

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *R.R.S. v. M.D.F.T.*,
2020 BCSC 1235

Date: 20200821
Docket: S132377
Registry: Vancouver

Between:

R.R.S.

Plaintiff

And

M.D.F.T.

Defendant

Corrected Judgment: The front page and text of the judgment were anonymized for publication purposes on August 28, 2020

Before: The Honourable Mr. Justice Walker

Reasons for Judgment

Counsel for the Plaintiff:

J.M. Cameron

Counsel for the Defendant:

J.J. Hittrich

Place and Dates of Trial:

Vancouver, B.C.
February 24-28, 2020
March 2-5, 2020
July 6-8, 2020

Place and Date of Judgment:

Vancouver, B.C.
August 21, 2020

Table of Contents

INTRODUCTION..... 3

R.R.S.’S TESTIMONY 8

 Background..... 9

 The Battery.....10

 Injuries and Symptoms12

EVIDENCE OF A.W. AND T.H.....21

 A.W.21

 T.H.22

M.D.F.T.’S DEFENCE25

CREDIBILITY AND RELIABILITY27

M.D.F.T.’S ROLE AS A SELF-REPRESENTED LITIGANT AND EVIDENCE33

DR. KASON.....35

EXPERT MEDICAL EVIDENCE.....45

 Dr. Koo.....45

 Expertise45

 Opinion.....46

 M.D.F.T.’s Criticisms of Dr. Koo’s Evidence.....52

 Concluding Remarks54

 Dr. Prout.....55

 Expertise55

 Opinion.....55

 M.D.F.T.’s Criticisms of Dr. Prout’s Evidence58

 Concluding Remarks59

FINDINGS.....59

NON-PECUNIARY DAMAGES62

LOSS OF PAST AND FUTURE EARNING CAPACITY.....66

 Introductory Remarks66

 Past Loss of Capacity.....68

 Loss of Future Income Earning Capacity71

COST OF FUTURE CARE.....74

AGGRAVATED DAMAGES.....75

PROVINCIAL HEALTH CLAIM.....76

SUMMARY76

Introduction

[1] On April 15, 2009, the plaintiff, R.S.S., was assaulted moments after he left the grounds of his high school in Delta, B.C. to walk home. R.R.S. was 14 years old and a grade 9 student at that time. Acting on the instruction of the defendant, M.D.F.T., two adult males, one or both wielding telescopic metal batons, jumped out of a vehicle driven by M.D.F.T., ran after R.R.S., and physically assaulted him. When they paused at M.D.F.T.'s instruction, R.R.S. was physically assaulted by M.D.F.T.'s eldest son, M.T. M.D.F.T. was approximately 45 years old at that time.

[2] When A.S., a student standing nearby, tried to prevent M.D.F.T. from joining in the assault, M.D.F.T. head-butted him. Indeed, according to M.D.F.T., after his son assaulted R.R.S., M.D.F.T. walked over to R.R.S. and said words to the effect, "Are we even now?"

[3] The assault on R.R.S. is said to be revenge for a high-school spat between R.R.S. and M.D.F.T.'s other, younger son, S.T., who was also a student at Delta Secondary School, over a female student. In one incident, S.T. told R.R.S. that he kissed R.R.S.'s girlfriend. A short time later, they exchanged verbal insults. Feeling threatened, R.R.S. struck S.T. in the face. After that, they parted ways and had no further interaction.

[4] Judge Dohm of the Provincial Court convicted M.D.F.T. of two counts of assault causing bodily harm for his role as the directing mind of the assault on R.R.S. Judge Dohm's reasons for judgment are unreported but have been transcribed (16 March 2011, Surrey Registry 176395-1). Judge Dohm rejected M.D.F.T.'s evidence and defence. The key findings from his reasons are excerpted below:

[21] Based on the testimony of the Crown witnesses, I find the following to be the facts relating to the two charges of assault causing bodily harm: The accused was at the school looking for R.S. in order to seek revenge for R.S. punching his son [S.T.] in the face. The accused was driving his truck, his son [M.T.] was in the front seat and two unknown males were in the backseat. When R.S. was located, the accused drove his truck into the oncoming lane of travel and came to an abrupt stop, causing the tires to screech. The accused turned his head to the backseat and said something like, "Go get

'em," which immediately resulted in the two unknown males exiting the truck and chasing R.S. One or both of these men were armed with an item similar to an asp baton. The two males caught up to R.S., who had tripped and fallen, and they began to strike R.S. with the baton and their fists. R.S. was struck several times on the head and upper body.

[22] The accused and [M.T.] arrived within seconds and the accused told the two males to "let [M.T.] get in there". The two males immediately stopped beating R.S. R.S. stood up and began to take his football jersey and chain off. [M.T.] moved in and struck R.S. and the two began to wrestle. The accused remained within a few feet of this altercation, making sure no one intervened. He uttered words of encouragement to [M.T.] and he also said, "This is what you get," obviously directed to R.S.

[23] R.S. began to get on top of [M.T.] and the accused moved closer to them as if he was about to intervene in the altercation. [A.S.] observed the accused's movements and he grabbed the accused by his jacket and positioned himself between the accused and the two boys fighting to prevent the accused's further advancement. [A.S.] said to the accused words to the effect that these were "just kids". The accused paused, looked at [A.S.], and then head-butted [A.S.] with the top of the accused's head striking [A.S.] in the mouth area. The accused began to bleed and he wiped some of the blood on [A.S.]'s face. The head butt caused [A.S.] to have a white flash and he let go of the accused. The altercation with R.S. and [M.T.] came to an end around the same time. Moments later, the accused came up to R.S. and put his arm around him and said, "Are we all even?" R.S. angrily said, "No." The accused started heading back to his truck.

...

[25] Based on these findings I have no difficulty concluding the Crown has proven beyond a reasonable doubt the guilt of the accused on the two charges of assault causing bodily harm. The accused was the directing mind of the assault on R.S. by these two unknown males. He was at the school for a specific purpose; to exact revenge for R.S. punching his son [S.T.]. He obviously recruited the two males specifically for that purpose. He directed the two males to pursue and assault R.S. and he ordered them to stop beating R.S. so [M.T.] could fight R.S. The evidence proves the accused was a party to this assault on R.S. by the two unknown males.

[26] The intentional nature of the head butt to [A.S.], along with the pause by the accused immediately prior to it, demonstrates the accused's actions were deliberate and not accidental or incidental. As for the accused's complaint that the head butt was never described by any of the witnesses who saw it, in my view it is well understood what a head butt is, and in any event, D.E. did describe it when he testified he saw the accused take back his head and hit [A.S.] with his head. That description clearly established the intentional nature of the accused's actions in head-butting [A.S.] in the mouth.

[5] M.D.F.T.'s conviction was upheld by the Court of Appeal: *R v. M.F.T.*, 2012 BCCA 428.

[6] R.R.S. commenced this action against M.D.F.T. on April 4, 2013 seeking damages for the tort of battery.

[7] The trial of this action began on February 24, 2020. M.D.F.T. was self-represented for part of the trial. He denied liability at the outset of trial. His current trial counsel came on record just as R.R.S. was closing his case. Acting on M.D.F.T.'s behalf, defence counsel brought a no evidence motion after R.R.S.'s case closed, alleging there was no evidence to establish M.D.F.T. was liable in battery. I dismissed the application. My reasons are indexed at 2020 BCSC 549.

[8] After the no evidence motion was dismissed, M.D.F.T. admitted liability. The trial proceeded as a damages assessment. With the assistance of defence counsel, M.D.F.T. adduced evidence in his case.

[9] In these reasons, I will refer to the assault on R.R.S. and M.D.F.T.'s conduct constituting battery collectively as the "battery".

[10] M.D.F.T. decided not to lead any expert evidence concerning damages. It was a position he took well before the start of the trial. M.D.F.T.'s former counsel advised Master Cameron at a trial management conference on February 13, 2020 that M.D.F.T. was not seeking a defence medical opinion.

[11] M.D.F.T. closed his case at trial on March 4, 2020. The next morning, on March 5, when closing submissions were to get underway, M.D.F.T.'s counsel applied to adjourn the trial in order to obtain transcripts of the evidence. At that time, M.D.F.T.'s counsel also raised the possibility that his client may seek to tender new evidence or to re-open his case. However, after hearing submissions from R.R.S.'s counsel concerning the position taken before Master Cameron at the trial management conference, M.D.F.T.'s counsel confirmed that his client would not seek to do so:

THE COURT: And the medical expert -- the medical reports were served on prior counsel.

MR. HITTRICH: Yes, and -- and the fact that there wasn't evidence -- there's no expert rebuttal evidence, which is -- which is a tragedy, and that

puts us in a very, very difficult position. But -- and we did consider applying for a full adjournment to -- to -- to reopen the trial, and to obtain the court's permission to -- to hire a rebuttal expert, but my understanding from my friend is that former counsel had indicated that they were not seeking any expert rebuttal evidence, and there's records on that, and given the fact that there have been two adjournment requests, we didn't think that Your Lordship would be inclined to order that.

THE COURT: So you're not going to proceed on that basis, you want the short adjournment to get the transcripts?

MR. HITTRICH: That's correct. I do apologize to the court, and to the plaintiff, and counsel for the plaintiff. I -- this is -- this is not a situation that I normally would find myself in, and -- and in fact I -- Your Lordship will remember when I first appeared, I was originally only retained --

THE COURT: Right.

MR. HITTRICH: -- to -- on that one issue, the no evidence motion, and then essentially I felt sorry for my client, I made the -- perhaps the mistake to -- to be retained, but I felt he needed help, and so I apologize to -- to everyone, but there's a lot of money in play, and in terms of fairness, [M.D.F.T.] deserves proper representation.

[12] Although M.D.F.T.'s adjournment application was contested, I allowed it on terms to allow defence counsel to obtain the transcripts.

[13] Continuation of the trial was initially delayed to accommodate defence counsel's schedule and his request to obtain transcripts from the trial. It was adjourned again as a result of restrictions posed by the COVID-19 pandemic. The trial resumed on July 6, 2020 for closing argument.

[14] When the trial resumed for closing submissions, one of the arguments advanced by M.D.F.T. was that if at the conclusion of closing argument, I found the evidence insufficient to establish R.R.S.'s claim for damages on a balance of probabilities, I should adjourn the trial and order an independent medical examination on M.D.F.T.'s behalf. I rejected his submission shortly after it was made. I advised the parties that the submission overlooked the adversarial nature of litigation. It is up to R.R.S. to prove his case on a balance of probabilities and up to M.D.F.T. to establish that all or some of it has not been proven. It is not for the Court to intervene for either party to prove their case. After hearing my comments, M.D.F.T. advised of his decision to proceed with closing argument and that he would

not seek an adjournment of the trial in order to obtain a medical examination of R.R.S.

[15] R.R.S. seeks an award for non-pecuniary damages, past and future loss of earning capacity, cost of future care, aggravated damages, and recovery of a claim of the Ministry of Health per the *Health Care Costs Recovery Act*, S.B.C. 2008, c. 27 [HCCRA]. He does not advance a claim for special damages.

[16] All heads of damages sought by R.R.S. are in dispute.

[17] M.D.F.T. acknowledges that R.R.S. was injured as a result of the battery. His defence is that all of R.R.S.'s injuries resolved themselves within a short period of time with no lasting effects. M.D.F.T. maintains that some of the injuries and symptoms R.R.S. complained of at trial were not caused by the battery, while others are concocted. Regardless, M.D.F.T. submits that the medical evidence adduced in support of R.R.S.'s claim should be given little to no weight because R.R.S. misled (mostly intentionally, M.D.F.T. argues) the medical experts.

[18] The causation and concoction issues raised by M.D.F.T. have a significant bearing on the outcome of the damages assessment and award. M.D.F.T.'s submissions are also an attack on the evidence of the lay witnesses – R.R.S.'s wife, A.W., and his mother, T.H. – whose evidence corroborated R.R.S.'s evidence regarding his injuries suffered from the battery. In that respect, if correct, then M.D.F.T.'s submissions mean that R.R.S., A.W., and T.H. gave misleading testimony. Consequently, in light of these serious allegations, it is necessary to examine their evidence in some detail.

[19] When the trial resumed for closing argument, M.D.F.T. applied to have most of the letter exhibits marked as numbered exhibits. Most of those were clinical records. M.D.F.T.'s application was initially contested on the basis that there was never an agreement to enter any of those exhibits into evidence for proof of truth of contents or as business records and, as per *Cunningham v. Slubowski et. al.*, 2003 BCSC 1854 at paras. 6-20, because there was no evidence of compliance with the

statutory pre-conditions of admissibility under s. 42 of the *Evidence Act*, R.S.B.C. 1996, c. 124. Ultimately, the parties agreed that the clinical records could be marked as numbered exhibits - not for proof of truth of contents or as business records - as evidence that the notes or entries in them were made on the dates recorded. None of the other letter exhibits marked as numbered exhibits (e.g., photographs) were entered into evidence as proof of the truth of their contents.

[20] Nonetheless, M.D.F.T. relied heavily on the purported truth of numerous entries in the clinical records and images shown in four photographs in his closing argument, as he sought to establish his assertion of misleading testimony, submissions concerning deficiencies in the evidence adduced in R.R.S.'s case, and his challenge to the expert evidence and the testimony of R.R.S., A.W., and T.H.

[21] However, in the circumstances, only those clinical records and documents (including photographs) put to and adopted as true by a witness may be considered for the truth of their contents. This occurred in limited instances. R.R.S.'s current family doctor, Dr. Kason, reviewed and confirmed the truth of many of his records. In a few instances, records or a summary of those records were put to R.R.S. or T.H. The photographs were never put to R.R.S. or A.W. and were only shown to T.H.

[22] M.D.F.T. faces another problem in his reliance on the clinical records - they did not change the evidence of the medical experts or R.R.S.'s family doctor. M.D.F.T. put a number of records or notes in records or summaries of them to those witnesses as he asked them questions, attempting to obtain admissions to establish other causes for R.R.S.'s stated injuries and symptoms. Their opinions concerning causation did not change (I have excerpted some examples from their testimony later in these reasons).

R.R.S.'s Testimony

[23] In this section, I provide some background facts about R.R.S. along with his account of the incident and the injuries he claims he suffered as a result of the battery. I will do the same for the lay witnesses' evidence in the next section.

Background

[24] R.R.S. is 26 years old. He grew up in Ladner, B.C. His mother is an educational assistant for children with disabilities. His father is a landscaper. His parents were married when the battery occurred. R.R.S. has two siblings, a sister who is 23 and works at a bank, and a brother who is 19 years old and is attending school. R.R.S. has two children, aged 7 and 3, from his relationship with his wife, A.W. R.R.S. met A.W. in high school. She works at a children's clothing store. R.R.S. and his family live in an apartment in Tsawwassen, B.C.

[25] R.R.S. testified that as a young boy of 11 and 12 years old, he enjoyed school, particularly math and physical education, with overall marks of a C+ average. He played soccer in a community league and basketball and track and field at school. He had also begun training in kickboxing in grade 9 before the battery occurred.

[26] R.R.S.'s only significant pre-battery health issue involved "junior migraines" he suffered from between the ages of 8 and 12. When they occurred, which was approximately every few months, R.R.S. suffered an intense headache that would last one or two days. At times, to help with the symptoms, he would sit in a dark room and take Advil. He was never prescribed any specialized medication for his junior migraines. Sometimes, when his migraines were sufficiently intense, R.R.S. missed a day or two of school. R.R.S. testified that his migraines stopped when he was in grade 8. He also said he was not prone to anxiety or panic attacks prior to the battery and got along well with his teachers at Delta Secondary School. He enjoyed a positive mood, a good relationship with his parents and friends, and an active social life.

[27] Prior to the battery, R.R.S. had not considered any educational or work plans following graduation from high school.

The Battery

[28] Approximately two months before the battery occurred, M.D.F.T.'s son, S.T. approached R.R.S. in the weight room of his high school gym, to tell him that he had kissed his girlfriend. R.R.S. said he was upset to hear this and asked S.T. to leave. S.T. is a year younger in age and was in grade 8 at the time. R.R.S. had no contact with S.T. outside of school and knew him through friends of friends. They had no difficult or unpleasant interactions prior to that moment. Sometime later, about six weeks before the battery took place, R.R.S. and S.T. exchanged harsh words at school, just before classes started. R.R.S. testified that S.T. had something to tell him, and as S.T. got closer and closer to him with his chest puffed out, R.R.S. thought physical contact from S.T. was going to occur. As S.T. was making verbally abusive comments, R.R.S. said he struck S.T. across the face. He said they then went their separate ways.

[29] Afterwards, S.T.'s older brother, M.T., approached R.R.S. and arranged to fight him on April 18, 2009, just outside the school grounds, as revenge for what R.R.S. did to S.T. M.T. told R.R.S. the fight needed to be somewhere where his father, M.D.F.T., could be nearby. R.R.S. knew who M.D.F.T. was, having seen him in passing at the local recreation centre.

