IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Pan v. Shihundu,*
2014 BCSC 504

Date: 20140325
Docket: M114153
Registry: Vancouver

Between:

Ming Ka Pan also known as Michael Pan

Plaintiff

And

Maryam Shihundu
Daniel Shihundu

Defendants

- and -

Docket: M114475
Registry: Vancouver

Between:

Ming Ka Pan also known as Michael Pan

Plaintiff

And

Miriam Friedberg

Defendant

Before: The Honourable Mr. Justice R. Punnett

Reasons for Judgment

Counsel for the Claimant:	A.J.R. Winstanley
Counsel for the Defendants:	K.H. Hall
Place and Date of Trial:	Vancouver, B.C. December 2-5 & 9-10, 2013
Place and Date of Judgment:	Vancouver, B.C. March 25, 2014

[1] This is a claim for damages arising from two motor vehicle accidents. Liability for both

accidents was admitted on the morning of trial. At issue are the injuries sustained by the plaintiff, the effect and extent of the plaintiff's pre-existing condition, the cause of his current injuries and what entitlement the plaintiff has to damages for non-pecuniary loss, future loss of earning capacity, future care costs, special damages and accelerated depreciation respecting his vehicle. No claim is advanced for past wage loss.

The Accidents

[2] The first motor vehicle accident occurred on September 17, 2009 (the "First Accident"). The defendant Maryam Shihundu was driving southbound on No. 1 Road in Richmond, British Columbia when she failed to yield on a left turn. The plaintiff was in the curb lane of two northbound lanes on No. 1 Road when the defendant turned in front of him; he braked but collided with the right side front wheel area of the defendant's vehicle. He had been travelling at 50 to 55 km/h prior to braking. He described the impact as a "big bang". His laptop computer was in the car and it struck the front dashboard. He provided no description of his own movement in the car. His airbag did not activate. The plaintiff's vehicle, a 2004 BMW M3, sustained $18,421 in damages. Of that total, $12,690.21 was for parts and the remainder for labour and taxes.

[3] The second accident occurred on February 26, 2011 (the "Second Accident"). Both the plaintiff and the defendant Miriam Friedberg were driving southbound on No. 3 Road, again in Richmond with the plaintiff in the curb lane and Ms. Friedberg in the passing lane. It was snowing at the time and there was snow on the road. As a result all traffic was travelling around 30 km/h. The defendant's vehicle turned into the right lane at a sharp angle, pulling in front of the plaintiff, then hit the curb. The plaintiff braked, causing his car to skid into the back of defendant's car.

[4] As with the 2009 accident the plaintiff did not describe the impact's effect on him while in the car and again, his airbag did not activate. Damage to his vehicle was $3,393.

[5] No expert evidence was provided respecting the force of the impacts.

The Plaintiff

[6] The plaintiff was born December 30, 1957. Prior to and at the time of both accidents he was employed as, and remains employed as, a construction manager and supervisor on residential construction projects, including detached homes, townhouses and apartments. The physical aspects of his job involve assisting with the unloading of building materials, using ladders to access two- and three-storey buildings under construction and cleaning up the site.

[7] The plaintiff has been married for 20 years and has two children. His wife testified at trial regarding the impact of the accidents on the plaintiff's health and on their marriage.

The Plaintiff's Pre-Accident Condition

[8] The plaintiff was involved in two motor vehicle accidents prior to those before the court. The first was in August 2000 and involved a low-speed collision in the parking lot at a shopping mall. Afterwards he saw his family physician, Dr. Kwok, with complaints of pain in his pelvis and hip. Dr. Kwok prescribed over-the-counter pain medication and sent the plaintiff for physiotherapy. The pain resolved after two to three weeks. He attended acupuncture treatment for tenderness in his left lower back for about a month. He testified that although the pain from that accident eased off, it never completely went away.

[9] Sometime in 2005 he was involved in another motor vehicle accident. The plaintiff was making a left hand turn when a vehicle coming from the opposite direction hit the right side of his vehicle and spun it around. He stated that as a result he experienced pain in his right shoulder as well as pain in his pelvis and hip area similar to that arising from the 2000 accident. The records of Dr. Adam Chan, who was then his chiropractor, and Dr. Kwok, his family doctor, do not reveal any entries for injuries arising from that accident. He testified that he had treatment by a physiotherapist and a massage therapist, which he said helped, but he again testified that the pain in his pelvis and hip "never goes away". However, the bulk of the pain in the plaintiff's hip and shoulder had cleared up within three months of the accident.

[10] The plaintiff did not miss any time at work as a result of either the 2000 or 2005 accidents. No claims were or are advanced respecting those accidents.

[11] The plaintiff testified that he continued to see Dr. Chan even after the initial difficulties arising out of these accidents cleared up because he required "maintenance" for recurring pain in his lower back. He said that the pain tended to flare up after lifting things at work, exercising at the gym, or even after a change in the weather. Dr. Chan's records show that he treated the plaintiff eight times in 2003, five times in 2004 and seven times in 2005 for lower back discomfort and some discomfort in his neck as well. There were no further treatments until December 2006. In 2006 the plaintiff made three visits to Dr. Chan. In 2007 he made a total of nine visits, all during the summer months, except one in December 2007. In 2008 he made three visits within a three-day period.

[12] Dr. Chan's records reveal that he again treated the plaintiff in late summer of 2009 for lower back discomfort. There were eight such visits in August and September 2009, just prior to the First

Accident.

[13] On the day of the First Accident the plaintiff had just left his massage therapist and was on his way to the gym when the accident occurred. After the accident he went home, retrieved another vehicle and went to the gym.

[14] The plaintiff alleges that in the First Accident he sustained bruising to his right knee, low back stiffness and pain in his right shoulder. Several months later he noticed numbness in his the thumb and two fingers on his left hand. He testified that the pain in his right knee went away within two weeks.

[15] The plaintiff testified that the numbness in his hand and fingers did not go away. He further stated that his problems with his lower back remained and his right shoulder was still painful at times. He said that as a result he was slower when doing housework and would divide up such tasks. The plaintiff made no mention of an injury to his neck or any impact such an injury might have had on his lifestyle.

[16] After the accident he attended on Dr. Chan many times for treatment respecting his lower back, shoulder and neck. The plaintiff did not say that his neck treatments were related to the First Accident.

[17] He did not miss any work as a result of the First Accident.

[18] The plaintiff testified that the Second Accident caused all of the same injuries to flare up: specifically, his lower back, shoulder, pelvis and hip pain returned, and he experienced the numbness in his fingers more frequently. His knee was not affected by the Second Accident.

[19] Again the plaintiff made no mention of a neck injury arising from the Second Accident.

[20] The first time he attended on Dr. Kwok after the Second Accident was in August 2011 for a heart-related condition. He agreed he did not mention the Second Accident to Dr. Kwok. Instead, he chose to attend on Dr. Chan, his chiropractor. His explanation for attending directly on Dr. Chan was that as in the past he had experienced more relief from chiropractic treatments than from the medications, physiotherapy and massage recommended by Dr. Kwok. From this I understood that Dr. Chan was his preferred or primary caregiver respecting matters such as back pain. On cross-examination he acknowledged that when he saw his cardiologist in September 2011 he advised him that he was exercising regularly, although he denied telling his cardiologist that he was exercising “vigorously”.

[21] He attended on his chiropractor, in his words, “many, many times”, continuing until the end of 2012. When he was unable to reach Dr. Chan -- who may have been on vacation at the time -- he commenced seeing a new chiropractor, Dr. Dosanjh, in November 2012. He has continued to see Dr. Dosanjh every 10 days to two weeks for pain in his low back and shoulder at a cost of $45 per session. If he cannot see Dr. Dosanjh, he says the pain “kind of comes back”. For the past five or six years he has also been receiving massage therapy once every two weeks at a cost of $30 per session. He feels much better after such treatment as it helps with his back pain. He continues to have numbness in his left thumb and first two fingers, although he did not indicate what if any issues the numbness causes for him. He also said that both knees become sore if he stands for a long time, but given that he only testified as to bruising of the right knee from the First Accident, it was not clear that this problem related to either of the accidents.

[22] The plaintiff said that none of the injuries have prevented him from working, but said that when he does heavy lifting at work his lower back pain returns. He does not think he can handle heavy lifting anymore and may have to hire someone in the future to do such work. He cannot rely on other workers on the site to do the required physical work as they are hired on a piecework basis and are not receptive to doing extra work in addition to that for which they are paid.

[23] His shoulder and back pain also interfere with his sleep and he is currently taking sleeping pills. Prior to the accidents he worked 10-12 hours a day but now is not confident he can handle that much work because of the physical exertion required.

[24] Prior to the accidents the plaintiff liked to go to the gym to work out. He still goes to the gym regularly but after the First Accident reduced his weight lifting and did more stretching and cardiovascular exercise because of lower back and shoulder pain. After the Second Accident Dr. Chan gave him even more stretching exercises to do and he says that the stretching now takes more time. He used to go walking or hiking with his wife but states his knee becomes sore if they walk long distances so he and his wife no longer do so.

