IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Dai v. Grose,*
2023 BCSC 717

Date: 20230502
Docket: M223358
Registry: New Westminster

Between:

Min Dai

Plaintiff

And

Jenna Marie Grose

Defendant

Before: The Honourable Mr. Justice Taylor

Reasons for Judgment

Counsel for the Plaintiff:	R. Davidson D. Cheema
Counsel for the Defendant:	M. Monroy Y. Soliman
Place and Dates of Trial:	New Westminster, B.C. October 31, 2022 November 1-4, 2022
Place and Date of Judgment:	New Westminster, B.C. May 2, 2023

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I. INTRODUCTION

[1] The plaintiff, Min Dai, makes a claim for damages arising out of a motor vehicle accident that took place on December 12, 2018 in the vicinity of 104th Avenue and 173rd Street in Surrey, British Columbia (the "Accident").

[2] In the Accident, Mr. Dai's 2017 BMW X6 was rear-ended by the 2006 Toyota Corolla of the defendant Jenna Marie Grose.

[3] Ms. Grose has admitted liability with respect to the Accident.

[4] Mr. Dai claims damages under the following categories:

1. non-pecuniary damages;
2. past income loss;
3. future income loss; and
4. costs of future care.

[5] The parties have agreed on special damages in the amount of $91.26.

II. BACKGROUND FACTS

[6] Mr. Dai is 58 years old and is married to Li Chun Guo. They immigrated together from China to Canada in 1998.

[7] Mr. Dai has a university degree in mechanical engineering and holds various certificates in software programming.

[8] Mr. Dai and his wife are the sole owners and operators of an electronics business incorporated under the name Digitech Enterprises Inc. ("Digitech"), which they started in 2001. Digitech is in the business of assembling electronic circuit boards in different applications which are sold to customers in accordance with customer specifications.

[9] The Digitech factory is located in Coquitlam in a facility measuring 2700 square feet. Formerly the factory was located in Surrey. The company has two assembly lines and various machines including a board loader, pick and place machines and reflow ovens.

[10] At Digitech, Mr. Dai is responsible for the technical and manufacturing side of the business, while Ms. Guo is responsible for administration and management. Mr. Dai maintains and prepares the machines at his factory, which do the assembly. These machines need to be supervised by Mr. Dai when they run.

[11] Digitech does not have employees but does have an on-call worker named Jenny Mou who has been with Digitech since 2016. Ms. Mou does not perform the technical work undertaken by Mr. Dai but instead assists with packing of products, cleaning and other tasks. Mr. Dai is the only person at Digitech who engages directly in the machine production process.

[12] The shares in Digitech are owned 50/50 between Mr. Dai and Ms. Guo and they pay themselves by receiving periodic draws from the company, with each receiving an equal salary over the years. Ms. Guo testified that the draws taken from Digitech are not representative of true employment income, as they prefer to leave the money in the company for tax reasons and withdraw only what they need. Both Mr. Dai and Ms. Guo testified that their original plan with Digitech was to grow the company and then to sell it at the point when they are ready to retire.

The Accident

[13] The Accident occurred while Mr. Dai was stopped and waiting for oncoming traffic to clear so he could make a left turn. Ms. Grose's vehicle slipped on ice and hit him from behind, resulting in his car being knocked forward about five metres.

[14] After the Accident, both Mr. Dai and Ms. Grose exited their own vehicles and walked to the side of the road, where they conversed while waiting for fire fighters to arrive on scene. After fire fighters arrived and spoke with both drivers, Mr. Dai was advised by fire fighters that he could leave the scene. He drove his vehicle to his

workplace, which was only approximately 100 metres away. Ms. Grose testified that she was at the side of the road for a maximum of a half hour. Mr. Dai testified it was an hour to an hour-and-a-half.

[15] Mr. Dai later took his vehicle to a repair shop. The cost of repair to the car was approximately $17,600.

[16] Mr. Dai testified that he thinks he may have hit his head on the headrest and he was left feeling “stunned” after the Accident, although he was also able to converse with Ms. Grose and the fire fighters.

[17] Mr. Dai testified that he worked the rest of the day but left early as he was not feeling well. Thereafter, he did not miss work again up until the date of trial, although he testified that his efficiency and physical wellbeing at work and at home have been compromised as a result of the Accident.

III. ISSUES

[18] The issues at trial were:

1. whether the Accident caused Mr. Dai any injuries; and if so
2. whether Mr. Dai is entitled to damages under the following categories:
    a. non-pecuniary damages;
    b. past income loss;
    c. future income loss; and
    d. costs of future care.

IV. ANALYSIS

1. Preliminary Issue: Credibility and Reliability

[19] In *Bradshaw v. Stenner*, 2010 BCSC 1398 at para. 186, aff'd 2012 BCCA 296, Justice Dillon summarized the key elements involved in assessing credibility as follows:

> [186] Credibility involves an assessment of the trustworthiness of a witness' testimony based upon the veracity or sincerity of a witness and the accuracy of the evidence that the witness provides (*Raymond v. Bosanquet (Township)* (1919), 1919 CanLII 11 (SCC), 59 S.C.R. 452, 50 D.L.R. 560 (S.C.C.)). The art of assessment involves examination of various factors such as the ability and opportunity to observe events, the firmness of [their] memory, the ability to resist the influence of interest to modify [their] recollection, whether the witness' evidence harmonizes with independent evidence that has been accepted, whether the witness changes [their] testimony during direct and cross-examination, whether the witness' testimony seems unreasonable, impossible, or unlikely, whether a witness has a motive to lie, and the demeanour of a witness generally (*Wallace v. Davis*, [1926] 31 O.W.N. 202 (Ont.H.C.); *Farnya v. Chorny*, [1952] 2 D.L.R. 152 (B.C.C.A.) [*Farnya*]; *R. v. S.(R.D.)*, 1997 CanLII 324 (SCC), [1997] 3 S.C.R. 484 at para.128 (S.C.C.)). Ultimately, the validity of the evidence depends on whether the evidence is consistent with the probabilities affecting the case as a whole and shown to be in existence at the time (*Farnya* at para. 356).

[20] In addition, as noted in *Welder v. Lee,* 2019 BCSC 1328 [*Welder*] at para. 60, a distinction must be made between credibility and reliability:

> … Credibility is concerned with the veracity of the witness and assessment of reliability involves consideration of the accuracy of the witness' testimony; accuracy engages the ability of the witness to observe, recall and recount: *R. v. Khan*, 2015 BCCA 320 at para. 44, leave to appeal ref'd [2015] S.C.C.A.

[21] I note at the outset that I found Mr. Dai to be a credible and forthright witness. His testimony was internally consistent and also consistent with the testimony of both Ms. Guo and the other lay witness, Mr. Curkendall. He was not prone to exaggeration nor was he evasive in his answers. He made concessions against interest where appropriate (for example, readily admitting that many of his injuries following the Accident resolved relatively quickly). I also note that the defence did not challenge the credibility of Mr. Dai in closing argument.

[22] That said, I did find that there were issues with the reliability of both his testimony and that of Ms. Guo, due in large part to the sparse availability of business records at trial, with the result that the Court was asked to accept their recollections at face value without documentary support. For example, although a key issue at trial was the impact of the Accident on Mr. Dai's hours worked and his efficiency at work, there were no time sheets or logs adduced at trial, with the result that the testimony stood alone. I will address this issue in more detail in the damages analysis below.

2. Did the Accident cause Mr. Dai any injuries?

[23] Mr. Dai claimed at trial that the following injuries were caused by the Accident: neck, back, shoulder, arm and leg pain, headaches, memory loss, lack of focus and difficulty concentrating, dizziness, a floater in his right eye, blurry vision, tinnitus, sleep disturbance and fatigue (the "Alleged Injuries").

[24] The defence admits that Mr. Dai suffered injuries to his neck, shoulder and back and also the right eye floater as a result of the Accident but disputes the other Alleged Injuries.

