
CANADA / JUDGMENT

Gao v. Yeung

2021 BCSC 693

COURT

Supreme Court of British Columbia

DECIDED

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2021 BCSC 693 Gao v. Yeung

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Gao v. Yeung,

2021 BCSC 693

Date: 20210415

Docket: M1610116

Registry: Vancouver

Between:

Fei Gao

Plaintiff

And

Ka Yeung

Defendant

Before: The Honourable Madam Justice Lyster

Reasons for Judgment

Counsel for the Plaintiff:

C.J. Chak

D. Yee

Counsel for the Defendant:

R.V. Gunnarsson

Place and Date of Trial:

Vancouver, B.C.

October 19-22, 2020

Place and Date of Judgment:

Vancouver, B.C.

April 15, 2021

Table of Contents

Introduction.. 3

Facts. 3

Plaintiff Lay Evidence. 3

Treatment History. 8

Expert Evidence. 10

Dr. Peter Zakardas. 10

Dr. Paul Marks. 13

Summary of Oral Ruling with Respect to Dr. Marks' Addendum Report 14

Analysis. 17

Findings with Respect to Expert Evidence. 17

Causation. 18

Credibility and Reliability of Mr. Gao. 19

Non-pecuniary Damages. 21

Cost of Future Care. 26

Conclusion.. 28

Introduction

- [1] Mr. Fei Gao was the passenger in a vehicle driven by Mr. Ka Yeung on January 4, 2015. They were travelling from Calgary to Vancouver westbound on Highway 1 near Revelstoke in snowy and icy conditions when Mr. Yeung lost control of the car, which went off the highway down a 30 to 40 foot embankment, overturning and landing on its roof under an underpass (the "Accident"). Fortunately, Mr. Gao was able to walk away from this serious Accident.

- [2] Liability is admitted. There is no dispute that Mr. Gao fractured the fifth metacarpal of his right hand in the Accident. It is also undisputed that Mr. Gao suffered soft tissue injuries to his neck, shoulder and lower back which resolved within a few weeks. The chief factual matter in dispute between the parties is whether the Accident also caused Mr. Gao to suffer a thoracic disc protrusion or herniation at the T7-8 level and bilateral rhomboid myofascial injury with scapular crepitus, resulting in chronic pain in his mid and upper back.
- [3] Mr. Gao claims non-pecuniary damages and damages for the cost of future care. There is no claim for past wage loss or loss of future capacity. The defendant accepts that Mr. Gao is entitled to non-pecuniary damages, but denies any claim for the cost of future care. The parties have agreed to the amount of special damages.

Facts

Plaintiff Lay Evidence

- [4] Mr. Gao was 23 years of age at the time of the Accident, and was 29 years old when he testified at trial. He has been married since 2013 to his wife, Wei Wei, who also testified. They have three young children, born in 2013, 2014 and 2020. They live together in Richmond.
- [5] Mr. Gao is originally from China, and moved to Canada with his family of origin in 2007. He took ESL classes after he arrived in Canada. He gave most of his evidence through an interpreter.
- [6] Prior to the Accident, Mr. Gao was very healthy and had not suffered any injuries. He went to the gym to do weight training and cardio activities regularly, and enjoyed playing badminton several times a week. He is self-employed as a business person.
- [7] At the time of the Accident, Mr. Gao was seated in the front passenger seat of Mr. Yeung's Toyota 4Runner. He was wearing his seat belt. He was sleepy and dozing off. He woke up as the car was going over the embankment and rolling over. The car landed on its roof.
- [8] Mr. Gao's memory of the Accident is limited. He may have lost consciousness for a few seconds. He was very frightened, dazed, dizzy and shocked. He was able to get out of the car on his own and then helped pull his friend Mr. Yeung from the driver's seat. He called the police, and once they arrived at the scene, the police called for an ambulance.
- [9] Immediately after the Accident, Mr. Gao felt pain all over his body, especially his back and neck. The side of his mouth was bleeding, as was his right hand. Mr. Gao is right hand dominant.

- [10] Mr. Gao and Mr. Yeung were transported by ambulance to the Queen Victoria Hospital in Revelstoke. Mr. Gao was examined and treated for bleeding at the hospital and was discharged. Mr. Yeung was admitted to hospital, and transferred the following day to the Kamloops hospital. Mr. Gao accompanied Mr. Yeung to Kamloops, where his cousin picked him up and took him to his home in Richmond.
- [11] Mr. Gao was continuing to experience pain and was having difficulty moving. His hand was very uncomfortable, and he was not able to lift anything. He saw his family doctor, Dr. Charles Jiang, on January 7, 2015, to whom he reported neck, shoulder and lower back pain. His right hand was in pain and swollen. Dr. Jiang sent him for an x-ray of his hand, which revealed that the fifth metacarpal was fractured.
- [12] Mr. Gao was referred to Richmond Hospital for rehabilitation and treatment of his hand. Initially, his hand was splinted and wrapped. It was then put in a cast, which he wore for approximately three months. He also received physiotherapy on his hand. According to a radiology report dated June 18, 2015, the proximal fifth metacarpal shaft fracture had healed, with mild residual deformity.
- [13] Mr. Gao's initial pain in his neck, shoulder and lower back resolved within two or three weeks. At this point, he was focussed on the pain in his hand. Under cross-examination, however, he testified that he could continue to feel sensation in his back. Mr. Gao testified in cross-examination that it was around two to four months after the Accident that the pain became concentrated in his mid and upper back. He testified that there was no particular event that happened after the Accident that triggered the mid and upper back pain.
- [14] At the time of trial, Mr. Gao testified that the main problems he was continuing to experience were with his hand. He said he feels something protruding from his hand where it was fractured. He said that he still could not lift things and had no strength in his hand. It is hard for him to help out around the house, such as taking out the garbage or lifting things when shopping. Mr. Gao used to play badminton, but says he has not been able to play since the Accident. He is right hand dominant, but his left hand is now stronger than his right, and he tries to use it most of the time.
- [15] Mr. Gao testified that his upper back remains very uncomfortable if he sits too long, and he needs to stand up and stretch every 20 minutes or so. When he stretches, he hears a cracking sound in his back. Mr. Gao also testified that his upper back is very uncomfortable when he gets up in the morning, and it takes five minutes before he is able to engage in the normal activities of self-care. In the morning, the pain can be 8 out of 10. He says that he has a sort of pain or pressure when he takes a deep breath. He also feels pain when he lies down at night, and it takes him five minutes to find a comfortable position to lie in.
- [16] Mr. Gao testified that he has a hard time lifting any of his children. His eldest was born in 2013. He liked to have a lot of interaction with her when she was little, carrying her and playing piggyback, but he was not able to do that after the Accident. He says that his daughter was unhappy with his inability to still do those activities with her. Mr. Gao's second