[30] The fight never took place. On the Wednesday before it was to occur, as R.R.S. left school at the end of the school day with some friends, he saw a group of M.T.'s friends staring at him, which he thought was odd, and even more so when one of them made a phone call on a cell phone. When R.R.S. walked out of the school parking lot he saw M.D.F.T.'s vehicle cut across a lane of traffic and saw M.D.F.T. look him in the eye. R.R.S. saw or heard M.D.F.T. mouth the words, "go get him", at which point two males who appeared to him to be older than 19 years old jumped out of the vehicle and ran towards him. R.R.S. believed both males carried collapsible metal batons but said that he could only be certain that at least one of the assailants wielded a baton.

[31] One of R.R.S.'s friends who was nearby said, "I think you should run," and as R.R.S. tried to run away, he heard M.D.F.T. scream, "trip him, trip him". R.R.S. was tripped and fell to the ground. He was beaten, he said, "for a solid minute" by at least one baton. He was hit all over his body with the blows mainly hitting the top of his head and back. He was kicked in the nose when he tried to look up. When one of R.R.S.'s friends tried to intervene, he was hit. At some point, the beating stopped when M.D.F.T. told the assailants to let his son go after R.R.S., and said, "Let [M.T.] get in there, let [M.T.] get in there". They stopped and M.T., who had got out of M.D.F.T.'s vehicle, began his assault on R.R.S. As he did, R.R.S. stood up and tried to take off his large baggy football jersey, and while his arms were in the air, M.T. hit him twice across the nose. The two then got tangled up and fell to the ground, with R.R.S. on top of M.T.

[32] R.R.S. felt disoriented and struggled to stand up to run back to school. With adrenaline coursing through his body, he put his knee on M.T.'s face to stop M.T. from striking him further.

[33] R.R.S. recalled one of the men who were circling him at that point, telling the other words to the effect, "I broke my baton on his head and he's still standing". One of R.R.S.'s friends came up to him to hand him bear spray and told him to use it if he was attacked again, but R.R.S. was so shaken and disoriented he could not remove the safety. As soon as the assailants saw the can of bear spray, they ran back to M.D.F.T.'s vehicle.

[34] R.R.S. ran back to school, into the administration office, for ice. He said the staff "freaked out" at his presenting condition, had him sit down, gave him an oxygen tank, and called for an ambulance. R.R.S. was taken to Delta Hospital in Ladner by ambulance, where he underwent some tests, including an x-ray of his head. Hospital staff attended to scrub the cuts on his scalp on the top of his head with a wire brush. R.R.S. also had two black eyes.

Injuries and Symptoms

[35] R.R.S. was discharged from hospital the same day. He suffered a cracked nose, concussion, and bruising throughout his body. He was driven home by his mother and spent much of the next several days resting in bed.

[36] The worst of the pain R.R.S. felt in the aftermath of the battery was to his head. In the weeks that followed, he felt pain and soreness throughout his body. In addition to bed rest, he took Advil and Tylenol.

[37] For the first six months following the battery, R.R.S. suffered from headaches. He said they were “much, much worse” in intensity and frequency than his junior migraines and caused him to vomit frequently. At times when outside he found the light so bright he would have to sit down and close his eyes.

[38] In the summer months following the battery, he suffered from paranoia, anxiety, and depression, and was always angry, to the point where it affected his social life. He was scared to walk into a grocery store or other like places. He described himself as hyper-vigilant and felt any male close to his age was going to assault him. R.R.S. stopped socializing with his friends and began associating with older boys, who, he said, “did things they should not be doing” such as selling drugs. He explained they were much bigger and tougher than he was and he thought they could protect him from any further reprisals. He admitted to selling drugs with them, and denied M.D.F.T.’s (unproven) accusation that he was selling drugs before the battery occurred.

[39] R.R.S. was not able to return to any of his sports activities over the summer due to his injuries. He tried to go back to kickboxing once in the summer but found it too difficult due to his headaches and head pain. Discouraged, he quit the sport.

[40] When school resumed in the fall, he felt ill at ease walking down school hallways where other children were present because he thought he would be attacked.

[41] R.R.S. became confrontational with his teachers when he returned to school in September 2009 to start grade 10. He found himself going into flight or fight mode when challenged by a teacher. His school work suffered due to his anger and frustration. After a couple of months, the school principal recommended R.R.S. move into the school's alternate program, held in an adjacent portable structure outside in the school parking lot, where he would be less stressed in an intimate setting with a maximum of 10 children. R.R.S. agreed, and found the program a much better atmosphere. He still had great difficulty concentrating and suffered constantly with an "overload of thoughts" in his head. He was frustrated trying to read. He had to read the same page over again because he forgot what he had just read.

[42] The teaching subjects offered in the alternate program were less complex than the regular program. For example, instead of English and math, students are taught communications and math essentials. Elective subjects are not offered. To enroll in them, students in the alternate program must earn the right to go back into the main school building to take one. Fortunately, R.R.S. was able to take electives in carpentry in grades 11 and 12. R.R.S. understood that his attendance in the alternate program would impact his ability to go to college, and he began to think about pursuing a trade. He enjoys carpentry.

[43] Throughout grade 10, R.R.S. was extremely anxious, depressed, and angry all of the time, which affected his home life and other relationships. He felt he could not trust adults, including his mother whom he had been close to before the battery. He felt he was the victim of personal attacks and would get into arguments with her, including physical altercations. Fortunately, his relationship with his mother is now greatly improved. R.R.S.'s parents separated in late 2010 or early 2011.

[44] At the end of grade 10, R.R.S. was still hyper-vigilant and continued to suffer from headaches. He returned to the alternate program in grade 11 with continued symptoms but at that time also noticed significant back pain. He denied any trauma or other precursor to his back pain and blames it on the injuries caused by the

battery. He found it difficult to sit in classroom chair and at times would have to lay down on a couch at the back of the classroom.

[45] He suffered from suicidal ideation at times. At one point he became so distraught that he went to his grandmother's home when he knew she was out in order to overdose on Tylenol. Fortunately, his mother, suspecting he was that distraught, called the police and they attended before R.R.S. could take the medication.

[46] R.R.S.'s anxiety was not helped by the threatening phone calls he received from men who claimed to have assaulted him. Unfortunately, apart from M.D.F.T. and M.T., the individuals involved in the battery were never identified.

[47] R.R.S. admitted to using cocaine every couple of weeks for a time after the battery and also to consuming more alcohol to self-medicate.

[48] R.R.S. met A.W. at high school in 2011 and their relationship developed from there. When she became pregnant while in grade 12, they decided to live together in a permanent relationship. They began living together in May 2012. R.R.S. thought working in carpentry would be a good means to support his family. He decided to pursue a level 1 carpentry ticket, which meant an apprenticeship outside of school. He secured an apprenticeship job with Heatherbrae Construction, which would count towards 16 school course credits.

[49] Unfortunately, R.R.S. was not able to complete the program due to his back pain, which worsened with job duties that required him to move lumber and work in difficult, compromising positions. He described his back pain starting out as aches and pains immediately after the battery. He did not worry about the pain because having grown up with a father who worked in construction and complained about a sore back, R.R.S. thought it was part of life. As the physical demands on his body increased once he started work with Heatherbrae Construction, his back pain quickly worsened. He suffered from various degrees of pain every day. R.R.S.'s back pain reached a point where he noticed "how little I could do". He had to take frequent

breaks while working at Heatherbrae Construction and at times, had to take time off of work when his pain was too bad in order to rest his back. R.R.S. said he was 16 or 17 years old when he realized he had a significant problem with his back. He saw his family doctor, Dr. Kason, for advice.

[50] After working there for almost a year, R.R.S. was laid off from Heatherbrae Construction while in grade 12. This increased his ongoing frustration consequent on his injuries since he hoped to progress in carpentry, earn a trade ticket, and reach the top tier and earn his red seal certificate.

[51] M.D.F.T. places much significance on a workplace accident R.R.S. was involved in while working for Heatherbrae Construction. R.R.S. was still in school when it occurred. While working at a job site, he heard an alarm, warning of a nearby blow-out of concrete during a pour. He also heard a call to immediately run from the scene. As he did, his helmet came off his head. In his haste, he hit his unprotected head against a scaffolding plank. He felt a little dizzy but kept working through the day. He did not suffer a loss of consciousness. When his employer found out about the incident the next day, R.R.S. was instructed to get a medical check up, which he did. Heatherbrae Construction paid his medical bills, including his attendance in an Emergency Room and an investigative CT scan. R.R.S. missed one day of work due to his medical visit. He was cleared to return to work the next day. He felt the effects for about a week and denied the incident had any effect on his ongoing headaches, back pain, or other symptoms from the injuries he sustained in the battery. The medical experts who testified at trial also do not attribute this incident to any of R.R.S.'s injuries and symptoms claimed to have been caused by the battery.

[52] In order to determine the cause of R.R.S.'s back pain, Dr. Kason ordered investigative modalities and referred R.R.S. to a spine specialist for evaluation. A CT scan was carried out in November 2013, followed by an MRI. The CT scan showed multiple disc bulges (and the MRI revealed annular tears associated with the disc bulges), which Dr. Kason and the medical experts testified are unusual for a person

of R.R.S.'s age. I discuss the results of the CT scan, MRIs, and other investigations concerning R.R.S.'s back pain in a later section of these reasons.

[53] R.R.S. graduated from high school in June 2012. Through his efforts he received a scholarship in grade 12 for his performance in trades.

[54] In December 2012, R.R.S. started a new job as a cashier for a Chevron gas station located in Ladner. He was paid minimum wage. He continued to suffer from back pain. His headaches continued to be a source of ongoing difficulty for him. They were so bad at times that he vomited. R.R.S. continued to feel anxious and depressed. Dr. Kason prescribed Tylenol 3 and Gabapentin for pain relief.

[55] R.R.S. left his job at Chevron about two years later, when his back pain became too much to cope with work. He qualified for government medical disability employment insurance (which provides benefits for approximately 15 weeks). He was off work from approximately September 2014 to May 2015.

[56] R.R.S.'s next job was with Delta Door and Panel ("Delta Door"). He thought he would enjoy working in a wood shop given his interest in carpentry. He also thought it would be easier on his back since he would be working with items on a smaller scale with a lighter lift load. Delta Door was located in the community where he lived. When R.R.S. applied for the job, he told the owner about his back issues, that he had been let go from Heatherbrae Construction, gave his mother as a reference, and asked if the company could accommodate him. The owner was so impressed with R.R.S.'s candour and interest in the job that he decided to give him a chance. He began working there in May 2015. R.R.S. proved to be a valuable employee. His work involved sanding cabinet doors, moving materials, and operating machinery such as table saws. His salary was \$40,000 per year. He loved his job and the owner thought so highly of his work that he accommodated R.R.S.'s need for breaks and time off to rest (which was approximately once a month at the outset but progressed to one day out of every two weeks). There were times that he could not get out of bed and at times when he could, he was so hunched over that

he could not stand up straight due to shooting pain down his back and legs. He would use heat and ice, take pain relief medication, and lay in bed to recover.

[57] R.R.S.'s job came to an end when Delta Door was sold. Just before the sale transaction closed, R.R.S. was told by his boss that the new owner was not prepared to accommodate him and would not keep him on. In November 2019, R.R.S. was let go from Delta Door. He returned to medical disability insurance.

[58] R.R.S. testified that his back pain is still unresolved. In his mind, his back pain is now worse than it was when he worked for Heatherbrae Construction. He understands that he has five disc bulges and spinal stenosis. He also understands that although he is too young for surgery, it may become necessary in the future. He takes Tylenol 3s and Gabapentin for pain relief. He did not find the several chiropractic treatments he received to provide any relief for his back pain. He found them painful.

[59] R.R.S. testified that his headaches have continued unabated since the battery. According to R.R.S., they are much greater in intensity and frequency than his junior migraines. They appear approximately every three weeks, last two to three days, and even now, about half of the time they are so intense that he vomits. He takes Advil, uses ice at times, and will sit in a dark room when they are bad.

[60] R.R.S. remains anxious and hyper-vigilant in public. He feels threatened around people he does not know. Although he admits his feelings are irrational, he carries a Bowie knife with him for protection and hides knives around his house and near his bed where he sleeps. He takes Ativan for his anxiety and panic attacks. He has received psychiatric counselling from time to time since 2010, which has provided him with some insight into his feelings. His feelings of depression have improved, in part, he said, because he understands he has to provide for his family and "to be there" for his two children.

[61] Nevertheless, in light of his ongoing symptoms, R.R.S. is concerned about his ability to provide for his family and to be a good father for his children.

[62] R.R.S. believes that if it were not for the injuries he suffered in the battery, he would have easily been able to follow in his grandfather's foot steps as a carpenter, and complete the various ticket levels for carpentry to obtain his red seal certificate (which would put him at a top pay scale).

[63] R.R.S. has not returned to any of his pre-battery sports activities.

[64] About two years after the battery, and after being encouraged by his parents in an effort for him to have some semblance of normalcy and see his friends on a regular basis, R.R.S. signed up for box and field lacrosse in Delta.

[65] Field lacrosse was organized through his school and box lacrosse was a community league. R.R.S. did not play every field lacrosse game since he needed permission to leave his alternate school program early in the day to attend a match.

[66] He played both for almost one season, but stopped due to a knee injury in lacrosse towards the end of the first season just as the playoffs began. He never returned to the sport. He consulted his doctor for medical advice for that injury. No medical therapy or follow-up was necessary.

[67] M.D.F.T. places significant emphasis on what he submits is the aggressive and sometimes violent nature of lacrosse. He also points to the one or two fights R.R.S. acknowledged in his evidence-in-chief that he engaged in while playing lacrosse. In his submissions, M.D.F.T. said that if R.R.S.'s complaints of ongoing back pain are true, then his participation in lacrosse accounts for much if not all of his current back pain. M.D.F.T. raised this point with the medical experts, Dr. Kason, and R.R.S. in cross-examination. R.R.S.'s evidence is that he protected himself from injury by wearing "lots" of protective padding, a helmet, and gloves. He also said that fighting was not permitted in his league; fights were quickly broken up by game referees. R.R.S. admitted he took the risk of further injury when playing lacrosse but explained that he wanted to be with his friends. He denied playing lacrosse with a sore back. According to the medical experts and Dr. Kason, there is no evidence to

establish M.D.F.T.'s submission; they attribute his back pain to the injuries R.R.S. suffered in the battery.

[68] M.D.F.T. also challenges R.R.S.'s claims of paranoia and anxiety, relying on two incidents where R.R.S. attended sporting events after the battery.

[69] The first occurred one and one-half to two years after the battery. R.R.S. went to a Vancouver Giants hockey game with his mother, his father, and his then girlfriend. When he went to get some snacks with his family during an intermission, M.D.F.T. walked past him and whispered something in his ear, which R.R.S. could not make out. It sent R.R.S. into a rage. M.D.F.T. was the subject of a no contact order from the Provincial Court. R.R.S.'s mother held her son back by his jacket while his girlfriend walked up to M.D.F.T. to tell him off. R.R.S. could not hear what she said but saw M.D.F.T. get "in her face" and utter something more. Stadium security came and separated M.D.F.T. from the R.R.S.'s family group. R.R.S.'s family reported the incident to the police.

[70] The second incident involved R.R.S. and M.T. at a Junior "B" lacrosse game at the Ladner Leisure Centre. In his evidence-in-chief, R.R.S. said he went to watch a lacrosse game with A.W. and a few friends. Coincidentally, M.T. was also there, although R.R.S. did not know it until he was leaving the arena. Like his father, M.T. was also under a no contact order and was supposed to leave the arena once he knew R.R.S. was there. When the game was over and as R.R.S. was leaving with A.W., they happened to walk past M.T. who was with some friends and near a vehicle. M.T. did not leave and instead started shouting something at R.R.S., at which point A.W. turned to face M.T. and reciprocated. She and M.T. got into a spitting match, and according to R.R.S., she "had a go" at M.T. after he spat right in her face. M.T. then grabbed A.W.'s wrist and pulled her arm into his car door and then shut the door on her arm. At that point, R.R.S. ran over and was able to extricate A.W. from the door. He was so angry that he tried to get M.T. out of his vehicle. He candidly acknowledged in his evidence-in-chief that his intention was to

hurt M.T. That did not occur because M.T. would not get out of his vehicle. R.R.S. took A.W. to his parents' home and called the police.

[71] M.D.F.T. submits that R.R.S.'s attendance at these events belies his evidence of anxiety and paranoia, especially around large groups of people. He argues R.R.S. would not have attended these events if he was suffering from those symptoms. M.D.F.T. says this is clear evidence of R.R.S.'s misleading testimony. However, the point was not put to R.R.S. in cross-examination. In considering the matter, and in particular the evidence of R.R.S.'s mother, who testified that she and R.R.S.'s father wanted their son to get involved in sports to improve his mood and function, I am satisfied that R.R.S. was attempting to engage in as normal a life as possible. In the first incident, he was on an outing with his parents and former girlfriend. In the second, he was with A.W. and his friends. I do not find that his attendance at those two isolated events detracts from his evidence that he suffers from anxiety and paranoia.