[25] Before the First Accident the plaintiff looked after the garden, cleaned the gutters and roof, did all of the vacuuming and mopped the floors. After the First Accident his ability to do the vacuuming and mopping of floors slowed down, so he now breaks the work up. As for his work outside in the garden, he has hired someone to do the more physical work, as he cannot control the power rake anymore and is no longer able to handle the lawn mowing and pruning of the trees. While he has continued to hire assistance for the yard work, he acknowledged on cross-examination that he can mow the lawn and do other yard work; it just takes longer than it did prior to the accidents.

[26] He presently takes a number of non-prescription drugs for muscle and lower back pain and uses muscle relaxation ointments and ice packs. On the advice of Dr. Chan he also purchased a belt to wrap around his pelvis.

[27] On cross-examination the plaintiff acknowledged that when he filled out the Insurance Corporation of British Columbia ("ICBC") claim form following the First Accident he indicated that he had lower back pain from the earlier accidents. He also agreed that his back pain prior to 2009 was also related to his job and his workouts at the gym. He acknowledged that in 2006 he had complained to Dr. Kwok about his low back pain and said that his lower back "always" gives him trouble "on and off". He acknowledged as well that when he began seeing Dr. Dosanjh in November 2012 he filled out an intake form in which he stated that he had been suffering from lower back pain for 10-plus years. He was also receiving chiropractic treatments prior to 2009 on what he called a "maintenance basis", which he indicated meant at least once a month, more if he experienced more pain. He also agreed that prior to the First Accident he attended the massage therapist one or two times a month.

Testimony of the Plaintiff's Wife

[28] The only lay witness called was the plaintiff's wife, Oi Ching Chan. She did not recall details of the 2000 or 2005 accidents. She testified on direct that the plaintiff commenced complaining of back problems in November 2009 and that she did not recall him making such complaints before that. She said that her husband's mood "was bad" after the 2009 accident and that he "was not very nice" to family members. She said he stopped doing the housework that he had been doing which had consisted of vacuuming, mopping the floor, cleaning the fish tank, dishwashing and moving heavy items. For a short period of time help was hired to assist her in household chores however no claim is advanced for that individual's services as it apparently followed Ms. Chan suffering a dislocation of her pelvis. She commented that after they hired that helper it relieved a lot of her stress and their relationship improved. She said that the plaintiff is still not doing household chores. She noted as well that long drives lead him to complain about pain in his back and his knee and that he no longer bends when dancing but holds his back straight due to pain in his knees.

[29] With respect to the 2011 accident she was present in the vehicle. She said that her husband's health worsened and that he attended Dr. Chan and the massage therapist frequently. He regularly complained of not being happy. She said he no longer cleans the roof each year or does the garden work.

[30] She made no mention that he suffered from any neck problems or numbness in his hand or

arm. She said their marital relationship had suffered following the accidents but offered no details. It appears from her testimony that their relationship has subsequently improved.

Medical and Expert Evidence

[31] The medical evidence consisted of:

a) Dr. Kwok, the plaintiff's family physician. He did not provide an expert opinion.

b) Dr. Chan, the plaintiff's chiropractor from 2003 to 2012. He did not provide an expert opinion.

c) Dr. Dosanjh, the plaintiff's chiropractor from November 21, 2012 until the present. Dr. Dosanjh provided no expert opinion.

d) Dr. Parhar, a general practitioner with expertise in occupational medicine who provided two independent medical reports at the request of the plaintiff.

e) Dr. Werry, an orthopaedic surgeon, who provided two independent medical reports at the request of the defendants.

f) Dr. Attariwala, a radiologist who provided no expert opinion.

Evidentiary Rulings

[32] A number of preliminary issues arose with regards to the medical evidence, each of which required a ruling during the course of trial. I summarize those issues and my reasons below.

Issue re Magnetic Resonance Imaging ("MRI") Results

[33] The plaintiff sought to call Dr. Attariwala, the radiologist, to give a factual narrative of the steps taken in administering the MRIs and the observations made, including identifying for the court the anatomical features shown on the image, on the basis that such is not expert evidence. The defendant submitted it was expert opinion evidence and that as no notice was given it should be excluded.

[34] In *Anderson v. Dwyer*, 2009 BCSC 1872, the plaintiff sought to call her chiropractor to testify with respect to the contents of the X-rays he had taken. The defendant objected, claiming that the chiropractor's testimony would qualify as expert evidence and notice had not been given. The court described the distinction between factual evidence and expert opinion requiring notice as follows:

> [14] This distinction is a very meaningful one in this case. Any evidence by Dr. Wooden seeking to offer an opinion about the plaintiff's injuries, such as the inferences to be drawn from the observations in the x-rays or with respect to the cause or mechanism of the injury, would be prohibited because of the plaintiff's failure to comply with Rule 40A. However, the witness's factual narrative of the actions he took and the observations he made, including describing without interpretation, the anatomical features he observed in the x-rays does not amount to offering an opinion and does not offend the Rule. The fact that he brings special training or experience to bear in having taken those actions and made those observations is not determinative. It is whether he draws inferences or offers opinion beyond what the actual evidence itself is capable of revealing.
>
> [15] In this regard, I consider this kind of factual evidence to be analogous to those matters described by Madam Justice Garson as being "more in the nature of observations" as opposed to inferences having complex interpretive or diagnostic components …

[35] On this basis, I ordered that Dr. Attariwala could testify in a purely factual manner about the MRIs that he performed and could describe, without drawing any inferences or offering any opinion, the anatomical features illustrated in the MRI imaging results.

Issue of Plaintiff Expert "Rebuttal" Report

[36] The defendants objected to the admission of Dr. Parhar's report dated October 15, 2013, submitting that it was not a proper rebuttal report because it contained new evidence. The defendants noted that instead of limiting his comments to issues raised by Dr. Werry, Dr. Parhar included commentary and opinion on the MRI results in his report. As such, they say his report was not proper rebuttal. It was delivered only 42 days prior to trial and as a result was well out of time for the service of an expert report. Notwithstanding that objection, the defendants were able to obtain a rebuttal report from Dr. Werry prior to trial.

[37] Rule 11-6(4) of the *Supreme Court Civil Rules* permits a party to tender a responding report within 42 days of trial, rather than within 84 days, as is generally required for the service of an initial report. The rule is "intended to apply only to evidence that is truly responsive or in rebuttal to specific opinion evidence tendered by the opposite party. It is not intended to provide defendants with a general exemption from the basic time limit for serving expert reports" (*Crane v. Lee*, 2011 BCSC 898 at para. 22).

[38] The portions of Dr. Parhar's report that were not rebuttal arose as a result of the MRI results that became available on September 4, 2013. They were not available at the time Dr. Parhar prepared his original report nor were they available at the time Dr. Werry provided his August 15, 2013 report.

[39] In this instance the defendants were able to obtain a further report from Dr. Werry responding to Dr. Parhar's second report. Had they not been able to do so Dr. Parhar's report would have been inadmissible, at least in so far as it was not truly responsive to Dr. Werry's report (a debatable point given the references to the MRI results throughout). Any potential prejudice to the defendants was therefore negated. As a result it was not unfair to permit the report to be received nor did an issue of ambush arise.

[40] I concluded as a result, that while the report was not limited to rebuttal opinion, it was nevertheless admissible in the circumstances of this case.

[41] The further rebuttal report of Dr. Werry dated November 29, 2013 was also admissible with direct examination of Dr. Werry to be restricted to clarifying terminology or otherwise making his report more understandable.

Dr. Kwok

[42] Dr. Kwok was called to explain his clinical records. He confirmed that he had treated the plaintiff for back pain after the 2000 motor vehicle accident. He noted specifically that the plaintiff complained of mild paraspinal muscle tenderness and a resulting inability to perform heavy work. Thereafter his records do not disclose any attendances by the plaintiff respecting his lower back complaints other than a May 2001 reference to massage therapy.

[43] Dr. Kwok had no record of any post-2005 motor vehicle accident complaints. There was mention of right arm numbness but nothing in his notes linking it to an accident and an October 2006 mention of lower back pain but that did not appear to be related to a motor vehicle accident.

[44] After the First Accident Dr. Kwok noted that the plaintiff was experiencing right shoulder pain, right buttock pain, had bruising to his right medial knee, a tender scapula muscle and a tender upper back. There was no mention of neck pain. He prescribed Tylenol. In December 2009 he reported to ICBC on a medical report form known as a CL-19 that the plaintiff's right shoulder was now normal, the knee was 60% better, the interscapular muscle was 20% better and the buttock pain -- which he clarified in his testimony referred to the plaintiff's right lower back -- was 40% better. He noted as well that the plaintiff had informed him he had had 30 chiropractic treatments. He had not prescribed them. Dr. Kwok had no records relating to the Second Accident. He did have a record from January 2010 indicating that the plaintiff was experiencing numbness in his left fingers, but there was no indication that this was connected to a motor vehicle accident.