daughter was born less than a month before the Accident, and he could not carry her because of his hand. He could carry her if he forced himself, but it was difficult. His second daughter has a very different personality from his first daughter--isolated, reserved and irritable. He does not have as good a relationship with his second daughter as his first. He attributes their poorer relationship and her personality attributes to his inability to interact with her in the same way he could interact with his first daughter. Mr. Gao's youngest child, a son, was only four months old at the time of trial. Mr. Gao testified he is not able to carry him often because it is difficult for him.

- [17] I accept that Mr. Gao's ability to pick up his children and play with them has been negatively affected by his injuries. However, I find his evidence that his relationship with his second daughter or her personality was affected by the Accident speculative, and I am unable to find that any difficulties with his second daughter were caused by the Accident.
- [18] Mr. Gao testified that his relationship with his wife suffered after the Accident. She had just had their second child, and he was unable to help her with the baby. He was wearing a splint or cast on his hand for about three months, so he could not help his wife. It continued to be very hard on them for about a year. His injuries affected their intimate relationship. Before the Accident, they would be intimate in the mornings, but since the Accident his back is painful for the first five minutes, and once he has stretched, the mood is no longer there. When they are intimate, he is somewhat restricted in what he can do physically.
- [19] Mr. Gao had to rely on his wife because he could not do a lot of things. He could not drive for almost a year, so she had to drive him to hospital, chiropractic or other appointments. Once he started to drive, Mr. Gao remained afraid of going on long trips, and avoids driving long distances. He does not want to get in a car, and if he does, his back hurts. He therefore avoids family car trips. Plane trips back home to China are also very difficult for him.
- [20] Mr. Gao testified that before the Accident he liked going out for drinks, socializing with friends, playing badminton, and taking part in fitness activities. Since the Accident, he does not feel like going out or hanging out with people, so he chooses not to go out. He tried to play badminton once with his best friend, Chen Sun. His hand was a little better by this time, but his back bothered him, and he could not play. He is too afraid to try to play badminton again.
- [21] Mr. Sun confirmed Mr. Gao's evidence about the activities they used to engage in prior to the Accident, as well as the single attempt he made to play badminton afterwards. Mr. Sun testified that he bought a brace for Mr. Gao's hand but Mr. Gao was still unable to play badminton.

- [22] Mr. Gao feels he has changed a lot since the Accident--he used to be outgoing but now he seldom has the urge to initiate conversation with other people. He has become more reserved and isolated. He feels he is better now than in the first year following the Accident, but he still does not want to go out and see friends. His relationship with Mr. Chen has been adversely affected, because Mr. Gao feels that they are no longer equals and Mr. Chen is always trying to take care of him.
- [23] Because of the nature of his work, which does not require him to do much physical labour, the injuries to Mr. Gao's hand and back have not affected his ability to work.
- [24] Ms. Wei confirmed the substance of Mr. Gao's evidence. She felt that her husband had changed quite a lot since the Accident. Before the Accident, she described Mr. Gao as very warm-hearted, down to earth, honest and likable. After the Accident, he was unable to help her with household chores and his personality became quite a bit different. Ms. Wei felt that he had become selfish, and testified that they often argue because of very small things and their relationship is not as strong as it used to be. She confirmed that in the morning he appears to be in pain in his back and he stretches. She confirmed that their intimate relationship has been adversely affected as a result. Ms. Wei testified that Mr. Gao no longer likes to socialize or make new friends. He does not like to go on vacations or driving trips with the family. At times, Ms. Wei testified, she feels like a single parent.
- [25] In cross-examination of both Ms. Wei and Mr. Sun, the defendant attempted to suggest that the changes they observed in Mr. Gao's personality were due, not to the Accident, but his increased responsibilities as a father and business person. Both Ms. Wei and Mr. Sun resisted those suggestions. While I accept that Mr. Gao would have had less time and energy available to socialize as his responsibilities as a father and a business person grew, I find that the Accident, and the pain Mr. Gao has experienced as a result of the injuries caused by it, have been significant factors in his poor mood, reduced interest in socializing and reduced interest in spending time with his family. I also accept that Mr. Gao's relationship with Ms. Wei, including their intimate life, has been adversely affected by the Accident.

Treatment History

- [26] Mr. Gao saw his family physician, Dr. Charles Jiang, on January 7, 2015. According to Dr. Jiang's notes, he complained of neck, shoulder and lower back pain, and pain and swelling in his right hand and wrist. Mr. Gao testified that at that time he felt pain all over his body. Dr. Jiang ordered an x-ray of his right hand and referred him to physiotherapy. The x-ray was taken on January 8, 2015, and showed an obliquely oriented fracture of the right fifth metacarpal. Also on January 8, 2015, Mr. Gao went to Richmond Hospital ER, complaining of mild back pain and pain and swelling in his right hand. He was referred to a plastic surgeon, Dr. Benjamin Gelfant, who splinted the hand and recommended conservative treatment.

