

CANADA / JUDGMENT

Kalsey v. Byra

2021 BCSC 2170

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Supreme Court of British Columbia

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2021 BCSC 2170 Kalsey v. Byra

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Kalsey v. Byra,

2021 BCSC 2170

Date: 20211105

Docket: M193478

Registry: Vancouver

Between:

Satpal Singh Kalsey

Plaintiff

And

Ayrton Dale Ortiz, Canadian Dealer Lease Services Inc.,

Daniel Pater Byra, Christopher Byra, and

Jane Elizabeth Byra

Defendants

Corrected Reasons: Figure for Loss of Earning Capacity

at para. 158(c) was corrected on January 19, 2023

Before: The Honourable Madam Justice Marzari

Reasons for Judgment

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Place and Date of Trial:

Vancouver, B.C.

September 27-29, 2021

October 1, 4-8, 2021

Place and Date of Judgment:

Vancouver, B.C.

November 5, 2021

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INTRODUCTION

- [1] Satpal Singh Kalsey seeks damages in relation to personal injuries arising from two motor vehicle accidents that occurred within two months of each other on May 29, 2018 (the "First Accident") and July 30, 2018 (the "Second Accident") (collectively, the "Accidents"). Mr. Kalsey seeks pecuniary and non-pecuniary damages, including loss of past earnings and future earning capacity, costs of future care, and special damages. The defendants admit liability in each of the Accidents, but say that Mr. Kalsey's losses are more limited than he claims.
- [2] Overall, the parties agree that Mr. Kalsey suffered soft-tissue injuries in each of the Accidents, which properly give rise to a claim in damages. They also agree that:
- a) Mr. Kalsey suffered wage loss in the five to six months before he returned full time to his position as a bus driver for the Coast Mountain Bus Company ("CMBC");
 - b) Mr. Kalsey continues to suffer some chronic myofascial pain as a result of the Accidents; and
 - c) Mr. Kalsey continues to suffer mild Somatic Symptom Disorder ("SSD") as a result of the Accidents.
- [3] They also agree that his damages are indivisible as between the two Accidents.
- [4] However, the parties do not agree with respect to whether the full extent of Mr. Kalsey's current injuries are caused by the Accidents. For example, Mr. Kalsey says the Accidents caused persisting injuries to his neck, shoulders, hips, and lower back, while the defendants say that the injuries are now primarily limited to his right shoulder and neck. More

importantly, the parties disagree about the extent to which these injuries impact his function and losses, and the extent to which pre-existing or later arising non-tortious factors contribute to his current condition and future prognosis.

- [5] The defendants point to Mr. Kalsey's pre-existing history of neck and back pain prior to the Accidents (as chronicled in part in his extensive massage and chiropractic treatment history since becoming a bus driver in 2016) and to a pre-existing diagnosis of Adjustment Disorder arising from a workplace incident in 2017. They also point to another workplace injury in late 2019, approximately a year after Mr. Kalsey had successfully returned to full time work, in which Mr. Kalsey injured his back when lifting a man who had fallen from his wheelchair while disembarking from a bus (the "Wheelchair Incident"). The defendants say it was this incident that caused Mr. Kalsey to seek out alternative employment and ultimately accept his current position as the Safety Coordinator at Interfor's Acorn Mill in Delta, BC.
- [6] Mr. Kalsey disagrees, and says the Accidents caused him to change his employment. In any event, it is uncontentious that Mr. Kalsey earns a higher salary at his current position at Interfor than he did as a bus driver at CMBC. However, Mr. Kalsey says that he has lost the job security that he previously had as a bus driver at CMBC, as well as significant future income in the form of a more lucrative pension benefit, and greater opportunities for premium pay and advancement at CMBC.

ISSUES

- [7] The primary issues that I must determine in this case are as follows:
- a) Causation: To what extent did the Accidents contribute to Mr. Kalsey's current physical and psychological injuries? In particular, to what extent were those injuries likely to occur in any event as a result of either his pre-existing conditions or the Wheelchair Incident in 2019?
 - b) Non-pecuniary damages: What is the appropriate award in this case?
 - c) Past loss of earnings: How should this be assessed, and should Mr. Kalsey's wage losses after the Accidents be offset by his increased salary at his new position commencing in 2020?
 - d) Future earning capacity: Has Mr. Kalsey experienced a loss and, if so, what is the appropriate award?
 - e) Costs of Future Care.
 - f) Special Damages.

BACKGROUND AND FACTUAL FINDINGS

- [8] As noted above, the parties have been able to agree on many key facts, including the presence of a chronic mental and physical injury. With respect to the remaining factual issues that require resolution, I rely on the evidence elicited in the direct and cross-examination of Mr. Kalsey, his wife Opreet Kang, his sister-in-law, his massage therapist and

his chiropractor (called by the defendants), as well as the plaintiff's three medical experts: Dr. David Koo, Dr. David Morgan, and Ms. Natalie Hull. I have also considered the expert opinion evidence of the economist, Darren Benning, and the records-review report of occupational therapist, Beverley Wilson.

