

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Lee v. MacLean*,
2010 BCSC 734

Date: 20100521
Docket: M93853
Registry: New Westminster

Between:

Shun Lee

Plaintiff

And

Audrey E. MacLean and Donald Rea MacLean

Defendants

- and -

Docket: M93852
Registry: New Westminster

Between:

Shun Lee

Plaintiff

And

Mei Sao

Defendant

Before: The Honourable G. R. J. Gaul

Reasons for Judgment

Counsel for Plaintiff:

W. D. Mussio

Counsel for Defendants:

K. E. Ducey
M. Booth

Place and Date of Trial:

New Westminster, B.C.
December 15 - 18, 2008
May 28 - 29, 2009

Written Submissions of Plaintiff

June 5, 2009

Place and Date of Judgment:

New Westminster, B.C.
May 21, 2010

[1] The plaintiff, Mr, Shun Lee, was involved in two motor vehicle accidents in 2003. The first occurred on 14 August (“Accident #1”) and the second on 12 October (“Accident #2”). I will refer to the two accidents combined as the “2003 Accidents”.

[2] Mr. Lee maintains that he was not responsible for either of the 2003 Accidents. He further claims to have suffered lasting injuries as a result of the accidents and seeks an award of damages under the following headings: non-pecuniary damages, past wage loss, future loss of capacity, special damages and future care costs.

[3] The defendants in Accident #1, Audrey and Donald MacLean, have admitted liability for the accident. However, they argue Mr. Lee was also partially responsible on account of his own negligence and therefore there should be a commensurate reduction to any award of damages. The defendant in Accident #2, Mr. Mei Sao, has admitted liability for the accident; however, he maintains Mr. Lee’s injuries were minor in nature and that should be reflected in the quantum of damages awarded.

Facts

Plaintiff’s health and level of activity: 1993 to 2003

[4] Prior to the 2003 Accidents Mr. Lee had been involved in three previous motor vehicles accidents: one in 1993, one in 1994 and one in 1995. I will refer to these accidents collectively as the “1990s Accidents”.

[5] Mr. Lee suffered a possible fracture to the orbital bone above his right eye in the 1993 accident. He acknowledged being responsible for the accident and in light of that fact as well as the fact that he claimed to have suffered no lasting injury or effect from the accident, he sought no compensation from his insurer.

[6] The physical impact on Mr. Lee of the 1994 accident was more severe. His vehicle was struck from behind and spun around and he suffered injuries to the right side of his body. Specifically, he had recurrent pain that radiated from his neck and right shoulder area down his back. Mr. Lee sought compensation for the injuries he

suffered in the 1994 motor vehicle accident. His claim was settled with the other driver's insurer, the Insurance Corporation of British Columbia ("ICBC"), in September 1998.

[7] In December 1995, Mr. Lee was involved in a third motor vehicle accident. On this occasion his motor vehicle was again struck from behind by another vehicle. Although the evidence relating to this accident is sparse, it would appear Mr. Lee suffered no significant injuries of note.

[8] Even though Mr. Lee was not the picture of health prior to Accident #1, he was a reasonably active person, given his prior medical history. He skied in the winter and mountain biked in the summer and enjoyed playing with his young children. He also exercised at a local gym and participated in Tae Kwan Do. However, all of his activities were governed by how he felt at the time and more particularly whether he was experiencing the physical pain or discomfort that had developed after the 1990s Accidents.

Medical Treatment: 1993 to 2003

[9] Following the motor vehicle accidents in the mid-1990s, Mr. Lee was seen and treated by a number of medical professionals.

Dr. Grant Ayling

[10] Mr. Lee saw his family physician, Dr. Ayling ten days after the 1994 accident.

[11] Over the course of the next two and a half years, Dr. Ayling saw Mr. Lee on 18 different occasions. During this period Mr. Lee complained of occasional mild headaches, muscle spasms and discomfort in his neck, mid-back and right shoulder area and pain in his right arm.

[12] Dr. Ayling recommended a multitude of treatments for Mr. Lee, including physiotherapy, massage therapy, Shiatsu massage, stretching and strengthening programs, all with limited success.

[13] Dr. Ayling authored a medical legal report dated 4 February 1997. During cross-examination, he confirmed the contents of the report as well as the opinions contained within it. In particular, he acknowledged that in 1997 he diagnosed Mr. Lee to be suffering from:

- a. Cervical facet joint strain with secondary soft tissue injuries;
- b. Thoracic facet joint strain;
- c. Bilateral lateral epicondylitis; and
- d. Mild lumbar facet joint strain and secondary soft tissue injuries.

[14] Under the heading “Disability”, Dr. Ayling concluded:

As a result of the motor vehicle accident of October 21, 1994, Mr. Lee was not totally disabled, but has suffered partial disability. There have been a number of days where he has left work early as a result of an increase in the severity of his symptoms but generally, he has missed very little work as a result of the injuries received in this motor vehicle accident. The most persistent regions causing ongoing impact upon his life have been with regard to the upper shoulder region on the right side, with involvement of the right arm and hand. He has also had problems in the mid to lower thoracic region on the right side as well.

He has been troubled with headaches from time to time although these have generally not been persistent in nature and usually are present in the occipital region with radiation to the top of the scalp. He is an electrical engineer and his job is primarily working with the company’s computer system which requires a lot of work at the computer terminal and so posture does indeed play a significant role in his overall recovery process.

[...]

Examinations have consistently shown the presence of right trapezius muscle spasm and trigger points since the motor vehicle accident. I expect that this chronic area of muscle spasm has contributed to many symptoms involving the right arm and hand in that the nerve fibres are compressed within the areas of muscle spasm in the neck and upper shoulder region, creating many of the symptoms complained of.

[15] Under the heading “Prognosis”, Dr. Ayling concluded:

Despite the fact that it is now over two years since the motor vehicle accident, I continue to believe that Mr. Lee’s ultimate prognosis is likely to that of a good recovery from the injuries received in this motor vehicle accident. His particular work obviously played a role in his recovery process in that he is required to sit for often long periods of time at a computer terminal and that the postural stresses placed upon the mid and upper back and neck regions will have often prolonged the recovery process.

[...]

The main persistent feature has been that of evident soft tissue injuries and as mentioned above these have been primarily centered in the upper right neck and shoulder region, as well as the mid to lower thoracic region on the right side. It is likely that the complaints in the forearm on the right side around the elbow and distally to the hand are also consistent with the motor vehicle accident.

[...]

Mr. Lee has continued to maintain an active lifestyle, although it has obviously been impacted upon by the injuries received in this motor vehicle accident. He maintains a consistent stretching program and has at times worked on strengthening the areas of injury without a complete resolution of symptoms which have occurred as a result of the motor vehicle accident.

[16] Unable to explain and address all of Mr. Lee's symptomatology, Dr. Ayling recommended that Mr. Lee undergo an unconventional intramuscular stimulation treatment program, a type of acupuncture treatment, offered at the Institute for the Study and Treatment of Pain ("I-Stop").

[17] In August 1997, Dr. Ayling referred Mr. Lee to Dr. Rhonda Shuckett for an expert medical assessment of Mr. Lee's ongoing symptoms.

[18] From 1997 to 2001, Dr. Ayling continued to treat Mr. Lee for the pain he was feeling in his neck, shoulders and back. On the occasions that Dr. Ayling would examine Mr. Lee, he would complain of the regular reoccurrence of the pain and discomfort associated with the 1994 motor vehicle accident.

[19] By 1999, because Mr. Lee reported no substantive resolution of his pain levels, Dr. Ayling again referred Mr. Lee to Dr. Shuckett for a medical consultation.

[20] Dr. Ayling confirmed that by mid to late 2001 Mr. Lee still required treatment for the physical symptoms related to the 1990s Accidents and continued to recommend massage therapy to address the chronic nature of Mr. Lee's pain and discomfort.

Dr. Rhonda Shuckett

[21] Dr. Shuckett is a medical physician who specializes in rheumatology.

[22] In August 1997, Dr. Shuckett examined Mr. Lee and prepared a medical legal report dated 25 August 1997. In her report, Dr. Shuckett made the following observations:

[M]ore recently he is doing work as a software programmer in his job as an electrical engineer. He has to spend extended time at a desk and at a computer and he is finding this more and more difficult. He has difficulty sitting for a long time. He finds that his concentration is interrupted. At work he will have to lie on the ground intermittently to stretch.

[...]

The patient has experienced severe pain in the past in that he lost his left thumb in an accident and thus, he has experienced the upper end of pain. I asked him to rate his pain on a scale of zero to 10 being the worst pain he can imagine and zero being no pain. Day to day he says the pain is bearable at a level of 3-4 but it is constantly there and does not go away at all. At times it will go to close to an 8 or 9 out of 10, particularly recently he has had episodes of 8-9 out of 10, because in his newer job he is having more difficulty. About 4 weeks ago he had a spell where he had a very high level of pain. At that time, trying to stretch did not help him at all.

