

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Sun v. Sukhan*,
2012 BCSC 365

Date: 20120313
Docket: M105939
Registry: Vancouver

Between:

Ying Yu Andy Sun

Plaintiff

And

**Yuriy Oleksandovych Sukhan, Valentyna Grygorivna Sukhan and
Nissan Canada Inc.**

Defendants

Before: The Honourable Madam Justice Maisonville

Reasons for Judgment

Counsel for Plaintiff:

E. Goodman

Counsel for Defendants:

M. D. Murphy

Place and Date of Trial:

Vancouver, B.C.
February 16, 2012

Place and Date of Judgment:

Vancouver, B.C.
March 13, 2012

1. Introduction

[1] The plaintiff, Ying Yu Andy Sun, brings an application for summary trial pursuant to Rule 9-7 of the B.C. Rules of Court for an assessment of damages sustained in a motor vehicle accident. The collision occurred on October 31, 2009 in Vancouver B.C. On that Halloween evening at 8:20 p.m. the plaintiff was travelling westbound in the left lane of two westward lanes on 49th Avenue. He was driving his 2001, BMW 325i, four door sedan. He had stopped at the intersection of 49th Avenue and Tyne Street. The light was green and the plaintiff had stopped waiting to turn left. The vehicle driven by the defendant Valentyna Grygorivna Sukhan then rear-ended the plaintiff's motor vehicle. Liability for the accident has been admitted by all of the defendants. As a consequence of the accident, the plaintiff claims injuries were sustained to his neck, back, left arm and left leg.

2. Summary Trial – Appropriateness

[2] Liability for the accident has been admitted. This summary trial consequently concerns an assessment of damages only. There are neither credibility nor complexity issues to resolve according to both counsel for the plaintiff and the defendants. I find accordingly that the case is appropriate for determination by summary trial (see *Mayer v. Mayer*, 2012 BCCA 77).

3. Background of the Plaintiff

[3] Mr. Sun will be 31 years of age this year and is employed in the Information and Technology sector as an IT specialist by Richwood Trading Ltd. He is not married. Prior to the accident, he enjoyed good health and was an active person who enjoyed snowboarding and golfing.

4. The Accident

[4] The plaintiff had stopped his vehicle at the intersection of 49th Avenue and Tyne Street. He was stopped in the left lane on 49th Avenue waiting to turn left from 49th Avenue onto Tyne Street. At the time of the accident he had with him a

passenger, his girlfriend Sharon Chin. The impact occurred when the vehicle driven by the defendant driver, a 2008 Infiniti, rear-ended the plaintiff. He felt his body move. While he was wearing a seatbelt, he is unsure if the seatbelt engaged or if any part of his body hit the inside of the vehicle. On exiting his vehicle, he noticed there was slight damage to the licence plate of the other car but he did not recall seeing any other damage to the other car. No police or ambulance attended.

5. Injuries and Treatment

[5] Immediately after the collision, the plaintiff thought he was alright, however, the next day he began to feel pain in his neck and lower back. He consequently phoned his family doctor, Dr. Allan Yun-Fan Tsang to make an appointment. That day he rested; he did not take any medication. On November 4, 2009 Mr. Sun attended Dr. Tsang's office for assessment of his pain. Dr. Tsang described the plaintiff's complaint of the onset of pain in his report the injuries after the accident as follows:

He was ambulatory immediately at the scene of the accident. The next day, Mr. Sun began to feel pain in his lower back that radiated down to his left thigh.

[6] Dr. Tsang diagnosed the plaintiff with soft tissue injuries to his back and he was prescribed physiotherapy. When the plaintiff returned to work, he found that he could not sit for extended periods of time and he developed numbness in his leg and arm. The weekend after the accident, concerned about the numbness to these parts of his body, he attended at the emergency department of Burnaby Hospital, although he was discharged. On November 9, 2009 Mr. Sun returned to Dr. Tsang's office complaining of an "achy" type pain in his neck and back with mild numbness of his left arm and left leg. On examination Dr. Tsang noted the plaintiff had a full range of motion; there was no tenderness. However, there was a decreased left ankle jerk reflex. The plaintiff was given a prescription for Diclofenac, an oral anti-inflammatory medication. An x-ray revealed his spine to be normal.

[7] Mr. Sun was seen again by Dr. Tsang on November 24, 2009. Although the doctor's findings remained the same, subjectively, Mr. Sun described the symptoms as having improved mildly. Mr. Sun was advised to continue his physiotherapy. Mr. Sun re-attended Dr. Tsang's office on December 8, 2009 again complaining of pain in his neck and back, in addition to the ongoing mild numbness in his left arm and leg, although he had improved further. He felt, however, that his left arm and left leg were weaker than on his right side. This was noted by Dr. Tsang on physical examination and he recommended continuing physiotherapy.