- [9] The defendants say that Mr. Kalsey's account of his injuries should not be fully accepted. To this end, they point to the fact that Mr. Kalsey signed a health insurance application in December 2018 indicating that he had no psychiatric disorders, no muscular or skeletal disorders or diseases, and that his Accident-related injuries had resolved. Mr. Kalsey testified that he had consulted an agent when answering the questions on this application and had fully disclosed his motor vehicle injuries and condition to this agent. He also stated that he had accepted the advice of the agent in this regard when providing his answers.
- [10] Had Mr. Kalsey exaggerated his injuries before me, I may have been more concerned. However, Mr. Kalsey's account of his ongoing injuries, although not suggesting they had fully resolved, related more to his durability at work and recreational pursuits, his frustration with having to maintain a rigorous stretching regime, and his anxiety and depressed thoughts around his diminished ability to play with his daughter and support his wife around the house. I am not surprised that he did not consider these ailments to be "disorders" or "diseases" in December 2018, and his generally optimistic and resilient perspective might have also coloured his answers to the insurance questionnaire at that time.
- [11] Overall, I find that Mr. Kalsey was a credible and reliable witness with respect to his injuries. I agree with his counsel that, for the most part, Mr. Kalsey did not overstate or linger on his pain or functional limitations, and that based on the testimonies of his wife and sister-in-law, it is even possible that he understated his condition.

Pre-Accident History

- [12] Mr. Kalsey's history is relatively uncontentious. He was born in the United Kingdom. His mother left him and his brother when he was about ten years old after a difficult time. Mr. Kalsey needed counselling and was raised by his father after that, and his young life became more stable. He took on many responsibilities at a young age. I accept the opinion of the psychiatrist, Dr. Morgan, that Mr. Kalsey had Adverse Childhood Experiences, which made him more vulnerable to psychological injuries later in life. Nevertheless, Mr. Kalsey also benefited from protective factors, including participating in physical activities like martial arts and rugby. Overall, he has demonstrated remarkable resilience throughout his life.
- [13] Mr. Kalsey moved to Canada in 2007, at approximately 27 years old. He met his wife in 2010 and they married in 2012. In the years before the Accidents, Mr. Kalsey enjoyed outdoor physical activity, including long rides on his bicycle and motor bike, and skiing (he had worked at Grouse Mountain in his off-season).

- [14] In or about 2015, Mr. Kalsey and his wife decided that they wanted to start a family. Mr. Kalsey gave up his job in the field of telecommunication tower construction, which would regularly take him away from home for weeks at a time, and began a diploma program in Occupational Health and Safety ("OHS"). During this time, Mr. Kalsey also temporarily worked in a number of different retail stores, including Home Depot and FGL Sports Ltd., before becoming a bus driver with CMBC.
- [15] In or about 2015, the couple also moved into the basement of Ms. Kang's parent's home so they could assist around the house and save money. Prior to the Accidents, I find that Mr. Kalsey was responsible for household cleaning, including vacuuming, kitchen and bathroom cleaning, and taking out the garbage. He also did most of the yard work and home maintenance (particularly for his in-laws while living with them). Ms. Kang was primarily responsible for shopping and cooking.
- [16] I accept the evidence of both Mr. Kalsey and Ms. Kang that Mr. Kalsey enjoyed driving a public transit bus and was well-suited to many aspects of this job. I also find that aspects of this job were hard on him physically and mentally. Shortly after commencing this job, Mr. Kalsey began to take advantage of the massage and chiropractic benefits offered by his union. His treatment records show regular treatments for tension and soreness in his low back, mid-back, and neck, as well as some headaches and occasional acute injuries, such as to his Achilles.
- [17] In the two years leading up to the Accidents, Mr. Kalsey sustained a number of work-related injuries, including:
- a) In spring 2017, he suffered a left Achilles injury that rendered him unable to work for two months. Mr. Kalsey says this injury was related to his bus driving work;
 - b) In September 2017, Mr. Kalsey's bus was involved in a collision with a cyclist, for which he was found not responsible. The event was a traumatic and intense experience, and Mr. Kalsey developed an Adjustment Disorder for which he was prescribed anti-depressants for a short time. As a result, he was off work for approximately one month and he was required to complete a month-long temporary rehabilitation placement followed by a three-week graduated return to work.
 - c) On January 30, 2018, Mr. Kalsey was adjusting poles on his bus when he injured his left shoulder. As a result, he was off work until March 6, 2018, when he commenced a graduated return to work.
 - d) In March 2018, Mr. Kalsey experienced another work-related injury when his seat bottomed out over a railroad.