In addition to the pains described above, he has noted an alteration of his right shoulder whereby in certain positions it will tend to "pop out". This had never happened prior to the MVA.

Treatment Advice:

Presently he is on no medications and prefers, understandably, not to be on any medications, particularly considering the chronic nature of his symptoms. He took Ibuprofen for 2 days but this leads to GI upset. He underwent physiotherapy and massage therapy for an interval. He has been doing Tai Kwan Do lightly for the past year but does this in a very limited way. It has somewhat increased his flexibility but has not helped his pain at all. He is still doing some of his sports activities but has had to markedly alter the way he does these. The patient is left handed and thus, he continues to be able to play tennis but his endurance has decreased and is not able to play as well. He throws and (sic) baseball and football and occasionally will throw these with the right hand, however, he does not do this well and tends to throw poorly because of the right arm weakness and locking of the shoulder. He mountain bikes but is unable to take any trails. He does exercise at the gym. He will occasionally play hockey but again he is mostly using his left hand. He has really had to tone down the degree of his exercise.

[...]

Impression:

[...]

The symptoms which he describes are classic for symptoms of TOS...This condition of a muscular or functional TOS can certainly occur after muscular injury as would occur at the time of twisting in an MVA...

[I]t appears that most of the twisting and torsion and force was on this patient's right trapezius region and this would explain the presence of right sided TOS after the MVA.

In addition, this patient has suffered a whiplash injury to his neck and more so to the thoracic spines. He has considerable pain and tenderness on palpation in the area between T3 – T10 thoracic spines. Paravertebral muscle spasm is palpable there. Considering that this patient has a torsion twisting type injury and was constrained by his seat belt it appears that most of the whiplash was to the right thoracic outlet region and also to the dorsal or thoracic spine region. It is probable that the pain in the dorsal spine in the thoracic is related to ligaments and muscle injury rather than disc herniation, as disc herniation is not common in this region.

[...]

Impression of Causality and Prognosis:

[...]

I strongly believe that this patient's right sided arm symptoms and tingling in an ulnar distribution along with a positive Adson's test is highly compatible with TOS related to the MVA. He also has evidence of cervical and particularly thoracic paravertebral spasm and tenderness, in keeping with a whiplash injury.

It is always difficult to prognosticate when seeing a patient at one point in time. However, I am seeing him now almost 3 years after the MVA. The fact that he is having ongoing symptoms troubling him, suggests that he may have long term residual pain. I feel we would have to extrapolate from his status at the present time, considering that this is already a long time interval and we are already dealing with chronic pain. Once the pain is chronic and particularly once it is lasting for more than 2 – 3 years, it is much less likely to improve [sic].

Because this patient's work has changed to doing more intense sedentary, prolonged computer work, he is having considerable difficulty and is having to adapt her [sic] work by lying on the floor and stretching, for example. He is doing some sports activities but has had to severely compromise these as far as level of endurance and the degree of stamina and aggressiveness with which he can do these exercises.

[23] When Dr. Shuckett re-examined Mr. Lee in December 1999 he still had severe complaints regarding his physical well-being. More particularly, Dr. Shuckett observed that Mr. Lee continued to suffer from myofascial pain in the area of his neck and right shoulder and arm.

Dr. Peter Fry

[24] Dr. Fry is vascular surgeon with an expertise in thoracic outlet syndrome. Mr. Lee was examined by Dr. Fry in July 1998 at the request of ICBC. He prepared a medical legal report for ICBC dated 30 July 1998.

[25] Although Dr. Fry was retained by ICBC with respect to Mr. Lee's injuries from his 1994 accident, it was Mr. Lee who sought and obtained Dr. Fry's opinion concerning his injuries from the 2003 Accidents.

[26] Although Dr. Fry did not testify at trial, he did provide a full deposition of his evidence. An audio and video recording as well as a written transcript of that deposition were filed as exhibits at trial.

[27] During the course of his evidence, Dr. Fry acknowledged he authored the 30 July 1998 medical legal report. That report contains the following observations and conclusions:

His symptoms at the present time have progressed in the last 18 months. He is now complaining of pain and tenderness indicating the right elbow, pain in the wrist indicating the dorsum of the hand and also of the area of the lateral epicondyle on the right side. He also indicated pain over the thenar eminence indicating that his symptoms were mainly related to joints. He also complained of a "popping" sound in the shoulder and a grinding sensation with shoulder rotation. He complained of tiredness around the left shoulder, a sensation of fatigue on that side and occasional soreness associated with neck and muscle spasm particularly on the right side. He felt generally fatigued and he felt that these symptoms were getting worse. Any activity with his right arm in an overhead position resulted in a pulling sensation in the elbow and paresthesias to the fourth and fifth fingers. Repetitive movement of the right upper extremity would also produce discomfort in the posterior aspect of his shoulder. He noted increasing weakness on the right side as far as his grip was concerned.

[...]

Impressions

My impression at the time having completed his physical examination was that he had evidence of a vascular and neurogenic thoracic outlet syndrome on the right and left side and that he also had some evidence of shoulder pathology unrelated to this condition on the right side.

[...]

Summary & Opinion

In summary, there is little doubt that Mr. Lee does in fact have signs and symptoms consistent with thoracic outlet syndrome particularly on his right side. One can demonstrate on physical examination definite evidence of compromise of the neurovascular bundle within the thoracic outlet not only on the right but also on the left side, his dominant side, which, incidentally, is essentially asymptomatic apart from during the physical examination. This brings up the question of whether this individual had a small thoracic outlet from a developmental standpoint since he clearly has evidence of a compromised thoracic outlet at the present time even on the left side which is asymptomatic. Complicating the issue is the fact that at the present time he clearly has evidence of right sided thoracic outlet syndrome with ulnar nerve symptoms involving nerve roots C7-8 and T1 and these symptoms are reproducible when putting his through provocative manoeuvres. What concerns me, however, is the fact that he was able to backpack around Europe and, I believe, in the Grand Canyon as well without any significant disability or exacerbation of his symptoms which would have to be viewed as very atypical of a patient with "active" thoracic outlet syndrome. One also must recognize that many of his symptoms are not consistent with a diagnosis of thoracic outlet syndrome and I am unable to suggest a diagnosis for his upper body tingling and numbness that is reported by several observers particularly Dr. Ayling since this does not fit any obvious neurogenic pattern. One also has to wonder whether Mr. Lee has a low pain threshold in reference to some of the symptoms that he is complaining of. Nevertheless, he does have evidence of thoracic outlet syndrome on the right side and this is what you have asked me to comment on in reference to his disability.

As far as the issue of causation is concerned he has had three motor vehicle accidents. I think the pattern here is probably consistent with a significant injury to the thoracic outlet due to whiplash occurring during the first accident which likely produced scarring of the scalene muscles, etc. which in an individual who perhaps already had a "small" thoracic outlet then made him vulnerable for the second accident occurring in October of 1994 and possibly exacerbated by the third accident in 1995. It would seem to me the most likely explanation is a combination of these several factors that have ultimately resulted in mild to moderate thoracic outlet syndrome on the right side and evidence of thoracic outlet compression on the left side without significant symptoms.

As far as occupation is concerned, my understanding is that he has not lost any significant time off work. As far as disability goes, he has ongoing symptoms, many of which can not be explained by thoracic outlet syndrome, and I would defer to Dr. Shuckett in reference to explanation of his other musculoskeletal problems. Certainly as she has indicated he has ongoing symptoms some four years out from the original accident and I think there is a reasonable possibility that he will require first rib resection on the right side in order to resolve his current symptoms. He may well require the same procedure on the left side if he ultimately develops symptoms on that side but it would be very difficult to relate that aspect to any of his motor vehicle accidents.

[28] During his testimony, Mr. Lee acknowledged that by 1995 he was having difficulty sitting in one place for more than 45 minutes. The situation improved somewhat by the end of the decade; however, he still had problems sitting for prolonged periods and difficulty concentrating at work, both of which he attributed to the pain and discomfort he continued to suffer from the 1990s Accidents.

[29] Although hesitant at first, during cross-examination Mr. Lee eventually agreed with the suggestion that he had told Dr. Fry during their appointment in July 1998 that his physical symptoms had been worsening over the past 18 months. He also acknowledged that in 1999 he informed Dr. Shuckett that he continued to have pain in his right shoulder area most days. Around this same time Mr. Lee declined the suggestion from one of his doctors that he undergo Botox treatment for the pain in his shoulder. He decided against this treatment because he was opposed to any bodily intrusive measures and because there was no guarantee it would resolve his pain in any event.

