

# IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Siu v. Clapper*,  
2020 BCSC 944

Date: 20200624  
Docket: M182122  
Registry: Vancouver

Between:

**Tommy Wan King Siu**

Plaintiff

And

**Matthew Clapper, Design Roofing & Sheet Metal Ltd., and Element Fleet  
Management Inc.**

Defendants

Before: The Honourable Mr. Justice Gomery

## **Reasons for Judgment**

Counsel for the Plaintiff:

I. Birk  
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Counsel for the Defendants:

M.W. Yu  
J. Veitch

Place and Dates of Trial:

Vancouver, B.C.  
June 8-12 & 15, 2020

Place and Date of Judgment:

Vancouver, B.C.  
June 24, 2020

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**Introduction**

[1] Tommy Siu was injured when he dropped his motorcycle to avoid a collision with the defendants' truck. They admit liability for the accident and these reasons address the assessment of damages for the injuries suffered by Mr. Siu.

[2] Mr. Siu claims damages under the following heads:

- a) Non-pecuniary loss;
- b) Past wage loss;
- c) Loss of income earning capacity;
- d) Cost of future care;
- e) Special damages.

[3] Mr. Siu asks for a damage award of \$541,472. The defendants submit that \$54,991 would be appropriate. Much of the difference lies in the parties' differing positions with respect to loss of income earning capacity. Mr. Siu claims \$400,000 and the defendants say that there should be no award under this head of loss. The nub of the issue is this. Mr. Siu lost time from work for three months after the accident. While he has not lost income due to his injuries since then, he maintains that he is at risk of losing future income. The defendants deny that the residual effects of his injuries put him at risk of losing income to the extent that he would be entitled to an award on this basis.

**Background**

[4] The accident occurred on May 8, 2017.

[5] Mr. Siu is 40 years old. He graduated from high school in 1998 and completed a course in civil drafting at BCIT. Since 2001, he has worked for Enermax Mountain Manufacturing Ltd. ("Enermax"). Enermax fabricates pressure vessels and heat exchangers for industrial customers.

[6] Enermax hired Mr. Siu as a draftsman when he was 21 years old. It promoted him several times and he achieved a position as one of the company's estimators. Estimators respond to enquiries from potential customers, and their estimates determine both whether the company will obtain the work and whether it will be profitable. This is high-pressure work requiring considerable focus and attention to detail. The president and majority shareholder, Phillip Shafer, came to consider Mr. Siu a key employee and made him a 5% shareholder in the company.

[7] Apart from Mr. Shafer and Mr. Siu, there are two other employee-shareholders. One of them is Mr. Siu's friend and fellow estimator, Mr. Yao.

[8] In February 2017, shortly before the accident, anticipating his eventual transition into retirement, Mr. Shafer brought in Baljit Aujla as General Manager of Enermax, reporting to Mr. Shafer. Since then, Mr. Siu has reported to Mr. Aujla.

[9] Generally speaking, Enermax's estimators are also responsible for project management on the work brought in by them. At the time of the accident in May 2017, Mr. Siu was working as both as an estimator and a project manager. At the end of 2019, Mr. Aujla removed Mr. Siu's project management responsibilities, without reduction of his salary. Since then, Mr. Siu has worked only as an estimator.

[10] Mr. Siu is unmarried and has no dependents. For the past eight years, he has lived in a small apartment in Burnaby. At the time of the accident, he had a serious girlfriend, Ms. Wong, but that relationship has now ended and he is not presently involved in a serious relationship.

### **The accident**

[11] The accident occurred on the Pitt River bridge. Mr. Siu and the defendants' vehicle, a utility truck, were travelling westbound in different lanes. The defendants' truck shifted into Mr. Siu's lane and he and his motorcycle fell in avoiding a collision. Mr. Siu hit the ground and rolled several times on the pavement.

[12] Mr. Siu was wearing full protective equipment appropriate to the occasion: a fitted helmet, a jacket with Kevlar inserts, a backpack, boots, and gloves. His helmet, boots, backpack, and clothing were abraded by contact with the pavement; the jacket and gloves were worn through. The motorcycle was damaged and written off by I.C.B.C.