[8] Mr. Sun again attended Dr. Tsang's office on December 22, 2009 for a follow-up appointment. He had lifted something in the previous weekend and felt an exacerbation of his lower back pain. On the other hand, he reported his numbness in his left arm and left leg had continued to improve and his left leg felt stronger.

[9] On physical examination, conducted on December 22, 2009, Dr. Tsang noted the tenderness of the left trapezius muscle and the left rhomboid muscles on palpation. His range of motion was intact, but respecting his lumbar spine, there was a mild restriction in the range of motion and tenderness on palpation. Continuing physiotherapy was ordered for Mr. Sun.

[10] On both January 14, 2010 and February 8, 2010, Mr. Sun again presented to Dr. Tsang for assessment. Mr. Sun had been carrying on with his physiotherapy sessions and he reported slow but steady improvement in his pain, numbness and weakness. There were no significant findings noted by Dr. Tsang on his physical examination for those dates. He was seen again in follow-up on March 15, 2010 where he showed gradual improvement in his symptoms. He had a business trip planned in which he was to go to Taiwan. He advised Dr. Tsang of his upcoming trip in April 2010. Mr. Sun was concerned because of the 12-hour length of the flight; he even considered upgrading his flight so that he would have more leg room, but this was too costly. Exercises and stretches were discussed by Dr. Tsang with Mr. Sun. In fact, the plaintiff's concern was well founded as when he was in Taiwan in April 2010 he did suffer an exacerbation of his injury and had to attend at the Lo-Tung

Hospital. While he was not admitted to the hospital, he was prescribed medication and treated.

[11] On May 13, 2010 Mr. Sun, having returned from his business trip to Taiwan, saw Dr. Tsang and complained of ongoing left side mechanical lower back pain. Physical examination revealed tenderness when Dr. Tsang's palpated Mr. Sun's paralumbar muscles. The doctor reviewed exercises with Mr. Sun to alleviate this. On June 3, 2010 he returned for reassessment. Dr. Tsang wrote, "[h]e still felt an achy pain in his lower back." No other physical symptoms presented. On June 29, 2010 Mr. Sun reported that he was receiving acupuncture treatment and noticing improvement in his lower back. "[h]e felt that his exercise tolerance was limited, but he was trying to increase his exercise intensity gradually." On July 27, 2010 Mr. Sun felt much better overall with continued acupuncture therapy. He had stopped physiotherapy two weeks previously. He was exercising regularly in a graduated fashion. Subjectively, he described his pain as improved by more than 60%. For at least half of his waking hours, he felt pain-free.

[12] He was seen again by Dr. Tsang on September 28, 2010 and stated that he was virtually back to normal. He had stopped receiving acupuncture treatments. On February 22, 2011 he was again seen by Dr. Tsang, functioning normally, having reported that he had been able to go snowboarding and that he was doing the regular exercises, which had prevented a relapse of his back pain.

[13] He indicated that, following the physiotherapy treatment, which had been prescribed to him by Dr. Tsang, the numbness in his left arm and left leg began to resolve in three to six months. Approximately eight to ten months passed before the numb feelings completely resolved.

[14] Writing on July 23, 2011 Dr. Tsang states:

In summary, Mr. Sun suffered soft tissue injuries of his neck and back as a result of his involvement in a motor vehicle accident on October 31, 2009. Recovery from his injuries was slow and required a prolonged period of physiotherapy, independent exercises, and ultimately acupuncture. While he was able to continue with his usual work following the motor vehicle accident,

the quality of his life with respect to social, recreational, and overall functioning was affected by his injuries. He has made slow but continued progress in his rehabilitation. At the time of this writing, he has recovered fully from his injuries. No future disability or complication is anticipated.

[15] At the plaintiff's discovery, which occurred on July 12, 2011, he indicated that he felt about 95% recovered but that he had some residual problems such as a mild occasional soreness in his neck. He stated:

- 201 Q And do you have any problems -- any other problems now that you associate with your low back -- sorry -- that you associate with the accident?
- A Yes. Right now it's like -- like the neck. In certain positions sometimes it still occurs that the soreness is still there
- 202 Q Like the neck, is it a mild soreness?
- A It's a mild soreness

[16] The mild soreness occurs from him being in certain positions, such as driving for lengthy periods or sitting for prolonged periods.

