81] Regarding (b), I accept that the defendants established, through Mr. Wong's cross-examination, that he may have looked for jobs in 2020 or 2021 but did not apply for any.

[82] Nevertheless, I agree with Ms. Leung's submission that it is unrealistic to expect Mr. Wong to have found alternative work since the accident. There is too much working against him. He is in his 60s with limited English and no education beyond high school in Hong Kong. His injuries took away his strength and mobility, disturbed his sleep, and precluded extended standing, sitting, squatting or walking. Dr. Flaschner's opinion was that he was suited to sedentary or light work allowing for frequent changes in position and posture throughout the day. COVID-19 caused the closure of the concession stand business where he had worked and some businesses like it. Ms. Lai took up housecleaning work to support the family, which suggests Mr. Wong was unable to work.

[83] In my view, the evidence does not support a finding that Mr. Wong missed some reasonable, realistic opportunity to mitigate his financial losses.

D. Future Care

[84] Mr. Wong testified that he would like to return to acupuncture for its temporary relief of pain in his right leg. He also wishes to pursue the active rehabilitation and medication recommendations of Dr. Flaschner for additional pain management and function.

[85] He seeks the following:

- \$1,056–\$2,112 representing the cost of 12–24 kinesiology sessions at \$88/session (a 6–8-week active rehabilitation program consisting of 2–3 sessions per week)
- \$5,000–\$10,000 representing 10–20 acupuncture treatments per year at \$100/session for 5 years
- \$500 for medications

Total amount claimed: \$6,556–12,612

[86] In final argument, the defendants did not strenuously contest the medical justification or general reasonableness of such treatments.

[87] In my view, the types of treatments are reasonable and justified on the medical evidence. However, the number of sessions is excessive based on Mr. Wong's history of using such treatments. Taking this into account, in my view \$8,000 is reasonable for future care.

E. Special Damages

[88] The parties agree Mr. Wong's special damages are \$5,522.73.

F. Should Mr. Wong's damages be limited to \$100,000 under Fast Track Litigation R. 15-1?

[89] This issue was flagged by Ms. Leung at the outset of trial and both sides addressed it in closing submissions.

[90] The defendants seek to limit Mr. Wong's damages to \$100,000 because this was a fast track action under R. 15-1. Mr. Wong argues that the court should

exercise its discretion under R.15-1(3) to exceed the \$100,000 limit and award his damages as assessed. The defendants say this would be unfair, as they prepared the case in reliance on the \$100,000 limit.

[91] For the reasons that follow, in my view it is in the interests of justice to exercise my discretion under R. 15-1(3) to allow the damages as assessed. There is obvious unfairness to Mr. Wong in limiting his damages far below the amount actually assessed, particularly when he never expressly indicated an intention to so limit them. I see less unfairness to the defendants in exceeding the \$100,000 limit because, from what I can discern on the evidence, they were not materially prejudiced in preparing their case by reliance on the limit.

[92] Rule 15-1(2)(a) provides that any party may file a Notice of Fast Track Action in Form 61. The filing of the notice requires that at least one of the four criteria set out in R. 15-1(1) applies, namely:

- a) The claim is for \$100 000 or less, exclusive of interest and costs;
- b) The trial can be completed in three days;
- c) The parties consent; or
- d) The court orders it.

[93] Rule 15-1 makes fast track actions procedurally efficient by placing limits on (among other things): interlocutory applications, examinations for discovery, costs and the number of expert reports.

[94] Rule 15-1(3) gives the court discretion to exceed the \$100,000 limit:

Damages not limited

(3) Nothing in this rule prevents a court from awarding damages to a plaintiff in a fast track action for an amount in excess of \$100 000.

[95] On January 22, 2018, Mr. Wong filed his Notice of Civil Claim and Notice of Fast Track Action. The defendants' Response, filed August 7, 2018, confirmed that that the fast track process applied.

[96] Counsel agreed that the parties conducted the case in accord with the fast track regime. The discoveries were limited to two hours. Mr. Wong filed only one expert report, and the defendants filed none.

[97] The defendants say the first indication they had that Mr. Wong sought damages over \$100,000 was in settlement negotiations two weeks before trial. Their final argument says: “2 weeks prior to trial ... the defence became aware that the plaintiff intended to exceed the monetary limit set out in the rule.”

[98] Mr. Wong’s Notice of Civil Claim did not indicate which sub-rule(s) he relied on to qualify for fast track. From my review of the cases, this is often so and this uncertainty can lead to difficulties for the parties and the court. In my view, to make matters clear, counsel and litigants should specify in their pleadings which sub-rule(s) they rely on for fast track.