[13] Immediately afterwards, at the scene of the accident, Mr. Siu found that he could not stand. An ambulance arrived and he was put on a stretcher with a neck brace and taken to the hospital. Later that day, he was diagnosed with a mild concussion and discharged. Ms. Wong picked him up from the hospital and drove him home.

### **Assessment of damages**

#### **Non-pecuniary loss**

##### ***Legal framework***

[14] Non-pecuniary damages are awarded as compensation for past and future pain, suffering, disability, and loss of enjoyment of life. The Court must take into account both the seriousness of the injury and the ability of the award to ameliorate the condition or offer solace to the victim: *Stapley v. Hejslet*, 2006 BCCA 34 at para. 45, leave to appeal ref'd, [2006] S.C.C.A. No. 100 [*Stapley*]. In *Stapley* at para. 46, the Court noted a non-exhaustive list of factors to be considered: age of the plaintiff; nature of the injury; severity and duration of pain; disability; emotional suffering; loss or impairment of life; impairment of family, marital and social relationships; impairment of physical and mental abilities; loss of lifestyle; and stoicism as a factor that should not, generally speaking, penalize the plaintiff.

[15] An award must be fair and reasonable, and fairness is measured against the awards made in comparable cases, recognizing that other cases provide only a rough guide. Each case must be decided on its own facts: *Trites v. Penner*, 2010 BCSC 882 at para. 189.

***Mr. Siu's injuries and the evolution of his condition***

[16] In brief, Mr. Siu suffered a concussion (that is, a “mild traumatic brain injury”), soft tissue injuries to his neck and torso, bruising, and abrasions in the accident. Within a year, his injuries had resolved except for an injury to the soft tissues in the area of his left shoulder blade. He still experiences chronic pain from his shoulder that limits some of his recreational activities but does not disable him from working at Enermax. This chronic injury is not expected to get better.

[17] I accept Mr. Siu's evidence describing his physical injuries and ongoing discomfort. I accept the uncontradicted evidence of the two physicians called as expert witnesses by the plaintiff. They are Dr. Ho, a family physician, and Dr. Waseem, a physiatrist. Their evidence provides a clear and straight-forward portrait of Mr. Siu's injuries and condition. Dr. Waseem describes the injury as “chronic myofascial pain of the left shoulder emanating from the infraspinatus muscle”. Mr. Siu's continuing shoulder injury is confirmed both by ultrasound scans revealing supraspinatus tendinosis and by increased muscle tone and tension observable on physical examination of the affected area.

[18] In the immediate aftermath of the accident, Mr. Siu experienced full-body pain, headaches, and dizziness. He was off work until June 12, 2017, when he began a graduated return to part-time work. He resumed working full time on August 7, 2017.

[19] On the advice of Dr. Ho, Mr. Siu attended many physiotherapy, massage therapy, and kinesiology appointments, obtaining symptomatic relief. He attended 134 appointments between May 12, 2017 and February 20, 2020. The defendants accept that Mr. Siu's payments for these treatments were all reasonable and necessary in consequence of the accident.

[20] Dr. Ho prescribed Naprosyn for inflammation and pain, and Mr. Siu took this medicine for approximately one year, starting at the end of May 2017. Mr. Siu stopped taking Naprosyn because he felt that he did not need it anymore.

[21] At this time, Mr. Siu suffers what Dr. Waseem describes as a “mild disability”. He is able to work full time at the office and pursue recreational activities, though he experiences pain that bothers and distracts him. Sometimes the pain in his shoulder flares up and becomes a sharp pain for a time.

[22] In addition to his physical symptoms, Mr. Siu maintains that he also experiences cognitive and psychological difficulties since the accident. He says that his concentration and memory are not as good as they used to be, that this has affected his job performance, and that he has become irritable and moody.

[23] While it is clear that Mr. Siu suffered a concussion in the accident, there is no expert medical evidence tying that injury to his current complaints. Dr. Ho testifies that, typically, the effects of a concussion are felt for up to six months. It has been three years since the accident. When Dr. Waseem examined Mr. Siu more than a year before the trial, he noted that Mr. Siu’s cognitive complaints were outside the scope of his expertise as a physiatrist, and suggested that they be evaluated by a neuropsychologist. No further evaluation was undertaken.

[24] I view Mr. Siu’s complaint that he has become irritable and moody as subjective. It is not meaningfully corroborated by the testimony of witnesses who have dealt with him since the accident. In May 2019, Mr. Siu denied to Dr. Waseem that his mood was disturbed or that he was anxious.

