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CANADA / JUDGMENT

## Dhaliwal v. Shao

2019 BCSC 1098

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Supreme Court of British Columbia

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2019 BCSC 1098 Dhaliwal v. Shao

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Dhaliwal v. Shao,

2019 BCSC 1098

Date: 20190529

Docket: S159963

Registry: Vancouver

Between:

Gurinder Singh Dhaliwal

Plaintiff

And

Vivien Shao, Hsiu-Ching Jessie Lu, John Doe, and

Insurance Corporation of British Columbia

Defendants

Before: Master Cameron

Oral Reasons for Judgment

Counsel for the Plaintiff:

S. Ferguson

Counsel for the Defendants Shao and Lu:

H. Rai

Counsel for the Defendant Insurance Corporation of British Columbia:

H. Hwang

Place and Date of Hearing:

Vancouver, B.C.

May 27, 2019

Place and Date of Judgment:

Vancouver, B.C.

May 29, 2019

## Introduction

- [1] With this application filed on May 9, 2019, the plaintiff seeks an order that the jury notice filed by the defendants Vivien Shao and Hsiu-Ching Jessie Lu be struck and the trial set to commence on June 3, 2019, for 15 days proceed before a judge alone. All of the defendants oppose the application.

## Background

- [2] This action arises from a motor vehicle accident that occurred on March 19, 2015. Liability for the accident has been denied by all defendants. The plaintiff filed a Notice of Civil Claim that alleges the following: traumatic brain injury; injury to the head; injury to the neck; injury to the back; injury to the shoulders; injury to the arms; injury to the legs; injury to the ankles; psychological and/or psychiatric symptoms including depression and anxiety; and such further and other injuries as may become apparent through medical reports and examinations, details of which were to be provided as they became known.
- [3] The plaintiff further alleged that as a result of the injuries suffered in the accident he suffers from headaches, nausea, dizziness, and fatigue. He also has memory issues that affect his ability to recollect information, including his memory of the accident. All heads of damage are in dispute, including general damages; past and future loss of earning capacity; past and future loss of housekeeping capacity; cost of future care, and special damages.
- [4] With respect to the alleged traumatic brain injury, a pivotal issue in dispute is whether lesions identified on an MRI of the plaintiff's brain are as a result of the accident or are unrelated to the trauma of the accident.

- [5] The Notice of Trial was filed on December 13, 2017, and on January 3, 2018, the defendant Insurance Corporation of British Columbia filed a notice requesting trial by jury. On January 9, 2018, the defendants Vivien Shao and Hsiu-Ching Jessie Lu filed a notice requesting trial by jury. It is that jury notice that still remains extant.
- [6] The plaintiff has served expert reports from a psychiatrist, Dr. David Koo; a neurologist, Dr. Samuel Yip; a psychiatrist, Dr. Harinath Mallavarapu; a radiologist, Dr. Spencer Lister; an occupational therapist, certified functional capacity evaluator, Edgar Emnacen; an economist, Sergiy Pivnenkoa, and a vocational consultant, Tiffany Chan.
- [7] The defendants have served expert reports from Dr. Andrew Woolfenden, a neurologist; Dr. William Siu, a radiologist; Dr. Jonathan Hawkeswood, a psychiatrist, and a vocational consultant, Clae Willis.
- [8] On January 10, 2018, the defendants served a notice requiring trial by jury on the plaintiff. On April 12, 2019, the defendants paid the initial jury fees in the sum of \$1,500. The balance of the jury fees are due on June 1, 2019.
- [9] In a medical-legal report dated February 20, 2017, Dr. Siu, finds that the plaintiff's imaging is not consistent with the plaintiff having suffered from a traumatic brain injury. In his medical-legal report dated March 8, 2019, Dr. Woolfenden, opines that the plaintiff has a diagnosis of spinal strain injury, neurologic-like symptoms and cryptogenic bilateral cerebral ischemic infarcts. He provides various reasons as to why he believes the plaintiff did not suffer from a mild traumatic brain injury as a result of the accident. He also provides a prognosis and recommendations for future treatment.
- [10] In his medical-legal report dated February 15, 2019, Dr. Lister, attaches an MRI examination report that notes the MRI findings of the plaintiff are consistent with a traumatic brain injury. In his response medical-legal report dated April 11, 2019, Dr. Lister opines that the plaintiff's multiple brain lesions are consistent with a traumatic brain injury from the subject accident.