[25] The onus is on Mr. Dai to prove on a balance of probabilities that (1) he did in fact suffer the Alleged Injuries; and (2) that the Accident caused the Alleged Injuries. To establish causation, Mr. Dai must demonstrate that "but for" the Accident he would not have suffered the Alleged Injuries: *Clements v. Clements,* 2012 SCC 32 at para. 8 [*Clements*]. Inherent in the "but for" test is a requirement that the Accident was necessary to bring about the Alleged Injuries, although not necessarily the sole cause: *Athey v. Leonati*, [1996] 3 S.C.R. 458 at para. 17, 1996 CanLII 183; *Clements* at paras. 8–10; *Ediger v. Johnston*, 2013 SCC 18 at para. 28.

[26] Mr. Dai need only establish a "substantial connection between the injury and the defendant's conduct", beyond the *de minimus* range, in order to establish causation: *Snell v. Farrell*, [1990] 2 S.C.R. 311 at 327, 1990 CanLII 70; *Farrant v. Laktin*, 2011 BCCA 336 at paras. 9–11. The "but for" test must be applied in a "robust common sense fashion" with no requirement for scientific evidence of the

precise contribution the defendant's negligence made to the injury: *Welder* at para. 76; *Clements* at para. 9.

[27] I will address each of the Alleged Injuries in turn.

Neck, Back, Shoulder, Arm and Leg Pain

[28] Mr. Dai testified that he experienced neck, back, shoulder, arm and leg pain the day after the Accident.

[29] The defence conceded at trial that Mr. Dai did sustain soft tissue injuries to his neck, shoulders and back as a result of the Accident, but took the position that these were mild injuries and relatively short-lived.

[30] The evidence at trial supported the defence position. Mr. Dai testified that the shoulder, arm and leg pain resolved within a few months and the neck and upper back injuries got "better and better" and resolved within a year. Mr. Dai agreed under cross-examination that, within the first year, his symptoms for these injuries were mild and were improving and that, physically, he was "not bad".

[31] I conclude that Mr. Dai did in fact experience the above-described neck, back, shoulder, arm and leg pain but that it was short-lived and had essentially resolved within a year after the Accident.

Floater

[32] Mr. Dai testified that he experienced a floater in his right eye that he first noticed the afternoon of the day of the Accident, and that he continues to experience that floater. He testified that the floater affects his performance at work because he does detailed operations on circuit boards, often looking through a microscope, and he has to contend regularly with the floater crossing in front of and blocking his

vision. When that happens he has to shake his head and take a short break until the floater clears.

[33] Both the plaintiff and the defence adduced expert evidence with respect to the floater:

- Dr. Briar Sexton was qualified by the defence as an expert in neuro-ophthalmology. She is a licensed ophthalmologist with a private practice and a Clinical Assistant professor in the Department of Ophthalmology in Visual Sciences at the University of British Columbia; and

- Dr. Selena Teja was qualified by the plaintiff as an expert in neuro-ophthalmology. She is a licensed ophthalmologist in practice at the University of British Columbia and Vancouver General Hospital and also a Clinical Instructor of Ophthalmology at the University of British Columbia.

[34] Dr. Sexton opined in her report that Mr. Dai has a posterior vitreous detachment with a visible floater, noting that acceleration/deceleration injury can cause vitreous floaters.

[35] With respect to prognosis, Dr. Sexton stated that vitreous floaters are common in the population and do not pose any functional limitations. She stated that Mr. Dai will continue to see his floater, as there is no treatment for it, but opined that it is not a disability and will not affect his employment or require him to reduce hours of work.

[36] Dr. Teja opined that Mr. Dai had suffered a posterior vitreous detachment in the right eye, consistent with a traumatic etiology in the context of a history of moderate myopia. She also opined that she did not expect any element of disability secondary to posterior vitreous detachment given that there were no sequelae of retinal compromise.

[37] I conclude that the Accident did indeed cause Mr. Dai to develop a floater. However, the medical evidence is that a floater is an annoyance or inconvenience

but is not a disability and would not be expected to affect Mr. Dai's work performance. It appears from Mr. Dai's testimony that the floater is a nuisance from time to time at work, but also that he has adapted and that it has not caused him to develop any material functional limitations.

Tinnitus

[38] Mr. Dai alleges that the Accident caused him to develop tinnitus, which is a high-pitched buzzing noise that he began to experience shortly after the Accident.

[39] Mr. Dai testified that tinnitus is the primary issue he has struggled with since the Accident, that it has become worse over time, and that it has created a big obstacle to falling asleep. He testified that, since the onset of the tinnitus, he started going to bed at 8 pm to prepare for trying to fall asleep by using techniques like listening to music. He testified that this process, and his difficulties falling asleep, cause him stress. He testified that he usually wakes at 2 am or 3 am and thereafter finds it even harder to fall asleep again. He testified that his quality of sleep is also bad as a result of the tinnitus.

[40] Dr. Fred Matta was qualified by the plaintiff as an expert in audiology. He is currently the Director of Audiology and Senior Audiologist with the Sonaris Ear Center and was previously the Public Health Audiology Clinical Practice Leader with the Fraser Health Authority.

[41] Dr. Matta conducted a formal tinnitus evaluation on July 13, 2022, which also included an evaluation for hyperacusis (a disorder in loudness perception which may result in patients being overly sensitive to sounds). Following completion of the testing, Dr. Matta opined that Mr. Dai's decreased sound tolerance indicated the presence of hyperacusis and concluded as follows with respect to tinnitus:

> In light of the history and presenting audiological findings, I am of the opinion that the MVA has been a significant contributor to Mr. Dai's hearing loss and tinnitus. Given the persistence of Mr. Dai's hearing loss and tinnitus, I do believe they are permanent, lifelong conditions.

[42] Dr. Matta further opined that hearing loss, tinnitus and, to a variable degree, dizziness are commonly reported symptoms associated with motor vehicle accidents involving closed head injury. He further opined:

> Mr. Dai reported that his head struck the head rest which, depending on the force of the impact, could result in inertial displacement of intracranial contents due to the rapid acceleration and deceleration forces of the head. In turn, the inner ear structures can be damaged from these jarring forces and stretching of cranial nerves can occur.
>
> Hearing loss following closed head injury may be progressive. The literature suggests that hearing loss following closed head injuries may go unreported until the level of hearing loss reaches a certain level of cognitive awareness. The hearing loss can therefore be progressive which is consistent with Mr. Dai's subjective awareness of declining hearing over the last year.

[43] With respect to prior history, Dr. Matta noted that there was an absence of audiometric data prior to the Accident and it is therefore not possible to know if there was some other inciting event that may have contributed to Mr. Dai's hearing decline. However, he observed that there was no reported history of noise exposure, occupational or otherwise, that could have manifested in hearing loss and no reported history of pathology nor a history of early onset familial hearing loss. Given his age at the time of the Accident, Dr. Matta opined that presbycusis (high-frequency hearing loss) did not play a significant role in the reduced hearing.

[44] The defence did not qualify an expert to contradict the opinion of Dr. Matta or his assumptions. One of these assumptions was that Mr. Dai had no pre-existing hearing conditions that predisposed him to his symptoms. In cross-examination and argument, the defence suggested that Mr. Dai may have developed prior hearing issues due to loud machinery in his workplace, but these suggestions were not supported by evidence or expert opinion of any kind, and therefore did not rise beyond the level of speculation.

[45] To the extent that evidence was adduced, it did not support the defence argument. Mr. Dai testified that the machines within the workplace all meet manufacturer's standards on noise. He further testified that he has conducted his own (admittedly non-scientific) testing of decibel levels using his phone, and that the

decibel levels were well below the levels that Mr. Matta testified could cause hearing loss. The defence had the opportunity to conduct its own professional decibel testing at the workplace and also to adduce expert evidence on this issue to displace Mr. Dai's testimony but chose not to do so.

[46] I found Mr. Dai's testimony concerning the timing of his development of tinnitus after the Accident, and its debilitating effect upon him, to be credible and to be supported by the expert evidence adduced at trial. I conclude that the Accident caused Mr. Dai's hyperacusis and tinnitus and has also been the principal cause of his sleep disturbance and fatigue since the Accident.