[25] There is more substance to Mr. Siu’s complaint concerning his ability to concentrate and his memory. He is experiencing chronic pain and both Dr. Waseem and Dr. Ho testify that chronic pain can distract and interfere with an individual’s ability to concentrate. Mr. Siu himself attributes his lack of concentration and forgetfulness at work to the distraction of pain. There is objective evidence that tends to confirm Mr. Siu’s sense that he has made mistakes at work. His co-worker, Mr. Yao, testifies that Mr. Siu makes more mistakes than he used to in his estimates. Mr. Aujla joined Enermax only shortly before the accident. He cannot speak to Mr. Siu’s prior performance, but became concerned about Mr. Siu’s job performance as an

estimator in 2018 and took away his responsibilities for project management at the end of 2019.

[26] I find that Mr. Siu's concentration and memory have suffered in consequence of the injuries suffered by him in the accident. It is important to note, however, that these adverse effects have diminished over time. Mr. Aujla's retrospective evaluation of Mr. Siu's job performance was better in February 2020 than in March 2019, and, in mid-2020, he says he is happy with Mr. Siu's performance this year. Mr. Siu did not resume riding a motorcycle following the accident because he was scared to get back on one and unsure that he would be able to concentrate well enough to ride safely. Shortly before trial, he purchased a motorcycle and has begun riding again. I infer that his concentration has improved.

***Other Stapley considerations***

[27] Mr. Siu is 40 years old. He keeps in touch with his brother and parents, having dinner with them weekly. The accident and his injuries do not appear to have affected these family relationships. Mr. Siu's relationship with his former girlfriend, Ms. Wong, was serious and he was thinking of starting a family with her. He ended the relationship after the accident, feeling that he could no longer be a good boyfriend to her. It is fair to say that the accident contributed to ending this relationship.

[28] Apart from his relationships with Ms. Wong and his immediate family, prior to the accident, Mr. Siu's life outside of work focused on recreational and sports activities. His most consistent activity was recreational heavy weightlifting, which he pursued at a gym about three times a week. He also worked out on a treadmill at the gym. From time to time, he played badminton, volleyball, and pick-up basketball. He went jogging and rollerblading. He did some hiking with Ms. Wong and rode his motorcycle weekly for pleasure. He went out to restaurants with friends.

[29] Since the accident, Mr. Siu has reduced his recreational and social activities. He has returned to weightlifting, but less often, with lighter weights. He no longer plays badminton or rollerblades, and he jogs less often. He has tried playing



basketball but feels that it did not go well, because he worried about reinjuring his shoulder. On one occasion, his brother noted that he was protective of his injury in helping to move a couch. Mr. Sui has gained approximately 25 pounds since the accident and attributes the weight gain to a lack of exercise and eating less healthily. Mr. Yao confirms that Mr. Siu is now reluctant to join him on hikes and in the sports they used to play together.

[30] Summarizing, the injuries suffered by Mr. Siu have had a significant, though not a devastating, effect on his life. He has experienced a diminution in his social relationships, some loss of a lifestyle he evidently enjoyed, and a sense of impairment in his physical and mental abilities. These changes have been accompanied and to some extent caused by chronic pain.

[31] While Mr. Siu's physical condition has stabilized, not all of the deficits I have described are permanent. In his expert report, Dr. Ho advises Mr. Siu to be as active as possible and to attempt to return to as many of his pre-accident activities as his level of pain permits. Mr. Siu is doing better at work and has returned to riding a motorcycle. He is still a relatively young man, and there are grounds for cautious optimism that he will recover more of the life that he formerly enjoyed as he continues to adjust to his mild physical disability. Nevertheless, he is likely to continue experiencing pain indefinitely.

### ***Comparable cases***

[32] Mr. Siu relies on *Dhaul v. Meahan*, 2019 BCSC 990 [*Dhaul*], *Tzotzolis v. Wyman*, 2019 BCSC 2026 [*Tzotzolis*], and *Bain v. Goodridge*, 2019 BCSC 1450 [*Bain*] as establishing a range of damages in cases of chronic soft tissue pain affecting mood and memory of \$90,000 to \$100,000. He proposes an award of \$95,000.

