

CANADA / JUDGMENT

Wong v. Campbell

2020 BCSC 243

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Supreme Court of British Columbia

DECIDED

25 February 2020

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2020 BCSC 243 Wong v. Campbell

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Wong v. Campbell,

2020 BCSC 243

Date: 20200225

Docket: M168059

Registry: Vancouver

Between:

Parker Wong

Plaintiff

And

Lauren Marie Campbell

Defendant

- and -

Docket: M174274

Registry: Vancouver

Between:

Parker Wong

Plaintiff

And

Derek Harrison

Defendant

Before: The Honourable Mr. Justice Walker

Reasons for Judgment

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Place and Dates of Trial:

Vancouver, B.C.

December 9-13, 2019

December 16, 19-20, 2019

Place and Date of Judgment:

Vancouver, B.C.

February 25, 2020

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Introduction

- [1] The plaintiff, Parker Wong, is 22 years old. He seeks damages for injuries he suffered in two motor vehicle accidents which occurred in 2011 and 2016. The separate actions brought for each accident are being tried together by consent. Liability is admitted for both accidents.
- [2] Those two accidents bookend two others in which Mr. Wong was also injured. The first was a snowboarding accident in 2013; the other a single vehicle accident in 2014 in which Mr. Wong was at fault.
- [3] The four accidents are well-summarized in Mr. Wong's closing written submissions:
4. Four events feature prominently in this case:
- a. The May 24, 2011 motor vehicle collision on Lincoln Ave. in Coquitlam, BC in which Parker was a belted front seat passenger in a Mercedes being driven by his Grandfather Victor Nenka which collided with the Defendant Lauren Marie Campbell's vehicle (the "2011 Collision");
- b. A snowboarding accident on April 27, 2013 on Whistler Mountain wherein the Plaintiff missed a turn, slid down a 50-70 foot embankment and struck a tree, after which he was transported down the mountain by Ski Patrol to the Whistler Clinic and then, owing to blood in his urine, taken by Air Ambulance to BC Children's Hospital (the "2013 Snowboarding Accident");
- c. The December 4, 2014 single vehicle collision in which Parker was driving his parents' Honda Accord when he lost control on black ice and crashed into a tree and telephone pole, causing the airbags to deploy (the "2014 Single Vehicle Collision"); and
- d. The May 20, 2016 motor vehicle collision in the parking lot of Seven Oaks Shopping Centre in Abbotsford, where the Defendant Derek Harrison reversed his vehicle into a Mitsubishi being driven by Parker's mother Tamara Wong (the "2016 Collision").
- [4] I will use the same definitions for each accident.

- [5] Mr. Wong was wearing a seat belt during all three motor vehicle accidents. The defendants do not allege a failure to mitigate.
- [6] Mr. Wong seeks an award for non-pecuniary damages, together with an award for cost of future care and lost earning capacity. He does not assert a claim for past wage loss. His claim for special damages was settled by the parties in the amount of \$2,200.
- [7] Mr. Wong suffers from chronic pain due to the soft tissue neck and back injuries he sustained in the 2011 Collision and 2016 Collision. Since the 2011 Collision, he also suffers from ongoing persistent headaches of varying intensity and duration multiple times per week. Mr. Wong currently experiences intense headaches once per week on average. His headaches are not only distracting, they affect his concentration, function, mood, and sleep. At times, he suffers from dizziness, usually associated with his headaches. His headaches can also affect his vision, such that his surroundings appear, he said, "to go a little dark".
- [8] He has recovered much but not all of his physical function. Mr. Wong's ongoing headaches are now his most significant problem.
- [9] The medical experts (both physiatrists) who testified for Mr. Wong (Dr. Lisa Caillier) and the defendants (Dr. William Craig) agree Mr. Wong currently suffers from chronic pain due to his headaches and ongoing neck and back symptoms and that further steps can be taken to help him manage his symptoms.
- [10] However, they disagree on the cause of Mr. Wong's low back symptoms, whether Botox injections are an appropriate treatment to manage Mr. Wong's headaches, and whether any of his chronic pain symptoms can be resolved altogether with treatment. Overall, though, their main disagreements concern whether Mr. Wong suffered a low back injury in the 2011 Collision or whether it was caused by the 2013 Snowboarding Accident (or alternatively, if it was caused by the former, the extent to which the latter aggravated that injury).
- [11] The parties are remarkably close in their positions concerning the dollar amount of the award for non-pecuniary damages in spite of the defendants' position that Mr. Wong's injuries suffered in the 2011 Collision and 2016 Collision currently pose minimal interference with his daily function.
- [12] Before turning to my findings of fact concerning each accident and the injuries Mr. Wong suffered in each, I wish to comment on the nature of his evidence since the credibility and reliability of his evidence bears on the opinions expressed by the physiatrists and my assessment of an appropriate award.
- [13] Mr. Wong presented as a forthright, understated, candid, and appropriately consistent witness who strove to present an accurate account of each accident and his injuries and symptoms without any hint of embellishment. The defendants acknowledged as much in their closing argument.

- [14] Mr. Wong acknowledged when he lacked recollection without hesitation. I found him to be a highly credible, reliable, and understated witness in all respects. Mr. Wong is, without doubt, highly motivated to do as much as he can in all aspects of his life in spite of his symptoms. I am satisfied and find that prior to the 2011 Collision, and with the exception of asthma, Mr. Wong was a healthy, happy, physically active young person.
- [15] In *Bradshaw v. Stenner*, 2010 BCSC 1398, Madam Justice Dillon aptly summarized the approach taken to assessing the credibility and reliability of a witness's testimony:
- [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.); *Farnya v. Chorny*, [1952] 2 D.L.R. 152 (B.C.C.A.) [Farnya]; *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 (*Farnya* at para. 356).
- [16] Borrowing in part from the language in *Bradshaw*, I found Mr. Wong's evidence "consistent with the probabilities affecting the case as a whole and shown to be in existence at the time." I have no hesitation or concerns in accepting the trustworthiness and reliability of his evidence.

2011 Collision

- [17] The 2011 Collision occurred on May 24, 2011 when Mr. Wong was 13 years old. He was riding as a passenger in a vehicle owned and driven by his grandfather, Viktor Nenka. As they were heading towards Mr. Wong's family home, the defendant, Lauren Campbell, suddenly and without any warning, reversed out of her driveway and struck the front passenger side corner of Mr. Nenka's vehicle. Mr. Nenka had no opportunity to react to avoid the collision. The force of the collision caused Mr. Nenka's vehicle to shift to the left into the middle of the road, effectively blocking traffic. I accept Mr. Nenka's description of the force of the impact as akin to hitting a brick wall. Dust and debris released into his vehicle upon impact. Photographs of the vehicle show significant body damage to its right front side.
- [18] Mr. Wong was shaken up from the impact, and felt anxious and scared. He was alarmed by the significant amount of dust coming inside the vehicle from its air vents. He was so shaken up that for some time after the accident, he was scared to ride in a motor vehicle.

- [19] Mr. Wong was unable to open the passenger door and was helped out of the vehicle by his grandfather from the other side. Mr. Wong was examined by ambulance paramedics but not taken to the hospital.
- [20] Mr. Wong lacks a precise recall of his symptoms immediately post impact due to his age at that time as well as the passage of time. He remembers stiffness in his neck, which increased as the hours passed. He suffered from pain in his head, which he described as feeling like a headache in the area of his frontal lobe, something he never experienced before. He also suffered pain in his chest area where he wore his seat belt.
- [21] Mr. Wong's symptoms persisted at roughly the same level of intensity for approximately a week, at which time they began to vary, either day by day or week by week. The intensity of his headache pain varied from mild to intense. When the headache pain was intense, it was so overwhelming that he had difficulty concentrating and carrying out many if not all of his activities during the day.
- [22] Mr. Wong was taken by his mother to see Dr. B.K. Lim, his family doctor, shortly after the collision. Dr. Lim did not prescribe any pain medication or recommend treatment. He strongly encouraged Mr. Wong to be as physically active as possible and to push through his pain. Mr. Wong accepted and followed that advice. Over time, Mr. Wong tried to minimize his use of over-the-counter pain aids and instead attempted to stretch and be as active as much as possible to relieve stiffness and soreness.
- [23] Mr. Wong began to experience low back pain, but not immediately after the 2011 Collision occurred. He candidly acknowledged he cannot recall how long after the collision he noticed it. He also confirmed it was the least troubling of his symptoms. His mother, Tamara Wong, who has worked at St. Paul's Hospital for 30 years in an administrative capacity, testified she put medicated "stinky strips" for pain (which she said are similar to Salonpas strips for pain) on her son's back after the 2011 Collision to help with his back pain. In her evidence, which I accept, she testified that her son complained of back pain. She placed four inch strips onto the middle of and down her son's back and also on his neck. She did not, however, specifically identify whether they were intended, in part, to help with low back pain.
- [24] Mr. Wong continued to suffer neck and back pain and headaches of varying degrees of intensity until the 2013 Snowboarding Accident. On some days, he was symptomatic in all three areas, and in others, only one or two. He candidly stated that the frequency and severity of all of his symptoms improved prior to the 2013 Snowboarding Accident. That said, Mr. Wong cannot recall a single day where he was pain free.
- [25] Tamara Wong also confirmed that her son's neck and back pain symptoms had improved by the time the 2013 Snowboarding Accident occurred.

- [26] Mr. Wong also mentioned suffering from abdominal pain from time to time following the 2011 Collision and said it would occur without any triggering event (although he noticed it more when engaging in certain activities such as running and fitness testing at his school, the Pacific Academy, which is a private school). He described feeling tightness and a jabbing pain, which hampered his willingness to participate in certain physical activities while attending Pacific Academy. These symptoms did not disappear prior to the 2013 Snowboarding Accident.
- [27] Mr. Wong was finishing grade 8 at Pacific Academy when the 2011 Collision occurred. He had numerous varied interests, including, bowling, performing volunteer work with his church, and taekwondo. He was a keen bowler since age 8, after his mother suggested he participate in a local bowling club. Despite a mediocre start, he quickly became proficient and began competing in tournaments. He had been competitively bowling with considerable success at the time the 2011 Collision occurred, spending up to eight hours per week in league games and tournaments.
- [28] He did not miss school following the 2011 Collision and went on to graduate from Pacific Academy, before starting grade 9 in the fall term at BC Christian Academy. He did miss a special 14th birthday party his parents had arranged with local firefighters, when the fire department suggested that he postpone it due to his injuries.
- [29] As Mr. Wong's neck and back symptoms improved, his headaches became his primary issue. Then, as now, they came on without warning, mostly either in the morning or middle of the day. Likewise, then, as now, when severe, his headaches adversely affected his concentration and impacted his ability to carry out his activities during the day, including his physical activities, and at times, to the point of not feeling like doing anything. They continue to affect his sleep (he finds it more difficult to fall and stay asleep) as well as his mood (he becomes withdrawn and irritable). Mr. Wong finds some relief with Advil or Tylenol. He always has a supply of those over-the-counter pain medications with him when bowling or participating in other physical activities. Mr. Wong also believes that his headaches affected his performance at school.