[17] In conclusion, while the plaintiff deposed he still suffers pain on occasion necessitating physiotherapy treatments, he is now largely recovered from his neck and back injuries which lasted approximately one year and nine months. The numbness to his left arm and left leg had completely resolved by eight to ten months after the accident with the help of physiotherapy. This Court accepts what the plaintiff has said about his injuries and that taken together with Dr. Tsang's report indicating that the plaintiff's injuries continued past the April 2010 CL19 report date. As noted above, Dr. Tsang, in his medical summary report dated July 23, 2011, stated that Mr. Sun suffered soft tissue injuries of his back and neck as a result of his involvement in the motor vehicle accident on October 31, 2009. Recovery from his injuries continued slowly, but by July 23, 2011 he was completely recovered according to Dr. Tsang's writing on that day. While there is no further medical reports, he still occasionally seeks chiropractic treatments from Dr. Chan and occasionally has flare-ups, including September and November of 2011.

[18] The plaintiff, as noted, sought out acupuncture and physiotherapy to assist in his recovery. He also sought chiropractic treatments from Dr. Fredrick Chan. He first saw Dr. Chan on August 16, 2011.

6. Issue – Assessment of Damages

[19] The issue in this trial is the amount to be assessed for non-pecuniary damages for the plaintiff, in the circumstances of this accident. The defendants say this was a low velocity impact accident. They do not say that the plaintiff has suffered no injuries, but rather submit that his injuries resolved earlier than indicated in Dr. Tsang's medical expert report, and that non-pecuniary damages should be assessed in the range of \$5,000 to \$10,000.

[20] The defendants agree to his past wage loss with the necessary deductions. However, the defendants submit that the special damages claimed here should cease as of the end of August 2010. The defendants agree that all of the physiotherapy payments made by Mr. Sun for his treatment, totalling \$960, should be paid. In respect of the acupuncture payments, which total \$1,140, the defendants say that only \$960 of that should be payable which accords with the cut-off date of the end of August 2010, after which they say the plaintiff's injuries had resolved. In respect of the chiropractor, the total amount paid by Mr. Sun to date for his treatment is \$870; the total the defendants say should be paid is five visits at \$45 each visit, together with the initial visit of \$60 but not the remainder, again coinciding with the date of the end of August 2010 when the defendants say the plaintiff was recovered from his injuries. In Taiwan, the special expense was for the medication that he was prescribed on April 19, 2010 when he attended at the hospital for \$16.50. This amount is not in issue.

[21] The plaintiff's evidence is unopposed, there are no credibility issues in this matter, and I accept his descriptions of the pain he endured and his description of his injuries.

7. Damage to Plaintiff's Vehicle

[22] The damage to the vehicle was described by the assessing adjuster, with respect to the bumper, as a plastic face all warped, and a gross total damage of \$927.31 was found including all taxes. Total labour costs were estimated to be \$607.20.

8. Injuries from Low Velocity Accident

[23] From the pictures that were put in evidence on the summary trial, the vehicle appeared to have sustained only minor damage, but again that does not mean that the plaintiff did not suffer genuine injuries, nor is it the case that with soft tissue injuries there is always a physical presentation that can be seen or felt. The pain remains real to the victim of the accident, and his credibility is not an issue on this application.

9. Position of the Defendants

[24] The defendants submit, however, that the plaintiff was recovered by April 2010. He could do all the pre-accident activities he used to do by that time. The basis for the defendants' opinion that the plaintiff had largely recovered as at that date is taken from the CL19 report of Dr. Tsang on April 6, 2010. The plaintiff stated that he had seen the CL19 and was aware that Dr. Tsang had indicated that he was capable of working and that he was capable of doing non-work activities, including golfing. The relevant discovery evidence is as follows:

513 Q But all of your other activities that you normally would engage in, Dr. Tsang was telling you that it was his view that --

A Yes

514 Q -- as of early April you should be able to do those things? Is that yes? He was telling you that?

A Well, that's why he tried to get me to get back to the activities.

515 Q Fair enough. But that's what he was telling you at that time?

A Yes

[25] I note, however, that Dr. Tsang's three-page report dated July 23, 2011 is far more thoughtful and detailed than the CL19 report form with predetermined questions filled in by Dr. Tsang. The plaintiff had deposed at his discovery held on July 12, 2011 that as at that specific date he felt better; however, he deposed he had not resumed many activities. He has not resumed golf or snowboarding since July 2011.

10. Pre-Accident and Post-Accident Health

[26] Prior to the accident the plaintiff deposed that he had no health issues. In the winter he would go snowboarding at least eight to nine times in a season and in the summer and fall he would golf or attend a driving range at least once a week. He noted that he only began feeling pain after the accident and attended at his family doctor as noted above. He deposed:

By March 2010, I continued to experience intense back pain if I drove for more than an hour or sat for extended periods of time.

[27] He tried to alleviate his pain by attending at the acupuncture and physiotherapy treatments. He deposed that by September 2010 he felt his back pain had improved somewhat so he discontinued the acupuncture treatments and carried on only with the at-home exercise taught to him by the physiotherapist.