[30] Mr. Lee acknowledged that he felt periodic pain and discomfort, predominantly in his right shoulder area and lower back during the time period leading up to Accident #1.

Activities: 1994 to 2003

[31] Although still struggling with regular flare-ups of pain and spasms in the shoulders, neck and back, by the mid to late 1990s Mr. Lee was managing to cope with the residual effects of his injuries. However, there is no question those effects were still present.

[32] In June 1994, Mr. Lee travelled and holidayed in Europe with his sister during which time they backpacked, rollerbladed and cycled. Mr. Lee was able to participate in these activities notwithstanding the physical discomfort he experienced doing them.

[33] By 1995, Mr. Lee had resumed a light regime of weekly Tae Kwon Do, and had recommenced skiing, cycling and playing tennis. He managed these activities

by regularly stretching and by resting whenever his pain or discomfort reached a level necessitating it.

[34] In the fall of 1996, Mr. Lee hiked a portion of the Grand Canyon with his family. Again, he relied on regular breaks to rest and stretch in order to complete this trip.

[35] Greg Chin, a friend of Mr. Lee's, described how in 1997 he and Mr. Lee succeeded in hiking up Mount Seymour. Mr. Chin also described how in the later part of the 1990s the two of them would engage in mountain biking on challenging terrain. Mr. Chin noted that although Mr. Lee would always complain of physical discomfort, he was able to participate in the activities.

[36] In 1999 the Lee's first child was born. Their second child arrived in 2002. During the course of his evidence at trial, Mr. Lee acknowledged that the birth of his children curtailed and modified the nature and extent of his social and sporting activities and that during the time leading up to Accident #1, he did experience the occasional reoccurrence of pain in his neck, shoulders and back.

Employment: 1995 to 2003

[37] Mr. Lee is an electrical engineer, having graduated from the faculty of Applied Science at the University of British Columbia in 1991.

[38] From 1991 to 1995 Mr. Lee worked as a consultant in the area of electro-engineering power distribution.

[39] In 1995, Mr. Lee was an employee with MDS AutoMed Ltd. ("AutoMed") primarily doing computer network administration. Over the next two year, Mr. Lee's duties changed and he became more involved in computer software design.

[40] Geoff Auchinleck also worked at AutoMed and often collaborated with Mr. Lee on company projects.

[41] In 1997, Mr. Auchinleck left AutoMed and began a new company, Neoteric Technology Ltd. ("Neoteric"). Recognizing the need for a program developer to write computer code, Mr. Auchinleck asked Mr. Lee to join his company. During his testimony, Mr. Auchinleck explained that he had no concerns about Mr. Lee's physical health or ability to perform his employment duties when he invited Mr. Lee to join Neoteric.

[42] Initially Mr. Lee worked on contract with Neoteric. He received shares in Neoteric as a portion of his compensation during his early years with the company, in addition to a modest salary. Mr. Lee's income tax records indicate he earned \$45,000 in 2000; and \$60,000 in 2001 and 2002.

[43] In 2003, Mr. Lee's employment status with Neoteric was converted from independent contractor to full time employee. His new employee status did not alter his remuneration which remained around \$60,000 per annum.

[44] Mr. Lee's gross business income for the year 2002 was \$75,745 which included income received on account of his being a shareholder of Neoteric as well as income he received for performing work for other clients. His employment income of \$59,999.94 for 2003 was supplemented by an additional \$29,000 from contracts he performed for private clients.

Accident #1: 14 August 2003

[45] At approximately 9:00 a.m. on 14 August 2003, Mr. Lee was driving a 1990 Mercedes-Benz 190E sedan eastbound on 12th Avenue in Vancouver. When he arrived at the intersection of 12th Avenue and Main Street, Mr. Lee stopped his vehicle as the traffic light had turned red. Mr. Lee's was the first vehicle in the left hand turning lane. His intention was to turn left onto Main Street northbound when the light turned green.

[46] Around the same time, Mr. MacLean was driving his 2000 Toyota Echo south on Main Street. When he came to the intersection of Main Street and 12th Avenue, he stopped his car in the left hand turn lane. His evidence was unclear whether the

traffic light was red, amber or green. Nevertheless, his plan was to turn left onto 12th Avenue eastbound.

[47] Mr. MacLean's evidence regarding where he stopped his vehicle in relation to the intersection was also inconsistent and unclear. At one point in his testimony, he indicated that his vehicle was stopped with its front portion partially in the intersection. At another point he indicated that after his vehicle came to a stop he allowed it to roll forward into the intersection. In general I found Mr. MacLean's evidence unpersuasive and where it conflicted with that of Mr. Lee, I have accepted Mr. Lee's evidence.

[48] While stopped at the intersection waiting to turn left onto Main Street, Mr. Lee saw Mr. MacLean's vehicle. It was motionless and had come to a stop ahead of the cross walk that traverses Main Street.

[49] When the eastbound traffic light on 12th Avenue turned green, Mr. Lee proceeded to make his left hand turn onto Main Street. At some point during his turn, Mr. Lee noticed the defendant's vehicle moving towards his from the left and was unable to avoid a collision.

[50] Mr. MacLean's vehicle struck the driver's side of Mr. Lee's vehicle. At the point of impact Mr. Lee's vehicle was approximately two thirds of the way through its turn.

[51] The damage to Mr. MacLean's vehicle was minimal. However the damage to Mr. Lee's vehicle was more substantial. There was a "punch mark" on the driver's side rear wheel well and the total cost to repair Mr. Lee's vehicle was \$2,413.44.

Condition & Treatment Post Accident #1

[52] Immediately following Accident #1, Mr. Lee recalls having spasms in his right leg and developing stiffness and pain on the right side of his body.

[53] Over the next few days, the pain on Mr. Lee's right side became more constant and pronounced. The level of pain and discomfort increased to the point where it began causing Mr. Lee concentration problems at work.

[54] Dr. Ayling examined Mr. Lee on 22 August 2003 and observed that Mr. Lee had paracervical muscle and trapezius muscle spasms on both sides of his body, though more pronounced on the right side. To address Mr. Lee's physical condition, Dr. Ayling recommended that Mr. Lee increase his training and stretching at the gym and continue with massage therapy.

[55] A second examination by Dr. Ayling on 11 September 2003 disclosed similar symptomatology. Mr. Lee also had muscle spasms on the left side of his body.

[56] On 8 October 2003, Dr. Ayling examined Mr. Lee a third time. Mr. Lee continued to complain of pain in his neck, upper shoulder and lower back areas as well as headaches. Dr. Ayling recommended that Mr. Lee commence physiotherapy. For reasons that are not clear, Mr. Lee did not attend physiotherapy.

Accident #2: 12 October 2003

[57] On 12 October 2003, Mr. Lee was driving a 2001 Audi A4 Quattro sedan eastbound on Canada Way, in Burnaby. He, his wife, Betty, and their two children were en route to Mr. Lee's sister's home.

[58] At the intersection of Canada Way and 17th Avenue, Mr. Lee stopped his car behind one that was waiting to make a left-hand onto 17th Avenue.

[59] Mr. Sao was driving his 1987 Nissan pickup truck eastbound on Canada Way at around the same time as Mr. Lee. The roads were wet, as it had been raining that day. Mr. Sao's vehicle was travelling behind Mr. Lee's and when the Lee vehicle came to a stop Mr. Sao attempted to switch lanes to the right in order to pass it.

[60] Mr. Sao did not change lanes soon enough and as a result the front driver side of his vehicle's bumper struck the rear passenger side of Mr. Lee's vehicle. Mr.

Sao testified that he believed he was travelling between 45 and 48 kilometres per hour when the accident occurred.

[61] Mr. Lee described the collision as a “heavy jolt”. Betty Lee described the collision in a similar way and noted that the Lee’s two children who were asleep in the back of their vehicle were awoken by the impact.

[62] Mr. Sao stopped his vehicle nearby and spoke with Mr. Lee. The two men exchanged driver and vehicle information and then continued on their respective ways.

[63] The damage to Mr. Lee’s vehicle was approximately \$2,600. The damage to Mr. Sao’s vehicle was approximately \$1,900.

Condition & Treatment Post Accident #2

[64] Mr. Lee felt physical discomfort and stress in his upper body as he drove to his sister’s house immediately after Accident #2. In the days that followed the accident, Mr. Lee developed headaches and the residual pains from Accident #1 became more acute.

[65] Mr. Lee went to see Dr. Ayling on 20 October 2003. Dr. Ayling observed that Mr. Lee had a full range of motion in his neck, although there was some decreased flexibility to the left. He noted spasms in the paracervical muscle as well as the trapezius muscle, with the spasms being more pronounced on the right side of Mr. Lee’s body. Mr. Lee also complained of tenderness in his back, particularly on the right side.