2013 Snowboarding Accident

- [30] The 2013 Snowboarding Accident occurred when Mr. Wong missed a turn while snowboarding at Whistler, and ended up over an embankment. He fell to the ground, and then slid 50 to 70 feet until he came to a stop after hitting the base of a tree with his left side (above his hip). He felt pain in his left flank area and was taken to the local medical clinic by members of the ski patrol. Following an assessment, where blood was found in his urine, Mr. Wong was taken by air ambulance to BC Children's Hospital in Vancouver. He suffered a lacerated kidney (with a large blood clot formed around it) and bruising to his left side. He also suffered pain and a soft tissue injury to his left leg. Mr. Wong remained in the hospital for six days.

- [31] Of the four accidents he was involved in, Mr. Wong confirmed the 2013 Snowboarding Accident was the most forceful in terms of impact. Leaving aside his low back issues (which I discuss in a separate section), remarkably, Mr. Wong did not suffer any new neck or back injuries, although he confirmed recalling discomfort and pain for a time when walking or changing positions in bed, and acknowledged that he may have suffered a flare-up of his back pain. He missed two days of school after his release from the hospital and also took up to two weeks off from competitive bowling.
- [32] None of the injuries he suffered in the 2013 Snowboarding Accident caused ongoing issues for him. His kidney and left flank soft tissue injuries healed quickly and without incident. He was substantially recovered after approximately two months.

2014 Single Vehicle Collision

- [33] The 2014 Single Vehicle Collision occurred on December 4, 2014. Mr. Wong lost control of his vehicle on a wet and icy road as he was driving home from school, and hit a nearby tree and lamppost. The vehicle's airbags deployed. He suffered a mild degree of shock and confusion, and suffered from temporary ringing in his ears. He was assessed by ambulance paramedics who suggested he be further examined at the hospital. His mother arrived at the scene, found her son to be "a bit off" in terms of his coherence, and took him to the nearby Eagle Ridge Hospital. The assessment, conducted in the Emergency Department, was negative and Mr. Wong was discharged. He was also screened for alcohol and drugs while at Eagle Ridge Hospital with negative results.
- [34] Mr. Wong experienced some brief generalized stiffness that did not impact his activities or school work. He did not suffer any new or lingering injuries from this collision.
- [35] Dr. Caillier's opinion is the 2014 Single Vehicle Collision caused a "temporary increase in [Mr. Wong's] neck symptoms"; otherwise, she said, that collision "has not had a significant impact upon his already present symptoms associated" with the 2011 Collision.

2016 Collision

- [36] The 2016 Collision occurred on May 26, 2016. Mr. Wong was a passenger in the front seat of his mother's SUV. While they were stopped in a mall parking lot, the driver of the vehicle in front of them, suddenly and without warning, put his car into reverse and backed directly into the SUV. According to Mr. Wong's mother, whose evidence I accept, it was a hard impact even though the at-fault driver was not travelling at a great rate of speed. Mr. Wong testified that of the four accidents, the impact involved in this collision was the least forceful.
- [37] Mr. Wong recalls feeling discomfort and tenderness in his neck shortly after impact.
- [38] The injuries caused by the 2016 Collision are summarized in Dr. Caillier's second medical legal report dated April 23, 2019 ("April 2019 Report"):

1. Aggravation of pre-existing chronic pain involving his neck and upper through to lower back regions.
 2. Aggravation of post-traumatic headaches.
 3. Difficulties with sleep.
 4. Difficulties with activities that he engages in recreationally including that of competitive bowling as well as his post-secondary education secondary to increased pain and headaches.
- [39] Prior to the 2016 Collision, and except for his headaches, the frequency and intensity of Mr. Wong's symptoms from the 2011 Collision continued to improve. Mr. Wong learned to make adjustments to accommodate discomfort or pain in his neck and back. His activities were not impaired unless pain or stiffness was particularly bad.
- [40] According to Dr. Caillier, Mr. Wong would have likely continued to experience intermittent pain involving his neck and back (caused by the 2011 Collision) in the absence of the 2016 Collision. In her opinion, the 2016 Collision aggravated Mr. Wong's pre-existing chronic pain condition involving his neck and upper through to lower back regions.
- [41] In her first medical legal report dated December 22, 2016 ("December 2016 Report"), Dr. Caillier said Mr. Wong's chronic pain and headache symptoms had not returned to his pre-2016 Collision level. She remarked on continued improvement in her April 2019 Report, but again noted they had not returned to as they were prior to the 2016 Collision.
- [42] However, as a result of his recent work with a personal trainer starting in June 2019 (one of Dr. Caillier's recommendations), Mr. Wong has achieved significant improvement in his neck and back symptoms and function.

The Psychiatrists' Evidence

Areas of Agreement

- [43] Dr. Caillier and Dr. Craig agree on the following:
- (a) The 2011 Collision caused headaches and soft tissue injuries to Mr. Wong's neck, upper back, posterior shoulder, and chest.
 - (b) The 2013 Snowboarding Accident caused renal and abdominal injuries.
 - (c) The 2013 Snowboarding Accident did not aggravate Mr. Wong's neck injury caused by the 2011 Collision and did not cause a new injury to Mr. Wong's cervical spine.
 - (d) Mr. Wong fully recovered from his renal and related abdominal injury prior to the 2014 Single Vehicle Collision and the 2016 Collision.
 - (e) Mr. Wong suffered an exacerbation of his neck, shoulder, and low back injuries in the 2016 Collision.

- (f) Mr. Wong is at risk of aggravation of his current symptoms if he is involved in a work, recreational, or motor vehicle accident. He is also at risk for re-injury and for more complicated and protracted recovery with subsequent injury and trauma.
- [44] In terms of admissions favourable to Mr. Wong's case, Dr. Craig admitted in cross-examination:
- (a) Mr. Wong should be commended for pursuing his education and activities (including sports) given that he has suffered from chronic pain for almost nine years.
- (b) Mr. Wong's mood has suffered since the 2011 Collision, especially due to his intense headaches, causing him to withdraw from social interactions and activities and making him irritable. If Mr. Wong has suffered adverse impact to sleep for the past eight years (which I find he has as well), these are negative prognostic factors for further recovery.
- (c) If Mr. Wong's pain affects his ability to focus, concentrate, sit, and stand (which I also find), then over the course of his working life of 40 to 50 years, his injuries would prevent him from engaging in more physically demanding employment.

Areas of Disagreement

- [45] As previously noted, the key areas of disagreement between the physiatrists concern the cause of Mr. Wong's low back pain, whether Botox injections are an appropriate treatment protocol for his headaches, and the extent to which Mr. Wong's ongoing symptoms are capable of complete resolution.
- [46] In terms of low back injury, in Dr. Cailler's opinion the 2011 Collision caused a low back injury. Dr. Craig holds a different opinion; he opined that the 2013 Snowboarding Accident is the original cause of Mr. Wong's low back injury and pain.
- [47] Dr. Caillier is also of the opinion that Botox injections are an appropriate treatment for Mr. Wong's headaches and should be employed if he does not obtain relief from other treatment recommendations. Dr. Craig disagrees.
- [48] It is also Dr. Caillier's opinion that Mr. Wong's ongoing symptoms are not capable of complete resolution. Dr. Craig opined that resolution may be possible.
- [49] Dr. Caillier met and assessed Mr. Wong on two separate occasions, November 8, 2016 and April 23, 2019.
- [50] As part of her fulsome and thorough assessment, Dr. Caillier tested Mr. Wong for exaggerated pain responses, with negative results. She did not accept Mr. Wong's account of events at face value and instead considered the potential causes of his injuries and symptoms. Dr. Caillier also carried out an in-depth review of the clinical and hospital records. She did not have the Eagle Ridge Hospital records (concerning the 2016 Collision) until she testified at trial since they only became available shortly before trial. Their contents did not alter her opinion. In hearing Dr. Caillier's testimony, where her candour,

objectivity, and lack of advocacy were manifest, I was satisfied that she was able to fully and accurately assess, from a medical perspective, the merits of Mr. Wong's reports of his symptoms, the specific injuries caused by each of the four accidents, and appropriate treatment protocols and prognosis for recovery. I reject the defence submission that she was biased in favour of Mr. Wong.

- [51] The defence physiatrist, Dr. Craig, never met with Mr. Wong. His opinion is based on his review of clinical and hospital records and Dr. Caillier's April 2019 Report.
- [52] Although Dr. Craig is a highly qualified, experienced physiatrist, I remain concerned with the reliability of those aspects of his opinions that conflict with Dr. Caillier for the following reasons.
- [53] First, his opinions are premised solely on a records review.
- [54] Judgments in this Court comment on the weight to be accorded to expert reports premised solely on a records review.
- [55] For example, in *Preston v. Kontzamanis*, 2015 BCSC 2219, Mr. Justice Parrett expressed these concerns:
- [125] The defendant provided and relied upon what purported to be an independent medical report (IME) by Dr. Boyle.
- [126] Dr. Boyle readily acknowledged that he was not asked to and did not meet with, examine or interview the plaintiff.
- [127] Dr. Boyle reviewed documents and information provided by counsel and wrote his report.
- [128] These documents and that information included clinical records of various medical professionals.
- [129] This is a process that is unlikely to assist the court in any material way. The first concession is invariably, and was in this case, that interviewing, examining and getting a personal history is important to providing an accurate and complete assessment.
- [130] This is a trend that appears to have been of relatively recent origin.
- [131] It is also a trend which has drawn adverse comment from judges of this court. *Dhaliwal v. Bassi* 2007 B.C.S.C. 549 (Burnyeat, J. at paras. 2-3); *Ruscheinski v. Biln* 2011 B.C.S.C. 1263 (Walker, J. at paras. 85-87); *Rizotti v. Doe* 2012 B.C.S.C. 1330 (Tindale, J. at para. 35).
- [132] To these I would add my own comments. Where an expert chooses to prepare a report as he did here, expecting this court to accept and rely on it. He is presenting a report in which he effectively asserts that he accepts as true and accurate the factual base on which his opinions are based.

[133] Where he does so without seeing, examining or taking a personal history he chooses to offer his opinion on the basis of hearsay. Worse still he chooses to offer it on the basis of his interpretation of hearsay recorded by others.

[Emphasis added]

[56] In his reasons, Parrett J. refers to *Ruscheniski v. Biln*, 2011 BCSC 1263, where I made these remarks concerning the reliability of opinions based solely on a records review:

[85] I prefer the evidence of Drs. Feldman and Wasti over the defence expert, Dr. Turnbull. I accept Dr. Feldman's opinion (supported by Dr. Wasti) that meeting a patient, obtaining their history directly, and conducting a thorough examination are essential to provide an accurate diagnosis of a patient's injuries and to determine an appropriate prognosis.

[86] In my opinion, when dealing with cases where chronic pain is suggested or suspected, an examination of a patient that is designed to look for objective evidence of injury, such as muscle spasm, as opposed to feigned pain behaviour, coupled with an appropriate and thoughtful approach to taking a patient's history, will lead to a diagnosis and prognosis that is much more reliable than a records review. I accept Dr. Feldman's evidence that without a physical examination of Ms. Ruscheinski, it would not have been possible to detect the winging of her scapula.