## The Issues

- [11] The issues to be decided on this application are whether the application may be brought now out of time, and, if so, whether the jury notice ought to be struck.

## The Law

- [12] Rule 12-6 of the Supreme Court Civil Rules, B.C. Reg 168/2009, provides a party may require a trial to be heard by a jury by filing and serving a jury notice. Subrule 12-6(5) describes the basis upon which an application may be brought to strike a jury notice.
- (5) Except in cases of defamation, false imprisonment and malicious prosecution, a party on whom a notice under subrule (3) has been served may apply

- (a) within 7 days after service for an order that the trial or part of it be heard by the court without a jury on the ground that
  - (i) the issues require prolonged examination of documents or accounts or a scientific or local investigation that cannot be made conveniently with a jury,
  - (ii) the issues are of an intricate or complex character, or
  - (iii) the extra time and cost involved in requiring that the trial be heard by the court with a jury would be disproportionate to the amount involved in the action, or
  - (b) at any time for an order that the trial be heard by the court without a jury on the ground that the trial relates to a fast track action or to one of the proceedings referred to in subrule (2).
- [13] Rule 22-4 provides that the court may exercise its discretion to extend the time within which this or any application may be brought.

Should the time be expended within which this application may be brought

### The position of the parties

- [14] The plaintiff submits that the considerations that should be taken into account in exercising the discretion pursuant to Rule 22-4 to extend the time limit to apply to strike the jury are set out in *Wallman v. Insurance Corporation of British Columbia*, 2012 BCSC 1849, a decision of Mr. Justice Willcock, as he then was. His Lordship said:
- [38] The parties acknowledge that it is the original jury notice that must be considered in determining whether the application to strike the jury is brought in time. Where that time has passed, the judicial discretion to extend time limits afforded in what is now Rule 22-4, formally Rule 3(2), should be exercised where:
- (a) at an early stage of the proceedings, the plaintiff formed an intention to strike the jury notice;
  - (b) there has been such a change in circumstances as to materially alter the character of the proceedings and render them clearly inappropriate for trial by judge and jury; or
  - (c) trial fairness so requires reconsideration of the mode of trial that the lapse of time cannot bar the motion to strike.
- [39] In support of that description of the criteria I rely on *Reischer v. Love*, 2005 BCSC 1352; *Harder v. Nikolov*, 2001 BCSC 1101, and *Gulamani v. Chandra*, supra. These criteria permit the jury notice to be set aside where the failure to apply was due to inadvertence, where there was always an intention to apply, where the facts have substantially changed and the applicant cannot fairly be required to have applied earlier, where the interests of justice speaks strongly in favour of trial by judge alone.

[*Gulamani v. Chandra*, 2009 BCSC 1042]

- [15] Counsel for the plaintiff was candid on this application that there was a lengthy delay in bringing this application from January 2018, when the jury notice was delivered, until the setting of the application in May of 2019. He submitted it was not until his consulting radiologist, Dr. Spencer Lister, provided his rebuttal report to that served by the defendants' consulting neurologist, Dr. Siu, that he fully and completely recognized and appreciated that this case was simply too complex for a jury. Accordingly, it cannot be maintained that at an early stage of the proceedings the plaintiff formed an intention to strike the jury notice.
- [16] The second consideration is whether there has been such a change in circumstance as to materially alter the character of the proceedings and render them clearly inappropriate for trial by a judge and jury. Plaintiff's counsel relies on the development of the medical evidence to submit that there has been a change in circumstances in this case. Counsel for the defendants say there has been no change and that the central issue on damages; that is, whether the plaintiff has suffered a traumatic brain injury resulting from the motor vehicle accident, has been known from the outset of the proceedings. I am not satisfied that the plaintiff has made out any material change in the character of the proceedings. All that has changed is the development of the expert medical evidence that will be relied upon at trial by all parties. That is a common feature in almost all personal injury litigation.
- [17] The last factor for consideration in the application to extend the time to apply to strike the jury notice is trial fairness. The plaintiff submits that the complexity of the evidence on whether there is a traumatic brain injury referable to the accident is too much for a jury to fully understand, digest, and that to leave this issue to a jury would be unwise in the interests of justice. The defendants submit that the jury will be entirely capable of assessing a case of this complexity, and that the plaintiff has overstated the nature of the inquiries the jury will be required to undertake in this case. In addressing this factor, I note that the defendants do not point to any actual prejudice in their preparation for trial due to the lateness of this application. And while it ought to have been brought sooner than it was, I am of the view that the issues in the case are of sufficient complexity that it is in the interests of justice and to ensure trial fairness that the application be addressed on its merits. Accordingly, the plaintiff is granted relief under Rule 22(4) for the extension of time to apply to strike the jury notice.