[66] Dr. Ayling recommended that Mr. Lee undergo physiotherapy and continue with his strength and flexibility exercises at the gym.

[67] Between 2003 and 2005, Mr. Lee was examined multiple times by Dr. Ayling. Dr. Ayling consistently advised and encouraged Mr. Lee to continue his exercise routine, as well as his physiotherapy. Dr. Ayling also recommended that Mr. Lee commence I-Stop acupuncture treatments. To assist in developing a treatment plan

for Mr. Lee, Dr. Ayling referred Mr. Lee to Dr. Anthony Salvian, a vascular surgeon, and Dr. Rhonda Shuckett, a rheumatologist, for further assessment of Mr. Lee's condition, particularly the thoracic outlet syndrome.

[68] In November 2003, Mr. Lee confirmed to his physiotherapist that his sitting tolerance was 60 minutes. This suggests his tolerance was better than his condition before Accident #1. He also informed his therapist that he continued to have pain and stiffness on the right side of his body.

[69] In December 2003 and again in January 2004, Mr. Lee reported to his physiotherapist that he was exercising and able to play with his children, including holding them above his shoulders. At the latter appointment, he advised that he was "feeling good". Mr. Lee attributed this improvement to the acupuncture treatment he was following. Notwithstanding these positive reports, Mr. Lee continued to occasionally suffer from headaches, and pain in his neck, shoulders and back. The degree of the discomfort was such that by late 2004 or early 2005 it was affecting his ability to concentrate at work.

[70] In early 2005, Mr. Lee developed a problem with his voice. He was eventually diagnosed as suffering from a serious virus. A growth that had developed in his throat required multiple surgeries between 2005 and 2007. Mr. Lee acknowledged to his doctors that the ailment and treatment caused strain on his shoulders and resulted in pain and discomfort in that area of his body.

[71] In February 2006 and again in July 2006, Mr. Lee was seen by Dr. Salvian and Dr. Russell O'Connor, two medical specialists regarding Mr. Lee's on-going symptoms of thoracic outlet syndrome. Neither of these medical doctors provided evidence at trial; however, I understand their clinical records were made available to the defendants.

[72] A CT scan and an MRI were conducted in March 2006. The results indicated that Mr. Lee had a mild multi-level spondylosis and a small left C6-7 disc herniation that compressed slightly on the left C7 nerve root.

[73] By the end of 2006 and into 2007, Mr. Lee's activity level had reduced significantly. He had stopped his acupuncture treatments and had replaced them with chiropractic treatments. He had also begun seeing a naturopathic doctor to address all of his ailments including some that had no relationship with his history of motor vehicle accidents. Mr. Lee was no longer engaged in active sports such as skiing and mountain biking, and found skating with his son to be tiring. He also found his energy levels to be low and this impacted his ability to take on and complete tasks at both work and at home.

[74] In late 2007, Mr. Lee travelled to Europe for a combined business trip and vacation. He advised Dr. Ayling upon his return that he did not feel too bad while he was away but since his return to work the pain in his neck and arms had flared-up.

[75] Although he was hesitant to try Botox treatments earlier, by mid 2007 Mr. Lee was prepared to undergo such treatment. Consequently, Dr. Ayling referred him to Dr. O'Connor, a physical medicine and rehabilitation specialist, for the purpose of assessing Mr. Lee's candidacy for Botox treatment.

[76] During 2008, Mr. Lee had two Botox injections on the right side of his body. The results of the treatments were not positive, as Mr. Lee continued to suffer from pain and discomfort on his right and left side of his body.

[77] Mr. Lee's difficulties working as a computer programmer have continued to the present, and he continues to have difficulty completing his household chores.

[78] With respect to his present activity level, Mr. Lee is not as aggressive or adventuresome as he once was. He no longer skis or mountain bikes like he used to and now only partakes in milder activities, such as walking and skating with his family. He continues to do exercises at home, particularly on an elliptical trainer; but he finds it can aggravate the pain in his back.

Expert Evidence / Opinion

Dr. Ayling

[79] During the course of his evidence, Dr. Ayling confirmed that his diagnosis of Mr. Lee's injuries after the 2003 Accidents was essentially the same as the one he provided for Mr. Lee's 1990s Accident. He also confirmed that on most of the occasions he saw Mr. Lee since 1994, Mr. Lee was experiencing spasms in his neck, shoulder and back areas.

[80] In a medical legal report dated 11 September 2008, Dr. Ayling articulated his expert opinion as follows:

DIAGNOSIS

Motor vehicle accident August 14, 2003:

1. Cervical facet joint strain with secondary soft tissue injuries.
2. Thoracic facet joint strain with secondary soft tissue injuries.
3. Lumbar facet joint strain with secondary soft tissue injuries.
4. Right temporomandibular joint strain.
5. Right sacroiliac joint strain.

Motor vehicle accident October 12, 2003:

1. Cervical facet joint strain with secondary soft tissue injuries.
2. Thoracic facet joint strain with secondary soft tissue injuries.
3. Lumbar facet joint strain with secondary soft tissue injuries.
4. Bilateral thoracic outlet syndrome.

Prior to the motor vehicle accidents occurring in 2003, Shun was initially involved in a motor vehicle accident occurring in December 1993, which was a direct head on impact and resulted in some minor facial injuries but his symptoms had settled within fairly short order. His second motor vehicle accident was of a more significant nature and occurred on October 21, 1994 in which his vehicle was T-boned. Following this motor vehicle accident, he had significant soft tissue injuries involving the cervical, thoracic and lumbar regions as well as bilateral lateral epicondylitis and further reports indicated the presence of thoracic outlet syndrome on his right side. Shun continued to have problems attributable to the motor vehicle accident of 1994 prior to the accident of 2003. He had intermittent pain associated with the right neck and with associated radiation into the right arm, most likely as a result of a combination of the right thoracic outlet syndrome and persistent, chronic spasm in the right neck and upper shoulder regions.

[81] Under the heading “Prognosis”, Dr. Ayling provided the following opinion of Mr. Lee’s condition:

Prior to the motor vehicle accident of August 14, 2003, Shun continued to have some residual discomfort associated with the right neck and upper shoulder region as well as some mild numbness; particularly involving the ulnar aspect of his right hand which were left over from the previous motor vehicle accident of October 21, 1994. While there were still residual symptoms, they did not have a significant impact on his overall function and he was able to maintain most of his activities.

[...]

It is well recognized that following motor vehicle accidents there is always a heightened risk for further exacerbation of the previously injured areas should another similar type of injury occur. If however, an individual is able to fully recover, and maintain good strength and flexibility in the previous injured areas, then there is a strong case to be made for the fact that future traumas would have less of an impact upon their overall condition. However, in Shun’s situation, he still had some residual injuries present almost nine years later following the previous motor vehicle accident and it would be difficult to imagine that he will achieve a situation where he will be completely pain free in the future. The fact that a second motor vehicle accident occurred within a period of two months also did not help and has probably played a significant role in creating the current situation where he continues to experience significant disability in the form of pain and an inability to perform at the same level of activity and function which he had prior to the 2003 motor vehicle accidents.

[...]

Shun continues to have ongoing pain and clinical evidence of soft tissue injuries in his mid to lower thoracic region as well as some lower back pain; particularly associated with the right sacroiliac joint region. Both these areas have contributed to this inability to sit for long periods of time and this has created problems in his work as a computer programmer and designer.

[...]

To further complicate this situation, Shun has had a problem over the past approximately three and a half years with his voice...Although there has been some improvement in Shun’s voice, he continues to have a very hoarse and husky quality to his voice. This would also have a role in limiting his ability to change occupations; particularly if it was to one where a lot of voice use was required such as in sales or promotion position.

Given that it is now five years since the initial motor vehicle accident of August 14, 2003, it is unlikely that his symptoms are going to significantly improve beyond the current situation. In fact, he has been dealing to some degree with some chronic spasm with associated discomfort in the right neck and upper shoulder region radiating into the right arm and had for almost fourteen years since the motor vehicle accident of October 21st, 1994. The symptoms have clearly been exacerbated in the two 2003 motor vehicle accidents and have most definitely impacted upon his prognosis in an

adverse fashion. Complicating the situation is that subsequent to the second motor vehicle accident in 2003, he has developed a left thoracic outlet syndrome which had been present previously but was completely asymptomatic as noted by Dr. Peter Fry in his reports.

It should also be pointed out that over a period of eleven years from March 1995 to March 2006, there has been the development of some mild multi level spondylosis in the cervical spine which have probably occurred as a result of the combination of these motor vehicle accidents and the chronic stress placed upon the cervical spine by the persistent muscle spasm and soft tissue injuries in the adjacent areas of the neck and upper shoulder regions. Consequently, it would be anticipated that there will be continued gradual deterioration in the region of the cervical spine with the continued presence of the ongoing chronic spasm associated with the adjacent soft tissue structures in the neck region.