[88] My view of the matter is also supported by the remarks of Burnyeat J. in *Dhaliwal v. Bassi*, 2007 BCSC 549, 73 B.C.L.R. (4th) 177, where he wrote at paras. 2-3:

[2] The role of an expert is to assist the Court. I am not assisted by receiving the "opinion" from a psychiatrist who has not seen a person and who bases his opinion only on documentation made available to him where much of that documentation will ultimately not be in evidence. Ordinarily, counsel will provide the factual assumptions to the expert that counsel will then proceed to prove in evidence. Those factual assumptions should be clearly stated in the statement of the expert. It is not for an expert to merely review a number of documents, many of which will not be in evidence and make certain findings of fact. ...

[3] As well, the Court has commented a number of times on it being inadvisable to rely on the opinion of a medical advisor who has not seen a plaintiff: see for instance *Parish v. Scott*, [1966] B.C.J. (Q.L.) No. 2839 (B.C.S.C.) at paras. 5 and 29. ...

[Emphasis added]

[57] Second, Dr. Craig's opinion concerning the cause of the low back injury and the progress of Mr. Wong's symptoms following each accident are largely predicated on Dr. Lim's clinical notes. Dr. Lim's clinical notes are sparse. I agree with Mr. Wong's submission that unlike some chronic pain cases, he was not a regular attendee at Dr. Lim's office. He followed Dr. Lim's advice to get on with his life, to not hold back, and to be as active as possible.

- [58] Dr. Craig premised his opinion that the low back injury was not caused by the 2011 Collision on the absence of any note in the family doctor's clinical records of reports of low back pain. Dr. Craig points out that a note of low back pain first appears in those records following the 2013 Snowboarding Accident.
- [59] I do not accept Dr. Craig's evidence and the defence's contention that the absence of a note in Dr. Lim's records means Mr. Wong did not suffer from low back pain following the 2011 Collision. That submission is grounded in the assumption that Dr. Lim recorded every complaint Mr. Wong made to him and Mr. Wong complained of every symptom, such that in the absence of a note of a low back pain complaint, it did not exist.
- [60] In *Edmondson v. Payer*, 2011 BCSC 118, aff'd 2012 BCCA 114, Mr. Justice N. Smith discussed the limited use and inherent reliability concerns with clinical records:
- [23] Much of the defendant's submission on the plaintiff's credibility flows from what is, or is not, found in the clinical records of doctors the plaintiff has seen. It is therefore important to review the limited purposes for which clinical records are admissible. It is easy to lose sight of those limitations in cases of this kind, where the time spent parsing a single note made by a doctor often far exceeds the length of the medical appointment that the note records.
- [34] The difficulty with statements in clinical records is that, because they are only a brief summary or paraphrase, there is no record of anything else that may have been said and which might in some way explain, expand upon or qualify a particular doctor's note. The plaintiff will usually have no specific recollection of what was said and, when shown the record on cross-examination, can rarely do more than agree that he or she must have said what the doctor wrote.
- [35] Further difficulties arise when a number of clinical records made over a lengthy period are being considered. Inconsistencies are almost inevitable because few people, when asked to describe their condition on numerous occasions, will use exactly the same words or emphasis each time. As Parrett J. said in *Burke-Pietramala v. Samad*, 2004 BCSC 470, at paragraph 104:
- ...the reports are those of a layperson going through a traumatic and difficult time and one for which she is seeing little, if any, hope for improvement. Secondly, the histories are those recorded by different doctors who may well have had different perspectives and different perceptions of what is important. ... I find little surprising in the variations of the plaintiff's history in this case, particularly given the human tendency to reconsider, review and summarize history in light of new information.
- [61] As Smith J. aptly pointed out, the absence of a record or note is not evidence of anything and cannot lead to an inference concerning the lack of injury:

[36] While the content of a clinical record may be evidence for some purposes, the absence of a record is not, in itself, evidence of anything. For example, the absence of reference to a symptom in a doctor's notes of a particular visit cannot be the sole basis for any inference about the existence or non-existence of that symptom. At most, it indicates only that it was not the focus of discussion on that occasion.

[Emphasis added]

[62] The case authorities are clear it is for the trier of fact to determine whether the plaintiff's evidence concerning an injury is credible and reliable. In that respect, Smith J. made these comments Edmondson concerning the plaintiff's evidence and alleged contradictions arising from clinical records:

[48] I do not find a significant inconsistency or contradiction between the evidence the plaintiff gave at trial and the very brief statements attributed to her in the clinical records. I also found the plaintiff to be a generally forthright and credible witness. Her evidence was internally consistent and consistent with what little other evidence exists, such as the evidence of her sister. She did not appear to be exaggerating her symptoms and she unhesitatingly admitted that she tries, as much as possible, to not let her injury interfere with her lifestyle.

[Emphasis added]

[63] Similar comments were made by Madam Justice Gropper in *Myers v. Leng*, 2006 BCSC 1582, when considering defence submissions regarding inferences to be drawn from gaps in clinical records due to the plaintiff's infrequent visits to his doctor:

[49] Dr. Clayton was asked about the gap in the plaintiff's seeking of medical treatment. The doctor stated:

Gaps between visits are fairly typical. Some come infrequently. Others attend every day. It doesn't change my conclusions or cause any concern.

[50] I am not troubled by the gap in the plaintiff seeking treatment. His decision not to continue to see a doctor about his neck and back complaints was clearly based on a reasonable conclusion that the doctors could only provide temporary relief from the pain by prescribing medication and physiotherapy. The plaintiff did not consider either to be helpful. It is a sensible and practical approach to medical treatment. If continuous medical treatment can cure you, or make you feel better, then it is worthwhile to attend on a regular basis. If it cannot, there really is no point in taking the doctor's time. The purpose of a (sic) seeing a doctor is not to create a chronicle of complaints for the purpose of proving that you have ongoing pain from an injury arising from a motor-vehicle accident. Rather than detract from the accuracy of the plaintiff's complaint, I consider the plaintiff's course of conduct, in not seeing the doctor on a continuous basis, to enhance his evidence.

[Emphasis added]

- [64] Third, and applying the reasoning in Edmondson and Myers, the veracity and reliability of Mr. Wong's account of each accident and his report of symptoms following each one are critical to the assessment of causation and aggravation of prior injuries. Of necessity, Dr. Craig's opinion must discount Mr. Wong's evidence concerning his low back pain following the 2011 Collision. As discussed, I have no hesitation in accepting the credibility and reliability of Mr. Wong's evidence.
- [65] Fourth, I found Dr. Craig strayed into advocacy and conjecture in several areas (e.g., when opining about the nature and severity of some of the injuries Mr. Wong sustained in the 2013 Snowboarding Accident and the 2014 Single Vehicle Collision, Mr. Wong's post-accident mood issues, and the potential impact on Mr. Wong's mental health from re-injury or aggravation leading to worsening symptoms).
- [66] Fifth, Dr. Craig was inexplicably argumentative when rejecting out of hand any possible benefits of Botox injections. The tone and demeanour of his evidence changed. He became highly emotive as he ventured into argument.
- [67] Dr. Craig's insistence in his viva voce evidence that Botox injections were not warranted and were not a clinically accepted scope of practice to treat Mr. Wong's headaches is also inconsistent with his medical legal report where he said:

Based on the description of his headaches, I do not think that Botox injections would be warranted, as they do not sound migrainous in nature. If he has a positive response to trigger point injections, but only temporarily, then a few sets of Botox injections could be warranted for the myofascial pain. Cost is approximately \$450-900 for the medicine and \$100-350 for the procedure with this being repeated up to three times. Cost is not covered through the Medical Services Plan.

[Emphasis added]

- [68] When pressed for the basis of his opinion that Mr. Wong's headaches "do not sound migrainous in nature", Dr. Craig referred to and began quoting from Dr. Caillier's December 2016 Report, which was not provided to him as part of his records review. He only reviewed the April 2019 Report.
- [69] I agree with Mr. Wong's submissions that once it was drawn to Dr. Craig's attention that he was never given the December 2016 Report, he engaged in additional argument as he began to read portions from it (since, having conducted only a records review, he had not obtained from Mr. Wong a description of his headache symptoms).
- [70] The following extract from Mr. Wong's closing written submissions accurately summarizes what transpired, including Dr. Craig's seeming attempt to justify a headache diagnosis that would preclude any possible medical recommendation for Botox injections:

- (c) when he started quoting the 2016 report in error, then his next justification for the description of "non-migrainous" headache stems from Dr. Caillier's report which is found at Exhibit 3, Tab 2, p. 32, from which Dr. Craig read during cross-examination (a passage which says very little about the symptoms of headaches Parker experiences):

Okay, so starting on page 32 of Tab 2, just about line 33: Mr. Wong continues to have headaches that are provoked with increased neck pain or what he

is studying and there are times when they're triggered for no specific reasons. Typically frontal, mild headaches most days, which are more tolerable. The more intense headaches can last an entire day, and occasional associated with sensitivity to noise and light.

- (d) When common symptoms of headaches with migrainous features were put to Dr. Craig from which Parker testified he had been suffering, including dizziness, sensitivity to light and sound, black outs and temple pain, Dr. Craig equivocated and said all these symptoms could be found in "non-migrainous headaches as well". The point here is that Dr. Craig appeared to be grasping for a headache diagnosis that would preclude a recommendation for Botox injections for headaches, a recommendation which comes with significant future cost of care if effective.
- (e) Most notably, when Dr. Craig testified under oath that patients with cervicogenic headaches or headaches secondary to neck trauma are not frequently and only "occasionally" treated with Botox injections because it's not "a clinically accepted scope of practice". More than once Dr. Craig was given the opportunity to clarify his evidence under oath on this point. He did not.

[71] I would add to those submissions Dr. Craig's evidence concerning the controversy surrounding Botox injections for post-traumatic headaches, where he appears to have inadvertently acknowledged Mr. Wong's headaches are migraines:

A Ah, I would - - from the reports of many experts that I've read who are doing a lot of Botox - -

Q Yes?

A - - it's controversial as to whether Botox is indicated in post-traumatic headaches. Botox, although it's a safe medication, there's a very high cost associated with it. There is also issues with potential risks associated with it. It's really a treatment of last resort if everything else doesn't work, and from what I'm seeing from his treatment, he hasn't had a lot of typical treatments that I would suggest, and if you're not addressing those underlying conditions, you're not really addressing the migraine trigger.

Q So - -

A Just like if a neurologist was to see somebody with classic migraines, they're going to look at what the triggers are, try to identify those, reduce those. They would try medications. They would try different therapies. They would essentially try everything before jumping to the Botox.

[Emphasis added]

- [72] Dr. Craig mischaracterized Dr. Caillier's recommendation for Botox treatments when he suggested that she had "jumped" to recommending Botox. As I explain in the Cost of Future Care section, she recommended Botox injections if additional therapies are unsuccessful. Dr. Craig also overlooked, when giving the evidence noted in the foregoing excerpt, the numerous other treatment protocols recommended by Dr. Caillier, which were undertaken by Mr. Wong.
- [73] Sixth, Dr. Craig's opinion in his medical legal report for potential complete resolution of symptoms appears to be mentioned in passing, without elaboration, and not expressed as something that is likely or probable.
- [74] It is also at odds with his viva voce evidence, where Dr. Craig:
- (a) agreed that if Mr. Wong remains physically fit, and despite working out regularly for the last six months, continues to suffer headaches, neck, and back pain, there is a reduced probability for resolution of his symptoms;
 - (b) acknowledged the two year post-accident mark is a fairly accurate average time interval for improvement (the 2011 Collision was eight years ago and the 2016 Collision was over three years ago); and
 - (c) acknowledged that he still sees patients who are symptomatic in over seven or nine years in spite of improvements in symptoms.
- [75] For these reasons, I prefer the opinions expressed by Dr. Caillier in her two reports and at trial over those of Dr. Craig where they conflict.

