

CANADA / JUDGMENT

Hinds v. Chae

2022 BCSC 1735

COURT

Supreme Court of British Columbia

DECIDED

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2022 BCSC 1375

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Hinds v. Chae,

2022 BCSC 1735

Date: 20221005

Docket: M155805

Registry: Vancouver

Between:

Hubert Oliver Hinds

Plaintiff

And:

Thanh Tung Nguyen and Thuy T. Bui

Defendants

Docket: M190920

Registry: Vancouver

Between:

Hubert Oliver Hinds

Plaintiff

And:

Heera Chae and Joanna Danuta Starczynowski

Defendants

Before: The Honourable Madam Justice Morellato

Reasons for Judgment

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Vancouver, B.C.

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Place and Date of Judgment:

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October 5, 2022

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I. INTRODUCTION

- [1] Mr. Hubert Hinds sustained personal injuries in two motor vehicle accidents. On August 30, 2013, Mr. Hinds was injured while driving a public transit bus ("2013 Accident"). Mr. Hinds was also injured on January 20, 2018 while driving his own car ("January 2018 Accident"). Liability is admitted in both the 2013 Accident and the January 2018 Accident (together, "2013 and January 2018 Accidents").
- [2] There were two other intervening accidents. In May 2014, Mr. Hinds rear-ended another vehicle. In July 2018, Mr. Hinds was in a single vehicle, motorcycle accident.
- [3] The issues before me are: 1) the nature and extent of Mr. Hinds' injuries as a result of the 2013 and January 2018 Accidents; 2) causation; 3) non-pecuniary damages; 3) loss of past income earning capacity; 4) loss of future income earning capacity; 5) cost of future care; and 6) special damages.
- [4] The defendants acknowledge that: 1) the 2013 Accident contributed to an injury to the metatarsal head of the fifth toe; and 2) the January 2018 Accident caused soft tissue injuries to Mr. Hinds' neck and back, although they submit these have mostly resolved. Further, the defendants submit Mr. Hinds has not established on a balance of probabilities that the 2013 Accident caused Mr. Hinds' knee problems, or his low back problems.

- [5] In addition, the defendants submit that Mr. Hinds has failed to prove that his tinnitus symptoms and headaches were caused by the January 2018 Accident; the defendants submit that Mr. Hinds' testimony was not reliable in regards to these symptoms, such that he has failed to establish that these complaints were caused by either of the 2013 or January 2018 Accidents.
- [6] Mr. Hinds made a claim for WorkSafe BC ("WCB") benefits in relation to the 2013 Accident. Counsel for Mr. Hinds advised that this claim does not have a substantial impact on how damages are to be assessed, apart from the issue of the inclusion of healthcare costs expended by WCB, which are a component of special damages and are largely agreed upon between the parties.

II. SUMMARY OF LAY EVIDENCE

A. Evidence of Mr. Hinds

- [7] Mr. Hinds is 70 years old. He was born on September 29, 1952 in Kingston, Jamaica and immigrated to Winnipeg when he was 12 years old. He is married with no children.
- [8] Following his high school graduation, Mr. Hinds worked in various jobs for a number of years before he became a bus driver. He worked for a number of retail businesses, including various men's clothing stores; he managed men's clothing stores in Winnipeg, Calgary and Vancouver. He also worked in the food industry; he ran an ice-cream business, as well a local café. In addition, Mr. Hinds worked for an employment placement agency, and he also sold computers and furniture.
- [9] In 2005, Mr. Hinds completed a course to become a qualified real estate agent, although he did not pursue his licence. Instead, he began working as a bus driver for TransLink. He appreciates the security that his bus driving job has provided. He started working for TransLink in 2005 and has worked there ever since.
- [10] In addition to his real estate course, Mr. Hinds completed part of Grade 12. He added that while he was working in retail, each company provided its own management training and "upgrading". He also received "a certificate" while working at an employment placement agency. Mr. Hinds is qualified to drive a bus and car. He also has a Class I motorcycle licence and a pilot's licence.
- [11] Mr. Hinds was married in 2016. He has known his wife since 2001; they were initially friends but started a romantic relationship in 2012. The couple began living together sometime in 2012 or 2013.

- [12] Mr. Hinds lives in a one-bedroom condominium in New Westminster, which he purchased in 2005. There is a mortgage on the condominium of \$300,000. Mr. Hinds also owns a townhouse in Langley ("Townhouse"), which he purchased in 2007, as well as a townhouse in Winnipeg ("Winnipeg Property") which he purchased in 2008. Each property generates rental income.
- [13] Mr. Hinds purchased a recreational property on an island near Ucluelet, British Columbia, on which he built a cabin prior to the 2013 Accident. This property has since sold.
1. Mr. Hinds' Health Before the 2013 Accident
- [14] Mr. Hinds testified during his direct examination that prior to the 2013 Accident, his health was very good. He added that he did not require any medications.
- [15] Mr. Hinds also testified that, before the 2013 Accident, he was very active and engaged in "lots of outdoor activities". He loved to walk long distances, ride his bicycle and would sometimes do both on the same day. He also loved to dance and did so weekly.
- [16] He testified that he rode his bicycle throughout the week, and would cycle on the weekends for the whole day, from 10:00 a.m. to 6:00 or 7:00 p.m. He acknowledged that after he was married, his wife did not like to ride bicycles and they would instead go on walks together.
- [17] Mr. Hinds especially enjoyed riding his motorcycle. He started motorcycling in June or July of each year and would ride until the fall. His motorcycle replaced his car in the summer months. His wife also enjoyed riding his motorcycle.
- [18] Mr. Hinds would travel by boat to his cabin, using his boat both for transportation and for fishing. He testified that he would travel to the cabin from spring until November. He would also travel by ferry.
- [19] Mr. Hinds did the maintenance work on his properties including carpet cleaning, painting, repairs and general upkeep such as grass cutting. He hired a property manager for his Winnipeg Property but travelled there on one occasion after she had left.
- [20] Mr. Hinds testified that he "did all the cleaning" in his condominium, as well as his laundry.
- [21] Mr. Hinds testified he also did all the maintenance and mechanical work on his vehicles which included his car, motorcycle, truck and boat. He explained that his father was a heavy-duty mechanic so he "grew up learning mechanics". Mr. Hinds testified that he kept his vehicles "pristine". He would regularly clean, wash, vacuum and polish these vehicles.
- (a) Cross-Examination Regarding Mr. Hinds' Health Before the 2013 Accident
- [22] Contrary to his own testimony, Mr. Hinds' health prior to the 2013 Accident was not excellent.

- [23] It was put to Mr. Hinds on cross-examination that, even though he had testified that his health was very good before the 2013 Accident, he had actually been off work for a number of weeks in 2013 for health-related reasons before the 2013 Accident. At first, Mr. Hinds testified he did not recall these absences.
- [24] Mr. Hinds was taken to a disability claim form, filled out by Mr. Hinds, that stated he had been off work due to a pinched nerve in his neck and shoulder in February 2013. He was also absent from work on sick leave in March and April 2013. Once he was taken to another written record setting out his absences from work, Mr. Hinds did not dispute the accuracy of these documents.
- [25] Employment records showed, and Mr. Hinds agreed, that he was absent from work on sick leave on February 12 and 13, 2013. He worked on February 14 and 15, 2013, was off work Saturday, Sunday and Monday (February 16, 17 and 18, 2013), and then used banked statutory holiday for two weeks until March 1. After that he was absent on sick leave again from March 5 through to May 3, 2013, inclusive.
- [26] Mr. Hinds remarked he had "his own reasons" for "each time off" but did not elaborate on these reasons, although he acknowledged he had a pinched nerve in his neck.
- [27] Other disability claim forms showed, and Mr. Hinds agreed, that he was off work in early 2012, for two days, with a rotator cuff injury. On August 7, 8, and 9, 2012 he was on sick leave due to right knee and hip pain. Mr. Hinds also acknowledged missing a few days of work in June 2011 due to a "bladder kidney infection". In September 2010, he acknowledged he was off work due to a sore left leg and hip.
- [28] There was no cross-examination on Mr. Hinds' medical or clinical records relating to the period before the 2013 Accident. He was examined only on employment records and on related forms he filled out prior to the 2013 Accident. Doctors' records or clinical notes relating to the period before the 2013 Accident were not disclosed or placed before the Court. As I will address later in these reasons, this made my assessment of damages more difficult than it needed to be.

2. The 2013 Accident

- [29] This accident occurred at approximately 8:00 p.m. on August 30, 2013, near the beginning of Mr. Hinds' shift, as he was driving his bus across the intersection of Smith Street and Spruce Avenue in Burnaby. The defendant's vehicle crossed into the intersection and collided with his bus. Mr. Hinds testified that he was travelling at or below the speed limit because he was "coming up to a stop". He was wearing a seatbelt.

- [30] Mr. Hinds recalled that the defendant's vehicle struck the left driver's side of the bus under the window and the front-left side of bus. The bus then hit a sign post. Mr. Hinds explained that he tried to evade the collision by going onto the curb. The windshield and body of the bus were damaged. Mr. Hinds estimated the defendant's vehicle was travelling in excess of 50 kilometers per hour when he hit the bus, and that the vehicle was increasing its speed.
- [31] After the accident, Mr. Hinds checked to see if his passengers were "OK" and then went to see if the driver of the vehicle that hit him was "OK". Mr. Hinds recalled that he and a couple of other people helped to get the defendant driver out of his vehicle.
- [32] Mr. Hinds called his supervisor. An ambulance and the police were also dispatched. Mr. Hinds put safety cones around the bus and he stayed on the scene for "a couple of hours". He did not feel pain in his foot that night; the pain in his foot became apparent the next morning.
- [33] Mr. Hinds does not recall his foot striking anything at the time of the collision, although he remembers he was "was anxiety-ridden and shaken". His bus was towed away and his supervisor came to the scene of the accident and took him back to the bus depot. Mr. Hinds drove himself home.
- [34] It is not entirely clear how Mr. Hinds' foot was injured. Mr. Hinds asserts that while he is driving a bus, his foot rests on a pad or plate on the floor of the bus that swivels; a swivel to the right causes contact with a post that activates the right turn signal and a swivel to the left causes contact with post that activates the left turn signal. While he testified that he did not recall his foot hitting anything, he also testified that his "foot got jammed into the plate". He also stated that his left foot slid over and jammed into the left turn signal post. He did not recall any sudden pain.

3. The Period After the 2013 Accident

- [35] After the 2013 Accident, Mr. Hinds was diagnosed with Type 2 diabetes. He testified he treats the disease with diet and exercise, and does not take medication for it.
- [36] The morning after the 2013 Accident, Mr. Hinds recalled that he "got out of bed and my left toe small toe was swollen and the underside of my foot was swollen". He testified that he "couldn't put weight on the bottom of my foot". He recalled that it was the weekend and that he did not have to go to work that day.
- [37] Mr. Hinds testified that he noticed a nodule on the bottom of his foot the morning after the 2013 Accident and that he went to the emergency ward of the Royal Columbia Hospital that day. He described the nodule as "very tender". Mr. Hinds testified that he thought he was given painkillers at the hospital.
- [38] During his cross-examination, Mr. Hinds was taken to his examination for discovery transcript dated February 9, 2017, where he deposed that he went to the hospital on the Monday following the 2013 Accident, rather than the next day (i.e., Saturday) as he had

initially testified. Mr. Hinds was taken to hospital records which confirmed he went to the hospital on September 3, 2013, not August 31. He then confirmed that he went to the hospital on September 3, after he had called his dispatcher to advise he was not able to go to work, and the dispatcher suggested he go to the hospital. Mr. Hinds walked into the hospital.

- [39] The hospital emergency record stated that there was "mild tenderness", no bruising or swelling, and Mr. Hinds had "O pain axial load". Mr. Hinds agreed on cross-examination with the note in the hospital record that stated there was no bruising. However, he testified that "for me, there was swelling". Mr. Hinds agreed he told the emergency doctor how he was feeling but he maintained he was "very sore," even though the emergency doctor's note referred only to "mild tenderness" in his foot.
- [40] Mr. Hinds initially testified that, the Monday morning after the 2013 Accident, he went to see his doctor, after going to the hospital, "because I couldn't work with the injury on my foot". He stated that the doctor "saw the same thing I saw," and that his foot was "more tender and sorer at that time, than when [he] was at the hospital". Mr. Hinds said that over the weekend, the "swelling got worse".
- [41] Mr. Hinds testified his foot was very sensitive to weight-bearing, and that he was "hobbling around". He explained he could not put his shoe on because of the swelling.
- [42] On cross-examination, Mr. Hinds was taken to his doctor's medical records, which provided that the first time he went to see his family doctor after the 2013 Accident was on September 6, 2013. He conceded he did not go to see his family doctor three days after the 2013 Accident as he original testified. Mr. Hinds agreed he went to see his family doctor one week after this accident. He did not take issue with the accuracy of this September 6, 2013 date and corrected his evidence. He acknowledged that he went to see his doctor because he needed a doctor's note to stay off work.
- [43] The doctor's log stated that Mr. Hinds described the accident, and then documented Mr. Hinds' subjective report as involving a "sore" left foot, although he noted that the "rest of body [was] OK", and that Mr. Hinds was "psychologically OK". With regard to his objective examination, the doctor's clinical note provided that Mr. Hinds' left foot was "tender". The doctor's clinical notes do not reference a nodule, although Mr. Hinds agreed that his doctor palpated his foot. Mr. Hinds did not take issue with the doctor's notes.
- [44] Mr. Hinds was shown a WCB document prepared by his family doctor on September 9, 2013. That document stated, among other things, that after the 2013 Accident, Mr. Hinds reported he had "problems walking". Mr. Hinds confirmed he told his family doctor this was so.
- [45] Mr. Hinds testified that he "couldn't drive the way my foot was" because the pain was "distracting" and was a safety concern. He also noted that walking was part of the job. Bus drivers must "prep" and walk around their bus, and the buses are particularly long.

- [46] Mr. Hinds acknowledged he returned to see his family doctor on September 13, 2012. His doctor's note stated "soreness down 20% and swelling down 50%". Mr. Hinds did not take issue with this notation or suggest it was in error. Mr. Hinds saw his family doctor again on October 24, 2013. The doctor's note stated that the swelling in the foot was "down by 65%". Mr. Hinds did not take issue with this notation or its accuracy.
- [47] Mr. Hinds initially took approximately three weeks of sick leave after the 2013 Accident. He then returned to work for a week but was again on sick leave until May 2014. Between March 13, 2014 and May 9, 2014, Mr. Hinds attended a WCB occupational rehabilitation program through Drake Medox Health Solutions. The program involved various physiotherapy exercises and other treatments, including a gradual return to work towards the end of the rehabilitation program.
- [48] Mr. Hinds' rehabilitation program was completed in mid-May 2014 and he returned to work after its completion. He continued working until September 12, 2014. He testified that by September 2014, he could not continue working. Mr. Hinds testified his left knee was sore because he was "compensating" for his foot and he was walking in a different way. He testified he was in too much pain to work.
- [49] Mr. Hinds testified that he first noticed the issue with his knee within weeks of the 2013 Accident. Mr. Hinds added that the pain first started with his left knee, "then my right knee got involved". He testified that when he returned to work on May 2014, he "was always in pain" and realized "I couldn't do it". Mr. Hinds stopped working in mid-September 2014 for 15 months. He testified that his left knee had a torn meniscus and "eventually the left one too".
- [50] Specifically, Mr. Hinds was off work again from September 14, 2014 until December 9, 2015. In December 2015, Mr. Hinds began another gradual return to work schedule. Mr. Hinds testified that when he returned to work in December 2015, after 15 months off, he felt he could go back. He eventually returned to driving, with a gradual increase in driving time. Mr. Hinds started working full-time again on January 5, 2016.
- [51] Although Mr. Hinds began working full-time in January 2016, he testified that he still had low back, right side pain and that he "couldn't ride or walk" and "couldn't get down on my knees to do maintenance around on the house".
- [52] Mr. Hinds explained that his knee condition is getting worse, stating he also has "pain in my shins" and that his lack of mobility has effected his "energy level".
- [53] Mr. Hinds testified that "all [his] activities ceased" after the 2013 Accident. He explained that before the 2013 Accident, he would sometimes park his car and walk 6 to 10 kilometers to the bus depot; now he parks in the handicap parking spot.

[54] He stated that he tried to do recreational walking but found he "had to stop every 10 minutes". He found his foot would swell in his shoe. He added that he could only walk for 10-15 minutes, and that "a half hour walking was my maximum". On cross-examination, Mr. Hinds testified his foot swells up periodically.