[72] M.D.F.T. also points to other instances that occurred in their community involving an exchange of verbal insults between R.R.S. and M.T. It will suffice at this juncture to set out my findings regarding these incidents. They occurred during chance encounters and do not involve public gatherings or events. They do not have any bearing on R.R.S.'s asserted mental health issues. Instead, they are illustrative of his ongoing anger at M.D.F.T. and M.T.'s participation in the battery. Further, in each of these incidents and the two sporting events, both M.T. and M.D.F.T. did not heed the no contact orders issued against them.

[73] R.R.S.'s ongoing symptoms adversely impact his relationship with A.W. and his two children. He does not like going to restaurants, movie theatres, or other public places because he suffers from sensory overload and becomes anxious and hyper-vigilant. That in turn limits his family's social pursuits. He finds it difficult to take his children to playgrounds or public attractions such as Playland. He said his heart begins to race, he starts sweating, and thinks that adult males are there to hurt him and his family. He continues to use Ativan when needed and following the

recommendation of the spine specialist, uses marijuana at night after his children are in bed to relieve his pain and anxiety. He also does stretching exercises given to him by the spine specialist and takes Ibuprofen. At times he takes Tylenol 3s twice per day, as recommended by his doctor.

[74] R.R.S. wants to return to work but is unsure what he can do. His plan is to find a job, preferably in the field of carpentry or woodworking, that can accommodate his physical restrictions. In the meantime, he pursues his woodworking hobby at home. From some of the photographs in evidence, it appears that he is a gifted carver. He has sold a few items on-line but is unsure if he can make a living as a carver. At the time of trial, R.R.S. was receiving medical disability insurance benefits, which provide benefits for 15 weeks. Otherwise, A.W. provides the primary financial support for their family.

Evidence of A.W. and T.H.

[75] A.W. and T.H. gave evidence, based on their personal observations, corroborating R.R.S.'s injuries and symptoms. Since A.W. met R.R.S. after the battery, she was only able to testify about her personal observations from that point forward. T.H. was able to compare and contrast R.R.S.'s physical and emotional function before and after the battery.

A.W.

[76] A.W. and R.R.S. met in 2011 while both were attending the alternate school program at Delta Secondary School. Their relationship became serious after four months of dating. A.W. saw R.R.S. nearly every day at school in addition to their dating. A.W. confirmed R.R.S. needed to take regular breaks in a quiet room at the back of class when he was feeling anxious or the noise level in the classroom became too loud. She commented that on one of their early dates at a movie theatre, before she knew of the battery, R.R.S. became agitated when police officers in the movie were beating up someone with batons. After they left the theatre, he told her about the battery and showed her newspaper articles reporting on it. Later,

once they began living together, she observed R.R.S. struggling with back pain and headaches. She also observed him vomiting.

[77] A.W. confirmed her observations of R.R.S.'s anxiety. They refrain from social engagements, and going out to restaurants and other public places because R.R.S. becomes visibly agitated when people are present, to the point of becoming very quiet and shaky, but also hyper-vigilant as he continually looks around. When they have tried to go to a restaurant, she found R.R.S. becomes very quiet, is unable to eat, and is anxious to leave as quickly as possible. If A.W. wishes to have a restaurant meal, R.R.S. prefers to call for take-out, which she will then pick up. The thought of going out to public places or events upsets R.R.S. As a consequence, A.W. is the one who takes the children to parks and to their events. She is accompanied sometimes by her father or mother-in-law. On the rare occasion R.R.S. joins them, he sits as far away as possible from other people in order to keep everyone within his view.

[78] A.W. described her observations of R.R.S. suffering from back pain. She sees him struggle to bend down to put his socks and shoes on when he suffers from flare-ups of pain. At times, she has helped him get out of the shower as he struggles to lift one leg over the bathtub to exit. She has also called his employer to let them know that he would not be at work due to back pain. She has seen R.R.S. physically unable to get out of bed to go to work in spite of his best efforts and also return home early from work due to pain. Their children are told that they are not to roughhouse with their father or engage in any aggressive activity around his back.

T.H.

[79] T.H. confirmed the accounts given by R.R.S. and A.W. of her son's injuries and ongoing symptoms. She gave evidence concerning his pre-battery personality, aptitude, and lifestyle. She described her son as someone everyone called "the natural", meaning the child for whom things came naturally. He was good at sports and academics, was socially outgoing, had no developmental issues and no school teacher interventions, displayed no signs of anxiety or panic, wore his heart on his

sleeve, was liked by his teachers, and presented as “a very happy bright-eyed boy”. Prior to the battery, R.R.S. played basketball for the school team and the Steve Nash basketball program, and enjoyed going to movies, the PNE, and on outings with friends. The family regularly spent time at their recreational property at 100 Mile House, going horseback riding, riding on all terrain vehicles, and fishing. R.R.S. made one attempt to return to their recreational property after his first son was born but was in a great deal of pain, especially after the long car ride which greatly aggravated his back pain.

[80] T.H. confirmed her son did not suffer from any pre-existing back issues. She acknowledged that he suffered from a few emotional highs and lows prior to the battery, which she thought were normal for a boy “pushing the boundaries”. She acknowledged that she and her son were very close and had an open relationship where he felt free to discuss many matters with her, including those of a personal nature. Her son’s relationship with his father was difficult, in part due to his father’s rigid and opinionated personality.

[81] T.H. also gave evidence of R.R.S.’s appearance immediately following the battery, when she saw him at the Delta Hospital in the trauma area of the Emergency Room. He had abrasions to his head and was crying. Hospital staff had to scrub his head and body to remove pebbles and other debris. The next day, her son appeared disoriented, emotional, and in disbelief at what occurred. He could not understand why he was assaulted. T.H. slept in the same room with R.R.S. the first night because he did not feel safe.

[82] T.H. confirmed that R.R.S. was asked to stay home for two weeks in light of the effect the assault had on the school’s student body. He was assigned a home school teacher for two weeks. She said that even by summer 2009, her son was not his former self. His eyes now seemed dark and empty, he lost his drive and ambition, was angry, felt worthless, and was withdrawn. He became visibly agitated at the clinking of dishes at home and would not go out to restaurants as he did before the battery.

[83] She also confirmed an incident where R.R.S. expressed thoughts of suicide. She recounted an incident that occurred in 2010 or 2011 where she could not find R.R.S. when she returned home from work. She noticed a kitchen knife missing from the knife block. She found him in the farm field, he told her something to the effect that he “did not want to be here anymore”. She took him to their family doctor for help.

[84] T.H. has witnessed R.R.S.’s emotional outbursts since the battery, describing him as a rollercoaster of emotions, presenting on some days very somber and on others, crying and feeling helpless, with no sense of belonging and feeling unsafe. She said he went so far as to insist on having wood blocks in window frames to keep them closed and to have the doors to the house bolted.

[85] T.H. denied her son suffered from any significant pre-battery injury. She said she never had to take her son to the doctor for any lacrosse-related injury other than his knee injury. She also said R.R.S. signed up for lacrosse with her blessing, emphasizing that she and her husband “tried very hard to get him into sports again”.

[86] She also confirmed her own observations of his back pain, confirming they became more noticeable when he began carpentry work and moving heavy loads, carrying large items, or being on his feet for long periods. Her evidence, which I have excerpted below, provides useful corroboration of the evidence of R.R.S. and A.W.:

Q Did you ever see any signs of any physical problems with his back after the assault?

A Yes.

Q Can you describe those?

A Um, it was -- it wasn't like an immediate, um, he had aches and pains. But it came out more so when he was directing into the field where he was wanting to go into, where he had to exert himself lifting heavy loads or carrying things or being on his feet for a long period of time.

Q And what I'll ask you is if you can tell us if -- did you ever observe, yourself, with your eyes, any visible signs perhaps of back problems for him?

A Oh, yes. I've had to help him put his shoes on. Because he'll have come in and sometimes when he would come to visit, he can't -- he wouldn't sit down because if he would sit down, he didn't want to get back up because it was stiff or sore. And then there were times where he couldn't bend over to put his shoes on. So I physically helped him put his shoes on.

Q Had you ever seen any things like that, the difficulty standing, sitting, the difficulty tying his shoes, prior to the assault?

A No.

Q Other than the assault, are you aware of any incident as his mother in his life of direct trauma to his back? Like a bad car crash or anything?

A Nothing.

[Emphasis added]

[87] She, like A.W., has observed R.R.S. struggle to reach down to tie up his shoes and get back up again due to back pain which, as noted above, she confirmed was never an issue prior to the battery. T.H. also corroborated A.W.'s evidence regarding R.R.S.'s physical difficulties with his children, and has observed his difficulties carrying the children from their car seats and her son's restrictions in physical play.

M.D.F.T.'s Defence

[88] M.D.F.T.'s core defence is that R.R.S.'s injuries were of nominal and transient effect. Specifically, M.D.F.T. does not dispute that R.R.S. suffered a concussion, black eyes, and fractured nose. He disputes R.R.S.'s claim concerning headaches, back pain, and mental health issues and says causation has not been proven.

[89] M.D.F.T.'s position is that R.R.S.'s evidence linking his symptoms to the injuries he sustained in the battery is misleading and in some instances, concocted. M.D.F.T. also maintains that R.R.S. gave misleading information to medical experts. As a result, M.D.F.T. says those experts' opinions are unreliable, particularly their opinions that R.R.S.'s stated complaints of injuries and symptoms were caused by the battery, and should be given no weight. M.D.F.T. also says that there is a paucity of reliable evidence from R.R.S. and the lay witnesses to establish causation for his alleged injuries.

[90] M.D.F.T.'s position is summarized in the following excerpts from his written submissions:

11. While the basic issues for this Court are the damages in dispute, there is a critical preliminary issue of causation.
12. A careful review of the trial transcript of the Plaintiff, the clinical notes, and the trial transcripts of the Plaintiff's spouse and mother raise serious credibility issues going to the vital issue of causation and how the current alleged severe symptoms and conditions of the Plaintiff as to his alleged back and neck pain and headaches can be reliably linked to an event 11 years ago.
13. The Plaintiff provided misleading information to his 2 experts, Dr. Koo and Dr. Prout. He failed to alert them to the fact that it was only in April 2011, 2 full years after the April 15, 2009 incident that he reported any back pain. He failed to mention to them that he had no difficulty playing a very physically demanding sport, namely lacrosse for 2 teams. The experts failed to notice that the Plaintiff failed to report any headaches to his family physicians after May 11, 2009.
- ...
16. The overall direct evidence of the Plaintiff, the relatively sparse evidence of the lay witnesses, and the absence of critical clinical evidence as to the alleged injuries raise very serious credibility issues concerning the true extent of the Plaintiff's injuries and whether there is a reliable causal link to the April 15, 2009 incident. A careful review of the Plaintiff's evidence, those of the lay witnesses and the clinical records on him show glaring gaps as to what was not addressed or reported.
17. The Plaintiff alleges that he had significant headaches after the April 2009 incident which have continued to this day, 11 years later, and yet after May 2009 there is no clinical record of any headaches. Furthermore his common law spouse [A.W.] makes only 2 very brief references to her spouse having headaches very early in their relationship and the Plaintiff's mother [T.H.], does not mention her son having any headaches.
18. These key lay witnesses failed to corroborate the severe alleged headaches by the Plaintiff. Since the Plaintiff lived with both of them, they would have been in the best position to particularize in detail the extent, severity, and frequency of the alleged headaches.

[91] In oral argument, defence counsel said the reference to the April 2011 date in paragraph 13 of the written submissions should read January 2011 instead.

Credibility and Reliability

[92] In this section, I discuss the credibility and reliability of the evidence of R.R.S., A.W., and T.H.

[93] What struck me overall about R.R.S.'s testimony was his flat, almost depressed, affect while giving his evidence-in-chief. R.R.S. gave his evidence without any hint of overstatement or embellishment, even though at times he was visibly shaking with anger during some of M.D.F.T.'s questions.

[94] Many of M.D.F.T.'s questions were framed as argumentative statements or statements of what M.D.F.T.'s evidence might be when he testified. R.R.S. continued to answer the questions in a forthright manner despite M.D.F.T.'s approach and despite the absence of any apology or expression of regret from M.D.F.T.

[95] R.R.S. was clearly distressed in having to face questions directly from M.D.F.T. as he conducted his own cross-examination. He was clearly upset with M.D.F.T. as he questioned him for one and one-half days on a wide range of matters beyond the battery extending well into his personal life, including potential mental health issues suffered by certain extended family members. R.R.S. managed to remain calm as he answered his questions despite M.D.F.T.'s probing questions, some of which were provocative, as illustrated in the excerpts below. Throughout, R.R.S. gave his evidence in a forthright and candid manner, readily admitting facts that were adverse or potentially adverse to his case.

[96] In one series of questions, M.D.F.T. asked R.R.S. if he was a drug dealer:

Q Okay. I'm just going to ask you straight up. I know how you answered it in the discovery, so -- and what you said in court. But -- so I'm going to ask you, are you a drug dealer now?

A No.

Q Okay. Were you dealing drugs before?

A In high school, yes.

A Okay.

A Not at the time of the incident.

Q Okay. But after, shortly after, you --

A Correct.

Q -- decided -- okay. Basically the same kind of --

THE COURT: Shortly after what?

[M.D.F.T.]: Oh, sorry. Shortly after the incident. That's what he's saying.

A Correct.

Q So you decided to deal drugs?

A Correct.

Q Okay. Any reason?

A It's something that I regret. I was young and stupid and I was trying to surround myself with people who I thought would keep me safe.

Q So peer pressure, basically, is what you're saying here?

A No. It was for my own safety, as I felt if I was involved with people like that, older children who were doing those sorts of things, that they would be able to protect me if something like what you did were to happen again.

[Emphasis added]

[97] M.D.F.T. also tried to ameliorate his role in the battery when he pursued R.R.S. for an admission that he did not strike him:

Q Okay. When you say "you did", I'm going to ask you again. We've gone over this, but when you say what I did, did I ever lay a hand on you?

A You did lay a hand on me, you did not strike me.

Q Okay. Can you explain to the court what you mean by "laid a hand on you"?

A I do.

Q Okay.

A I can, sorry. After I was beaten and then he ordered the assailants off of me --

THE COURT: "He" being...?

A Pardon me, M.D.F.T. After it was all said and done, he came up and put his arm around me and asked if we were all good now.

[M.D.F.T.]:

Q Okay.

A Yeah.

Q In the discovery from Mr. Coté, you said something along the lines of that I said, "Are we okay now?" I'm just going by words, 'cause it's important here. So --

A Okay....

[M.D.F.T.]:

Q Is it possible, do you agree that I said to you, "Are you okay?"

A No.

Q Okay.

A And, if you did, which -- that was not what I recall, it was in an extremely belittling manner. You were trying to assert dominance is what I felt, over a 14-year-old boy.

Q Can you tell me exactly why you believe that?

A Yeah, your demeanour and the fact that you had broughten [sic], you know, assailants to beat me with batons at my school, a place where I'm supposed to feel safe.

Q Right.

A Yeah.

Q So you're going to sit here, you're going to look at me right in the eye and you're going to tell me that I wanted you to be injured?

A I don't need to look you in the eye, and yes, you absolutely did want me injured.

Q Okay. It's a fair answer. Everybody's entitled to an opinion.

[Emphasis added]

[98] He also treated R.R.S.'s evidence that as a 14-year-old at the time of the battery he had no plans beyond grade 12, with a cavalier remark:

Q ...

Grade 9, when asked earlier from opposing counsel, Mr. Cameron, in Grade 9 -- I believe he asked you if you had any plans for life after school. I think you said something along the lines -- now, am I right or am I wrong, did you say something along the lines that you didn't really have any plans after school in Grade 9?

A That's correct.

Q You weren't planning on being a construction worker or a firefighter or -- or a police officer, or anything?

A No.

Q Just doesn't matter, fly by the seat of my pants?

A I was 14.

[Emphasis added]

[99] M.D.F.T. questioned R.R.S. about the temporal aspect of the onset of his back pain. From the nature of his questions, it was clear that M.D.F.T. was alive to the notes in the various clinical records and of appropriate questions to ask, as illustrated from these excerpts:

Q Okay. I want to ask you why you didn't go and see any help for your back until November 2009, some -- some eight-and-a-half months or so after the [indiscernible].

A That was when it started bothering me to the point where I couldn't wait any longer.

Q Okay. Sorry, just so I understand, it started bothering you or couldn't wait any longer?

A It was bothering me to the point where I couldn't wait any longer to seek medical help.

Q Okay. So were you -- did -- was it bothering you prior to that and then you went to -- you couldn't wait any longer, or did it start bothering you in November?

A I can't recall exactly --

Q Okay.

A -- when but that was when I sought medical attention.

Q Okay. And then there was nothing after that for a short period of time, a couple of years or something?

A Okay.

...

Q If -- if, in fact, that you were sore everywhere I guess I'm asking you why you didn't make any complaints that day at the hospital, any complaint about your back?

A The main concern was my head.

[M.D.F.T.]: Okay. I'm fine with that.