[28] By the summer of 2011, he was performing the exercises he had learned at physiotherapy for 30 minutes about once or twice a week. He deposed that his "neck pain [had] recovered to about 95% of its pre-Accident status about one year after the Accident".

[29] By the time of the examination for discovery, held on July 12, 2011, he deposed that he felt he had recovered

95% from the injuries caused by the Accident. However, I continued to experience occasional lingering soreness in my neck and back. I also continued to feel weaker than before the Accident.

He continued to suffer occasional pain in his back. I find the plaintiff is stoic, and, while he does not exercise at a gym, I accept he was an active before the accident. After the accident, he refrained from lifting heavy objects. It was not until summer 2011 that he believed his injuries had resolved enough to enable him to resume his earlier activities including lifting heavy objects, such as furniture and groceries. However, after he made the attempts at lifting, the flare-ups of his pain increased. He attended Dr. Tsang again in September 2011 to describe the flare-ups. He was prescribed Celebrex for the pain on November 24, 2011.

[30] He has not resumed golfing, having only attended the driving range once in July 2011. He had snowboarded twice in December 2010, but he felt weaker.

[31] Mr. Sun used to travel to Portland for vacation trips before the accident. He tried to take a trip to Portland after the accident. In connection with that, his evidence on the discovery was:

438 Q You told me about that earlier and I'll ask you about that in a minute, but any other vacation-type trips you've taken since the accident?

A Because after the Portland trip I think I am not able to take any more trips.

430 Q and how did you get there?

A We drove, but because I wasn't able to drive for a long time, so most of the time my friend drove.

[32] Mr. Sun's recollection was that, in April 2010 his doctor suggested that he should start trying out all of the activities that he used to do. He did not, however, and when he did, he felt it worsened his progress and it was not an enjoyable experience for him.

11. Income Loss

[33] The CL15 form for income loss was filled out by the vice president, Ellen Liu, of Richwood Trading Ltd. and was before the Court. I accept the plaintiff's income loss as being \$2,009.61 less the payroll deductions set out by Ms. Liu: \$320.92 for Income Tax, less \$34.88 for Employment Insurance, less \$92.59 for Canada

Pension Plan. I accept that the plaintiff suffered a loss of income in the amount of \$1,561.22.

12. Special Damages

[34] I award special damages to the plaintiff in the amount of \$4,172.60, having been incurred through physiotherapy appointments, acupuncture and travel expenses. I accept his evidence respecting the type and duration of treatment taken to mitigate his pain from these injuries. Having found that the plaintiff sustained the injuries he deposed to above, with occasional flare-ups, I do not disallow any of his claims for special damages.

13. Non-Pecuniary Damages - Parties' Position

[35] The plaintiff submits an appropriate award for non-pecuniary damages would be in the range of \$25,000 to \$30,000. The defendants submit the appropriate range for damages is somewhere between \$5,000 and \$10,000. Each side provided authorities in support of their positions.

A. The Plaintiff's Position

[36] The plaintiff referred to *Cariglino v. Okuda*, 2011 BCSC 1429 [*Cariglino*]. In *Cariglino*, the collision was described by the plaintiff as a "hard impact" (para. 15). She felt immediately shaken and disoriented, her right elbow and right collar were hurt and she began getting a headache. It continued to worsen the next day with a pounding headache pinching between her shoulders and a burning sensation in her neck and collar bone. While the burning sensation resolved the following day, she still attended a walk-in clinic five days after the accident. The notes of one of the walk-in clinic's treating doctors indicated "pain [to the] left side [of the] neck, left collar bone, sore movement, left neck felt hot, tender right neck, pain flexion, lateral flexion to the left, limited flexion, lateral flexion" Mild soft tissue injuries were diagnosed as well by her general practitioner. She had never complained of those prior to medical visit. Approximately two weeks later, her general practitioner noted her complaints included persistent soft tissue injury of the neck, trapezius and

episodes of low back pain and chronic low back pain and hip pain with a compensatory aggravation of the left side of her body, which were all related to the motor vehicle accident. She also had dizzy spells and complained of excruciating pain in the right side of her head. McKinnon J. noted that the defendant had failed to provide any medical evidence to the contrary and stated at para. 35:

The defendant contends that the very minor nature of the collision would render “improbable” the nature and extent of the injuries the plaintiff contends she suffers. I was not provided with opinion evidence to support that contention and thus am unable to accept the bald proposition that minor damage equals minor injury.

[37] Ultimately, the court awarded \$35,000 in non-pecuniary damages.

[38] I find that the injuries suffered by the plaintiff in that case, given that the medical opinion was the plaintiff was only 70% recovered one year following the collision and that it was accepted that she had some difficulty which had continued to the date of trial, even anticipating that she should soon be fully recovered, to be unlike the situation before the Court. Here, the plaintiff is largely recovered.