[55] Mr. Hinds testified that "before the accident" he would travel back home to Jamaica and sometimes back to Winnipeg; he would also travel across British Columbia. He acknowledged that he went to Spain for three weeks in 2016 and did some sightseeing but "not as much" as his wife, because of the "limitations with [his] feet". Mr. Hinds also acknowledged he travelled abroad with his wife in 2017, although he testified that his wife did most of the site-seeing because he "could not walk very much".

[56] Mr. Hinds was taken on cross-examination to a report dated March 3, 2015, authored by an orthopaedic surgeon, Dr. Apostle. Counsel put to Mr. Hinds the following passage from Dr. Apostle's letter:

He [Mr. Hinds] tells me he is capable of walking approximately three to four hours at which point the pain from pressure on the small mass in his foot becomes quite significant and he has to stop and rest and take his shoes off. Shoe wear and activity both aggravate his pain.

[57] Mr. Hinds agreed on cross-examination that he told Dr. Apostle what was stated in the above quote.

[58] Mr. Hinds testified that he can no longer do repairs around the house. He has not hired a housekeeper and he stated he is limited to doing light housework. He explained that he could no longer go back to his cabin as it is too rugged. The ground is uneven and rocky. He was concerned he could injure his foot. He said this is "one of the reasons" he sold his cabin.

[59] Mr. Hinds was cross-examined on his evidence at his examination for discovery on February 9, 2017 regarding his house cleaning capacity. He was asked the following questions:

Q Where you living alone at the time of the [2013 Accident]?

A Yes.

Q Okay, were you cleaning your own house or did you have help?

A I was cleaning my own house.

Q Okay, and after the [2013 Accident] have you needed to hire anybody to clean your house for you?

A No, I haven't. It just takes me longer.

Q Is housekeeping something that you enjoy doing?

A For myself? Yes.

Q Okay. So if it takes you longer, it's something you enjoy, are you upset about that?

A That - well, it's taking me longer, because once you're up doing for a while I have to stop because of my foot. Yes, that's not pleasant.

Q Okay, but other than that you're able to get everything done, right?

A Yes, I get everything done.

[60] Mr. Hinds confirmed on cross-examination that these statements were true in 2017.

[61] Mr. Hinds was also cross-examined on the mechanics of using the left and right turn signals on the buses that he drove. He confirmed that the heel of his left foot would rest on the floor of the bus between the left and right turn signals and the top part of his foot would move to the left and the right to engage the turn signals. He agreed he presses down on the area of the left foot where he now has a dime size nodule under his toe, when engaging the left turn signal. He also agreed he pressed on that area, and do so many times a day for the eight years prior to the Accident.

[62] Mr. Hinds also agrees that when he went back to work after the 2013 Accident without orthotics, his foot was sore and so he tried to adjust and reposition his foot to avoid the sore spot when he was applying pressure to press the left turn signal. He now wears orthotics at work and elsewhere.

[63] Mr. Hinds recalled that between 2013 and 2014, he boated to his cabin "a couple of times"; he stated that he sold his boat sometime in 2014 or 2015, noting that he "couldn't do maintenance any more and it needed repairs".

[64] Mr. Hinds was also cross-examined on how the 2013 Accident affected his boating. He was taken to his examination for discovery transcript where he was asked how often he boated before the 2018 Accident. Mr. Hinds responded that he used to boat "quite a bit" and:

... after the 2018 accident it was worse because then I really couldn't go. After the first accident it was - it slowed me down quite a bit.

[65] Mr. Hinds confirmed this evidence at trial. When questioned on cross-examination about when he sold his boat, Mr. Hinds changed his evidence and stated that he sold his boat in 2017 before the January 2018 Accident.

[66] Mr. Hinds was also taken to his Examination for Discovery transcript of November 20, 2020 when he stated that he could only walk a couple of hundred yards at a time and "nothing extensive, where[as] I used to like go for a few hours or a half day". Mr. Hinds agreed with counsel for the defendants that this evidence at his examination for discovery was accurate. He also agreed that this was because of his knees, hip and lower back pain.

[67] At trial, Mr. Hinds testified that between the 2013 Accident and January 2018 Accident he would cycle for "half an hour to 45 minutes". It was pointed out to Mr. Hinds that this conflicted with his evidence at his examination for discovery on November 2020, where he deposed he cycled for a couple of hours at a time before the 2018 Accident:

Q How often were you cycling before the 2018 Accident?

A Whenever possible.

Q Where you going more than once a week or less than once a week before the accident?

A A couple of times a week.

Q Okay, I take it in the summertime or when the weather is nice?

A Summertime only, yes.

Q Okay, how long were your bike rides before the accident?

A Stanley Park.

Q So was that like a couple of hours? An hour? Longer than that?

A Yeah, I'd say a couple of hours. Because you ride, you stop -- you know, its not like a constant burst.

[68] Mr. Hinds responded that he answered the way he did because he thought the question referred to how often he cycled before the 2013 Accident. Mr. Hinds added that the only riding he did after the 2013 Accident were short rides down to an industrial park; he rode his bicycle because he was just trying to loosen up his knees, and "get his cardio up"; he explained he could not ride for long as he could not keep his foot straight into the peddle.

[69] Mr. Hinds testified that after the 2013 Accident, until he sold the Townhouse, he did light cleaning and hired a carpet-cleaning service, reiterating that before that, he did "all the cleaning, maintenance and repair".

[70] Mr. Hinds testified he has ridden his motorcycle about a half dozen times between 2013 and 2018. He stated he could not do the maintenance on the motorcycle as he once did. Mr. Hinds testified he still cleans his car "but not as often" as he once did. Before the 2013 Accident he would clean his car once or twice a week; now he cleans his car once a month.

[71] Mr. Hinds testified that after 2013 Accident, he has not danced at all.

[72] In December 2013, Mr. Hinds was first fitted with his first pair of orthotic shoes but he still experienced discomfort in his left foot. The shoe was modified in March 2014 and a replacement orthotic was obtained in May 2018. Mr. Hinds testified that he was "supposed to replace my orthotics every two years" but he has not because they are "so expensive". Mr. Hinds explained that he needs a dress pair of orthotic shoes, a pair of orthotic shoes for work, an orthotic running shoe for walking and orthotic slippers to wear in the house all the time. He explained he is uncomfortable going bare foot.

- [73] On cross-examination, Mr. Hinds was taken to the Occupational Rehabilitation Report of Drake Medox Health Solutions dated May 13, 2014 ("Rehabilitation Report"). This was a report to WCB which contained clinical observations, one of which was that Mr. Hinds' gait was normal. Mr. Hinds did not agree with this observation, although he agreed that by May 13, 2014 he was on a gradual return-to-work schedule.
- [74] Mr. Hinds also agreed with the assessments on page 2 in the Rehabilitation Report. Specifically, he agreed that he was able to complete an eight-hour shift during his gradual return to work, but said that was not able to do so until the middle of May 2014. He also agreed that he was able to stand and bear weight on his left leg and perform pre-trip inspections of his bus during his gradual return to work. He also agreed that he was able to apply force to his left foot when he was operating a bus during his gradual return to work, and he was able to climb two steps for ten repetitions and put weight on his left leg. It was after this assessment that Mr. Hinds was discharged from his rehabilitation program and deemed fit to return to work.
- [75] Mr. Hinds was taken to a medical record relating to the appointment with his family doctor on October 3, 2016. He acknowledged he went to see his family doctor for lower back pain and that he had missed several days of work due to what the doctor described as an ill-fitting bus seat. He also acknowledged he received a prescription for Naproxen that day. He testified that this was not the first time he used Naproxen and that he had taken it after the 2013 Accident. However, Mr. Hinds was shown Pharmanet records which indicated that October 3, 2016 was the first time he was prescribed Naproxen. Mr. Hinds explained the discrepancy by saying he "might have used" his wife's Naproxen tablets before October 3, 2016. He also explained the discrepancy between the Pharmanet record and his prior testimony by stating that he used over-the-counter, non-prescription Naproxen such as Advil.
- [76] During his re-direct examination, Mr. Hinds stated that the WCB back injury caused by the ill-fitting bus seat was not an ongoing problem.
- [77] Notably, Mr. Hinds stated, when pressed on cross-examination, that, prior to the 2013 Accident, he did not remember having any discomfort that was "as severe" as what he now experiences in his left foot where the nodule developed. He later stated he did not have a problem with his left foot before the 2013 Accident and injury, but also stated "not like that", referring to the pain he felt after the 2013 Accident.
- (a) The May 2014 Accident
- [78] As noted earlier in these reasons, Mr. Hinds was in an accident on May 5, 2014. The evidence surrounding this accident is less fulsome than it could or should have been. The fact that he was in this accident was revealed on cross-examination. When Mr. Hinds was first asked whether he was in an accident on May 5, 2014, he testified that he did not recall the accident.

- [79] Mr. Hinds was taken to a Drake Medox Health Solutions "Contact Log" relating to his gradual return to work program. The Contact Log stated that on May 6, 2014, Mr. Hinds reported that he had been in a bus accident on the previous day, May 5, at 5:45 p.m. After being taken through this record, Mr. Hinds did not dispute being in this accident and confirmed he had rear-ended the vehicle in front of him. He also acknowledged not going to work the day after the Accident and the Friday following it.
- [80] More specifically, Mr. Hinds did not take issue with this Contact Log note that stated he advised Drake Medox Health Solutions about this accident and that he could not go to work that day as his left foot and knee were quite sore. He acknowledged that the record was likely more accurate than his memory. When asked whether he ever reported having knee pain after the 2013 Accident and before this May 5, 2014 accident, Mr. Hinds testified that he could not recall having reported knee pain during this period. However, he agreed on cross-examination that this appeared to be his first recorded complaint of knee problems after the 2013 Accident.
- (b) The January 2018 Accident and its Aftermath
- [81] Mr. Hinds testified that in the early morning of January 20, 2018, he and his wife had just dropped off a friend at the airport terminal, and were stopped at a red light when they were rear-ended. The car behind them pushed their vehicle into the car stopped in front of them.
- [82] Mr. Hinds recalled that he did not get out of his car at first. He said he felt light headed and heard ringing in his ears. His stomach felt "uneasy". He testified feeling a "buzz coming from top of [his] head", noting he had not experienced that before.
- [83] Mr. Hinds testified that he went to see his family doctor within a day or two of the January 2018 Accident. He said that the reasons for seeing the doctor were because of the stiffness in his neck, a ringing in his ear, and a knot in his back. Mr. Hinds testified that his family doctor referred him to the tinnitus clinic at St. Paul's Hospital and to physiotherapy for his back.
- [84] Mr. Hinds testified that he wore a soft neck collar for a few weeks after the January 2018 Accident. He was also taking Tylenol, Advil and Naproxen for this injury. He stated he recalled being prescribed medication for his tinnitus but it was not effective. Mr. Hinds added that that he takes Tylenol and Advil on daily basis since the 2013 Accident. He said he also takes Naproxen when Advil and Tylenol do not work. He stated "I need Naproxen a couple of times a week - most of the time Advil and Tylenol work".
- [85] Mr. Hinds testified that he experiences ringing in his ears "the majority of the time". He described his tinnitus as "getting worse".

- [86] Mr. Hinds reported that he continues to use the physiotherapy equipment he was provided about every other day. He said that he uses "my ball when I am sitting on the chair" and "bands to stretch". He also does stretch exercises on the floor. He acknowledged this exercising is not part of a routine.
- [87] Mr. Hinds also described how his mood has changed, stating that "[his] head and foot hurt all the time" and that his physiotherapy was helping with both. Mr. Hinds testified that he is more irritable now, becomes frustrated more easily, and that he experiences "more low moods now than high". He stated that did not have mood problems before the 2013 Accident.
- [88] Mr. Hinds has not sought counselling for his low moods but stated that he will pursue counselling if he keeps feeling the way he does.
- [89] Mr. Hinds went to five massage therapy treatments between May 2019 and March 13, 2020 but found that they did not help much. The massage therapist "mainly worked on my knee and my back" but the massage only helped "for the day or a couple of days"
- [90] Mr. Hinds testified that he returned to work in December 2018 "because I ran out of long-term disability". When he returned to work, he had a different role; he did a maintenance job, cleaning the front of buses. He found this was very painful because his knees were always very swollen. He worked reduced hours at a reduced hourly rate from December 2, 2018 to July 19, 2019, earning \$28.00 an hour during this time. In December 2019, Mr. Hinds began working full-time as a bus driver at the hourly rate for that position.
- [91] Mr. Hinds testified that after the January 2018 Accident, he was "not doing much around the house". He noted that his wife's son "comes in twice a month to help with laundry, vacuuming, dishes" and that his niece comes over once in a while to do housework but not very often. Mr. Hinds noted that his wife was also injured in the January 2018 Accident and so they needed the extra help.
- [92] Mr. Hinds testified that prior to the 2013 Accident, he did not have "retirement plans". He also stated, however, that he plans to work into his mid to late 70s. He explained that he starting working for TransLink when he was in his 50s. He testified he wants "to get his maximum pension" and that would mean working until he was 75 or 76. Mr. Hinds added that "I can't stop working as it is now. My pension as it exists now, isn't enough". He has "decided to suck it up" so he "can earn more".
- [93] Mr. Hinds testified that the mortgage on his condominium is \$350,000 and the mortgage on his Townhouse is \$500,000 mortgage. The rent on his Townhouse does not cover his expenses for that property.

[94] Mr. Hinds also testified that "My plan now is to stop working as soon as possible because I hurt so much", adding that his "low mood is part of the reason he wants to keep working". Mr. Hinds described how the pain in his knees has slowed him down "quite a bit". Mr. Hinds feels his knees are getting worse but no surgery is recommended or planned. He also testified that he does not sleep well, about 4 to 5.5 hours of sleep at night, and he has a constant buzz in his ears.

(i) Cross-examination Regarding January 2018 Accident

[95] In regard to his neck symptoms, it was pointed out to Mr. Hinds that while he had testified that he wore a neck collar after the January 2018 Accident, the medical records indicated he was not fitted with a neck collar until his July 2018 motorcycle accident. Mr. Hinds responded that he had worn a collar after both these 2018 accidents. He stated that he had another neck collar, perhaps from a first aid kit at home, which he wore after the January 2018 Accident. When questioned about this, he confirmed he had not told his physiotherapist or his doctor about choosing to wear a neck collar after the January 2018 Accident.

[96] Mr. Hinds confirmed that he went to see his family doctor for the first time on January 23, 2018, three days after the January 2018 Accident. He also acknowledged that the medical log for that day does not mention tinnitus. Mr. Hinds was questioned as to why there is no mention of tinnitus in the doctor's log for January 23, 2018 visit, given Mr. Hinds' testimony that he went to see his family doctor about the ringing in his ears within what he recalled to be a day or to after the 2018 Accident. Mr. Hinds responded that he did not recall giving this testimony.

[97] It was put to Mr. Hinds that the reason the doctor's log does not reference tinnitus is because he did not mention it to his doctor, and that the tinnitus surfaced months later. Mr. Hinds responded that he did tell his family doctor about his tinnitus on his first visit to him after the 2018 Accident.

[98] Mr. Hinds was taken to his family doctor's log relating to his next visit on January 26, 2018, six days after the January 2018 Accident. The doctor's notes stated that Mr. Hinds' "stiffness was improving" but, once again, there was no reference to ringing in the ears or tinnitus. The doctor's clinical notes recorded that he undertook a thorough physical examination of Mr. Hinds' head, eyes, neck, lungs, heart, abdomen, genitalia, rectal area, skin, "extremities", and his "neurologic and "psychiatric" state. His doctor also noted:

ENT: external auditory canals and tympanic membranes clear, hearing grossly intact. No nasal discharge. Oral cavity and pharynx normal. Teeth and gingiva in good general condition.

[99] Mr. Hinds acknowledged there was no reference to tinnitus or ringing in the ears in these notes; he also confirmed that his family doctor gave him a "full physical" that day. Further, he acknowledged his family doctor noted: "Motor, sensory and cerebellar function testing normal".