Dr. Chan

[45] Dr. Chan was called to explain his notes, both because they were illegible to anyone but himself and because he used various symbols, the meaning of which were known only to him. He first treated the plaintiff in 2003 for low back discomfort and noted a complaint of pain radiating to his right hip in the buttock region and that such symptoms increased with walking. He recorded approximately 30 further treatments between 2003 and 2009, all dealing with lower back discomfort and some neck discomfort. He had no note of a 2005 accident.

[46] Dr. Chan's records state that the August and September 2009 treatments were for lower back discomfort and that by September 8, 2009 the plaintiff's condition had improved. After the First Accident the plaintiff complained to him respecting bruising to his knee, right shoulder pain and right thigh pain. Treatment included work on his thoracic and cervical spine. Thereafter the majority of treatments indicate lower back and neck complaints, with the majority focused on the neck.

[47] After the Second Accident he noted the plaintiff complained of radiating leg pain and pain between his shoulder blades and in his lower back.

[48] He prepared a medical report for ICBC dated March 12, 2011, in which he reported that the plaintiff had a low back problem aggravated by the First Accident in 2009 and that the Second Accident had re-aggravated the previous injury. He noted that the symptoms would not interfere with the plaintiff's normal activities, although he was to avoid strenuous lifting and prolonged bending. In a progress report dated October 8, 2011, he noted again that the plaintiff had a low back problem before the Second Accident and concluded that the plaintiff's condition was "good" and that his symptoms had subsided and he had been symptom free for a while. Dr. Chan also indicated that the plaintiff's continuing slight limitation respecting rotation and lateral bending was the result of the plaintiff's pre-existing condition prior to the 2009 accident.

Dr. Parhar and Dr. Werry

[49] Plaintiff's counsel retained Dr. Parhar to provide an independent medical legal report respecting the injuries suffered by the plaintiff in the 2009 and 2011 accidents. Dr. Parhar is a general practitioner and is the medical director of CORE Occupational Healthcare Centre where he provides consultation services to assist in the rehabilitation of injured or ill workers. He provided two reports, the first dated March 1, 2012, relating to an assessment conducted on February 21, 2012, and the second dated October 15, 2013, allegedly pursuant to Rule 11-6(4), responding to a report from Dr. Werry who conducted an independent medical examination at the request of the defendants. I say allegedly because in fact the October 15, 2013 report was, as mentioned, more

than simply a responsive report.

[50] In his first report Dr. Parhar states that he based his opinion on the following facts and assumptions:

> 1. I assume to be true what Mr. Michael (Ming Ka) Pan has told me with respect to his symptoms, the impact of his symptoms on his functioning ability, and his response to various treatment modalities.
> 2. I have relied [on] and assumed to be true, [the] medical reports, clinical records and x-ray reports as outlined in the section entitled Medical Imaging, Investigations, and Consultations.
> 3. I have also assumed to be true, my own test of physical examination and observations of Mr. Michael (Ming Ka) Pan.
>
> …

[51] Consistent with these assumptions he accepted, based on what the plaintiff told him, that the plaintiff had "almost completely resolved, but not 100% from" the 2000 and 2005 accidents and that prior to 2009 "he was still attending chiropractic treatments three to five times per year for occasional back pain." Further, Dr. Parhar accepted that "[p]rior to the motor vehicle collision of September 17, 2009, Michael did have some back pain, but it was of a much less severity and did not require treatment as was required after the motor vehicle collision of September 17, 2009 and February 26, 2011."

[52] He said that his review of Dr. Chan's records from February 21, 2003 to August 26, 2010 showed that while the plaintiff had attended for chiropractic treatments prior to the accidents, "it is clear that there are considerably more visits since the motor vehicle collision of September 17, 2009 than occurred previously."

[53] As I noted earlier the vast majority of such post-September 17, 2009 visits related to treatments of the patient's cervical spine (in other words, his neck). However, since the chiropractic notes were illegible it is understandable that Dr. Parhar could only elicit from them that the visits occurred, not the treatment details.

[54] He opined in his report of March 1, 2012:

> It is also well documented that Michael was attending a chiropractor prior to the first motor vehicle collision of September 17, 2009. I am of the opinion that he likely did have some mild residual lower back discomfort, possibly related to prior motor vehicle collisions, that he reports to have occurred in 2000 and 2005. I am of the firm opinion that this prior lower back "ache" was very minimal. Although he did visit the chiropractor, it was for what he and his chiropractor were considering to be "maintenance treatments." Certainly any musculoligamentous condition affecting his lower back was significantly worsened in the

motor vehicle collisions of September 17, 2009 and February 26, 2011.

[55] However, as discussed above, Dr. Chan testified that his records reveal that the plaintiff attended on him a few times in 2007 and 2008 but in August 2009 and early September 2009, just prior to the MVA on September 17, 2009, the plaintiff attended on him eight times. Those treatments related to the plaintiff's lumbar spine, thoracic spine and neck.

[56] When asked about those increased visits in August 2009 the plaintiff stated that the eight chiropractic treatments he received in the weeks prior to the accident and the prescription from Dr. Kwok in August 2009 for Celebrex indicates that his back pain must have been "really bad". He also stated that after treatment by Dr. Chan he was "still not good" hence the visit to the massage therapist on the day of the accident. There was no evidence respecting what precipitated these visits.

[57] The plaintiff had also been receiving massage one or two times a month prior to the accident.

[58] In response to Dr. Parhar's report the defendants produced a report from Dr. Werry, dated August 15, 2013. Dr. Werry is an experienced orthopaedic surgeon. Since 2002 he has concentrated on joint replacement, specifically relating to the hip, knee and shoulder. He acknowledged that he would not normally accept referrals for cervical pain nor has he done surgery on cervical and lumbar spine since his residency. He acknowledged that it was his practice to discuss any imaging done with the radiologist.

[59] No radiological imaging results were provided to Dr. Werry with respect to his first report.

[60] Dr. Werry was of the opinion that the low back injury was probably a soft tissue injury consisting of muscle strain and ligamentous sprain. He found it unlikely that the plaintiff had suffered any neck injury because he found no mention of such in Dr. Kwok's notes or in Dr. Chan's records. The latter was because, as mentioned earlier, the records of Dr. Chan were illegible to anyone other than Dr. Chan. Unfortunately no readable copy of Dr. Chan's notes had been provided to Dr. Werry. However, given that the plaintiff did not raise in his evidence any complaints respecting his neck, no evidence of a cervical spine injury is before the court.

[61] Dr. Werry concluded that the plaintiff's low back discomfort and stiffness would be best managed through a self-directed regular exercise program designed and initially supervised by an exercise-oriented physiotherapist or kinesiologist.

[62] Subsequently plaintiff's counsel arranged on September 4, 2013, for Dr. Attariwala of AIM Medical Imaging to perform an MRI of the plaintiff's spine. Dr. Parhar was then provided with Dr. Werry's report and the results of that MRI.

[63] This prompted a further report from Dr. Parhar dated October 15, 2013. Dr. Parhar noted that Dr. Werry did not have the benefit of X-rays or the MRI findings when he prepared his report. He disagreed with Dr. Werry's opinion that the plaintiff would likely not require injections or surgery for his injuries. While in his view, the issues identified on the MRI with the lumbar spine (back) "may not be amenable to any surgical procedure" the MRI of the cervical spine (neck) suggested a possible need for future surgical intervention. He concluded:

> While at the current time, Michael does not have symptoms suggestive of neurological compromise, should these findings on MRI, both on the cervical spine and lumbar spine, progress to the point of neurological compromise, then an assessment with a spinal surgeon, such as a neurosurgeon, to explore treatment options such as injections and/or spinal surgery, should be considered.

[64] Dr. Parhar also gave his opinion that the multilevel spondylotic changes to the lumbar spine shown in the MRI "represent osteoarthritis of the lumbar spine, which pre-existed the motor vehicle collision of September 17, 2009. It is further likely that this pre-existing osteoarthritis condition was aggravated and thus, made symptomatic by the forces exerted on the lumbar spine in the motor vehicle collision of September 17, 2009." In his view, it was not clear whether an annular tear in the lumbar spine pre-existed or was caused by the First Accident, but he said that the Second Accident "clearly caused this annular tear at L2-3 to become symptomatic."

[65] With regards to the MRI evidence, Dr. Parhar concluded:

> The most significant revision to my prognosis for Michael's injuries [upon reviewing the additional information] would be that which addresses the cervical spine and lumbar spine conditions. Clearly, the **osteoarthritis (degenerative arthritis) conditions** as identified on the MRI imaging of September 4, 2013, indicate very significant multilevel spondylotic changes throughout the lumbar spine, with an annular tear at L2-L3. As already noted, the spondylotic or osteoarthritis condition, likely pre-existed the motor vehicle collision of September 17, 2009, but was aggravated by this motor vehicle collision. Unfortunately the normal course of osteoarthritis is that once it has been activated, it does tend to worsen as the patient ages and as more time elapses. Thus, my prognosis for Michael's lower back or lumbar spine condition is that I would expect it to worsen in the coming years.