Should the jury notice be struck - the governing principles

[18] Returning to Wallman:

- [42] A trial by judge and jury is a presumptive right, affirmed by the Court of Appeal in *Cochrane v. Insurance Corp. of British Columbia*, 2005 BCCA 399. It is only where the applicant opposing the jury trial has satisfied one or more of the exceptions set out in what is now Rule 12-6(5) that the jury notice may be struck. To review the Rule, 12-6(5) permits a judge to strike the jury notice where the applicant has established:

- (1) the issues require a prolonged examination of documents that cannot be made conveniently with a jury;
  - (2) the issues require a prolonged examination of accounts that cannot be made conveniently with a jury;
  - (3) the issues require a scientific investigation that cannot be made conveniently by a jury; or
  - (4) the issues are of an intricate or complex character.
- [43] The fact the materials in evidence are lengthy does not necessarily mean that a prolonged examination of them is required. The common experience is that in most cases, hospital, medical, or accounting records, having been made an exhibit, play very little role in the proceedings. That was a finding of the Chief Justice in *Wipfli (Guardian ad litem of) v. Britten* (1981), 32 B.C.L.R. 343 (S.C.). To determine whether a prolonged examination will be required by the trier of fact, the court must consider carefully what the evidence will actually be: *Guichon v. Johnston*, [1998] B.C.J. No. 2643 (S.C.).
- [44] When a prolonged examination or scientific investigation will be necessary, the court must then turn to the second part of the test: whether or not that examination can be made conveniently with a jury. The test is not whether the examination can possibly be effected by a jury. It incorporates the concept of convenience. Convenience in this context includes the ability of a jury to both understand evidence and retain that understanding such that a fruitful analysis will be possible by the end of the trial.
- [45] The ground for striking a jury notice in Rule 12-6(5)(a)(ii) requires the court to consider whether the issues are of intricate or complex character. The combination of many issues may make them sufficiently complex that the matter should be tried without a jury: *Yewdale v. Insurance Corp. of British Columbia* (1994), 1 B.C.L.R. (3d) 278 (S.C.).

...

- [47] In another personal injury case arising out of a motor vehicle accident set for 25 days, *Cliff v. Dahl*, 2012 BCSC 276, Madam Justice Bruce held, at para. 42:

...the onus rests with the applicant to demonstrate, if there will be a need for prolonged examination of documentary evidence, that it is inconvenient for the jury to do so in this particular case. As the court said in *Gulamani*, the mere fact that there will be a need for a prolonged examination of documents does not automatically lead to a conclusion that it will be "inconvenient" for a jury to do so. The question is whether a jury can be made to understand the evidence and to retain this understanding until the end of the trial.

...