[33] The defendants rely on *McBurney v. Levesque*, 2019 BCSC 1897 [*McBurney*], *Yip v. Saran*, 2014 BCSC 1283 [*Yip*], *Hickey v. Pena*, 2013 BCSC 465 [*Hickey*], *De Gaye v. Bhullar*, 2010 BCSC 1798 [*De Gaye*] and *Fillmore v. McKay*, 2010 BCSC 1401 [*Fillmore*]. In these cases, which the defendants submit involved

more serious injuries than those suffered by Mr. Siu, the plaintiffs recovered damages in the range of \$50,000 to \$75,000, or \$50,000 to \$89,000, according to the defendants' calculations, taking inflation into account. The defendants propose an award of \$40,000.

[34] I do not agree that the defendants' cases generally featured more serious injuries than those suffered by Mr. Siu. The chronic physical pain suffered by Mr. Siu is an important aspect of his claim. In contrast, four of the cases cited by the defendants involved plaintiffs who had physically recovered or were looking forward to substantial physical recovery by the time of trial: in *McBurney*, the plaintiff was "essentially back to his normal self" (para. 28); in *Yip*, the plaintiff had substantially recovered from her physical injuries, though she was still experiencing some pain (paras. 63 & 66) and had acquired an emotional disorder (para. 70); in *Hickey*, the plaintiff had returned to an active, functioning lifestyle, with a favourable prognosis for her remaining symptoms (paras. 82-85 & 93); in *De Gaye*, the plaintiff had suffered moderately severe and disabling injuries that had "drastically improved" by the time of trial, with an 80% probability of further improvement following anticipated surgery (paras. 86 & 92).

[35] The defendants' fifth case is *Fillmore*, where the plaintiff suffered chronic physical pain resulting from the accident, and also emotional injuries from which he was expected to recover eventually (para. 157). The award in *Fillmore* was \$75,000, according to the defendants' calculation equal to \$89,000 in today's dollars.

[36] While the plaintiff's cases involved soft tissue injuries resulting in chronic pain, the consequences were cumulatively somewhat more serious than those suffered by Mr. Siu. For example, in *Dhaul* and *Bain*, the plaintiffs suffered frequent ongoing headaches years after the accidents in question. Mr. Siu suffered from headaches only for a month. In *Tzotzolis*, in addition to chronic low back pain, the plaintiff suffered a serious injury to his family life in his relationships with his wife and young child (paras. 14-15). Mr. Siu's relationships were not so intimately affected.

**Assessment of non-pecuniary damages**

[37] Consideration of comparable cases only takes one so far. As Justice Saunders observed in *Tzotzolis* at para. 45:

Assessments of non-pecuniary damages all turn on their facts, and inevitably each case provided as a comparator will have distinguishing features which differentiate the basis for the non-pecuniary damages claim. The assessment of non-pecuniary damages is not a mathematical exercise based on comparing hard numbers such as days of total disability from employment, days of hospitalization, numbers of surgeries or treatment sessions or the number of pills that have been prescribed. The aim is to arrive at an award that holistically captures degrees of disability and impairment of functioning and that is as consistent as possible with similar cases, adjusting for inflation.

[38] In my view, taking into account the seriousness and persistence of Mr. Siu's injuries as set out above, and their overall effect on his life, an award of \$80,000 is fair and reasonable in the circumstances of this case.

**Past wage loss**

[39] Mr. Siu suffered a wage loss by reason of his absence from work between May 8 and August 11, 2017. This period encompassed seven bi-weekly pay periods during which, but for the accident, he would have earned \$2,241.70 per pay period or a total of \$15,691.90. According to Enermax's payroll register, he was paid only \$6,920.45. His wage loss is the difference of \$8,771.45.

[40] Mr. Siu received short-term disability benefits of \$5,307.66 in connection with this loss. They do not diminish his claim and the disability plan is subrogated to his rights in respect of \$5,307.66.

[41] Mr. Siu submits that he should be further compensated for a reduced bonus by reason of poor work performance attributable to his injuries. His friend and colleague, Mr. Yao, received a bonus of \$4,000 in 2019, while Mr. Siu's bonus was only \$2,000. Bonuses are allocated among employees by Mr. Aujla from a pool of funds made available to him for this purpose. I am not persuaded on the evidence that there is a real and substantial probability that Mr. Siu's bonus would have been larger, but for his injuries.