[39] The plaintiff also provided to the Court the decision, *De Leon v. Harold*, 2010 BCSC 1802 [*De Leon*]. In *De Leon*, Power J. awarded \$12,000 in non-pecuniary damages, the plaintiff having discharged the burden that soft tissue injuries to her back and neck were a result of the accident. As in the present case, the plaintiff thought immediately following the accident that she was fine. She continued on to her work as a registered nurse. While she worked the day of the accident, the next day she called in sick. She attended at her physician and was diagnosed with soft tissue injuries to her neck and back. Having complained of mid-back pain, she was advised to embark on a course of therapy, to take anti-inflammatory medications, as well as to take a week or two off from work. The injuries were substantially resolved within two months of the accident and the injury was almost completely resolved within six months. I find that the plaintiff’s injuries in that case were substantially less severe than the plaintiff’s here.

[40] In *Khangura v. Zhang*, 2007 BCSC 1289 [*Khangura*], also provided by the plaintiff, Rice J. reviewed an accident where the plaintiff's vehicle's repair cost was \$4,650.12. The injuries to the plaintiff consisted of pain and stiffness in the neck, shoulders and lower back. The injuries were healed substantially over the year following the accident, except for lingering lower back pain. His physician, however, had indicated that the lower back pain would go on indefinitely. In the decision, there were, additionally, credibility issues which do not arise here.

[41] Mr. Justice Rice helpfully summarized a number of cases considering non-pecuniary injuries in similar circumstances and those are set out in para. 13:

Plaintiff's authorities:

(a) *White v. Stonestreet*, 2006 BCSC 801: The plaintiff was rear-ended by the defendant's car. The significant component of the plaintiff's claim for damages was based on his lower back symptoms. The plaintiff testified about a prospective business venture at the Tsawwassen ferry terminal that both he and his father did not proceed with because the plaintiff was not up to it. The plaintiff was awarded \$35,000 for non-pecuniary damages, \$1,401.29 for special damages, and nothing for his loss of opportunity to pursue the business venture claim.

(b) *Lane v. Ford Credit Canada Leasing Limited et al*, 2003 BCSC 701: The defendant drove through a red light and hit the plaintiff's passenger side of the vehicle. The plaintiff stated that she suffered four years of significant painful debilitation symptoms, which included headaches, as a result of the accident. The plaintiff was awarded \$40,000 for non-pecuniary damages; past wage loss of \$2,058.84; special damages for \$2,090.35 and cost of future care of \$1,000, with interest on the past wage loss and special damages awarded.

(c) *Verhnjak v. Papa*, 2005 BCSC 1129: The plaintiff was 55 years old when she was broadsided in a motor vehicle accident. Her vehicle was a write-off. The plaintiff was attending a residential care course in Surrey, British Columbia at the time of the accident. She was under significant financial stress as her husband was ill and their piano reconstruction business had gone under. She was on welfare and living with her children for a time. She had pain in her upper back, neck and headache. Almost three years post-accident the plaintiff's general practitioner concluded that her soft tissue injury in the cervical spine and upper and lower back had not resolved. Prognosis for further improvement was poor. The plaintiff was awarded \$40,000 for non-pecuniary damages; \$20,000 for loss of future earning and \$2,307.63 in special damages.

(d) *Gorosh v. Bowen et al*, 2005 BCSC 917: The plaintiff sought damages from a motor vehicle accident that occurred nine years earlier. The plaintiff was 14-1/2 years old at the time of the accident and a passenger in the back seat of a car that was broadsided. She was diagnosed the next day as having

neck and back strain. The plaintiff did not miss any school due to the accident. The plaintiff continued to suffer from chronic pain, depression, headaches and insomnia. She was unlikely to fully recover from her injuries. The plaintiff was awarded \$40,000 for non-pecuniary damages; \$30,000 for loss of future earning capacity; \$3,200 for future cost of care; \$1,000 plus interest for loss of past earning capacity and \$1,928.23 plus interest for special damages.

(e) *Klippenstein v. Parmar et al*, 2003 BCSC 1138: The plaintiff's truck was hit from behind and spun around into the path of another vehicle. The plaintiff experienced right shoulder pain with restricted shoulder motion, loss of grip strength in his right hand, and pain located in his upper back and neck. There was only a modest prospect of resolution. His family physician recommended physiotherapy and time off work. The defence said that the plaintiff failed to take recommended physiotherapy treatment. Future wage loss was assessed at \$50,000. Non-pecuniary damages were awarded for \$40,000, after a 20% reduction for failure to undergo physiotherapy.