Mild Traumatic Brain Injury

[47] Mr. Dai testified that he has experienced the following symptoms since the Accident, but not before:

- headaches on the back of the head on the left side, starting on the afternoon of the day of the Accident. He now experiences headaches one to two times per week. They are generally manageable without medication but he uses Tylenol when the pain is worse;
- memory loss, starting two months after the Accident;
- lack of focus and difficulty concentrating that has developed since the Accident;
- dizziness, which he experienced on the day of the Accident and has only partially resolved. He says he now experiences dizziness on average once per week; and
- blurry vision, that he began to experience two to three months after the Accident. He says that he experiences blurry vision on average after every half hour when he is doing his work and is obliged to stop and wait for ten to 15 minutes to allow his eyes to clear. He testified that this requires him to take

> multiple extra breaks during the day, making him less productive. Mr. Dai testified that before the Accident he spent one to one and a half days per week in total doing detailed manual work. Now he spends up to a total of two to two and a half days per week to complete the same work.

[48] The position of the defence is that the foregoing symptoms were not caused by the Accident.

[49] In support of his position, Mr. Dai relies upon the expert report of the neuro-ophthalmologist Dr. Teja. In that report Dr. Teja opined that Mr. Dai had experienced a post-concussive syndrome consistent with a mild traumatic brain injury, whose symptoms included dizziness, visual blurring, and impaired convergence with prolonged near tasks. She found that, given the onset of the post-concussive syndrome shortly after this mild traumatic brain injury and no other ocular or neurological disease that could be causative, this was most likely caused by the Accident. She observed that, under the traditional views of concussion, it was thought that loss of consciousness or retrograde amnesia (of which there was no evidence in this case) was necessary to make this diagnosis. However, she explained that it is now well-recognized in the literature that the majority of patients who sustain a mild traumatic brain injury actually do not present with one or both of these symptoms, and included the relevant academic citations in her report which supported her conclusion.

[50] Dr. Teja opined that this finding that Mr. Dai suffered a mild traumatic brain injury as a result of the Accident was supported by an MRI conducted on October 11, 2019 (about a year after the Accident), in which the radiological interpretation indicated prior traumatic hemorrhage despite the fact that, other than the Accident (in which Mr. Dai testified that he thinks he hit his head on the headrest), “there is no other history of head trauma that could have resulted in this”. She explained that “[t]his finding is well described in mild traumatic brain injury literature and represents the deposition of hemosiderin indicating prior hemorrhage and diffuse axonal injury.”

[51] With respect to her prognosis, Dr. Teja concluded that it is uncertain whether the symptoms will alleviate and that, while the symptoms persist, it is to be anticipated that Mr. Dai will suffer a loss of productivity at work:

> Although 90% of mild traumatic brain injury symptoms will resolve by the first year, there are individuals who experience prolonged and persistent debilitating symptoms. Mr. Dai is working full time currently, but given his symptoms and how they would affect his ability to function at work I would expect decreased productivity. There is no way to know when these symptoms will completely alleviate.

[52] Dr. Sexton, the other neuro-ophthalmologist who testified at trial, had a different view, opining that Mr. Dai did not sustain a mild traumatic brain injury from the Accident. She reached this conclusion on the basis that he reported there was no loss of consciousness or memory at or around the time of the Accident. Dr. Sexton also opined that the intermittent blur that Mr. Dai reported for near vision and looking down could be secondary to either dry eye or refractive error.

[53] With respect to the MRI that showed a “single focus of susceptibility within the left parietal lobe” that “may represent sequelae of prior traumatic hemorrhage”, Dr. Sexton opined that it was “very unlikely” that it was the result of the Accident, although she did not give a reason in her report for that conclusion.

[54] Having weighed both reports and the evidence given on cross-examination, I find Dr. Teja’s opinion to be more persuasive on this point than Dr. Sexton’s opinion for three reasons. First, Dr. Sexton’s conclusion was based upon the narrow assumption that a mild traumatic brain injury could not be diagnosed without evidence of unconsciousness or memory loss. However, she admitted under cross-examination that she had not reviewed the scientific articles in Dr. Teja’s report that indicate otherwise, nor could she state why she disagreed with the conclusions in those articles.

[55] Second, while Dr. Teja gave a specific and detailed explanation as to why the MRI result was supportive of her conclusion, Dr. Sexton stated categorically that the

MRI was not supportive of a finding of mild traumatic brain injury without providing any explanation.

[56] Third, Dr. Sexton's theory that the blurry vision is attributable to an outdated prescription for eyeglasses is a convenient explanation for one of the symptoms but is overly narrow because it fails to explain the cause of the array of other symptoms that Mr. Dai experienced after the Accident, such as dizziness, headaches, forgetfulness and difficulties with concentration. Dr. Teja's conclusion, in my view, is more globally persuasive in light of all the available evidence.

[57] Accordingly, I conclude that the Accident caused Mr. Dai to incur a post-concussive syndrome consistent with a mild traumatic brain injury, whose symptoms included headaches, dizziness, memory loss, visual blurring, lack of focus and impaired convergence with prolonged near tasks. I also conclude that these symptoms have persisted to the date of trial, that it is uncertain as to whether they will alleviate, and that the symptoms have impacted upon Mr. Dai's productivity at work.

3. Is Mr. Dai entitled to damages?

[58] I have concluded that the Accident caused Mr. Dai short-term neck, back, shoulder, arm and leg pain but that this resolved within the first year. I have also concluded that the Accident caused Mr. Dai to incur a mild traumatic brain injury, hyperacusis, tinnitus and a floater. The evidence was that the floater is more of a nuisance than a material injury, but the other injuries have had a real impact upon his work and home life.

[59] I now proceed to consider whether Mr. Dai is entitled to damages as a result of these injuries. I will address each of the individual heads of damage in turn.

a. Non-pecuniary damages

[60] Non-pecuniary damages are awarded to compensate a plaintiff for pain, suffering, loss of enjoyment of life and loss of amenities: *Welder* at para. 82. In

Stapley v. Hejslet, 2006 BCCA 34 at para. 46, the Court of Appeal set out an inexhaustive list of factors to consider when assessing non-pecuniary damages:

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

[61] Each plaintiff must be assessed individually, though reference to previous similar cases can be helpful: *Zamora v. Lapointe*, 2019 BCSC 1053 at para. 56.

[62] Mr. Dai is 58 years old and testified that he now intends to work for at least another 10 years. Mr. Dai and Ms. Guo both testified that he had originally hoped to retire in 2026 but that he has had to postpone his expected retirement due to the reduction of his work efficiency after the Accident, which in turn has negatively affected growth projections at Digitech.

[63] Mr. Dai testified that, prior to the Accident, he enjoyed skiing with Ms. Guo three to four times per month in the winters and hiking every one or two weeks on average in the local mountains during the summers and once every fall. Ms. Guo also testified that Mr. Dai was a very energetic person prior to the Accident, who spent little time resting. Mr. Dai testified that, after the Accident, he no longer skis and his hiking has been replaced by walking due to his injuries, including fatigue. That said, he did admit in his testimony that he has returned to all his pre-Accident

household chores, so it cannot be said that the Accident has had a debilitating effect on him in that respect.

[64] Mr. Dai testified that the tinnitus and resulting sleep disturbance have had a big impact on his quality of life. Before the Accident, he was able to spend social evenings with his wife. Now he has to go to bed at 8 pm, where he listens to music to try to shift his attention away from the tinnitus. He testified that this has caused him a lot of stress and impacted his relationship with his wife and also his social life.