[Emphasis added]

[100] A.W. and T.H. also gave their evidence in a forthright manner without embellishment and exaggeration. They were clearly distressed and apprehensive as they had to look at M.D.F.T. throughout cross-examination. I was impressed with their efforts to remain composed as they answered M.D.F.T.'s numerous questions, including highly intrusive questions exploring mental illness in R.R.S.'s family, in a forthright and candid manner. With one exception, which I address below, I found

their evidence provided reliable and credible corroboration for much of R.R.S.'s evidence

[101] I turn now to the one area of evidence of A.W. and T.H. that I found was not reliable. It concerns R.R.S.'s ability to lift his children above his head or put them on his upper back close to his neck.

[102] M.D.F.T. placed great importance on four photographs he said he obtained from R.R.S.'s Instagram page. M.D.F.T. relies on those photographs in support of his submission that evidence concerning R.R.S.'s inability to engage in physical activity with his children is concocted. Three photographs show a child on the upper part of R.R.S.'s back close to his neck. Another shows R.R.S. lifting an infant above his head. The photographs were not disclosed by M.D.F.T. to R.R.S. prior to trial. The existence of at least one of the photographs was mentioned for the first time while M.D.F.T. was cross-examining A.W. However, M.D.F.T. did not produce them until his cross-examination of T.H., which followed the testimony of R.R.S., A.W., and the medical evidence.

[103] M.D.F.T. raised the issue of R.R.S.'s ability to hold his children above his head or carry them on his back with A.W. and T.H., but not with R.R.S.

[104] M.D.F.T. first raised the issue with A.W. during cross-examination. She denied M.D.F.T.'s suggestion that R.R.S. could carry their children on his back. In answer to one of M.D.F.T.'s questions, she said she was not aware of photographs showing R.R.S. carrying his son on his back.

[105] As mentioned, M.D.F.T. did not show any of the four photographs to A.W. even though he appeared to have at least one of them in hand when he questioned her. She was not able to consider them. M.D.F.T. only showed the photographs to T.H., who testified in her examination-in-chief that R.R.S. has difficulty putting his children in their car seats and was not able to "piggyback" his children. T.H. was unaware of the photographs and the circumstances in which they were taken. T.H. did not attempt to downplay what they depicted. At the same time, she could not say whether they represented a one-time event or whether the children were put on

R.R.S.'s back with assistance. She did, however, acknowledge that her son could do certain things, such as lift his children up from time to time, but on a limited basis.

[106] The photographs were originally tendered into evidence as letter exhibits. Upon the application of M.D.F.T.'s trial counsel during closing argument, they were marked as numbered exhibits but on the condition that they, as well as other letter exhibits now marked as numbered exhibits, were not admitted into evidence for proof of the truth of their contents. T.H. confirmed that the person in the photographs is R.R.S. There is no evidence concerning the circumstances in which they were taken. If the photographs represent more than a one-time event, then their potential effect is to undermine the reliability of the evidence of A.W. that R.R.S. is not able to carry his children on his back.

[107] That said, the photographs do not affect the credibility and overall reliability of her evidence or the evidence of T.H. I was satisfied that they did not attempt to mislead with exaggerated or concocted evidence.

[108] A.W. and T.H. were clearly very distressed in having to give evidence in circumstances where they had to face M.D.F.T. directly. It is the only instance where their evidence was contradicted. I was impressed overall with their effort to answer M.D.F.T.'s questions in as forthright a manner as possible without engaging in argument or debate. Both were clear in describing R.R.S.'s physical limitations around the house and with his family, and except for this one instance, provided convincing, credible testimony corroborating R.R.S.'s evidence.

[109] The photographs also do not have any direct impact on R.R.S.'s evidence since he did not say he could not lift or carry his children nor did he leave that impression.

[110] I am reinforced in my assessment of their credibility from the corroborative evidence of Dr. Kason and objective findings of the medical experts, which I discuss in sections that follow.

[111] I was left in no doubt after hearing the evidence of R.R.S. and T.H. concerning his back pain that they truthfully described the evolution of his back pain and symptoms, the reasons for seeking medical attention when he did, and that both honestly believe it is the result of the injuries he sustained in the battery.

[112] I have the same view of their honest belief concerning R.R.S.'s post-battery headaches. I accept that R.R.S. provided a truthful account of his headache symptoms and the differences from his junior migraines. It does not detract from my assessment of the veracity of the evidence of A.W. and T.H. that neither of them spoke of R.R.S.'s headaches at length, nor does it detract from my assessment of R.R.S.'s evidence. There is also no basis to suggest A.W. and T.H. were complicit in an attempt by R.R.S. to mislead or provide concocted evidence on the subject. Dr. Kason also gave credible and reliable evidence corroborating the onset of R.R.S.'s post-battery headaches and the differences between them and his junior migraines.

[113] I am satisfied that neither R.R.S., A.W., or T.H. attempted to provide misleading evidence or that R.R.S. attempted to mislead the medical experts.

M.D.F.T.'s Role as a Self-Represented Litigant and Evidence

[114] Before I turn to the medical evidence, I wish to comment on M.D.F.T.'s submission that since he was acting on his own at the time, he did not appreciate that he was required to put his points and records to the witnesses. It is devoid of merit.

[115] M.D.F.T. did a very able job, especially for a self-represented litigant, in conducting his cross-examinations of the witnesses, including Dr. Kason and the medical experts. It was clear from his questions that M.D.F.T. had a basic understanding of the confrontation principle as well as the details and potential nuances in the various medical reports and clinical records in evidence.

[116] M.D.F.T. challenged Dr. Kason and the medical experts on possible causes of R.R.S.'s current complaints, in particular his subjective reports of ongoing

headaches, back pain, anxiety, and panic attacks. In doing so, M.D.F.T. raised with the medical experts possible causes other than the battery, including R.R.S.'s post-battery participation in field and box lacrosse, the workplace accident where R.R.S. hit his head on a scaffold beam, and whether R.R.S.'s tendency to stand with one foot turned outward more than the other caused or contributed to his back pain.

[117] I also wish to set out my findings concerning the evidence adduced in M.D.F.T.'s case. It did not undermine the evidence adduced in R.R.S.'s case.

[118] M.D.F.T.'s evidence, which was brief, touched on his former job, his current health issues, and apparent post-battery invectives he said R.R.S. exchanged when M.D.F.T. saw him at a Vancouver Giants game with his mother and father. M.D.F.T. did not apologize or express remorse when giving his evidence even though he was represented by counsel at that point and was aware that R.R.S.'s claim included a claim for aggravated damages. Instead, the main focus of the evidence adduced in his case was an attempt to paint R.R.S. as an aggressive individual who sought out a fight with M.T.

[119] In addition to his own evidence, M.D.F.T. adduced evidence from his sons, M.T. and S.T. Most of their evidence centred on castigating the character of R.R.S. (and at one point, A.W.). Some of their evidence appeared to be led in a meritless attempt to ameliorate M.D.F.T.'s role in the battery.

[120] I heard evidence of ongoing slights and acrimony held towards R.R.S. by members of M.D.F.T.'s family (and of at least one lawsuit, currently in limbo, brought by at least one member of M.D.F.T.'s family against R.R.S.). None of the evidence is relevant to the issue of damages.

[121] M.D.F.T. placed great reliance on S.T.'s position as an RCMP officer as S.T. sought to impugn R.R.S.'s character during his testimony. However, much of the evidence given by S.T. (and also M.T.) was never put to R.R.S., A.W., or T.H. In addition, R.R.S.'s attempts to challenge S.T.'s credibility in cross-examination were objected to when M.D.F.T. (represented by counsel at that point) objected to any

questions being put to S.T. about his prior knowledge of his father's role in planning and carrying out the battery and S.T.'s involvement in it, on the basis that the issues were *res judicata* in light of M.D.F.T.'s admission of liability at the close of R.R.S.'s case and the decision of Judge Dohm.

[122] My overall view of M.D.F.T.'s evidence is that it had little to no probative value. My assessment of the evidence of M.T. and S.T. is that it was intended to justify the battery, castigate R.R.S.'s character, and was of minimal probative value and dubious credibility.

[123] M.D.F.T. suggested in closing argument that the evidence of M.T. and S.T. is relevant to the issue of provocation. His submission overlooks his unqualified admission of liability. Even if M.D.F.T. had not admitted liability, the defence would not be available. Provocation may be available to mitigate damages for assault or battery but only where a defendant can prove the conduct of the plaintiff is of such a nature as to cause him to lose his power of self-control, and it must have occurred at the time of, or shortly before the assault: *McCaffery v. Arguello*, 2014 BCSC 70 at paras. 27-33. Provocation is not engaged on the facts of this case. Also, M.D.F.T.'s evidence did not address provocation. Moreover, there was nothing about R.R.S.'s conduct shortly before or during the battery that could be viewed to cause M.D.F.T. to lose his power of self-control. The battery, I find, was planned and facilitated by M.D.F.T. in advance.

Dr. Kason

[124] Dr. Jason Kason is R.R.S.'s family doctor. He took over the practice from his father, who had been R.R.S.'s family doctor for many years. For a time, including when the battery occurred, both doctors worked at the medical practice. Dr. Kason's father saw R.R.S. at the clinic immediately following the battery.

[125] Dr. Kason's evidence was frank and objective and without any hint of advocacy or bias. During his evidence, Dr. Kason reviewed and explained many of the clinical records from the medical practice concerning R.R.S., which go as far

back to when R.R.S. was three years old. Through his review, the contents of the records Dr. Kason reviewed were proven true.

[126] Dr. Kason's evidence corroborated much of the evidence of R.R.S. and T.H. regarding the absence of any contributory medical history. His evidence is significant because it not only confirms the credibility and reliability of their evidence and the evidence of A.W. regarding new injuries and symptoms post-battery, but also shows that R.R.S. did not provide misleading testimony or mislead the medical experts. I provide some examples below.

[127] The only pre-battery note of back pain is August 11, 1997, made when R.R.S. was three years old. At that time R.R.S. was suffering from a viral infection, which resulted in a slight wheeze and some back pain.

[128] Similar to T.H., Dr. Kason testified that a year prior to the battery, R.R.S. was suffering from some anger and emotional upset that did not require medical intervention. Dr. Kason saw R.R.S. in June 2008 concerning his emotional "ups and downs", and noted in his clinical records that for about four to five months, R.R.S. was "snapping easy" and had an urge to hit things. R.R.S.'s sleep, interest, and appetite were normal, and he was not suffering any feelings of worthlessness or suicidal ideation. Dr. Kason recommended that R.R.S. speak with a school counsellor and take Omega 3 vitamin supplements. When R.R.S. saw Dr. Kason in March 2009, he expressed anger with his father and about problems in his parents' marriage. Dr. Kason did not refer R.R.S. for a psychiatric assessment nor did he prescribe any medication for his anger management issues.

[129] Dr. Kason said, in answer to M.D.F.T.'s questions, that R.R.S.'s pre-battery anger and frustration were symptoms of "teenage angst".

[130] In his evidence-in-chief, Dr. Kason explained the nature of R.R.S.'s post-battery symptoms when he saw him on May 21, 2009:

Q All right. And it looks like the very next day that the --

A Mm-hmm.

Q -- patient came in to see you?

A Yes.

Q And do you recall this visit?

A Yeah, actually I remember it quite well, because it's not typical for a kid to be this upset, especially a boy at around 15 years of age, but we were discussing his mood.

He was feeling extremely emotional, roughly five to six times a day he would well up just randomly with tears. He was wanting to be alone. Again, his -- his mood, he was not happy, he would get roughly eight hours of sleep. He had normal interest in activities. He had no feelings of guilt although he -- he had no interest in school. His energy was down, his concentration was down, his appetite was normal. He had some psychomotor slowness, like just less volition to do things, and there was no suicidal ideation.

As part of this interview we asked about things in his life. He was -- he drank alcohol rarely and he would have -- smoke marihuana on weekends.

Q And these are things that -- that you just asked and he just told you himself straight up?

A These are things that I ask. It's part of a -- sort of a more structured interview.

[Emphasis added]

[131] Dr. Kason determined R.R.S.'s post-battery symptoms were sufficiently serious to warrant a referral to a pediatric physician who specializes in psychiatric care for an assessment.

[132] Dr. Kason disagreed with M.D.F.T.'s suggestion that R.R.S.'s presenting emotional health issues when he saw him in September 2009 were essentially a continuation of pre-battery issues. He also disagreed with M.D.F.T.'s suggestion that R.R.S.'s pre-battery anger management issues were a precursor to his post-battery emotional and mood issues. In Dr. Kason's opinion, R.R.S.'s post-battery symptoms were strikingly different.

[133] I have set out excerpts of some of Dr. Kason's answers to M.D.F.T.'s questions probing a possible connection between pre-battery anger management issues and his post-battery mental health issues below:

Q Okay. In 2008, what you classified as ups and downs and then in your report wrote, "Snapped, hitting things, anxious, low concentration,

frustration, punched a wall, people didn't want him around, anger issues, I guess. Anger also. Would you say that that could've been the beginning of maybe possible signs of outward anger, frustration, outward -- acting out?

A I would say, you know, looking at my notes, and you know, my description of what I found on examination, it would be -- it would fall in sort of category of sort of a teenage angst where, you know, 14-year-old boys are, you know, it's a transition in their life, they're, you know, at that -- I guess that's grade 9. So I don't think that would be a precursor of anything, but I think that's what was going on there given that the majority of my assessment there was nothing glaring.

Q Do you think that that report may have been in keeping with some of the other reports later on with the -- some of the thoughts and anger issues? Sound very -- sound similar.

A No. Like if -- if you're making reference to when I saw him in September of 2009, it was a striking different visit and diagnosis. Even by my plan in 2008 recommending seeing a school counsellor and taking Omega -- Omega 3 vitamins opposed to a far larger assessment of his mental health that I was arranging in 2009.

...

Q Do you think that it could be related to his issues in September, same kind of behaviours to some degree. I know that you just specified that it was much different but do you think that it could've kind of connected itself to that same -- same issue?

A No.

Q No?

A No.

Q So you don't think there'd be a history of when he came in you were thinking, "Well, gee, he was just here last year kind of for the same thing, although this time he has a different complaint, the behaviour is similar."

A This behaviour wasn't similar.

Q Can you tell me how it was different.

A By -- I guess I mentioned I -- I remember this visit and he was -- he was extremely emotional. He was crying in the office. He was very downcast, withdrawn, and the visit back in 2008 --

Q Did he show any of those --

A -- he wasn't then.

Q Did he show any of those same issues in the visit of 2008.

A Not that I --

Q As far as downcast and --

A Not that I recall.

...

Q Okay. In March 30th, 2009, he came and saw you and he had issues again. He had some issues with his father, something to do with the family marriage. I guess he came in to see you over some -- doesn't specify but I would imagine some anxiety issues, psychological issues or something to that degree.

A He -- it -- he specifically actually saw my father on that visit.

...

Q So if that is the case, there are definitely some anxiety issues. I know you're treading lightly here but I'm just trying to ask you the question, it looks to me like, or do you agree with me, that there is some outlining issues, whether it be arguing with father, whether it be issues with his mother, issues with friends not wanting to be around him, things that are causing him anxiety to the point that he's reporting it to a doctor? And it's bothering him so much that he's coming and seeing a doctor. Usually young people won't go and see a doctor just because they're upset, their friend doesn't want to associate with them or something along those lines. Do we agree that maybe there is some history here before 2009 of anxiety and for reasons that I just explained?

A I -- I -- I can't deny that there's history because it's documented here, that I saw him on June 19, 2008.

Q Mm-hmm.

A And then he was seen nine months later regarding an anger issue, but I -- I can comment that when he was seen in February it wasn't discussed, which was the time in between those visits.

Q But it's fair to say that there is some kind of -- there is some kind of parallels here?

A I don't -- not sure if I follow.

Q Okay. Is it fair to say that there is, as I said, a history, whether you're going to say it's not related or not, but there -- there's clearly some issues here with mental health he's coming to see you on to the point that he's making a doctor's appointment?

A Yes. I would -- I would say that he was -- he was seen twice regarding mental health concerns.

Q Okay. So -- but in your judgment that's not a precursor to maybe issues after this event? Like there's no --

THE COURT: By event, do you mean the assault?

[M.D.F.T.]: Yes, in 2009.

THE COURT: Okay.

A Pre -- what do you mean by precursor?

[M.D.F.T.]:

Q If none of these -- if none of these reports were made by you prior to April 2009, then I would say clearly there's nothing outstanding here that

would say that there's any similar behaviours prior to April 15, 2009. But seeing as there's been a few entries and some of those issues are very similar as far as mental health or anxiety, isn't it fair to say that there is -- and I'm not asking you for personal reasons for what you -- I'm asking what would be logical, that there is some same behaviours that've -- that have been shown after 2009?

A I guess what I -- what I could say is that he had some teenage angst types of behaviours in June, he was dealing with an anger management issue during -- or like -- and that was my -- my father's recording when he was seen on March 30th, and then he was then seen by me for a more thorough assessment on September 22nd. I cannot -- I -- I can't say that, has he develop -- shown a pattern of mental health issues that he had a susceptibility to encounter more significant mental health issues in September. I -- I can't say that.

[Emphasis added]

[134] M.D.F.T. also questioned Dr. Kason about the possibility of R.R.S.'s current anxiety symptoms being the result of inherited mental illness (R.R.S. acknowledged in cross-examination that he understood a relative suffered from a mental illness). Dr. Kason was not aware of any mental illness in R.R.S.'s family. He said that if there was, it would not, on its own, mean R.R.S. would inherit it.