- [27] On January 12, 2015, Mr. Gao returned to see Dr. Gelfant for follow-up. Dr. Gelfant referred Mr. Gao to a hand therapist at the Richmond Hand Clinic for splinting, physiotherapy and rehabilitation. Mr. Gao had five hand physiotherapy sessions between January 13 and March 12, 2015. The hand physiotherapist fitted a splint to Mr. Gao's hand on January 13. By February 26, Mr. Gao reported that the pain had resolved but he felt clicking when he made a fist. Mr. Gao discontinued treatment when he left for a trip to China.
- [28] On February 16, 2015, Mr. Gao saw Dr. Jiang. He was still wearing the cast on his hand. His back pain had not resolved. Dr. Jiang referred him to physiotherapy for the back pain. Mr. Gao does not appear to have acted on that referral at that time. In a report dated February 19, 2015, Dr. Jiang characterized Mr. Gao's neck and lower back injuries as Grade II. His hand and range of motion in his neck were both improving, but he still felt pain when making a fist.
- [29] On June 15, 2015, Mr. Gao's hand was assessed by Dr. Peter Gropper, an orthopaedic surgeon. His report was not entered into evidence.
- [30] Mr. Gao saw Dr. Jiang on July 15, 2015, at which time his back pain had not resolved. Dr. Jiang noted that Mr. Gao had done physiotherapy for his hand, but not his back to that point. He saw him again on July 24, 2015, complaining of hand and lumbar back pain. Dr. Jiang noted that Mr. Gao had done chiropractic treatment a few times. He recommended physiotherapy for the back pain. He saw him again on August 19, 2015, at which time Dr. Jiang noted Mr. Gao was receiving chiropractic treatment twice a week, but felt he was not improving too much.
- [31] Mr. Gao saw a chiropractor for treatment of his back 14 times between July 23 and October 19, 2015. Mr. Gao testified that he stopped seeing the chiropractor because he did not feel she was giving him too much help.
- [32] On April 8, 2016, Mr. Gao saw Dr. Jiang, complaining of upper back pain and intermittent right arm pain with some weakness. Dr. Jiang noted bilateral sub-scapular tenderness and referred Mr. Gao to acupuncture and physiotherapy.
- [33] Mr. Gao saw a physiotherapist for treatment of his neck and upper back 11 times between April 25 and July 4, 2016. He also received acupuncture once on April 27, 2016. Mr. Gao did not like either form of treatment, as he found the physiotherapist used a lot of force, and he was scared of the needles used in the acupuncture.
- [34] Mr. Gao does not appear to have received any treatment for back pain after July 4, 2016 until October 2019. However, on September 28, 2017, Mr. Gao again saw Dr. Jiang with respect to ongoing back pain. Mr. Gao testified that he asked friends for treatment recommendations and searched online. He said he went to someone for treatment once, but could not remember the name, stating several times he did not have a good memory for this sort of thing. As mentioned elsewhere, this evidence was rather vague and I cannot rely on it. Mr. Gao testified that in this period he felt so depressed that he just wanted to give up.

- [35] Mr. Gao resumed treatment for his back pain in October 2019. He started to see a chiropractor on October 17, 2019, and has continued to do so regularly up to trial. He also started to see a massage therapist on October 22, 2019, and continued to do so regularly until January 23, 2020, after which he discontinued massage therapy due to concerns about COVID-19. He would like to resume massage therapy once the pandemic is over.
- [36] Following the Accident, Mr. Gao took some over the counter painkillers from time to time, but he did not like to do so because he was afraid he would become reliant on them.

Expert Evidence

Dr. Peter Zakardas

- [37] Dr. Peter Zakardas was accepted as an expert in the area of orthopaedic surgery. He was called as a witness by Mr. Gao. He examined Mr. Gao on August 16, 2019 and wrote a report on that same date which was introduced into evidence.
- [38] At the time of his examination, Mr. Gao's main complaints were right hand pain and weakness and mid-upper back pain. In his report, Dr. Zakardas noted that Mr. Gao had palpable tenderness over his rhomboid musculature bilaterally consistent with myofascial discomfort. He also had bilateral scapular thoracic crepitus on examination. Dr. Zakardas described this as clicking or catching or grinding caused by the scapula moving against the ribs, which can sometimes be heard or felt on palpation. In addition, Mr. Gao had a healed fracture of his fifth metacarpal with residual right hand weakness. His hand was not tender on palpation. Dr. Zakardas opined that, given the absence of these symptoms prior to the Accident, it was more likely than not that the Accident caused Mr. Gao's right hand pain and weakness and upper back pain symptoms.
- [39] Dr. Zakardas suggested that Mr. Gao would benefit from occasional chiropractic or massage treatments performed on a monthly basis. He did not recommend surgery.
- [40] In terms of Mr. Gao's prognosis, Dr. Zakardas encouraged him to work on his hand and upper extremity strength. Given that the fifth metacarpal had healed, Dr. Zakardas was of the view that there was no reason why Mr. Gao should not regain full strength in the future. In terms of his back pain, Dr. Zakardas reported that Mr. Gao was now overall 60% recovered. He expected that Mr. Gao may likely have reached a maximal level of recovery with respect to his bilateral rhomboid myofascial discomfort.
- [41] Dr. Zakardas provided an addendum report dated July 2, 2020, after reviewing an MRI report of the thoracic spine which had been performed on February 5, 2020. He did not examine Mr. Gao for a second time. Dr. Zakardas wrote that the MRI demonstrated that the Accident "was likely responsible for a higher degree of traumatic injury than I had originally diagnosed in my report dated August 16, 2019." Specifically, the MRI indicated a 3 mm T7-8 central disc herniation. Dr. Zakardas wrote:

On examination Mr. Gao described severe upper back pain, which could reach levels of 8/10, with occasional clicking. His upper back pain was not associated with any radicular symptoms of numbness or weakness in either upper extremity. The MRI substantiates a set of severe upper back pain symptoms attributable to more than myofascial [sic] pain alone. More likely than not the T7-8 herniation as noted on the MRI is a result of this MVA trauma, and at the age of 29 is not associated with degenerative change. I therefore attribute the T7-8 3 mm central disc herniation to trauma sustained as the SUV rolled over and over at highway speed on a roadside embankment.