[65] Further, it is apparent from the evidence that Mr. Dai's injuries have had a material impact upon his enjoyment at work. While it is true, as the defence points out, that Mr. Dai's symptoms have not been sufficiently serious to cause him to miss days at work since the day after the Accident, it is also true that his symptoms cause him discomfort at work and reduce his productivity, requiring him to work longer hours to achieve the same results, with a resultant loss of free time to enjoy other activities. It is clear from Mr. Dai's testimony that he is a hard worker committed to the continued success of his business and, as a small business owner, appears to perceive no alternative but to continue to work hard despite his injuries. In my view based on the testimony taken as a whole, I find that he clearly has a stoic character and, as emphasized in *Stapley*, he should not be penalized for that fact.

[66] Finally, Mr. Dai's prospects for improvement five years after the Accident appear to be uncertain at best. Dr. Matta's opinion is that the tinnitus and hearing loss are permanent conditions, while Dr. Teja opines that the prospects for recovery from the mild traumatic brain injury symptoms are simply unknown.

[67] Mr. Dai is seeking non-pecuniary damages in the amount of $120,000. The defence submits that an appropriate award for non-pecuniary damages should be in the range of $75,000.

[68] The plaintiff relies upon the following authorities: *Holdershaw v. Summers*, 2020 BCSC 1317; *Murphy v. Jagerhofer*, 2009 BCSC 335 and *Kijowski v. Scott*, 2015 BCSC 2335. The defence relies upon the following authorities: *Pichugin v.*

Stoian, 2014 BCSC 928 and *Yang v. Chan*, 2012 BCSC 1753. I have reviewed and considered all the authorities provided to me by counsel in reaching my conclusion.

[69] The ruling in *Pichugin* (award of $48,000 in 2014) is clearly distinguishable, as the plaintiff's condition in that case had improved to a point only two years after the accident that he described himself as "much better" (at para. 32) and as having only "minor problems from time to time" (at para. 39). The plaintiff had returned to full-time work as a ship captain by that time when he had an unrelated heart attack. The plaintiff admitted that it was the heart attack, and the fact that he felt he was working too hard, that led him principally to quit his job, and not the injuries from the accident. In my view the impact of the Accident on Mr. Dai's home and work life was considerably greater than in *Pichugin*, and there was no evidence in this case that Mr. Dai suffered from material health conditions separate from the injuries caused by the Accident.

[70] In *Yang* (award of $60,000 in 2012), the principal long-term injury caused to the plaintiff was tinnitus. The Court found that the plaintiff's soft tissue injuries had resolved within six months of the accident and also found that the plaintiff suffered from pre-existing and other injuries that were not causally related to the accident. Mr. Dai's injuries in this case are more serious and more long-lasting and, again, he suffered from no other non-Accident conditions or injuries.

[71] On the other hand, there are in my view significant parallels between this case and *Holdershaw*. In that case, the plaintiff suffered from a variety of symptoms consistent with a mild traumatic brain injury, including headaches, dizziness, tinnitus, and loss of concentration, all of which affected his sleep, caused him stress and had led to a reduction in prior athletic activities. At the same time the evidence was that he continued to work hard at his job as a site superintendent and to put in unpaid hours well in excess of those required by his employment contract, and also to perform household chores if he could not enlist others to assist.

[72] In *Holdershaw*, the Court ordered an award of $120,000 in 2020, which included an award for loss of housekeeping capacity (which is not a factor in this

case), emphasizing that the amount of the non-pecuniary award should compensate for more than direct injuries citing the following quote from *Moskaleva v. Laurie*, 2009 BCCA 260:

> [95] The underlying purpose of non-pecuniary damages is to "make life more endurable" and should be seen as compensating for more than just a plaintiff's direct injuries …. In *Lindal* at 637, Dickson J. for the Court emphasized that the quantum of an award is determined through a functional approach and should not necessarily correlate with the gravity of the injury:
>
> > Thus the amount of an award for the non-pecuniary damage should not depend alone upon the seriousness of the injury but upon its ability to ameliorate the condition of the victim considering his or her particular situation. It therefore will not follow that in considering what part of the maximum should be awarded, the gravity of the injury alone will be determinative. An appreciation of the individual's loss is the key and the "need for solace will not necessarily correlate with the seriousness of the injury." In dealing with an award of this nature it will be impossible to develop a "tariff". An award will very in each case to "meet the specific circumstances of the individual case".

[73] In *Murphy*, where the Court awarded $100,000 in 2009, the plaintiff had experienced back and neck pain, some hearing loss, tinnitus and episodes of dizziness in addition to jaw and myofascial pain, with a cautious outlook for improvement. While he continued to work, these conditions had affected him emotionally. He was tired at the end of the day, lacked motivation at home, was forgetful and had not developed a full relationship (bond) with his children.

[74] In *Kijowski*, where the Court awarded $140,000 in 2015, the plaintiff suffered tinnitus, hearing loss, and dizziness in addition to a variety of soft tissue injuries. While there are certainly parallels between this case and the case at bar, I find that the plaintiff was older in *Kijowski*, the injuries were more severe with a more guarded prognosis, and the impact on the plaintiff was marginally more severe.

[75] After considering all the *Stapley* factors, and the relevant authorities, I conclude that an appropriate award of non-pecuniary damages in this case is $110,000.

b. Past Income Loss

[76] In *Singh v. Paquette*, 2022 BCSC 1579, Justice Walker helpfully summarized the legal analysis to be applied with respect to a past income loss claim:

> [162] Past income loss is a component of loss of earning capacity. The award is meant to compensate an injured plaintiff for the loss of the value of the work that the plaintiff would have performed but was unable to because of the injury caused by the tortfeasor's negligence: *Rowe v. Bobell Express Ltd.,* 2005 BCCA 141 at paras. 28–30; *Bradley v. Bath*, 2010 BCCA 10 at paras. 31-32; *Falati v. Smith*, 2010 BCSC 465 at para. 39, aff'd 2011 BCCA 45; *X. v. Y.*, 2011 BCSC 944 at para. 185; *M.B. v. British Columbia*, 2003 SCC 53 at paras. 47, 49; *Wainwright* at para. 171. Compensation for past loss of earning capacity is based on what the plaintiff would have, not could have, earned but for the injury: *Pololos v. Cinnamon-Lopez*, 2016 BCSC 81 at para. 130.
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> [163] Pursuant to s. 98 of the *Insurance (Vehicle) Act*, R.S.B.C. 1996, c. 231, the plaintiff's recovery is limited to net income loss: *Rizzolo v. Brett*, 2009 BCSC 732 at para. 72, aff'd 2020 BCCA 398; *Wainwright* at para. 172.
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> [164] While the standard of proof for proving a past event is on a balance of probabilities, any hypothetical events, past or future, will be taken into consideration as long as it is a real and substantial possibility and not mere speculation, and will be given weight according to its relative likelihood: *Athey v. Leonati*, [1996] 3 S.C.R. 458 at paras. 27-28; *Smith v. Knudsen*, 2004 BCCA 613 at paras. 27–29; *Rousta v. MacKay*, 2018 BCCA 29 at paras. 14, 27-28.
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> [165] In *Falati*, Justice Saunders summarized the principles governing the assessment of pre-trial lost earning capacity caused by the tortfeasor:
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> > [39] Though pre-trial losses are often spoken of as if they are a separate head of damages, e.g. "past loss of income" or "past wage loss", it is clear that both pre-trial and future losses are properly characterized as a component of loss of earning capacity – *Rowe v. Bobell Express Ltd.*, 2005 BCCA 141. The principles governing the evaluation of capacity claims have been articulated most clearly in judgments dealing with future losses, that is to say, loss of future earning capacity: for example, the recent decision of the Court of Appeal in *Perren v. Lalari*, 2010 BCCA 140, in which the alternative "real possibility" and "capital asset" approaches to assessment are reviewed and discussed.
> >
> > [40] The full assessment of damages for such losses may involve, at least to some extent, consideration of hypothetical situations and contingencies – what might have happened, or what might yet happen, had the accident not occurred, as distinct from what actually has happened. However, particularly where the claimed losses are derived from something other than a measurable, conventional income stream, the determination of a plaintiff's prospective post-

accident, pre-trial losses can involve considering many of the same contingencies as govern the assessment of a loss of future earning capacity: "The only difference is that knowledge of events occurring before trial takes the place of prediction" – Prof. Waddams, *The Law of Damages*, Looseleaf Ed. (2008) para. 3.360. When considering hypotheticals and contingencies in the context of a pre-trial loss, the same general principles which govern the assessment of lost future earning capacity may be equally applicable – Waddams, *ibid.* As stated by Rowles J.A. in *Smith v. Knudsen*, 2004 BCCA 613, at para. 29,

> "What would have happened in the past but for the injury is no more 'knowable' than what will happen in the future and therefore it is appropriate to assess the likelihood of hypothetical and future events rather than applying the balance of probabilities test that is applied with respect to past actual events."