[66] Dr. Werry then issued a final report of November 29, 2013, responding to Dr. Parhar's second report, in which he also commented on the MRI results. Having reviewed the radiologist's findings, he concludes that "[t]he lumbar spine MRI scan findings represent mild degenerative changes which are common and frequently asymptomatic in the general population of mid age." In

his view, the annular tear noted in Dr. Parhar's report "is a small degenerative defect which is part of the other degenerative changes which have occurred in the disc … I would agree with the radiologist that the posterior disc bulge is very small …". He gave the opinion that the MRI did not show changes consistent with low back pain, noting in particular that there was no sign of significant collapse and narrowing of the discs, significant disruption of the structure of the annulus, degenerative facet joints, or nerve roots pinched by disc material. He disagreed with Dr. Parhar's conclusion that the changes in the lumbar spine were "very significant," stating that the degenerative changes seen on the scan "are relatively mild and are commonly found in the general population of middle age, and are frequently asymptomatic. As I noted above, disc height is well maintained and the facet joints are free of any degenerative change except for one level where there was mild hypertrophy of the facets."

[67] In Dr. Werry's view, neither accident caused anatomic damage to the plaintiff's spinal column, as trauma "severe enough to produce actual damage to discs, joints, bones, or ligaments would produce severe incapacitating pain sufficient to render the injured person immobile." He concluded that the plaintiff's low back symptoms after the accidents were "typical for soft tissue injury."

Submissions Respecting Expert Reports

[68] The plaintiff submits that Dr. Werry's reports do not provide a basis for a finding that there was a pre-existing basis for complaints of cervical or thoracic pain prior to the First Accident. That is, the plaintiff says Dr. Werry has simply relied on the complaints of the plaintiff and there is no medical evidence upon which to base his opinion of causation relating to such complaints. The same criticism is raised with respect to Dr. Werry's comment that the low back pain was aggravated by an MVA in 2005.

[69] The defendants submit that Dr. Parhar's reports are substantially inadmissible, firstly because he failed to consider discrepancies arising between the clinical records and what the plaintiff told him and secondly because he relied on complaints from the plaintiff that were not mentioned by the plaintiff in his evidence. They also submit that Dr. Parhar came across as an advocate.

[70] Dr. Parhar agreed in cross-examination that if what the plaintiff told him was incorrect or untrue his opinion might change. He testified that he does not see it as his role to look for discrepancies between clinical records and information provided by the patient when preparing a medical legal report. Certainly in this case Dr. Parhar did not consider the clinical records provided

when assessing the plaintiff in the sense of considering such records and their contents as compared to the evidence of the plaintiff.

[71] As noted by Mr. Justice McEwan in *Fan v. Chana*, 2009 BCSC 1127, at para. 73:

> [73] … As courts have observed on any number of occasions, the approach taken by medical professionals is not forensic: they assume that the patient is accurately reporting to them and then set about a diagnosis that plausibly fits the pattern of the complaint. In the absence of objective signs of injury, the court's reliance on the medical profession must, however, proceed from the facts *it* finds, and must seek congruence between those facts and the advice offered by the medical witnesses as to the possible medical consequences and the potential duration of the injuries.

[72] Dr. Parhar took the plaintiff at his word when he said he was attending chiropractic treatment three to five times per year for occasional back pain prior to the First Accident. Despite having the chiropractic records, Dr. Parhar made no mention of the increased treatments in the weeks leading up to the First Accident. He conceded at trial that an increase in the frequency of such treatment could indicate something more than "maintenance" was occurring. He also failed to note Dr. Chan's discharge report of October 11, 2011, in which Dr. Chan recorded that the plaintiff had returned to his pre-2009 accident condition and had been symptom free for "awhile".

[73] The acceptance of what the plaintiff told him without considering contrary or qualifying information in the clinical records, particularly with respect to the issue of pre-existing symptomatic lower back problems, undermines his conclusions that the plaintiff's symptoms arose due to the accident. I am not satisfied that the symptoms complained of were asymptomatic at the time of the 2009 accident in light of the evidence of the plaintiff and the chiropractic visits immediately prior to the accident in 2009. In addition his assumption that the number of post-2009 accident visits to the chiropractor indicated the accident's impact on the plaintiff's lower back is undermined by the illegible chiropractic records, which as explained by Dr. Chan were predominantly for treatment of the plaintiff's neck, an injury not mentioned by the plaintiff in his testimony.

[74] When Dr. Chan's discharge report of October 11, 2011, was put to Dr. Parhar he argued that conditions can wax and wane and that perhaps the plaintiff was only symptom-free that particular day. In doing so, and in ignoring Dr. Chan's note that the plaintiff had been symptom free for "awhile", the appearance of advocacy arises. In addition, in his March 1, 2012 report Dr. Parhar stated that the plaintiff "drinks only socially". On cross-examination, however, when asked if he was aware that the plaintiff's cardiologist described the plaintiff's drinking as "excessive" (noting seven beers and one bottle of red wine four days per week), Dr. Parhar admitted he was not aware of that but advocated for the plaintiff by stating that such drinking could be considered social if imbibing

with others.

[75] In reaching his prognosis Dr. Parhar relies on complaints of ongoing neck pain. Given the plaintiff did not testify to such pain, the evidentiary basis for Dr. Parhar's reliance on complaints of ongoing neck pain is absent. Those portions of his report that address a claim of cervical or neck pain are therefore irrelevant.

[76] When Dr. Parhar addressed the MRI imaging results in his October 15 report he opined that the spondylotic or osteoarthritis (degenerative arthritis) conditions identified on the MRI imaging of the plaintiff's lumbar and cervical spine on September 4, 2013 likely pre-existed the motor vehicle collision of September 17, 2009, but were asymptomatic until aggravated by this motor vehicle collision.

[77] I am satisfied that Dr. Parhar was mistaken in finding that the plaintiff was asymptomatic before the 2009 Accident. I find that the plaintiff was suffering from symptomatic lower back pain at the time of the First Accident.

[78] In addition, in providing his report of October 15, 2013 Dr. Parhar had not seen the plaintiff since February 2012 nor had he been provided with clinical records past October 8, 2011.

[79] As a result the weight to be given to the admissible portions of the reports of Dr. Parhar and his conclusions are accordingly diminished. I cannot accept his conclusion that all of the plaintiff's symptoms are due to the accidents.

[80] In his opinion dated August 15, 2013, Dr. Werry noted that when the plaintiff changed chiropractors in November 2012 he stated on the registration form under major complaints "lower back sore/pain-chronic pain (10+ years)". His examination showed full range of motion in the plaintiff's neck, upper, and low back with no pain. His diagnosis was:

> Mr. Pan had experienced low back pain following an MVA in approximately 2000, aggravated by an MVA in 2005, and by prolonged driving prior to his September 2009 MVA.
>
> The nature of Mr. Pan's low back injury was probably soft tissue injury consisting of muscle strain and ligamentous sprain. He had no neurologic symptoms.
>
> Mr. Pan had right shoulder pain. The documentation does not allow a retrospective diagnosis of right shoulder injury. Mr. Pan's current right shoulder examination is normal.
>
> Mr. Pan recalled injury to his left knee. The family physician record documented a bruise over the right knee. Mr. Pan sustained contusion to the right knee. His current knee symptoms include a sensation of weakness in the left and right knees after prolonged standing. His current knee physical examination is normal and does not provide a diagnosis for his current knee complaints.

[81] Given there is no evidence of a neck injury and its effects, the differing views of Dr. Parhar and Dr. Werry respecting the MRI interpretation are only relevant respecting the lower back injury.

[82] Dr. Werry in his August 15, 2013 report under the heading “Facts and Assumptions” stated:

> 1. Mr. Pan recalled 2 motor vehicle accidents (MVA) prior to the September 17, 2009 MVA. Following an MVA in 2000 he experienced some low back pain and had chiropractic treatment for this. He had a second MVA in 2005 which also caused or aggravated low back pain. From 2005 he had experienced low back pain with prolonged driving.
> 2. Mr. Pan had seen Dr. A. Chan, chiropractor, periodically from February 2003. Dr. Chan’s records recorded 6 treatments in August 2009 and 2 in September 2009, prior to the September MVA.

[83] As noted earlier plaintiff’s counsel submits that Dr. Werry in stating that the motor vehicle accident in 2005 caused or aggravated low back pain is reaching a conclusion on causation based solely on what the plaintiff told him. He repeated this under the heading “Opinion”. Plaintiff’s counsel argues that in doing so he was giving an opinion respecting the effect of the 2005 motor vehicle accident without any medical evidence to base it on.

[84] With respect, it is clear from the report that Dr. Werry was proceeding on the basis that the effects of the two accidents were as stated by the plaintiff and his opinion regarding the plaintiff’s condition prior to the First Accident is clearly based on the medical records and the evidence of the plaintiff. In any event the cause of the pre-existing and symptomatic lower back pain is irrelevant. The relevant point is that the plaintiff had, and continued to suffer, lower back pain.