(f) *Kroeker v. Jansen* (1995), 4 B.C.L.R. (3d) 178 (C.A.), 123 D.L.R. (4th) 652: The plaintiff was injured in a motor vehicle accident which resulted in the loss of physical capacity and she was prevented from performing some household tasks. The plaintiff's husband shared in the housework and takes. The plaintiff was entitled to damages for loss of ability to perform household tasks in the amount of \$50,000 for non-pecuniary damages and awarded \$3,000 for the cost of future housekeeping.

(g) *McTavish v. MacGillivray*, 2000 BCCA 164: This was an appeal from an award to the plaintiff for loss of housekeeping capacity. The plaintiff was injured in two motor vehicle accidents and her ability to do housework was very limited. The Court of Appeal upheld the judge's earlier awarded granted to the plaintiff of \$20,800 for past loss of household service and \$43,170 for future loss of housekeeping capacity.

Defendant's authorities:

(a) *Al-Mundlawi v. Gara*, 2005 BCSC 740: The court accepted that the plaintiff had been injured in a rear-end collision with extensive damage to his vehicle. The plaintiff suffered mild tissue injuries to his back and neck which resolved within two months with residual discomfort for an additional four months. He was awarded \$7,500 in non-pecuniary damages.

(b) *Darji v. Regimbald*, 2006 BCSC 834: The plaintiff suffered mild whiplash injury, which gradually had improved within one year of the accident. There was evidence that the plaintiff had pre-existing lower back pain. He was awarded \$12,000 in non-pecuniary damages.

(c) *Barrows v. Wong*, 2006 BCPC 407: The plaintiff suffered mild soft tissue injury to the neck and back and was awarded \$5,000 in non-pecuniary damages. The plaintiff returned to work full time approximately seven weeks after the accident and was fully recovered some five months afterwards.

(d) *Rempel v. Froese*, 2006 BCPC 481: The plaintiff's soft tissue injuries were chiefly resolved within seven months with some residual discomfort thereafter. The plaintiff was awarded \$7,500 in non-pecuniary damages.

(e) *Qualizza v. Lee*, 2007 BCSC 303: The plaintiff suffered headaches and soft tissue injuries to the back and neck, which passed the acute stage within a few weeks with residual pain lasting approximately 18 months. The court awarded non-pecuniary damages of \$12,000.

(f) *King v. Buccini*, 2006 BCSC 1587: The plaintiff had short-lived back symptoms and neck pain persisting for approximately six months. He still suffered from minor residual effects. He received an award of \$5,000 for non-pecuniary damages.

[42] Ultimately Rice J. awarded \$26,000 in non-pecuniary damages in *Khangura* for the plaintiff's injuries.

[43] The plaintiff also relied on *Lee v. Hawari*, 2009 BCSC 1904 [*Lee*]. In that case it was found that the plaintiff continued to suffer significant effects from her injuries over a period of six months, until March 2007, with gradual improvement over that time. The pattern of her pain, however, seemed to change significantly. The plaintiff also had not made meaningful efforts to undergo rehabilitation which had been suggested to her by her doctor. It was found by the Court that she continued to suffer symptoms of her injuries more than two and a half years after the accident. Although the prognosis was that she will fully recover, Adair J. awarded \$21,000 in non-pecuniary damages. That is not the situation in the case at bar in that the duration of the injuries in *Lee* was longer than the injuries in the present case. Additionally, here, the plaintiff has sought out physiotherapy, acupuncture and chiropractic treatments to resolve his pain.

[44] The plaintiff cited *Millala v. Shaw-Smith*, 2008 BCSC 1481 [*Millala*]. The plaintiff suffered a few days loss of work, but returned to work suffering flare-ups in his lower back, lumbar region which was his chief area of pain. The plaintiff in *Millala* was sent for an independent medical examination. In that case the plaintiff was seeking non-pecuniary damages in the range of \$40,000 to \$50,000. Counsel for the defendants argued that the award should be far less, in the range of \$8,000 to \$14,000. Non-pecuniary damages were awarded in the amount of \$35,000 by Arnold-Bailey J. The reason for that award was set out by the court at para. 97:

[97] I find that an appropriate award of non-pecuniary damages in the present case is \$35,000. This takes into account the significant pain, suffering

and disability experienced by the plaintiff throughout the first several months after the accident, during which time he was significantly incapacitated. It also takes into account the pain, discomfort and loss of enjoyment of life that he has suffered thereafter, in terms of being unable to sit comfortably and work at his computer for long periods of time as demanded by his business, and being unable to pursue his former sports and athletic activities at his pre-accident level. This amount also takes into account that the plaintiff continues to suffer some flare ups in back pain from time to time and experiences physical limitations depending on his activity.