- [48] The fine line between cases that can be heard by civil juries and those regarded as too complex or requiring scientific investigations that cannot be conveniently conducted is drawn in the narrow space between the decisions of this court in *Gulamani* and *Reischer*. In

Reischer, the plaintiff had been involved in a series of motor vehicle accidents, two of which gave rise to the proceedings to be heard by the jury. The plaintiff claimed the first caused concussion, a head injury, loss of consciousness, soft-tissue injuries, shock, nervous upset, and emotional trauma, all leading to a loss of past and future income-earning ability. The second accident occurred three-and-a-half years later. It was said to have caused flexion/extension injury and pain causing headaches, sleep deprivation, and causing or contributing to the loss of past and future income. Liability was in issue. The trial, as I have noted, was set for 15 days. The contentious issues included causation, contributory negligence, and assessment of physical and psychological injury, pre-existing causes, economic loss, and the credibility of the plaintiff. The plaintiff described the issues as so intricate or complex that a jury would find them difficult to understand. The evidence included voluminous hospital records, 500 scanned images, seven or eight medical-legal reports, vocational, engineering, and economic reports, and the testimony of most experts at trial.

[50] At para. 54 of Reischer, the court declined to strike the jury notice and concluded:

Upon consideration of the pleadings, the expert reports filed in connection with these applications and counsels' submissions, I am not persuaded that the issues cannot "conveniently" be determined by a jury, or that the issues are of such an intricate or complex character that the defendants should be denied that right. Rather, I am satisfied that although the issues are somewhat intricate and complex the examination of the documentary evidence and consideration of the expert testimony to be led in connection with the nature, extent and cause of the plaintiff's alleged injuries can, with proper direction, be made conveniently with a jury.

[51] The court found that a jury would be sophisticated enough, with the assistance of counsel and a judge, to comprehend the evidence, retain an understanding of it, and apply it in analysis. In Gulamani, Madam Justice Arnold-Bailey held at para. 43:

In my view, the point to be drawn from Reischer is clear: juries in this province are held to be informed and intelligent and capable of assessing expert evidence where it is properly presented. In other words, the threshold for determining whether a prolonged examination of documents or a scientific investigation is necessary and whether it can be conveniently done by a jury... or whether the issues are of a complex or intricate nature... is relatively high even in the context of a long trial with many difficult legal questions.

[19] The case considered in Gulamani was described in para. 45:

... in the present case, a great volume, primarily of medical records, but also accounting records, will be submitted into evidence. This will likely be comprised of several thousands of pages and the specific nature of these records will indeed involve a prolonged examination. They go far beyond the category of hospital records and procedure manuals that McEachern C.J.B.C. referred to in Wipfli. The medical evidence will stem from the 20 medical/legal reports to date, with perhaps a half dozen or more to come, and, at a minimum, 22 or 23 expert witnesses. Among the physicians and medical specialists are neurologists, thoracic surgeons with a special expertise in

thoracic outlet syndrome, rheumatologists, orthopaedic surgeons (including ones with special expertise in shoulders), chronic pain specialists, psychiatrists and physiatrists. Other experts include psychologists, kinesiologists, chiropractors, vocational counsellors, and functional capacity evaluators. A review of the medical/legal reports filed to date indicates a considerable range of opinions, amongst the medical specialists in particular, as to the correct diagnosis, and the extent of and preferred treatment options for the various injuries and conditions that the plaintiff claims arose from the first accident, and then were exacerbated and augmented by injuries sustained in the second accident. There is no question in my view that the nature of the examination that must be carried out by the trier of fact of these documents, reports and accounts may not be done "conveniently" by a jury, attributing to that word its proper legal meaning.

[20] The legal issues in that case were also described as very complex. At para. 50, the court held:

[50] In addition, the legal issues presented by this case are likely to be exceedingly complicated. I agree with the submission made on behalf of the plaintiff that the law related to the issue of causation in this case, including the interjection of the defence of novus actus, is very complex even for those trained in law. Assessing the quantum of damages under the various heads claimed and apportioning damages as between the two sets of defendants is likely to be an exceedingly difficult and complex task.

For those reasons the jury notice was set aside in *Gulamani*.