- [100] When Mr. Hinds was asked whether it was possible he did not start to complain about his tinnitus symptoms until April 2016, Mr. Hinds responded: ""I believe it was earlier".
- [101] Mr. Hinds agreed that he had previously testified that the first thing his doctor did when Mr. Hinds mentioned the ringing or buzzing in his head was to refer him to the St. Paul's Tinnitus Clinic. Mr. Hinds was taken to a document he tendered which stated that he had an audiogram on May 30, 2018, and an audiology evaluation on July 30, 2018.
- [102] Mr. Hinds testified that as his tinnitus got worse, he went to a specialist. He admitted, "I agree I don't remember exactly".
- [103] Mr. Hinds acknowledged that none of his family doctor's clinical logs of his various appointments in January, February, and March 2018 was tinnitus or buzzing in the ear mentioned. He also acknowledged that at the March 20, 2018 appointment, where his family doctor used the acronym "P" for plan, no reference was made to tinnitus or its treatment. The plan involved "occasional Naproxen" as needed and continued physiotherapy.
- [104] Mr. Hinds described the buzzing in his head was like "an electric power grid", stating that "it hasn't gone away" and that when he gets tired, it gets louder.
- [105] Mr. Hinds was cross-examined about his family doctor's May 8, 2018 clinical note that stated "tinnitus is on and off," in light of Mr. Hinds' testimony that the buzzing in his head is always there and getting worse. Mr. Hinds at first responded that his tinnitus was never "on and off"; he said it was constant, and that he would not have told his doctor that his tinnitus was "on and off".
- [106] When cross-examined further, Mr. Hinds changed his testimony and said that his tinnitus could be "on and off" in the sense it could be "up and down" between January and May 2018, or less loud and then more "amplified" later in the day. When pressed on this point, Mr. Hinds admitted he may have told his family doctor that his tinnitus symptoms were "on and off".
- [107] Mr. Hinds also agreed that it was not until May 2018 that he was referred to a specialist for treatment of his tinnitus symptoms. When Mr. Hinds was initially asked on cross-examination whether the sound in his head was like crickets, Mr. Hinds responded that it was not like that; he reiterated that it was a buzzing sound. Mr. Hinds was then taken to a clinical note made by his physiotherapist, dated February 21, 2018, which state that Mr. Hinds reported he heard "cricket sounds in both ears (esp. when he was trying to sleep)". After reviewing this clinical record, Mr. Hinds agreed that the record was accurate. He testified he then recalled the cricket sound or a high pitch whining sound like an electrical high voltage sound.

- [108] Mr. Hinds was also taken to records during his cross-examination that documented his attendance at the tinnitus clinic at St. Paul's. The records show he attended the clinic on only two occasions: August 1 and August 17, 2018.
- [109] Mr. Hinds agreed that until he was shown these records, his memory was that he had been referred to the tinnitus clinic earlier than he actually was. Mr. Hinds initially testified that his family doctor referred him to the tinnitus clinic right after he first advised him of his symptoms, which he believe was a few days after the 2018 Accident at his first visit to his family doctor on January 23, 2018.
- [110] When it was put to Mr. Hinds that his memory was poor regarding the course of his tinnitus treatment in 2018, he responded: "It's possible".
- [111] Mr. Hinds had 11 physiotherapy sessions with New West Orthopaedic and Sports Medicine Centre in 2014 between September 16, 2014 and November 6, 2014; 58 sessions with Trail Physiotherapy between February 21, 2018 and December 10, 2018; and 11 sessions between April 22, 2019 and June 10, 2019.
- [112] Mr. Hinds acknowledged that there was a gap in his physiotherapy treatments between November 6, 2014 and February 2018. He testified that "my prescription ran out and so I stopped". He also stated that when he resumed his physiotherapy after the January 2018 Accident, he stopped on June 10, 2019 because his prescription "ran out" and was denied by ICBC.

(ii) The July 2018 Accident

- [113] As noted earlier in these reasons, Mr. Hinds was in a motorcycle accident in July 2018. He testified that he recalled he was riding his motorcycle out to Chilliwack and when he decided to turned the motorcycle around he "blackened out". Mr. Hinds stated "I was going so slow" and "slid off the bike". He stated he fell into a ditch "on my bum and on my back". He testified that he did not hurt his knee or back, and that there were no "new injuries" as a result of this accident.
- [114] On cross-examination, Mr. Hinds altered his evidence. He admitted he had a new injury because of the motorcycle accident, stating the "main soreness" was in his left shoulder. He disagreed, however, that his lower back had been injured in this accident. He stated that he never complained of injuries after the motorcycle accident, other than his shoulder.
- [115] Mr. Hinds was taken on cross-examination to medical records of the Abbotsford Regional Hospital and, specifically, the consultation report of Dr. Pourvali, who examined him at 23:05 on July 26, 2018 after his motorcycle accident, as part of the emergency care he received before his admission to that hospital. Mr. Hinds acknowledged that Dr. Pourvali concluded in her consultation report that he had "soft tissue injury to his head, neck, back as well as shoulders" and stated that his "chief complaint is neck pain". Mr. Hinds did not agree with this medical assessment, stating he did not recall having problems with his neck and back, and that it was only his shoulder that bothered him.

- [116] Mr. Hinds did acknowledge, however, that he was "switched" to an Aspen collar for his neck after his assessment by Dr. Pourvali, and agreed that he was sent for an MRI to ensure he had not "broken any structure in his neck". Mr. Hinds agreed he was admitted through the emergency department and that he spent 4 days in hospital after the motorcycle accident. He said he was admitted for observation.
- [117] Mr. Hinds testified that he was feeling "about the same" in July 2018 as he did after the January 2018 Accident. He was still receiving physiotherapy for his neck and back prior to his motorcycle accident in July 2018.
- [118] Mr. Hinds had not returned to work in July 2018, noting "I still had the foot issue and my back was stiff". He explained that he was riding his motorcycle because it alleviated the stiffness in his back. He added that the tinnitus "never went away but that [he] was less dizzy" before the motorcycle accident in July 2018.
- [119] Mr. Hinds confirmed on cross-examination that he was told by his employer that he could not go back to work for "at least a year" after losing consciousness as a result of the motorcycle accident.
- [120] On cross-examination, Mr. Hinds stated that he did not injure his lower back in the January 2018 Accident. He stated the seat belt injured his upper back under the shoulder blade.
- [121] When asked on cross-examination whether he acknowledged any improvement in his neck and back pain between the January 2018 Accident and his motorcycle accident in July 2018, he did not answer directly but eventually acknowledged he had experienced some improvement but added that he was still having problems.
- [122] Mr. Hinds was taken to his family doctor's log regarding a medical appointment on February 27, 2018. At that time, Mr. Hinds reported still having stiffness in his neck and back but feeling 30% to 40 % better. His doctor's note, relating to a March 20, 2018 appointment, stated that Mr. Hinds had reported feeling "45% improved". Mr. Hinds agreed with these notes.
- [123] At a July 30, 2018 appointment with his family doctor, Mr. Hinds agreed he was given a referral for further physiotherapy. When it was put to Mr. Hinds that he was given a physiotherapy referral because of the motorcycle accident a few days earlier, Mr. Hinds responded that the physiotherapy was merely a continuation of his previous physiotherapy sessions and that his prescription had run out by then and needed to be renewed.
- [124] Mr. Hinds was then taken to another one of his family doctor's logs dated August 28, 2018 that stated "referral for PHYSIO re: shoulder - pt. caught in traffic - moved appointment to 1 pm". Mr. Hinds then acknowledged that he was referred to physiotherapy as a result of his left shoulder injury from motorcycle accident. The doctor's clinical note stated "still has neck and L. shoulder stiffness". It was put to Mr. Hinds that his doctor's clinical note referred to Mr. Hinds still having neck and left shoulder stiffness from the motorcycle accident. Mr. Hinds responded that he just had left shoulder pain from the Accident and did

not remember complaining about neck pain, even though he acknowledged that Dr. Pourvali recommended an Aspen Collar, which he chose to wear.

- [125] Mr. Hinds was cross-examined on when he was fit to drive after the motorcycle accident in July 2018. Mr. Hinds confirmed his doctor's clinical note dated, September 24, 2018, which stated in capital letters that Mr. Hinds was "fit to drive". On October 5, 2018, his family doctor filled out forms confirming he was fit to go back to "work full duties". Mr. Hinds explained that he wanted to return to work and that he made an application to do so. He required a note from his family doctor and obtained his doctor's approval after speaking to a Dr. Pearlman who was associated with his employer.
- [126] Mr. Hinds confirmed that as a result of his "black out" associated with his motorcycle accident, his employer would not permit him to drive a bus for six more months. Mr. Hinds returned to work in December but was not able to drive a bus; consequently, he earned lower wages.
- [127] It was put to Mr. Hinds that his current difficulty with housekeeping is primarily related to tasks that require kneeling because his knees are sore; and, as well, tasks that require stooping are difficult because his low back and hip are sore. He responded "it is overall fatigue, I am aching a lot" and he said he is frustrated from the "constant headache of the buzz all day long". He added that he does surface cleaning, and wipes surfaces but does not do "deep cleaning" or "major cleaning" anymore.
- [128] Mr. Hinds confirmed that from January to June 2019, when he was not permitted to drive buses, he was cleaning buses. During this time, he developed a nodule under his ring finger of his right hand. He believes that was from the pressure of using a mop to clean the ceilings and various other parts of buses. His supervisor gave him an additional cotton glove but he found it was "not sufficient" to correct the problem.
- [129] Mr. Hinds was also taken on redirect examination to his April 10, 2018 visit with his family doctor. His doctor's clinical notes for that appointment stated "neck ROM is improving 50% - tinnitus is still ongoing". Mr. Hinds confirmed that his tinnitus was in fact ongoing at the time of the April 10, 2018 doctor's visit. Mr. Hinds confirmed that he was receiving a particular physiotherapy treatment for his dizziness at the time.
- [130] Mr. Hinds testified that his neck and back pain has now subsided and is largely resolved except that he experiences flare-up when he is tired or overexerts himself. He stated, however, that he had problems with his neck and back pain "the whole time" he was off work after the January 2018 Accident, which was from January 20, 2018 until December 2, 2018. He stated he "had an ache in my neck and in my back under my blade," adding his pain was "at the top of rib cage on the right side under my shoulder blade".
- [131] Mr. Hinds testified that while his neck pain has now subsided, he still has a limited range of motion.

(c) Evidence of Maria Ligea Oancea

- [132] Ms. Oancea, a school teacher, is married to Mr. Hinds. She has known Mr. Hinds since "around 2000". Initially, they "were just friends". Ms. Oancea's recollection of when she and Mr. Hinds started living together was somewhat different than Mr. Hinds. Ms. Oancea testified the couple started living together approximately a year before they were married, after the 2013 Accident.
- [133] Ms. Oancea testified that prior to the 2013 Accident, Mr. Hinds was "the star of the party". He was charismatic, had a great sense of humour and was "an amazing dancer". Ms. Oancea stated that Mr. Hinds was also "so clean", his shirts were ironed and his house was impeccable. She described her husband as "exceptional". She describes how he would spend his weekends cleaning his vehicles and how this was "almost peculiar".
- [134] Ms. Oancea testified that she was not aware of Mr. Hinds having health issues, and did not observe Mr. Hinds having any physical limitations in respect to the activities they were doing together before the 2013 Accident. In addition to dancing, which Ms. Oancea described as their "passion", she recalled how the couple "loved" to go for walks together. She testified that "We'd go walking often once we went from where he parked his truck to where he worked to me it was a long way". She also recalled how the couple would go walking in Richmond and in their neighbourhood, or around the seawall.
- [135] Ms. Oancea testified how the couple would also go to clubs, community centers, and to people's parties to socialize and dance. She described how they went dancing every weekend. She added that Mr. Hinds also like bicycling and motorcycling.
- [136] Ms. Oancea was on the bus when the 2013 Accident occurred. She recalled "a big impact", that the bus hit a pole, and some passengers fell to the ground. She described the collision as "dramatic". Ms. Oancea acknowledged that when she left the scene of the 2013 Accident, she was not aware that Mr. Hinds was injured in any way.
- [137] Ms. Oancea recalled that Mr. Hinds had a sore foot the day after the 2013 Accident.
- [138] Ms. Oancea recalled that she and Mr. Hinds went dancing after the 2013 Accident "occasionally but not regular like before". She recalled going on walks but not on the long walks like they did before the Accident. Ms. Oancea added that Mr. Hinds "would tell me his knee was hurting". First one knee starting hurting and then the other.
- [139] Ms. Oancea testified that Mr. Hinds' home was not "as impeccable as before", "not as neat and clean as before" the 2013 Accident, and Mr. Hinds did not clean his vehicles like he once did. She stated that when she started living with Mr. Hinds, she tried to do the housework and Mr. Hinds "tried to help occasionally". Ms. Oancea added that, while Mr. Hinds "dressed clean and nice", his appearance was not "as crisp as before" the 2013 Accident.

- [140] Ms. Oancea recalled she and Mr. Hinds went to Spain about a year after their wedding, in 2016. She noticed Mr. Hinds could not do all the activities she did and that "we couldn't see the things I wanted to see in Spain". Ms. Oancea testified that "the same thing happened" during their next overseas trip to France; she "couldn't see all the things [she] wanted".
- [141] Ms. Oancea recalled the January 2018 Accident. Mr. Hinds was driving their vehicle and she was a passenger. Her recollection was consistent with that of Mr. Hinds. They were stopped at a controlled intersection, with two or three cars ahead of them and "suddenly someone hit [them] really hard". Ms. Oancea recalled they both she and Mr. Hinds sat in their vehicle for a few minutes, before going to see the passenger in the other car.
- [142] Ms. Oancea testified that because Mr. Hinds told her, at the scene of the January 2018 Accident, that he "was dizzy" and felt nauseous, she told him to go and sit on passenger side of the car. She took care of exchanging information with the driver of the other vehicle and then drove Mr. Hinds and herself home. She noted that "normally" it was Mr. Hinds who drove their car when they were driving together.
- [143] Ms. Oancea testified that she was also injured in the January 2018 Accident and that she is still suffering injuries from that accident.
- [144] Ms. Oancea recalled that after the January 2018 Accident, Mr. Hinds seemed distracted and complained he "had a sound in his head". Ms. Oancea also testified, that the next day after the 2019 Accident, "if I remember correctly he also had an upper back thing".
- [145] Following the 2013 Accident, Ms. Oancea testified that her son helped out initially by vacuuming and doing laundry once a month. Mr. Hinds' niece would also help them with cooking and cleaning. She said they both helped out about once a month for about a year. Now, her son and Mr. Hinds' niece come to help out with the housework once in two or three months.
- [146] Ms. Oancea testified after the January 2013 Accident, Mr. Hinds' mood changed. She stated that he started to be "a bit cranky" and was not the "sparkling personality" he was before the Accident. She added that after the 2018 Accident his mood worsened. When asked about his sleep patterns, Ms. Oancea responded that "he moves a lot and that effects my sleep as well". While led somewhat on her direct examination, Ms. Oancea testified that Mr. Hinds also tossed and turned before the January 2018 Accident but this worsened after that accident.
- [147] Ms. Oancea confirmed that prior to the 2013 Accident she and Mr. Oancea did not discuss their retirement plans.
- [148] Ms. Oancea was asked whether she was first prescribed Naproxen after the 2018 Accident. She seemed tentative and stated she could not recall.

- [149] When asked on cross-examination whether she recalled Mr. Hinds' motorcycle accident in 2018, Ms. Oancea remembered this accident and agreed it was a fairly significant event, and added "luckily with very little consequences".
- [150] Ms. Oancea agreed Mr. Hinds spent a few days in the hospital after the July 2018 motorcycle accident, stating he was there for observation. She also agreed that Mr. Hinds suffered a shoulder injury and further agreed that he was given a cervical collar to wear. When asked if this was the first time she had seen Mr. Hinds wear a neck collar, she said she thought so, but was not sure.

III. SUMMARY OF EXPERT EVIDENCE

A. Dr. Waseem

- [151] Dr. Zeeshan Waseem was called by Mr. Hinds. Dr. Waseem was qualified as a specialist in Physical Medicine and Rehabilitation. He conducted an independent medical examination of Mr. Hinds on November 16, 2021 and rendered his written report on November 18, 2021 ("Waseem Report" or "Report"). Mr. Waseem stated in his Report that he was asked to provide an opinion "from a physiatric perspective on the matter of the motor vehicle accidents of August 30, 2013 and January 20, 2018".
- [152] Dr. Waseem also noted in his Report that "No pre-accident medical records were provided for review".
- [153] Mr. Hinds advised Dr. Waseem during his medical assessment that: 1) he had a left index finger joint dislocation in 2008 that resolved; 2) he had a right fifth finger mallet fracture in 2013 that resolved "with residual flexion deformity of the distal interphalangeal joint; and 3) he had two previous surgeries involving a "bilateral inguinal hernia repair (remote)" and a "resection right wrist ganglion cyst".
- [154] As regards the objective findings surrounding the 2013 Accident, Dr. Waseem noted that Mr. Hinds underwent a foot x-ray at the hospital following this accident, which did not reveal any acute bony injury.
- [155] Dr. Waseem stated in his report that "the complete acute care hospital records of Royal Columbia Hospital were not provided for review", although he was provided with the medical records of Mr. Hinds' family doctor from September 6, 2013 onward. Those records indicated that Mr. Hinds reported knee pain to his family doctor on January 13, 2017 and May 8, 2017.
- [156] Dr. Waseem summarized the following diagnostic interventions:
- a) A bone scan on October 11, 2013 noting degenerative changes in both feet;

- b) An X-ray of left foot on October 11, 2014 noting sore left toe and head of fifth metatarsal with degenerative changes in joint of great toes; cause for second toe or left fifth metatarsal head pain not identified;
- c) An x-ray of both knees on November 4, 2014 noting joint space narrowing bilaterally; entheropathy about insertion of patellar tendon;
- d) An MRI of left foot on June 24, 2015 noting a lesion beneath the fifth metatarsal head, suggesting localized fibrosis, possible relation to plantar fibromatosis;
- e) An X-ray of left foot on July 9, 2016 noting "no abnormality".