[41] Those general principles involved in the process of assessment include the following:

- The task of a court is to assess damages, rather than to calculate them mathematically – *Mulholland (Guardian ad litem of) v Riley Estate* (1995), 12 B.C.L.R. (3d) 248 at para. 43;

- The standard of proof is not the balance of probabilities; the plaintiff need only establish a real and substantial possibility of loss, one which is not mere speculation, and hypothetical events are to be weighed according to their relative likelihood – *Athey v Leonati*, [1996] 3 S.C.R. 458, 140 D.L.R. (4th) 235, at para. 27;

- Allowances must be made for the contingencies that the assumptions upon which an award is based may prove to be wrong – *Milina v. Bartsch* (1985), 49 B.C.L.R. (2d) 33 at 79 (S.C.), aff'd (1987), 49 B.C.L.R. (2d) 99 (C.A.);

- Any assessment is to be evaluated in view of its overall fairness and reasonableness – *Rosvold*, at para. 11.

[42] A trial decision of Finch J., as he then was, *Brown v. Golaiy*, 1985 CanLII 149, 26 B.C.L.R. (3d) 353, which has been frequently cited, sets out a list of further specific considerations which may be taken into account in making an assessment:

> "The means by which the value of the lost, or impaired, asset is to be assessed varies of course from case to case. Some of the

> considerations to take into account in making that assessment include whether:
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> 1. The plaintiff has been rendered less capable overall from earning income from all types of employment;
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> 2. The plaintiff is less marketable or attractive as an employee to potential employers;
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> 3. The plaintiff has lost the ability to take advantage of all job opportunities which might otherwise have been open to him, had he not been injured; and
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> 4. The plaintiff is less valuable to himself as a person capable of earning income in a competitive labour market."
>
> [43] Having said that, one cannot lose sight of the rule that the determination of what has in fact happened in the past is on the basis of the balance of probabilities – *Steenblok v. Funk*, [1990] 5 W.W.R. 365, 46 B.C.L.R. (2d) 133 (B.C.C.A.); see also *Smith v. Knudsen*, at para. 36. In the present case the plaintiff must prove that each of the various claimed losses of opportunity by which he says the loss or earning capacity is to be evaluated was, more likely than not, actually caused by the accident. If the plaintiff succeeds on that issue, then the potential value of each of these opportunities, adjusted for various contingencies, may be weighed in determining the value of the plaintiff's lost earnings capacity, both past and future.

[77] Taking into account the above summary of the law, the first question to be answered with respect to past income loss in this case is whether the injuries Mr. Dai derived from the Accident caused a loss of earning capacity. In other words, what must be assessed is the loss of the value of the work, if any, that Mr. Dai would have performed but was unable to because of the injuries.

[78] In this case, I am satisfied that Mr. Dai's injuries did indeed cause a loss of earning capacity for him. On the one hand it is true, as the defence argues, that Mr. Dai's injuries have not impacted the number of hours he is able to work – to the contrary, they have by his own admission increased since the Accident. It is

undisputed that Mr. Dai missed only two hours of work on the day of the Accident and has not missed any days of work thereafter on account of the injuries. Moreover, as Mr. Dai himself testified, he has in fact been working longer hours during the weekdays and Saturdays after the Accident than he was before.

[79] However, on the other hand, it is also clear that Mr. Dai's efficiency at work has declined considerably as a result of the injuries. Mr. Dai testified that, after the Accident, he has had concentration issues almost every day which makes it difficult for him to focus on his work on tiny components and results in more mistakes. As a result of these mistakes, he also now requires more time spent on inspections and quality control. He also suffers from blurred vision on a daily basis when he does detailed work for more than 30 minutes, requiring him to take ten-minute breaks until the blurring resolves. As a result, he testified, the time it takes him to undertake the manual labour component of his job has increased from one to one and a half days per week to two to two and a half days per week. He also testified that, post-Accident, he has had to work longer on week days and Saturdays precisely because he needs the extra hours to make up for the loss of efficiency. In other words, it is clear that, as a result of the Accident, Mr. Dai now works more hours than before but actually produces less on a per-hour basis. This is a loss of earning capacity.

[80] That said, as mentioned above, there are issues with the reliability of Mr. Dai's testimony concerning the amount of his loss of efficiency, as he failed at trial to adduce supporting documentation such as time sheets/logs or any compelling accounting analysis other than his own anecdotal account. I will take this into account in the analysis that follows as a factor tending to reduce the amount of the damages assessment.

[81] The challenge in this case is how to value Mr. Dai's loss of efficiency. The defendant argues that Mr. Dai has suffered no past loss of earning capacity because revenues and net income actually increased substantially at Digitech after the 2018 Accident, with a particularly large jump in the following 2019 year. Revenues and net income at Digitech were as follows from 2014 to 2021:

Year	2014	2015	2016	2017	2018	2019	2020	2021
Sales revenue	213,871	291,897	361,765	385,462	468,874	646,895	637,095	606,804
Net income	87,293	166,229	232,629	166,563	259,605	418,085	450,658	346,501

[82] With respect to the above, I observe that the big increase in sales revenue and net income occurred in 2019 but that, subsequently, sales and net income have remained level or marginally declined (although remaining considerably above pre-Accident levels).

[83] While the increase in Digitech revenues and income in 2019 is certainly an important consideration in determining whether Mr. Dai's capacity to earn income was diminished after the Accident, it is not determinative taken alone. This was made clear by the Court of Appeal in *Ibbitson v. Cooper*, 2012 BCCA 249 at para. 19:

> While in many cases the actual lost income will be the most reliable measure of the value of the loss of capacity to earn income, this is not necessarily so. A hard and fast rule that actual lost income is the only measure would result in the erosion of the distinction made by this Court in *Rowe*: it is not the actual lost income which is compensable but the lost capacity i.e. the damage to the asset. The measure may vary where the circumstances require; evidence of the value of the loss may take many forms (see *Rowe*). As was held in *Rosvold v. Dunlop*, 2001 BCCA 1 at para. 11, 84 B.C.L.R. (3d) 158, the overall fairness and reasonableness of the award must be considered taking into account all the evidence. An award for loss of earning capacity requires the assessment of damages, not calculation according to some mathematical formula.

[84] In this case, the plaintiff argues correctly that Digitech was on a strong growth trajectory from 2014-2018. He also argues that he and Ms. Guo had a realistic pre-Accident expectation that Digitech revenues would ultimately grow to $1 million. Seen in this light, the plaintiff argues that the levelling off of growth at Digitech after 2019 is a reflection of Mr. Dai's reduced efficiency and an inability to service growing customer demand at the same rate as before. This argument is given force by the

fact that Mr. Dai was the only person responsible for production at Digitech, with the result that any reduction in his productivity would have had a direct impact on the Digitech bottom line.

[85] In terms of a methodology for quantifying Mr. Dai's loss of earning capacity, the plaintiff argues that it can be most easily measured in terms of the loss in 2019 of one its two main customers, TempTrip. TempTrip was a customer of Digitech between 2013 and 2019 and used Digitech exclusively for its circuit board assembly on cloud-based monitoring temperature services. Prior to 2019, TempTrip order volumes varied from 10,000 to 30,000 units, with the 2019 order being worth just under $100,000 of revenue to Digitech.