[135] Dr. Kason also testified that post-traumatic stress disorder (which the medical experts likened R.R.S.'s symptoms to) is not inherited.

[136] Thus, there was no evidence adduced to establish that R.R.S. was suffering from any pre-existing mental illness prior to the battery. Nor is there any evidence to establish that R.R.S.'s pre-battery anger management issues contributed to his current symptoms. The position advanced by M.D.F.T. during the trial is speculative.

[137] Dr. Kason's evidence also confirmed the injury to R.R.S.'s back and his current complaints to be caused by the battery. Dr. Kason ruled out any pre-battery causes of R.R.S.'s back pain.

[138] R.R.S. saw Dr. Kason's father on April 16, 2009 and in addition to abrasions to his knees, arms, and head, R.R.S. presented with bruising to his back and neck.

[139] When R.R.S. saw Dr. Kason in September 2009, nine months after the battery, he complained of back pain. Dr. Kason prescribed Naproxen (an anti-

inflammatory) to take twice per day and recommended exercises to help with range of motion. Dr. Kason said there was no information to suggest an intervening back injury between R.R.S.'s visit on April 16, 2009 and this consultation.

[140] Dr. Kason's evidence also corroborates R.R.S.'s testimony concerning the worsening of his back pain.

[141] The next time R.R.S. saw Dr. Kason for his low back was on April 21, 2011. R.R.S. reported increasing lower back pain, usually uncomfortable but now worsening over the past few months. On examination, Dr. Kason found tight and tender paraspinal muscles. He recommended Naproxen 500 mg a day plus motion exercises and heat. At a visit to Dr. Kason several months later, on August 23, 2011, R.R.S. complained of a tender back, lower lumbar left side, with minimal help from anti-inflammatory medication, as well as anxiety attacks. Dr. Kason ordered an x-ray for R.R.S.'s back and Ativan prescribed for his anxiety.

[142] Further visits by R.R.S. to Dr. Kason concerning back pain followed. I summarize Dr. Kason's evidence concerning some of his clinical notes below:

- October 28, 2011, back pain on left side around sacro-iliac ("SI") joint with spasms "now and then" and constant ache. X-rays looked normal. Dr. Kason diagnosed it as a strain and recommended anti-inflammatory medication and physiotherapy;
- October 22, 2013, ongoing back pain with feeling of mobile lumps in lumbar spinal region. On examination, Dr. Kason found tenderness to the SI joints, more so on the left. He referred R.R.S. for a CT scan with provisional diagnosis of sacroiliacileitis;
- March 24, 2014, ongoing back pain, reviewed results of CT scan, Naproxen prescribed, referral to a spine specialist at Vancouver General Hospital;
- April 10, 2014, ongoing back pain; note written for employer;

- June 4, 2014, ongoing back pain, another note written for employer;
- August 5, 2014, ongoing back pain, patient reporting reduced sensation in both legs and buttock and reduced power, MRI ordered;
- March 25, 2015, chronic back pain; getting worse, shooting pains down legs, reduced power in legs with associated fatigue, referral to a physiatrist;
- November 9, 2016, back pain, tight paraspinal muscles on the left side, bent over funny on November 2 and feels pain in mid and lower back; and
- September 16, 2019, ongoing back pain, missed 30 days of work January to September; sitting in car difficult; Gabapentin (nerve pain medication with mild anti-anxiety properties) and Tylenol 3 prescribed; had long discussion about focusing on function as opposed to pain.

[143] According to Dr. Kason and the medical experts, the CT scan taken in late November 2013 revealed disc bulges to R.R.S.'s spine. The scan results showed moderate generalized L3-4 disc bulge and moderate posterocentral L5-S1 disc bulge.

[144] M.D.F.T. argues the note prepared by the radiologist who read the CT scan, which says, "not clinically significant", demonstrates the bulges are not serious. His submission overlooks Dr. Kason's evidence. Dr. Kason did not accept the radiologist's conclusion and referred R.R.S. for an MRI. As I discuss in the section dealing with the medical expert evidence, the MRI revealed that R.R.S. suffers from annular tears in his spine that are associated with the disc bulges. Annular tears can only be detected from an MRI.

[145] In cross-examination, Dr. Kason was asked if the disc bulges could have been caused by heavy physical work activity, one season of lacrosse, or the scaffold incident. Dr. Kason testified that it would be extremely unlikely for a 19-year-old individual who did not suffer a significant blow since the findings were typically found in a much older person. Dr. Kason confirmed that apart from the battery, there were

no recorded incidents in his clinical records nor did he recall any other instance of traumatic force applied to R.R.S.'s back.

[146] Dr. Kason was aware that R.R.S. played lacrosse after the battery. It is noted in his clinical records. Dr. Kason did not advise him not to play the sport. Dr. Kason did not have the results of the CT scan and MRI until after R.R.S. stopped playing lacrosse (and therefore, sports altogether), which explains why Dr. Kason disagreed with M.D.F.T.'s suggestion that it was inappropriate for R.R.S. to have played lacrosse when he did:

Q Mm-hmm. Okay. So it's not his best interests. I know -- you know, when you were saying that it's probably not good to sit around all day. I'm not recommending that, but maybe casual exercise or something along those lines, maybe not physical contact, full contact sports, probably not advisable.

A No, I -- I would -- I disagree with that.

Q Okay.

A Because there's some -- there's so many benefits of being in that environment from a cardiovascular standpoint, from a comradery aspect, from, you know, fitting in with others. Specific -- I mean I guess you could say, with men, that's our -- that's our outlet. That's how we meet people and hang out with people and socialize and discuss our issues, I guess you could say, with sports. You -- you take sports out of the picture for people, specifically I would say male youth, they don't really have much of an outlet. Their social circle shrinks and they -- they become, you know, withdrawn, they don't --

...

Q So let me just try to finish by saying, given the choice, if you wanted to say, "Gee, R.R.S., you should be getting work and your cardiovascular, maybe your social attributes and some of these others", lacrosse wouldn't be your first one to pick. You may, given a choice, try to pick something that was less physical.

A I wouldn't say that.

Q So you'd -- it might be one of your first ones that you'd pick, a sport, a physical contact sport?

A I would say choose a sport you enjoy. Choose a sport where you'll -- you'll fit in. Choose a sport you understand.

[Emphasis added]

[147] Dr. Kason also corroborated the evidence of R.R.S. and T.H. concerning the onset of headaches following the battery. R.R.S. saw Dr. Kason in May 2009 for his

ongoing headaches. Dr. Kason determined they were caused by the injuries he sustained in the battery, adding they were pressure headaches in the temporal region and were likely post-concussive headaches.

[148] In support of his defence that R.R.S.'s injuries healed quickly, M.D.F.T. pointed to a note in the clinical records made by Dr. Kason's father when he saw R.R.S. on May 11, 2009. Dr. Kason's father wrote a note suggesting that with the exception of R.R.S.'s headaches, which Dr. Kason's father noted as "mild", R.R.S.'s other injuries were thought to be healed. However, M.D.F.T.'s submission overlooks the results of R.R.S.'s follow-up visit to Dr. Kason nine days later, on May 20, 2009, where Dr. Kason determined R.R.S.'s temporal headaches were a significant issue. During Dr. Kason's review of his clinical records of R.R.S.'s subsequent visits, which include Dr. Kason's findings on examination, it is clear that the assessment made by Dr. Kason's father that R.R.S.'s other injuries had healed was premature and his assessment of the severity of the headaches was incorrect.

[149] In summary, Dr. Kason's evidence corroborated the evidence of R.R.S., A.W., and T.H. concerning R.R.S.'s injuries and symptoms suffered in the battery, including his ongoing injury to his back, headaches, and mental health issues. Through Dr. Kason's evidence, the truth of the contents of the clinical records he reviewed, which were relied on by the medical experts, was proven. Dr. Kason was aware that R.R.S. played lacrosse and supported his decision to do so. He was not misled by R.R.S. Dr. Kason's records contain notes concerning R.R.S.'s knee injury from lacrosse. That information was available to the experts on their review of Dr. Kason's records. As will be shown from my review of their evidence in the next section, they were questioned at length by M.D.F.T. about a possible connection between lacrosse and M.D.F.T.'s back injury and I conclude that no basis for it was shown in this case.

Expert Medical Evidence

[150] R.R.S. called two medical experts to provide opinion evidence concerning the injuries he suffered in the battery, Dr. David Koo and Dr. Alistair Prout. Both conducted a thorough examination of R.R.S. as part of their assessment.

Dr. Koo

Expertise

[151] Dr. David Koo is a physiatrist. He gave expert evidence in the field of physical medicine and rehabilitation, and in particular, diagnosis, prognosis, management, and rehabilitation of individuals suffering from injuries caused by trauma. Dr. Koo has extensive experience in these fields. He graduated from medical school in 1995 and completed his training in physical medicine and rehabilitation in 2000 and received his Fellowship in that specialty. Dr. Koo has held the position of assistant professor in the department of physical medicine and rehabilitation at the University of British Columbia medical school since July 2000. The majority of his clinical practice is as an attending physician at GF Strong Rehabilitation Centre in the Lower Mainland, which is the province's largest rehabilitation hospital, providing integrative rehabilitative care to patients suffering from a variety of neurologic and musculoskeletal conditions or trauma.

[152] In his medical-legal report dated September 27, 2019 ("Koo Report"), Dr. Koo described the medical specialty of physiatry:

Physiatry is a medical specialty focusing on the treatment and rehabilitation of persons with a wide variety of physical impairments and subsequent disabilities. Emphasis is placed on the optimization of function through the combined use of medications, physical modalities, therapeutic exercise and activity modification, adaptive equipment and assistive devices, orthoses (braces), prostheses (artificial limbs), and accommodative and compensatory strategies. Physiatrists are trained in the diagnosis, management and rehabilitation of persons with spinal cord injury, acquired brain injury, general medical disorders, neurological disorders, amputations, arthritis, soft tissue injuries, chronic pain and musculoskeletal conditions. As a physiatrist I possess expertise in the use of history, physical examination and medical investigations in the assessment of disability and the effects of medical conditions and injuries on patients' functional abilities.

In addition to providing medical management, physiatrists are also involved in the prescription and supervision of restorative and compensatory therapies and rehabilitation services.

Opinion

[153] Dr. Koo's examination tested for objective evidence of injury. Dr. Koo found R.R.S. compliant, and said in his report that R.R.S. "complied with my physical examination and performed the requested maneuvers to the best of his ability and was reasonably able to provide accurate feedback during the subjective components of the examination when assessing for sensation and pain localization."

[154] From my review of the Koo Report in conjunction with his evidence, I was satisfied that Dr. Koo's investigation, including his consideration of R.R.S.'s pre-battery medical history, was thorough. Dr. Koo did not rely solely on R.R.S.'s subjective reporting, but carefully considered objective evidence of potential pre-battery medical issues that could cause or contribute to any of R.R.S.'s presenting symptoms.

[155] Dr. Koo set out his diagnosis of the injuries R.R.S. suffered from the battery is set out in the Koo Report:

Based on the aforementioned facts and assumptions from my review of the information provided as well as my interview and examination of [R.R.S.], it is my opinion that the assault which took place on April 15, 2009 likely resulted in the following injuries and conditions:

1. Mild traumatic brain injury (also known as concussion);
2. Left maxillary sinus hemorrhage
3. Soft tissue injuries to the neck, back, pelvis and hips, with contusions and myofascial pain.
4. Adjustment disorder with depression and anxiety.
5. Posttraumatic migraine headaches.
6. Chronic sleep disruption.
7. Chronic mechanical neck and back pain on the basis of myofascial injury and probable lumbar disc bulging with annular tears at L3-4 and L5-S1.

...

From the medical records as well as R.R.S.'s account, it appears that on April 15, 2009 he was struck on a repeated basis, sustaining blows to his head, back, face, shoulders and arms with a combination of metal telescopic batons as well as a kick to the face and at least two fists to the head.

He incurred two black eyes as well as rectangular-shaped bruises along his shoulders and back, and bruises on his arms.

[Emphasis added]

[156] In Dr. Koo's opinion, R.R.S.'s ongoing neck and back pain are the result of injuries he sustained in the battery. Contrary to M.D.F.T.'s submission, Dr. Koo's opinion concerning the cause of the back injury is not based solely upon R.R.S.'s subjective reports. It is also based on his physical examination of R.R.S.:

[R.R.S.] reports neck, shoulder, upper and lower back pain from the time of the assault. His physical examination is notable for soft tissue tenderness and pain reproduction with palpation of the musculoligamentous structures involving his neck (left suboccipital, cervical paraspinals), upper back and posterior shoulders (upper fibres of trapezius, rhomboids), thoracic and lumbar spine (midline thoracic and lumbar interspinous segments, quadratus lumborum, sacroiliac region), as well as pelvis and hip girdle (gluteus medius and proximal iliotibial band).

In my opinion, much of [R.R.S.'s] ongoing post-accident reports of pain and stiffness to the neck and back, relates to chronic myofascial pain, which is likely the sequelae of his initial soft tissue injuries that have not fully resolved despite time and attempts at returning to normal activity.

Over time his lower back pain has, if anything, worsened. His CT scan of the lumbar spine demonstrates moderate disc bulges at L3-4 and L5-S1, and his MRI scan demonstrates small posterior annular tears at L3-4 and L5-S1. In my opinion, the accident in question [referring to the battery] was likely causal to these traumatic disc changes at L3-4 and L5-S1, which would be unusual to be present in someone of [R.R.S.'s] age (these were taken in 2014 when he was 21).

In my opinion, the component of his lower back pain that is made worse with flexion versus extension and exacerbated with Valsalva maneuvers such as coughing and sneezing, such that he needs to brace himself prior to these activities, suggests that an element of his back pain is likely discogenic. I did not find clinical evidence or historical evidence of nerve root compromise or lumbar radiculopathy (also known as sciatica) and this is also consistent with his CT and MRI imaging which does not demonstrate significant focal nerve root impingement resulting from his disc bulges.

[Emphasis added]

[157] Dr. Koo explained the annulus is an outer, stronger fibrous network that is part of the spine. It can be detected on an MRI but not on a CT scan, which is why

the tears were not observed until later. According to Dr. Koo, an annular tear is significant because it is associated with disc bulging and a narrowing of the spinal tunnel (called spinal stenosis) which in turn affects the nerve roots, causing pain. Dr. Koo explained that degenerative changes such as disc bulges do not occur suddenly but over time. Something seen on a CAT scan in 2013 did not develop, he explained, in the year or two beforehand. In response to M.D.F.T.'s questions about lacrosse possibly causing the disc bulges, Dr. Koo said if the disc bulges were caused by something other than the battery, he would have expected to see evidence of an emergency room visit with acute back pain:

A Sure. So I - - what I would suggest is if there was a non-assault incident that would have caused multi-level disc bulges, I would have associated that with the presentation to an Emergency Room with acute low back pain.

[158] The only evidence of a lacrosse injury is to R.R.S.'s knee. In answering M.D.F.T.'s questions about the possible role of the knee injury with R.R.S.'s back injury, Dr. Koo explained that his question was conjecture since a knee injury is usually confined to the knee. There would need to be evidence, Dr. Koo said, of a blow to the back.

[159] Dr. Koo considered the role of R.R.S.'s carpentry work and other employment in his back pain and possible causes other than the battery:

In my opinion, the increase in his biomechanical load as a result of his carpentry apprenticeship and subsequent employment, likely aggravated his post-assault soft tissue and discogenic injuries, which is more physically demanding than high school curriculum. This had led to a worsening of his back pain over time.

...

More disabling and chronic, however, is his back pain which, if anything, has gotten worse over time. This is likely a result of his incompletely resolved soft tissue injuries, vulnerability as it relates to his symptomatic lumbar disc bulges and likely exacerbation through the work demands of employment as a carpenter's apprentice, and now from prolonged standing as it relates to his work in a cabinet manufacturing company. ...

[Emphasis added]

[160] Dr. Koo opined that R.R.S.'s ongoing headaches were initially the result of a mild traumatic brain injury but are now due to chronic pain and related symptoms:

Following the assault, he recalls headaches and dizziness and in my opinion, likely incurred a mild traumatic brain injury (also known as concussion) at the time of the assault.

...

He continues to have intermittent headaches about twice per month which are of a severe nature, lasting up to three days. These are migrainous in quality and associated with notable light sensitivity, nausea and intermittent vomiting.

Although his initial mild traumatic brain injury and concussion likely contributed to his early experience of more severe and continuous headaches, his ongoing intermittent headaches, in my opinion, are likely related to the sequelae of his neck and upper back injuries and the triggering of underlying migraine headaches. This would be known as a cervicogenic etiology. In my opinion, he may have a remote history of juvenile migraines but did not have recurrent or notable headaches leading up to the assault in question, nor does he have a notable family history of migraines by his recollection. In my opinion, his posttraumatic nightmares are likely directly and mostly attributable to the effects of his assault.