[157] Dr. Waseem noted that the medical records indicated that Mr. Hinds also consulted the following specialists:

- a) A rheumatologist, Dr. Verdejo, on November 13, 2014, who noted soft tissue pain "possible flexor tenosynovitis of traumatic nature of left fifth MTP joint" and stated: "the way he walks, his footwear have contributed to ongoing pressure on the area and would explain why he has a small callus pad in the area as compared to the right; recommended metatarsal bar to remove pressure from area proximal to it; wider, deeper shoes, consider steroid injection";

Mr. Hinds had another visit with Dr. Verdejo on November 4, 2014 who noted "early primary osteoarthritis of knees; clinically possibly stenosing tensynovitus left fifth toe flexor tension, small fibrous tissue build-up cause pain with pressure;

Mr. Hinds had a third visit with Dr. Verdejo, on November 14, 2014; Dr. Verdejo again noted "primary osteoarthritis both knees confirmed on x-rays; he also noted left fifth toe flexor tenosynovitis with fibrous build-up, painful when steps on it; injected with depo-medrol; will hopefully decrease the size of the lump; if unresponsive, consider surgical removal;

Dr. Verdejo also treated Mr. Hinds on April 13, 2019 and in July 2019 for "stenosing tenosynovitis cause trigger phenomenon of right finger; received two injections and advised to wear padded gloves at work;

- b) a sport medicine specialist, Dr. Kuan, on March 17, 2014; Dr. Waseem noted this medical record indicated "musculoskeletal discomfort left foot secondary to sprain/strain injury in Mr. Hinds' left foot; symptoms exacerbated by disrupted gait pattern and calls, formation; recommend rehabilitation program to correct gait pattern, continue with custom-made orthotics to alleviate pressure at bottom of left fifth toe, not fit to return to work;"
- c) an otolaryngologist, Dr. Roger Irvine, on July 30, 2018, noting "intrusive tinnitus";
- d) a sports medicine physician, Dr. Carl Shearer, at an unspecified date for what Dr. Waseem described as "bilateral knee pain". Dr. Shearer recommended knee braces but Mr. Hinds reported that he did not purchase these due to "financial considerations;"

- e) a podiatrist, Dr. Gavin Chalmers, on May 1, 2018, in relation to "chronic foot metatarsalgia status post trauma; diabetes mellitus - foot risk category 0 "; Dr. Chalmers also recommended a "more functional type orthosis" in combination with "a more athletic based shoe".

[158] Dr. Waseem also addressed the January 2018 Accident in his Report, and noted that Mr. Hinds reported that he experienced the onset of his tinnitus within a few days of the January 2018 Accident rather than at the time of the Accident.

[159] Dr. Waseem noted the following diagnostic interventions after the January 2018 Accident:

- a) An X-ray of the cervical spine on January 23, 2018, noting degenerative changes;
- b) An X-ray of the lumbar spine on January 23, 2018, noting lumbar spine and bilateral sacroiliac joint degenerative changes;
- c) X-ray bilateral shoulder on July 26, 2018 noting left shoulder joint degenerative changes and calcific tendinopathy; right shoulder joint degenerative changes;
- d) An MRI of the cervical spine on July 31, 2018 noting degenerative changes with multi-level; neuroforaminal narrowing;
- e) An X-ray of the left knee on January 7, 2019 with the note "normal";
- f) MRI left knee on February 17, 2019, noting a "tear meniscal body and posterior horn"; possible tear of lateral aspect of the knee; cartilage loss; Baker's cyst;
- g) An X-ray right knee on February 14, 2020 noting "no abnormality".
- h) An MRI of right knee on June 4, 2020 noting a "complex meniscus tear".

[160] At the time of Dr. Waseem's examination of Mr. Hinds on November 16, 2021, Mr. Hinds reported the following symptoms, describe by Dr. Waseem in part as follows:

- Left foot pain, localized to the fifth toe/metatarsal region;
- Mid-back pain, "right infrascapular";
- pain in both knees since 2019 which Mr. Hinds stated "led to pain involving his lower back"
- -"initially experienced neck pain has resolved however he continues to have residual stiffness in his neck which is intermittent not of major concern"
- tinnitus that interferes with his ability to concentrate, disrupts sleep and provokes daily headaches;
- vertigo
- mood disturbance; Mr. Hinds "noted his pain/tinnitus and anxiety are interrelated.

[161] Mr. Hinds reported that the following functional tolerances;

- Sitting: unrestricted
- Standing: 30-60 minutes ("pre-loss unrestricted")
- Walking: 30-60 minutes ("pre-loss unrestricted")

[162] During his examination, Dr. Waseem observed that Mr. Hinds had an "antalgic gait when not wearing shoes" and favoured his left foot but had a "normal biomechanical gait pattern". Dr. Waseem clarified during his testimony that by "antalgic", he meant "painful".

[163] Dr. Waseem reported that on examination and with palpation, no back pain was noted, with the exception that:

pain was noted to palpation of the right thoracic multifidus muscles in the infrascapular region. In these areas, muscle stiffness, increased muscle tone and trigger points were notable. Thoracic spine range of motion (bilateral rotation) was within normal limits and symmetric. There was no crepitus noted during range of motion testing. Thoracic spine movements did not increase his pain.

[164] Dr. Waseem clarified that this was an area where pain was noted; it was not in the shoulder area but in the mid-back to right, where the muscles support the mid-back.

[165] No pain was noted along the cervical spine, neck, and lumbar spine or related muscles. On examination of the upper extremities, there was no pain with palpation of joint lines, muscles, ligaments and tendons with active and passive movements; Mr. Hinds' range of motion was within normal limits, including in the shoulder area. No pain was noted in the neck area.

[166] Upon his physical examination of Mr. Hinds' left foot, Dr. Waseem noted pain with palpation of "the fifth metatarsal head on the plantar aspect of the left foot where a tender nodule over the flexor tendon was notable".

[167] Dr. Waseem also noted, on examination of lower extremities, that there "was no pain to palpation of the medial joint lines of both knees" and "no evidence of muscle stiffness, increased muscle tone, spasms, taut band or trigger points". He found there was "bilateral knee joint crepitus without effusion". Crepitus was defined in his report as "grating sound and sensation indicative of an abnormal rubbing of joints". He found no bursitis.

[168] Dr. Waseem concluded, based on the history obtained and review of the medical records, that Mr. Hinds sustained a flexor tendon injury of the fifth toe of the left foot as a result of the 2013 Accident. Notably, Dr. Waseem was not aware at the time of rendering this opinion that Mr. Hinds had bus driving duties that put repeated pressure on his left foot and fifth toe.

[169] Dr. Waseem also opined:

- (1) "As a result of the January 20, 2018 accident, Mr. Hinds suffered [a] sprain/strain soft tissue injury to the cervical and thoracic spines".
- (2) "The injury to the cervical spine has essentially resolved".
- (3) "Tinnitus, associated with headaches, and vertigo are reported and documented, however, are outside the scope of my expertise as a physiatrist". Dr. Waseem deferred to an otolaryngologist in this regard.
- (4) The "right hand trigger finger arose non-contemporaneously following the [2013 and 2018 Accidents]"; "without any apparent documented injuries to the right hand in the accidents, this complaint would not appear to be accident-related".
- (5) Mr. Hinds also has bilateral knee pain.

[170] Dr. Waseem confirmed during his testimony that Mr. Hinds attributes both the knee pain and the lower back pain to changes in his manner of walking as a result of his left foot pain. Dr. Waseem did not draw a conclusion on whether to 2013 Accident caused these sources of pain; he deferred to the opinion of a "foot and ankle orthopedic surgeon".

[171] Dr. Waseem specifically stated in his report that:

My opinions are provided in the absence of a review of the complete acute care hospital records and updated medical records. Should these become available I would be pleased to review them and update/revise my opinions accordingly, as needed"

[172] In regard to Mr. Hinds' prognosis, Dr. Waseem opined:

The prognosis for a full symptomatic recovery is poor for the following reasons: the symptoms have been long-standing in nature persisting for over several to many years despite appropriate conservative measures and medical attention including injection therapy; he has hit a plateau in his recovery

[173] Dr. Waseem also opined that Mr. Hinds has "exhausted his treatment options" such that "his physical condition would be considered chronic and unremitting and, therefore permanent". He had "no further recommendations for future treatment".

[174] Dr. Waseem clarified during his testimony that his documentation of pain in the thoracic spine referred to Mr. Hinds' subjective report of pain in the upper right area of his back, by the shoulder blade.

[175] Dr. Waseem also clarified during his testimony that the injury to Mr. Hinds' neck has resolved but that Mr. Hinds reported that he continued to have soft tissue pain in mid-back, as well as low back pain that Mr. Hinds attributed to his foot problem. However, Dr. Waseem reiterated that this particular causal link was outside his area of expertise and, accordingly, he deferred to an orthopedic surgeon for opinion on causation.

[176] Dr. Waseem confirmed that he would recommend continued treatment with foot orthotics.

- [177] When asked on cross-examination, Dr. Waseem confirmed he was not aware of subsequent injuries after the 2013 Accident and before the 2018 Accident, although he testified that he did ask Mr. Hinds about such subsequent injuries. He confirmed that to his understanding there "were no other traumatic events".
- [178] Dr. Waseem agreed during cross-examination that he did not ask Mr. Hinds about how he used his feet in the course of his job as a bus driver. He was not aware that Mr. Hinds' job involved consistently applying pressure under his left foot. He also confirmed he was not asked to opine on the effect of the constant application of pressure on the outside fifth toe of his left foot while bus-driving.
- [179] Dr. Waseem agreed the tender nodule on the bottom of Mr. Hinds' left foot, was 14 by 15 millimeters in size, about "dime size". Dr. Waseem also agreed that the dime size spot has been consistently the source of Mr. Hinds' foot problem since the 2013 Accident and that is what "he has completely complained about".
- [180] Dr. Waseem stated that the point of impact at the bottom of his left foot was sufficient to cause Mr. Hinds' injury; however, he acknowledged he did not discuss the specific mechanism of the injury with Mr. Hinds. He stated that he understood that the area under Mr. Hinds' fifth toe bore the brunt of the impact during the collision. He added that the arch of the foot causes pressure to move laterally to the outside of the fifth toe.
- [181] Mr. Waseem also agreed that "the sort of injury that Mr. Hinds presented with is the sort of injury that can well be caused by repetitive force or strain to the body". Dr. Waseem acknowledged that Mr. Hinds' trigger finger problem, while not causally related to the 2013 Accident or the January 2018 Accident, could also have been caused by repetitive strain; the finger also formed a nodule, as did the foot.
- [182] Dr. Waseem agreed that if he had a patient who came to him with an injury on the bottom of their foot, exactly at the dime size location on Mr. Hinds' foot, and that person had during the course of the previous eight years been applying repetitive pressure on that foot, he would consider the repetitive pressure on the foot as a possible cause.
- [183] Mr. Waseem was presented with the following hypothetical: if a person about Mr. Hinds' age, with his general physical characteristics, and at 60 years of age, during the course of their work, applied force to a small trigger, button or switch to that part of the left foot (under the fifth toe) every time they turned left in a bus, for a period of eight years, four or five days a week, for an eight or more hour shift, would it be plausible that may well may lead to problems in that area of the foot that Mr. Hinds has his injury, Dr. Waseem responded "potentially yes, that would be a contributing agent".
- [184] When asked whether he was of the view that the 2013 Accident triggered a latent condition, Dr. Waseem responded in the affirmative, adding that "such an injury fits neatly with that type of accident" and it "would go some way to explain how he ended with this injury".

- [185] Dr. Waseem acknowledged Mr. Hinds would have been more vulnerable to the injury he in fact sustained to his left foot because of this repetitive pressure on his foot while driving buses but noted that, to the best of his knowledge, Mr. Hinds had no foot problems prior to the 2013 Accident. However, he also stated he was not provided with medical records prior to the 2013 Accident.
- [186] Dr. Waseem noted that Mr. Hinds sustained a left shoulder injury in the July 2018 motorcycle accident and agreed this injury resolved itself after several months.
- [187] On cross-examination, Dr. Waseem confirmed that although Mr. Hinds reported an injury to his neck in the January 2018 Accident and his neck injury would have been exacerbated after the July 2018 motorcycle accident, his neck injury had resolved by the time of the November 2021 medical examination.
- [188] Dr. Waseem was asked whether it would have been relevant to his opinion to know that Mr. Hinds was off work in the early half of 2013, before the 2013 Accident. He responded that this could have factored into his opinion but he was not apprised of this fact.
- [189] Dr. Waseem confirmed that he did not opine on the cause of Mr. Hinds' knee, low back or hip pain.

B. Dr. Simon Horlick

- [190] Dr. Horlick was tendered as an expert by the defendants and was qualified as an orthopaedic surgeon. In addition to his orthopaedic practice, Dr. Horlick was also a clinical assistant professor at UBC Medical School and a visiting specialist consultant at WCB. In his consulting role with WCB he had a mandate to provide opinions about orthopaedic injuries and impairments, and specifically about any associated disability including fitness or capability of returning to employment.
- [191] Dr. Horlick conducted a physical examination of Mr. Hinds on October 21, 2021 and produced his report on the same day. He confirmed he was retained to "deal with" the January 2018 Accident only. Dr. Horlick confirmed he did not address complaints of tinnitus, headaches or vertigo as this is outside his area of expertise and clinical practice.
- [192] Dr. Horlick made a number of clinical findings regarding Mr. Hinds' physical condition, including:
- a) cranial nerve examination was normal;
 - b) there was no palpatory tenderness in and around his cervical spine or related musculature; there was full and pain-free range of motion in his cervical spine;
 - c) shoulder, arms, elbows, hands and wrists "were normal with respect to inspection, palpation, range of motion and orthopaedic special testing of these anatomic regions;

- d) there was an elicitable nodule on the long flexor tendon of his right long finger that was painful and uncomfortable for him but he did not exhibit and restriction in grip strength or finger range of motion;
- e) the neurologic examination of his upper extremities including sensory and motor examination and deep tendon reflexes was normal; the vascular examination of his upper extremities was normal; he had symmetrical arm and forearm grip bilaterally;
- f) tests for thoracic outlet syndrome including Adson's and elevated stress tests were negative; tests for carpal tunnel syndrome including Tinel's sign and Phalen's test were negative;
- g) inspection of the thoracic spine showed a normal thoracic kyphosis or curvature; normal chest expansion; normal protraction and retraction of his scapula; no winging of his scapula with chest pull-ups. He had no elicitable tenderness to palpation over his posterior spinous processes, parathoracic musculature, or costochondral and costovertebral regions;
- h) discomfort at the inferior border of the right scapula which he described as an area that intermittently gets tight or feels like a knot; however, this was not elicitable or described at the time of examination;
- i) inspection of his lumbar spine showed a normal lumbar lordosis; no pain at the extremes of lumbar flexion or lumbar extension;
- j) no palpatory tenderness over his posterior lumbar spinous processes, sacroiliac joints, gluteal or trochanteric bilaterally;
- k) normal lumbar flexion; normal rotation through his thoracolumbar spine to the right and left with no voiced complaints at the extremes of lumbar spine range of motion;
- l) area of described discomfort at in the lumbar spine in the right paralumbar region;
- m) normal gait; he had difficulty walking on his toes primarily because of pain on the lateral border of his left foot; his movements were not fluid or symmetrical when walking on his toes;
- n) in a seated position, straight leg raising was 90 degrees with no voiced complaints in the low back or referred pain into the lower extremities; on the supine position, straight leg raising was 80 degrees with no complaints of pain in the back or referred pain in the lower extremities;
- o) hips, thighs, knees, ankles and feet normal on inspection, palpation, range of motion, and "orthopaedic testing of these anatomical regions";
- p) very tender to palpation on the plantar aspect of the fifth metatarsal; a palpable nodule was present under the foot, on the outside surface of the left foot.