[86] However, in 2019, TempTrip decided to substantially increase its demand for circuit boards from Digitech. The CEO of TempTrip, Mr. Curkendall, testified at trial and explained that he was the main point of contact between TempTrip and Digitech, with most of his communication being with Ms. Guo. Mr. Curkendall testified that he recalls a conversation with Ms. Guo about the TempTrip request for substantially increased production (a doubling from $100,000 to $200,000 in sales by Digitech) and that he observed that Ms. Guo had a lack of enthusiasm about being able to meet TempTrip's demands for increased volumes. He was also advised by his team in 2019 that there was an increasing problem with quality control at Digitech (also stating that he did not recall such quality control issues prior to 2019). Although Mr. Curkendall testified that he was unaware of the Accident at the time, he clearly testified that the lack of enthusiasm from Ms. Guo and the new quality control issues led him to decide to cancel the 2019 order with Digitech and to find another supplier. Since that time, TempTrip has placed no further orders with Digitech (even though it has continued to work with suppliers in Canada).

[87] The issue of whether the Accident caused the loss of TempTrip as a customer is a question of past fact that must be proved on a balance of probabilities (although, as I will discuss below, any analysis relating to lost revenue that may have flowed from hypotheticals must be based on the lower "real and substantial

possibility" standard). In my view the evidence does indeed establish on a balance of probabilities that the loss of TempTrip as a customer was a direct result of the Accident. Ms. Guo testified that she did indeed express a lack of enthusiasm in her conversation with Mr. Curkendall, which was consistent with Mr. Curkendall's testimony. Ms. Guo explained that the reason she expressed a lack of enthusiasm was because the TempTrip request for an increased order took place shortly after the Accident and that, due to Mr. Dai's injuries and reduced work capacity at the time, she had doubts about Mr. Dai's ability to meet the increased production demands. She further testified that, before the Accident, Digitech was proactive and would generally complete orders ahead of schedule. However, after the Accident, Digitech was more reactive and had more difficulty meeting deadlines due to Mr. Dai's health and productivity issues.

[88] Ms. Guo's testimony at trial was consistent with Mr. Curkendall's and directly tied her hesitation about accepting TempTrip's increased production demands to her concerns about Mr. Dai's injuries as a result of the Accident. The timing of the Accident also coincided very closely with TempTrip's developing concerns about quality control, which is consistent with Mr. Dai's testimony that the quality of his work declined after the Accident. I also note that Mr. Curkendall testified that he has had no business or personal relationship with Mr. Dai and Ms. Guo since 2019. He therefore had little apparent motivation in his testimony not to be truthful.

[89] Having found that the Accident caused the departure of TempTrip as a customer of Digitech, the next question is whether the departure of TempTrip caused a loss to Digitech (and therefore Mr. Dai). In *Everett v. King* (1981), 34 B.C.L.R. 27, 1981 CanLII 716, aff'd 53 B.C.L.R. 144, 1983 CanLII 705 (C.A.), the Court found that a business loss suffered by a small husband-wife company could also be attributed to the plaintiff husband shareholder:

> [10] The problem before me is somewhat different in that the shares in the company are held equally by Mr. and Mrs. Everett. Does that mean that Mr. Everett's recovery must be limited to 50 per cent of the lost income? I think not. I am not dealing with the respective share holdings of strangers at law but rather with a small husband-wife company. It matters not whether he

> has 99 shares and she has one or whether he has 500 shares and she has 500 shares. They operate a small family business in which everything goes into the family "pot". I hold that in the circumstances of this case the loss sustained by the company was a loss sustained by Mr. Everett. To hold otherwise would, in my view, be contrary to the realities of the situation.

[90] In my view, the rationale in *Everett* is equally applicable in this case. At para. 23, the Court found that the company was organized in such a way that "everything went towards the needs of the family" and "this was a family operation without any breakdown as to what was his and what was hers". I find on the evidence that the same was true with respect to Digitech in this case. Both Mr. Dai and Ms. Guo testified that they were equally invested in growing Digitech, that their respective draws were based solely on need and not a true reflection of income, and that their long-term strategy was to keep as much income as possible in the company for tax purposes. Mr. Dai is therefore entitled to claim any loss suffered by Digitech with respect to the departure of TempTrip as his own personal loss (although subject to the tax implications I will address below).

[91] However, the question of whether Digitech suffered a loss as a result of the departure of TempTrip as a customer is a hypothetical question relating to counterfactual revenue flows and profits to Digitech if TempTrip had remained a customer. It must therefore be assessed in accordance with the "real and substantial possibility of loss" standard and not the balance of probabilities.

[92] In support of his argument, Mr. Dai adduced expert evidence from Nicholas Coleman, a forensic economist, who opined in his report (the "Coleman Report") that, assuming that Digitech had continued to make sales to TempTrip at the same rate as in 2019 (plus inflation) and also continued to maintain all other sales to other customers on the books, Mr. Dai's loss as a result of the departure of TempTrip as a customer could be assessed at $400,464, net of taxes at an assumed rate of 15%, adjusted to $340,394.

[93] In my view, the evidence at trial established that there is a real and substantial possibility that the departure of TempTrip as a customer caused a

financial loss to Digitech. However, it is also my view that the evidence does not support a loss of the magnitude propounded by Mr. Dai, taking into account the likelihood of the assumptions underlying the Coleman Report and the relative weight to be given to applicable contingencies.

[94] With respect to the likelihood of positive contingencies, I note that the assumption in the Coleman Report on the future volume of orders from TempTrip was conservative, in that it tracked off the $100,000 2019 level of orders and not the $200,000 requested by TempTrip moving forward after 2019, which would potentially have driven growth if TempTrip had stayed with Digitech. In addition, I note the evidence that Digitech's automated assembly lines in 2019 were running well under capacity, potentially positioning those assembly lines to meet TempTrip's increased demand for product (subject to the limitations created by the labour component I will discuss below).

[95] However, the likelihood of these positive contingencies is outweighed by more significant negative contingencies and some serious questions concerning the assumptions in the Coleman Report, which in my view point to a much lower assessment of Digitech's (and correspondingly Mr. Dai's) loss. Specifically:

- in a critique report prepared by John Timbol, a forensic accountant (the "Timbol Report"), Mr. Timbol observed that the Coleman Report did not consider the possibility that, as a result of the loss of TempTrip as a customer, Digitech would have had available additional capacity to fulfill orders from other customers. I agree with this common sense observation and note that it is borne out by the evidence, which indicated a substantial increase in revenues at Digitech in the 12 months following the loss of Temp Trip (a growth in revenue of close to $200,000, which is coincidentally very close to the growth Digitech would have enjoyed with TempTrip). Further, Ms. Guo herself admitted that substantial post-Accident growth of their other major customer, New World, allowed Digitech to "fill the gap left by TempTrip". Thus, absent an assumption of unlimited capacity, it would be

artificial and inconsistent with the evidence at trial to assume that none of the lost TempTrip revenues were offset by increased revenues from other customers;

- conversely, I must consider the possibility that if TempTrip had remained as a customer in 2019 and substantially increased their orders, Digitech might have been unable or unwilling (due to a lack of capacity) to accept increased orders from New World at the same time, with the effect that net growth in revenue in 2019 and beyond might not have been much different than what actually occurred. Certainly, there was no documentary or expert evidence adduced by the plaintiff to suggest that the increased New World and TempTrip volumes in 2019 and beyond could have been met by Digitech simultaneously;

- with respect to capacity, Mr. Timbol also correctly observed that the Coleman Report is based upon the speculative assumption that Digitech was on a growth trajectory that would ultimately achieve sales of $1,000,000 per year (as assumption that was neither analyzed nor validated in the Coleman Report itself). However, my concern about this assumption is that it was completely unsupported by evidence, other than the testimony of Mr. Dai and Ms. Guo concerning their subjective belief that this could be achieved. For example, the plaintiff adduced no expert reports, business plans, market studies, financial analysis or even spreadsheets which supported the likelihood of this potential rate of growth. Thus, while I accept that Digitech was indeed growing, I am not convinced that the evidence demonstrated that it would have grown at the accelerated rate assumed in the Coleman Report absent the Accident;