[85] Dr. Werry in preparing his report of August 15, 2013 had more current medical records than did Dr. Parhar. As is apparent from his report, he conducted a careful review of those records. The result is the facts and assumptions upon which he relied are more accurate than those relied upon by Dr. Parhar and more consistent with the evidence of the plaintiff at trial.

[86] Dr. Parhar and Dr. Werry’s second reports both address the MRI imaging results.

[87] The examining radiologist Dr. Raj Attariwala provided his impression of the plaintiff’s lumbar spine as follows:

> Multilevel spondylotic change throughout the lumbar spine with annular tear at L2-3. There is no severe neural foraminal narrowing or spinal canal stenosis at any level of the lumbar spine.
>
> Suspected pseudoarthrosis involving the transitional L5/S1 vertebral body and if there is concern for chronic pain, a nuclear medicine bone scan may be helpful.

[88] As noted earlier, Dr. Parhar found that the MRI imaging "indicat[ed] very significant multilevel spondylotic changes throughout the lumbar spine, with an annular tear at L2-L3. The spondylotic or osteoarthritis condition likely pre-existed the motor vehicle collision of September 17, 2009, but was aggravated by this motor vehicle condition. Unfortunately the normal course of osteoarthritis is that once it has been activated, it does tend to worsen as the patient ages and as more time elapses. Thus my prognosis for Michael's lower back or lumbar spine condition is that I would expect it to worsen in the coming years."

[89] Given I have found that the lumbar complaints of the plaintiff were ongoing I can only accept Dr. Parhar's opinion to the extent there was a pre-existing lower back injury that was aggravated by the two accidents, not that they rendered it symptomatic or, as he put it, that the accidents "activated" it. In addition his reliance on the number of chiropractic treatments after the First Accident and his discounting of Dr. Chan's discharge report in October 2009 affects my findings respecting the level of aggravation arising from the 2009 accident.

[90] Dr. Werry did not find that the MRI Imaging altered his diagnosis or prognosis.

[91] The plaintiff submits that Dr. Parhar, by virtue of his knowledge and greater experience relating MRI imaging to complaints of pain, has more expertise than Dr. Werry in interpreting the MRI results. While Dr. Parhar may frequently examine MRI reports and images and relate them to his patient's complaints he does not have the same training as an orthopaedic surgeon. He acknowledged that an orthopaedic surgeon such as Dr. Werry has more specialized training respecting the spine. He did not acknowledge that meant Dr. Werry had greater expertise reading MRI results. It was his view that an orthopaedic surgeon would have more limited experience in correlating MRI results to back pain.

[92] Both Dr. Parhar and Dr. Werry agree that that the plaintiff suffered a "musculoligamentous injury" to his lumbar spine in the First Accident. They only differ on whether it was symptomatic prior to 2009 or not. I have found the plaintiff's lower back was symptomatic prior to the accident. As a result I accept Dr. Werry's characterization of the nature of Mr. Pan's injury as more consistent with the evidence than that of Dr. Parhar.

Discussion

[93] The defendants do not take issue with the credibility of the plaintiff. I found him to be straightforward in his evidence and willing to stand corrected if challenged. He was however notably reticent when it came to describing his injuries and their effect. As acknowledged by

plaintiff's counsel, the plaintiff "seemed to only offer us occasional glimpses into the pain he was experiencing".

[94] Tellingly, the plaintiff described the injuries arising from each of the four accidents in similar ways: he said that that his shoulder, hip and back pain "kind of eased off" but never went away.

[95] The plaintiff offered no evidence of depression or marital difficulties arising from the accident.

[96] While it may be that the plaintiff is stoic about his injuries, he has not been hesitant to seek treatment. I accept he was reticent in describing his injuries and their effects. Even taking that into account, however, his evidence fails to support plaintiff's counsel's characterization of the injuries as severe and continuing. On the plaintiff's evidence they are intermittent and aggravated by certain activities but are amenable to treatment and resolution as periods of pain arise. They also are apparently controlled or alleviated by "maintenance" treatments.

Causation

[97] To support an award it is incumbent on the plaintiff to establish a causal connection between the defendants' negligence and the plaintiff's pain. The test for causation is the "but for" test, which requires the plaintiff to establish that he would not have suffered the loss "but for" the defendants' negligence: *Clements v. Clements*, 2012 SCC 32. However, the plaintiff does not need to establish that the accidents were the *only* cause of the injuries; where there are other potential non-tortious causes, like the plaintiff's pre-existing degenerative back condition, the defendant is still liable if the plaintiff can show that both were contributing causes of the current injury: *Farrant v. Laktin,* 2011 BCCA 336, at paras. 5, 9.

[98] Plaintiff's counsel commenced his submissions by stating that the most significant injury suffered by the plaintiff was the injury to his neck. As I have discussed, the plaintiff gave no evidence of such an injury and as a result no evidentiary basis was established for the expert opinion on, or clinical record references to, an injury to the plaintiff's cervical spine. Further, without the plaintiff's testimony on this point, there is no evidence of a causal link between the two accidents and any neck injuries the plaintiff may suffer from.

[99] In the case of a pre-existing injury, the tortfeasor must take their victim as they find them, even if the resulting injuries are more severe than they would be for a normal person. However, a defendant is not required to compensate the plaintiff for the effects of a pre-existing condition if the plaintiff would have experienced those effects regardless of the defendants' negligence: *Johal v. Conron*, 2013 BCSC 1924 at para. 72.

[100] I am satisfied that the plaintiff has established that he suffered the aggravation of a pre-existing lower back injury as a result of the 2009 and 2011 accidents. The aggravation of the pre-existing lower back injury is supported by the evidence of the plaintiff and his wife respecting the effects of the accidents on both his personal and business life, the hiring of household assistance outside the home and restrictions on his previous exercise regime.

[101] However, I am not satisfied that all of the plaintiff's current injuries were caused by the accidents. I find that the plaintiff's back problems were symptomatic prior to the accidents and that as a result there is a serious risk that he would have suffered from issues with his lower back even if the accidents had not occurred. As a result, the defendants are only partially responsible for the plaintiff's current injuries. I have taken this factor into account in assessing damages by reducing the award in order to reflect the risk that the plaintiff would have suffered the losses absent the accidents: *Wallace v. Thibodeau*, 2008 NBCA 78 at paras. 48-49.

[102] With respect to the tingling or numbness in his left hand, the plaintiff did not raise it as an issue until January 2010, some four months after the First Accident. There is no evidence linking it to that accident. With respect to the Second Accident the plaintiff states the numbness returned and was more frequently symptomatic than it had been before. The plaintiff offered no evidence that such numbness causes any distress or limits his activities in any way.

[103] With respect to the knee injury Mr. Pan stated that after the First Accident the pain went away after approximately 10 days to two weeks. After the Second Accident, while he described all of the past pain returning, he stated that the knee "seems fine". When asked if he continues to have problems with his knee he stated that both knees become sore if he stands for a long time. He commented he could no longer walk or hike long distances. His wife stated that his problems with his knees interfered with his ability to dance with her and that long drives lead him to complain about lower back and knee pain. There is no medical evidence of a continuing knee injury and on the evidence of the plaintiff I find that the knee injury arising from the First Accident was short term and that any continuing knee problems appear to relate to both knees and are unrelated to either motor vehicle accident.

[104] With respect to the plaintiff's shoulder injury he testified that it eases off but never goes away and that he continues to have pain in his right shoulder. He had suffered pain in his shoulder after the 2005 accident but it apparently resolved itself within a month to a month and one half. His shoulder pain was therefore asymptomatic at the time of the First Accident.

[105] He stated that his back and shoulder pain interfere with his ability to sleep. He relies on

painkillers and sleeping pills. He gave no evidence that his shoulder pain limited his activities, other than weight lifting at the gym. Dr. Werry found no evidence of injury to Mr. Pan's shoulder.

[106] The plaintiff claims for depression in 2009 after the accident and his wife stated that after the accident his "mood was bad" and he was "not very nice" to members of his family and that he complained about not being happy. She said as a result their marriage suffered but things improved after a short separation and marriage counselling and have been "very good" for the past six months. However, as noted earlier the plaintiff himself did not complain of depression arising from the accidents. In addition the plaintiff's wife's evidence is that she was stressed with household responsibilities and the hiring of help reduced her stress and improved their relationship. I am not satisfied that the plaintiff has established that either of the accidents caused any depression or unhappiness affecting his home life.

[107] In summary, I am satisfied that the plaintiff has proved on a balance of probabilities that the accidents aggravated his lower back and shoulder pain. I am also satisfied that he continues to suffer from lower back and shoulder pain and that such pain continues to a greater degree than was the case prior to the accidents. He has also established that the Second Accident made the tingling in his left arm and hand symptomatic and that his knee was injured and was sore for a few weeks after the First Accident. The plaintiff has not however established that either accident contributed to a neck or cervical spine injury.