Low Back Injury

- [76] This is an appropriate point to discuss my findings concerning the cause of Mr. Wong's low back symptoms.
- [77] The absence of a note in Dr. Lim's records concerning low back pain following the 2011 Collision and prior to the 2013 Snowboarding Accident is not proof that the 2011 Collision did not cause a low back injury and not proof that Mr. Wong did not suffer low back pain: Edmondson and Myers.
- [78] Dr. Lim was not called as a witness.
- [79] After observing and considering the evidence of Mr. Wong and his mother, I am satisfied Mr. Wong's delay in noticing his low back symptoms following the 2011 Collision was due to the severity of his other symptoms. His low back symptoms were and remain minor in comparison to his other symptoms. It is also clear Mr. Wong has never been overly focused on his low back issues. I am satisfied the 2011 Collision caused Mr. Wong mild low back pain and discomfort. There is no evidence the nature of the low back injury was anything other than soft tissue.

- [80] I also find the 2013 Snowboarding Accident mildly aggravated Mr. Wong's low back pain. Symptoms resulting from that aggravation quickly resolved.
- [81] The 2014 Single Vehicle Collision had no effect on Mr. Wong's low back issues.
- [82] However, the 2016 Collision worsened his low back symptoms.
- [83] I reject the defendants' submission that Mr. Wong's award should not take into account any aggravation to his low back injury caused by the 2016 Collision. They argue his low back injury from the 2013 Snowboarding Accident posed a measurable risk that would detrimentally affect him in the future. Their submission is not supported by evidence. There is also no evidence to engage the defendants' reliance on the crumbling skull and measureable risk analysis discussed in *Athey v. Leonati*, [1996] S.C.R. 458 at para. 35. Speculation is not a basis to support an assertion of measurable risk: *Zacharias v. Leys*, 2005 BCCA 560 at para. 16.
- [84] Even assuming the 2013 Snowboarding Accident was the initial cause of Mr. Wong's low back symptoms, the doctrine of indivisible injury is engaged on the evidence in this case such that the tortious defendant in the 2016 Collision is liable.
- [85] Indivisible injuries "are those that cannot be separated or have liability attributed to constituent causes": *Bradley v. Groves*, 2010 BCCA 361 at para. 20. In that case, the Court of Appeal discussed the meaning of an indivisible injury, and noting the difference between causation and liability:
- [17] *Athey* was a case involving both multiple tortious and non-tortious causes. The plaintiff had been injured in two motor vehicle accidents. While still recovering, he herniated a disc in his back during stretching at the gym. The question before the Court was how the damages should be apportioned between the tortious and non-tortious causes.
- [18] The Supreme Court of Canada found apportionment between tortious and non-tortious causes contrary to the principles of tort law, and therefore impermissible. The liability for any injury caused or contributed to by a tortious action should be borne jointly and severally by the tortfeasors, and not attributed to non-tortious action.
- [20] In the course of the discussion, Major J. (for the Court) described injuries produced by more than one cause as either "divisible" or "indivisible". Divisible injuries are those capable of being separated out and having their damages assessed independently. Indivisible injuries are those that cannot be separated or have liability attributed to the constituent causes. At paras. 22-25, he commented on apportionment between multiple causes and the issue of divisibility:
- (1) Multiple Tortious Causes
- [22] The respondents argued that apportionment between tortious and non-tortious causes should be permitted just as it is where multiple tortfeasors cause the injury. The two situations are not analogous. Apportionment between tortious causes is expressly permitted

by provincial negligence statutes and is consistent with the general principles of tort law. The plaintiff is still fully compensated and is placed in the position he or she would have been in but for the negligence of the defendants. Each defendant remains fully liable to the plaintiff for the injury, since each was a cause of the injury. The legislation simply permits defendants to seek contribution and indemnity from one another, according to the degree of responsibility for the injury.

[...]

(2) Divisible Injuries

[24] The respondents submitted that apportionment is permitted where the injuries caused by two defendants are divisible (for example, one injuring the plaintiff's foot and the other the plaintiff's arm): Fleming, *supra*, at p. 201. Separation of distinct and divisible injuries is not truly apportionment; it is simply making each defendant liable only for the injury he or she has caused, according to the usual rule. The respondents are correct that separation is also permitted where some of the injuries have tortious causes and some of the injuries have non-tortious causes: Fleming, *supra*, at p. 202. Again, such cases merely recognize that the defendant is not liable for injuries which were not caused by his or her negligence.

[Emphasis in original]

[21] Accordingly, liability to a plaintiff for indivisible injuries is joint and several.

[22] The conclusions in *Athey* were further refined in the decision of the Supreme Court in *E.D.G. v. Hammer*, 2003 SCC 52, [2003] 2 S.C.R. 429.

[23] In *E.D.G.* the majority of the Court per McLachlin C.J.C., said as follows:

[31] In my view, the Board's reading of the principle articulated in *Athey* is overly narrow. After making the claim cited above, Major J. further expanded upon his reasoning, stating at para. 19 that:

The law does not excuse a defendant from liability merely because other causal factors for which he is not responsible also helped produce the harm It is sufficient if the defendant's negligence was a cause of the harm.... [First emphasis added; second emphasis in original.]

This principle is not confined to cases involving non-tortious preconditions. It applies to any case in which the injuries caused by a number of factors are indivisible.

[32] There can be no question that *Athey* requires joint and several liability for indivisible injuries. Once a trial judge has concluded as a fact that an injury is indivisible, then the tortfeasors are jointly liable to the plaintiff. They can still seek apportionment (contribution and indemnity) from each other, but absent contributory negligence, the plaintiff can claim the entire amount from any of them.

- [33] The approach to apportionment in *Long v. Thiessen* is therefore no longer applicable to indivisible injuries. The reason is that *Long v. Thiessen* pre-supposes divisibility: Long requires courts to take a single injury and divide it up into constituent causes or points in time, and assess damages twice; once on the day before the second tort, and once at trial. Each defendant is responsible only for their share of the injury and the plaintiff can recover only the appropriate portion from each tortfeasor.
- [34] That approach is logically incompatible with the concept of an indivisible injury. If an injury cannot be divided into distinct parts, then joint liability to the plaintiff cannot be apportioned either. It is clear that tortfeasors causing or contributing to a single, indivisible injury are jointly liable to the plaintiff. This in no way restricts the tortfeasors' right to apportionment as between themselves under the Negligence Act, but it is a matter of indifference to the plaintiff, who may claim the entire amount from any defendant.
- [36] It may be that this represents an extension of pecuniary liability for consecutive or concurrent tortfeasors who contribute to an indivisible injury. We do not think it can be said that the Supreme Court of Canada was unmindful of that consequence. Moreover, apportionment legislation can potentially remedy injustice to defendants by letting them claim contribution and indemnity as against one another.

[Emphasis in original]

- [86] Since Mr. Wong's case involves instances of aggravation of pre-existing injuries, I also rely on the Court of Appeal's statement in *Bradley* that an aggravation of a pre-existing injury is not qualitatively different from an indivisible injury:
- [37] We are also unable to accept the appellant's submission that "aggravation" and "indivisibility" are qualitatively different, and require different legal approaches. If a trial judge finds on the facts of a particular case that subsequent tortious action has merged with prior tortious action to create an injury that is not attributable to one particular tortfeasor, then a finding of indivisibility is inevitable. That one tort made worse what another tort created does not automatically implicate a thin or crumbling skull approach (as in *Blackwater*), if the injuries cannot be distinguished from one another on the facts. Those doctrines deal with finding the plaintiff's original position, not with apportioning liability. The first accident remains a cause of the entire indivisible injury suffered by the plaintiff under the "but for" approach to causation endorsed by the Supreme Court of Canada in *Resurfice Corp. v. Hanke*, 2007 SCC 7, [2007] 1 S.C.R. 333. As noted by McLachlin C.J.C. in that case, showing that there are multiple causes for an injury will not excuse any particular tortfeasor found to have caused an injury on a "but-for" test, as "there is more than one potential cause in virtually all litigated cases of negligence" (at para. 19). It may be that in some cases, earlier injury and later injury to the same region of the body are divisible. While it will lie for the trial judge to decide in the circumstances of each case, it is difficult to see how the worsening of a single injury could be divided up.

[Emphasis in original]

[87] In the case at bar, I have found the 2011 Collision was the original cause of Mr. Wong's low back injury. It was mildly and temporarily aggravated in the 2013 Snowboarding Accident. It was aggravated again and worsened as a result of the 2016 Collision. It is only recently that Mr. Wong realized significant improvement in his low back symptoms through his work with a personal trainer. Applying the reasoning in Bradley to the case at bar, the tortious conduct of the defendant, Mr. Harrison, in the 2016 Collision, has merged with the tortious action of the defendant, Ms. Campbell, the tortfeasor driver in the 2011 Collision. Mr. Harrison is jointly and severally liable for the current state of Mr. Wong's low back symptoms, as he is for the aggravation of Mr. Wong's other injuries from the 2011 Collision extant at the time of the 2016 Collision.

Summary of Findings of Injuries Sustained

[88] I turn now to set out my findings concerning the specific injuries Mr. Wong sustained in the various accidents.

[89] Mr. Wong sustained the following injuries in the 2011 Collision:

- (a) chronic soft tissue musculoligamentous injury to neck and upper back extending through and into lower back regions;
- (b) chronic cervicogenic headaches of varying frequency and intensity, affecting concentration, mood, and sleep;
- (c) dizziness, likely associated with headaches;
- (d) chest pain;
- (e) soft tissue left shoulder and right shoulder girdle injuries;
- (f) mild intermittent abdominal pain; and
- (g) short term anxiety riding in vehicles.

[90] The injuries described in sub-paragraphs (d) to (g) were fully resolved by the time the 2013 Snowboarding Accident occurred.

[91] Mr. Wong suffered a left kidney injury in the 2013 Snowboarding Accident, soft tissue injury to his left flank, and a mild, temporary aggravation of his low back symptoms. Dr. Caillier described his injuries as "left renal trauma", "left flank pain", and "abdominal wall trauma" with associated injury from the "psoas to below the iliac crest". His injuries quickly and fully resolved prior to the 2014 Single Vehicle Collision. In Dr. Caillier's opinion, the injuries Mr. Wong sustained in this accident "did not have a significant impact upon [Mr. Wong's] already present [2011 Collision] complaints in the form of neck and back pain as well as headaches."