Dr. Shuckett

[82] Two expert medical legal reports relating to the present case were authored by Dr. Shuckett. One was dated 8 February 2007 and the other 25 September 2008.

[83] In her first report, Dr. Shuckett diagnosed Mr. Lee with the following conditions:

- a. Cervicogenic headaches;
- b. Neck pain mainly related to soft tissue, or connective tissue, injury;
- c. Myofascial pain syndrome of neck and shoulder girdle region with painful trigger points in the right neck and shoulder girdle area;
- d. Right upper extremity symptoms;
- e. Mid back pain of a mechanical nature; and
- f. Mechanical low back pain and sacroiliac ligament dysfunction.

[84] With respect to Mr. Lee suffering from thoracic outlet syndrome, Dr. Shuckett opined as follows:

Whether or not he has left thoracic outlet syndrome (TOS) is equivocal to me. He may have some left ulna nerve entrapment.

He did have some thoracic outlet syndrome after the more remote MVA of 1994 and, therefore I believe that he was predisposed to this from the 1994 MVA with some ongoing residual which was then exacerbated significantly with the 2003 MVAs.

Thus, this current right sided thoracic outlet syndrome is, I believe, a composite of the prior 1994 MVA as well as the 2003 MVAs. The 2003 MVAs materially contributed to the current right-sided thoracic outlet syndrome.

[85] Dr. Shuckett was also of the opinion that Mr. Lee did not suffer from fibromyalgia or chronic pain syndrome.

[86] Based upon the passage of time since the motor vehicle accidents, Dr. Shuckett concluded that Mr. Lee's present condition would be his norm and that it was unlikely his symptoms would improve significantly.

[87] Dr. Shuckett reassessed Mr. Lee on 24 September 2008 and provided her supplemental views and opinions in her second medical report. In essence, Dr. Shuckett's opinion of Mr. Lee's injuries remained essentially the same, except for her inclusion of thoracic outlet syndrome of the right arm as a part of her diagnosis. That diagnosis was a qualified one as she noted the condition was present following Mr. Lee's 1994 motor vehicle accident.

[88] Dr. Shuckett expressed her updated view of Mr. Lee's condition and prognosis as follows:

If not for the 2003 MVAs, I suspect that he would be working full-time and not as symptomatic as he is now. However, I do acknowledge some pre-existing right thoracic outlet syndrome and neck symptoms which would be expected to place him at greater risk for re-injury of these areas with the subject MVAs. As far as causality goes, I feel it would be instructive to have records from his family physician between the time of 1994 MVA and the 2003 subject MVAs.

[...]

By this time, it is already approximately five years since the subject MVAs. By this late point in time (well beyond two years after the MVAs), the fact that he has ongoing symptoms which are interfering with his activities of daily living and his occupation suggest that he has probably achieved maximum medical recovery.

I believe that there is a high chance that he will just have to live around his current symptoms...

[...]

I do not have any treatment suggestions at this time other than regular exercise such as regular walking.

Dr. Fry

[89] Unlike his role in relation to Mr. Lee's 1990s Accidents, Dr. Fry provided opinion evidence on behalf of Mr. Lee in respect to the 2003 Accidents. His medical legal reports dated 4 April 2007 and 8 July 2008 were filed as exhibits at trial. As previously mentioned in these reasons, the plaintiff presented Dr. Fry's evidence by way of video deposition.

[90] Dr. Fry confirmed that he had previously identified in 1998 that Mr. Lee was likely suffering from thoracic outlet syndrome on both sides of his body, though Mr. Lee was asymptomatic on the left side.

[91] In his report dated 4 April 2007, Dr. Fry concluded as follows:

This is a very complex case of an individual who has been involved in apparently 5 motor vehicle accidents over the years which have been associated with various degrees of soft tissue injury, neurological symptoms and been associated with various other diagnoses as well.

Unfortunately Mr. Lee is not a very good historian and there were certain memory lapses with respect to specifics of accidents of which he has been questioned.

Be that as it may, as noted in Dr. Shuckett's report there is compelling evidence that he developed signs of neurological symptoms with respect to the right arm consistent with a diagnosis of neurogenic thoracic outlet syndrome after the accident of 1994

Findings following that accident both by myself and Dr. Shuckett showed signs of compression of the thoracic outlet on the left side as well although following the accident of 1994 this seemingly was not producing too much in the way of difficulty but following the accident of August 2003 and October 2003 his left arm started to provide him with significant symptoms, this being his dominant arm.

It would seem from the history that it was in fact the accident of October 2003 that started to produce the problems on the left side.

There is no question that he has active symptoms compatible with a diagnosis of thoracic outlet syndrome, both neurogenic and vasculogenic on the left, and clearly he had evidence of some compression in this area at the time I originally saw him for a medical-legal report for ICBC in July 1998.

Equally clearly the problem with the thoracic outlet has progressed since that period of time and the medical evidence would point to the last two accidents particularly the October 2003 as being responsible for this change.

It would therefore seem that we identified him originally as an individual who had small thoracic outlets perhaps from a developmental standpoint or

perhaps related to the four motor vehicle accidents that occurred prior to the event of October 2003.

[...]

I think significantly at the present time he shows evidence of more serious compression of the thoracic outlet given that there is clinical evidence that the venous drainage of the arm on the left is impaired compared to the right side. This is an indication of fairly severe compression in this area, basically involving not only the vein but the artery where you can develop a bruit or turbulence during provocative testing for thoracic outlet syndrome and the reproduction of neurological symptoms that appear to involve both upper and lower plexus.

This being the case, I think it is highly that at some point in time Mr. Lee is going to require definitive surgery for thoracic outlet syndrome on the left.

[...]

I would opine that the accident of October 2003 was most likely responsible for provoking or exacerbating symptoms on the left side in a setting where he clearly had previous compression of the thoracic outlet and was therefore somewhat vulnerable to this injury.

[92] Dr. Fry reassessed Mr. Lee on 8 July 2008 and reconfirmed his opinion that the 2003 Accidents reinitiated Mr. Lee's symptoms of thoracic outlet syndrome or exacerbated Mr. Lee's pre-accident symptoms. Curiously, Dr. Fry reached the conclusion even though it was unclear to him from the medical records he says he reviewed whether Mr. Lee had any symptoms prior to the accidents of 2003.

[93] In his supplement medical legal report, Dr. Fry observed and concluded:

[T]here appears to be some subtle changes in terms of an improvement to some extent on the right side perhaps related to his Botox treatment but the left-sided symptoms and signs of neurogenic thoracic outlet syndrome remain impressive.

[...]

I think as I mentioned that on balance his symptoms are sufficiently severe that on the left side I would definitely entertain the thought of surgery ie first rib resection but on the right side the situation is less clear in that I suspect a significant portion of his symptoms are emanating from his cervical spine and soft tissue injuries associated with his neck.

Dr. Alan York

[94] Mr. Lee was examined by Dr. York, an expert in rheumatology, on 12 October 2007. Dr. York was retained by the defendants' insurers, ICBC. Dr. York's diagnosis of Mr. Lee's condition consisted of the following:

- a. Muscle spasms extending from the lower back proximally to the upper back to the neck;
- b. Cervicogenic headaches;
- c. Neurologic complaints in the right arm;
- d. Left sided thoracic outlet syndrome; and
- e. Localized myofascial pain syndrome.

[95] Dr. York was at a loss to explain how such apparently minor motor vehicle accidents could precipitate the onset of thoracic outlet syndrome.

[96] Under the heading “Prognosis”, Dr. York opined as follows:

I would expect a gradual recovery of such complaints with the passage of time. His relative young age, his previously discipline of exercise and the absence of significant psychopathology are positive prognostic factors, as is the absence of use of analgesics, however, this is reportedly due to lack of efficacy and intolerance of side effects.

[...]

I would recommend that Mr. Lee be encouraged to maintain a level of exercise to continue to mobilize his neck. Ergonomic review of his work station might be of benefit if it has not already been pursued.

Meghan Cameron

[97] Ms. Cameron is a qualified occupational therapist, registered with the College of Occupational Therapists of British Columbia. She was retained by Mr. Lee to prepare a physical capacity evaluation and a cost of future care analysis.

[98] In preparation of her reports, Ms. Cameron met with Mr. Lee on two occasions in early April 2008.

[99] In the physical capacity evaluation report dated 28 April 2008, Ms. Cameron concluded:

In my opinion, with consideration only to his present physical capacity, Mr. Lee is considered to be employable (ie. with some physical restrictions) on a part-time basis in sedentary job titles with significant sitting requirements and on a full time basis, in a restricted selection of light strength job titles. Although he performed work in a medium strength category, and

demonstrated the ability to lift into a heavy strength category below knuckle level, he reported significant increases in pain when handling this weight.