[Emphasis added]

[161] Likewise, the cause of R.R.S.'s ongoing concentration issues are not due to a brain injury but chronic pain and other symptoms, such as sleep disruption, resulting from the battery, which also results in fatigue and reduced energy for vocational pursuits during the day:

Although R.R.S. reports post-accident concerns with concentration, memory and poor scholastic performance, it is my opinion that the cause of [R.R.S.'s] ongoing cognitive complaints are more likely the result of his chronic pain, sleep disruption, and secondary psychological factors and social stressors that have arisen as a result of the injuries from the assault, more so than the lingering effects of a mild traumatic brain injury.

...

The aforementioned soft tissue injuries, discogenic injuries and headaches are likely contributing to a chronic sleep disruption with difficulty finding a comfortable position or being reawakened by pain. His ongoing sleep disruption likely results in ongoing fatigue during the daytime and reduced overall energy reserves as it relates to his normal work and avocational activities.

[Emphasis added]

[162] In Dr. Koo's opinion, R.R.S. also suffers from significant psychological injuries caused by the battery:

In addition to the aforementioned injuries, [R.R.S.] likely incurred significant psychological injury and social repercussions as a result of the accident [battery]. The effects of his assault and the withdrawal from his normal school setting, the requirement for homeschooling for the remainder of grade nine, and then a modified school environment for behavioural concerns in grades 10 and 11 have likely significantly affected his academic trajectory, peer connections, self-perception and self-worth, and have likely contributed to an ongoing adjustment disorder with depression, anxiety and probable posttraumatic stress symptoms.

[Emphasis added]

[163] Dr. Koo described R.R.S. as vulnerable to depression:

It is also important to note the concomitant diagnosis of a mild traumatic brain injury at the time of his assault carries with it a significantly increased risk for depression, relative to someone who incurred a similar severity of injuries that did not have an associated brain injury. It is generally accepted that neurotransmitter changes following a mild traumatic brain injury can be responsible for both primary (i.e. related to underlying brain injury and neurochemical imbalance) and secondary (related to post-accident psychosocial stressors and ongoing symptoms) as they relate to the cause of posttraumatic depression; hence, the higher incident rate.

[R.R.S.] has suffered from the above-mentioned diagnoses for over 10 years.

[164] Although R.R.S. believes his depression has improved, Dr. Koo diagnosed it as severe at the time of his consultation:

His PHQ-9 suggests that he likely has an ongoing severe major depressive disorder. This likely also further compounds his ongoing sleep concerns.

...

[R.R.S.'s] depression at present is severe. In my opinion, he is likely at increased vulnerability to psychosocial stressors, both accident and non-accident-related, and such stressors may precipitate a worsening of his depression, underlying sleep disruption, and further anxiety.

[Emphasis added]

[165] According to Dr. Koo, prognosis for resolution of R.R.S.'s physical symptoms is poor. He deferred to a psychiatrist or psychologist for prognosis concerning depression, anxiety, and post traumatic stress symptoms ("PTSD").

[166] R.R.S.'s injuries will continue to have an adverse effect on all aspects of his life, including his ability to earn income, Dr. Koo opined that R.R.S. is likely to have ongoing neck and back pain limiting his ability to tolerate bending, stooping, crouching, and prolonged standing, walking, and sitting. Working in a sedentary or light duty occupation with ability to change positions will likely lessen R.R.S.'s baseline pain and need for pain relief. In the Koo Report he wrote, "His current level of disability would best be characterized as severe", adding:

He is employed on a full-time basis at present but within that capacity continues to take up to 30 days off per year for recuperation due to pain aggravation. In my opinion, his ability to continue in this line of physical work is limited and would likely result in more neck and back pain aggravation than if he were in a more sedentary work environment where position changes, and less biomechanical load through his neck and back were required.

He is likely limited with regard to normal household and domestic responsibilities. He is probably capable of light housekeeping such as dishes, dusting, at-level cleaning and wiping countertops. He is likely moderately disabled as it relates to more physically demanding housework such as vacuuming, cleaning low surfaces and bathrooms, and would likely have difficulty with future yard work, gardening and landscaping, and exterior home maintenance when his living situation requires that.

Based on the duration, severity and lack of significant improvement in his headaches, neck and low back pain over time, it is my opinion that the goals of the rehabilitative process are to improve strength, flexibility and activity tolerance but not necessarily cure or reduce pain.

Ongoing physical accommodation with avoidance of aggravating activities and minimizing the risk for further discogenic injury through employment and domestic activities that may result in further disc herniation and/or protrusion should be implemented.

...

At this juncture, I am pessimistic about his durability for long term employment in his work as a cabinet manufacturer, based on his work intolerances to date and his ongoing pain aggravation. His low back pain aggravation is progressively worse with consecutive days at work, and his work intolerances to date are predictive that his future employment will likely be interspersed with periods of medical leave and recuperation, should he continue in this line of work.

[Emphasis added]

[167] Dr. Koo also said R.R.S. is predisposed to repetitive injury, acute strain, and flare-ups of pain due to his chronic myofascial pain caused by his soft tissue injuries.

M.D.F.T.'s Criticisms of Dr. Koo's Evidence

[168] At this juncture it is appropriate to discuss M.D.F.T.'s criticisms of Dr. Koo's analysis and opinions.

[169] Some were framed as rhetorical questions and some as statements suggesting "significant questions" about areas said not to have been dealt with in the evidence. Many of M.D.F.T.'s submissions were premised on the contents of various clinical records having been proven true, which, as mentioned, with the exception of Dr. Kason's records (including the CT and MRI scan results) and other entries adopted by R.R.S. or T.H., was not the case. Even so, the experts did not resile from their opinions when confronted with the clinical records (or summaries of them) that M.D.F.T. says in his submissions assist his defence. Some of M.D.F.T.'s criticisms of Dr. Koo's evidence purport to be medical opinions in the guise of argument not founded on any evidence. In some instances, a point raised in argument by M.D.F.T. was never put to Dr. Koo in cross-examination and in others, the submission overlooks his answer.

[170] I have set out in bullet point form below, a sampling of M.D.F.T.'s criticisms taken from his written submissions:

- On page 6, Dr. Koo claims that the Plaintiff is a reasonably accurate historian, but how would he know this?
- Looking at Dr. Koo's report, which is Exhibit 6, it is very puzzling how he could have written on page 5 of his report: "vi) On November 16, 2009 Dr. Kason [family doctor] notes back problems". This is entirely inconsistent with the actual notes of Dr. Kason.
- On the critical issue of causation, unfortunately Dr. Koo was never asked the following fundamental question: if the Plaintiff claims significant back injuries 11 years after an assault back on April 15, 2009, and had not back pain at all until sometime in early 2011, a period of almost 2 years, and had no problems playing lacrosse for 2 teams, what is the probability that his current back problems would be the cause of the April 2009 incident?
- Dr. Koo overlooked the Plaintiff's head injury at work in Jan. 2012.
- When Dr. Koo wrote his report, the Plaintiff did not tell him about lacrosse and the fact that he had no problems playing it. Unfortunately he was not asked to comment on how this new information may affect his conclusion on causation.

- Back pain itself is not a diagnosis. Disc bulges may be physiological or reflective of degenerative changes. Neither Dr. Koo nor [Dr.] Prout were able to link the disc bulges definitively to the April 2009 incident.
- [Dr. Koo] acknowledges that contact sports could have been the cause of the Plaintiff's disc bulges.
- If the Plaintiff did not report any headaches at all to his family physician after May 2009 and only in 2014 did he start complaining of regularly occurring back problems, how can there be a causal link today 11 years later to an incident back in April 2009?

[171] M.D.F.T.'s criticisms, including those set out above, are without merit.

[172] M.D.F.T. was clearly alive to purported gaps in the medical records about reports of back pain. He questioned Dr. Koo (as he did Dr. Kason and Dr. Prout) about the topic. Dr. Koo carefully considered the points put to him by M.D.F.T. in cross-examination. His answers were frank, candid, and credible. His opinion concerning causation remained unchanged. Despite putting various clinical records to Dr. Koo to consider, M.D.F.T. did not establish that Dr. Koo was given misleading or unreliable information by R.R.S. None of the records or propositions M.D.F.T. put to Dr. Koo in cross-examination demonstrated any reason to doubt Dr. Koo's opinions.

[173] M.D.F.T.'s submission that Dr. Koo relied on a non-existent note in Dr. Kason's records was not put to him (nor to Dr. Prout, against whom M.D.F.T. levelled the same criticism). It is also without merit. In looking over Dr. Kason's notes and the temporal sequence in which they were recorded, it is clear, I find, that both Dr. Koo and Dr. Prout misread the date of the note – which is shown as "09Nov16" – as November 16, 2009 instead of November 9, 2016.

[174] Dr. Koo was also questioned about the work incident where R.R.S. hit his head against a scaffold and suffered a concussion. Dr. Koo did not change his opinion that R.R.S.'s concussion was likely secondary and of brief duration, and unrelated to the injuries suffered in the battery.

[175] Dr. Koo also rejected M.D.F.T.'s suggestion that R.R.S.'s marijuana use aggravates or is the cause of his anxiety, panic attacks, or PTSD.

[176] M.D.F.T. also questioned Dr. Koo about a clinical record note concerning R.R.S.'s pre-battery 2008 anger management issues. Like Dr. Kason, Dr. Koo disagreed with M.D.F.T.'s suggestion that those issues were the same as R.R.S.'s post-battery symptoms of depression. Dr. Koo also explained that PTSD symptoms are the psychological consequence of a perceived life-threatening or potentially life-threatening event and the re-emergence of thoughts or ideas surrounding that event. Dr. Koo rejected the various pre-battery scenarios M.D.F.T. put to him (drawn by M.D.F.T. in part from notes in clinical records) as possible causes of R.R.S.'s current symptoms.

[177] Contrary to M.D.F.T.'s submission, Dr. Koo did not say that contact sports could have been the cause of R.R.S.'s disc bulges. In answering M.D.F.T.'s questions, Dr. Koo acknowledged it was hypothetically possible for an injury suffered while playing lacrosse to exacerbate R.R.S.'s back injury caused by the battery. However, Dr. Koo pointed out there was no evidence or record of any medically significant event involving R.R.S.'s back other than the battery, and there were none contained in the clinical records given to him by R.R.S.'s counsel or shown to him by M.D.F.T. in cross-examination.

[178] Dr. Koo also disagreed with M.D.F.T.'s suggestion that there was any basis to say that playing lacrosse was contraindicated after the battery because Dr. Kason was not aware of the disc bulges and annular tears at that time.

[179] Dr. Koo also said that the migraine headaches caused by the injuries sustained in the battery would not prevent R.R.S. from playing contact sports unless he was suffering from one at the time.

Concluding Remarks

[180] Dr. Koo's opinions are not wholly or even primarily based upon the subjective reporting of R.R.S. Nor are they based on misleading information. Dr. Koo considered and carefully assessed the reliability of R.R.S.'s reporting based on findings from the physical examination as well as test results, and from his records review. Dr. Koo also carefully considered the propositions put to him by M.D.F.T. in

cross-examination. His opinions did not change. I accept Dr. Koo's opinion that the battery is the major contributing cause of the injuries he diagnosed. I also found Dr. Koo took the same considered approach to prognosis.

Dr. Prout

Expertise

[181] Dr. Alister Prout was qualified to give expert opinion evidence concerning neurology. He obtained his medical degree in South Africa in 1983 and his certification as a specialist in neurology from the Royal College of Physicians and Surgeons in Canada in 1992. His clinical practice is in Vancouver. He is also a lecturer in neurology at St. Paul's Hospital and has coordinated undergraduate and postgraduate teaching in neurology at that hospital.

Opinion

[182] Dr. Prout was asked by R.R.S.'s counsel to assess R.R.S., particularly in light of his complaints of ongoing severe headaches. Dr. Prout conducted a thorough interview with R.R.S. and performed diagnostic tests in addition to the detailed history he obtained from R.R.S.

[183] Dr. Prout found objective evidence of tenderness in R.R.S.'s high cervical paraspinal and suboccipital muscles, left thoracic paraspinal muscles, over the sacroiliac joint areas bilaterally, and temporomandibular joint regions, as well as incidental tenderness over both elbows.

[184] Like Dr. Koo, Dr. Prout described the findings of annular tears shown on R.R.S.'s MRI to be unusual for a person of R.R.S.'s age in the absence of any other notable back injury in the past.

[185] From his review of the x-rays taken at Delta Hospital the day of the battery, Dr. Prout concluded the image in R.R.S.'s left maxillary antrum was likely blood present in the sinus cavity from the blows to the head.

[186] Dr. Prout considered the role of R.R.S.'s pre-battery junior migraines in his presenting symptoms. Dr. Prout determined that R.R.S. developed post-traumatic

headaches of a migrainous type as a result of the injuries he suffered in the battery. Those headaches, he opined, are caused by trauma. They are different from migraines, which are hereditary in nature. R.R.S.'s ongoing headaches are superimposed on soft tissue neck injuries sustained in the battery.

[187] Dr. Prout described R.R.S.'s current headache symptoms and difficulties with concentration and memory retention as the result of ongoing persistent pain and confounding psychological factors resulting from his injuries:

[R.R.S.] has multiple symptoms reported at the time of my evaluation and I provide the following diagnoses:

1. Post-traumatic migraine headaches

[R.R.S.] has a history of apparent childhood migraine that by history appeared to not be symptomatic or problematic immediately prior to the subject incident. [R.R.S.] subsequently suffered blows to the head and other portions of the body resulting in injuries to the face, head, neck and back. It is my opinion that as a result of the injuries sustained to the head in the subject incident [R.R.S.] developed post-traumatic headaches that have been of migrainous type.

...

It is my opinion that the post-traumatic migraine is superimposed on soft tissue neck injuries sustained in the subject incident and although the majority of the migraine type headaches likely occur separate from the neck pain, the variable neck pain reported may at times contribute to or precipitate some migraine type headaches.

...

During the alleged assault [R.R.S.] does appear to have a brief period of clouding of awareness for the details of the situation and reported difficulty with coordination. It is my opinion that [R.R.S.'s] description of the circumstances immediately post-incident are consistent with him having suffered a mild traumatic brain injury (concussion) at the time of the alleged assault. It is my opinion that, although [R.R.S.] described subsequent problems with concentration and memory, he likely recovered from the effects of the actual concussion sustained in the subject incident but had persistent symptoms relating to both the sequelae of the incident. It is my opinion that [R.R.S.'s] ongoing problems with concentration and memory which have persisted to this time, are likely now primarily the result of persistent pain symptoms and confounding psychological factors resultant upon the effect of the injuries sustained in the subject incident more so than lingering effects of the probable concussion sustained.

...

... With respect to [R.R.S.'s] neurologic status I would note that ongoing problems with memory and concentration are in my opinion primarily continuing as a result of persistent psychological and psychiatric sequelae of

the subject incident, these factors acting in concert with persisting pain symptoms most notably low back pain and recurrent disabling migraine headaches.

[Emphasis added]

[188] Dr. Prout also diagnosed R.R.S.'s issues with anxiety as PTSD.

[189] Dr. Prout's prognosis for resolution is generally poor, although there is some potential for improvement in neck and back symptoms with active rehabilitation.

R.R.S.'s injuries will impact on his employment and ability to carry out household tasks:

[R.R.S.] has now suffered from the above-mentioned diagnoses and symptoms for approximately ten years. It is my opinion that the prognosis for a resolution of his symptoms is very poor. With respect to the neurologic components of the injuries sustained I would note that some improvement in [R.R.S.'s] recurrent migraine headaches would be expected with more aggressive medical management of the headache disorder. [R.R.S.] should be treated by a treating neurologist and various treatment modalities including tracking of the headaches with a headache diary, acute abortive therapy of each migraine headache with specific antimigraine medications as well as addressing potential prophylactic antimigraine medications should be pursued. Should [R.R.S.] not obtain significant relief from prophylactic antimigraine medications and frequent disabling migraines continue, I would suggest a trial of botulinum toxin injections as treatment for chronic post-traumatic migraine. Such injections would be administered three monthly by a neurologist or pain specialist and would potentially result in a significant decrease in the frequency of migraine type headaches and result in a decreased need for acute symptomatic therapy for those headaches.

...

The prognosis with respect to an improvement in [R.R.S.'s] neck and particularly lower back pain symptoms is guarded although some improvement would be expected should more aggressive active rehabilitation and conditioning be pursued as discussed below.

...

It is my opinion that [R.R.S.'s] injuries will limit to a mild degree more physical household tasks or yard work that he may have wished or needed to perform.

...

It is my opinion that [R.R.S.'s] ongoing pain symptoms will diminish to a mild to moderate degree his ability to perform physical employment tasks, particularly employment tasks that would be more physically demanding than his current work. In addition [R.R.S.] is at times limited from his ability to be present at work at all as a result of flare ups of back pain and more

significantly severe migraine headaches which are disabling and prevent attendance at work on an intermittent basis.

[Emphasis added]

[190] In Dr. Prout's opinion, R.R.S. is susceptible to flare-ups of his headaches and low back pain. Dr. Prout recommended active rehabilitation as a modality for symptom management. Surgery is unlikely to be required for R.R.S.'s neck and back injuries.