[193] Dr. Horlick also reviewed numerous "imaging studies" of Mr. Hinds including:

- a) X-rays of both shoulders, on July 26, 2018, showing "mild glenohumeral osteoarthritis and nil else";
- b) MRI of the cervical spine on July 31, 2018 showing "the cord in normal in intensity"; no MRI findings to suggest cord edema or injury; multilevel degenerative change noted within the cervical spine;
- c) MRI of internal auditory canals on September 5, 2018, "documented as normal;"
- d) X-rays of cervical spine and lumbar spine on January 23, 2018, "documented as normal save for some mild osteophyte formation at C5-C6 and C6-C7 and mild C5-C6 disc space narrowing". In addition, "there is some osteophyte formation at L3-L4 through to L5-S1 with some mild lower lumbar facet osteoarthritis present.
- e) X-ray of left foot on July 8, 2016 "shows no abnormalities";
- f) MRI of left foot performed on June 24, 2015 "shows a lesion beneath the fifth metatarsal head, fifth metatarsophalangeal joint suggestive of localized fibrosis of plantar fibromatosis;
- g) X-rays of both knees performed on November 4, 2014 "notes mild medial compartment osteoarthritis in both knees;
- h) MRI of the left knee on February 17, 2019 "shows a large tear of the medial meniscus and cartilage loss within the patellofemoral compartment;
- i) X-ray of the left knee January 17, 2019, "documented as normal".

[194] Dr. Horlick noted in his report that Mr. Hinds "endorses that his neck and back have improved":

He states the improvement is anywhere between 60% and 70% ...With respect to his cervical spine his chief complaint is intermittent pain. He describes it as an ache or tightness in the paracervical regions on the right and left.

[195] With respect to the lumbar spine, Dr. Horlick noted that Mr. Hinds "endorses 60-70% improvement" with pain "focal to the lower lumbar spine biased to the right".

[196] As to Mr. Hinds' physical condition on October 21, 2021, Dr. Horlick concludes:

With respect to musculoskeletal complaints germane to the subject accident of January 20, 2018, these have improved by his [Mr. Hinds'] endorsement with respect to intensity, frequency and duration of symptoms. Concordant with this has been a minimal use of medications to manage his residual areas of complaint, which are primarily pain. He endorses the attendance to physiotherapy and massage therapy was helpful in his recovery trajectory; however, this has now plateaued because of his inability to attend treatments due to financial limitation.

[197] After examining Mr. Hinds and reviewing the medical documentation available, Dr. Horlick concluded that the January 2018 Accident "was responsible for his myofascial injuries confined to the cervical and lumbar spine region".

[198] Dr. Horlick added:

Mr. Hinds physical examination of this cervical and lumbar spine on October 2021, is devoid of any measures of physical impairment. He has no finding suggestive of any ongoing osseous disc or nerve-related pathology presently. His residual complaints in these anatomic regions would be in keeping with myofascial related pathology. He would benefit from further treatment strategies.

[199] Notably, Dr. Horlick did not agree with Dr. Waseem's conclusion that further treatment would not benefit Mr. Hinds' pain symptoms. He focused on Mr. Hinds' healing process being incomplete because his treatments were not continued. In light of his findings, Dr. Horlick recommended the following treatment plan:

- a) a return to physiotherapy, attending twice a week for one month, followed by once a week for a further two months; physiotherapy could introduce IMS or intramuscular stimulation; Dr. Horlick noted that "IMS has been extremely helpful in relieving, if not resolving, chronic pain of myofascial origin;
- b) attend massage therapy once every two weeks for one month, followed by once every three weeks for a further two months; Dr. Horlick opined that massage therapy would be complementary and synergistic with his physiotherapy; and
- c) upon completion of a three-month protocol, Mr. Hinds should spend 6 visits with a kinesiologist, attending his community gym, where he can be instructed on the safe and effective use of cardiovascular and musculoskeletal equipment to improve his musculoskeletal reconditioning.

[200] Dr. Horlick opined that, apart from the above treatment recommendations, "nothing else was medically necessary".

[201] Dr. Horlick was also of the view that "given Mr. Hinds' injuries are myofascial in origin," they would not result in progressive impairment or disability. He opined that "myofascial injuries will recover over the course of time and with a reconditioning treatment protocol and exposure to IMS as described". Dr. Horlick explained that "myofascial injuries are not associated with the development of degenerative arthritis in the axial or appendicular or the acceleration of pre-existing degenerative changes".

[202] As regards the July 26, 2018 motorcycle accident, Dr. Horlick opined:

The etiology for the fall off the motorcycle has never been clearly delineated. It has not been shown to be associated with a specific underlying pathology associated with complaints referable to tinnitus or headache.

- [203] With regard to Mr. Hinds' musculoskeletal injuries to his neck and back arising from the January 2018 Accident, Dr. Horlick opined that it would have been "reasonable that he had a three to four-month history of temporary disability as a bus driver, given the nature of his employment and physical tasks incumbent with same". He added that there would be "no contraindication" to Mr. Hinds returning to his employment as a bus driver after three of four months of treatment for his soft tissue neck and back injuries arising from the January 2018 Accident.
- [204] Furthermore, Dr. Horlick opined that there is no contraindication to Mr. Hinds continuing to work as a bus driver on a full-time basis for the indefinite future.
- [205] Dr. Horlick was also clear in his conclusion that Mr. Hinds could have ongoing issues associated with his left foot, bilateral knee complaints and his right ring-finger. He stated that in his opinion these symptoms "are not germane to the January 2018 Accident but rather were due to pre-existing complaints from prior accidents".
- [206] On cross-examination, Dr. Horlick acknowledged he did not conduct a functional capacity evaluation but he did discuss Mr. Hinds' job duties with him.
- [207] Dr. Horlick confirmed that Mr. Hinds reported to him that because of his ongoing left foot pain arising from the 2013 Accident, this resulted in pain in his left knee pain, and then because of having to rely more on his right knee, due to his left foot pain, he developed pain in his right knee. Dr. Horlick acknowledged he was not retained to opine on the physical injuries associated with the 2013 Accident. He did not did not question Mr. Hinds' veracity in regard to Mr. Hinds' statement that his left foot pain caused him bilateral knee pain. On cross-examination, Dr. Horlick acknowledged that he accepted this statement and did not find it unbelievable. Nevertheless, Dr. Horlick agreed he "had no issue in that regard" given his experience as an orthopaedic specialist dealing with injuries to the lower body.
- [208] Dr. Horlick testified that that he questioned Mr. Hinds "on more than one occasion" whether his complaints regarding his knees, left foot and his right hand were aggravated or made worse by the 2013 Accident. Mr. Hinds responded that his symptoms were not made worse by the 2013 Accident.
- [209] Dr. Horlick agreed that there is a psychological state or mood is an aspect of one's experience of pain as pain is subjective in nature.
- [210] When queried about the significance of the length of time one has experienced pain, Dr. Horlick testified that the length of time is relevant but it is not the most definitive or important factor, and the same applies to one's age. On cross-examination, Dr. Horlick was taken to that portion of his report where he opines that the musculoskeletal injuries from the January 2018 Accident would reasonably resolve within three to four months of temporary disability as a bus driver given the nature of his employment and its physical tasks. Dr. Horlick agreed he just considered the injuries to Mr. Hinds' neck and back in

making that assessment.

- [211] Dr. Horlick also clarified on cross-examination his opinion that there was no contradiction to Mr. Hinds continuing to work as a bus driver giving his assessment related to the neck and back injuries Mr. Hinds sustained in the January 2018 Accident. However, Dr. Horlick added that if Mr. Hinds continues to have ongoing issues associated with his left foot or knees, those are due to pre-existing complaints from prior accidents. Therefore, those injuries did not inform his opinion on Mr. Hinds' ability to return to work in three or four months after the January 2018 Accident. Again, Dr. Horlick was asked to provide an opinion only on the orthopaedic or muscular skeletal injuries arising from the January 2018 Accident.
- [212] On re-direct, Dr. Horlick was taken to that portion of his report where he noted what Mr. Hinds' had said about his left foot injury caused injury to both his knees. Counsel asked him whether he intended to endorse Mr. Hinds' opinion regarding what caused Mr. Hinds' knee pain. Dr. Horlick responded "no" and clarified that he had not opined on that issue and was not retained to do so.

C. Mr. Mark Gosling, M.A.

- [213] Mr. Hinds tendered Mr. Mark Gosling, an economist, for purposes of assisting the Court in assessing damages relating to Mr. Hinds' future earnings and his future cost of care. He was duly qualified as such.
- [214] Mr. Hinds issued an expert report on January 30, 2022 which set out employment income multipliers that he noted could be "scaled up or down to estimate the present value future earnings for any constant annual income level". He also provided cost of future care multipliers that could also be "scaled up or down to estimate the present value of future care costs for any constant annual cost".
- [215] Mr. Gosling estimated the employment income multiplier for the period from the trial date to age 75 at \$5,161. He also provided multipliers to the end of each calendar year and to each birthday. Mr. Gosling noted that these multipliers are not adjusted for labour market contingencies (non-participation in the labour force, unemployment and part-time work); as such, "the multiplier to the expected retirement age is appropriately applied to an annual figure (including non-wage benefits) which already accounts for the expected impact of unemployment, part-time work and non-participation for any reason other than retirement".
- [216] As regards cost of future care multipliers for annual expenses, Mr. Gosling calculated cumulative multipliers for periods from the trial date to each anniversary of the trial date to each of Mr. Hinds' future birthdays. For example, Mr. Gosling estimated that the present value of each \$1,000 cost incurred in the first year from the trial at \$982; and the present value of each \$1,000 cost incurred annual from the trial date throughout Mr. Hinds' remaining life is estimated at \$13,727.

[217] Mr. Gosling also provided multipliers for periodic expenses that are not incurred every year; that is, for expenses incurred every two years, every three years, et cetera, to a maximum interval of 20 years.

IV. RELIABILITY OF THE EVIDENCE TENDERED BY MR. HINDS

[218] In the often-cited decision of *Bradshaw v. Stenner*, 2010 BCSC 1398, aff'd, 2012 BCCA 296, at para. 186, the court addressed various factors that inform the assessment of a witness' credibility. These include: the firmness or clarity of the witness's memory; whether the witness changed their evidence between direct examination and cross-examination; whether the evidence given by the witness is in harmony with other independent evidence that has been accepted; and whether the witness is inconsistent in their evidence.

[219] In *Erickson v. Sibble*, 2012 BCSC 1880, at para. 8, the court clarified that while a witness may be truthful, their evidence may not be reliable:

Truthfulness and reliability are not always one and the same. A witness may sincerely believe that she is telling the truth, but lack the sufficient memory, perspective, cognitive ability or narrative capacity to give reliable testimony. Alternatively, a witness "may unconsciously indulge in the human tendency to reconstruct and distort history in a manner that favours the desired outcome": *Hardychuk v. Johnstone*, 2012 BCSC 1359 at para. 10 .

[220] There are various aspects of Mr. Hinds' testimony that cast doubt on the reliability of his evidence. In large measure, I do not see the problematic areas of Mr. Hinds' evidence as stemming from a lack of credibility but, rather, as a function of Mr. Hinds' incomplete or inaccurate recollection of a number of important facts. It became clear, during the course of his testimony, that the accuracy of his evidence was compromised by not only the passage of time and the many events that have transpired before and since the 2013 Accident, but also by his own strong opinions about his medical conditions and their causes that, in the circumstances of this case, he could not persuasively advance as a lay witness.

[221] The following are several examples that illustrate the court's concern in regard to the accuracy and the reliability of Mr. Hinds' evidence.

A. Absences from Work for Health Reasons Prior to the 2013 Accident

[222] During his direct examination, Mr. Hinds testified he was in "very good" health prior to the 2013 Accident. In cross-examination, Mr. Hinds confirmed his health was "excellent" prior to the 2013 Accident. However, Mr. Hinds was then taken to employment records that showed he was absent from work for about 11 weeks in 2013, just a few months before the 2013 Accident, complaining about a pinched nerve in his neck and shoulder. Other examples are that Mr. Hinds missed work in early 2012 due to a rotator cuff injury in his shoulder and, in the summer of 2012, he missed work due to right knee and hip pain.

[223] As such, I am unable to concluded that Mr. Hinds' health was trouble-free, "excellent" or "very good", as he described his fitness level before the 2013 Accident.

B. No Initial Recollection of the May 2014 Accident

[224] When first asked whether he was involved in a motor vehicle accident in May 2014, Mr. Hinds initially did not have any recollection of the accident. After being taken to a record kept by Medox Health Solutions, which stated he had reported to Medox Health Solutions that he had been in an accident on May 5, 2014, he acknowledged, as noted earlier in these reasons, that he had been in this accident and that he had rear-ended another vehicle in his bus. He agreed on cross-examination that he did not take issue with the contents of the note which stated that his knee and foot were "quite sore" after this accident and this appeared to be his first post-accident reported complaint of knee problems.

[225] After reviewing Mr. Hinds' admissions in light of the documentation placed before him, I find that this accident did occur, that Mr. Hinds took some time off work as a result, and that he reported hurting his foot and knee pain. Yet, he did not recall this event without assistance from the documentation put to him.

C. Physical Impact of Motorcycle Accident in July 2018

[226] Mr. Hinds effectively described this motorcycle accident as a minor accident, even though he thought he had "blacked out", "fell on his bum and back," and was not permitted to drive a bus for a year afterwards. On direct examination he testified he had no "new injuries" from this accident. He also stated that he did not hurt his knees or back.

[227] However, on cross-examination, Mr. Hinds changed his evidence indicating that he did sustain a "new injury" in this accident. He testified that his "main soreness" was in his left shoulder.

[228] Mr. Hinds also disagreed with the attending emergency doctor's consultation report that his "chief complaint" was neck pain, yet he acknowledged that Dr. Pourvali, who examined him on the night of the accident, recommended he wear an Aspen neck collar, which he in fact did wear.

[229] I am unable to accept Mr. Hinds' evidence that he did not suffer any neck injury in this motorcycle accident. His recollections on repeated occasions, including this particular event, were not complete or reliable. I find, on a balance of probabilities, that he at least aggravated his prior neck injury from the January 2018 Accident, and that he also sustained a shoulder injury in the motorcycle accident.

D. Evidence Regarding When Mr. Hinds First wore a Neck Collar

[230] During his direct examination, Mr. Hinds testified that his doctor gave him a neck collar to wear after the January 2018 Accident as a result of the injury to his neck. He stated he wore the collar for a few weeks, just taking it off when he showered. As noted earlier in these reasons, when it was pointed out to Mr. Hinds that the medical records noted he was fitted for a neck collar after the July 2018 motorcycle accident, he changed his evidence; he then said that he decided to wear a neck collar on his own accord after the January 2018 Accident and that it had not been given to him by his doctor. He stated the neck collar was "perhaps from a first aid kit at home" and confirmed on cross-examination that he had not told either his physiotherapist or his doctor about choosing to wear a neck collar after the January 2018 Accident. I found Mr. Hinds' response to this line of questioning underscored, at minimum, the infirmity of his recall.

E. Onset of Tinnitus Symptoms

- [231] Mr. Hinds' evidence regarding the onset of his tinnitus symptoms are not consistent with the medical records which he himself confirmed were accurate. He admitted that it was possible his memory regarding the history of his tinnitus treatment was "poor" and also stated "I agree I don't remember exactly".
- [232] An example of Mr. Hinds' somewhat confused recollection regarding his tinnitus treatment is his evidence that when he first went to see his family doctor after the January 2018 Accident, his family doctor referred him to the tinnitus clinic at St. Paul's Hospital. He testified that this was "one of the first things we did". Yet, Mr. Hinds eventually conceded that it was not until May 2018 that he was referred to a specialist for his tinnitus symptoms and that he attended the tinnitus clinic on August 1 and 17, 2018.
- [233] As noted earlier in these reasons, Mr. Hinds at first testified that his tinnitus was constant and not "on and off", as recorded in one of his family doctor's clinical notes. Mr. Hinds stated that he would not have told his doctor that his tinnitus was "on and off". However, Mr. Hinds eventually admitted during his cross-examination that he may have told his doctor his tinnitus symptoms were "on and off".

F. Use of Naproxen

- [234] Mr. Hinds testified during his direct examination that he took Naproxen and over the counter medication following his 2013 Accident. As noted earlier in these reasons, on cross-examination, he was taken to records that showed he was prescribed Naproxen for the first time in 2016 when he went to his family doctor about a low back injury caused by the seat on his bus. Mr. Hinds did not dispute the accuracy of the Pharmanet record or his doctor's clinical notes. He attempted to explain the discrepancy by saying he "might have used" his wife's Naproxen tablets before October 3, 2016. He also attempted to explain the discrepancy in his evidence by stating that he used over-the-counter, non-prescription

Naproxen such as Advil. However, Mr. Hinds had testified during his direct examination that he used Naproxen after the 2013 Accident when Advil (and Tylenol) did not work, thereby distinguishing his use of Naproxen from his use of Advil. Specifically, he testified that after the 2013 Accident he needed Naproxen a "couple of times a week" but that "most of the time" the Advil and Tylenol worked.