- [18] Apart from the September 2017 incident, Mr. Kalsey does not recall these incidents resulting in significant time away from work. However, his work records establish that, as a result of these pre-Accident incidents, in total, he was absent from work for approximately four and a half months, and on a temporary rehabilitation placement or graduated return to work for approximately another four months. I agree with the defendants that these work-related injuries suggest a lack of long term durability to be a bus driver, irrespective of the Accidents.
- [19] Indeed, even before the Accidents, Mr. Kalsey had been job shadowing supervisory and safety-oriented positions within CMBC, and had continued to pursue his diploma in OHS towards this end. At one point, he took the examinations for a supervisory position. Although he was unsuccessful, he had planned to try again and took the initiative to figure out how he might improve his results. I find that his long-term career goals did not include bus driving, but rather were oriented towards a supervisory or OHS position, albeit within CMBC.

The Accidents

- [20] The First Accident occurred on May 29, 2018, near the intersection of Southwest Marine Drive and Oak Street, in Vancouver, BC, while Mr. Kalsey was on his way to work. Mr. Kalsey was stopped at a red light and the defendant Ayrton Dale Ortiz was directly behind Mr. Kalsey. Mr. Ortiz testified that he also came to a full stop, but then released his brake pedal and his car moved forward. Mr. Ortiz described the impact as a "bump." Mr. Kalsey described it as being pushed forward. I find that while there was little to no visible damage to either vehicle, Mr. Kalsey experienced the impact physically. When Mr. Kalsey arrived at the bus yard (a short distance from the site of the First Accident) to start his shift, he experienced signs of shock - his mouth was dry, his hands were clammy, and his legs felt like jelly. He went for a small walk around the bus yard to see whether he was fit to work and, from there, called his supervisor and advised that he was going to go home. He testified that he could feel burning in his shoulders and upper neck at the base of his skull, which later extended down his back to his hips. At home, he was stiff and sore, and had difficulty bending over. Shortly thereafter, he made an appointment with his family doctor, his massage therapist, and his chiropractor.
- [21] Both Mr. Kalsey's chiropractic treatment records, and his chiropractor at trial, indicate that after the First Accident Mr. Kalsey experienced a qualitative change from his base level work-related tensions and soreness. The evidence also indicates that Mr. Kalsey's symptoms had significantly improved within a few weeks, and that the range of motion in his neck had been largely restored prior to the Second Accident. This is consistent with Mr. Kalsey's own evidence that he had been feeling better and had planned a gradual return to work at around the time of the Second Accident. I nonetheless accept Mr. Kalsey's evidence that he had not fully recovered to his physical pre-Accident baseline by that time.

- [22] In late July 2018, Mr. Kalsey and his wife moved out of her parent's basement suite and into a home in Delta, BC. The evidence establishes that, while Mr. Kalsey was able to assist with the move, he exhibited physical limitations that he did not have prior to the First Accident. He required more assistance moving heavier objects and was slower to complete the move.
- [23] The Second Accident occurred on July 30, 2018 near the intersection of Boundary Road and Vanness Avenue, in Vancouver, BC. Mr. Kalsey was stopped at a traffic light. The defendant Daniel Peter Byra was directly behind him and was preparing to stop at the light as well, but he looked down momentarily, mistimed his stop, and collided with Mr. Kalsey's vehicle. As a result of the Second Accident, a partial imprint of Mr. Byra's licence plate was visible on Mr. Kalsey's fender.
- [24] The medical evidence establishes that, in the First Accident, Mr. Kalsey experienced soft tissue injuries affecting his jaw, neck, shoulders, and upper and lower back. Although he had mostly recovered from these injuries and had planned a gradual return to work, the Second Accident aggravated his unresolved injuries from the First Accident, thereby significantly delaying his return to work plans.
- [25] I find that by the end of November 2018, Mr. Kalsey had recovered from both of the Accidents sufficiently to return to full time work as a bus driver. He continued this work until the end of November 2019, when he injured his back during the Wheelchair Incident. I accept Mr. Kalsey's evidence that working full time over this period was physically more difficult than it had been before the Accidents, particularly after the fourth or fifth full time work day. I also accept that, during this period, he had been exploring some options to attempt to alleviate those symptoms, including trying different schedules, types of buses and bus routes.
- [26] I also find that, throughout 2019, Mr. Kalsey's injuries required him to take time at the end of his work week to recover, which limited the renovations he was able to complete on his new home. While Mr. Kalsey had completed many home improvement projects for his in-laws while he lived at their home - including climbing on their roof and cleaning their gutters, and painting their garage - his ability to complete yard and home renovation work was more limited and took longer after the Accidents.
- [27] More significantly, I find that after the Accidents, he was limited in the physical activities he could engage in with his daughter, who was approximately six months old at the time of the First Accident and eight months old at the time of the Second Accident. Whereas he had regularly cared for his two young nieces before the Accidents, including playing physical games like horsey, he has been limited to more constrained physical play with his daughter, and has been unable to participate fully in her toddler soccer and biking camps over the last two years.