[42] Dr. Zakardas testified that palpable tenderness and a disc protrusion, especially in the thoracic spine, were extremely unlikely in an otherwise healthy young man, and were more likely than not caused in Mr. Gao's case by the Accident. Under cross-examination, Dr. Zakardas testified that the MRI did not show any abnormality of the spinal cord per se. While he agreed that such a herniation could be asymptomatic, and that it was possible the herniation was not responsible for Mr. Gao's pain, the coincidence of it appearing following the Accident was significant, and that it lent itself to objective findings consistent with trauma. The herniation was objective evidence that Mr. Gao did not have merely a soft tissue injury. Dr. Zakardas testified that Mr. Gao's back condition was chronic and would not undergo any great amount of further improvement.

[43] Dr. Zakardas was cross-examined about whether his opinion would change if the evidence established that Mr. Gao only began to experience upper back pain several months after the Accident. He said that it could, and if true that would raise questions about causation. In Dr. Zakardas' opinion, it was possible that the upper back pain could have been masked because Mr. Gao was focussed on his hand injury in the initial months. He said that such delayed reporting was not uncommon. It was also possible it could be a new injury. He remained surprised, however, at the comparatively minimal extent of Mr. Gao's injuries, in light of the nature of the Accident.

[44] In light of the new diagnosis of a disc herniation, Dr. Zakardas opined that Mr. Gao required symptomatic treatment to continue on a regular basis, possibly indefinitely. He recommended massage and chiropractic treatments. He also wrote that a trial of acupuncture and intramuscular stimulation ("IMS") physiotherapy was also indicated. He thought that Mr. Gao might elect to undergo a future selective block of the T7-8 nerve roots if his upper back pain symptoms persisted, but that such a course of action should only be considered after other conservative modalities had been exhausted or proven ineffective. He continued to believe that Mr. Gao was not a candidate for surgery.

Dr. Paul Marks

[45] Dr. Paul Marks was accepted as an expert in the area of orthopaedic surgery. He was called as a witness by the defendant. Dr. Marks examined Mr. Gao on July 24, 2019, and wrote a report dated September 13, 2019, which was introduced into evidence.

[46] Dr. Marks was of the view that the Accident caused Mr. Gao's broken metacarpal, which had healed clinically and radiographically, and some thoracic discomfort, with no residual consequences, impairment or disability identified. In his opinion, Mr. Gao's Accident-related injuries would have fully resolved within three months of the Accident. He did note that Mr. Gao experienced some pain in his mid-back on movement during his examination, and some tenderness on palpation over the metacarpal region.

[47] Dr. Marks wrote that:

Mr. Gao's ongoing, subjective reports of pain notwithstanding, the results of the physical examination failed to demonstrate any major, consistently reproducible and corroborative, residual objective signs of musculoskeletal impairment. As such, Mr. Gao's reported complaints to do not correlate with my objective findings or lack thereof.

[48] Dr. Marks did not expect that Mr. Gao would require any future care, medical treatment or further investigations for accident-related injuries. He noted in his report that Mr. Gao told him that his back pain started two months after the Accident, and testified that was indicative of something delayed after the Accident. He testified that significant complaints start immediately. In any event, Mr. Gao's back problems seemed to have resolved.

[49] Dr. Marks provided an addendum report dated August 28, 2020, which was entered into evidence. Dr. Marks wrote the addendum report after he had the opportunity to review Dr. Zakardas's two reports and the MRI. In regard to Dr. Zakardas's first report, and in particular his note that the grip strength in Mr. Gao's right hand was slightly reduced as compared to his left hand, Dr. Marks wrote that at the time of his evaluation there was some giving way of the right hand with some inconsistencies. Dr. Marks wrote that, unlike Dr. Zakardas, he did not note any crepitus or clicks in the shoulders. With respect to Dr. Zakardas's reference to Mr. Gao's back being 60% recovered, Dr. Marks noted that Mr. Gao had told him he was 50% of normal. In any event, Dr. Marks said that he was not able to identify any objective evidence of any abnormality in that regard. He disagreed with Dr. Zakardas with respect to further treatment, stating that in his opinion there was no indication for any further treatment.

[50] Dr. Marks also reviewed Dr. Zakardas's addendum report. He noted that the February 5, 2020 MRI indicated a "tiny central disc protrusion", which did not contact the spinal cord. He did not agree with Dr. Zakardas that the T7-8 herniation was the result of the MVA. Dr. Marks wrote:

I note at the time of my evaluation of July 24, 2019 that I could not identify any objective evidence. This is including either diminished range of motion, tenderness to palpation, muscle spasm, hypertonicity or increased tone; that once again, I have not identified any specific, accident related, orthopedic impairment, injury or disability that would lead to sequela. I do not attribute this finding of "tiny" imaging entity to the accident on this file, nor being clinically significant.

- [51] He disagreed strongly with Dr. Zakardas' recommendation for future treatment modalities, stating "[i]t is my opinion, to suggest that for this incidental finding on the MRI scan, therapy in a passive manner would be required 'possibly indefinitely' is irresponsible and there is no medical literature to support that recommendation."

Summary of Oral Ruling with Respect to Dr. Marks' Addendum Report

- [52] During the trial, prior to Dr. Marks testifying, Mr. Gao applied to exclude the addendum report of Dr. Marks, dated August 28, 2020. I provided an oral ruling in which I denied that application, which I summarize here.
- [53] In a letter dated September 16, 2020, Mr. Gao's counsel had notified defendant's counsel that they would object to the admissibility of the addendum report, on two bases: (1) that it was served late; and (2) that "this report is argument in guise of opinion."
- [54] In submissions before me, Mr. Gao's counsel withdrew the first objection, and focussed solely on the second. Initially, defendant's counsel indicated that he was at some disadvantage in responding to the objection, but I found he was given notice of the substance of the objection, and was not prejudiced.
- [55] Mr. Gao submitted that the addendum is advocacy in the guise of opinion and should therefore be excluded. He argued that the addendum is neither reliable nor of assistance to the Court. There were three reasons given: (1) that the majority of Dr. Marks' report was comprised of summaries of his September 13, 2019 report and Dr. Zakardas' two reports, and not expert opinion; (2) that on numerous occasions he disagreed with Dr. Zakardas without providing any basis; and (3) that when he did provide an opinion, he used inflammatory language designed to attack and discredit Dr. Zakardas, and not Dr. Zakardas's opinion.
- [56] In support of his submissions, Mr. Gao referred to the recent decision of *Dhugga v. Poirier*, 2020 BCSC 914 [Dhugga], in which the court discussed concerns about Dr. Marks' testimony in that case.
- [57] The defendant said in response that the addendum is of assistance to the Court. He submitted that the summaries of the earlier opinions may provide important context and background for the substance of the addendum, which are Dr. Marks' comments on the MRI performed on Mr. Gao on February 5, 2020. I noted that Dr. Zakardas' second report, dated July 2, 2020, dealt with the MRI and the significance of it to his opinion.
- [58] While acknowledging that the addendum is not a perfect report, and Dr. Marks' use of the word "irresponsible" to describe Dr. Zakardas' opinion on the treatment Mr. Gao will require is "regrettable", the defendant submitted that the addendum would nonetheless be of assistance to the Court, and that it should be admitted.