- [235] This inconsistency in Mr. Hinds' evidence is another example of the lack of cohesion and firmness of his testimony overall. His unreliable recollection of events, as well as his other evidence that was more consistent with the evidence as a whole, have each informed my findings on what injuries were or were not caused by the 2013 and January 2018 Accidents, as well as the extent, severity and persistent of his symptoms. I address these issues below, more specifically, in relation to Mr. Hinds' particular claims.

V. CAUSATION

- [236] A plaintiff has the onus at law of establishing, on a balance of probabilities, that a defendant's negligence either caused or materially contributed to the injuries in question. To be compensable, a defendant's negligence does not have to be the sole cause of the injury, as long as it is a cause, and the cause is not nominal or falls outside the *de minimis* range of damage. Nor is it necessary that causation be proved with scientific precision: *Athey v. Leonati*, [1996] 3 S.C.R. 458 at paras. 13-17; *Farrant v. Laktin*, 2011 BCCA 336 at para. 9; *Resurfice Corp. v. Hanke*, 2007 SCC 7 at paras. 21-23.
- [237] In *Borgfjord v. Boizard*, 2016 BCCA 317 reasoned that the court may make common sense inferences from the facts in determining causation:
- [55] Scientific proof of causation is not required; common sense inferences from the facts may suffice: *Clements (Litigation Guardian of) v. Clements*, 2012 SCC 32 at paras. 38, 46. However, inferences must be based on proven facts and cannot be simply guesswork or conjecture: *Kerr (Litigation Guardian of) v. Creighton*, 2008 BCCA 75 at paras. 58-62; *Haase v. Pedro* (1970), 21 B.C.L.R. (2d) 273 (C.A.) at 279-80, 305.
- [238] In *T.W.N.A. v. Canada (Ministry of Indian Affairs)*, 2003 BCCA 670, our Court of Appeal reasoned, at para. 22, that once causation has been proven, the tortfeasor is fully liable for the damage caused by his or her wrongful conduct even when pre-existing conditions or physical vulnerabilities existed prior to the accident. However, the Court also reasoned that different considerations apply when assessing damages. I will return to this point later in these reasons, when I assess the appropriate quantum of damages.

A. Mr. Hinds' Foot Injury from the 2013 Accident

[239] The defendants acknowledge, and I agree, that Mr. Hinds sustained an injury under the head of the fifth metatarsal bone of his left foot as a result of the 2013 Accident. Mr. Hinds' evidence, when coupled with the uncontroverted expert opinion of Dr. Waseem, establishes that this injury occurred at the time of the 2013 Accident.

B. Mr. Hinds' Bilateral Knee Pain

[240] Mr. Hinds is of the opinion that his bilateral knee pain was a function of his foot injury, because his foot pain affected the way he walked. No expert report was tendered by Mr. Hinds to confirm his view in this regard.

[241] Counsel for Mr. Hinds underscored that Mr. Hinds' opinion (that the change in his walking pattern was the cause of his knee pain) was considered to be a "plausible explanation" by Dr. Horlick during his cross-examination. Counsel for Mr. Hinds candidly acknowledged, however, that "while not endorsing the evidence of Mr. Hinds, Dr. Horlick did not take issue with it, such that it would call into question Mr. Hinds' veracity".

[242] To be clear, Dr. Horlick was not asked to opine and did not opine on the issue of whether Mr. Hinds' injury under the fifth toe of his left foot could cause arthritis or pain in Mr. Hinds' knees. While Dr. Horlick did not negate the possibility, he did not specifically examine Mr. Hinds or the documentary record in this regard, or have the benefit of hearing Mr. Hinds' evidence at trial in its entirety, or assess the reliability of Mr. Hinds' evidence in this light.

[243] Dr. Horlick's expert report stated that Mr. Hinds' "gait was normal," when he examined him, although he also noted that Mr. Hinds had difficulty walking on his toes, primarily because of pain on the "border of his left foot". Dr. Horlick also noted in his report that the examination of Mr. Hinds' hips, thighs, knees, ankles and feet was "normal with respect to inspection, palpation, range of motion, and or orthopaedic special testing of these anatomic regions", even though he noted Mr. Hinds was "very tender to palpation" under his left fifth toe of his left foot, where he felt a nodule.

[244] Dr. Waseem noted in his expert report that Mr. Hinds walked with a painful gait when he was not wearing his shoes, adding there was no focal muscular atrophy and that he had "a normal alignment of the axial spine and the upper and lower extremities". As noted above, Dr. Waseem's report also referenced a medical document authored by Dr. Kuan; Dr. Waseem described this document as noting "musculoskeletal discomfort left foot secondary to sprain/strain injury in Mr. Hinds' left foot; symptoms exacerbated by disrupted gait pattern and callus formation; recommend rehabilitation program to correct gait pattern". Dr. Kuan was not called as a witness or expert and the "symptoms" referenced in this note were not described.

- [245] In these circumstances, it is challenging to assess and conclude that there is a causal nexus between Mr. Hinds' left foot injury and his knee pain.
- [246] Counsel for Mr. Hinds relies on the decision of Justice Voith, as he then was, in *Zawadzki v. Calimoso*, 2011 BCSC 45. In *Zawadzki*, Justice Voith concluded that the accident in that case caused the plaintiff's lower back pain even though there was no expert evidence on that point. He reasoned:
- [80] In this case I am prepared to infer or conclude, on the balance of probabilities, that but for the Accident Mr. Zawadzki would not have the ongoing lower back pain that he does. There are times when such inferences are based on a "robust", though nonetheless legitimate, exercise of fact finding: *Lankenau Estate v. Dutton* (1991), 79 D.L.R. (4th) 705 at 714-718 (B.C.C.A.). Here I do not consider that such an inference requires a particularly "robust" approach to fact finding; instead, I consider it to be both pragmatic and an exercise of "common sense". Counsel for the defendant Mr. Calimoso agreed that no medical evidence existed which prevented me from drawing this inference.
- [247] I have no difficulty with the submission that, in the proper circumstance, a court may decide the question of causation in the absence of an expert opinion. I also accept the principles affirmed in *Zawadzki*, and they have guided my analysis. However, on the particular facts before me, I am not persuaded, on a balance of probabilities, that the 2013 Accident caused Mr. Hinds' knee pain, or the arthritis in his knees.
- [248] I have carefully considered whether I might, as Mr. Hinds asserts, draw a reasonable causal inference based on the record before me, without expert evidence. I am unable to do so.
- [249] There are a number of confounding facts or variables leading me to the conclusion that specialized expertise on the issue, in the particular circumstances of this case, is needed. Indeed, Dr. Waseem confirmed during his testimony that he did not have the specialized expertise necessary to opine upon on the issue of whether Mr. Hinds' knee pain and his osteoarthritis was attributable to changes in his manner of walking due to left foot pain. As noted above, he deferred to a foot and ankle orthopaedic surgeon. No such expert testified on this point.
- [250] Confounding the Court's assessment of causation further, in regard to the effect of the 2013 Accident on Mr. Hinds' knee pain, is the evidence that while Mr. Hinds has degenerative arthritis in his knees, it is not clear when this condition arose. This begs the question of whether the arthritis was an issue before the 2013 Accident or whether the 2013 Accident caused it. Mr. Hinds filled out a disability claim in the summer of 2012, in which he which he stated he was absent from work due to "pain in right knee and hip". However, we do not have any further details of this absence or his medical condition.

- [251] As noted earlier in these reasons, an additional challenge to the Court's assessment of the cause of Mr. Hinds' knee pain is that there are no clinical records from Mr. Hinds' family doctor or other doctors prior to the 2013 Accident and no direct or cross-examination evidence on such records as a result.
- [252] Also complicating the Court's assessment is Mr. Hinds' testimony that he had a torn meniscus in his right knee, and that "eventually" he suffered a torn meniscus in his left knee as well. An MRI of Mr. Hinds' right knee on June 4, 2020 noted a "complex meniscus tear", but the evidence before me does not inform the questions of when the meniscus tears actually happened or under what circumstances.
- [253] Counsel for the defendants underscores that Dr. Waseem, despite more than ten years of practice as a doctor with specialty training in rehabilitation medicine, did not consider he was qualified to comment on whether Mr. Hinds' foot injury in the 2013 Accident contributed to the arthritis or pain in Mr. Hinds' knees. Counsel for the defendants assert further that Mr. Hinds did not provide cogent or clear evidence about the onset of his knee pain and has not met his burden of proof in his regard.
- [254] Counsel for Mr. Hinds also points out that Dr. Waseem noted in his report that there was a clinical entry of a left knee complaint as early as February 11, 2014; specifically, this clinical note stated "getting used to shoes and orthotics, now left knee pain". The author of this note did not testify. Further, it is not clear whether this entry means Mr. Hinds had left knee pain related to his orthotic shoes or whether the phrase "now knee pain" indicates he first started to experience left knee pain at that time, or whether the knee pain was caused by Mr. Hinds' orthotics, or his arthritis, or both.
- [255] Mr. Hinds testified during his direct examination that he was having knee pain soon after the 2013 Accident but I am mindful that Mr. Hinds' memory regarding the onset of his symptoms and his various treatments was repeatedly shown to be unreliable, as I have discussed earlier in these reasons by providing illustrative examples. Reliable and consistent evidence regarding the onset of Mr. Hinds' knee pain and its proximity to the 2013 Accident would have been of some assistance in assessing the issue of causation.
- [256] The evidence as a whole is not clear as to the onset of the left and right knee pain or when the right and left menisci were torn. Again, this court can not comfortably rely on Mr. Hinds' recollections. Even if it could, the evidence that might support the necessary causal links, in the circumstances of this particular case, remains vague and incomplete. While evidence relating to causation may lead a court to draw a "plausible" causal connection, plausibility is not the requisite standard of proof. With or without the benefit of expert opinion, the evidence must go further. Mr. Hinds bears the onus of proving causation on the balance of probabilities. That onus has not been satisfied on the evidence before me.
- [257] In light of the above, I am unable to conclude that the 2013 Accident was a cause of Mr. Hinds' knee pain.

C. Mr. Hinds' Lower Back Pain

- [258] Mr. Hinds asserts that his lower back pain and hip pain was also caused by changes in the manner of his walking due to left foot pain. Once again, I am not able to draw a reasonable inference that draws a causal connection between Mr. Hinds' lower back and hip complaints and his manner of walking due to his foot pain. There is relatively little evidence on point apart from his opinion in this regard.
- [259] Dr. Waseem noted that Mr. Hinds' range of motion (flexion, extension and bilateral bending) was within normal limits and symmetric but also noted that "lumbar spine movements (flexion) did increase his lower back pain". However, as with Mr. Hinds' knee pain, Dr. Waseem was not able to provide an opinion on whether Mr. Hinds' "mechanical lower back pain", could be attributed to changes in his manner of walking due to left foot pain. Just as he did in regard to the cause of Mr. Hinds' knee pain, Dr. Waseem deferred this question to a foot and ankle orthopedic surgeon. Again, no such opinion was tendered.
- [260] I have considered whether I might draw a reasonable causal inference in light of the evidentiary matrix before me on this issue. I am simply unable to draw a reasonable inference that Mr. Hinds' lower back pain was exacerbated or caused by the 2013 Accident. This Court is in no better a position than Dr. Waseem to render an opinion in this regard.
- [261] However, a distinction must be made in regard to the injury Mr. Hinds sustained in the January 2018 Accident, as compared to the 2013 Accident. I am satisfied that the injury Mr. Hinds sustained in the 2018 Accident included myofascial injuries to his neck and lower back. The evidence of Dr. Horlick, when coupled with that of Mr. Hinds, proves on a balance of possibilities that the January 2018 Accident was responsible for such injuries. The defendants concede this point.

D. Mr. Hinds' Shoulder Pain

- [262] On cross-examination, Mr. Hinds admitted that his left shoulder was injured in the July 2018 motorcycle accident. This injury is clearly not compensable. The defendants were not responsible for this injury.

E. Mr. Hinds' Neck Pain

- [263] The defendants do not dispute that Mr. Hinds suffered a neck injury in the January 2018 Accident. Dr. Horlick opined that Mr. Hinds suffered a neck injury in the January 2018 Accident, supporting Mr. Hinds' evidence in this regard. Dr. Waseem also opined that Mr. Hinds' neck injury had "essentially resolved".

F. Mr. Hinds' Tinnitus

- [264] Mr. Hinds attributes his headaches and tinnitus to the January 2018 Accident. He testified he felt dizzy and ringing in his ears at the scene of the accident. He also testified that he went to see his family doctor within a day or two of the January 2018 Accident about the stiffness in his neck, the ringing in his ear, and a knot in his back.
- [265] Counsel for the defendants argue that Mr. Hinds "had only inadequate explanations as to why, if his tinnitus was an immediate and troublesome symptom, his doctor did not document his complaint of tinnitus until April [2018] " Further, the defendants note that Mr. Hinds claimed that his family doctor sent him to the tinnitus clinic as soon as he first raised the tinnitus issue with him. However, Mr. Hinds later agreed on cross-examination that his family doctor did not make his first tinnitus related referral until May 2018. Accordingly, the defendants argue that evidence leads to the conclusion that Mr. Hinds did not experience an immediate onset of tinnitus symptoms after the January 2018 Accident, undermining the plaintiff's assertion that the January 2018 Accident caused his tinnitus.
- [266] If it was simply the case that one clinical record, made shortly after the January 2018 Accident, failed to document Mr. Hinds' tinnitus, I would not be persuaded by the defendant's submission in this regard. Just because a doctor's note does not document a patient's complaint or symptom does not necessarily mean that the symptom did not exist at the time of the doctor's examination.
- [267] However, on January 26, 2018, during Mr. Hinds' second visit with his family doctor after the January 2018 Accident, the clinical record notes other physical symptoms arising from that accident but, again, does not refer to any tinnitus symptoms. The absence of a clinical note documenting tinnitus symptoms during this second visit is significant because Mr. Hinds' family doctor undertook what Mr. Hinds agreed was a full physical examination of him that day. The details of this physical examination are set out earlier in these reasons and need not be repeated here. Suffice it to say that his family doctor conducted a thorough physical examination of Mr. Hinds, including his head and ears, but did not mention any tinnitus symptoms or complaints.
- [268] Similarly, at Mr. Hinds' March 20, 2018 appointment with his family doctor, his family doctor did not note tinnitus symptoms, which Mr. Hinds also acknowledged on cross-examination. Further, the clinical log uses the acronym "P" for plan, but no reference was made to tinnitus or its treatment. The plan involved "occasional Naproxen" as needed and continued physiotherapy.
- [269] However, during Mr. Hinds' April 10, 2018 visit with his family doctor, the clinical notes mention "tinnitus is still ongoing". Mr. Hinds confirmed that his tinnitus was in fact ongoing at that time of the April 10, 2018 doctor's visit, although the record is not clear when tinnitus was first addressed by his family doctor.

- [270] Both Dr. Waseem and Dr. Horlick testified that an otolaryngologist would be the appropriate specialist to comment on whether Mr. Hinds' tinnitus, dizziness and headaches are a result of the 2018 Accident, or some other cause. That is, neither Dr. Waseem or Dr. Horlick were able to form an opinion on whether Mr. Hinds' January 2018 Accident caused his tinnitus symptoms. No otolaryngologist was called to provide this opinion.
- [271] While I appreciate and accept counsel for Mr. Hinds' submission that the court does not necessarily need expert opinions to prove causal links between a plaintiff's symptoms and a defendant's negligence, there are cases where the court is simply unable to draw a conclusion on causation without the assistance of an expert witness. This is such a case.
- [272] Dr. Waseem and Dr. Horlick both decided to defer and refer this causation issue to another specialist. This underscores the need for a particular specialist's expertise in determining the issue of causation in this case on this issue. Furthermore, the Court's ability to weigh the proximity of Mr. Hinds' tinnitus symptoms to the Accident is compromised by Mr. Hinds' inaccurate recollections of the circumstances following the January 2018 Accident; these relate in part to the course of treatment for his tinnitus, and his admission that his memory was faulty in this regard. Again, I have addressed these earlier in my reasons and these need not be repeated here.
- [273] Having carefully considered the evidence, I am unable to draw a reasonable inference that the January 2018 Accident caused Mr. Hinds' tinnitus symptoms.

G. Mr. Hinds' Headaches

- [274] Mr. Hinds attributes his headaches to his tinnitus symptoms and the January 2018 Accident. As discussed above, neither Dr. Waseem or Dr. Horlick attributed Mr. Hinds' headaches to the January 2018 Accident and deferred this issue to another type of specialist.
- [275] Having consider the evidence in its entirety, I find that I may draw a reasonable inference that, immediately following the 2018 Accident, Mr. Hinds felt unsettled and suffered a headache and dizziness due to soft tissue injuries. However, like Dr. Waseem, I am not able to discern the cause of Mr. Hinds' continuing tinnitus, and his associated headaches and vertigo; this is outside this court's expertise. I am simply unable to conclude on a balance of probabilities, or draw a reasonable inference on the evidentiary matrix before me, that Mr. Hinds continues to suffer headaches and vertigo as a result of tinnitus arising from the January 2018 Accident.