- [28] I should note that Mr. Kalsey is still a loving and engaged parent, but his feelings of inadequacy and insecurities regarding these limitations have caused sleeplessness and other psychological injuries.
- [29] I accept the evidence of Dr. Morgan that Mr. Kalsey likely developed an Unspecified Depressive Disorder after the First Accident, and a Major Depressive Disorder of mild to moderate severity after the Second Accident. Although his depressive symptoms had resolved by his examination in April 2021, Mr. Kalsey was still experiencing depressive cognitions, reflecting a negative view of the world and himself. Additionally, based on Dr. Morgan's opinion, I find that Mr. Kalsey developed SSD after the Accidents, which was initially more severe but has since become mild yet persistent. I also accept Dr. Morgan's evidence that this condition was most likely caused by the cumulative effect of both of the Accidents.
- [30] Following the September 2017 collision with a cyclist, Dr. Morgan had also diagnosed Mr. Kalsey as having experienced an episode of Adjustment Disorder, which required treatment for depression prior to the Accidents. While that disorder had fully resolved, it nonetheless left Mr. Kalsey more vulnerable to further such episodes. I accept Dr. Morgan's evidence that Mr. Kalsey's mental injuries after the Accidents were qualitatively different from those after the September 2017 incident. In particular, I find that the Accidents impaired one of his central coping mechanisms: his ability to exercise vigorously and enjoy outdoor physical activity.

Post-Accident Events

- [31] Towards the end of November 2019, after his first 12 months of continuous full time work as a bus driver, Mr. Kalsey injured his back in the Wheelchair Incident. His income over those 12 months, including his base wage and the various premiums available to him as a bus driver, was just over \$70,000.
- [32] At around that same time, Mr. Kalsey received his diploma in OHS from Simon Fraser University.
- [33] Mr. Kalsey testified that, throughout 2019, he had been looking for opportunities in OHS or supervisory roles at CMBC. However, after the Wheelchair Incident, he went into "overdrive" to find a new job.
- [34] Mr. Kalsey and his wife looked into Mr. Kalsey's opportunities to apply for an OHS or supervisory position at CMBC. Ms. Kang testified that they concluded that, based on his seniority and the availability of such positions, he would likely have to continue driving a bus for another one-and-a-half to two years before such an opportunity would arise. They both testified that Mr. Kalsey would have stayed with CMBC if he could have done so in one of these positions. They also testified that he searched for positions outside of CMBC because of the physical discomfort he experienced towards the end of each week of bus driving following the Accidents.

- [35] The defendants argue that bus driving was already causing Mr. Kalsey ongoing injuries and aches and pains before the Accidents. They also argue that it was the Wheelchair Incident that was the "straw that broke the camel's back" and led Mr. Kalsey to look outside CMBC for a position consistent with his new diploma.
- [36] In any event, the evidence establishes that Mr. Kalsey never returned to bus driving after the Wheelchair Incident in 2019, and instead went on a series of rehabilitation placements at half wage and less than half time throughout January and February 2020. In March 2020, Mr. Kalsey left CMBC, cashed out his pension, and started his new position as a Safety Coordinator with Interfor at the Acorn Mill in Delta, BC.
- [37] The evidence establishes that this new role is well suited to his abilities and his physical limitations. It involves a combination of desk work (for which his new employer got him a standing desk) and walking while performing inspections and audits of the Acorn Mill. He is able to structure his time to alternate stationary activities with moving activities. Furthermore, his employer provides him with the flexibility to arrive early or work later as needed to accommodate his physiotherapy and other appointments during work hours.
- [38] This position is also better paying than his work as a bus driver. Mr. Benning calculated Mr. Kalsey's current salary as just under \$80,000, and he also received a \$12,404 bonus in his first year. The Acorn Mill is close to his home in Delta, and he loves both the work and workplace.
- [39] At home, Ms. Kang hired several contractors to complete essential renovations to their new home. She also assumed some of the more physically demanding cleaning tasks previously undertaken by Mr. Kalsey. Although he does so at a slower pace, Mr. Kalsey continues to perform daily household tasks, including home, yard, and roof maintenance.

Current State of Injuries and Prognosis

- [40] I find that Mr. Kalsey continues to have mild chronic pain in his neck and shoulders and at the base of his skull caused by the Accidents. I also find that certain activities, including lifting and playing with his daughter, playing his guitar, and riding his bicycle and motorbike for extended periods of time, will cause flare ups of pain, particularly in his trapezius muscles and neck, and particularly on his right side. He has good days and bad days and, on good days, he takes the opportunity to be more active. However, he also has to be vigilant with his physiotherapy exercises, generally doing them every morning and night, and using a roller to roll out stiff or sore muscles throughout the day.
- [41] He resents this constant effort and diligence and the time it takes out of his day, and worries that he will never be free of this requirement. His daughter has now taken to joining him to do these exercises, and he wishes that their time together could be more playful and oriented to her needs rather than his.