I find the extent of the injuries in *Millala* were far greater than the injuries in the present case. Here, the plaintiff has, for the most part, recovered from his injuries and is not disabled or prevented from pursuing activities based on physical limitations.

[45] The last decision cited by the plaintiff was that of *Statton v. Haller and Haller*, 2006 BCSC 676 [*Statton*]. It was a low velocity collision, although as noted, that alone does not mean that a person has not suffered an injury, and no evidence was called on that point. The plaintiff in *Statton* had neck and shoulder injuries which became stiff and sore. Her condition gradually improved to the point where she felt that she had recovered 50% to 60%. Defence pointed out in that case that the plaintiff had continued to play soccer and baseball within seven days of the accident. The plaintiff testified, however, that her ability to play sports was reduced. She was also observed by her treating physician to have physical symptoms, including muscle spasms in her neck and upper back. When she was seen some weeks after the accident had occurred, her neck extensions were only one half of the normal range and the movements were painful to her cervical spine. Other neck movements were only in the three quarter range. Given these physical findings and the fact that the plaintiff would likely have ongoing headaches requiring massage and physiotherapy, the conclusion by the plaintiff's physician was that even though the accident had occurred three years prior, he wrote that there was "no indication that the plaintiff's problems would resolve themselves." Accordingly, the court awarded non-pecuniary damages of \$26,000. Again, I find that to be a more severe situation than the case at bar.

B. The Defendants' Position

[46] The defence relied upon *Butler v. Blaylock Estate*, [1981] B.C.J. No. 31, a decision of McEachern C.J.S.C., as he then was. In that case the plaintiff was 55 years of age at the time of the accident. He claimed for loss of income and non-pecuniary damages for his injuries. He was awarded \$7,500 for non-pecuniary damages. The defendants here stressed paras. 18 - 20 of the Chief Justice's decision:

18 I am not stating any new principles when I say that the Court should be exceedingly careful when there is little or no objective evidence of continuing injury, and when complaints of pain persist for long periods extending beyond the normal or usual recovery period.

19 An injured person is entitled to be fully and properly compensated for any injury or disability caused by a wrongdoer. But 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.

20 I have already said that I am not satisfied that the Plaintiff's complaints of continuing pain are real. I assess the Plaintiff's general damages for pain, suffering and loss of enjoyment of life, and the other elements of non-pecuniary damages, at \$7,500.00.

[47] Here, I find there is convincing evidence; the plaintiff had met the burden of proof respecting his injuries. It is not suggested the plaintiff is fabricating his pain or failed to mitigate. The position of the defendants, as I understand it, is that the Court should analyze the evidence as a whole. In cases where there is little in the way of objective findings, such as the present, the defendants submit the Court must be "exceedingly careful."

[48] The defendants also relied upon *Price v. Kostryba* (1982), 70 B.C.L.R. 397 (S.C.). In that case McEachern C.J.S.C. analyzed the difficulty that whiplash injuries pose i.e. soft tissue injuries present little in the way of objective findings and yet as noted by the Chief Justice, "every physician knows some patients whose complaint continues for years, and some apparently never recover" (at para. 4). Nonetheless, it was accepted that soft tissue injuries do exist and the absence of physical

symptoms is not an indication that the plaintiff is not suffering pain from injuries caused by an accident.

[49] The decision of *Brar v. Kaur*, 2010 BCSC 1220, was also argued on behalf of the defendants. In that case the plaintiff was recovered, according to his physician, within six months. In regard to hearing an assessment of damages by way of summary trial, Truscott J. held at paras. 42 and 43 as follows:

[42] It is near to impossible to assess credibility on a summary judgment application supported only by affidavits. The plaintiff's injuries were only soft tissue injuries caused by a very minor accident and those complaints were subjectively based and not objectively verifiable. Accordingly the Court must be cautious in accepting his complaints as proven.

[43] However Dr. Sandhu does not suggest in his report the plaintiff is not to be believed on his complaints or even suggest that he is exaggerating. He appears to have accepted the plaintiff's complaints as legitimate and consistent with the mechanism of the accident and I likewise am prepared to accept the complaints of the plaintiff as stated in his affidavit and as reported to Dr. Sandhu.

In that particular case, the plaintiff had sustained soft tissue injuries to his neck and back which lasted about six months. The court only awarded \$4,000 for non-pecuniary damages.

[50] In the case of *Dolha v. Heft*, 2011 BCSC 737 [*Dolha*], also relied on by the defendants, the plaintiff was awarded non-pecuniary damages for soft tissue injuries resulting from a motor vehicle accident, although minor in nature. The collision was described as a low velocity impact accident. The motor vehicle accident had occurred on June 3, 2008 and the plaintiff last saw her doctor for pain due to accident related injuries in November 2008. In that case Bruce J. accordingly awarded only an amount of \$7,000 for non-pecuniary damages. Given the very short duration of the pain suffered by the plaintiff in *Dolha*, it is unlike the present case.