H. Mr. Hinds' Changed Moods

- [276] There are many factors that may inform Mr. Hinds' mood problems since the 2013 Accident. In addition to the nodule under his left foot and the soft tissue injury to his neck and lower back as a result of the January 2018 Accident, he was hospitalized for four days after his motorcycle accident in July 2018. Furthermore, he was not permitted to drive a bus for one year due to the fact that he appeared to have "blacked out" after the motorcycle

accident. Furthermore, Mr. Hinds testified that he wanted to go back to driving buses by December 2018 but was not permitted to do so. Instead, he was given alternate work that involved cleaning buses and that, in turn, led to a painful nodule on the ring finger of his right hand. Compounding matters, he also suffered from lower back and knee pain prior to the January 2018 Accident that was not caused by the 2013 Accident but which, nonetheless, significantly affected his ability to walk long distances as he used to do, as well as engage in other activities such as dancing.

[277] There are a number of circumstances and factors that impacted Mr. Hinds' lower mood or moodiness that do not arise out of either the 2013 Accident or January 2018 Accident. Nevertheless, I am satisfied that the physical pain he experienced in his left foot following the 2013 Accident was significant enough to limit his activities, particularly his love of walking and dancing, to such an extent that these limitations have negatively affected his mood. I find that the neck and lower back injury caused by the January 2018 Accident also detrimentally affected Mr. Hinds' mood. Accordingly, because I have found that Mr. Hinds' mood was disturbed by the negligence of the defendants in these two accidents, he is entitled to be compensated for this loss. Of course, Mr. Hinds is not entitled to be compensated for symptoms affecting his mood that were not proven to be related to the 2013 Accident or the January 2018 Accident, as discussed above.

VI. DAMAGES

[278] A key first principle underpinning the proper assessment of damages is, so far as is possible, to put a plaintiff in the position he, she or they would have been in absent the defendant's negligence. In properly assessing damages, the Court is mindful of considering both the pre-accident and post-accident circumstances of the plaintiff, as articulated in the following, often-cited passage in *Athey* at para. 32:

The essential purpose and most basic principle of tort law is that the plaintiff must be placed in the position he or she would have been in absent the defendant's negligence (the "original position"). However, the plaintiff is not to be placed in a position better than his or her original one. It is therefore necessary not only to determine the plaintiff's position after the tort but also to assess what the "original position" would have been. It is the difference between these positions, the "original position" and the "injured position", which is the plaintiff's loss. In the cases referred to above, the intervening event was unrelated to the tort and therefore affected the plaintiff's "original position". The net loss was therefore not as great as it might have otherwise seemed, so damages were reduced to reflect this.

[Emphasis in original]

[279] As noted above, tortfeasors must take their victims as they find them. However, a defendant need not compensate the plaintiff for any debilitating effects of a pre-existing condition which the plaintiff would have experienced in any event and in the absence of the defendant's negligence. This principle is referred to as the "crumbling skull" rule: *Athey* at paras. 32-35; *Blackwater* at para. 78.

[280] Where it is necessary to assess hypothetical or future events, such as how Mr. Hinds' life would have proceeded in the absence of the defendants' negligence, it is well settled that the standard of proof is not the balance of probabilities but, rather, whether there is a real and substantial possibility that an event will occur. Accordingly, a future possibility may be properly taken into consideration by the Court where it "is a real and substantial possibility and not mere speculation": *Athey* at para. 27. This analysis is to be distinguished from assessing past events, which must be proven on a balance of probabilities. Once proven, such past events are "treated as certainties": *Athey* at para. 28.

[281] Where it is established that a future or hypothetical event is a real and substantial possibility and not mere speculation, it is to be given weight according to its relative likelihood. In *Athey*, the court provides the following example, at para. 27:

if there is a 30 percent chance that the plaintiff's injuries will worsen, then the damage award may be increased by 30 percent of the anticipated extra damages to reflect that risk. A future or hypothetical possibility will be taken into consideration as long as it is a real and substantial possibility and not mere speculation : *Schrump v. Koot* (1977), 18 O.R. (2d) 337 (C.A.) .

[282] In *Dornan v. Silva*, 2021 BCCA 228, Grauer J.A. of our Court of Appeal reasons that once it is established that a contingency or risk is a real and substantial possibility, the trial judge must then assess its relative likelihood. Furthermore, he affirms that the court's assessment of positive or negative contingencies, which are specific to the circumstances of the plaintiff, must be grounded in the evidence before the trial judge. At para. 92, he relies on the following passage in *Graham v. Rourke* (1990), 74 D.L.R. (4th) 1 (Ont. C.A.):

47. If a plaintiff or defendant relies on a specific contingency, positive or negative, that party must be able to point to evidence which supports an allowance for that contingency. The evidence will not prove that the potential contingency will happen or that it would have happened had the tortious event not occurred, but the evidence must be capable of supporting the conclusion that the occurrence of the contingency is a realistic as opposed to a speculative possibility

[emphasis added]

[283] In *Lo v. Vos*, 2021 BCCA 421 at para. 39, the Court of Appeal clearly stated that the onus of establishing a real and substantial possibility is on the party asserting it.

[284] Accordingly, once a court concludes that there is a real and substantial possibility of a future event and it is in the process of assessing its relative likelihood, a party must be able to point to the evidence before the court which supports the contingency in question. Further, in reaching its conclusion, the court must ground its reasons and conclusion on the contingency's relative likelihood having regard to that evidence. In Dornan, Justice Grauer reasons:

[134] There is no doubt that the task of the trial judge in circumstances such as these is not easy. By definition, we are dealing with possibilities, and there is no one right answer. But the law provides one right process, which, of course, must be tethered to the evidence, not to averages and approximations based on imprecise evidence.

[285] This jurisprudence, has informed my assessment of the various heads of damages.

A. Non-Pecuniary Damages

[286] Non-pecuniary damages are intended to compensate plaintiffs for their past and future pain, suffering, disability, and loss of enjoyment of life: Javorovic v. Booth, 2021 BCSC 336 at para. 54. In determining non-pecuniary damages, each case must be assessed based on the particular facts before the court: Trites v. Penner, 2010 BCSC 882 at paras. 188-189. When making that assessment, the following factors delineated in Stapley v. Hejslet, 2006 BCCA 34 at para. 46, are key considerations:

[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 arguably are 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).

[287] Further, as noted by the Court of Appeal in *Moskaleva v. Laurie*, 2009 BCCA 260, the amount of the non-pecuniary award should compensate for more than just direct injuries:

[95] The underlying purpose of non-pecuniary damages is to "make life more endurable" and should be seen as compensating for more than just a plaintiff's direct injuries [citations omitted]. In *Lindal*, at 637, Dickson J. for the Court emphasized that the quantum of an award is determined through a functional approach and should not necessarily correlate with the gravity of the injury:

Thus, the amount of an award for non-pecuniary damage should not depend alone upon the seriousness of the injury but upon its ability to ameliorate the condition of the victim considering his or her particular situation. It therefore will not follow that in considering what part of the maximum should be awarded the gravity of the injury alone will be determinative. An appreciation of the individual's loss is the key and the "need for solace will not necessarily correlate with the seriousness of the injury". In dealing with an award of this nature it will be impossible to develop a "tariff". An award will vary in each case "to meet the specific circumstances of the individual case".

[288] An appreciation of the individual's particular loss is key and the award will vary in each case "to meet the specific circumstances of the individual case".

[289] Counsel for Mr. Hinds submits that non-pecuniary damages in the range of \$140,000 to \$170,000 is appropriate in this case: see *Aarts-Chinyanta v. Binkley*, 2020 BCSC 392; *Bieling v. Morris*, 2021 BCSC 1905; *Doberstein v. Zhao*, 2020 BCSC 1788; and *Verjee v. Dunbrak*, 2019 BCSC 1696. Counsel for the defendants submit that the proper range of damages is between \$40,000 to \$55,000: see *Baracco v. Mallinson*, 2021 BCSC 156; *Shrieves v. Smith*, 2020 BCSC 710; and *Sulinksa v. Payne*, 2021 BCSC 202. I am of the view that the authorities advanced by counsel for the defendants are somewhat distinguishable and the defendants' proposed range of damages is too low for this case. However, the cases relied upon by the defendants are somewhat more aligned with my findings of fact than those relied upon by counsel for the defendants, particularly in light of my findings on causation: see also *Johnson v. Avis Rent-a-Car*, 2021 BCSC 1081; *Cook v. Kang*, 2020 BCSC 526.

[290] I am of the view that the appropriate quantum of non-pecuniary damages in this case is in the range of \$85,000. However, for the reasons discussed below, I have also concluded that a negative contingency of 25% ought to be applied to this assessment.

[291] I have examined each of the factors in *Stapley* and our Court of Appeal's functional analysis in *Moskaleva* in light of the circumstances before me. Furthermore, I have considered the authorities relied upon by both parties, giving due consideration to what guidance they offer and their relative comparability to the facts before me, keeping in mind that the compensation awarded must be fair to both parties.

- [292] I have considered the cumulative effect of the nature and scope of the injuries Mr. Hinds sustained to his left foot as a result of the 2013 Accident, and the myofascial injuries Mr. Hinds sustained to his neck and lower back injury in the January 2018 Accident. I have considered how the injuries and symptoms he has suffered as a result of these injuries have impaired his physical health, moods, recreational abilities, and general lifestyle including the impact on his ability to take care of his home, properties and vehicles. I have also provided an allowance for Mr. Hinds' loss of capacity to perform housekeeping tasks as a result of his Accident-related injuries: *Kim v. Lin*, 2018 BCCA 77 at para. 33; *Riley v. Ritsco*, 2018 BCCA 366 at para. 100.
- [293] For greater clarity, I have assessed the entirety of the evidence before me, including for example: 1) my finding that Mr. Hinds has had left foot pain for a number of years; 2) my conclusion that Mr. Hinds has not proven, on a balance of probabilities, that his knee and lower back pain, prior to the January 2018 Accident, were caused by the 2013 Accident; 3) my finding that Mr. Hinds suffered back and neck pain from the 2018 Accident, although these have now largely resolved, with the exception of some occasional flare-ups when he is tired or over-exerts himself; 4) my finding that Mr. Hinds has suffered mood disturbances as a result of these injuries, although he had not been diagnosed with any psychological disorder; 5) my conclusion that Mr. Hinds' left foot pain has made housework and repair work on his properties and vehicles slower and more difficult; and 6) my finding that Mr. Hinds' is not able to enjoy walking for longer periods of time as he once did, and he is no longer able to enjoy dancing, which he loved to do.
- [294] I also accept Dr. Horlick's opinion that Mr. Hinds' musculoskeletal injuries from the January 2018 Accident are myofascial in nature and that it would be reasonable to conclude that his neck and back injury would have had a three to four-month history of temporary disability. Given Dr. Horlick's qualifications and specific WCB expertise, I have no difficulty accepting this opinion. I note, however, that while I accept his evidence that Mr. Hinds' injuries justified about four months of absence from work (not factoring in his tinnitus, vertigo, tinnitus associated headaches, and knee pain), I am satisfied that Mr. Hinds' neck and back symptoms continued for some time after this period.
- [295] More specifically, I find that by the time Mr. Hinds returned to work in early December 2018, his neck and back pain symptoms from the January 2018 Accident were largely resolved. This finding is consistent with Mr. Hinds' own evidence, although as I have noted, I also find that Mr. Hinds continues to suffer some flare-ups.
- [296] I accept Dr. Horlick's evidence the Mr. Hinds' neck and back neck injuries, arising from the January 2018 Accident, have improved considerably and that his remaining symptoms would benefit from further treatment, as he outlines in his report. I also accept Dr. Horlick's that with such additional treatments, "further recovery, if not resolution, is probable".

- [297] I have also found that Mr. Hinds had a latent condition or sensitivity under the fifth toe of his left foot before the 2013 Accident, arising from the repeated pressure on that toe, which contributed to his left foot injury. Dr. Waseem testified that the repeated pressure to the left part of Mr. Hinds' foot by the fifth toe, over the eight years Mr. Hinds drove buses prior to the 2013 Accident, could well have contributed to the injury Mr. Hinds sustained in his left foot. Mr. Hinds himself acknowledged the repeated pressure on the fifth toe of his left foot during his years as a bus driver prior to the 2013 Accident.
- [298] Counsel for the defendants underscored that while Mr. Hinds stated he did not have any pre-accident discomfort in the area of his foot under his fifth toe, Mr. Hinds also forgot the health issues he had prior to the 2013 Accident. Counsel for the defendants' submission in this regard is well-taken and accepted. Indeed, during his cross-examination, Mr. Hinds modified his evidence somewhat and became less categorical about not having any pain in his left foot, prior to the 2013 Accident; specifically, towards the end of his cross-examination, Mr. Hinds stated that he did not remember having discomfort in that area of his foot that was "as severe" before the 2013 Accident or "not like that".
- [299] Mr. Hinds' latent condition or sensitivity in his left foot merits a negative contingency deduction, particularly in light of my conclusion that there is a real and substantial possibility that Mr. Hinds would eventually have developed left foot pain of the kind he now experiences, even in the absence of the 2013 Accident.
- [300] Counsel for the defendants also assert that less than a year after the 2013 Accident, in May 2014, during his gradual return to work, Mr. Hinds rear-ended a car in his bus. They submit that a rear-end accident would logically have applied force to the plane of his foot more than an accident from the side such as the 2013 Accident. Based on Mr. Hinds' own evidence, I find that this accident in May 2014 also exacerbated his left foot injury. As the Supreme Court of Canada reasoned in *Athey*, a defendant is not required to pay compensation for an injury that did not occur as a result of their negligence: at para. 24. Therefore, while Mr. Hinds is entitled to be compensated for the injury to his foot as a result of the 2013 Accident, the defendants are not responsible for the exacerbation of Mr. Hinds' foot pain in the bus accident in May 2014.
- [301] Counsel for the parties did not engage in the mathematical exercise of adding up the value of each injury. For example, counsel did not provide me with an amount that would represent the proper non-pecuniary award for Mr. Hinds' foot injury alone. Rather, the parties have proposed damage awards as a whole, and I have assessed Mr. Hinds' injuries as such a whole, considering the impact of his injuries on his health and lifestyle overall, including my finding that there is a real and substantial possibility that the repetitive pressure on his left foot, would eventually and in any event of the 2013 Accident, have result in the sort of injury and pain he currently experiences in his foot. Counsel for the defendants asserts that a 40% to 50% discount as a result of this negative contingency is warranted. In my view, such a discount would not be reasonable or fair to apply to the entirety of the non-pecuniary award, which includes compensation for injuries related to

the January 2018 Accident. I have also considered that while there is a real and substantial possibility that Mr. Hinds' left foot condition would have deteriorated from the constant pressure exerted on his fifth toe in any event, it is most likely that the deterioration would have been more gradual in the absence of the 2013 Accident. Nevertheless, the measure of damages must also be adjusted so as to not place Mr. Hinds in a better position than he would have been but for the 2013 Accident.

[302] In light of the circumstances and reasons set out above, I am of the view that a negative contingency deduction of 25% is fair and reasonable. In conclusion, the assessment of \$85,000 for non-pecuniary damages is reduced by a negative contingency of 25% or \$21,250, for an award of \$63,750.

B. Past Loss of Income Earning Capacity

[303] Past loss of earning capacity is informed by what Mr. Hinds would have earned but for the negligence of the defendants. The defendants concede that while Mr. Hinds was off work as a result of the 2013 and the January 2018 Accidents for some periods of time, they submit that some of the time he was off work was not related to injuries or symptoms arising from these accidents.

[304] After the 2013 Accident in late August 2013, Mr. Hinds took approximately two weeks off work before attempting to return to work the week of September 24, 2013; however, he was off work again from September 28, 2013 to May 11, 2014. The defendants recognize that, during those two periods of time, Mr. Hinds received treatment and participated in a rehabilitation program and a gradual return to work. I find that Mr. Hinds is entitled to past wage loss as a result of the 2013 Accident for the period after the 2013 Accident until May 11, 2014, less the wages he received during the time he worked in September 2013 and the wages earned during his gradual return to work in May 2014.

[305] However, the lost wages from his period of absence from work after May 2014 is a different matter. Mr. Hinds agreed during his cross-examination that by the middle of May 2014 he was able to: sit for his entire work shift; stand and bear weight on his left leg; apply force as necessary with his left foot; and climb steps by putting his weight on his left leg. Mr. Hinds also agreed with the rehabilitation assessment report's conclusion that he met all his job's demands. While he claimed he was not able to work in the fall of 2014 to December of 2015, the evidence in its entirety indicates this was the result of knee and lower back issues which I have found were not caused by the 2013 Accident.