- [59] I held that Mr. Gao was correct that the majority of the addendum is made up of Dr. Marks' summaries of the preceding expert reports in this matter. While that was of doubtful assistance to the Court, I accepted the defendant's submission that that summary might be important background and context to Dr. Marks' opinion with respect to the MRI, which is the real substance of the addendum.
- [60] I noted that the Court already has the benefit of Dr. Zakardas' opinion about the MRI, and that it would be of assistance to the Court to hear from Dr. Marks on that subject as well.
- [61] I considered Mr. Gao's submissions with respect to the language used by Dr. Marks to characterize Dr. Zakardas' opinion on treatment. That language was, as acknowledged by counsel for the defendant, regrettable.
- [62] I also considered the court's comments about Dr. Marks' evidence in Dhugga. I held that I could not place any reliance upon it at this stage, as they arose in the context of considering whether the court could rely on his evidence in its final judgment, not whether, as a threshold question, his report ought to be admitted.
- [63] I also considered Mr. Gao's alternative submission with respect to potential redactions to the addendum. In my view, the suggested redactions would have stripped the addendum of much of its meaning, and I declined to order them.
- [64] I was of the view that all of the concerns raised by Mr. Gao about the addendum could be better addressed through cross-examination and argument about whether the Court should ultimately rely on Dr. Marks' evidence, rather than by refusing to admit the addendum at the threshold. It was open to the parties, in their closing submissions, to make any arguments they deemed appropriate with respect to whether I should rely on Dr. Marks' evidence, and the weight it ought to be given.
- [65] I therefore declined to exclude the addendum report of Dr. Marks dated August 28, 2020.

Analysis

Findings with Respect to Expert Evidence

- [66] Having reviewed the reports and heard the testimony of both Dr. Zakardas and Dr. Marks, I have no difficulty in preferring the evidence and opinions of Dr. Zakardas.
- [67] I found Dr. Marks to be evasive and argumentative in giving his testimony. He was an advocate for the defence, more concerned with advancing its cause than assisting the Court with unbiased expert assistance. This was particularly true with respect to the key facts in dispute, namely, whether the Accident caused Mr. Gao's herniated disc at T7-8, and whether that herniated disc is the cause of Mr. Gao's ongoing upper back symptoms. In his addendum report, Dr. Marks stated that it was his opinion that the herniated disc was not caused by the Accident. In cross-examination, when asked whether the herniated disc could have been caused by the Accident, Dr. Marks refused to acknowledge that that was a

possibility, repeatedly saying that he did not know what the etiology was and that the most important thing was that it was not clinically significant. In the circumstances, Dr. Marks' refusal to acknowledge that the herniated disc could have been caused by the Accident was highly argumentative.

[68] The observations of the court in Dhugga are equally apposite here:

[58] Dr. Marks' reports and testimony in this case, and previously in this Court, has raised considerable controversy and allegations of opining in areas outside his expertise and that his evidence suggests he is acting more as an advocate for his client, as opposed to providing an unbiased report and testimony as is required of expert witnesses.

[69] Dr. Marks refused to acknowledge the reality of Mr. Gao's subjective complaints of pain in his mid and upper back and hand in the absence of any objective signs of musculoskeletal impairment which he could find. His opinion did not change in light of the objective evidence of crepitus found by Dr. Zakardas. Indeed, he refused to acknowledge that it was possible that Dr. Zakardas had observed crepitus.

[70] By contrast, Dr. Zakardas presented his evidence in an unbiased and professional manner, which was of assistance to the Court. He was thoughtful and non-argumentative in response to questions posed to him in cross-examination. In particular, he was open to considering the possibility that the disc herniation could have been caused by something other than the Accident, while remaining of the opinion that the Accident was the most likely cause.

[71] I accept Dr. Zakardas's opinion as expressed in his initial report and modified in his addendum report as a result of having the opportunity to review the MRI. In particular, I accept his opinion that the disc herniation at T7-8 was more likely than not caused by the Accident, and that that disc herniation is most likely the cause of Mr. Gao's ongoing symptoms in his mid and upper back. In this regard, I find that Mr. Gao likely had some symptoms in his mid and upper back after the Accident, but that he was focussed on the more obvious injury to his hand. It was only after the hand injury started to heal that Mr. Gao's attention turned to the pain he was experiencing in his mid and upper back.

Causation

[72] Mr. Gao must establish on a balance of probabilities that the defendant's negligence caused or materially contributed to his injuries. The defendant's negligence need not be the sole cause of the injury so long as it is part of the cause beyond the range of de minimus. Causation need not be determined by scientific precision: *Athey v. Leonati*, [1996] 3 S.C.R. 458 at paras. 13-17; *Farrant v. Laktin*, 2011 BCCA 336 at para. 9.