Assessment of Damages

[108] At the time of the Second Accident the plaintiff had not fully recovered from the First Accident. Where one defendant aggravates a pre-existing tortiously-caused injury, the resulting injuries are indivisible. There is no issue of contributory negligence. As a result, no apportionment of responsibility between the defendants is required. Each of them played a role in the plaintiff's loss. Both are jointly liable for the plaintiff's damages: *Bradley v. Groves,* 2010 BCCA 361.

Non-pecuniary Damages

[109] The law regarding non-pecuniary damages is summarized in *Hartnett v. Leischner & ICBC*, 2008 BCSC 1589 at paras. 80-81, where Madam Justice Russell states that the purpose of such awards is to compensate the plaintiff for "pain, suffering, loss of enjoyment of life and loss of amenities." While the award must be assessed by reference to the facts of the individual case, cases with similar injuries or otherwise similar facts "may serve as a guide to assist the court in arriving at an award that is just and fair to both parties." In *Stapley v. Hejslet*, 2006 BCCA 34 at para. 46, the Court of Appeal set out an inexhaustive list of factors that a court should consider in

awarding non-pecuniary damages:

> [46] …
>
> (a) age of the plaintiff;
>
> (b) nature of the injury;
>
> (c) severity and duration of pain;
>
> (d) disability;
>
> (e) emotional suffering; and
>
> (f) loss or impairment of life.
>
> …
>
> (g) impairment of family, marital and social relationships;
>
> (h) impairment of physical and mental abilities;
>
> (i) loss of lifestyle; and
>
> (j) the plaintiff's stoicism (as a factor that should not generally speaking, penalize the plaintiff …).

[110] The accidents in this instance were neither minor nor major. After the First Accident the plaintiff attended on Dr. Kwok complaining of right shoulder and right thigh pain. A bruised knee was observed. The plaintiff's interscapular muscles were tender but the range of motion on the right shoulder was normal. There were no specific complaints of neck or back pain during the initial visit. On October 8, 2009 the plaintiff on his second visit to Dr. Kwok after the accident made no complaints of neck or back pain. When Dr. Kwok saw the plaintiff on December 14, 2009, for completion of a CL19 Report there had been only two prior visits relating to the accident. He noted right interscapular muscle pain and right buttock area pain, the latter being the first time it was mentioned by the plaintiff. While Dr. Kwok saw the plaintiff 13 times from September 17, 2009 to January 26, 2011, only three of those visits related to the 2009 accident.

[111] The plaintiff saw Dr. Adam Chan, his chiropractor, on September 22, 2009. Dr. Chan's evidence was that the plaintiff reported discomfort in the right shoulder, right knee, and sacroiliac joint during this visit. He provided treatment on the cervical spine, thoracic spine, lumbar spine, and sacroiliac joint. Dr. Chan agreed that he treated the cervical spine even though there were no specific complaints of discomfort in that area. He agreed that he may have done so if there were complaints of middle back pain.

[112] It is of note that the plaintiff went to the gym within hours of the accident and resumed his running within weeks of the accident.

[113] There was no evidence that before the First Accident the plaintiff's lifestyle and activities were restricted by his lower back complaints. He testified that his activities involved his work, cycling, walking with his wife, assisting with housework, attending to outside house maintenance and yard work and visiting the gym. After the First Accident he withdrew from house and yard work. He did at some point do housework again however it took longer and required periods of rest. His ability to drive for long periods of time was also impaired. It appears that he is still able to participate in other activities, such as bicycling and walking, as he did prior to the accidents.

[114] As I have mentioned the plaintiff is not a "complainer". After the 2009 accident his visits to his chiropractor, massage therapist as well as to the gym increased, evidencing the increase in pain and discomfort he suffered after the accident. However the majority of the increased chiropractic visits related to his neck and the plaintiff has failed to establish that either accident caused a neck injury.

[115] Dr. Werry reported in August 2013 that the plaintiff had a full range of motion with respect to his upper and lower back without pain and there was no tenderness. His shoulder examination was normal. His knee examination was normal and I note the plaintiff's complaints to Dr. Werry about his knees related to both knees.

[116] The evidence of Dr. Parhar is that the injuries will not improve over time but will worsen. Dr. Werry was of the opinion that there will be no need for medical invasive treatments such as injections or surgery as the plaintiff's low back stiffness and discomfort is best managed through "maintenance of a self-directed regular exercise program … designed and initially supervised by an exercise-oriented physiotherapist or kinesiologist".

[117] The plaintiff had a long history of lower back pain and treatment for such. However, the plaintiff's ongoing problems with his lower back are somewhat greater than the level of difficulty he experienced prior to the First Accident. His current pattern of chiropractic "maintenance" treatments and massage is also in excess of the pattern that existed before the First Accident.

[118] The plaintiff seeks an award of $90,000 for non-pecuniary damages.

[119] In support he relies on the decision of *Unger v. Singh*, 2000 BCCA 94, where the court noted at para. 32:

> [32] … Cases involving primarily soft-tissue injury with some emotional problems including sleep disruption, nervousness, depression, seem to be from a low of $35,000 to a high of $125,000. However, I caution though that these numbers are only guides. …

[120] In *Unger* the injuries to the plaintiff's neck, shoulder, lower back and knee, together with her difficulties sleeping and "coping" had largely resolved at the time of trial two years after the accident. The Court of Appeal reduced the jury award of $187,000 to $90,000.

[121] Adjusted to current dollars, the range of awards for soft tissue injuries accompanied by the cited emotional problems would be approximately $42,000 to $150,000: *Harris v. Zabaras*, 2010 BCSC 97, at para. 66.

[122] In *Graydon v. Harris*, 2013 BCSC 182, the plaintiff was 60 years old at the time of the accident. His injuries consisted of ongoing headaches, neck, back and arm pain, all of which continued some five and one-half years after the accident. The defendants had argued that the accident had minimal impact on the plaintiff and that his symptoms were primarily attributable to his pre-accident condition or age related degeneration. The court applied a 25% contingency in respect of the plaintiff's pre-existing condition and awarded $60,000. *Graydon* involved more serious and continuing injuries with more impact on the plaintiff than those proven in this case.

[123] The defendants submit that at most the evidence supports an aggravation of the plaintiff's pre-existing symptomatic low back condition. They suggest that the appropriate amount for non-pecuniary damages is $25,000 to $35,000. They rely on the following authorities:

a) *Gendron v. Moffat*, 2010 BCSC 1231: The plaintiff, a 58-year-old owner/operator of a janitorial business, sustained cervical, thoracic, lumbar, and right shoulder strains as well as left shoulder and arm contusions. The plaintiff underwent an MRI within five months of the accident, which showed mild to moderate changes in her cervical spine. Although the plaintiff was continuing to complain of pain at trial, her symptoms were found to have substantially resolved within 20 months of the accident. After taking into consideration the plaintiff's age, the effect of her injuries, and the presence of arthritis either before or within a short time of the accident, the court awarded non-pecuniary damages of $25,000.

b) *Johal v. Conron*, 2013 BCSC 1924: The 57-year-old plaintiff alleged that her physical condition and limitations were made worse by the accident. She continued to suffer from neck, shoulder, and upper back pain as well as more severe and frequent headaches. She also suffered from back and lower body pain that she did not have prior to the accident. The plaintiff was found to have suffered mild to moderate soft tissue injuries to her cervical and lumbar spines, which aggravated her pre-existing conditions and caused new conditions in her lumbar spine and lower body. She was awarded $35,000 in non-

pecuniary damages. In rendering this award, Madam Justice Donegan noted at para. 88 that "[a]s a result of her pre-existing conditions, she is entitled to be compensated to the degree necessary to put her in her pre-accident condition or position, not a better position."

c) *Jordan v. Lowe*, 2012 BCSC 1482: The plaintiff, a 45-year-old police officer, suffered neck, shoulder and back injuries as a result of a motor vehicle accident. He had previously been diagnosed with degenerative disc disease in his cervical spine with nerve root compressions, which led to surgery in 2000. He eventually experienced a symptom-free state with occasional mild aching and intermittent stiffness. There were no records of complaints of pain or limitation in function associated with neck or back pain in the three years before the accident. The plaintiff was substantially recovered from his injuries at the time of trial but was still suffering from occasional neck, shoulder and thoracic back pain. He received an award of $35,000 for non-pecuniary damages.

[124] The plaintiff has established that he suffered a short-term injury to his knee and the aggravation of his lower back pain and a shoulder or upper back problem, which substantially resolved by the end of 2011 although not to his pre-accident state. While these issues affect his day-to-day life to some degree and may flare up if he overexerts himself either in his home life or work I am not satisfied that they are as serious as the plaintiff submits. I do accept that they have limited his activities and that he suffers continuing sleep disturbance, something that was not pre-existing. I am not satisfied that the plaintiff's alleged depression or unhappiness was caused by the accidents. The evidence respecting such was minimal and as a result has not been proven; nor has the plaintiff proven that his marital problems were a result of the accidents.