[306] The defendants assert that Mr. Hinds has led no persuasive evidence to justify any further period of disability resulting from the 2013 Accident beyond May 2014, nor any evidence that his time off from September 14, 2014 to December 9, 2015 was justified or reasonably connected to the 2013 Accident. Having carefully reviewed the evidence during this period, I agree with the defendants. I am not satisfied that there is a real and substantial possibility, given the evidence as a whole, that his left foot injury from the 2013 Accident prevented

him from working during this period. Mr. Hinds may very well have had knee and low back problems compromising his ability to return to work from September 14, 2014 to December 9, 2015, but the evidence does not establish that these physical problems were caused by the 2013 Accident.

[307] As regards the period after the January 2018 Accident, I accept that there was a period of time where Mr. Hinds was not able to work due to his neck and lower back injury resulting from that collision. However, I also accept these were soft tissue injuries; further, I accept Dr. Horlick's expert opinion that the nature of his injuries would allow him to have returned to work approximately four months following the January 2018 Accident.

[308] I am very mindful of Mr. Hinds' evidence that his tinnitus, vertigo and the headaches related to his tinnitus were such that he was not able to work. However, I have already found that the defendants are not liable for these conditions and symptoms; accordingly, there can be no award for past loss of income-earning capacity in this regard.

[309] Counsel has advised that based on the above findings, Mr. Hinds gross wage loss should be approximately \$58,000. However, the parties also submit that they will work together to determine the precise calculation of Mr. Hinds' net loss, once the Court makes the factual findings on the question of which periods of absence from his work were caused by the negligence of the defendants. I have done so; accordingly, I will leave the precise calculations of past capacity loss to counsel as requested.

C. Future Loss of Income Earning Capacity

[310] In order to receive an award for loss of earning capacity, a plaintiff must prove that there is a real and substantial possibility of a future event leading to an income loss: *Athey* at para. 27; *O'Connell v. Yung*, 2012 BCCA 57 at para. 56. If the plaintiff discharges that burden of proof, then depending upon the facts of the case, the plaintiff may prove the quantification of that loss of earning capacity, either on an earnings approach or a capital asset approach: *Perren v. Lalari*, 2010 BCCA 140 at para. 32.

[311] This Court must consider these guiding principles in light of the relevant factors found within the evidence as a whole: *Rosvold v. Dunlop*, 2001 BCCA 1 at para. 10. Such factors include:

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

[312] In *Pololos v. Cinnamon-Lopez*, 2016 BCSC 81, Justice Voith, as he then was, conveniently summarizes the applicable first principles as follows:

[133] The relevant legal principles are well-established:

- a) To the extent possible, a plaintiff should be put in the position he/she would have been in, but for the injuries caused by the defendant's negligence; *Lines v. W & D Logging Co. Ltd.*, 2009 BCCA 106 at para. 185, leave to appeal ref'd [2009] S.C.C.A. No. 197;
- b) The central task of the Court is to compare the likely future of the plaintiff's working life if the Accident had not occurred with the plaintiff's likely future working life after the Accident; *Gregory v. Insurance Corporation of British Columbia*, 2011 BCCA 144 at para. 32;
- c) The assessment of loss must be based on the evidence, but requires an exercise of judgment and is not a mathematical calculation; *Rosvold v. Dunlop*, 2001 BCCA 1 at para. 18;
- d) The two possible approaches to assessment of loss of future earning capacity are the "earnings approach" and the "capital asset approach"; *Brown v. Golaiy* (1985), 26 B.C.L.R. (3d) 353 at para. 7 (S.C.); and *Perren v. Lalari*, 2010 BCCA 140 at paras. 11-12;
- e) Under either approach, the plaintiff must prove that there is a "real and substantial possibility" of various future events leading to an income loss; *Perren* at para. 33;
- f) The earnings approach will be more appropriate when the loss is more easily measurable; *Westbroek v. Brizuela*, 2014 BCCA 48 at para. 64. Furthermore, while assessing an award for future loss of income is not a purely mathematical exercise, the Court should endeavour to use factual mathematical anchors as a starting foundation to quantify such loss; *Jurczak v. Mauro*, 2013 BCCA 507 at paras. 36-37;
- g) When relying on an "earnings approach", the Court must nevertheless always consider the overall fairness and reasonableness of the award, taking into account all of the evidence; *Rosvold* at para. 11.

[313] Notably, what is being compensated is not lost projected future earnings but the loss or impairment of earning capacity as a capital asset. The approach in *Brown v. Golaiy*, (1985), 26 B.C.L.R. (3d) 353 will be more useful when the loss is not easily measurable on an earnings approach: *Perrin* at paragraph 11-12; see also *Pallos v. Insurance Corp. of British Columbia* (1995), 100 B.C.L.R. (2d) 260 (C.A.), and *Romanchych v. Vallianatos*, 2010 BCCA 20. I am satisfied that in this case, the approach in *Brown v. Golaiy* is preferred given the complexities of my analysis, as discussed below. Counsel for Mr. Hinds also advanced this general approach to assessing future capacity loss.

[314] Counsel for Mr. Hinds submits that important factors in assessing wage loss in this case are:

- (a) Mr. Hinds' pre-accident intent to work until age 75;

- (b) Mr. Hinds' ongoing financial requirement to continue working, including mortgage of approximately \$300,000.00 against his personal residence; and
- (c) the persistent and permanent nature of Mr. Hinds' injuries.

[315] Counsel for Mr. Hinds refers to the following loss of capacity cases:

- (1) In *Penner v. Davies*, 2022 BCSC 13, the Court considered the loss the plaintiff would suffer by her inability to do her job, as well as the affect this loss would have on her pension entitlement. The court also took into account that the plaintiff could have worked for nine more years and awarded the plaintiff one and half years' income, at \$82,000.00;
- (2) In *Bouvier v. Behrend*, 2014 BCSC 1208, the plaintiff bus driver suffered from an arm injury at the age of 57 and could no longer work as a bus driver as a result. His employer gave him alternate work, but he found it less rewarding, retired early, and found other jobs. Plaintiff counsel submitted that the plaintiff would have worked until he reached the age of 75 had there been no injury; this was accepted by the court. The plaintiff was awarded approximately 2 years and 3 months of his income, in the amount of \$160,000.00;
- (3) In *Taylor v. Grundholm*, 2010 BCSC 860, the plaintiff was 56 years old at the time of the accident and suffered a soft tissue and bicep injury. Prior to the accident, the Plaintiff owned a recreational property that was only accessible by water and required frequent upkeep. Due to the injuries, the Plaintiff is no longer able to care for his cabin or enjoy the recreational activities he once did. The Court found awarded \$180,000.00 but in doing found it unlikely that the plaintiff would have worked to the age of 70, noting other reasons unrelated to the accident that made this outcome unlikely. The Court reasoned that the plaintiff's gout, diabetes and arthritis would likely have had an impact on his ability to work regardless of the accident, and he likely would only have worked until 65 years of age. There was also the possibility that his ailments could have forced retirement earlier than 65.

[316] Counsel for Mr. Hinds submits that an award representing 2 to 2.5 years of Mr. Hinds' current yearly income would be appropriate and therefore advances a future capacity loss in the range of \$140,000.00 to \$175,000.00.

[317] Counsel for the defendants assert that the plaintiff is not entitled to any future loss of capacity award. He adds that the only reliable evidence before the Court demonstrates that the plaintiff's foot injury has not been an impediment to full-time work since May 2014.

[318] In assessing this issue, the expert evidence of Dr. Horlick is of considerable assistance. Dr. Horlick opined that the soft tissue injuries to Mr. Hinds' neck and back, from the January 2018 Accident, would likely resolve within three to four months and that they are not degenerative in nature; further, he opined that continuing to work would not interfere with any improvements achievable through a concentrated period of treatment.

- [319] Counsel for the defendants also pointed out that it has now been nine years since the 2013 Accident and four years since the January 2018 Accident, and Mr. Hinds has not reduced his hours or taken additional days off because of these accidents since his return to work in December 2, 2018.
- [320] Indeed, Mr. Hinds testified that his neck and lower back symptoms from the January 2018 Accident have largely resolved except for some flare-ups. In this light, I am unable to conclude that there is a real and substantial possibility that these soft tissue issues to Mr. Hinds' neck and back would be the cause of Mr. Hinds retiring before his planned retirement at the age of 75.
- [321] I have also considered whether Mr. Hinds' left foot symptoms will deteriorate, thereby creating a real and substantial possibility that he will retire before the age of 75. Considering the guidance provided by the authorities cited above, I am of the view that as a result of Mr. Hinds' foot injury arising from the 2013 Accident there is a real and substantial possibility that his condition could worsen such that he will not be able to continue working until his planned retirement, and this will impact his income earning capacity.
- [322] The difficult assessment is arriving at a fair and reasonable quantum of loss. In complex cases where the earnings approach is not viable, our courts have awarded the plaintiff's annual income for one or more years: *Devito v. Watson*, 2020 BCSC 1106 at para. 103; *Da Silva v. Pollard*, 2019 BCSC 2249 at para. 151; *Pallos* at para. 43. I am of the view that awarding a single year of income is consistent with this case law, and is also fair and reasonable in light of all the circumstances of this particular case.
- [323] One years' income for Mr. Hinds is \$70,000. However, I must also consider not only his age but the other variables that necessarily inform my assessment, in addition to his foot injury. The assessment is complex in light of Mr. Hinds' ongoing knee pain, tinnitus, and tinnitus-related headaches that have not been proven to be caused or exacerbated by the 2013 Accident or the January 2018 Accident but which nevertheless effect his health and will likely affect the time of his retirement. I find that that there is a real and substantial possibility that these non-accident related ailments, not caused by the defendants' negligence, will most likely result in Mr. Hinds retiring earlier than he intended. Further, the severity of these non-accident related ailments, as described by Mr. Hinds during his testimony, are of such a degree that the likelihood of them causing Mr. Hinds to retire early is relatively high.
- [324] In addition, I must also address the negative contingency arising from the real and substantial possibility that, even in the absence of the 2013 Accident, Mr. Hinds will likely suffer left foot pain in the fifth toe of his left foot because of his latent vulnerability and sensitivity, coupled with the repetitive pressure on that toe from driving buses. Considering these various negative contingencies, I find that a 35% reduction, in Mr. Hinds' \$70,000 future capacity loss, is both reasonable and fair.

[325] Accordingly, Mr. Hinds is entitled to an award of \$45,500 for loss of future capacity.

D. Cost of Future Care

[326] The test for determining the appropriate award for cost of future care is an objective one based on the evidence and on costs reasonably and medically necessary to restore Mr. Hinds to his pre-accident condition, insofar as possible: *Tsalamandris v. McLeod*, 2012 BCCA 239 at paras. 62-63; *Gignac v. Insurance Corporation of British Columbia*, 2012 BCCA 351 at paras. 29-30. Such costs must also be reasonable in the sense that they are costs the plaintiff will likely incur: *O'Connell v. Yung*, 2012 BCCA 57 at para. 68. Each case must be determined based on its own unique circumstances.

[327] Mr. Hinds has worn orthotics for a number of years since the 2013 Accident. Dr. Waseem confirmed that the continued use of orthotics is an appropriate on-going treatment. This is a medically necessary and reasonable cost of future care.

[328] Mr. Hinds currently has three sets of orthotics. He testified, however, that he requires five pairs and that they need to be replaced every two to three years. The most recent replacement of orthotics was in 2018. The costs involved a podiatry appointment on April 30, 2018 with a fee of \$195 and the cost of the orthotics at \$765.39. Counsel for Mr. Hinds submits, in the alternative, noting the 4-year replacement period to date, that a 4-year replacement schedule at \$765.39 per orthotics would be acceptable. He requests leave to make further submissions on the present value of this cost of future care should the parties be unable to agree.

[329] Mr. Hind testified that it is painful for him to walk in his bare feet. I am satisfied that four orthotics replaced every 4 years is both a medically necessary and reasonable expense. Four pair of shoes is not an unreasonable request, particularly since Mr. Hinds made it clear he would benefit from orthotic slippers.

[330] There is, however, a negative contingency to be applied in regard to my finding that there is a real and substantial possibility, in light of Mr. Hinds' latent vulnerability in his left foot, that he would have been injured by the repetitive stress on his foot when bus driving, even if the 2013 Accident had not occurred. There is a real and substantial possibility that this would, for example, have resulted in the need for orthotics in any event. Counsel for the defendants asserts that since Mr. Hinds has been applying force to the small area of his left foot for seventeen years now, there is at least a 75% probability that Mr. Hinds would need orthotics by now if the Accident had not occurred. In my view, such a contingency deduction is excessive. While it is admittedly challenging to assess what this negative contingency ought to be, I am of the view that a 25% negative contingency would be appropriate: see, for example, *Ho v. Eccles*, 2021 BCSC 244; and *Radacina v. Aquino*, 2020 BCSC 1143.

[331] As regards further treatment cost, I have accepted the evidence of Dr. Horlick, over that of Dr. Waseem, that Mr. Hinds would benefit from additional treatment, including:

- (1) Physiotherapy with intramuscular stimulation (IMS) - twice a week for one month, followed by once a week for a further two months;
- (2) Massage therapy - once every two weeks for one month, followed by once every three weeks for a further two months; and
- (3) Kinesiology - six visits.

[332] The parties have agreed that the cost of the above services is as follows:

- (1) Physiotherapy
 - (i) Initial visit \$100.00
 - (ii) Subsequent visits \$81.00
- (2) Massage therapy
 - (i) 30 minutes \$86.10
 - (ii) 45 minutes \$99.75
 - (iii) 60 minutes \$114.45
- (3) Kinesiology
 - (i) Initial visit \$120.75
 - (ii) Subsequent visits \$84.00

[333] I find that these costs are medically necessary and reasonable.

[334] Counsel for both parties have requested that I determine what costs of future care are medically necessary and reasonable, and what contingencies do or do not apply. They have stated that they will then address and calculate the present value of the cost of Mr. Hinds' future care. Given my findings on the cost of future care set out above, I leave it to counsel to complete this next step as they have requested. Mr. Gosling's cost of future care multipliers should be of assistance to the parties in this regard.

E. Special Damages

[335] The parties agreed to special damages in the amount of \$10,100.95, representing past costs incurred by Mr. Hinds for orthotics, podiatry appointments, physiotherapy, massage therapy, and kinesiology sessions.

[336] The defendants have not agreed to pay special costs relating to the cost of Mr. Hinds' attendance at a tinnitus clinic or for his hearing aides. However, the parties agreed the following costs were incurred by Mr. Hinds:

- a) tinnitus clinic, August 31, 2018: \$100
- b) hearing aide, November 28, 2018: \$2,709.

[337] Given my finding that Mr. Hinds has not proven on a balance of probabilities that the January 2018 Accident was a cause of his tinnitus related injuries, Mr. Hinds is not entitled to special damages relating to the tinnitus clinic and his hearing aide.

VII. DISPOSTION

[338] In light of the above reasons, I have concluded that Mr. Hinds is entitled to the following damages:

- (1) non-pecuniary damages of \$63,750;
- (2)
 - a) past loss of earning capacity, as a result of the 2013 Accident, from September 3, 2013 to May 11, 2014, not including the time he worked and received income in September 2013 and the days he received income during his gradual return to work in May 2014;
 - b) past loss earning capacity, as a result of the January 2018 Accident, Mr. Hinds is entitled to past loss of earning capacity from January 20, 2018 to May 20, 2018. Counsel have advised that they will calculated the precise net loss upon receiving these reasons. Counsel for the defendants anticipates this gross loss to be approximately \$58,000, although this approximation requires more precise calculations;
- (3) future loss of earning capacity of \$45,500;
- (4) future cost of care:
 - a) four pairs of orthotics, on a four-year replacement cycle; and
 - b) the specific treatment costs, as agreed between the parties, based on Dr. Horlick's treatment recommendations. Counsel for both parties have stated they will calculate the present value of this total sum based on Mr. Gosling's future care multiplier once I have confirmed the medically necessary and reasonable costs of future care; however, the total sum of the cost of future care is subject to a 25% contingency reduction based on the finding that there a real and substantial possibility that Hinds' latent vulnerability in his left foot, when coupled with the repetitive pressure on that foot while engaging the left turn signal while bus driving, would have resulted in the injury he has experienced to the fifth toe of his left foot even if the 2013 Accident had not occurred; and
- (5) Special damages of in the amount of \$10,100.95.

[339] Subject to any submissions the parties may wish to make on the question of costs, and absent any circumstances of which I am unaware, Mr. Hinds is entitled to his costs at Scale B.

"MORELLATO J."

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