- [92] Over time, Mr. Wong's neck and back pain decreased in frequency and intensity such that he was able to accommodate his symptoms in his daily life. He found temporary relief from some of his symptoms with over-the-counter pain medication, acupuncture, massage therapy, and participation in active rehabilitation therapy from November 2016 to October 2017 (all as recommended by Dr. Caillier). His headaches also improved, but not nearly to the same extent as his soft tissue injuries.
- [93] Mr. Wong suffered short term shock, loss of concentration, ringing in his ears, and generalized stiffness following the 2014 Single Vehicle Collision, but did not suffer any aggravation to his pre-existing injuries other than a temporary increase in his neck symptoms.
- [94] The 2016 Collision caused aggravation to Mr. Wong's neck and back pain (including his low back) and worsening headache symptoms, which in turn adversely affected his sleep, concentration, mood, and function.
- [95] Mr. Wong also currently complains of infrequent abdominal pain, which Dr. Caillier said (and I accept) is not related to the 2011 Collision or the 2016 Collision.
- [96] Mr. Wong's neck and back symptoms, as well as his posture, strength, and flexibility, have greatly improved since he began working with a personal trainer (who is also a kinesiologist) in June 2019. Mr. Wong was forthright in his evidence when he said that in particular, he noticed significant improvement in his low back symptoms since working out with his personal trainer. Mr. Wong has also been helped with an ergonomic study station at home with an ergonomic chair, elevated laptop stand, and wireless keyboard and mouse. His neck and back pain remain intermittent.

Current Status and Prognosis

- [97] A useful overview of the status of Mr. Wong's neck and back symptoms as at April 2019 is found in the following extract from Dr. Caillier's April 2019 Report:

Mr. Wong, since the time he was last seen has been involved in an active rehabilitation program. The active rehabilitation program began in November 2016 and continued through to October 2017. He does report some benefit from this program as it helped with lessening the intensity of the pain a bit, but he did not become pain free, nor did his symptoms return to what they were like prior to May 20, 2016.

Since the time Mr. Wong was last seen, he continues to have ongoing back pain and he describes his back feeling very tight and sore and this involves the scapular region through to the lower back or what he describes as being mid back through the lower back. His neck is pretty good but at times it can also be aggravated in the form of stiffness.

He reports that his back pain can be intermittent or constant. At the present time, his back pain is more continuous, and he attributes this to the fact that he is moving from his dorm room to his parents' home.

The back symptoms can be triggered with sustained posturing as well as heavier-based activities as well as at times can be present randomly.

His neck symptoms can be triggered with the sustained posturing, particularly head down position.

At times, he can have difficulty falling asleep secondary to discomfort through the back region. Also, Mr. Wong reports that he will have difficulties sleeping secondary to the hectic nature of his school year.

[98] According to Dr. Caillier, there is still room to improve management of Mr. Wong's symptoms. I address those recommendations in the Cost of Future Care section.

[99] Dr. Caillier and Dr. Craig agree that Mr. Wong is susceptible to worsening pain. As Dr. Caillier explained in her April 2019 Report:

It remains my opinion that there is increased susceptibility and vulnerability to worsening pain should he sustain trauma to the regions involved with his current complaints. An increase in pain can have a negative impact upon his ability to function not only recreationally but also vocationally and at home.

Mr. Wong will need to take breaks as required whether he is studying or at work in order to lessen the stress to the musculature of the neck and back regions.

[100] After having been made aware of Mr. Wong's progress with the personal trainer, in her testimony, Dr. Caillier remains of the opinion that Mr. Wong's prognosis to become completely pain free is poor. The opinion she expressed in her April 2019 Report, as extracted below, concerning ongoing pain to his neck and back regions has not changed:

In my opinion, he will likely continue to have an increased level of pain as well as increased frequency of flares of pain involving the neck and back regions as a result of his involvement in the [2016 Collision].

It remains my opinion that benefit from recommendations made will likely result in there being a lessening of symptomatic flares when engaged in sustained posturing or heavier-based activities as well as increased endurance and tolerance for activities, but he is not going to become pain free.

In my opinion, even with further benefit from recommendations made, Mr. Wong will likely to continue to experience flares of pain depending on the activities he is engaged in, whether this is sustained posturing, repetitive or heavier-based activities. In my opinion, Mr. Wong is still capable of participating in such activities.

[101] Turning to Mr. Wong's headaches, they continue to be his primary issue. Their onset remains unpredictable and they vary in frequency and intensity. Even though working out with his personal trainer and on his own at a gym have reduced intensity and frequency, currently, Mr. Wong suffers from mild headaches three to five times a week on average, with at least one intense headache per week. His intense headaches adversely affect his entire day. There are times when a headache will come on suddenly during a day, and then disappear for a short time before returning. Intense headaches affect Mr. Wong's ability to concentrate (in his school classes, homework, and physical activities), his mood (he becomes irritable and withdrawn), sleep, and his willingness to participate in physical and social activities. Mr. Wong is able to obtain some relief with Advil or Tylenol. He tried a prescription pain medication prescribed by Dr. Caillier - Amitriptyline - but found it offered no relief.

[102] According to Dr. Caillier, Mr. Wong's headaches are provoked by increased neck pain (which she described as cervicogenic in nature) and postural and activity triggers (e.g., studying for school), and sometimes for no apparent reason. In her April 2019 Report, she said:

Mr. Wong continues to have headaches that are provoked with increase of neck pain or when he is studying and there are times when the headaches are triggered for no specific reason. The headaches typically involve the frontal regions.

He has a mild headache on most days, which is more tolerable, and lately he has more intense headaches once per week. The more intense headaches can last the entire day and occasionally there are associated symptoms in the form of dizziness as well as light and sound sensitivity.

[103] In Dr. Caillier's opinion, it is possible that unknown triggers of Mr. Wong's headaches may be dehydration or stress, which are unrelated to the collisions at issue in this action.

[104] However, in her opinion, absent the 2011 Collision and the 2016 Collision, Mr. Wong would not be experiencing his headaches when studying in class or "sustained posturing."

[105] In Dr. Caillier's opinion, Mr. Wong's headaches have not returned to their pre-2016 Collision level. The prospect for return to pre-2016 Collision level is poor. In Dr. Caillier's opinion, much depends on any benefits Mr. Wong may derive from treatment recommendations:

Previously, I opined that Mr. Wong was likely to have ongoing headaches into the future in association with neck symptoms, but the headaches could be improved upon as well as better managed such that they return to the level that they were like prior to [the 2016 Collision].

Mr. Wong has not had a return of his headaches to the level that they were prior to [the 2016 Collision];

In my opinion, Mr. Wong is likely to have ongoing headaches now and into the future in association with sustained postures through the head and neck region as well as when there are increases in pain.

In my opinion, it is unlikely that his headaches will return to the level they were prior to [the 2016 Collision].

In my opinion, provided Mr. Wong benefits from recommendations made, there will likely be improved management of headaches with a reduction in intensity and frequency, but he will continue to have intermittent headaches depending upon the level of activity as well as the level of neck pain that he does have.

During the times of a more intense headache, this can have a negative impact upon his ability to engage in activities as well as his cognitive abilities. The more intense headaches can have a negative impact upon his ability to relay information, discuss information as well as to be productive and efficient, whether this is within his post-secondary education or with work.

It remains my opinion that there is increased susceptibility to worsening of headaches should he sustain trauma to the neck region. A worsening of headaches can have a negative impact upon his ability to engage in activities of his choosing.

Abilities and Limitations: It remains my opinion that as a result of the chronic posttraumatic headache condition, there are difficulties with sustained posturing such as head down position or activities that increase the neck pain.

It remains my opinion that during the time the headache becomes more intense, this could have a negative impact upon his cognitive capabilities and reduce his ability to focus and retain information as well as relay information. This could have a potential impact upon his efficiency and productivity at work as well as his post-secondary education.

[Bold in original]

[106] Dr. Caillier also noted that Mr. Wong's sleep impairment issues are attributed both to his pain and to the hectic pace of his schoolwork. She recommended stretching and heat prior to retiring at night.

[107] With the benefit of Dr. Caillier's opinions, I find on a balance of probabilities that her treatment recommendations should allow Mr. Wong to better manage his symptoms, with a corresponding decrease in frequency and intensity. However, symptom management will not alleviate the adverse effects of intense headaches on Mr. Wong's educational and vocational pursuits. As well, Mr. Wong remains vulnerable to worsening symptoms from future trauma to his neck.

[108] Dr. Caillier is clear in her opinion, expressed in her April 2019 Report and testimony at trial, that Mr. Wong's current injuries do not prevent him working, carrying on with his education, bowling, or volunteering as a volleyball coach, so long as he can be accommodated when experiencing symptoms. Mr. Wong is now in a position where he will have to be accommodated at the workplace and take steps himself to avoid activities and postures that increase his symptoms or cause flares for the remainder of his life.

Impact on Mr. Wong's Life

- [109] Mr. Wong has established that his injuries sustained in the 2011 Collision and 2016 Collision continue to impact his activities and enjoyment of life.
- [110] The defendants correctly point to Mr. Wong's improvement in symptoms and physical stamina. They also point to the many activities Mr. Wong has engaged in since those accidents, such as his success at competitive bowling, ability to referee volleyball games, working part-time as a residence advisor while attending University of the Fraser Valley, working at a summer camp operated by SuperChefs, outdoor activities (such as hiking, white water rafting, and skeet shooting), working at an archeological dig in Ontario, travel, recent weightlifting at a gym, and pursuing his post secondary education.
- [111] However, I disagree with the defendants' submission that his injuries have and will continue to have minimal impact on his life, education, and employment prospects. Their submissions overlook a number of key pieces of evidence.
- [112] First, Mr. Wong assiduously followed Dr. Lim's advice to remain active and has used his best efforts to work through his symptoms.
- [113] Second, with respect to bowling, evidence from Mr. Wong's bowling instructors/coaches demonstrates that in spite of Mr. Wong's reticence to discuss his symptoms, it was clear to them when Mr. Wong was suffering from pain or headaches because it affected his physical stance, gait, and his performance.
- [114] Third, Mr. Wong's supervisor at the University of the Fraser Valley testified it was clear to her when Mr. Wong was suffering from headaches or back pain. On those occasions, he presented as lethargic; his outward appearance and mood were subdued as opposed to his "usual positive self". His supervisor said she "could see it in his eyes" and encouraged him to take time off of his duties and rest, which Mr. Wong was always hesitant to do. Mr. Wong's supervisor respected Mr. Wong's privacy, his gung-ho attitude, and work ethic, and ultimately agreed to let him decide how best to proceed when suffering from increased symptoms.
- [115] Mr. Wong's reticence to mention his symptoms is also reflected in his desire not to be viewed as different from his peers. When asked why he did not apply for any special consideration or accommodation at school, Mr. Wong explained that he did not wish to be treated in a way such that others would view him as unusual or as someone who could not perform.
- [116] Fourth, the defendants' position ignores Mr. Wong's own credible evidence concerning the breaks he had to take while bowling, refereeing, travel, at summer camps, and working at the archeology dig site. Sometimes he could relieve his symptoms with breaks to stretch or move about; at other times, particularly when suffering from an intense headache, he had to postpone activities, often for a day, and felt withdrawn and irritable.

- [117] Fifth, Mr. Wong's good academic performance at the University of the Fraser Valley demonstrate his work ethic but do not detract from his evidence and the evidence of credible corroborating lay witnesses concerning the adverse effects of his pain and headaches.
- [118] Lastly, their submission overlooks Dr. Craig's evidence concerning Mr. Wong's vulnerability and the effect of his injuries on his vocational pursuits.
- [119] I find that while Mr. Wong is making efforts to carry on his normal activities and to be as physically active as possible in spite of his symptoms, his headaches and, to a lesser extent, his neck and back pain, continue to have an ongoing adverse impact on his life.