[191] In terms of causation, Dr. Prout's opinion is the "vast majority" of R.R.S.'s "injuries and conditions diagnosed above were caused by the subject incident or were contributed to by the subject incident in a material way."

[192] He differed from Dr. Koo in respect of the role of R.R.S.'s pre-battery junior migraines, stating in his report, the battery "resulted in head and neck injuries that resulted in a recurrence and marked aggravation of probable pre-existing migraine type headaches."

[193] In terms of R.R.S.'s ongoing back pain, Dr. Prout wrote:

[R.R.S.] has likely had flare-ups of lower back pain due to minor sprain incidents subsequent to the alleged assault (particularly in 2015) but would not in my opinion have suffered from the ongoing lower back problems with variable flare ups of more acute lower back pain had the subject incident not occurred.

[Emphasis added]

M.D.F.T.'s Criticisms of Dr. Prout's Evidence

[194] M.D.F.T. also advanced similar criticisms of Dr. Prout in his closing submissions. I will provide a brief summary of Dr. Prout's evidence which demonstrates the lack of merit in M.D.F.T.'s critique.

[195] In respect of the potential role of post-battery events, such as lacrosse, exacerbating M.D.F.T.'s injuries or symptoms, Dr. Prout said there was no evidence he was aware of to establish one.

[196] Dr. Prout also disagreed with M.D.F.T.'s suggestion that the disc bulges were caused by R.R.S.'s participation in lacrosse. Dr. Prout rejected M.D.F.T.'s suggestion that the scaffolding incident played any part in R.R.S.'s ongoing symptoms. He also denied M.D.F.T.'s assertion that R.R.S.'s marijuana use caused or adversely affected any of his symptoms, including concentration and memory issues and paranoia.

Concluding Remarks

[197] Dr. Prout, like Dr. Koo, carefully considered the points put to him by M.D.F.T. in cross-examination. M.D.F.T. did not establish a basis to question Dr. Prout's investigation and assessment. He has not demonstrated that Dr. Prout was misled or inappropriately relied on any aspect of R.R.S.'s subjective reporting.

Findings

[198] Having set out the lay and medical evidence, and mindful that some of my findings are contained in prior sections of these reasons, I now turn to discuss my overarching findings of fact.

[199] At the age of 14 years old, R.R.S. sustained a disabling concussion, bruising and abrasions throughout his body, including his head, neck, and back, a mild traumatic brain injury (concussion), a fracture to his nose, black eyes, and soft tissue injuries to his neck and back. At 26 years old, he is now left with permanent ongoing chronic pain that in turn causes frequent, severe, disabling headaches (which are migranious in nature and about half of the time cause him to vomit), continues to affect his mood, and caused mental health injuries and symptoms. The battery has left him anxious and depressed, fearful for his safety and that of his family, hyper-vigilant, socially withdrawn, and caused him to suffer suicidal ideation and panic attacks.

[200] I accept R.R.S.'s evidence that the battery is etched in his memory. His psychological symptoms are akin to PTSD. His physical and psychological injuries have affected all aspects of his life. He no longer engages in sports, finds it painful to

engage in rough play or physical activities with his young sons as well as in many daily and household activities, and refrains from participating in social events outside of his home with his wife and children as much as possible (which in turn puts an unwelcome burden on his marriage). His injuries have also adversely impacted his ability to work and earn income, past and future, and to carry out many household tasks.

[201] R.R.S. provided a credible and reliable account of the circumstances concerning the battery, including those leading up to it, and of his injuries and past and post-battery injuries and symptoms. M.D.F.T. did not establish that R.R.S. misled Dr. Koo and Dr. Prout or provide misleading testimony.

[202] With the exception of their evidence concerning R.R.S.'s ability to raise a child above his head or hold one on his back, I make the same findings concerning the reliability of the evidence of A.W. and T.H. Insofar as the exception is concerned, I find that R.R.S. is able to engage in limited physical activities with his children from time to time, including lifting them or holding them one at a time for a brief period on his back.

[203] I accept the evidence of Dr. Kason.

[204] I reject M.D.F.T.'s submission that Dr. Koo and Dr. Prout were not asked critical questions concerning R.R.S.'s injuries, including causation.

[205] Proof of causation does not depend solely on scientific evidence of a tortfeasor's precise contribution: *Clements v. Clements*, 2012 SCC 32 at paras. 9-10; *Riley v. Ritsco*, 2018 BCCA 366 at para. 48. In this case, there is expert medical evidence supported by the lay witness testimony and Dr. Kason. From the totality of the evidence adduced in R.R.S.'s case, I find that R.R.S. has established on a balance of probabilities that his claimed injuries and symptoms were caused by the battery.

[206] The evidence establishes that the battery caused R.R.S.'s back injury. He was struck all over his body by at least one metal baton for approximately a minute.

His focus was on his head injury when attending Delta Hospital. Dr. Kason confirmed that evidence of bruising and abrasions to R.R.S.'s back was found on examination the day after the battery. R.R.S.'s explanation for the cause of the worsening of his back pain is credible and supported by the expert medical evidence.

[207] I reject M.D.F.T.'s submissions that gaps in references to back pain in Dr. Kason's clinical records indicate that R.R.S.'s back pain was not caused by the battery. I accept R.R.S.'s explanation that he decided to see his family doctor when his back pain began to interfere with his daily life and work. R.R.S. cannot be faulted because he went to his family doctor only when he (or his mother) thought it necessary: *Brock v. King*, 2009 BCSC 1179 at paras. 57-63. As pointed out by Mr. Justice Smith in *Edmondson v. Payer*, 2011 BCSC 118 at para. 36, aff'd on other grounds, 2012 BCCA 114, "the absence of a clinical record is not, in itself, evidence of anything."

[208] R.R.S.'s psychological symptoms and problems with concentration are not the result of a pre-existing mental illness or other cause.

[209] There is no evidence that R.R.S.'s participation in one season of lacrosse caused or contributed to any of his claimed injuries or symptoms. No criticism should be taken of R.R.S. for trying to play a sport. He was encouraged by his parents to play lacrosse. R.R.S. also saw it as an opportunity to resume social contact with his friends. He did not receive any medical advice to refrain from sports. His disc bulges and annular tears were discovered much later when the CT scan and MRI were carried out, after R.R.S. played lacrosse.

[210] With one exception, I accept the evidence of Dr. Koo and Dr. Prout without reservation. The exception concerns the only significant difference in their evidence, which is the nature of R.R.S.'s ongoing headaches.

[211] That said, it does not affect my damages assessment whether R.R.S.'s ongoing headaches are in fact new symptoms distinct from his junior migraines as Dr. Koo and Dr. Kason said, or whether they are the result of a recurrence or

aggravation of his previous junior migraines as Dr. Prout said. Both medical experts are clear in their opinion that their cause is ongoing chronic pain resulting from injuries R.R.S. sustained in the battery. I accept their opinion in that respect.

[212] M.D.F.T. remains liable for R.R.S.'s headaches in either case. If Dr. Prout's analysis is correct, the chronic pain R.R.S. suffers from due to the injuries he sustained in the battery triggered and significantly worsened his previously resolved junior migraines. The same result applies to the disc bulges. In both cases, if their origin pre-dates the battery, M.D.F.T. is liable because the battery triggered an asymptomatic condition that has not been established would have become symptomatic absent the battery: *Bouchard v. Brown Bros. Motor Lease Canada Ltd.*, 2011 BCSC 762 at paras. 97-110, varied 2012 BCCA 331.

[213] M.D.F.T. is responsible in law for the headaches because at a minimum, the injuries sustained from the battery materially contributed to R.R.S.'s now likely permanent headache symptoms. A non-tortious cause that precedes a negligent act but contributes to the injury is not relevant to causation unless symptomatic at the time of the tortious event: *Barnes v. Richardson et.al.*, 2008 BCSC 1349 at paras. 18, 21, aff'd 2010 BCCA 116, citing *Larwill v. Lanham*, 2003 BCCA 629 at para. 22.

[214] M.D.F.T. has not proven that R.R.S.'s workplace injury involving the scaffold beam or playing lacrosse for one year post-battery caused or contributed to any of R.R.S.'s injuries and symptoms that are the subject of his claim.

Non-Pecuniary Damages

[215] 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] The inexhaustive list of common factors cited in *Boyd* that influence an award of non-pecuniary damages includes:

- (a) age of the plaintiff;
- (b) nature of the injury;

- (c) severity and duration of pain;
- (d) disability;
- (e) emotional suffering; and
- (f) loss or impairment of life;

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

- (g) impairment of family, marital and social relationships;
- (h) impairment of physical and mental abilities;
- (i) loss of lifestyle; and
- (j) the plaintiff's stoicism (as a factor that should not, generally speaking, penalize the plaintiff: *Giang v. Clayton*, [2005] B.C.J. No. 163 (QL), 2005 BCCA 54).

[216] 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 individual: paras. 44-45. Those comments are echoed throughout the case authorities. For example, in *Morrison v. Koschzek*, 2019 BCSC 945, Mr. Justice Thompson said:

[60] Reference to awards made in similar cases can be of assistance in arriving at a fair award for non-pecuniary damages, and the cases cited by counsel have helped to identify the appropriate range. That said, each case must be decided on its own facts. An individualized assessment is called for, and it is neither possible nor desirable to develop a tariff: *Lindal v. Lindal*, [1981] 2 S.C.R. 629 at 637; *Dilello v. Montgomery*, 2005 BCCA 56 at paras. 39-43.

[217] I have considered the cases cited by the parties for guidance with those cautions in mind.

[218] Acknowledging in submissions that no two cases are alike, R.R.S. referred to the following cases for guidance in support of his submission that \$125,000 is an appropriate award in his case. I have excerpted his discussion from his written submissions:

172. In *Spencer v. Rozon et al*, 2000 BCSC 674...the Plaintiff was injured in an assault and suffered a number of injuries including a concussion, a mild personality disorder and a little more than four years after his injury,

continued to report post-traumatic stress disorder. The Court awarded \$75,000 in non-pecuniary damages (\$109,000 in 2020 dollars).

173. In **Crozier v. ICBC** 2019 BCSC 160... the Plaintiff was injured in a 2013 collision caused by an unidentified motorist. The Plaintiff suffered both physical and psychiatric injuries which were partially disabling and had a poor prognosis for full recovery. In assessing non-pecuniary damages at \$125,000 Mr. Justice Saunders provided the following reasons:

[99] The physical and psychological injuries Ms. Eros suffered include pain in the neck, back, shoulders, rib and chest; headache; dizziness and nausea; post-traumatic stress disorder, together with symptoms of depression and anxiety; fatigue, and problems with concentration and memory, either as a result of a mild traumatic brain injury (not confirmed through neuropsychological testing), or a combination of the physical and psychological/psychiatric injuries. Ms. Eros suffers from some residual headache and rib and chest pain. Fatigue remains a concern. She has significant chronic pain in the thoracic spine, and her psychological injuries continue. She is significantly disabled from working fully in her chosen field of massage therapy, and from engaging in physical labour of the type she did with SCRD. Her physical activity is limited. She can only do light housework.

[100] I also consider the following factors as particularly influential in the damages award. Ms. Eros avoids driving where possible. She is not the joyful, outgoing person she used to be. Her self-identity as a strong and fearless person is gone. She lost the chance of pursuing her relationship with Mr. Johnson. Her relationship with her mother deteriorated after the accident. She is more socially isolated.

[104] I find an appropriate award of non-pecuniary damages is \$125,000.

174. In **Evans v. Keill**, 2018 BCSC 1651... the Plaintiff sought damages for neck, upper back and psychological injuries arising out of a motor vehicle accident. She experienced migraines, neck pain, back pain and mental illness that permanently interfered with her ability to do physical work and required her to limit her recreational and social pursuits.

[166] I have concluded that as a result of the accident, Ms. Evans has suffered pain and a loss of enjoyment of life, which will continue into the foreseeable future and from which she is unlikely to ever fully recover.

[167] As a result of the injuries she sustained in the accident, Ms. Evans suffered from soft tissue injuries to her mid-back, upper back, neck and shoulder. She now has chronic pain in her neck and upper back. The pain is exacerbated by lifting and many different postures, including sitting, standing, certain neck angles and some yoga postures. It is exacerbated by physical activities where her neck or back bears weight, or involves lifting or working with her arms above a certain height. She experiences headaches and migraines. Over the course of two years after the accident the pain has gradually

improved by about 60% but has plateaued at its present level. It is permanent and not likely to improve. She has been prescribed analgesics and has taken over-the-counter medications to cope with her pain.

[168] Before the accident, Ms. Evans' mood was good and she enjoyed being physically active and social. She hiked several times a week, sometimes with friends, and regularly did yoga. She had a career that she enjoyed and was justifiably proud of given her eligibility for further promotion and that she achieved it without graduating high school. Her injuries rendered her unable to do her job.

[169] Due to the accident injuries, Ms. Evans suffered two major depressive episodes and somatic symptom disorder. She withdrew socially from her friends. She attempted suicide twice. She drank excessively.

[170] Overall, Ms. Evans' life is very different from what she enjoyed prior to the accident. However, after a significant and challenging struggle, she has reworked her life into a place where she is happy.

[171] The most significant of the *Stapley* factors in this case are Ms. Evans' age; the severity and duration of the pain; the impairment of her physical abilities; her associated loss of lifestyle; and the impairment of her relationships. Ms. Evans is relatively young. She was 34 years old at the time of the accident and she was 39 years old at trial. She faces the prospect of a lifetime of chronic pain and associated functional limitations. One of the most significant impacts of her injuries has been the impact on her ability to do her job as a produce manager, which she enjoyed and which was a source of pride.

175. The Court awarded \$110,000 in non-pecuniary damages.

[219] M.D.F.T. cited *Provencher v. St. Paul's Hospital*, 2015 BCSC 916, *Valerio v. Da Silveira*, 2011 BCSC 1055, *Kearns v. Marples*, 2009 BCSC 802, *Yocom v. Malcolm*, 1998 CanLII 5085 (BCSC), and *Saviskoff v. Morton*, 1997 CanLII 932 (BCSC), in support of his submission that an appropriate award is "nominal" damages in the range of \$15,000 to \$20,000. Those cases and his submissions are of limited assistance since they are predicated on two key factors. The first is that while R.R.S. suffered some physical injuries from the assault, they "could not have been significant" and have resolved. The second is that R.R.S. has not established that he suffered a back injury, headaches, or psychological issues from the battery.

[220] In my opinion, the facts of the case at bar are closer in nature to *Crozier* than *Evans*, particularly since R.R.S.'s headaches have not improved, as they did in

Evans by 60%. My findings concerning the *Stapley* factors are discussed in paras. 199-200 above. I assess \$125,000 as a fair and appropriate award for non-pecuniary damages.

Loss of Past and Future Earning Capacity

Introductory Remarks

[221] The claim is presented as a loss of earning capacity, past and future.

[222] In *Hardychuk v. Johnstone*, 2012 BCSC 1359, Madam Justice Dickson, as she then was, set out the principles to be applied in considering a claim for loss of future earning capacity:

[192] A claim for loss of future earning capacity raises two key questions: 1) has the plaintiff's earning capacity been impaired by his or her injuries; and, if so 2) what compensation should be awarded for the resulting financial harm that will accrue over time? The assessment of loss must be based on the evidence, and not an application of a purely mathematical calculation. The appropriate means of assessment will vary from case to case: *Brown v. Golai* (1985), 26 B.C.L.R. (3d) 353; *Pallos v. Insurance Corp. of British Columbia* (1995), 100 B.C.L.R. (2d) 260; *Pett v. Pett*, 2009 BCCA 232.

[193] The assessment of damages is a matter of judgment, not calculation: *Rosvold v. Dunlop*, 2001 BCCA 1.

[194] Insofar as is possible, the plaintiff should be put in the position he or she would have been in, from a work life perspective, but for the injuries caused by the defendant's negligence. Ongoing symptoms alone do not mandate an award for loss of earning capacity. Rather, the essential task of the Court is to compare the likely future of the plaintiff's working life if the accident had not happened with the plaintiff's likely future working life after its occurrence: *Lines v. W & D Logging Co. Ltd.*, 2009 BCCA 106; *Moore v. Cabral et. al.*, 2006 BCSC 920; *Gregory v. Insurance Corp. of British Columbia*, 2011 BCCA 144.

...

[196] The earnings approach involves a form of math-oriented methodology such as i) postulating a minimum annual income loss for the plaintiff's remaining years of work, multiplying the annual projected loss by the number of remaining years and calculating a present value or ii) awarding the plaintiff's entire annual income for a year or two: *Pallos; Gilbert v. Bottle*, 2011 BCSC 1389.

[223] Similar comments are found in *Birrer v. Thomas*, 2019 BCSC 1642.

[224] Evaluating a claim for past and future income loss may be assessed on a mathematical approach, based on actual earnings, or upon a finding of lost earning capacity.

[225] When the loss of capacity approach is employed, an assessment of hypothetical events is considered. A plaintiff is not required to prove those events and instead must demonstrate, as I find R.R.S. has done in the case at bar, a real and substantial possibility that he would suffer loss of income as a result of the tortfeasor's conduct. The approach is aptly discussed in *Birrer*.