- [73] The primary test for causation asks: but for the defendant's negligence, would the plaintiff have suffered the injury? The "but for" test recognizes that compensation for negligent conduct should only be made where a substantial connection between the injury and the defendant's conduct is present: *Resurface Corp. v. Hanke*, 2007 SCC 7 at paras. 21-23. Causation must be established on a balance of probabilities before damages are assessed: *Blackwater v. Plint*, 2005 SCC 58 at para. 78.
- [74] The defendant accepted that, as a result of the Accident, Mr. Gao suffered short term soft tissue injuries to his neck, shoulder and lower back, and a fracture to the fifth metacarpal of his right hand, which healed within a few months but caused some lingering pain and weakness. But he argued that Mr. Gao's upper and mid-back pain was not caused by the Accident. In this regard, he relied on Dr. Marks' opinion, which I have rejected. He also referred to *White v. Stonestreet*, 2006 BCSC 801 at paras. 73-76, in support of his submission that causation cannot be inferred simply based on the fact the upper body pain started after the Accident. At paras. 74-75 of that case, Mr. Justice Ehrcke wrote:
- [74] The inference from a temporal sequence to a causal connection, however, is not always reliable. In fact, this form of reasoning so often results in false conclusions that logicians have given it a Latin name. It is sometimes referred to as the fallacy of post hoc ergo propter hoc: "after this therefore because of this."
- [75] In searching for causes, a temporal connection is sometimes the only thing to go on. But if a mere temporal connection is going to form the basis for a conclusion about the cause of an event, then it is important to examine that temporal connection carefully. Just how close are the events in time? Were there other events happening around the same time, or even closer in time, that would provide an alternate, and more accurate, explanation of the true cause?
- [75] I have considered the questions suggested by Ehrcke J. in that passage. Prior to the Accident, Mr. Gao was a healthy young man, who had no pre-existing injuries. There were no intervening events close in time to the Accident which could have caused his back symptoms. His upper and mid-back symptoms arose within two or three months at most of the Accident, and I accept Dr. Zakardas's opinion that they were likely masked while Mr. Gao was focussed on the fracture in and treatment of his right hand. Given Mr. Gao's age, the disc herniation is unlikely to be degenerative in origin. On all of the evidence, I conclude that the disc herniation and Mr. Gao's ongoing symptoms in his mid and upper back were caused by the Accident.

Credibility and Reliability of Mr. Gao

- [76] The defendant argued that Mr. Gao lacked credibility, or at a minimum was an unreliable witness. The defendant submitted that Mr. Gao was caught in inconsistencies, obfuscations, and glossing over facts which he ought to have had a clear memory of.

[77] The defendant relied on the factors set out in *Julian v. Joyce*, 2016 BCSC 1417 at para. 35, in which the court cited *Bradshaw v. Stenner*, 2010 BCSC 1398:

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), 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 his memory, the ability to resist the influence of interest to modify his recollection, whether the witness' evidence harmonizes with independent evidence that has been accepted, whether the witness changes his 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.); *Faryna v. Chorny*, [1952] 2 D.L.R. [354] (B.C.C.A.) [*Faryna*]; *R. v. S.(R.D.)*, [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 (*Faryna* at para. 356).

[78] I found Mr. Gao to be a credible witness whose evidence was reliable, with some limited exceptions. Some of the matters relied upon by the defendant may be explained, at least in part, by the fact that English is Mr. Gao's second language. In his testimony before me, while he was able to answer some questions directly in English, Mr. Gao relied upon an interpreter for most of his evidence. The defendant pointed to some inconsistencies between what Mr. Gao reportedly told Dr. Marks and Dr. Zakardas during their examinations and his evidence on the stand. Mr. Gao did not have an interpreter present for the examinations with Dr. Marks and Dr. Zakardas, and I place no reliance on any apparent inconsistencies between what he told each of them and his evidence in Court.

[79] The defendant pointed to the fact that in his testimony, Mr. Gao described trying to play badminton at some point after the cast was removed from his hand, but when he was asked at examination for discovery whether he had tried playing badminton since the Accident, he said no. Mr. Gao testified in re-examination that there were problems with the interpretation provided at the examination for discovery. A review of the transcript of the examination for discovery confirms that there were some difficulties in the interpretation provided at that time. Particularly in light of the fact that Mr. Sun corroborated Mr. Gao's evidence with respect to his attempt to play badminton, I am unable to find that this inconsistency between Mr. Gao's evidence at trial and on examination for discovery negatively impacts the reliability of his evidence before me.

- [80] Other matters pointed to by the defendant, such as the fact that at examination for discovery Mr. Gao testified that he used painkillers for the first few months after the Accident, while at trial he said that he used them on and off, do not reflect any substantial inconsistency which would make Mr. Gao's evidence unreliable. I found the defendant's argument that there was material inconsistency between the evidence of Mr. Gao and Ms. Wei with respect to his ability to carry heavy items similarly unpersuasive.
- [81] I did find Mr. Gao's evidence with respect to the treatments he has received for his back pain and the reasons why he received no treatment between April 2016 and October 2019 somewhat vague, which negatively affected its reliability. I have taken the vagueness of Mr. Gao's evidence on these points into account, to the extent it is relevant, in assessing his non-pecuniary damages and damages for cost of future care. As already indicated, I also found Mr. Gao's evidence about the effect of the Accident on his relationship with his daughter speculative, and I do not rely on that evidence in assessing damages.

Non-pecuniary Damages

- [82] Mr. Gao submitted that a reasonable award for non-pecuniary damages would be \$130,000. The defendant submitted that an appropriate award would be \$55,000, and that if the Court accepted that Mr. Gao's ongoing back pain was caused by the Accident, an appropriate award would be \$70,000.
- [83] The law governing the assessment of non-pecuniary damages is settled, as set out by Madam Justice Kirkpatrick in *Stapley v. Hesjlet*, 2006 BCCA 34 at para. 46:
- [46] The inexhaustive list of common factors cited in *Boyd* that influence an award of non-pecuniary damages includes:
- (a) age of the plaintiff;
 - (b) nature of the injury;
 - (c) severity and duration of pain;
 - (d) disability;
 - (e) emotional suffering; and
 - (f) loss or impairment of life;

I would add the following factors, although they may arguably be subsumed in the above list:

- (g) impairment of family, marital and social relationships;
- (h) impairment of physical and mental abilities;
- (i) loss of lifestyle; and