- [42] I find that with this additional time and effort, Mr. Kalsey has maintained a significant level of functionality, despite his persistent mild pain. Ms. Hull, an occupational therapist, performed a functional capacity evaluation of Mr. Kalsey in June 2021. Upon testing, Ms. Hull found that Mr. Kalsey has ordinary levels of function in most areas of daily life, with the following functional limitations:
- a) He is not suited for repetitive or sustained end range reaching (i.e., extending his arm out and away from his body) with his right arm, which affects his ability to perform certain heavier household cleaning tasks;
 - b) He is limited to brief intervals (approximately 20 seconds or less) of overhead reaching using his right arm, on an infrequent basis. His left arm overhead reaching is also limited to short intervals (up to 60 seconds), on an infrequent basis;
 - c) He has a reasonable sitting tolerance of approximately 60 minutes, and is capable of work requiring full time sitting demands if he has opportunities to take regular postural breaks to stand and/or walk about regularly throughout the day. He is not suited for jobs requiring rigid prolonged sitting demands, including bus driving;
 - d) He is capable of jobs requiring standing and self-paced walking demands. He can tolerate standing and walking demands for approximately 1/3 of the work day; and
 - e) He can manage short and occasional stretches of stooping, crouching, kneeling, and crawling.
- [43] Ms. Hull testified that, based on the tests she conducted, Mr. Kalsey's pacing, planning, prioritizing, and similar techniques have allowed him to remain as functional as he is.
- [44] I do not consider the records review performed by Ms. Wilson to cast any doubt onto the above findings. It confirms Mr. Kalsey's unsuitability as a bus driver in light of his objective functional limitations.
- [45] With respect to Mr. Kalsey's mood and psychological state, I find that Mr. Kalsey is very close to his wife's large family and his ability to contribute to that family is very important to him. His sister-in-law describes Mr. Kalsey as hard working and fiercely caring and considerate to his family. Prior to the Accidents, she describes Mr. Kalsey as a man who was charming, supportive, accommodating, and full of joy. She says that he continues to be a loving and supportive family member, but his sense of joy has diminished since the Accidents, and he is less able to accommodate the needs of others over his own.
- [46] This largely accords with Ms. Kang's and Mr. Kalsey's evidence. I find that being a supportive and loving father, husband, son-in-law, and brother-in-law has been, and continues to be, an important part of Mr. Kalsey's sense of self-worth and identity, and that he is keenly aware of where he now considers to be falling short in these areas.

- [47] I find that Mr. Kalsey's mild but persistent SSD and depressive cognitions elevate his experience of pain, induce anxiety regarding physical activity, and limit his functioning in a manner that tends to reinforce his physical limitations.
- [48] With respect to Mr. Kalsey's prognosis, Dr. Koo opined that Mr. Kalsey has likely achieved "maximal medical recovery," which he clarified in cross examination as meaning that Mr. Kalsey was at the point of diminishing returns of medical interventions to improve his condition. However, Dr. Koo recommended that Mr. Kalsey continue passive therapies to increase his cardiovascular endurance, strength, and range of motion, including regular oversight by a personal trainer or kinesiologist. Dr. Koo also recommended that Mr. Kalsey be assessed by a psychiatrist and an occupational therapist.
- [49] With respect to his psychiatric assessment, while Dr. Morgan also provided a guarded prognosis, I found his report and opinion to be more optimistic than Dr. Koo's. I also found his opinion to be based on assumptions regarding Mr. Kalsey's past and current condition that were more consistent with the evidence adduced at trial and my findings in that regard. Dr. Morgan opined that with a combination of cognitive behavioural therapy ("CBT") to assist with his SSD and anxiety symptoms, appropriate medication, and supportive physical treatment for pain management, it is possible that Mr. Kalsey could fully recover. Without those treatments and therapies, Dr. Morgan opined that his condition could decline. His opinion is that the more likely outcome is somewhere in between these two extremes and that the recommended treatments could make a significant difference.
- [50] Because physical activity is one of Mr. Kalsey's protective factors, restoring physical comfort and alleviating anxiety around physical movement is likely to also improve Mr. Kalsey's mood. Similarly, improvements to his mood should also contribute to better physical health.
- [51] I find that it is likely that Mr. Kalsey will always have to closely manage his symptoms, including by stretching and exercising daily, as well as planning ahead to incorporate appropriate levels of activity as needed. I also find that Mr. Kalsey will likely always struggle with recreational and workplace activities that require lengthy periods of static sitting and reaching. Nevertheless, I consider that his mood and physical function, and his ability to play physically with his daughter and pursue his favoured recreational activities, have continued to improve since the Accidents and may improve further with proper treatment.