Summary

- [120] At this juncture, Mr. Wong's symptoms have plateaued.
- [121] He suffers from ongoing chronic pain attributed to his neck and back pain and ongoing headaches, which can only be managed as opposed to cured.
- [122] Mr. Wong's most significant complaint is his ongoing headaches. On average, he suffers from mild headaches three to five times per week and one intense headache once per week which affects his concentration, mood, activities, and sleep. Mr. Wong's neck and back pain are significantly improved, with the latter now presenting mainly as discomfort and stiffness that Mr. Wong is able to cope with and manage. Mr. Wong's prognosis for further recovery is poor. He is susceptible to flares of pain and to further injury. It is expected that Mr. Wong will suffer headaches of varying intensity and frequency for the remainder of his life.

Non Pecuniary Damages

- [123] In the oft-cited decision in *Stapley v. Hejslet*, 2006 BCCA 34, the Court of Appeal set out a non-exhaustive list of common factors which influence an award of non-pecuniary damages:
- [46] he 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).

[Emphasis added]

[124] The parties cited a number of case authorities in support of their submissions concerning the appropriate quantum of the award. In *Stapley*, Madam Justice Kirkpatrick cautioned against engaging solely in a comparative analysis of the injuries suffered by plaintiffs in prior decisions to those suffered by the plaintiff in the case at bar when assessing an appropriate award. The award must take into account the specific circumstances of the victim: paras. 44-45.

[125] I have considered the cases cited by the parties with that caution in mind.

[126] The cases cited by the parties in their written submissions provide useful guidance of an appropriate range for the award under this head of damage, and for that reason I have excerpted their helpful review of those cases from their written submissions (the bold is in their submissions).

[127] In his written submissions, Mr. Wong cited these cases with awards ranging between \$85,000 and \$110,000) in support of his submission that an appropriate award is \$95,000:

144. Parker's non-pecuniary award can be considered in reference to the following comparable cases involving chronic intermittent pain spanning several years by the time of trial:

- *Blackman v. Dha*, 2015 BCSC 698: The Plaintiff [age 37] suffered with intermittent and mild neck pain and headaches following a collision that occurred 5 years before trial. The medical prognosis was to the effect that this mild intermittent pain would continue into the future. The Plaintiff continued to work-full time since the collision, and was able to participate in recreational and family activities. The court found that the plaintiff remained stoical and determined in the face of her pain. Madam Justice Devlin awarded \$80,000 in non-pecuniary damages (\$85,000 in present day funds).

- *Carson v. Ehman*, 2019 BCSC 2120: The Plaintiff was a 22-year old student at the time of the Collision, wherein she sustained injuries to her neck, shoulders, upper back and related headaches. She took one week off work, but did not lose any pay. By the time of trial (5 years later), her symptoms had improved but that improvement had plateaued, and the court was satisfied that she would likely continue to suffer pain and headaches on and off into the foreseeable future. Mr. Justice Ehrcke awarded non-pecuniary damages of \$85,000.

· *Williams v. Nekrasoff*, 2008 BCSC 1520: The Plaintiff was a 23-year old university student at the time of trial. He was involved in 3 motor vehicle accidents, the first of which occurred when he was 10 years old. The collisions resulted in soft-tissue injuries to his neck, upper back and shoulder and regular headaches. His symptoms improved after the collision but soon plateaued and remained constant for ten years. His pain did not prevent the Plaintiff from participating in the normal activities of a child or teenager including playing fairly competitive hockey. The court found that the Plaintiff was motivated to improve his physical conditioning by taking an intensive fitness program for hockey, and his future plans included attending law school. The prognosis was somewhat favourable with the prospect of significant, but probably not complete resolution of symptoms into the future. The court considered the fact that the Plaintiff had suffered ongoing (non-disabling) pain for more than 10 years, and noted it was to the Plaintiff's credit that he has been willing to accept his pain and carry on with most of his pre-collision activities. Mr. Justice N. Smith awarded \$75,000 in non-pecuniary damages (\$89,000 in present day funds).

· *Ruscheinski v. Biln*, 2011 BCSC 1263: The Plaintiff was 17 years old at the time of the first accident, and was 22 at trial. She sustained injuries to her upper back, shoulders and related headaches, but by the time of trial had gained "significant relief" from physiotherapy treatments and an exercise program. The Plaintiff testified that the intensity of her headaches had improved, although she still experienced them daily. The Plaintiff continued to pursue yoga, run, hike and snowboard, and her symptoms had improved sufficiently so that she was able to travel. The Plaintiff missed minimal work and had no past wage loss, and following the accident was able to receive a raise in her pay and two promotions. The court found that the Plaintiff was "highly motivated to overcome her symptoms through treatments and physical exercise", but noted that a positive outcome following pursuit of the treatments recommended would still leave her suffering from partial disability for the rest of her life. Your Lordship awarded non-pecuniary damages of \$85,000 (\$96,000 in present day funds).

· *Sekhon v. Gill*, 2019 BCSC 811: The Plaintiff was a 25 year old university student at the time of trial. She was involved in 3 motor vehicle accidents which resulted in ongoing chronic soft tissue injuries and mild psychological features. The court found that the plaintiff's pain was likely to be permanent, although variable in its severity, and that the plaintiff was at high risk for aggravation of her symptoms in the event of future trauma or stress. Mr. Justice N. Smith awarded \$110,000 in non-pecuniary damages.

[128] Additional cases were cited on behalf of Mr. Wong in oral submissions. Those I found helpful are:

- (a) *Carlisle v. Vanthof*, 2015 BCSC 2427: A 34 year old plaintiff who was active in outdoors and gym based activities prior to the accident suffers with chronic pain. She is able to manage if sedentary, but suffers significant flares when active. Her condition was expected to wax and wane to different degrees indefinitely. None of the medical doctors recommended she restrict her activities. However, the plaintiff is restricted from engaging full time in all of her former activities given associated flares. She was awarded \$90,000.

- (b) Cartwright v. Cartwright, 2012 BCSC 1140: A 20 year old plaintiff, who was 15 at the time of the accident, suffered soft tissue injuries to her neck and back of moderate severity. She is left with back pain that is chronic in nature and also suffers from headaches (severity unknown). She was moderately affected by her injuries with a prognosis of possible diminishment of pain that is manageable with proper rehabilitation and regular exercise. The award was \$60,000.

[129] The defendants referred to these cases in their written submissions to support their submission that the award should be in the range of \$60,000 to \$75,000:

134. In *Embleton v Innes*, 2013 BCSC 851, a female plaintiff was involved in a motor vehicle accident and sustained injuries to her neck, upper back and shoulder. She developed headaches associated with the neck pain. At the time of the accident, the plaintiff was 37 years-old and a mother of two young children and also worked as a care aid[e]. She had been very physically active prior to the accident. In the summer, the plaintiff would play slo-pitch and soccer, in the winter months she would play volleyball and hockey. Her teammates described the plaintiff as being fully capable of performing at a high level of sport. A year after the accident she had returned to her sporting activities, but with less tolerance for extreme exertion. She experience symptomatic flare-ups of her injuries approximately once every two weeks. She took over the counter pain medication on a daily basis to deal with her headaches and neck pain and was prescribed sleep medication. She continued to work and play through the pain and as of the time of trial, the court found her ongoing symptoms were a nagging irritant than they were an actual disability due to the fact that whatever symptoms she was having did not hold her back from going to the field, court or rink to compete in her sports. The plaintiff received an award of \$60,000 for non-pecuniary damages.
135. In *Hinder v Yellow Cab Co*, 2015 BCSC 2069, the plaintiff was 29 years-old at the time of the accident. She was an interior designer and a mountain-biker so skilled that she could have become a professional. Following the accident, the plaintiff sustained soft tissue injury to her upper and lower back, neck pain and headaches. She also had pain in the side of her right leg and her right knee was bruised. While some of her soft tissue injuries resolved, she was left with neck pain and headaches that regularly progressed to become very painful and disabling, forcing her to stop whatever she is doing. The medical evidence showed that even with significant medical intervention, the neck pain and cervicogenic headaches were likely to continue into the foreseeable future. The Plaintiff had debilitating headaches approximately once every two weeks. She has been able to resume mountain-biking, however at a less intense level and at a lower frequency than prior to the accident. The court further found, "the plaintiff was not a complainer, she was a hard worker and carried on despite the pain. Her home life and recreational activities have been impaired to a significant degree than likely would have been the case for a less strong and stalwart person." However, this does not mean she did not suffer while incapacitated by neck pain and headaches. She was able to maintain her family and social relationships because of her

positive attitude. The court awarded the Plaintiff \$60,000 in non-pecuniary damages.

136. In *Poulin v. Armstrong*, 2019 BCSC 926, a 14 year-old student suffered injuries when the defendant's vehicle struck the vehicle in which the plaintiff was a passenger. The Plaintiff suffered moderate soft tissue injuries to her neck and upper back, with related headaches. Her symptoms improved over time but did not resolve. She was left with ongoing chronic pain and headaches. Her symptoms impacted her daily life and ability to engage in her formerly very physically active lifestyle. Any sustained activity beyond a moderate range of physical activity exacerbated her pain to the point of substantial functional capacity. According to the medical evidence, she would likely continue to suffer indefinitely from pain in her upper back and neck with associated headaches. She was injured at a young age but the Plaintiff was 20 years old at the time of trial and had gone onto University and was completing a degree i[n] Kinesiology and planned to pursue a Master's in Physiotherapy. [S]he had been deprived of the full enjoyment of her physical person and would continue to suffer from these deficits for many years. This was a significant setback especially for someone as active as the Plaintiff. The Plaintiff was awarded \$65,000 in non-pecuniary damages.
137. In *Fontaine v Van Kampen*, 2013 CarswellBC 7295, the Plaintiff was a customer service representative who suffered injuries when the Defendant's vehicle suddenly veered into her lane, sideswiping her vehicle. She saw her doctor with complaints of pain in her lower back, neck and shoulder as well as moderate to severe headaches. The symptoms from the accident, particularly her lower back pain, had all b[ut] completely prevented her from participating in the intense physical activities that she once enjoyed, including her life long pursuit of hockey. She suffered headache[s] which in turn negatively affected her sleep mood and emotional health. She was also left suffering from chronic pain to her low back. With ongoing rehabilitation it was likely that her symptoms would improve, but it was unlikely that she would return to her pre-accident condition. The court awarded the Plaintiff with \$75,000 in non-pecuniary damages.
- [130] Mr. Wong is a highly motivated and stoic plaintiff who followed his doctor's advice to remain as active as possible in spite of his symptoms. He pursued bowling, refereeing volleyball, volunteer work with his church locally and in Africa, his education, work at summer camps, and work as a resident advisor. He sought a physical trainer who has recently helped him with his low back and neck pain. He has continued to work out in a gym environment on his own, and has been able to increase his tolerance for lifting weights. Mr. Wong's perseverance and his continued optimism and stoicism are to his credit and should not detract from the award.
- [131] He is able to accommodate much of his neck and back pain so long as he remains active, continues to stretch and exercise, and continues from time to time with passive modalities. He is vulnerable to flares and aggravation of his injuries from subsequent trauma.