- further, given the fact that Mr. Dai was historically the only employee responsible for production at Digitech, this level of growth is in my view made more improbable in light of the available evidence concerning Mr. Dai's work schedule. Mr. Dai testified that, even before the Accident, he was working full

weekdays and half days on Saturdays (i.e. close to six days a week). Even if the machines at Digitech had additional capacity, the reality is that it appears unlikely there were enough additional days or hours in the week to enable Mr. Dai to virtually double his personal output, without additional labour assistance. Despite this limitation, the evidence was clear (and admitted by Mr. Dai) that Digitech had no concrete plans to hire additional employees to supplement Mr. Dai's productivity prior to the Accident which, as I mentioned above, would have placed a limitation on Digitech's ability to meet the projected high growth in customer demand;

- for the foregoing reason, I find there is a real and substantial possibility that if orders had grown at the rate anticipated by Mr. Dai (i.e. on a trajectory toward $1 million in revenues), Digitech would have been required to hire additional employees, which in turn would have increased costs and potentially negatively affected profitability. In this respect, the Timbol Report correctly notes that the Coleman Report made an allowance only for variable expenses of 10% and not overhead expenses such as additional staff, space and depreciation, which one would have expected to increase with a continued high rate of growth. This in turn would have had the effect of overstating the alleged loss in the Coleman Report; and

- finally, the Timbol Report points out that the tax calculation in the Coleman Report is based upon the lower 15% corporate rate, which in turn was based upon the assumption that the profits would remain in the company and not ultimately be paid out to Mr. Dai. Such an assumption is not in my view consistent with the approach set out in *Everett* above, the fact that Mr. Dai is claiming damages as an individual and not a corporation, nor the evidence that Mr. Dai and Ms. Guo would withdraw money from Digitech as they needed it, in which case it was taxed at higher personal income rates (and not corporate rates) if distributed as wages or as dividends. The Timbol Report opined that the impact of the avoided personal income taxes results in an overstatement of the loss in the Coleman Report by $156,981. However, that

> amount is likely a bit high as it does not take into account the possibility that Mr. Dai might conceivably have been able to defer the withdrawal of at least some income from Digitech until later in life when his own marginal rate would potentially have been lower. An overstatement of $100,000 in the Coleman Report therefore appears more balanced (on the full net amount of $340,000 claimed by the plaintiff).

[96] Taking into account the foregoing, I conclude that the lost TempTrip revenues do not, taken alone, support the quantum of the loss alleged by the plaintiff as a real and substantial possibility. At a minimum, in my view, the alleged quantum must be subject to a significant reduction based upon negative contingencies, questionable assumptions and the lack of key supporting evidence. Having balanced out the various factors, I conclude that a reduction of 50% (from the $400,000 gross income alleged by the plaintiff down to $200,000) is appropriate plus a proportionate reduction for taxation taking into account a balance between individual and not merely corporate rates, resulting in an assessment of $125,000 net of tax.

[97] There is also an alternative method for assessing Mr. Dai's past income loss in this case. In his testimony, Mr. Dai estimated that before the Accident he spent one to one and a half days per week in total doing detailed manual work but, after the Accident, he spends up to a total of two to two and a half days per week to complete the same work. Assuming a six-day work week, this is a loss in productivity of 16.7% (1/6= 16.67%), although as noted above this is not supported by time sheets and is therefore an approximation at best. Using the net revenue for Digitech in 2018 of $259,605 as a baseline, working an additional day per week to complete the same amount of work translates into an annual loss of productivity of $43,276.15 or $173,104.61 for the 4-year period between 2019 and 2022.

[98] The assessed amount must be also be calculated net of income tax: s. 98 of the *Insurance (Vehicle) Act*, R.S.B.C. 1996, c. 231. The defence proposes that the amount should be subject to the highest marginal rate, to account for the fact that Mr. Dai would receive it as income or dividends. Mr. Dai suggests that it is unfair to

apply the highest marginal rate since it is possible that he would have withdrawn the money from the company at a time when he would be subject to a lower rate. In my view, the fair approach is to assess a rate at about the midpoint between the lowest and highest combined federal and provincial rates in BC, which is about 33%. This results in a net loss assessed at approximately $115,000.

[99] Applying the mid point between the two different methods of calculation I have considered above, I assess the amount for past income loss at $120,000.

c. Future Income Loss

[100] In *Honeybourn v. Aghdasidehaji,* 2022 BCSC 258, Justice Blok summarised the recent jurisprudence governing the assessment of damages for future loss of earning capacity:

> [129] The law applicable to loss of future earning capacity was summarized as follows in *Villing v. Husseni*, 2016 BCCA 422:
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> > [17] In order to receive an award for loss of earning capacity, a plaintiff must prove a real and substantial possibility that his or her earning capacity has been impaired: *Perren v. Lalari*, 2010 BCCA 140 at paras. 30-32 [*Perren*]. If the plaintiff has discharged the burden of proof, then the judge must turn to an assessment of damages. The assessment may be based on an earnings approach or a capital asset approach: *Perren* at para. 32. An earnings approach is most appropriate where the loss is more easily quantifiable. In general, a party may be forced to default to a capital asset approach where the loss is not easily quantifiable.
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> [130] In a trilogy of cases, the Court of Appeal recently clarified the law relating to the assessment of future losses of earning capacity: *Dornan v. Silva*, 2021 BCCA 228 [*Dornan*]; *Rab v. Prescott*, 2021 BCCA 345 [*Rab*]; and *Lo v. Vos*, 2021 BCCA 421. In *Rab*, the court articulated a three-step process:
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> > [47] From these cases, a three-step process emerges for considering claims for loss of future earning capacity, particularly where the evidence indicates no loss of income at the time of trial. The first is evidentiary: whether the evidence discloses a *potential* future event that could lead to a loss of capacity (e.g., chronic injury, future surgery or risk of arthritis, giving rise to the sort of considerations discussed in *Brown*). The second is whether, on the evidence, there is a real and substantial possibility that the future event in question will cause a pecuniary loss. If such a real and substantial possibility exists, the third step is to assess the value of that

> possible future loss, which step must include assessing the relative likelihood of the possibility occurring – see the discussion in *Dornan* at paras 93-95.
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> [131] *Rab* states that the first step (i.e. the evidentiary inquiry) gives rise to the four considerations set out in *Brown v. Golaiy* (1985), 26 B.C.L.R. (3d) 353 at para. 8 (S.C.) [*Brown*]. The questions are whether:
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> 1) The plaintiff has been rendered less capable overall from earning income from all types of employment;
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> 2) The plaintiff is less marketable or attractive as an employee to potential employers;
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> 3) The plaintiff has lost the ability to take advantage of all job opportunities which might otherwise have been open to her, had she not been injured; and
>
> 4) The plaintiff is less valuable to herself as a person capable of earning income in a competitive labour market.
>
> [132] In considering the second and third steps set out in *Rab*, hypothetical events are given weight according to their relative likelihood. A hypothetical possibility will be taken into consideration as long as it is a real and substantial possibility and not mere speculation: *Turner v. Dionne*, 2017 BCSC 1905 at para. 316, citing *Athey v. Leonati,* [1996] 3 S.C.R. 458 at para. 27. See also *Dornan* at paras. 93-94.

[101] Turning to the first step in the *Rab* analysis, I find that the evidence discloses a potential future event, namely Mr. Dai's ongoing symptoms from injuries caused by the Accident as described above, that has presently and could in future lead to a potential loss of capacity. In this respect, I note that Mr. Dai continues to experience tinnitus, hearing loss and symptoms associated with the mild traumatic brain injury. Dr. Matta opined that the tinnitus and hearing loss are permanent. Dr. Teja opined that Mr. Dai's future prognosis relating to the mild traumatic brain injury symptoms is uncertain. Taking into account these prognoses, and looking ahead into the future, the evidence supports the conclusion that there is a real and substantial possibility that Mr. Dai will be rendered less capable overall from earning income as a co-owner of Digitech (there was no evidence he has any future intention of seeking employment elsewhere) and less valuable to himself and to Digitech than before the Accident.