CAUSATION

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

- [53] The primary test for causation asks whether the plaintiff would have suffered the injury but for the defendant's negligence. The "but for" test recognizes that compensation for negligent conduct should only be made where there is a substantial connection between the injury and the defendant's conduct: *Resurface Corp. v. Hanke*, 2007 SCC 7 at paras. 21-23.
- [54] However, the plaintiff need not establish that the defendant's negligence was the sole cause of the injury: *Athey* at para. 17. In *Karim v. Li*, 2015 BCSC 498, Justice Abrioux (as he then was) addressed non-tortious contributing causes to personal injuries:
- [92] A defendant is liable for any injuries caused or contributed to by her or her negligence. If the defendant's conduct is found to be a cause of the injury, the presence of other non-tortious contributing causes does not reduce the extent of the defendant's liability. However, if the defendants did not cause an injury, the defendants will not be liable for any losses or damages flowing from that injury: *Brewster v. Li*, 2013 BCSC 774 at para. 78; *Blackwater v. Plint*, 2005 SCC 58 at para. 78.
- [55] Causation must be established on a balance of probabilities before damages are assessed.
- [56] The plaintiff must be placed in the position that they would have been in if but for the defendant's negligence - no better or worse. Tortfeasors must take their victims as they find them, even if the plaintiff's injuries are more severe than they would be for the average person (also known as the "thin skull" rule). However, the defendant need not compensate the plaintiff for any debilitating effects of a pre-existing condition that they would have experienced anyway (also known as the "crumbling skull" rule): *Athey* at paras. 32-35. The Supreme Court of Canada articulated the "crumbling skull" rule in *Athey* as follows:
- [35] The so-called "crumbling skull" rule simply recognizes that the pre-existing condition was inherent in the plaintiff's "original position". The defendant need not put the plaintiff in a position better than her or her original position. The defendant is liable for the injuries caused, even if they are extreme, but need not compensate the plaintiff for any debilitating effects of the pre-existing condition which the plaintiff would have experienced anyway. The defendant is liable for the additional damage but not the pre-existing damage . . . Likewise, if there is a measurable risk that the pre-existing condition would have detrimentally affected the plaintiff in the future, regardless of the defendant's negligence, then this can be taken into account in reducing the overall award . . . This is consistent with the general rule that the plaintiff must be returned to the position he would have been in, with all of its attendant risks and shortcomings, and not a better position.
- [Emphasis in original.]
- [57] The "crumbling skull" factor may be addressed in a number of ways, including as a percentage reduction on damages awards, which reflects the likelihood that a pre-existing injury or condition would result in similar losses: see for example *Booth v. Gartner*, 2010 BCSC 471; and *Beardwood v. Sheppard*, 2016 BCSC 100.

- [58] In *T.W.N.A. v. Canada* (Ministry of Indian Affairs), 2003 BCCA 670, the Court of Appeal treated non-tortious events that contributed to the plaintiff's damages similarly to a "crumbling skull" scenario:
- [36] Unrelated intervening events must be taken into account in the same way as pre-existing conditions. If such an event would have affected the plaintiff's original position adversely in any event, the net loss attributable to the tort will not be as great and damages will be reduced proportionately (*Athey v. Leonati* at 31-32).
- [59] The treatment of a contributory but non-tortious event is different from the question of causation. Causation is established pursuant to the "but for" test, which does not exclude the contribution of other non-tortious causes. However, even where the plaintiff has met the burden of proof of a causative link, the defendant may not be responsible for the full extent of the plaintiff's loss where there is another non-tortious cause that has contributed to those losses. As set out by the Supreme Court of Canada in *Blackwater v. Plint*, 2005 SCC 58:

78 It is important to distinguish between causation as the source of the loss and the rules of damage assessment in tort. The rules of causation consider generally whether "but for" the defendant's acts, the plaintiff's damages would have been incurred on a balance of probabilities. Even though there may be several tortious and non-tortious causes of injury, so long as the defendant's act is a cause of the plaintiff's damages, the defendant is fully liable for that damage. The rules of damages then consider what the original position of the plaintiff would have been. The governing principle is that the defendant need not put the plaintiff in a better position than his original position and should not compensate the plaintiff for any damages he would have suffered anyway: *Athey* . . .