- (j) the plaintiff's stoicism (as a factor that should not, generally speaking, penalize the plaintiff: *Giang v. Clayton*, [2005] B.C.J. No. 163 (QL), 2005 BCCA 54).
- [84] I have found that the ongoing mid and upper back pain suffered by Mr. Gao was caused by the Accident. He has a herniated disc at the T7-8 level and a bilateral rhomboid myofascial injury with scapular crepitus. Six years after the Accident, that condition is chronic, and unlikely to substantially improve. He also suffered a displaced fracture of his fifth metatarsal on his dominant right hand. He continues to experience some weakness and tenderness in the affected hand. Mr. Gao also experienced some soft tissue injuries to his neck and lower back which resolved within three weeks of the Accident.
- [85] At the time of the Accident, Mr. Gao was only 23 years old.
- [86] Mr. Gao was unable to drive for almost one year after the Accident. He has been unable to play badminton. His ability to lift objects heavier than 30 pounds has been adversely affected. As a result, he has difficulty performing some household chores. More importantly, his ability to hold and play with his second and third children was negatively affected.
- [87] Mr. Gao's personality has changed as a result of the Accident. He is more withdrawn and has less interest in socializing. His relationship with his wife has been negatively affected, including their intimate relations. He has less interest in spending time with his family, including not wanting to go on vacation or long drives with them.
- [88] In considering the extent of the effects of the Accident I have considered the period of time in which Mr. Gao was not taking any therapy for his back injuries. Mr. Gao was diligent in seeking therapy, including initially physiotherapy for his hand, and then chiropractic treatment and physiotherapy for his back, until April 2016. He then ceased to take any effective actions to receive therapy until October 2019. The defendant did not argue that Mr. Gao therefore failed to mitigate his damages, but did rely on this gap in arguing he lacked credibility. Mr. Gao argued that he did not seek treatment in that period because it did not help and he wanted to look for better treatment. He further argued that he gave up hope until he saw Dr. Zakardas, after which he again tried treatment. Mr. Gao submitted that he should not be penalized for not seeking treatment for three years.
- [89] I accept that Mr. Gao should not be penalized for his stoicism. I also accept that Mr. Gao may have felt disheartened by the lack of improvement in his symptoms while receiving treatment. However, his failure to take any effective steps to seek any therapy for over three years suggests to me that his pain was not very severe after April 2016. I have taken this into account in assessing his non-pecuniary damages.
- [90] The defendant relies on two cases in support of his suggested quantum for non-pecuniary damages. The first is *Kemle v. McRae*, 2013 BCSC 935 [Kemle]. The plaintiff in that case was 25 years old at the time of the accident. He was a pedestrian who was hit by a car backing out of a parking spot. He suffered a shoulder injury, pain radiating up his left thigh, and a fracture to the fifth metacarpal of his left hand. Those symptoms were largely resolved

within a year of the accident. The plaintiff was unable to establish that his lower back symptoms were caused by the accident. The court in Kemle awarded \$50,000 for non-pecuniary damages, which adjusted for inflation totals \$56,061. That award included \$5,000 for loss of housekeeping capacity, which is not claimed by Mr. Gao.

- [91] In my view, Kemle is distinguishable on the basis both that the plaintiff's injuries were largely resolved within a year of the accident, and he was unable to prove that his lower back problems were caused by the accident.
- [92] The second case relied upon by the defendant is Sandher v. Binning, 2012 BCSC 1000 [Sandher]. The plaintiff in that case was 35 years old. He was involved in a head-on collision and suffered soft tissue injuries to his neck, back, chest and right shoulder that gradually improved and were largely resolved within six months, but continued to cause intermittent pain in his neck and back. He also suffered an injury to his right hand in the form of closed fractures of two metacarpals. He underwent surgery, wore a cast, and continued to suffer some reported swelling, pain and weakness. The court awarded \$40,000 for non-pecuniary damages in Sandher, which adjusted for inflation amounts to \$44,960.
- [93] Sandher is distinguishable on the basis that the plaintiff's injuries were largely resolved within six months. Further, the court found the plaintiff to be an unreliable historian who exaggerated the effects of his injuries on his day to day life.
- [94] Mr. Gao relied upon a number of cases in support of his claimed quantum of non-pecuniary damages:

Case

Quantum

Ferguson v. McLaughlin, 2015 BCSC 2432 [Ferguson]

\$80,000 (adjusted \$86,095.84)

Gill v. Lai, 2018 BCSC 101

\$140,000 (adjusted \$142,921.01)

Ilett v. Buckley, 2016 BCSC 1407 [Ilett]

\$100,000 (adjusted \$106, 449.11)

Rickett v. Sangra, 2019 BCSC 167 [Rickett]

\$80,000 (adjusted \$80,116.96)

Roy v. Storvick, 2013 BCSC 1198 [Roy]

\$75,000 (adjusted \$83,468.72)

Sturm v. Clarke, 2016 BCSC 1657 [Sturm]

\$70,000 (adjusted \$74,514.31)

- [95] Each of the cases relied upon by Mr. Gao bears some similarities to the present case. None of course are identical, and each case must be assessed individually.
- [96] Like the plaintiff in *Ferguson*, Mr. Gao is a young man whose intimate life has been adversely affected by back pain. The court in *Ferguson* noted at para. 168 that the plaintiff had a long life ahead of him where he would be suffering from pain, which had affected him in intimate moments and might also affect his ability to lift and play with the child. The same is true of Mr. Gao.
- [97] The plaintiff in *Ilet* was 19 years old at the time of the accident. As set out by the court at para. 186, he suffered chronic pain in his shoulder, neck and right hip, which the court held would be unlikely to resolve completely. He was no longer able to participate in the physically active lifestyle he had prior to the accident.
- [98] The plaintiff in *Rickett* was slightly older than Mr. Gao at 30 years of age. He suffered a wrist injury which continued to cause him pain as well as a soft tissue injury to his low back which had resolved. At para. 87, the court commented that as a result of his injuries Mr. Rickett was "unable to be the husband and father that he knows he should be." The same can be said of Mr. Gao.
- [99] Like Mr. Gao, the plaintiffs in both *Roy* and *Sturm* suffered disc protrusions. They each suffered from chronic pain as a result of their injuries which affected their lifestyle.
- [100] Having considered all of the cases referred to by the parties, the nature of the injuries suffered by Mr. Gao and the effect they have had on his personality, marriage, family life and social activities, I have determined that an award of \$100,000 for non-pecuniary damages is appropriate.