[102] With respect to the second step in the *Rab* analysis, there is a real and substantial possibility that Mr. Dai's continued symptoms will continue to cause a

pecuniary loss into the future. In my analysis above concerning past income loss, I concluded that this loss is equivalent to an approximate 16.7% loss of efficiency, which one can anticipate will manifest itself through a loss of revenue at Digitech or an increase in costs associated with the need to hire more help for Mr. Dai to offset that loss of efficiency.

[103] With respect to the third step in the *Rab* analysis, I must assess the value of the possible future loss, which step must include assessing the relative likelihood of the possibility occurring, and applicable contingencies.

[104] Mr. Dai, who is 58 years old, testified that he now anticipates working for another ten years. Mr. Timbol opined that the average age or retirement for self-employed males is 68 years, which dovetails with Mr. Dai's own expectations. In the Coleman Report, the multiplier to be applied up to the age of 68, which accounts for general contingencies, is 5.899. This multiplier was not contested in the Timbol Report.

[105] In my analysis on past income loss, I calculated that, after reductions for negative contingencies, questionable assumptions and lack of evidence, Mr. Dai's annual Accident-related loss of efficiency could be valued at $43,276.15 per year and then netted this amount for income tax. In the context of a future loss of earnings, I will apply the pre-tax amount because such a loss is an assessment and there is no deduction for income tax as there is for past income loss: *Kelly v. Kotz*, 2014 BCSC 1022 at para. 6; *Arnold v. Teno*, [1978] 2 S.C.R. 287. Applying the multiplier of 5.899 from the Coleman Report to age 68 results in a total amount of $255,286 moving forward as a maximum for future income loss.

[106] However, this amount must be adjusted to take into account specific contingencies. I have reviewed some of the key contingencies in my analysis of past wage loss above, which are already taken into account. However, there are certain additional contingencies that I must take into account that are applicable to the future income loss analysis even though not applicable to the past income loss analysis, which in my view merit an additional reduction. Specifically:

- Mr. Dai's long-term medical prognosis is uncertain. With respect to many of the symptoms he experienced immediately after the Accident, many have improved (other than the tinnitus, which has become worse over time). It is therefore plausible that he could experience further improvement of at least some of his symptoms (in particular relating to the mild traumatic brain injury), which would reduce his losses in future. Of course his condition could also worsen or fail to improve, which I must also take into account. Based upon all the medical evidence, it appears to me on balance that the odds of Mr. Dai's symptoms improving are about even with the odds of their deterioration.

- While the loss of TempTrip as a customer clearly had a material impact on Digitech in the short term, it would not be reasonable or fair to assume over the long term that TempTrip would have been a "customer for life". With the passage of time it is reasonable to assume that TempTrip could have been lost as a customer to Digitech for any number of reasons, including finding a better or cheaper supplier, merging with a competitor or even going out of business. The impact of any assessment of loss taking into account the departure of TempTrip thus must diminish over time.

- There is a real and substantial possibility that Digitech may hire additional labour in future to assist Mr. Dai, which could have the impact of offsetting the loss of productivity experienced by Mr. Dai, albeit resulting in an increase in costs. For example, Mr. Dai could decide to take on a more managerial or supervisory role and delegate the tasks requiring fine motor skills and concentration which are most impacted by his injuries. There is a possibility this could limit the direct impact of his injury symptoms on the efficiency and accuracy of the day-to-day manufacturing process, and therefore offset losses of productivity at Digitech.

- Ms. Guo admitted in her testimony that, after the Accident, Digitech has made no effort to find new customers, instead focusing only on servicing existing customers. Ms. Guo testified that the decision not to market or cold call

> potential new customers was due to her concerns about Mr. Dai's diminished productivity but, as noted above, this diminished productivity could have been addressed by hiring more help. Looking to the future, it is reasonable to expect that Digitech will make reasonable efforts to seek out new customers, which, combined with hiring additional labour, could also offset the loss of Mr. Dai's productivity.

[107] Weighing the various contingencies, it is my view that a further 50% reduction of the total amount of $255,286 for future income loss is merited (beyond the reduction I applied for contingencies relating to past income loss). I conclude that an award of $127,643 for future income loss is appropriate.

d. Costs of Future Care

[108] The applicable principles with respect to cost of future care were recently set out in *Quigley v. Cymbalisty*, 2021 BCCA 33 as follows:

> [43] The purpose of the award for costs of future care is to restore the injured party to the position she would have been in had the accident not occurred: *Andrews v. Grand & Toy Alberta Ltd.* (1978), 83 D.L.R. (3d) 452 (S.C.C.) at p. 462; *Gignac v. Insurance Corporation of British Columbia*, 2012 BCCA 351 at para. 29. This is based on what is reasonably necessary on the medical evidence to promote the mental and physical health of the plaintiff: *Milina v. Bartsch* (1985), 49 B.C.L.R. (2d) 33, adopted in *Aberdeen v. Zanatta*, 2008 BCCA 420 at para. 41.
>
> [44] It is not necessary that a physician testify to the medical necessity of each item of care for which a claim is advanced. However, an award for future care must have medical justification and be reasonable: *Aberdeen* at para. 42; *Gao* at para. 69.

[109] Dr. Matta opined that Mr. Dai has permanent hearing loss in both ears that also contributes to increased tinnitus awareness and impacts his ability to communicate. Dr. Matta opined:

> Given Mr. Dai's hearing loss and tinnitus are lifelong conditions, I expect that the annual cost of care will continue for the rest of his life.

[110] Dr. Matta's evidence was uncontradicted at trial.

[111] Dr. Matta recommended the following aids to manage Mr. Dai's condition:

- a receiver-in-the-canal (RITE) hearing aids to provide sufficient amplification;
- a second pair of custom fitted completely-in-canal (CIC) hearing aids to be worn at bedtime; and
- a tabletop generator for the enrichment of auditory background.

[112] Dr. Matta opined that hearing aids have an average life cycle of five years and therefore that Mr. Dai would require a new set of hearing aids every five years.

[113] The average annual cost for the equipment recommended by Dr. Matta is $4,027.20. Mr. Coleman opined in his report that the multiplier from the trial date to the end of Mr. Dai's life expectancy is 19.103. This results in a future cost claim of $76,931.60.

[114] The defence argues that Dr. Matta admitted in cross-examination that if Mr. Dai were to use hearing protection at work, he would advise against using hearing aids, as it might expose Mr. Dai to more noise. I do not see this argument as justifying a reduction in the award. Regardless of Dr. Matta's opinion with respect to the workplace, Mr. Dai has a life outside the workplace and Dr. Matta's advice is clear that Mr. Dai needs the equipment in question to manage his condition in all aspects of his life. He will also need it after his retirement.

[115] The defence further argues in closing that Mr. Dai should use a white noise generator purchased at Best Buy before purchasing the equipment recommended by Dr. Matta. Again, this argument was unsupported by expert evidence and I therefore find it unpersuasive.

[116] The defence further agrees to the following costs: $600 for five audiologist diagnostic assessment (at $120 per session) and $496 for one year of tinnitus treatment/counselling. In my view these costs are justified.

[117] Accordingly, I award costs of future care in the amount of $78,027.60.

V. ORDER

[118] I conclude that Mr. Dai is entitled to the following award of damages against the defendant:

Head of Damage	**Award**
a. Non-pecuniary damages	$110,000
b. Damages for Loss of Past Income	$120,000
c. Damages for Loss of Future Income	$127,643
d. Costs of Future Care	$78,027.60
TOTAL	**$435,670.60**

[119] The award for costs of future care shall be subject to the applicable discount rate under s. 56 of the *Law and Equity Act*, R.S.B.C. 1996, c. 253. The award for loss of future income already incorporates a discount multiplier from an economist and therefore shall be subject to no further discount.

[120] I grant the parties leave to speak to the issue of costs and pre- and post-judgment interest.

"M. Taylor J."