- [60] And, as summarized by this Court at para. 36 of *Cummings v. Tellier*, 2019 BCSC 2067, endorsing para. 34 of *Khudabux v. McClary*, 2018 BCCA 234, "[a] finding in favour of causation does not require a determination as to the extent of the contribution in relation to other possible factors. That determination is relevant to damages, not causation."
- [61] In some cases, a new act or event, occurring after a defendant's wrongful act, may give such a pronounced new impetus or deflection to the chain of causation that the original wrongful act of the defendant is no longer a sufficient cause upon which to rest legal liability at all. This principle is known as the defence of "novus actus interveniens": *Yoshikawa. v. Yu* (1996), 21 B.C.L.R. (3d) 318 (C.A.) at para. 21. The defence of novus actus interveniens is successful when the new act is of sufficient magnitude to break the chain of causation. The novus actus interveniens analysis is conducted as part of the proximate cause analysis so that a defendant is not held liable for objectively unforeseen consequences of his or her actions. The question of whether a subsequent act breaks the chain of causation is a question of fact: *Hussack v. Chilliwack School District No. 33*, 2011 BCCA 258 at paras. 87-88.

- [62] The defendants in this case make both arguments regarding Mr. Kalsey's workplace accident at the end of 2019. They also argue that Mr. Kalsey's history of workplace injuries and treatments establish a pre-existing condition with a likelihood of future injury and loss, independent of the Accidents.

Pre-existing Conditions

- [63] The defendants say that Mr. Kalsey had a variety of pre-existing conditions that were affecting and, would likely have contributed to, the diminishment of the enjoyment of his life even without the Accidents. These are primarily the aches and tensions that are recorded in his massage and chiropractic therapy records from 2016 until the Accidents in 2018, which the defendants say were primarily related to his job as a bus driver.
- [64] Mr. Kalsey's documented complaints ranged from stiffness and soreness to pain, and affected him from his neck to his lower back, with occasional issues with his legs and ankle as well. The evidence establishes that he took advantage of regular chiropractic, massage therapy, and acupuncture treatments, all of which were available through his union benefits.
- [65] The defendants also note that Mr. Kalsey was diagnosed with gout in 2012 and experienced a painful flare up of that condition in September 2018, not long after the Accidents. Dr. Koo described gout as a permanent condition, but one that could generally be well-managed, and only painful when it flares.
- [66] Mr. Kalsey was also likely predisposed to anxiety and SSD as a result of his Adverse Childhood Experiences.
- [67] The defendants argue that this combination of pre-existing conditions would have likely manifested, at least physically, "in some fashion" regardless of the Accidents. The defendants acknowledge that these complaints did not appear to have significant functional impact, but suggest that a 15% discount should be applied to Mr. Kalsey's non-pecuniary damages to account for these conditions. They rely on *MacGregor v. Bergen*, 2019 BCSC 315 and *Hoy v. Williams*, 2014 BCSC 234 at para. 131, as cases where a similar discount was applied for non-acute pre-existing conditions.
- [68] The defendants seek a further 15 to 20% discount to Mr. Kalsey's non-pecuniary damages in relation to the Wheelchair Incident, in much the same way that the Court in *Athey* contemplated a reduction in damages for events that do not break the chain of causation, but nonetheless independently contribute to a plaintiff's disability. The defendants argue that the Wheelchair Incident was an independently arising event that was both physically disabling and factored into Mr. Kalsey's psychological condition as assessed by Dr. Morgan.
- [69] I understand this to be an alternative to the defendant's primary argument that the Wheelchair Incident broke the chain of causation altogether in relation to future earnings loss, because it is responsible for Mr. Kalsey's decision to leave his position as a bus driver.

- [70] Mr. Kalsey says that, while the Wheelchair Incident in late 2019 may have accelerated his search for alternate employment, he would not have been looking for alternate employment outside of CMBC were it not for the Accidents.

Findings

- [71] I find on the evidence that Mr. Kalsey's pre-Accident soreness and tension documented in his chiropractic and massage therapy records is not evidence of a pre-existing condition that was likely to cause longer term chronic pain, as these were variable and transient symptoms that resolved with therapy. Generally, these appointments were scheduled well in advance, as preventative maintenance, rather than in response to acute concerns or pre-existing chronic pain conditions. The therapists testified that these treatments and conditions were similar to those experienced by other bus driver clients.
- [72] However, I also find that Mr. Kalsey's history of bus driving-related physical complaints, particularly in his record of injury-related time off work, indicate that bus driving was physically demanding on Mr. Kalsey and there is a real and substantial possibility that it would not have been sustainable long term irrespective of the Accidents.
- [73] This is somewhat acknowledged by Mr. Kalsey, whose evidence is that he was looking to move on from bus driving, but hoping to do so within CMBC. He testified that, had the Accidents not occurred, he would have persisted in his bus driving role for as long as it took to obtain a supervisory position at CMBC. I find that at the time of the Accidents, there was also a real and substantial possibility that Mr. Kalsey would have been able to continue his work as a bus driver for another three to five years, before successfully securing the type of safety or supervisor oriented position within CMBC that he aspired to.
- [74] Overall, I find that the Accidents precluded Mr. Kalsey from being able to work as a bus driver for another three to five years after the Accidents, but were not the sole cause of Mr. Kalsey's decision to accept a position at Interfor in March 2020. At the end of 2019, not only was Mr. Kalsey on disability leave again for another workplace injury, but he had also just received his OHS diploma. The career opportunity at Interfor paid substantially more and was closer to home. The fact that it was physically more sustainable than bus driving, particularly after the Accidents, likely also played a significant role in this decision.
- [75] I also do not consider Mr. Kalsey's employment change to have had a negative impact on his health. To the contrary, he loves his current job and feels appreciated and supported in doing it; it is flexible, closer to home, allows him to think on his feet, and does not require him to maintain a static and uncomfortable position all day. While Mr. Kalsey's new position also carries considerable responsibilities, Mr. Kalsey's description of driving public transit buses - from missing switches to being spat on - suggests that that position also involved significant mental stressors.