[21] In *Moll v. Parmar*, 2012 BCSC 1915, Mr. Justice Abrioux, as he then was, said, in quoting from *Gulamani* at para. 34:

[29] To determine whether a prolonged examination would be required by the trier of fact, rather, the court must consider more carefully what the evidence will actually be. *Guichon v. Johnston*, [1998] B.C.J. No. 2643 (S.C.), exemplifies this type of analysis. In that case, the plaintiff was a passenger in the defendants' uninsured motor vehicle, and when it was involved in an accident he allegedly suffered a brain injury. At para. 23 the court noted firstly that it is not sufficient to "state simply that a jury will be obliged to consider medical or scientific evidence in order to set the jury notice aside." There were at least three medical experts involved in the case who collectively administered dozens of tests and wrote several reports. Master Baker turned to analyze the specific evidence in these reports that would likely be put to a jury in that case. That evidence included "complex, multi-faceted [sic] and not easily or lightly considered or understood" medical perspectives on brain injuries, as evident in two quotes from one expert report that Master Baker included by way of illustration:

. . . Cytotoxic processes (processes causing cell damage) include the release of free oxygen radicals, particularly the highly reactive hydroxyl radical, lipid peroxidation of cell membranes, opening of ion channels to influx of calcium, release of cytokines and metabolism of free fatty acids into highly vasoreactive substances that may cause vasoconstriction (blood vessel constriction) and ischemia (reduced oxygen supply to the tissues). Such processes may also be

interruptible by mechanism-specific therapeutic agents such as lipid antioxidants, calcium channel blockers, and glutamate (i.e., a neurotransmitter) receptor antagonists. . .

"Systemic" factors that may cause "secondary insults" to the injured brain include hypoxemia (i.e., low blood oxygen concentration) arteriolar hypotension (i.e., low pressure within the smaller arterial blood vessels), hypercarbia (i.e., high blood carbon dioxide concentration), severe hypocarbia (i.e., low blood carbon dioxide concentration), pyrexia (i.e., fever), hyponatremia (i.e., low blood sodium concentration), anaemia (i.e., low blood haemoglobin concentration (haemoglobin is the protein in the red blood cells that carries oxygen), and diffuse intravascular coagulopathy (i.e., a process in which there is a derangement in the clotting process).

[30] Given the nature of that evidence, it was found that a prolonged examination would be necessary.

[22] Later in his judgment, Mr. Justice Abrioux said:

[45] In my view, there can be little doubt that the issues in this case will require a prolonged examination of documents or accounts or a scientific or local investigation. The plaintiff presents two alternative theories, the first being whether the accident caused an organic brain injury, which is scientifically complex. The reports of the neuroradiologist attest to this.

...

[48] I have reviewed the various authorities to which I was referred by counsel. They indicate, in my view, that cases such as this which involve allegation of traumatic brain injury are not, as is submitted by counsel for the plaintiff, "routinely" heard by judge with a jury. Whether they are or not will depend on a close examination of the facts and circumstances in each case.

The positions of the parties

[23] Plaintiff's counsel submits that the case is complex and highlights the following matters:

11. The total number of pages of medical documents that have been exchanged in the action, including expert reports, totals approximately 1,334 pages.
12. As a result of the Plaintiff's memory issues, numerous medical and treatment providers will be called to testify. It is expected...there will be evidentiary issues pertaining to out of court statements, that the Plaintiff will seek to tender for the truth of their contents. It is also expected that a disproportionate number of the medical records will be sought to be entered into evidence and put before the trier of fact.

13. Liability for the Accident is in dispute. The Defendant Shao alleges that the Accident was caused primarily by an unidentified motorist. The Plaintiff currently has little to no memory of the Accident. It is expected that the Plaintiff's evidence about the Accident will come from out of court statements and notes, which the Plaintiff will seek to enter into evidence for the truth of their contents.
14. If the Defendant Shao's evidence is accepted on liability, it is expected that the jury will have to apportion liability between the parties, including the unidentified motorist.
15. If the trier of fact reaches a decision that an unidentified motorist is liable for the Accident, they will have to determine whether the Plaintiff made all reasonable steps to ascertain the identity of the unidentified motorist and complied with the statutory requirements in section 24 of the Insurance (Vehicle) Act.
16. The medical reports that have been served are of a scientific and complex nature. In particular the reports of Dr. Lister, Dr. Siu and Dr. Woolfenden, which pertain to the MRI imaging and the causation issue for the Plaintiff's alleged traumatic brain injury. These reports involve interpretations of the MRI imaging and involve interpreting highly technical and scientific terminology. Causation for the lesions on the MRI is a central issue in this action.