[125] In my view, there is a 25% chance that the plaintiff's pre-existing conditions would have interfered with his life to the degree they do now had neither accident occurred. As such, a reasonable sum for the impact on Mr. Pan's life from the aggravation of his pre-existing lower back, shoulder and knee problems, after applying a 25% contingency in respect of his pre-existing condition, is $40,000.

Loss of Earning Capacity

[126] The plaintiff argues that his medical condition creates a real and substantial possibility of a future event leading to an income loss for him -- specifically, he says he will need to hire a worker to help him complete physical tasks at worksites. The plaintiff submits that a figure of $25,000 would be an appropriate award to compensate him for this future loss.

[127] In support of this portion of the claim the plaintiff relies on the prognosis given by Dr. Parhar in his March 1, 2012 report, where he addressed the plaintiff's occupational situation as follows:

> Given that the underlying medical conditions which resulted from the motor vehicle collisions of September 17, 2009 and February 26, 2011 are themselves permanent, it would be reasonable to conclude that the occupational limitations they have resulted in should also be deemed to be permanent. That is, I would expect Michael to be limited in heavier work, such as lifting, bending, twisting, carrying, and doing overhead and over shoulder height work on a permanent basis. Fortunately, as he is self-employed and owns his own company, he may be able to delegate these more physical tasks to others.

Dr. Parhar stated that if the plaintiff was expected to continue handling physical tasks, it would be prudent for him to consider retraining for an alternative career.

[128] Given his age the plaintiff submits retraining for another career is unlikely and the more probable event is the plaintiff will have to hire a labourer to carry out the more physical aspects of his job.

[129] The defendants submit that the evidence does not establish a permanent impairment arising from the two accidents and as a result they say that the plaintiff has failed to meet the test required for an award for future loss of earning capacity.

[130] The defendants note that the evidence of impairment came solely from the plaintiff, who testified that his lower back pain returns every time he does any heavy lifting. He therefore believes he will have to hire people to do such tasks for him in the future. Dr. Werry opined in his report of August 15, 2013 that the plaintiff "will probably be capable of continuing his contracting work for another 10 or 15 years, assuming that this work is mainly supervisory. Mr. Pan's physical involvement with his work has been limited to clean-up of construction debris at the end of the working day".

[131] They note as well that the plaintiff has not presented a claim for past loss of income. In other words, from 2009 until the time of the trial the plaintiff has apparently been able to perform his job without assistance.

[132] While, as the plaintiff put it, the court must look into its "crystal ball" and try to see the future, in doing so it must find a real and substantial possibility of a future loss before any award for future loss of earning capacity can be made.

[133] The defendants refer to *Buttar v. Brennan*, 2012 BCSC 531, where Mr. Justice Abrioux noted that courts should be "exceedingly careful" where the injury or loss is only demonstrated by

subjective evidence from the plaintiff himself (para. 24). He noted that “no one can expect his fellow citizen or citizens to compensate him in the absence of convincing evidence -- which could be just his own evidence if the surrounding circumstances are consistent -- that his complaints of pain are true reflections of a continuing injury” (*ibid).* The court must look for congruence between the facts its finds and the opinions given by medical witnesses as to the possible medical and other consequences and potential duration of the injuries. Further, in analyzing the plaintiff’s evidence, the court must:

> [25] …
>
> … subject his story to an examination of its consistency with the probabilities which surround the currently existing conditions. … the real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions.
>
> …

[134] In *Buttar,* there was no objective or corroborating evidence to support the plaintiff’s contention that he was only able to work 50% of the time he had prior to the accident. While the court in that case was addressing considerations arising where there was an absence of objective signs of injury, the defendants submit that the same considerations apply when there is an absence of objective evidence of continuing disability. I accept that to be the case.

[135] The defendants submit that the plaintiff’s bare assertions are not in harmony with the other evidence and circumstances and that to rely solely on his evidence without corroborating medical opinion would lower the burden of proof for a potentially significant head of damages to a meaningless level.

[136] In *Parker v. Lemmon*, 2012 BCSC 27, the applicable legal principles respecting loss of future earning capacity were summarized at para. 42:

> [42] …
>
> (1) A plaintiff must first prove there is a real and substantial possibility of a future event leading to an income loss before the Court will embark on an assessment of the loss;
>
> (2) A future or hypothetical possibility will be taken into consideration as long as it is a real and substantial possibility and not mere speculation;
>
> (3) A plaintiff may be able to prove that there is a substantial possibility of a future income loss despite having returned to his or her employment;

(4) An inability to perform an occupation that is not a realistic alternative occupation is not proof of a future loss;

(5) It is not the loss of earnings but rather the loss of earning capacity for which compensation must be made;

(6) If the plaintiff discharges the burden of proof, then there must be quantification of that loss;

(7) Two available methods of quantifying the loss are (a) an earnings approach or (b) a capital asset approach;

(8) An earnings approach will be more useful when the loss is more easily measurable;

(9) The capital asset approach will be more useful when the loss is not easily measurable.

[137] Mr. Pan has not made a claim for past wage loss. While this is a factor to consider it is not determinative (*Rosvold v. Dunlop*, 2001 BCCA 1). It is now five years since the 2009 accident and two years since the 2011 accident. During that time the plaintiff has performed the same work he did prior to the accidents, although he says that heavy lifting causes him lower back pain. He was however being treated for lower back pain before the First Accident and he testified that between 2005 and 2009 he required chiropractic treatment to address back pain that arose when he did lifting or climbing at work.

[138] I am not satisfied that the evidence supports a real and substantial possibility of a future loss arising from the accidents. While the plaintiff has suffered an aggravation of his pre-existing lower back symptoms, the evidence does not establish that the accidents, rather than age and the pre-existing condition itself, are the cause of any future disability. The medical evidence is conflicting. However, as I have indicated, I prefer the evidence of Dr. Werry to the opinion of Dr. Parhar given Dr. Parhar's opinion flows from his view that the pre-existing condition of the plaintiff was asymptomatic, which is contrary to my finding that it was in fact symptomatic. Dr. Werry's opinion is more in accord with the evidence of the plaintiff and the findings of this Court. I am of the view that the plaintiff has failed to establish that there is a substantial possibility of a future event leading to an income loss.

[139] The claim for loss of future earning capacity is dismissed.

Special Damages

[140] The plaintiff seeks reimbursement for the following out-of-pocket expenses:

a) $112 for damage to his laptop;

b) $2,310 for gardening expenses;

c) $44.37 for Ibuprofen, Advil and Platinum Muscle & Back Pain Relief;

d) $770 for physiotherapy treatment from Flora Lee Physiotherapy;

e) $11,565 for chiropractic treatments from Dr. Adam Chan;

f) $1,205 for chiropractic treatments from Dr. Navchaiten Dosanjh.

[141] The defendants take no issue with respect to the laptop damage. With respect to item (b) they accept that the gardening expenses in 2009 are recoverable but submit that thereafter they are not, on the basis that the plaintiff had recovered to his pre-accident condition.

[142] With respect to item (c) the defendants deny liability on the basis that the plaintiff took the same medications prior to the First Accident and there is no evidence that his need for them increased after either accident.

[143] The defendants also submit that no award should be made for item (d) as the plaintiff failed to lead any evidence with respect to the necessity for the physiotherapy treatment. He also did not lead any evidence that these treatments were related to the First or Second Accident.

[144] The defendants submit that any chiropractic treatment provided after October 8, 2011, the date when Dr. Chan indicated that the plaintiff had been symptom free for “awhile”, relates to the plaintiff’s pre-existing condition and is therefore not compensable. They say that by that date he had returned to his pre-accident baseline and any future maintenance treatments would have been required to treat the existing condition, absent the accidents. According to the defendants’ calculations, the chiropractic expenses from the 2009 Accident to October 8, 2011 amount to $3,765.

[145] The defendants also point out that the majority of the chiropractic treatments were undertaken without being recommended by the plaintiff’s family doctor. They refer to *Redl v. Sellin,* 2013 BCSC 581, where Mr. Justice Saunders said this:

> [55] Generally speaking, claims for special damages are subject only to the standard of reasonableness. However, as with claims for the cost of future care … when a claimed expense has been incurred in relation to treatment aimed at promotion of a plaintiff’s physical or mental well-being, evidence of the medical justification for the expense is a factor in determining reasonableness. …

[146] The plaintiff shall recover the cost of $112 for damage to his laptop computer. With respect to the claim for gardening expenses I accept the need for those incurred between 2009 and 2012 in

the sum of $2,310. It is appropriate that they be reduced by the same contingency of 25% as I applied respecting the non-pecuniary damages, in order to recognize the possibility that Mr. Pan may have needed assistance with the gardening as a result of his pre-existing issues even absent the accidents in 2009 and 2011.

[147] The claim for the over-the-counter medications in the sum of $44.37 is dismissed, as the plaintiff has not shown that the use of such increased after the 2009 Accident.