[42] Accordingly, Mr. Siu's wage loss claim is \$8,771.

**Loss of income earning capacity**

[43] As I noted at the outset of these reasons, this is the most significant issue in this case.

[44] The legal framework for assessment of Mr. Siu's claim that he has suffered a loss of income earning capacity is settled. The burden is on Mr. Siu to prove that there is a real and substantial possibility that he will suffer a future loss of income by reason of his injuries: *Perren v. Lalari*, 2010 BCCA 140 at para. 32 [*Perren*]. The amount of the loss is determined by assessing its probability, bearing in mind that it is ultimately a question of what is fair and reasonable in the circumstances; *Grewal v. Naumann*, 2017 BCCA 158 at paras. 48-49. The assessment is a matter of judgment, not mathematical calculation; *Rosvold v. Dunlop*, 2001 BCCA 1 at para. 18.

[45] The parties join issue as to whether there is a real and substantial possibility that Mr. Siu will be unable to retain his employment with Enermax earning his present income.

[46] Mr. Aujla gave careful, nuanced evidence concerning Mr. Siu's job performance as an estimator and project manager, and his prospects with Enermax. He explains that estimation involves working in an office, going through drawings and specifications, and working to deadline. The objective is to convert a customer inquiry into a profitable order. Project management involves seeing the order through the purchase and engineering of components, communicating with the customer concerning the production schedule, and ensuring that the product is delivered on time. The project manager must identify and address roadblocks that may challenge the delivery date.

[47] Following Mr. Siu's return to full-time work in August 2017, Mr. Aujla was dissatisfied with his job performance. Mr. Siu was making mistakes and Enermax

lost money on those projects. Mr. Aujla warned Mr. Siu orally, but not in writing, that he needed to do better.

[48] Mr. Aujla instituted a system of written performance reviews for all Enermax employees and gave Mr. Siu his first performance review, covering the 2018 calendar year, in March 2019. On a five-point scale, Mr. Aujla rated Mr. Siu's performance at a four or "below average" under the headings of "acceptance of responsibility" and "attitude". On all other attributes, including "quality of work", Mr. Aujla rated Mr. Siu at a three for "competent".

[49] At the end of 2019, Mr. Aujla removed Mr. Siu's responsibility for project management. His reasoning was that Mr. Siu was at present unable to handle both estimating and managing projects. He wanted to give Mr. Siu an opportunity to focus on estimating only.

[50] In Mr. Siu's 2019 performance review, delivered in February 2020, Mr. Aujla maintained the evaluation at four-under "acceptance of responsibility", this time rating him at a three, or competent, on all other attributes. Concerning "acceptance of responsibility", he commented:

Need improvement and this is the reason you are not doing the PM for the jobs and I hope you can do better job in estimating.

Concerning "quality of work", he commented in connection with the rating of "competent":

As an estimator, acceptable.

[51] As I have already noted, Mr. Aujla is happier with Mr. Siu's job performance in 2020. He finds that Mr. Siu is improving in his estimating work. If he can continue to improve, Mr. Aujla intends to reassign him project management work. Mr. Aujla is hopeful that this will occur.

[52] If Mr. Siu does not continue to improve and return to project management, Mr. Aujla considers that he will have to speak with Mr. Siu "to discuss some other arrangement". Mr. Siu is earning a base salary of \$90,000 and the company could

hire an experienced replacement for \$67,000. Mr. Aujla is unable to say what the outcome of the discussion would be, but he evidently does not consider it sensible over the long term for Enermax to continue to employ Mr. Siu at a salary of \$90,000 if Mr. Siu is unable to serve both as an estimator and a project manager.

[53] It would not be up to Mr. Aujla whether to terminate Mr. Siu's employment. Because Mr. Siu is a shareholder, it would be a decision for the board of directors.

[54] The following considerations favour a finding that there is a real and substantial possibility that Mr. Siu will be unable to retain his employment as an estimator with Enermax earning his present income. Mr. Siu's job performance has been relatively poor since the accident; among Enermax's estimators, he is below average. The chronic pain suffered by Mr. Siu is a cause of his poor job performance, and it will probably persist. Mr. Siu is an expensive estimator and Mr. Aujla is contemplating a change in Mr. Siu's employment status if his job performance does not improve. Mr. Aujla wants Mr. Siu to succeed but is guarded as to his prospects.