[24] Counsel for the defendant submits that:

13. It has been recognized that juries are capable of understanding, retaining and analyzing expert evidence about scientific or technical matters.

#### **Fanson v. Caldarella, 2014 BCSC 853 at para. 15**

14. A jury does not need to understand over 100 diagnostic tests performed by experts who may be called to testify at trial. No trier of fact, judge or jury, is required to have this level of understanding. What is required is that the jury have an understanding of the basis for an opinion, in other words its foundation, and an ability to weigh that opinion against other conflicting opinions on the same point.

#### **Rados v. Pannu, 2015 BCSC 453 at para. 51**

15. The jury should not be required to carefully review volumes of clinical notes. Clinical records are admissible for limited purposes and only in defined situations. While a given trial may involve a large number of documents, it is not always necessary for the trier of fact to examine each and every one of them. Whether a "prolonged examination of documents" will be necessary will not be determined by a page count, but rather by the content of the documents and whether the issues in the trial will require the jury to pour over the content in detail.

Samuel v. Chrysler Credit Canada, 2007 BCCA 431

**Jackson v. Yusishen, 2013 BCSC 1982 at para. 7**

- [25] Counsel for the defendant also relies on *Henshall v. Plona*, 2012 BCSC 1852. This matter involved a 25-day trial and involved 32 expert reports and 22 lay witnesses. Expert evidence established the plaintiff sustained multiple instances of head trauma before the accident, which complicated the determination of causation. As a result of the collision, the plaintiff claimed he had suffered from a traumatic brain injury, chronic pain, and psychological disorders. The court found that the applicant had failed to satisfy that the jury notice should be struck based on the grounds provided in Rule 12-6(5)(a).
- [26] In *Donaldson v. Dorworth*, 2017 BCCA 236, the plaintiff had complained of a variety of symptoms after a motor vehicle accident, and was seen by at least 18 medical practitioners. In that case competing and overlapping diagnoses were offered by various doctors, including conversion disorder, functional movement disorder, major depressive disorder, neurocognitive disorder, and personality disorder, adjustment order with anxiety, somatic symptom disorder, factitious disorder, and hypochondriasis. The plaintiff in *Donaldson* argued that the subject conversion disorders was one that was too difficult for a jury to decide and a jury would not be able to understand or retain the medical evidence adequately, as there were some unusual features of the plaintiff's damages claim, including opinion evidence of the medical reports that described the plaintiff as presenting polar opposite diagnoses and prognoses. The judge disagreed and held that with a modest amount of supplementary explanatory assistance by the experts in their evidence in chief, the expert reports could be understood by the jury, and the decision was upheld on appeal.

**Analysis**

- [27] In my view, this case will require a prolonged examination of documents and a scientific investigation. Having said that, the number of experts who will be relied upon by the parties and the length of the trial itself does not make this case inconvenient for a jury to hear and decide fairly. The pivotal issue in this case is whether lesions identified on an MRI of the plaintiff's brain are as a result of the accident or unrelated to the trauma of the accident. I have reviewed the expert reports of Drs. Lister and Siu, the two neuroradiologists who will offer opposing opinions on this critical issue.

- [28] On September 10, 2015, Dr. Lister reported on his MRI examination of the plaintiff and said:

**MRI Examination Report****Clinical History:**

Post motor vehicle accident, rear-ended. Now has persistent headaches.

**Technique:**

Multisequence multiplanar MR images of the head and cervical spine were obtained at 1.5T.

MRI Head:

Findings:

No intracranial mass is demonstrated.

Several focal areas of abnormal increased signal intensity are demonstrated on T2-weighted sequences within subcortical and deep cerebral white matter bilaterally.

Several well-defined focal areas of gliosis/vacuolization of white matter are demonstrated in the superior corona radiata and adjacent periventricular white matter bilaterally. Some areas of blooming decreased signal intensity are demonstrated in these locations as well on gradient echo sequences, consistent with remote previous hemorrhage.