Cost of Future Care

- [101] Mr. Gao sought an award of \$56,564 for the cost of future care. Mr. Gao's position was based on the treatment recommendations made by Dr. Zakardas, who recommended massage and chiropractic treatment on a monthly basis for an indefinite period of time. Dr. Zakardas also stated that a trial of acupuncture and IMS physiotherapy was also indicated. Given that Mr. Gao has not found physiotherapy helpful and is not willing to undergo acupuncture, he sought only the cost of massage and chiropractic therapy.
- [102] Mr. Gao relied upon the expert report of an economist, Mr. Darren Benning, in support of the present value of those therapies for Mr. Gao's anticipated lifetime. Mr. Benning's report was dated October 8, 2019, and assumed a reference date of January 6, 2020, when this matter was initially scheduled to proceed to trial.

- [103] Mr. Benning had calculated the cost of massage therapy as \$1,260 per year, with a net present value for Mr. Gao's lifetime of \$40,116. Mr. Gao submitted that that figure should be adjusted to take into account the adjournment of the trial to October 2020, and the fact that Mr. Gao will not take massage therapy until the COVID-19 pandemic has abated, resulting in an amount sought of \$37,911. Mr. Benning calculated the net present value of chiropractic care at \$19,103. Mr. Gao submitted that that amount should be adjusted in light of the adjournment of the trial, and therefore sought \$18,653 for chiropractic treatment.
- [104] The defendant submitted that no award for future care should be made. The defendant maintained this position, regardless of the Court's finding on whether Mr. Gao's continuing back symptoms were caused by the Accident. In this regard, the defendant relied upon the opinion of Dr. Marks that no further treatment is indicated. The defendant also relied on the fact that Mr. Gao did not attend treatment of any kind between July 2016 and October 2019, and occasionally did not attend scheduled appointments. He argued that, as a result, there was reason to believe that going forward, Mr. Gao would not attend treatments.
- [105] The law with respect to awards for the cost of future care is well-established. As set out by Madam Justice Bennett in *Gignac v. Insurance Corporation of British Columbia*, 2012 BCCA 351 at paras. 28-31:
- [28] In *Andrews v. Grand & Toy Alberta Ltd.* (1978), 83 D.L.R. (3d) 452 at 462, Dickson C.J.C. said:
- In theory a claim for the cost of future care is a pecuniary claim for the amount which may reasonably be expected to be expended in putting the injured party in the position he would have been in if he had not sustained the injury. Obviously, a plaintiff who has been gravely and permanently impaired can never be put in the position he would have been in if the tort had not been committed. To this extent, *restitutio in integrum* is not possible. Money is a barren substitute for health and personal happiness, but to the extent, within reason, that money can be used to sustain or improve the mental or physical health of the injured person it may properly form part of a claim.
- [29] The purpose of the award for costs of future care is to restore, as best as possible with a monetary award, the injured person to the position he would have been in had the accident not occurred.
- [30] The award 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 (B.C.S.C.) and adopted in *Aberdeen v. Zanatta*, 2008 BCCA 420 at para. 41.
- [31] ICBC says that the trial judge did not examine each request and determine if there was an evidentiary link between the medical assessment and the care recommended by the occupational therapist and rehabilitation consultant. As Garson J.A. said in *Gregory v. Insurance Corporation of British Columbia*, 2011 BCCA 144 at para. 39:

I do not consider it necessary, in order for a plaintiff to successfully advance a future cost of care claim, that a physician testify to the medical necessity of each and every item of care that is claimed. But there must be some evidentiary link drawn between the physician's assessment of pain, disability, and recommended treatment and the care recommended by a qualified health care professional: *Aberdeen* at paras. 43, 63.

[106] In my view, Mr. Gao's position with respect to the cost of future care is well-founded. I have already indicated that I prefer the opinion of Dr. Zakardas to that of Dr. Marks. I accept Dr. Zakardas's recommendations with respect to the treatment which may be of benefit to Mr. Gao in managing his symptoms going forward. Mr. Gao has appropriately not sought compensation for the treatments recommended by Dr. Zakardas which he will not take. He has also appropriately reduced the award sought to take into account the adjournment of the trial and the effect of the COVID-19 pandemic on his willingness to go to massage therapy.

[107] Mr. Gao's past failure to seek out treatment for three years and periodic cancellations or "no-shows" do lead me to the conclusion that it is appropriate to reduce the award for cost of future care to reflect the contingency that he will not receive all of the treatment recommended. Given that Mr. Gao has regularly attended at chiropractic treatment, even during the pandemic, I find that a modest contingency of 10% is appropriate.

[108] I therefore award Mr. Gao compensation for the cost of future care in the amount of \$50,908. As requested by the defendant, for the application of s. 83 of the Insurance (Vehicle) Act, R.S.B.C. 1996, c. 231, that figure is broken down as follows: \$34,120 is for massage therapy, and \$16,788 is for chiropractic care.

Conclusion

[109] For these reasons, I have ordered non-pecuniary damages in the amount of \$100,000 and the cost of future care in the amount of \$50,908.

[110] The parties have agreed to special damages. The parties' submissions with respect to the amount of special damages agreed to were not entirely clear, but I believe they total \$2,205.40, of which \$1,550.55 are payable under Part 7 of Insurance (Vehicle) Regulation, B.C. Reg. 447/83, and \$654.85 are to be included in the Court's Judgment.

[111] Mr. Gao has been substantially successful and is entitled to his costs of this action unless there are circumstances of which I am unaware. If there are any matters which require clarification, or the parties are unable to agree on costs, the parties may request to appear before me to speak to any outstanding issues within 30 days of the date of this Judgment.

"Lyster J."

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