[64] Moving to the loss of future earning capacity, an assessment of future earning capacity also involves consideration of hypothetical events. Again, the plaintiff is not required to prove these hypothetical events on a balance of probabilities. The 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; *Morlan v. Barrett*, 2012 BCCA 66 at para. 38.

[65] There are multiple approaches to the assessment of future loss of income. The earnings approach involves a specific mathematical methodology and is more appropriate when the loss is more easily measured in a pecuniary way; *Westbroek v. Brizuela*, 2014 BCCA 48 at para. 64; *Pololos v. Cinnamon-Lopez*, 2016 BCSC 81 at para. 133.

[66] The main alternative is the capital asset approach. Justice Kent explained the capital asset approach in *Hoy v. Williams*, 2014 BCSC 234 at para. 158:

[158] The capital asset approach involves considering factors such as i) whether the plaintiff has been rendered less capable overall of earning income from all types of employment; ii) whether the plaintiff is less marketable or attractive as a potential employee; iii) whether the plaintiff has lost the ability to take advantage of all job opportunities that might otherwise have been open; and iv) whether the plaintiff is less valuable to herself as a person capable of earning income in a competitive labour market: *Brown v. Golaiy* (1985), 26 B.C.L.R. (3d) 353 (S.C.); *Gilbert v. Bottle*, 2011 BCSC 1389 at para. 233; *Morgan v. Galbraith*, 2013 BCCA 305 at paras. 53 & 56.

[67] I find that the capital asset approach is appropriate in this case given that:

- (a) the plaintiff has remained employed since the accident; and,
- (b) there is uncertainty regarding the plaintiff's prognosis and the viability or necessity of various treatment options.

Layes v. Stevens, 2018 BCCA 415 at para. 29; *Reddy v. Staples*, 2015 BCSC 87 at para. 133.

[226] In *Ibbitson v. Cooper*, 2012 BCCA 249, the Court of Appeal described an award for loss of earning capacity to represent the damage to the person's capacity to earn income. It is not calculated according to a mathematical formula:

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

[227] In *Smith v. Knudsen*, 2004 BCCA 613, at para. 29, the Court of Appeal said that a claim for past loss of capacity is assessed in the same manner as future loss of earning capacity:

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

[228] As was the case in *Birrer*, the loss of capacity approach is the appropriate methodology to use to assess R.R.S.'s awards for past and future income loss, particularly in light of R.R.S.'s young age and lack of work history when the battery occurred.

Past Loss of Capacity

[229] In support of his claim for a pre-tax award of \$95,000, R.R.S. relies on evidence from Statistics Canada's 2016 census showing the average earnings for a high school graduate in British Columbia is at least \$59,000.

[230] R.R.S.'s gross earnings since 2012, when he was 18 years old, are as follows: \$10,257 (2012); \$15,146 (2013); \$4,770 (2014); \$18,599 (2015); \$33,197 (2016); \$35,373 (2017); \$34,421 (2018); and \$30,527 (2019).

[231] I agree with R.R.S.'s submission and find that absent the battery, he would have, at a minimum, worked in the field of carpentry, and in all likelihood have secured the various tickets required to obtain his red seal certificate.

[232] In his submissions, R.R.S. says that his income would have increased over time, from when he was 19 years old to age 25, at which point he would have achieved the average earnings level of \$59,000. His claim for past loss of capacity is summarized in his written submissions in the chart excerpted below. It is based on a progressive scale, representing the difference between his actual earnings and what he maintains he could have earned:

Year	Age	Earned	Should Have Earned	Loss
2012	18	10,257	10,257	N/A
2013	19	15,146	17,257	2,111
2014	20	4,770	24,257	19,487
2015	21	18,599	31,257	12,658
2016	22	33,197	38,257	5,060
2017	23	35,373	45,257	9,884
2018	24	34,421	52,257	17,836
2019	25	30,527*	59,000	28,473
		*number relied on from year-to-date paystub		
Total				95,509

[233] R.R.S. seeks an award for past loss of capacity adjusted for income tax in the amount of \$75,000 (which he explained in submissions is a net loss of just over \$10,000 per year).

[234] M.D.F.T.'s submits that R.R.S.'s expulsion from school following the battery is to blame for having to move into the alternative class module at Delta Secondary, such that the battery has no effect on R.R.S.'s income earning capacity. I disagree.

[235] Following the battery, R.R.S. was told by the school principal to stay home and not attend class for two weeks to allow matters to settle down at school in light of the upset the incident caused to students and staff. Unfortunately, R.R.S. failed to heed the instruction, and upon hearing from his large group of friends that they wanted to see him, walked back to the school grounds to see them. He was expelled for the rest of the term for breaching the instruction and was home schooled for one hour per week for the brief time remaining in the school year before summer recess. He realized his mistake and wrote a letter of apology. The expulsion did not prevent R.R.S.'s return to school for grade 10. It was not the reason for the principal's recommendation that he attend the alternative program. The recommendation was based upon R.R.S.'s presenting symptoms of frustration, anxiety, and anger and the challenges those symptoms (caused by the injuries he sustained in the battery) posed for him in his school work upon his return to school in September 2009.

[236] I find that R.R.S.'s grades suffered as a result of the battery. His letter grades in Grade 8 ranged between Bs and Cs, with Bs in math, social studies, guitar, and life skills, C+s in science and English, a C- in drama, and an A grade in health and careers. None of his marks in Grade 9 were higher than a C letter grade; social studies and physical education dropped to C- and he received a failing grade in a ceramics elective. His marks improved in Grades 10 to 12 when he attended the alternate program and attained some Bs in core subjects such as English, science, and math essentials.

[237] However, in the absence of any evidence concerning R.R.S.'s plans to attend post-secondary education absent the battery, there is no evidence from which I can determine the merits of R.R.S.'s submission that his drop in marks affected the likelihood of R.R.S. attending a college or university following graduation and jobs he may have obtained as a result of a college degree had the battery not occurred.

[238] However, it is not something I would have to decide since R.R.S.'s claim for past and future loss of earning capacity is premised on his ability to earn income as

a carpenter, earning his various tickets to be able to reach the average high school graduate income of \$59,000 by age 25.

[239] I find R.R.S.'s injuries have impacted on his ability to earn income in his post-battery chosen field of carpentry, his ability to advance and achieve his tickets and red seal certificate, and will continue to do so for the remainder of his lifetime.

[240] In assessing the quantum of the award for past loss of capacity, I am of the opinion that R.R.S.'s valuation is overly optimistic. It reflects his best possible case, and assumes he would have obtained average earnings for high school graduates by age 25. It also does not take into account negative contingencies. In my opinion, a fair and appropriate pre-tax award reflects that absent the battery, R.R.S. would likely have taken closer to age 30 to achieve those earnings. In my opinion, a fair and appropriate pre-tax award reflects approximately two-thirds of the pre-tax amount claimed. I assess the award at \$65,000, and leave it to counsel to determine the after tax amount.

Loss of Future Income Earning Capacity

[241] R.R.S.'s claim for lost future income is supported by the expert medical evidence. Even with active rehabilitation, R.R.S. will not experience complete resolution of his chronic pain symptoms and associated headaches. He will require ongoing accommodation from an understanding employer.

[242] In assessing a fair and appropriate award for this head of damage, I have, in part, considered the impact of R.R.S.'s impaired capacity on his potential future earnings in relation to a multiple of lost average annual salary of a high school graduate: *Miller v. Lawlor*, 2012 BCSC 387 at paras. 129 -137.

[243] R.R.S.'s submissions approach the award in the same way. In oral submissions, he departed from his position in his written submissions (where he said his diminished capacity was 20%), and said his loss of capacity ranged between 15 and 20%. Using average high school earnings of \$59,000 as a baseline, a 20% reduction in capacity results in an annual loss is \$11,800. A 15% loss of capacity

results in an annual loss of income of \$8,850. R.R.S. submits that both amounts are conservative and appropriately reflects negative and positive contingencies, especially since the difference between his best paying job so far (at Delta Door) and \$59,000 is closer to 33%.

[244] Relying on *MacGregor v. Bergen*, 2019 BCSC 315 and *Tsonis v. Mizuguchi*, 2020 BCSC 643, R.R.S. correctly points out that I do not need actuarial evidence to determine the appropriate multiplier to use, since I may rely on the discount rates prescribed in the *Law and Equity Act Regulation*, B.C. Reg. 352/81. Thus, he says the present value of an award premised on an annual loss of income of \$11,800 over 40 years, using a multiplier of 29.9158, is \$353,006. If his diminished capacity is assessed at 15%, the award is \$264,755 (rounded).

[245] I agree with R.R.S. that assessing the award based on a percentage of diminished capacity points to that range. However, R.R.S.'s calculations do not take into account labour market contingencies. If they are to be applied, which in my opinion should be the case, R.R.S. acknowledged in his submissions a further 10% reduction of the award is appropriate. In that event, the global figures to use in assessing the award would be reduced to be either \$317,705 or \$238,280 (rounded).

[246] I have also considered an approach based upon a multiplier of years of lost income of \$59,000.

[247] In respect of the appropriate multiplier to use in this case, R.R.S. relies on *Miller*. In that case, Mr. Justice Mackenzie pointed out there was no ceiling placed upon the number of years that may be used in determining an appropriate multiplier:

[132] In fact, Mr. Justice Groberman has recently said in *Bradshaw v. Matwick*, 2011 BCCA 111 at para. 33:

As this Court has noted on many occasions, an assessment of future income loss is an exercise in judgment and assessment, and not a mathematically precise calculation – see *Parypa v. Wickware*, 1999 BCCA 88 particularly at para. 36.

[133] One occasion was in *Morris v. Rose Estate* (1996), 75 B.C.A.C. 263. At para. 28, Donald J.A. said, “it is the judge’s sense of what is fair

compensation that matters. There is much more art than science in the process.”

[134] Following these appellate directions, I agree with the defendant that in these circumstances, it is appropriate to use the capital asset approach put forward by Finch J.A. in *Pallos* at para. 43, and “to award the plaintiff’s entire annual income for one or more years.” I do so primarily because of the plaintiff’s youth, his ongoing apprenticeship, and the positive and negative contingencies outlined above.

...

[137] However, I have found no authority that restricts an award for loss of future earning capacity utilizing this method to one or two years of annual income, and the defendant agrees. Mr. Justice Finch in *Pallos*, again, uses the phrase “one or more years” [emphasis added]. Indeed, in *Phoutharath v. Moscrop*, 2002 BCSC 686, Garson J. (as she then was) referred at para. 57 to *Kahle v. Ritter*, 2002 BCSC 199, and *Letourneau v. Min*, 2001 BCSC 1519, as well as *Pallos*, and concluded that Mr. Phoutharath’s “risk of demotion is greater than” the plaintiffs’ in those three cases, adding that if she chose that method she “would award three years’ lost income.”

[Emphasis in original]

[248] In *Miller*, Mackenzie J. determined a multiple of three years’ income was appropriate: para. 139.

[249] R.R.S. submits that if the multiplier approach is used, the appropriate multiple in his case ranges between 4 and 5.5 years, resulting in a global award between \$236,000 and \$330,000.

[250] In my opinion, the award should be assessed using the multiplier approach, especially given R.R.S.’s short work history when the battery occurred and his present age.

[251] After taking into account the permanent nature and severity of R.R.S.’s injuries caused by the battery, my finding that he would not achieve the average earnings figure until at least aged 30, the lengthy temporal aspect of loss given his current age, and his need for significant accommodation over many years of employment until retirement, I have determined that the appropriate multiplier in this case is four years of lost annual income of \$59,000. I have assessed \$236,000 as a fair and appropriate award for loss of future earning capacity.

Cost of Future Care

[252] The purpose of an award for future care costs is to restore, as best as possible, R.R.S. to the position that he would have been in absent the battery. The award is based on evidence of what is reasonably necessary to promote his physical and mental health. I must also be satisfied that R.R.S. will avail himself of the recommended treatments.

[253] R.R.S. seeks a monetary award that will allow him to pursue the care recommendations of Dr. Koo and Dr. Prout.

[254] Dr. Koo recommended R.R.S. receive six to eight treatment sessions of physiotherapy, chiropractic treatments, massage therapy, acupuncture, and possibly IMS needling to find out which modality provides the greatest benefit. If any are helpful then they should, he opined, be repeated as part of a pain management program with a frequency of every two to four weeks overall, depending on the duration of benefit.

[255] Dr. Koo also recommended R.R.S. participate in an active rehabilitation program overseen by a kinesiologist. Ongoing monitoring for functional improvements is required. In Dr. Koo's opinion, the program is unlikely to achieve a significant reduction of underlying pain due to the duration and severity to date, but it may result in improved overall physical condition. Independent exercise involving low impact activities such as walking, stretching, swimming, yoga, and Pilates are also recommended.

[256] Dr. Koo recommended R.R.S. see a psychologist for 12 treatment sessions over the next year to provide counselling, acceptance therapy, and cognitive behavioural therapy to help cope with his chronic pain, depression, and anxiety.

[257] Dr. Koo also recommended a consultation with a psychiatrist to consider appropriate pharmaceutical or injection therapy to help shorten the duration and possibly the frequency of individual episodes of R.R.S.'s headaches (but would not be curative).

[258] Dr. Prout recommended an active rehabilitation program designed to work up an exercise program for R.R.S., with particular focus on conditioning and core strengthening exercises. He said passive modalities would be less beneficial in the management of neck and back symptoms, with medication unlikely to assist at all. Like Dr. Koo, he recommended treatment by a treating psychologist or psychiatrist.

[259] Dr. Prout's other recommendations are: (a) specific anti-migraine medications; (b) depending on the outcome of those medications, possible trials of oral preventative medication to reduce the frequency of the severe migraine headaches; and (c) a trial of Botox injections to manage the severity and frequency of the migraine headaches.

[260] R.R.S. did not adduce evidence of costs and instead submits that a nominal award of \$15,000 is appropriately conservative in light of the doctors' recommendations. It is clear from his evidence that he would not attend any further treatments with a chiropractor. However, I am satisfied from R.R.S.'s ready compliance with Dr. Kason's referrals and recommendations, that he will pursue the recommendations made by Dr. Koo and Dr. Prout so long as he finds them helpful. In the circumstances, I agree that the award must be limited to a nominal amount and agree that \$15,000 is an appropriately conservative award.

Aggravated Damages

[261] Aggravated damages are awarded where a tortfeasor's conduct is particularly highhanded or oppressive so as to increase the victim's humiliation and anxiety. Aggravated damages take into account the additional harm caused to a victim's feelings by such conduct. In *Hill v. Church of Scientology of Toronto*, [1995] 2 S.C.R. 1130, at para. 189, the Supreme Court of Canada said aggravated damages are compensatory in nature and "represent the expression of natural indignation of right-thinking people arising from the malicious conduct of the defendant."

[262] R.R.S. drew my attention to the reasons in *Spencer v. Rozon et. al.*, 2000 BCSC 674 for guidance. In that case, the "brutal and unexpected assault" on the plaintiff by the defendant was found to be an emotionally traumatic event causing the

plaintiff to suffer shock, anxiety, ongoing low grade depression, loss of confidence to the point of being introverted, loss of memory and impaired concentration, personality and behavioural changes, and a post-traumatic stress disorder which eventually resolved. The award for aggravated damages was \$25,000.

[263] R.R.S. seeks an award of \$35,000, which is the current equivalent of the award in *Rozon*.

[264] There was no justification for the battery inflicted upon R.R.S. It was facilitated by the actions of an adult on a 14-year-old child at a place where R.R.S. ought to feel safe.

[265] I agree with T.H.'s apt description of the effect of the incident on R.R.S. – the battery “took away my son’s - - took away my son’s joy and innocence of being a youth.” To that I add my finding that the anxiety and other injuries he suffered in the battery will continue to affect him in all respects of his life throughout the remainder of his life.

[266] The *dicta* in *Hill* is engaged on the facts of this case. An award of aggravated damages should be awarded to reflect the natural indignation of right-thinking people for M.D.F.T.'s senseless and outrageous conduct. I award \$35,000 for this head of damage.

Provincial Health Claim

[267] The claim is made per the *HCCRA* and is proven by a certificate issued by the Minister of Health under s. 16(2) dated March 2, 2020 in the amount of \$3,976.88. R.R.S. is obliged to present the claim to recover health care costs.

Summary

[268] I have assessed an appropriate award to R.R.S. for the injuries he suffered in the battery in the amount of \$479,376.88, as follows:

- (a) non-pecuniary damages: \$125,000;

- (b) past lost earning capacity: \$65,000 (gross);
- (c) loss of future income earning capacity: \$236,000;
- (d) cost of future care: \$15,000;
- (e) aggravated damages: \$35,000; and
- (f) *HCCRA* claim: \$3,376.88.

[269] I leave it to counsel to work up an agreement on tax gross up issues. Failing agreement, they should contact Vancouver Trial Scheduling for a further appearance.

[270] Unless there are some facts of which I am unaware, R.R.S. shall have his costs.

“Walker J.”

The Honourable Mr. Justice Walker