No cortical infarcts are demonstrated.

The cerebral ventricles are unremarkable.

Impression:

Multiple foci of abnormal increased signal intensity are demonstrated within cerebral white matter bilaterally with associated regions of vacuolization and remote hemorrhage in the superior corona radiata and adjacent periventricular white matter bilaterally.

The findings are consistent with traumatic brain injury.

[29] Dr. Siu in his report dated February 20, 2017, said, inter alia, reading from page 305:

b) MRI Brain Scan, September 10, 2015, Access MRI

This scan was performed 6 months after the MVA. Mr. Dhaliwal was 27 years old at the time of this scan.

The brain images consisted of Sagittal T1, axial T2, axial FLAIR, axial gradient echo, axial susceptibility weighted imaging, coronal FLAIR and coronal T1 sequences.

Again seen were lesions in the right and left caudate and lentiform nuclei, unchanged compared with the previous CT scan. These lesions have central fluid signal with surrounding rim of T2 hyperintensity (i.e. brightness), typical in appearance for old lacunar infarcts.

Two tiny T2 hyperintense lesions are also noted in the right frontal subcortical white matter, measuring less than 3 mm in size.

There was no evidence of any hemorrhage or hemosiderin in these lesions or elsewhere in the brain. (Hemosiderin is a chronic break-down product of hemoglobin deposited in the brain from previous hemorrhage. Brain hemorrhage can be seen in infarcted or injured brain tissues. The SWI and gradient echo sequences are highly sensitive in detecting the presence of hemosiderin.)

No focal abnormality was seen in the central or deeper portions of the brain, such as the corpus callosum, brain stem or cerebellum.

The left lateral ventricle again showed mild ex vacuo dilatation due to the adjacent lacunar infarcts. The rest of the cerebrospinal fluid containing ventricles and extra-axial spaces were within normal limits with no evidence of post-traumatic encephalomalacia or generalized brain atrophy. No extra-axial hematoma or abnormal fluid collection was detected. No brain herniation was present.

[30] At page 306:

The CT and MRI scans of Mr. Dhaliwal's brain, performed 5 and 6 months respectively after the MVA, showed several lesions in the basal ganglia structures of the right and left cerebral hemispheres, namely the caudate and lentiform nuclei. These lesions have typical CT and MRI features of old lacunar infarcts. Lacunar infarcts occur due to blockage of tiny blood vessel[s] supplying these structures and not due to an embolic process.

These lacuna infarcts likely developed at least 6 months or longer, prior to the initial CT scan, and likely predated the MVA.

[31] From paras. 13, 14, and 15 on pages 307 and 308 of the report:

During the MVA, Mr. Dhaliwal's car was rear-ended. One type of brain injury that can be sustained from an acceleration-deceleration impact is brain contusion (i.e. brain bruising). Brain contusion injury occurs as the brain impacts onto the inner surfaces of the bony skull, in a coup-contra coup distribution. In the acute phase (days to weeks), the bruised brain would swell and may contain visible hemorrhage. Over time (months to years), the bruise brain would undergo permanent focal tissue loss (i.e. scarring) as the damaged brain tissue is not capable of repair. The damaged scarred brain tissue is termed post-traumatic encephalomalacia. The encephalomalacia would be visible as an area of focal loss of brain volume with abnormal signal on T2 weighted sequences and may or may not contain molecules of hemosiderin. No post-traumatic encephalomalacia was evident in Mr. Dhaliwal's brain.

Another type of traumatic brain injury is diffuse axonal injury (DAI). DAI is caused by a rotational shear force in which the gray matter on the surface of the brain moves at a different velocity to the deeper white matter due to difference in the densities of the tissues, resulting in disruptions (i.e. shear injury) of the axonal processes of neurons. DAI lesions are most commonly found at the junction of the gray and white matter in the cerebral hemispheres. More severe DAI injury can result in shear lesions in deep structures, such as the corpus callosum and brainstem. DAI can cause shear hemorrhages, as tiny blood vessels (capillaries) are also torn with the axons of the nerve cells.