[55] Mr. Siu is undoubtedly qualified by his experience to work as an estimator for some other company than Enermax, but he would be unlikely to earn a comparable income as an estimator elsewhere. Given his age, education, and employment history, he would be unlikely to earn more money doing something else. If he had to leave Enermax, he would probably suffer an income loss. While Enermax does not have cause to dismiss Mr. Siu, his right to compensation if he is dismissed, constructively or otherwise, would mitigate but not eliminate his income loss over the long run.

[56] The following considerations are to the contrary. Mr. Siu's job performance since 2018 has been on an upward trajectory. Notwithstanding some mistakes, he is generally viewed by Mr. Aujla as a competent employee. On Mr. Aujla's recommendation, Enermax paid him a \$2,000 bonus, based in part on his performance, in 2018 and 2019. Mr. Siu is regaining competence and focus. He has a long history with Enermax, is a shareholder, and is considered a key employee by

the majority shareholder, Mr. Shafer. Mr. Siu is liked by Mr. Shafer and Mr. Aujla. A unilateral reduction in Mr. Siu's income would entitle Mr. Siu to sue Enermax for constructive dismissal and any dismissal would be expensive for Enermax. The company is likely to be deterred by the expense, even if Mr. Aujla recommends cutting ties.

[57] Weighing all these considerations, in my view, there is a real and substantial possibility that Mr. Siu's performance will not improve and Enermax will be driven to make some change that will inure to Mr. Siu's economic detriment. Commendably, Enermax has accommodated Mr. Siu to this point. However, Enermax is a business. It is clear from Mr. Aujla's evidence that the present employment arrangement is not economically sensible for Enermax over the long run. Mr. Siu's job performance has improved, but there is a risk that he will not be able to continue or sustain the improvement. If he cannot do so, there is a risk that the company will take steps to rectify the situation, to Mr. Siu's economic detriment. The cumulative risk of this combination of eventualities is real and substantial.

[58] While the risk is real and substantial, it is not highly probable. In my view, it is more likely than not that the risk will be avoided, with continued effort and improvement on the part of Mr. Siu. Even in the absence of continued improvement, the personal and economic disincentives I have noted may inhibit Enermax from taking action.

[59] Accordingly, I consider that Mr. Siu is entitled to a relatively modest award for loss of income earning capacity.

[60] The cases identify two approaches to the assessment of loss of future earning capacity: the "earnings approach" and the "capital asset approach"; *Perren* at para. 32. The earnings approach involves what Justice Duncan described in *Ali v. Rai*, 2015 BCSC 2085 at para. 149 [*Ali*] as "a form of math-oriented methodology". The capital asset approach is better suited to cases where the loss is not easily measurable, as in this case.

[61] In some cases, judges applying the capital asset approach have valued a plaintiff's loss of future earning capacity as equivalent to some number of years' earnings; *Pallos v. Insurance Corporation of British Columbia* (1995), 100 B.C.L.R. (2d) 260 (C.A.) at para. 43 [*Pallos*]. Often it is fixed at two years; *Raikou v. Spencer*, 2014 BCSC 1 at para. 99; *Davidge v. Fairholm*, 2014 BCSC 1948 at paras. 166-173; *Werner v. Rocks*, [1994] B.C.J. No. 767 (S.C.) at paras. 43-53; *Ali* at para. 159, aff'd *sub. nom. Ali v. Glover*, 2016 BCCA 446 at paras. 19-21. In *Pallos*, Finch J.A. (as he then was) observed at para. 43 that, while this among other methods seems arbitrary, "[i]t has, however, often been said that the difficulty of making a fair assessment of damages cannot relieve the court of its duty to do so".

[62] Mr. Siu is at the mid-point of his working life. His injuries have exposed him to a risk that he will lose well-paying employment – better than he could obtain elsewhere – with a stable company that he is committed to. To the extent of the risk, he has suffered a loss of income earning capacity in that he is "less valuable to himself as an income earner"; *Ali* in BCCA at para. 19, citing *Brown v. Golaiy* (1985), 26 B.C.L.R. (3d) 353 (S.C.). The risk is real and substantial, but it is not highly probable. In my view, it is fair and reasonable to value Mr. Siu's loss of income earning capacity as equivalent to one year's salary. Accordingly, I award him \$90,000.