[99] Although there is nothing to suggest Mr. Wong relied on the defendants’ consent when filing his Form 61, arguably they provided their consent under R. 15-1(1)(c) when they accepted the process in their Response (*Saopaseuth v. Phavongkham*, 2015 BCSC 45, at para. 26). Mr. Wong’s counsel might have thought the trial could be completed in three days under R. 15-1(1)(b). Yet, when the trial was scheduled for five days in March 2022, there was no suggestion it should therefore be removed from the process. His counsel might have selected it because Mr. Wong was claiming \$100,000 or less under R. 15-1(1)(a), but the Notice of Civil Claim does not plead that, nor was there evidence of Mr. Wong ever communicating that position to the defendants.

[100] Ms. Leung argued the defendants should have realized Mr. Wong was claiming more than \$100,000 based on Mr. Wong’s examination for discovery and Mr. Chan’s August 28, 2018 Certificate of Earnings, indicating that Mr. Wong worked full-time for Flagship from June 14 to August 4, 2017. I do not accept this argument. In my view, looking at the circumstances as a whole, and particularly Mr. Wong’s low income before the accident, there was no clear indication he was seeking over \$100,000 until two weeks before trial.

[101] Mr. Wenngatz argued that the defendants relied on the \$100,000 limit in preparing their case. He said that, as a result, they limited their preparations and evidence, for example by foregoing:

- a) additional document disclosure, such as Mr. Wong's banking records, to see if he actually did work at Flagship or whether the entire employment itself was fabricated post-accident as between Mr. Wong and Mr. Chan to assist Mr. Wong in obtaining a higher award;
- b) additional witness interviews, such as coworkers at Flagship; and,
- c) their own expert evidence.

[102] This submission is difficult to assess because there is no evidence attesting to it. Having said that, I recognize the difficulties in providing such evidence without potentially waiving privilege over much of one's file.

[103] I am not persuaded the defendants were materially prejudiced in the preparation of their case. They knew Mr. Wong sought damages over \$100,000 when they deposed Mr. Chan a week before trial. There is no evidence that, forewarned with that knowledge, they took that opportunity to identify and pursue additional witnesses or documents from Flagship or Mr. Wong. Nor in the two weeks before trial, or during the trial itself, did they pursue the additional witnesses or records they say they would have had they known of this earlier. They did not specify what expert evidence they might otherwise have obtained. They did not see the need to address any of this at the beginning of trial, for example by taking the position that the s.15-1(3) issue should be decided at the outset because, if the court was inclined to exceed the \$100,000 limit, they required an adjournment to augment their preparations and evidence.

[104] In sum, the question of whether to exercise the R. 15-1(3) discretion arises in these circumstances:

- a) It is unclear on what basis Mr. Wong proceeded under the fast track process, and he never formally took the position that he was claiming \$100,000 or less.

- b) The parties followed the fast track process, including in terms of length of discovery and number of experts.
- c) The defendants were told Mr. Wong was seeking more than \$100,000 around two weeks before trial in settlement negotiations. Mr. Wong offered no explanation for not advising of this earlier.
- d) Neither party sought an adjournment of the trial to deal with this issue.
- e) The assessed damages are \$411,522.73.
- f) The defendants did not rely to their material prejudice on the \$100,000 limit in terms of how they prepared the case.

[105] I have not identified prior cases that provide guidance about R. 15-1(3) in these circumstances. In *Rajan v. Budrugeac*, 2020 BCSC 1056, paras. 114–16, the court declined to limit its award to \$100,000 despite the limit applying under R. 15-1. It awarded approximately \$200,000 but without analysis that assists in our situation.

[106] Balancing all of this, in my view there is much unfairness to Mr. Wong in limiting his damages so far below the amount actually assessed. I see less unfairness to the defendants in exceeding the \$100,000 limit because they were not materially prejudiced in the preparation of their case by reliance on the fast track process, and the \$100,000 limit was never expressly confirmed by Mr. Wong during the proceedings.

[107] I therefore exercise the discretion under R. 15-1(3) to exceed \$100,000 and award damages to Mr. Wong in the amount assessed.

V. CONCLUSION

[108] Mr. Wong is awarded the following damages, totalling \$411,522.73:

Pain and suffering: \$100,000

Loss of earning capacity (before tax adjustment): \$298,000

Future care: \$8,000

Special damages: \$5,522.73 (by consent)

[109] Subject to the parties making submissions on costs, Mr. Wong is awarded his costs under R. 15-1(15).

“Coval J.”