The CT and MRI Head scans did not show any lesions in Mr. Dhaliwal's brain that are characteristic of diffuse axonal injury. In other words, the lesions that were found in his brain are unlikely to be due to diffuse axonal injury.

[32] In a rebuttal report dated April 11, 2019, Dr. Lister took issue with Dr. Siu's primary conclusions and said in paras. 4 and 6 at page 133:

I agree with Dr. Siu's opinion (IV., at paragraph 3 of his report) that the, "...lesions have typical appearance of old lacunar infarcts, appearing as 'holes' in the brain, with mild ex vacuo dilatation of the left frontal horn," however, I would add that these lesions also have a typical appearance for traumatic axonal injury and post-traumatic encephalomalacia. There is substantial overlap in the appearance of lunar infarcts in post-traumatic encephalomalacia.

I agree with Dr. Siu's comment in paragraph 4 of his report, "No other brain abnormality was seen. There was no evidence of post traumatic encephalomalacia secondary to previous contusion injury. No hemorrhage or hematoma was identified. No herniation (i.e. abnormal shift of brain tissue within the various intracranial compartments) was present. No bony fracture was seen in the face or skull," however, I would add that there is evidence consistent with post-traumatic encephalomalacia due to axonal injury (rather than contusion). There is substantial overlap in the appearance of lunar lacunar infarcts and post-traumatic encephalomalacia. The abnormalities Dr. Siu identifies in IV. a), paragraph two of his report, when viewed in isolation, have a typical appearance for lunar infarcts but are also consistent with the encephalomalacia related to a traumatic brain injury.

[33] Lastly from paras. 10, 11 and 12 at page 134 of Dr. Lister's report:

I disagree with Dr. Siu's comments in paragraph 5 of his report. There was no evidence of any hemorrhage or hemosiderin in these lesions or elsewhere in the brain. The lesion in the left corona radiata and left nucleus (lesion 5 in the Table of Lesions in Appendix B) shows linear blooming decrease signal intensity on susceptibly weighted images consistent with hemosiderin/previous hemorrhage.

I disagree with Dr. Siu's comments in paragraph 7 of his report, "The left lateral ventricle again showed mild ex vacuo dilatation due to the adjacent lacuna infarcts," in that his comment concludes that the lesion responsible for ex vacuo dilatation as a lacunar infarct. It is a lesion with encephalomalacia and perilesional increase signal on T2-weighted sequences. If viewed in isolation from other evidence, it has features consistent with a lacunar infarct but could also be a related traumatic brain injury.

I disagree with Dr. Siu's comment in paragraph 7 of his report, "The rest of the cerebrospinal fluid containing ventricles and extra-axial spaces were within normal limits with no evidence of post-traumatic encephalomalacia or generalized brain atrophy in that the lesions in the right and left caudate nuclei which extend into adjacent white matter (lesions 5 and 6 in the Table of Lesions in Appendix B) are consistent with and could be due to post-traumatic encephalomalacia.

[34] These conflicting opinions are the central issue on damages in this case and by virtue of their nature and content are fairly described in my view as "complex, multifaceted, and not easily or lightly considered or understood". To fully understand this evidence, the trier of fact will need to be able to ask questions of these experts and assimilate their answers carefully to reach a reasoned conclusion on whether the plaintiff sustained a traumatic brain injury. Even with the guidance and assistance of the trial judge, it will be a difficult task for a jury to retain a clear understanding of this technical medical and scientific

evidence through this 15 day trial while also dealing with the other issues on liability and quantum. I find it would not be convenient for the jury to do so as that term is defined in the governing authorities. In the result, I direct that the trial of this action be with a judge without a jury.

### Costs

[35] The plaintiff was successful on his application and is entitled to costs; however, the plaintiff was very late in bringing his application, such that the defendants paid the jury deposit of \$1,500 on April 12, 2019. This application should have been brought before the deposit was due, and as such if that deposit is not refundable to the defendants, the plaintiffs must reimburse the defendants for this amount.

"Master Cameron"

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