- [132] Mr. Wong has a poor prognosis for complete recovery from his headaches. His symptoms will not be cured. As was pointed out in *Munoz v. Singh*, 2014 BCSC 567 at para. 164, enduring pain, even where intermittent with fluctuating intensity, "takes a toll on everyday living and casts a pall over the pleasures of life."
- [133] Given Mr. Wong's age, the fact that he will suffer from the effects of ongoing headaches on a weekly basis for the remainder of his life, and taking into account the effect of inflation on the awards in the older cases cited by the parties, I have determined an appropriate award for non-pecuniary damage is \$90,000.

Cost of Future Care

- [134] Mr. Wong's award for the cost of future care is based on what the medical evidence establishes is reasonably necessary to promote his mental and physical health. Adjustments for negative and positive contingencies depends on his specific care needs: *Milna v. Bartsch* (1985), 49 B.C.L.R. (2d) 33 (B.C.S.C.); *Langille v. Nguyen*, 2013 BCSC 1460 at paras. 231-235. The standard of proof is "substantial risk" of pecuniary loss. Medical necessity is not necessary. In *Gregory v. Insurance Corporation of British Columbia*, 2011 BCCA 144 at para. 39, Madam Justice Garson said, "there must be some evidentiary link between the physician's assessment of pain, disability, and recommended treatment and the care recommended by a qualified health care professional." The assessment for this head of damage is not a precise accounting exercise: *Krangle (Guardian ad litem of) v. Brisco*, 2002 SCC 9 at para. 21. The plaintiff making the claim must also establish that he or she will utilize the recommended treatments: *Izony v. Weidlich*, 2006 BCSC 1315 at para. 74.
- [135] Mr. Wong claims for the future costs of ongoing acupuncture and massage, ongoing medication costs, ongoing Botox injections (to help with his headaches), and for certain one-time expenses. Each item was recommended by Dr. Caillier to help manage Mr. Wong's chronic pain.
- [136] Dr. Caillier made the following recommendations in her April 2019 Report:
- (a) Ongoing, regular-based exercise program of at least three times per week, through a combination of pool and gym exercises.
 - (b) A further 16 to 18 sessions of an active rehabilitation program on a one-to-one basis with either a kinesiologist or personal trainer within a gym environment, followed by an additional six to eight one-to-one sessions with a kinesiologist or personal trainer per year for the next three years.
 - (c) Four to six massage therapy or acupuncture treatments per year on an ongoing basis, with greater access during times of symptomatic flares.
 - (d) Ergonomic desks and computer/keyboards at home for his school studies and then at his place of employment.

- (e) Wheelie-bag to carry documents for work.
- (f) Topical anti-inflammatory medication.
- (g) Assessment at the CHANGE pain clinic for possible trial of myofascial trigger point injections to the neck and back regions.
- (h) Trial of prescription pain medication such as Nortriptyline, gabapentin, Effexor, or Topamax to help manage headaches.
- (i) Prophylactic management of headaches with magnesium citrate, riboflavin 200mg twice daily, as well as Coenzyme Q10.
- (j) Advil or Tylenol.
- (k) Botox injections.

[137] Dr. Craig's primary disagreement is with Botox injections.

[138] The dollar values ascribed to the items recommended by Dr. Caillier and sought by Mr. Wong are provided for in the expert opinion evidence of Louise Craig, who based her opinion on her review of the medical evidence together with an in-person assessment, including tests designed to examine Mr. Wong's function. In addition to being qualified to provide expert evidence concerning future care costs, Ms. Craig has additional experience in the medical field as a physiotherapist. Her assessment found objective and subjective findings of pain and impairment.

[139] Ms. Craig also recommended two ergonomic assessments (home and work) as well as vocational coaching for Mr. Wong to help him improve his opportunities for employment (including better means of presenting himself to potential employers given the accommodations he needs as a result of his symptoms and restrictions).

[140] Mr. Wong seeks recovery of the mid-point of Ms. Craig's valuation of one-time expenses and likewise the net present value of the mid-point for ongoing costs (e.g., massage, and acupuncture). His claim for medication (not including Botox treatments) is valued at 33% of the costs identified by Ms. Craig.

[141] Mr. Wong does not seek recovery of all of the care items recommended by Dr. Caillier and as discussed by Ms. Craig in her report.

[142] Instead, he claims the following:

- (a) one-time expenses (e.g., ergonomic assessment, work stations, vocational counselling) - \$10,434;
- (b) ongoing massage, acupuncture, and physiotherapy - \$19,341.24;
- (c) ongoing medication costs - \$15,434.27;

(d) ongoing Botox injections - \$158,801.76.

[143] There is no cost to trigger point injections since they are covered by the provincial Medical Services Plan.

[144] As noted, the main area of disagreement between the parties in terms of future care concerned Botox injections. The defendants relied on the evidence of Dr. Craig. Otherwise, they did not adduce any expert evidence regarding the future care claim and instead, chose to dispute entitlement or quantum in submissions.

[145] Before turning to the Botox issue, I will deal with the other future care items claimed.

[146] I find the evidence amply supports Mr. Wong's claim for future care costs and further, that he will continue to follow those he has undertaken to date and will utilize those he has yet to engage. There is clear medical justification for the claims for the medical and ergonomic-related expenses. I also find that a one-time expense for vocational counselling, as recommended by Ms. Craig, is justified to assist Mr. Wong's employment prospects in light of the need for accommodation. The values for these care items are clearly supported by Ms. Craig's evidence and the amounts claimed are reasonable.

[147] I also note some of the future care claims were recommended by Dr. Craig. In his report, he said that "there are good treatment recommendations as outlined by Dr. Caillier", and specifically recommended 16 to 20 further sessions with a kinesiologist, continued passive therapies (although not on a long-term yearly basis), and trigger point injections.

[148] Otherwise, the defendants did not lead any evidence concerning the future care claim. In many instances the defendants' arguments took issue with the scope of the claims (e.g., that the cost of massage therapy, physiotherapy, and acupuncture treatments should only be awarded to cover anticipated flares of pain and hence at the low end of the range provided by Ms. Craig) and the bottom end of the range for one-time costs such as ergonomic aids.

[149] In my opinion, the mid-point values sought by Mr. Wong are appropriate in the circumstances of this case, especially since he still requires ongoing treatments to manage his symptoms before he reaches a point where he will only require treatment for flares.

[150] Mr. Wong is prepared to try the other prescription pain medications recommended by Dr. Caillier despite negative results from his use of Amitriptyline so long as the side effects will not interfere with his school work and employment. I am satisfied that Mr. Wong will try one or more of the recommended medications and will continue to use them if the side effects are not an issue. Although Mr. Wong has thus established this aspect of his claim, I remain concerned over the significant prospect that they will be of little to no effect in light of his experience with Amitriptyline. I find Mr. Wong's proposed two-thirds' reduction of those costs to be appropriate in the circumstances.

[151] Consequently, Mr. Wong has demonstrated entitlement to an award for future care costs for items (a) to (c) in paragraph 142 above, in the total amount of \$45,209.51.

[152] I turn now to the claim for Botox injections.

[153] Dr. Caillier recommends Botox treatments if Mr. Wong does not benefit from tow further treatments. In her December 2016 Report, she wrote:

Recommendations:

Other considerations would be for a trial of Botox, particularly if he does not benefit from the more conservative management strategies. For Botox injections, one could consider not only the neck and top of the shoulder musculature but also the frontalis and temporalis muscles.

If Botox is to be considered then I would recommend that he be referred to either a physiatrist or a neurologist in the community who is well-versed with giving such injections.

[Bold in original]

[154] In her April 2019 Report she again recommended Botox injections if Mr. Wong "does not benefit how he should from further engagement in an active rehabilitation program as well as trialing the myofascial trigger point injections."

[155] Apart from trying some of the prescription pain medications, the only treatment recommended by Dr. Caillier and Dr. Craig that Mr. Wong has not yet undertaken are the trigger point injections.

[156] Dr. Caillier acknowledged the efficacy of Botox treatment is not guaranteed. In her experience, 60 to 70% of her patients experience some improvement to management (not cure) of their symptoms from Botox injections. However, she also candidly acknowledged there is a one in three chance that Mr. Wong will not derive any benefit from Botox injections.

[157] According to Dr. Caillier, physicians in this province are not permitted to charge patients for in-office injections. Botox injections are generally carried out at private clinics. The charge out rate ranges between \$10 and \$12 per unit (including medication) for a total per injection cost of \$1,500 to \$1,800. The Food and Drug Administration recommends four treatments per year. Dr. Caillier said that in her experience, the benefits from the medication typically wears off after two and one-half months. She estimates an annual cost of \$7,200 for Mr. Wong.

[158] I am satisfied that Mr. Wong has established medical justification for Botox treatment. Likewise, Mr. Wong confirmed that he will try Botox injections if remaining treatments do not assist and continue to do so for as long as if they assist his headache symptoms.

[159] Significant awards for Botox injections have been made in this Court in appropriate cases: Pearson v. Savage, 2017 BCSC 1435; Chow v. Goodman, 2016 BCSC 1486; McKenzie v. Lloyd, 2016 BCSC 1745; Picton v. Fredericks, 2016 BCSC 1470.

- [160] In McKenzie, at para. 256, Madam Justice Russell discounted the award for Botox injections for the remainder of the plaintiff's lifetime by 50% to account for the possibility that treatment may not be effective. There is a one in three likelihood that Botox treatment will not benefit Mr. Wong.
- [161] The present value of the cost of Botox injections for the remainder of Mr. Wong's lifetime is \$244,310.40. In submissions, Mr. Wong proposed a 35% reduction to that figure, for a total claim of \$158,801.76.
- [162] In spite of Dr. Craig's written opinion confirming medical justification for some Botox injections, the defendants' position is that there is no basis for the award. Their alternative position is that if a claim for Botox is allowed, it should be premised on the same deduction Mr. Wong has suggested for his other medication costs, i.e., 66%, for an award of \$83,066.
- [163] In this instance, I agree with the defendants' alternative submission given that the outcome of trigger point injection therapy is unknown and given uncertainty whether Botox injections will provide any relief or if they do, for what length of time. Accordingly, the award for Botox injections is \$83,066.
- [164] Thus, the total award for cost of future care is \$128,275.51.