[...]

With respect to Mr. Lee's occupation as an Electrical Engineer / Software Developer, the National Occupational Classification (NOC) classifies this job under the heading Software Engineers (NOC #2173). The NOC indicates that job titles under this heading require limited strength capacity (the ability to handle loads up to 5 kilograms / 11 pounds), the ability to work in sitting, and upper limb coordination (the ability to coordinate the movements of the upper extremities).

Based on this assessment, Mr. Lee meets the strength requirements of this position. However, he does not meet the requirements for sitting and upper limb coordination, which are significant aspects of his job as outlined by the NOC and as reported by Mr. Lee.

Analysis

Plaintiff's Failure to call Expert Medical Witnesses – Adverse Inference

[100] It is clear that over the course of the past 16 years or so, Mr. Lee has seen and been treated by many medical doctors. Not all of those medical practitioners prepared medical legal reports or testified at the trial.

[101] Dr. Salvian and Dr. O'Connor are two physicians who treated Mr. Lee and from whom there is no evidence. The defendants argue that the Court should draw an adverse inference against Mr. Lee on account of this fact.

[102] The issue of drawing an adverse inference on account of a failure to call a witness was addressed in *Buksh v. Miles*, 2008 BCCA 318 at paras. 31-33, where Saunders J.A. observed the following:

The general proposition long applied in British Columbia, stated by Mr. Justice Davey in *Barker v. McQuahe* (1964), 49 W.W.R. 685 (BCCA), is that an inference adverse to a litigant may be drawn if, without sufficient explanation, that litigant fails to call a witness who might be expected to give supporting evidence. Further, said Mr. Justice Davey at 689, a plaintiff seeking damages for personal injuries "ought to call all doctors who attended him in respect of any important aspect of the matters that are in dispute, or explain why he does not do so".

It seems to me that the tactic of asking for an adverse inference is much over-used in today's legal environment, and requires, at the least, a threshold examination by the trial judge before such an instruction is given to the jury.

A judge trying a case with a jury is bound to instruct the jury as to the applicable law, and thereby to assist the jury in its consideration of the evidence and determination of the facts. Whether an adverse inference is drawn from failure to call a witness is a question for the trier of fact...However, it bears reminding that the delivery of medical care is not now as it was in 1964 when Mr. Justice Davey made his comments in *Barker*. There is, today, a proliferation of “walk-in” medical clinics where the role of the “walk-in” clinic physician may be more limited than was the role of a family physician in 1964. Further, even people who have a family doctor may attend one or more such clinics as a matter of convenience, but still rely upon their family physician for core medical advice and treatment. The proposition stated by Mr. Justice Davey does not anticipate the present model of medical care. Likewise, the discovery process available to both sides of a lawsuit is not now as it was in 1964 when, in explaining his view on the need to call all treating physicians, Mr. Justice Davey referred to the professional confidence between doctor and the patient. Today, the free exchange of information and provision of clinical records through document discovery raises the possibility that an adverse inference may be sought in circumstances where it is known to counsel asking for the inference that the opinion of the doctor in question was not adverse to the opposite party.

[103] In the circumstances of this case, I find no grounds to draw the inference the defendants urge I should. The defendants had access to the clinical records of both doctors and could have called them as witnesses if they believed their evidence was vital to their case.

[104] Moreover, I am satisfied there is ample evidence before the Court, in the form of oral testimony, medical legal reports and clinical notes and records to develop a clear understanding of Mr. Lee’s physical condition.

Liability

[105] Liability was admitted on behalf of the defendant in Accident #2. The only live issue relating to liability relates to Accident #1.

[106] I find Mr. Lee was in the course of making a legal left hand turn on a green light when Mr. MacLean improperly and without warning advanced his vehicle into the intersection and collided with Mr. Lee’s vehicle.

[107] I am satisfied that Mr. MacLean’s vehicle was stopped before the cross-walk and that he allowed his vehicle to creep ahead onto and over it while his traffic light

remained red. While a small portion of his vehicle may have been in the intersection when Mr. Lee began his turn, I find the vehicle was stationary at that point.

[108] I do not accept Mr. MacLean's argument that Mr. Lee should have taken more care in entering the intersection and performing the turn and by not doing so he was partially responsible for the accident. In particular, I reject the suggestion that Mr. Lee breached his duty to keep a proper look out for other vehicles and should have been able to avoid the collision with Mr. MacLean's vehicle. I find Mr. Lee could not have foreseen that the defendant's vehicle would advance into the intersection when it did and consequently I find he could not have done anything to avoid the collision.

[109] I therefore find Mr. MacLean 100% liable for Accident #1.

Causation

[110] Causation is a major issue in this litigation.

[111] Mr. Lee acknowledges that he suffered injuries in the 1990s Accidents but he insists that by 2003 the residual effects from those injuries were minimal and he was functioning adequately on all levels at the time.

[112] Mr. Lee accepts that his pre-accident health issues are relevant factors to be considered when assessing and determining his present claim, and more particularly when addressing the question of causation; however, he maintains they are not the main cause of his current physical difficulties. In particular, he points to the physical symptoms that developed on the left side of his body after the 2003 Accidents and argues these are uniquely attributable to those accidents.

[113] The defendants argue that the 2003 Accidents aggravated Mr. Lee's pre-existing condition for only a few months and that his continued complaints of pain and discomfort likely resulted from flare-ups of his previous injuries or the serious throat condition he developed in 2005.

[114] The Supreme Court of Canada set out the legal test for causation in *Athey v. Leonati*, [1996] 3 S.C.R. 458 at paras. 13-14:

Causation is established where the plaintiff proves to the civil standard on a balance of probabilities that the defendant caused or contributed to the injury.

The general, but not conclusive, test for causation is the “but for” test, which requires the plaintiff to show that the injury would not have occurred but for the negligence of the defendant.

[115] The test for causation was further refined in *Resurface Corp. v. Hanke*, 2007 SCC 7, where McLachlin C.J. observed at paras. 21 and 23:

[21] First, the basic test for determining causation remains the “but for” test. This applies to multi-cause injuries. The plaintiff bears the burden of showing that “but for” the negligent act or omission of each defendant, the injury would not have occurred. Having done this, contributory negligence may be apportioned, as permitted by statute.

[...]

[23] The “but for” test recognizes that compensation for negligent conduct should only be made “where a substantial connection between the injury and the defendant’s conduct” is present. It ensures that a defendant will not be held liable for the plaintiff’s injuries where they “may very well be due to factors unconnected to the defendant and not the fault of anyone”: *Snell v. Farrell*, at p. 327, *per* Sopinka, J.

“Crumbling Skull” vs. “Thin Skull”

[116] Mr. Lee clearly had a pre-existing physical condition when he was involved in the two motor vehicle accidents in 2003. The jurisprudence that addresses the situation of a plaintiff with pre-existing physical issues has created two categories of claimants: the “crumbling skull” claimant and the “thin skull” claimant.

[117] In *Filsinger v. ICBC*, 2009 BCSC 232 at paras. 24-26 [*Filsinger*], Rice J. neatly articulated the two categories at paras. 24 to 26:

The issue is whether this is a “thin skull” or a “crumbling skull” situation. Both address the circumstances of a pre-existing condition, and its effect upon the accident victim. The law is that the defendant need not compensate the plaintiff for any debilitating effects of a pre-existing condition if the plaintiff would have experienced them regardless of the accident: *Athey v. Leonati*, [1996] 3 S.C.R. 458 at para. 35, 140 D.L.R. (4th) 235. The court requires “a measurable risk” or “a real or substantial possibility and not speculation” that the pre-existing condition would have manifested itself in the future regardless of the plaintiff’s (sic) negligence. The measurable risk need not be proven on a balance of probabilities, but given weight according to the probability of its occurrence: *Athey v. Leonati*, at para. 27.

The injury is deemed “thin skull” when there is a pre-existing condition that is not active or symptomatic at the time of the accident, and that was unlikely to become active but for the accident.

A “crumbling skull” injury is also one where there is a pre-existing condition, but one which is active or likely to be active. If the injury is proven to be of a thin skull nature, then the defendant is liable for all of the plaintiff’s injuries resulting from the accident. If it is of a crumbling skull nature, then the plaintiff is liable only to the extent that the accident caused an aggravation to the existing condition.

[118] Applying the principles enunciated in *Filsinger*, I am satisfied Mr. Lee is both a “crumbling skull” and “thin skull” plaintiff. The determination of which depends upon the precise injury.

[119] The neck, right shoulder and lower back pains Mr. Lee complained of following the 2003 Accidents were quite similar to those he complained of after the 1990s Accidents. I am satisfied that these symptoms would have continued to manifest themselves even if Mr. Lee had not been involved in the 2003 motor vehicle accidents.