[148] The claim for $770 for physiotherapy treatment from Flora Lee Physiotherapy is dismissed, as the plaintiff led no evidence that those treatments in 2012 related to either of the accidents.

[149] With respect to the chiropractic treatments from Dr. Chan, the treatments from the First Accident until October 2011 are recoverable in the sum of $3,765 less 25%. While they include treatment of the unproven neck injury they also include treatment for the plaintiff's lower back.

[150] However with respect to the claim for chiropractic and massage treatments after October 2011 the medical evidence does not establish the need for them. Dr. Werry recommended as noted earlier that the plaintiff's low back stiffness and discomfort would be best treated not by passive therapies but by "maintenance of a self-directed regular exercise program … designed and initially supervised by an exercise-oriented physiotherapist or kinesiologist". In all of the circumstances I am not satisfied that the chiropractic and massage treatments claimed and in particular any additional such treatments in excess of those prior to 2009 are reasonable. The claim for future chiropractic treatments is dismissed.

Cost of Future Care

[151] The plaintiff advances a claim for costs of rehabilitation treatments and medications in the future based on his current use. He provided an expert report from Alison Henry, an occupational therapist. The lump sum present value of the cost of future care items was the subject of a report from an economist, Darren Benning.

[152] Ms. Henry noted that "determining the extent to which Mr. Pan's current costs are related directly to injuries sustained in the motor vehicle accidents in question does not form part of [the] report".

[153] The future care items claimed include chiropractic treatments, massage therapy, medication, a neck pillow, a sacroiliac belt, a back support cushion and ice packs.

[154] The claim for chiropractic treatments is for maintenance treatments every 10 days to two weeks at $45 a visit and massage therapy every two weeks at $30 per visit. In addition while the plaintiff claims for additional treatments when he has flare ups this was the situation before 2009. He has not established on the medical evidence justification for such treatments. As noted earlier the opinion of Dr. Werry was that exercise rather than passive treatments was recommended.

[155] While I appreciate that the plaintiff may continue to receive chiropractic “maintenance” treatments and massage that is a matter of his choice. I note as well that both Dr. Parhar and Dr. Werry agreed that while such may be helpful in any acute phase of post-accident symptoms they are unlikely to affect the plaintiff’s future prognosis.

[156] The claim for future chiropractic and massage treatments is dismissed.

[157] No evidence was led of the need for a neck pillow. The claim is not proven.

[158] The plaintiff also has not proven that his need for ice packs, a sacroiliac belt or back support is due to the accidents. I note that no such expenses have been claimed as special damages, which suggests that such items were not necessary for treatment immediately following the accidents. There was no medical evidence tendered to show that these items are necessary, even if the need is due to the accidents. The claim for these items is dismissed.

[159] With respect to the medications claimed, some do not relate to the treatment of pain. The remainder have not been shown to exceed those already in use prior to the First Accident. The claim for such future care costs is dismissed.

Depreciation Claim

[160] The plaintiff purchased the 2004 BMW M3 for $30,000 US in March 2008. As noted above, the vehicle required $18,421 in repairs following the First Accident. After that accident the plaintiff attempted to sell the BMW. He listed it on Craigslist for three months at an asking price of $27,000. It was his evidence that he had a few inquiries but no offers after advising prospective buyers of the damage caused by the First Accident. He made similar attempts to sell it in 2011 but received no response. As a result, he still owns and drives the vehicle.

[161] The plaintiff provided an expert report from Carey Scarrow, who was qualified as an expert in the field of automotive appraisals and automotive collision repairs. He opined that as a result of the 2009 accident the vehicle sustained an accelerated depreciation of $4,000 due to the stigma associated with the BMW having been in the accident.

[162] In examining the vehicle Mr. Scarrow noted uneven body panel alignment in the front of the vehicle and other minor deficiencies including flaws in the refinished body panels with inconsistent coating thickness. He commented that the overall repair quality was of acceptable industry standards for the calibre of car but not representative of its previous pre-accident factory standard.

[163] Mr. Scarrow noted that it was mandatory for the seller to declare any damage over $2,000 to a prospective purchaser. He stated that the repaired areas will deteriorate at varying rates, making the repairs more evident as the vehicle ages.

[164] He then provided his opinion that the collision repairs resulted in a value of $15,000, an accelerated depreciation of $4,000 when compared with an estimated value of $19,000 for a BMW of that make, age, and mileage but without the accident damage. In his report Mr. Scarrow indicated that he based this opinion on his inspection of the vehicle itself, references to the Sanford Gold Book, July 2013 edition (a used car valuation guide), as well as what he referred to as "local market comparable research." In cross-examination he expanded somewhat on this methodology, noting that he relies on his years of experience in used car valuation and sales to determine the valuation numbers. In this case he said that he also posted the car for sale for a period of three to four days and gauged the response from potential buyers. He noted that potential buyers for vehicles of this type are particularly "fussy" about the details of previous damage and repairs.

[165] The plaintiff relies on *Signorello v. Khan,* 2010 BCSC 1448, and *Cummings v. 565204 B.C. LTD.*, 2009 BCSC 1009. *Signorello* stands for the proposition that a vehicle need not be sold in order to demonstrate an accelerated depreciation loss (para. 29); see also *Cummings*, at para. 73.

[166] The defendants acknowledge that claims for accelerated depreciation are good in law. However, they submit there is a heavy burden on a plaintiff to adduce sufficient evidence to prove that accelerated depreciation has actually taken place. They rely on *Miles v*. *Mendoza,* 1994 CanLII 419 (B.C.S.C.), and *Burrard Import Ltd. v. Budget Rent-A-Car of B.C. Ltd*, 2001 BCPC 75. In *Miles*, the court noted that "difficulties of proof" arise where the car is not sold after the accident, as the depreciating effect of the accident declines over time. The court also said that expert evidence of that only spoke to the general "stigma" attaching to damaged vehicles was not sufficiently persuasive proof to award damages for accelerated depreciation: "it cannot be "assumed", by virtue of the occurrence of an accident requiring extensive repairs, that a properly repaired vehicle has suffered accelerated depreciation" (para. 40).

[167] *Burrard* followed *Miles* in finding that the evidence did not meet the necessary standard given the claimant's expert's opinion amounted to no more than a simple proposition and as a

result was not the type of persuasive evidence contemplated by the jurisprudence.

[168] The defendants submit that the plaintiff must prove that the accelerated depreciation actually occurred by adducing evidence that goes over and above the simple proposition that a car which has been in an accident, even though properly repaired, carries a stigma. They say that in this case the plaintiff's evidence does not go beyond asserting the existence of such a stigma.

[169] I cannot accept this submission, for two reasons. First, in my view, the evidentiary standard as described in *Miles* has not been applied quite so strictly in recent decisions. In *Cummings*, for example, Madam Justice Gerow awarded $7,600 in damages for accelerated depreciation. There the evidence consisted of an automobile valuation expert's opinion that the plaintiff's vehicle had suffered an accelerated depreciation of 20% following the accident. There is no comment in the decision as to the factual basis for this opinion and no suggestion that it went beyond the expert's experience of the "stigma" in the marketplace. The owner had also attempted to trade the vehicle in but was informed by the dealership that they did not accept trade-ins on vehicles with more than $5,000 in damage.

[170] In *Signorello* the car was an extremely rare exotic high-performance luxury sports car, manufactured by Mercedes-Benz. The valuation expert set a value based on conversations he had with various Mercedes-Benz dealers in the province. The court identified some concerns with this evidence, noting that the defendant had argued that the expert's opinion was based on hearsay and opinion evidence itself. Justice Grauer then said at para. 25:

> [25] … the starting point for any vehicle appraisal is the Canadian *Black Book*, a guide to the wholesale value of used vehicles in Canada relied upon by dealers across the country. This car is so rare, however, that it does not appear in the *Black Book*. Of course the figures in that book could also be described as opinion evidence … In the particular circumstances of the case, it is my conclusion that it was not an inappropriate way for Mr. Cogbill to approach the problem, although it would have been preferable had he included the specifics of his conversations. As it was, he did indicate the dealers whom he consulted, …

[171] From this I take that the expert may rely on the Black Book or similar valuation guides in coming to an opinion as to the value of the vehicle. It also suggests that the "difficulties of proof" that may arise if the car is not sold can be overcome by an expert's opinion.

[172] Second, even if one accepts that the standard from *Miles* still applies, I am of the view that the evidence tendered here does go beyond a "bare" opinion that the car has suffered depreciation due to a "stigma." Mr. Scarrow based his valuation on a long history of appraising cars, including BMWs. He also relied on the Gold Book, a valuation guide, and market research that he described

in cross-examination. The plaintiff also provided evidence that he had attempted to sell the vehicle at a reduced price following the accident and received no offers.

[173] I conclude that the plaintiff's evidence is sufficient to establish accelerated depreciation in value for the BMW. I accept Mr. Scarrow's figures and award damages of $4,000.

Costs

[174] Unless there are matters that I am not aware of the plaintiff shall have his costs at Scale B.

"Punnett J."