Loss of Future Earning Capacity

- [165] Given his age and minimal work history, Mr. Wong advances a claim for loss of a capital asset. To be entitled to an award, he must establish that there is a real and substantial possibility of a future event leading to an income loss: *Perren v. Lalari*, 2010 BCCA 140. In *Perren*, the Court of Appeal discussed the test as follows:
- [30] Having reviewed all of these cases, I conclude that none of them are inconsistent with the basic principles articulated in *Athey v. Leonati*, [1996] 3 S.C.R. 458, and *Andrews v. Grand & Toy Alberta Ltd.*, [1978] 2 S.C.R. 229. These principles are:
1. A future or hypothetical possibility will be taken into consideration as long as it is a real and substantial possibility and not mere speculation [*Athey* at para. 27], and
 2. It is not loss of earnings but, rather, loss of earning capacity for which compensation must be made [*Andrews* at 251].
- [31] Furthermore, I conclude that there is no conflict between *Steward* and the earlier judgment in *Pallos*. As mentioned earlier, *Pallos* is not authority for the proposition that mere speculation of future loss of earning capacity is sufficient to justify an award for damages for loss of future earning capacity.
- [32] A plaintiff must always prove, as was noted by Donald J.A. in *Steward*, by Bauman J. in *Chang*, and by Tysoe J.A. in *Romanchych*, that there is a real and substantial possibility of a future event leading to an income loss. If the plaintiff discharges that burden of proof, then depending upon the facts of the case, the plaintiff may prove the quantification of that loss

of earning capacity, either on an earnings approach, as in *Steenblok*, or a capital asset approach, as in *Brown*. The former approach will be more useful when the loss is more easily measurable, as it was in *Steenblok*. The latter approach will be more useful when the loss is not as easily measurable, as in *Pallos* and *Romanchych*. A plaintiff may indeed be able to prove that there is a substantial possibility of a future loss of income despite having returned to his or her usual employment. That was the case in both *Pallos* and *Parypa*. But, as Donald J.A. said in *Steward*, an inability to perform an occupation that is not a realistic alternative occupation is not proof of a future loss.

[Emphasis in original]

[166] In assessing an appropriate award, I must, consider, at a minimum, the four factors discussed in *Brown v. Gola* (1985), 26 B.C.L.R. (3d) 353 (B.C.S.C.):

1. whether the plaintiff has been rendered less capable overall from earning income from all types of employment;
2. whether the plaintiff is less marketable or attractive as an employee to potential employers;
3. whether the plaintiff has lost the ability to take advantage of all job opportunities which might otherwise have been open to him, had he not been injured; and
4. whether the plaintiff is less valuable to himself as a person capable of earning income in a competitive labour market.

[167] Mr. Wong's injuries, current status, and prognosis engage each of those factors.

[168] Mr. Wong has established an entitlement to an award under this head of damage. The expert medical evidence clearly establishes that Mr. Wong's ongoing headaches, even if they can be better managed, and increases or flares in his neck and back pain, will adversely impact his vocational pursuits.

[169] The defendants' submission that Mr. Wong has not established a loss of capital asset is not supported by the evidence. It is also inconsistent with the evidence of their medical expert, Dr. Craig, who acknowledged that if Mr. Wong's pain affects his ability to focus, concentrate, sit, and stand, then over the course of his working life, his injuries would prevent him from engaging in more physically demanding employment.

[170] In *Rosvold v. Dunlop*, 2001 BCCA 1 at para. 8, the Court of Appeal said, "[w]hat is being compensated is not lost projected future earnings but the loss or impairment of earning capacity as a capital asset." While projections from past earnings may be used (*Rosvold* at para. 8), they have no application in the facts of Mr. Wong's case: *Perren* at para. 12. The lump sum award for loss of a capital asset considers possibilities, probabilities, chances, opportunities, and risks, taking into account all of the evidence, so long as they are a real and substantial possibility and not mere speculation: *Rosvold* at para. 9; *Jurczak v. Mauro*, 2013 BCCA 507 at paras. 36-37; *Miscisco v. Small*, 2001 BCCA 576 at para. 2.

- [171] Evidence of continued pain can ground an award of loss of future earning capacity: *Morlan v. Barrett*, 2012 BCCA 66 at para. 41; *Shapiro v. Dailey*, 2010 BCSC 770 at para. 100, *aff'd* 2012 BCCA 128.
- [172] For younger plaintiffs who do not have a settled career or career path, quantifying the award is at large: *Sinnott v. Boggs*, 2007 BCCA 267 at paras. 16-17; *Romanchych v. Vallianatos*, 2010 BCCA 20 at para. 15.
- [173] In this province, courts have often assessed at large awards based on the plaintiff's potential average annual earnings, and then multiplying that amount by an appropriate number of years after considering contingencies. I refer to this as the "multiplier approach". Case authorities provided by the parties in submissions provide awards between one and four years: *Brown*; *Davidge v. Fairholm*, 2014 BCSC 1948; *Miller v. Lawlor*, 2012 BCSC 387; *Scott v. Cheng*, 2019 BCSC 697.
- [174] Mr. Wong suggests a different approach, one that capitalizes the value of the economic asset and then discounts it for the impairment. This approach first requires a determination of Mr. Wong's life time earning potential by: (a) taking what I find to be his average earnings (which he submits is shown on the evidence to be \$95,025 per year); (b) determining retirement age (which involves another factual determination); and (c) applying an appropriate contingency (e.g., mortality and/or economic/labour market contingencies) to determine present value. The second step is to determine the quantum of impairment as expressed as a percentage (which Mr. Wong submits in his case is 20%). The third and final step is to apply that number against the present value of the life time earnings amount to determine the award. In submissions, Mr. Wong suggested the present value of his capital earnings asset is approximately \$2.898 million to age 65 if an actuarial multiplier is used or approximately \$2.234 million if an economic multiplier is used. Depending on the actuarial multiplier used, Mr. Wong said his claim is either \$579,728.52 or \$447,833.82.
- [175] Respectfully, in my opinion, the multiplier approach is the appropriate one to assess an at large award in this case. This accords with the weight of the authorities involving younger plaintiffs with a scant or no work history.
- [176] As an officer of the Court, defence counsel acknowledged, as it was quite proper for him to do, the evidence supports a loss of capacity claim and suggested, in the alternative, that the award should be minimal, at one to two years valued at approximately \$45,000 per year or one year at \$95,000. In my opinion, neither amount reflects the true nature and effects of Mr. Wong's injuries and ongoing symptoms.

- [177] Mr. Wong also advanced an alternative submission. As noted above, he cited case authority in this province using the multiplier approach for younger plaintiffs, and submitted if it is the method employed, then the award should reflect a significant temporal multiplier given the effects on a 24 year old Mr. Wong of the enduring nature of his headaches (which may at best be managed) and the limitations and requisite accommodations on his vocational opportunities posed by his neck and back pain.
- [178] In closing written submissions, Mr. Wong made these compelling points with which I agree:
170. In many ways, Parker has done well because he has been sheltered as a teenager and a student, living in his parents' home, having accommodating coaches in the McPhees and part-time employers like Christine Zapisocki. Parker has been able to accommodate periods of time with bad headaches by relying on "banked games" in competitive bowling or getting pulled out of bowling tournaments and matches. In his role as an RA at UFV, Christine Zapisocki trusted the Plaintiff to work around his headaches or poor sleep by making up or completing his job duties on his own time. As with the McPhees, Dr. Chang and Parker's mother, Christine affirmed that Parker was not a whiner, that he "pushed through his work" if he had slept poorly, that she would encourage him to take time off work, but that he only made it known to her that he was struggling with headache or poor sleeps some six occasions over two years.
171. In Parker, we have a young man that will be approaching the competitive job market at the bottom of the vocational food chain, and he will be competing against just as young and hungry and qualified applicants as him, but competitors who are unencumbered with chronic pain and headaches. Part of the diminishment to Parker's earning capacity the Defendants have visited on the Plaintiff is putting him in the position of having to either omit in the job interview setting that he has enduring chronic pain and headaches that impact weekly, or he tells the truth.
- [179] Mr. Wong is highly motivated to obtain a Bachelor of Arts degree, likely in forensics. He graduated from high school in 2015 and since studied at the University of the Fraser Valley. His focus is on criminology but he has also taken courses in geography and sciences. He anticipates graduating with a diploma in criminology this spring and of being accepted at the British Columbia Institute of Technology ("BCIT") for either the Fall 2020 or January 2021 term to attend its health sciences degree program. According to Mr. Wong, BCIT is the only post secondary institution in the province that truly offers a forensics program. His goal is to graduate with a Bachelor of Arts ("B.A.") degree in Health Sciences Forensics.

- [180] Given his academic performance to date, I have no hesitation in finding that absent the 2011 Collision and 2016 Collision, Mr. Wong would have graduated with a B.A. degree of his choice. Likewise, I find that in spite of the injuries he suffered in those accidents, Mr. Wong will achieve his goal to attend BCIT in September 2020 and will successfully complete a two year program in forensics, graduating with a B.A. degree in spring 2022, at which point he should be available to enter the workforce.
- [181] Mr. Wong has expressed an interest working as a coroner or with a police force or border services once he graduates. Dr. Caillier has encouraged Mr. Wong to pursue his B.A. degree and his chosen career. I accept her evidence that Mr. Wong is capable of working in his chosen career so long as he can be accommodated by his employer for his headache symptoms and when he suffers flares of neck and back pain or increased pain symptoms due to postural/activity based triggers.
- [182] The only income evidence adduced at trial is the average annual earnings of males living in this province with a B.A. degree in 2019 is \$95,025.
- [183] I reject the defence submission that since Mr. Wong's starting income may be lower than the average income amount, it is inappropriate to use this figure when assessing the award, for several reasons. Mr. Wong's impaired earning capacity is not limited to his early working years. It is a loss suffered for the whole of his working life. The dollar amount in evidence reflects an average of all incomes for all age and income earning cohorts with a B.A. degree. As noted above, it is the only evidence of income. The defence did not tender any evidence concerning potential incomes. Given Mr. Wong's dedication, personality, and ambition, I am satisfied on the balance of probabilities that absent the injuries he sustained in the 2011 Collision and 2016 Collision, Mr. Wong would have readily achieved the income average.
- [184] There is no basis to incorporate into my analysis the defence submission that Mr. Wong could work in his father's liquor store business in a management position (he owns three liquor stores), even though it involves frequent lifting of heavy boxes and stocking shelves. Quite apart from Mr. Wong's evidence that when he worked for his father's business he tried to avoid heavy lifting so as not to aggravate his symptoms, no evidence was adduced of income earning potential.
- [185] For these reasons, I have determined an appropriate award for loss of future earning capacity - for what I find to be a significant impairment to Mr. Wong's lifetime earning capacity owing to his ongoing symptoms caused by the injuries caused by the 2011 Collision and 2016 Collision (which are at best managed), his ongoing need for accommodation, and his ongoing vulnerability to flares, triggers for pain due to posture and activity, and aggravation or injury - to be \$285,075, which is premised on three years' of the average earnings amount of \$95,025.

Summary

[186] In light of the injuries suffered by Mr. Wong in the 2011 Collision and 2016 Collision, resulting in enduring headaches and chronic pain, I have determined the following amounts to comprise an appropriate award of damages:

- (a) non-pecuniary damages - \$90,000;
- (b) cost of future care - \$128,275.51;
- (c) loss of future earning capacity - \$285,075.

[187] When added to the special damages claim agreed to by the parties (\$2,200), the total award is \$505,550.51.

[188] In addition, Mr. Wong is entitled to court order interest and an award for applicable tax gross up as agreed between the parties, plus any management fees that may be agreed upon. Likewise, any applicable statutory deductions shall be applied as agreed between the parties. Failing agreement the parties may return before me to make further submissions concerning any or all of those issues.

[189] Absent some matter which counsel which to address, Mr. Wong is entitled to his costs.

"Walker J."

The Honourable Mr. Justice Walker

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Prepared on 27 October 2026 · Esheria