[120] With respect to the left side of Mr. Lee’s body, the issue is more difficult. I accept the evidence of Dr. Fry that in 1998 Mr. Lee exhibited signs of thoracic outlet syndrome on the left side of his body, even though Mr. Lee was asymptomatic at the time. I am persuaded by the evidence of Dr. Fry and Dr. Shuckett that the nature of Accident #1 and Accident #2 were such that they triggered the onset of the thoracic outlet syndrome symptoms on Mr. Lee’s left side and are therefore attributable to those accidents.

[121] I also find that the concentration problems, headaches and associated vision problems that arose after the 2003 Accidents can at least be partially attributed to those accidents.

[122] I have considered the problem Mr. Lee has had with his throat and the effects it has had on his general physical condition. I find this condition did exacerbate his physical symptoms, especially the pain and stiffness he has experienced in his neck

and shoulder areas. I consider this throat condition to be an intervening event, not attributable to either Accident # 1 or Accident #2.

[123] Given the pre-existing condition of Mr. Lee and the fact that the symptoms on the right side of his body were likely to have continued, notwithstanding the 2003 Accidents, I find that it is appropriate to make a 25% reduction in the non-pecuniary damages as well as the award for loss of earning capacity.

Plaintiff's Failure to Mitigate

[124] The defendants argue that there should be a further reduction in any award to Mr. Lee on account of his alleged failure to mitigate his damages.

[125] The defendants point to Mr. Lee's hesitancy to have surgery to address his symptoms and his failure to continue with his exercise routine on a regular basis. They also note his reluctance to use medications to address the discomfort associated with his injuries. In short, the defendants maintain that Mr. Lee failed to follow the advice of his medical doctors.

[126] The onus rests on the defence to satisfy the Court that Mr. Lee has acted unreasonably in not following recommended treatment of his physicians. The defendants must also prove, the extent, if any, to which Mr. Lee's damages would have been reduced had the treatment been followed: *Chiu v. Chiu*, 2002 BCCA 618; *Myatt v. Holicza*, 2000 BCSC 1149.

[127] I do not agree with the submission of the defendants with respect to mitigation. While it is true that Mr. Lee chose not to follow all of the recommendations of his medical professionals, I find his reasons for doing so were rational and not whimsical. I find he has earnestly pursued his full recovery with good intentions and therefore he should not be penalized for not complying with everything his doctors have suggested or recommended.

[128] As I am not persuaded that had he accepted and adhered to all of those recommendations the outcome would have been different, I reject the defendants' argument for a further discount to any award for failure to mitigate.

Damages

Multiple Accidents – Apportionment of Damages

[129] The parties are in general agreement that in the event the Court makes an award of damages, the apportionment of those damages should be 25% to Accident #1 and 75% to Accident #2.

Non-Pecuniary Damages

[130] Mr. Lee claims he suffered or developed a number of injuries as a result of the 2003 Accidents. In particular he claims to have suffered myofascial pain syndrome in his neck with associated pain and spasm in his back, as well as thoracic outlet syndrome on the left side of his body. He has also suffered headaches and vision problems on account of the accidents.

[131] Mr. Lee seeks an award for non-pecuniary damages in the range of \$100,000. In support of this position, he relies upon the following decisions: *Niloufari v. Coumont*, 2008 BCSC 816; *Notenbomer v. Andjelic*, 2008 BCSC ; *Pelkinen v. Unrau*, 2008 BCSC 375; and *Whyte v. Morin*, 2007 BCSC 2048.

[132] The defendants argue that Mr. Lee suffered from pre-existing injuries that had not completely resolved themselves at the time of the 2003 Accidents. They maintain that at best Mr. Lee suffered transitory mild soft tissue injuries that lasted for only a few months and that any recurrent pains or discomfort are attributable to his pre-existing condition or his intervening throat condition.

[133] The defendants submit that the range of non-pecuniary damages is \$10,000 to \$20,000, with \$3,000 to \$4,000 being attributed to Accident #1 and the balance attributed to Accident #2.

[134] In support of their position on non-pecuniary damages, the defendant rely on the following case authorities: *Hoskin v. Trisevic*, 2002 BCSC 903; *Farrant v. Laktin*, 2008 BCSC 234; *Read v. Marques*, 2003 BCSC 167; *Harandi v. Khan*, 2003 BCSC 714; *McLaughlin v. Scott*, 2001 BCSC 1085; and *McKee v. Biver* (13 June 2005), Vancouver M021432 (B.C.S.C.).

[135] I found Mr. Lee to be a credible witness when he described the timing, nature and extent of his injuries. In doing so, I accept that he had pre-existing pains prior to the 2003 Accidents, some of which were identical to those which developed after the 1990s Accidents.

[136] Mr. Lee is entitled to be compensated for his injuries. I do not find those injuries to have been as trivial or transient as suggested by the defendants. On the whole I favour Mr. Lee's description of the injuries and find that an appropriate award for non-pecuniary damages to be \$85,000. There will, however, be a 25% contingency discount to this amount on account of Mr. Lee's pre-existing physical ailments.

[137] As a result, the award for non-pecuniary damages is \$63,750.

Past Wage Loss

[138] Up until the 2003 Accidents, Mr. Lee was managing the pain and discomfort he felt from the injuries associated with the motor vehicle accidents in the 1990s.

[139] I accept the evidence of Mr. Lee and that of Mr. Auchinleck regarding the decline in Mr. Lee's productivity following the 2003 Accidents.

[140] The two men had pointed discussions in 2005 and 2006 regarding the needs of Neoteric and Mr. Lee's inability to perform as he once did. By this time, Mr. Lee had abandoned his extra contract work for private clients so that he could concentrate on his work for Neoteric. Mr. Lee's wage increases were less than those of his Neoteric colleagues because of Mr. Lee's inability to perform his duties to the level expected of him.

[141] The situation at Neoteric was deteriorating by the end of 2007. Mr. Lee was not working at anything near his capacity or ability, yet he was drawing a full salary. This had a negative impact on the morale of the other Neoteric employees who were working and producing at full capacity. It also impacted Mr. Lee, as he knew he was not working and producing the way he should and sensed his colleagues begrudged the fact that he continued to be paid a full salary. This added stress on Mr. Lee exacerbated his physical condition.

[142] In December 2007, Mr. Auchinleck met with Mr. Lee and discussed the difficulties Mr. Lee was having and the problems they were causing for Neoteric. Mr. Lee had been a valued and productive worker for the company and Mr. Auchinleck wished to find a resolution that would benefit the company without prejudicing the financial wellbeing of Mr. Lee and his family. At the conclusion of their meeting, they decided Mr. Lee would be converted from a full time employee with Neoteric to a part-time contractor. A written contract confirming Mr. Lee's status with the company was executed on 22 December 2007 (the "Employment Agreement"). The Employment Agreement acknowledged that Mr. Lee would continue to receive a salary of \$82,000 per annum but that there would be no annual remuneration review. The agreement also contained the following terms:

It is recognized that due to his current physical condition as a consequence of injuries sustained in his automobile accidents in August and October 2004 (sic), that Shun Lee will be expected to maintain an approximate workload of 50%. The actual productivity will be reviewed /determined at periodic intervals.

As a result of Shun Lee's reduced workload, the full salary is considered to be an advance that will be reduced by the reviewed performance of his duties. It is expected that Shun Lee will continue to attempt to recover the expected differential and will reimburse Neoteric based upon an end of the year review of his productivity.

[143] There were no improvements in Mr. Lee's productivity in 2008. By the end of 2008, Mr. Auchinleck was in negotiations to sell Neoteric to another corporation as Neoteric was facing financial difficulties which needed immediate attention.

[144] On January 30, 2009, Mr. Lee was placed on permanent leave from Neoteric. He has received no remuneration from the company since that time.

[145] On 16 April 2009, the business interests and assets of Neoteric were purchased by Haemonetics Corporation. All shareholders of Neoteric, including Mr. Lee, received compensation from Haemonetics for their respective shares.

[146] Mr. Auchinleck candidly admitted during his cross-examination that the Employment Agreement was drafted with Mr. Lee's present litigation in mind. According to Mr. Auchinleck, under the Employment Agreement, 50% of Mr. Lee's salary was an "advance" which Mr. Lee is expected to repay from any award he receives in this action.

[147] Although the defendants are correct to point out that Mr. Lee did not miss a significant number of days from work on account of his injuries, and his taxable income remained constant or increased marginally in the years after the 2003 Accidents, those are not the only yardsticks to be used in determining and calculating any past wage loss Mr. Lee may have suffered.