### **Cost of future care**

[63] Mr. Siu claims \$25,000 to cover future physiotherapy, massage therapy and active rehabilitation treatments from a kinesiologist. This number is pulled from the air, without supporting calculations. The defendants propose an award of \$1,896, based on a recommendation in Dr. Ho's report.

[64] The purpose of an award for the cost of future care is to restore, so far as is possible with a monetary award, the plaintiff to the position he would have been in had the accident not occurred. The award is based on what is reasonably necessary on the medical evidence to promote the mental and physical health of the plaintiff; *Gignac v. Insurance Corporation of British Columbia*, 2012 BCCA 351 at paras. 29-



30 [*Gignac*], citing *Milina v. Bartsch* (1985), 49 B.C.L.R. (2d) 33 (S.C.) and *Aberdeen v. Zanatta*, 2008 BCCA 420 at para. 41.

[65] Each part of the claim must be supported by medical evidence. If the plaintiff relies on the report of an occupational therapist or rehabilitation consultant, there must be an evidentiary link between the medical evidence and the recommendations in the report; *Gignac* at para. 31. If the plaintiff has not used or sought out a service in the past, it will usually be difficult for him to justify a claim in respect of that service; *Warick v. Diwell*, 2018 BCCA 53 at para. 55.

[66] Mr. Siu's \$25,000 claim lacks an evidentiary rationale.

[67] Dr. Waseem recommends, "intermittent access to physiotherapy 6-8 times per year as needed indefinitely to manage symptom exacerbation". Dr. Ho states:

Periodic passive care is recommended, especially for flare-ups symptoms. An average of twelve visits a year to the patient's choice of practitioner for the next two years would be reasonable.

[68] Neither physician was asked to explain his recommendation. I do not know why Dr. Ho proposes more frequent visits than Dr. Waseem, but terminating after two years.

[69] Mr. Siu obtains temporary symptomatic relief from physiotherapy, massage therapy, and kinesiology treatments. They help him manage his chronic pain. His need for these treatments is unlikely to end in two years time. For this reason, I prefer Dr. Waseem's recommendation to Dr. Ho's.

[70] The evidence is that physiotherapy visits cost \$79 each. Dr. Waseem's recommendation is associated with an annual cost of approximately \$480 to \$640. At a discount rate of 2%, a lump sum of \$13,500 would fund 25 years of treatments at \$540 per year.

[71] I award \$13,500 for the cost of future care.

**Special damages**

[72] The parties agree that Mr. Siu has incurred special damages of \$4,838.40 for physiotherapy, massage therapy, and kinesiology treatments. There is a dispute as to \$2,367.31 spent by Mr. Siu in May 2020 to purchase motorcycle gear to replace the gear that was damaged in the accident.

[73] In my view, the amounts paid by Mr. Siu to replace his motorcycle jacket and helmet are properly claimed as special damages. His old jacket and helmet were damaged and required replacement, and it was reasonable for Mr. Siu to postpone purchasing new gear until he purchased a replacement motorcycle.

[74] The other piece of gear purchased by Mr. Siu was a helmet-mounted camera. He says that he wanted the camera so that he will have evidence in case of future accidents. That is not unreasonable, but the purchase price of the camera is not an expenditure made necessary to replace something lost in the accident. I allow \$2,099.76 for the purchase of the motorcycle jacket and helmet.

[75] Accordingly, Mr. Siu's claim for special damages is \$6,938.16.

**Disposition**

[76] For these reasons, I award Mr. Siu damages as follows:

- a) Non-pecuniary loss of \$80,000;
- b) Past wage loss of \$8,771;
- c) Loss of income earning capacity of \$90,000;
- d) Cost of future care of \$13,500; and
- e) Special damages of \$6,938.16.

[77] The total is \$199,209.16.

[78] Unless there are matters that must be brought to my attention, Mr. Siu is entitled to costs. If the parties wish to make submissions as to costs, they may do so in writing. Their submissions should not exceed five pages in length (excluding appendices) and should be exchanged according to a schedule to be agreed between counsel, with the first submission to be filed with the registry within 28 days of the release of these reasons.

“Gomery J.”