[51] The defendants also relied on *Gradek v. DaimlerChrysler Financial Services Canada Inc.*, 2009 BCSC 1572. The accident in that case, occurred on May 13, 2006. It was not disputed that the plaintiff was still seeing his doctor in 2009 for difficulties arising from the accident including soft tissue injuries to the neck and lower back. His injuries were not substantial however and he showed no evidence of

long term damages. The court found his evidence to be “at times contradictory and confusing.” He was awarded \$8,000 for non-pecuniary damages.

[52] The defendants also relied upon *Dolha v. Heft*, 2011 BCSC 738 [*Dolha v. Heft*] which was a companion case dealing with the sister of the plaintiff in the earlier *Dolha v. Heft* decision (see para. 49 herein). The second matter proceeded by way of summary trial pursuant to Rule 9-7 of the *Supreme Court Civil Rules*, B.C. Reg. 168/2009. The accident had occurred June 3, 2008. The plaintiff complained of neck pain, upper back pain, lower back pain and headaches and dizziness. She was seen by a physician and prescribed Motrin, heat and exercise. She also sustained nausea and dizziness but those did not persist long after June 10, 2008 and were resolved within six months after the collision. The back and neck pain improved slowly and completely resolved by November 10, 2010. The court held in *Dolha v. Heft* at para 15:

[15] The primary difference between the plaintiff and her sister is the length of time it took to recover from the injuries caused by the accident. While the plaintiff's evidence is that her neck and back did not fully recover until November 2010, her sister completely recovered from her injuries within six to nine months after the accident.

[53] In regard to objective injury findings, it is important to note that Bruce J. agreed with the earlier cited authorities respecting low velocity impacts and their relationships to injuries. On this point, Bruce J. stated at paras. 17 to 18:

[17] It is not the law that if a plaintiff cannot show objective evidence of continuing injury that she cannot recover. If the pain suffered by the plaintiff is real and continuing and resulted from the injuries suffered in the accident, the plaintiff is entitled to recover damages: *Butler v. Blaylock Estate*, [1983] B.C.J. No. 1490 (C.A.).

[18] However, where there is little or no evidence to support the plaintiff's claims of continuing pain from the accident-related injuries, a reasonable inference is that the pain was either very minor or non-existent. The plaintiff maintains her pain symptoms persisted for over two years, but she did not seek out further treatment from her physician after June 10, 2008. Nor did she seek a referral for massage therapy, physiotherapy or chiropractic treatments. In addition, her physical activities were only marginally affected by the pain she suffered and the plaintiff was able to continue working. There was also no disruption to her social relationships. For the most part the plaintiff's life was unaffected by the pain she experienced from the injuries caused by the accident. The plaintiff's affidavit also describes the pain she

experienced in very vague, generalized terms. She does not provide a description of the nature or severity of the pain that would permit the court to evaluate its impact on her mentally or physically.

The court awarded \$10,000 in non-pecuniary damages. Here, in contrast with Mr. Sun, the plaintiff has sought out medical treatment and deposed to his ongoing flare-ups of pain which result from doing certain activities.

[54] The defendants also relied on the decision in *Ceraldi v. Duthie*, 2008 BCSC 1812, which was decided after a summary trial. The plaintiff suffered soft tissue injuries to her neck, left shoulder and mid back which caused her pain and suffering from a motor vehicle accident. She could not work for two months. She also sustained sleeping difficulties. She was found to have suffered mild to moderate soft tissue injuries that had largely resolved within eight months of the accident and accordingly she was awarded \$13,000 in non-pecuniary damages.

14. Conclusion

[55] In all of the circumstances, I find while the plaintiff's injuries had largely resolved within one year and nine months, he has some ongoing complaints of pain, coupled with his inability to perform certain activities as a consequence of his fear of causing flare-ups to his lower back such as carrying heavy objects.

[56] Taking evidence as a whole, I find that the plaintiff has, on a balance of probability, proved he was injured from this accident for one year and nine months and that he presently has some minor complaints on occasion relating to his lower back and neck, but that these are not preventing the plaintiff from enjoying his pre-accident state of health and activity level.

[57] I award the following:

Non-pecuniary Damages:	\$20,000.00
Loss of Income:	1,561.22
Special Damages:	<u>4,172.60</u>
T o t a l	\$25,733.82

[58] In the event that counsel is unable to reach an agreement respecting costs, counsel may, within 30 days of the release of this judgment, speak to costs by advising the registry.

“Maisonville J.”

The Honourable Madam Justice Maisonville