[148] In *Kahle v. Ritter*, 2002 BCSC 199, D.M. Smith J., as she then was, clearly framed the analysis of past wage loss, at para. 109

Proof of a loss of opportunity claim requires a plaintiff to establish on a balance of probabilities a causal connection between the injuries sustained in the accident and the loss of opportunity...Past income loss is not an assessment of a hypothetical or future event which is based on a real and substantial possibility of its occurrence (the test for future or hypothetical event), but rather is proof on a balance of probabilities that the injuries caused the loss of opportunity. In short, the issue is whether Mr. Kahle has established on a balance of probabilities that but for the accident he would have realized this income.

[149] Mr. Lee submits he lost approximately \$82,000 in past wages and income on account of his injuries from the 2003 Accidents. This figure includes 50% of his 2008 salary which he argues needs to be repaid. Mr. Lee classifies this as a "gratuitous payment" from his employer and argues the defendants cannot take advantage of Neoteric's generosity towards him and attempt to avoid compensating him for lost income: *Kask v. Tam* (1996), 21 B.C.L.R. (3d) 11 (C.A.); *Frers v. De Moulin*, 2002 BCSC 408. Mr. Lee also argues that he has fallen behind in terms of professional advancement and points to the other computer programmers with

Neoteric who earned a higher salary than he ever did. Finally, Mr. Lee claims he lost his health care benefit package which equates to approximately \$2,500 per year.

[150] I accept Mr. Lee did lose some income on account of his injuries from the 2003 Accidents. The figure is not as great as suggested by Mr. Lee because I find he would have faced some of the losses irrespective of the injuries in question. In particular, I find his recurring neck, back and right shoulder problems would have impacted on his advancement with the company and affected his annual income. His serious throat condition that developed in 2005 and lasts to this day is also a consideration and I find it would have contributed to a loss of income, irrespective of the 2003 Accidents.

[151] In all the circumstances, I award Mr. Lee \$45,000 for past loss of income.

Future Loss of Capacity

[152] The standard of proof for making an award for loss of future earning capacity is simple probability and not balance of probabilities: *Rosvold v. Dunlop*, 2001 BCCA 1 [*Rosvold*].

[153] In assessing whether Mr. Lee is entitled to compensation under this heading of damages, it is useful to keep in mind the list of considerations that Finch J., as he then was, set out in *Brown v. Golaiy* (1985), 26 B.C.L.R. (3d) 353 (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.

[154] I accept Mr. Lee's argument that his physical symptoms are unlikely to resolve themselves given how much time has passed since the accidents.

Moreover, I accept that on account of his pain and discomfort Mr. Lee will likely be restricted in the type and amount of work he will be able to perform in the future. On the whole I find Mr. Lee has met the criteria set out in *Brown*, and is therefore entitled to an award for his loss of future earning capacity.

[155] Assigning a quantum of damages under this heading is not a precise mathematical calculation: *Rosvold*. The answer to the question involves the Court looking into the future as best it can and predicting how much additional income Mr. Lee would have earned but for the injuries he suffered in the 2003 Accidents.

[156] Mr. Lee seeks \$500,000 for his loss of future earning capacity. He reaches this figure by arguing that for the remainder of his working life (ie. until he is 65 years old) he will be restricted to working part-time and will likely lose approximately \$40,000 per year. Actuarial evidence presented in the form of a written report from Mr. Darren Benning, president of PETA Consultants Ltd., supports the assertion that Mr. Lee's total loss would be between \$500,000 and \$600,000.

[157] While I find Mr. Lee has suffered some loss of future earning capacity, that loss is not as significant as he claims, nor is it solely attributable to the injuries resulting from Accident # 1 and Accident #2.

[158] I find that on account of his pre-existing injuries, Mr. Lee had clear functional limitations in 2003 when he had the accidents that are the subject of this litigation and that these limitations continue to exist to the present day. I also find that his throat condition, which is completely unrelated to the accidents, will also impact upon his future potential to earn an income.

[159] I find that Mr. Lee's loss of future earning capacity equates to \$20,000 per year. Using Mr. Benning's actuarial calculations, I conclude that Mr. Lee's gross loss under this heading is \$296,620. Deducting the 25% contingency on account of his pre-existing injuries, and an additional 3% for his throat ailment, the award for loss of future income earning capacity is \$213,566.

Special Damages

[160] Mr. Lee seeks compensation for the out-of-pocket expenses he has incurred addressing the treatment of his injuries.

[161] The parties have agreed that the \$395 sought for the physiotherapy treatments is appropriate. Their agreement ends there.

[162] The defendants argue that Mr. Lee has not established that the remaining expenses relating to the various treatments he underwent were reasonably necessary as a result of the 2003 Accidents. To a certain extent, I agree.

[163] I find it was reasonable for Mr. Lee to undergo the I-Stop acupuncture treatment and the Botox treatments, and therefore the expenses, including travel costs, associated with them are reimbursable. The same cannot be said of the expenses relating to the naturopathic treatment and medications. On the evidence before me I am not satisfied this treatment was necessary to address the injuries from the 2003 Accidents. Some of these latter expenses related to physical conditions or ailments completely unrelated to the accidents, and therefore I reject them.

[164] Nor am I satisfied that the remaining expenses categorized by Mr. Lee as “miscellaneous” or those incurred after the date of trial are attributable to the injuries from the 2003 Accidents. Some of those costs relate to naturopathic treatment or medications that I am not persuaded are associated with the Mr. Lee’s injuries.

[165] In total, I award Mr. Lee \$7,250 in Special Damages.

Future Care

[166] I agree with Mr. Lee’s submission that he should be compensated for the reasonably necessary or foreseeable expenses he will incur for his future medical care. However, as with all of the other headings of damages, the expenses must be attributable to the disability resulting from the injuries suffered in the 2003 Accidents and not his pre-existing condition.

[167] Mr. Lee seeks an award under this heading of damages for \$123,000. This amount is based upon the cost of future care analysis dated 14 May 2008, that was prepared by Ms. Cameron and an actuarial assessment of her recommendations that was completed by Mr. Benning.

[168] The medical experts who provided evidence at trial did not opine to any significant degree on the question of Mr. Lee's future needs. There was a consensus that he would have long term physical issues, however there was no agreement with respect to how those issues should be addressed.

[169] Having considered the evidence of the medical doctors, as well as that of Ms. Cameron, I find that Mr. Lee's claim for future care is inflated. I am not persuaded that he requires all of the items and services that are recommended by Ms. Cameron.

[170] I do not agree with Ms. Cameron's recommendations regarding household assistance for Mr. Lee, nor do I accept that all of the ergonomic office equipment suggested is appropriate in the circumstances. I am equally unpersuaded that on account of his injuries from the 2003 Accidents Mr. Lee requires supplementary household assistance and marital counselling.

[171] I accept that Mr. Lee will need long-term physiotherapy and possibly surgical intervention to address the injuries he suffered in the 2003 Accidents. He will also need to maintain a regular regime of exercise and stretching, both at home and at a fitness facility. Finally, I accept that he may require additional Botox treatments or some other similar form of treatment. Although I reject the suggestion that Mr. Lee requires all of the home and office equipment listed by Ms. Cameron, I will allow for an ergonomic office chair. I have reached this conclusion notwithstanding the fact that in the late 1990s Dr. Ayling recommended that Mr. Lee obtain such a chair and Mr. Lee chose not to do so because of the cost.

[172] Mr. Lee has, in the past, shown a focused determination to overcome his physical limitations. Although his activity levels have diminished over time, I do not

attribute that fact solely to the pain and discomfort associated to the injuries he suffered in the 2003 Accidents. After the 1990s Accidents Mr. Lee was able to manage his levels of pain and discomfort to such a degree that he was able to lead a reasonably normal life. I see no reason why Mr. Lee should not be able to reproduce those results if he approaches his future rehabilitation with the same drive as he has shown in the past.

[173] I will therefore allow Mr. Lee's claim for the cost of the following items:

- Physiotherapy;
- Kinesiology consultations;
- Fitness centre membership
- Ergonomic office chair; and
- Botox or similar treatments.

[174] Using the costs Ms. Cameron assigned to these items and Mr. Benning's actuarial assessment of those costs as a general guideline, I award Mr. Lee \$15,000 in future case costs.

Summary

[175] In summary, I find in favour of the plaintiff and make the following award:

- Non-pecuniary damages: \$63,750
- Past Wage Loss: \$45,000
- Future loss of capacity: \$213,566
- Special damages: \$7,250
- Cost of Future Care: \$15,000
- Total: \$344,566

[176] I attribute 25% of the final award to the defendants in Accident #1 and the remaining 75% to the defendant in Accident #2.

[177] The monetary awards I have made do not include tax gross up, management fees or any other ancillary considerations. If the parties cannot agree on any of these items, then they may set the matter down for hearing before me on a date that is mutually convenient to all parties.

[178] Mr. Lee is entitled to his costs on scale B, with leave to apply.

“G. R. J. Gaul J.”