[76] I find that the Wheelchair Incident was a non-tortious factor that contributed to Mr. Kalsey's decision to look for alternative employment at the beginning of 2020, but not one that broke the chain of causation in relation to his pecuniary losses. In relation to Mr. Kalsey's non-pecuniary losses, I find that the Wheelchair Incident likely also contributed to his psychological injuries that were still present at the time of trial, but were not the cause of them. This loss of mobility for a period of a few months, together with Mr. Kalsey's pre-existing vulnerability to SSD and depression in situations where he experiences a loss of physical activity, requires some adjustment to Mr. Kalsey's non-pecuniary damages. However, rather than applying a specific discount factor, I prefer to take this factor into account more generally when assessing his damages.

NON-PECUNIARY DAMAGES

[77] Non-pecuniary damages are awarded to compensate the plaintiff for pain, suffering, loss of enjoyment of life, and loss of amenities. The compensation awarded should be fair to all parties, and fairness is measured against awards made in comparable cases, taking into account the specific and unique circumstances of each plaintiff. Comparable cases, though helpful, serve only as a rough guide. Each case depends on its own unique facts: *Trites v. Penner*, 2010 BCSC 882 at paras. 188-189.

[78] In *Stapley v. Hejslet*, 2006 BCCA 34, the Court of Appeal outlined the factors to be considered when assessing non-pecuniary damages at paras. 45-46:

[45] Before embarking on that task, I think it is instructive to reiterate the underlying purpose of non-pecuniary damages. Much, of course, has been said about this topic. However, given the not-infrequent inclination by lawyers and judges to compare only injuries, the following passage from *Lindal v. Lindal*, *supra*, at 637 is a helpful reminder:

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" (*Cooper-Stephenson and Saunders, Personal Injury Damages in Canada* (1981), at p.373). 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" (*Thornton* at p.284 of S.C.R.).

[46] The inexhaustive list of common factors cited in [*Boyd v. Harris*, 2004 BCCA 146] that influence an award of non-pecuniary damages includes:

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

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

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

- (g) impairment of family, marital and social relationships;
- (h) impairment of physical and mental abilities;
- (i) loss of lifestyle; and
- (j) the plaintiff's stoicism (as a factor that should not, generally speaking, penalize the plaintiff: *Giang v. Clayton*, 2005 BCCA 54).

[79] The assessment of non-pecuniary damages is necessarily influenced by the individual plaintiff's personal experiences in dealing with his or her injuries and their consequences: *Dilello v. Montgomery*, 2005 BCCA 56 at para. 25.

Parties' Positions

[80] Mr. Kalsey was 38 years old at the time of the Accidents and 41 years old at the time of trial. Mr. Kalsey is seeking a non-pecuniary damages award of \$165,000, including compensation for his loss of housekeeping capacity.

[81] He relies on the following cases where non-pecuniary damages were awarded in the \$130,000 to 165,000 range (when adjusted for inflation), that he says are comparable: *Flores v. Burrows*, 2018 BCSC 334 (\$115,000), *Tolea v. Huang*, 2021 BCSC 260 (\$150,000); *Johnstone v. Rogic*, 2018 BCSC 988 (\$145,000); and *Bidulka v. Haugen*, 2020 BCSC 1065 (\$165,000).

[82] The defendants say that in all of the above cases, the plaintiffs suffered more severe chronic pain conditions than Mr. Kalsey.

[83] The defendants submit that Mr. Kalsey's injuries merit a non-pecuniary award between \$50,000 and \$75,000, after appropriate discount factors are applied for his pre-existing condition and the Wheelchair Incident. The defendants rely on the following cases where awards were made in the \$46,000 to \$80,000 range (when adjusted for inflation), which they say are illustrative of an appropriate award in this case: *Eng v. Titov*, 2012 BCSC 300 (\$40,000); *Sooch v. Snell*, 2012 BCSC 696 (\$45,000); *Bhumrah v. McLeary*, 2021 BCSC 560 (\$80,000); and *Mothe v. Silva et al.* 2015 BCSC 140 (\$40,000).

[84] Of these, the defendants suggest Bhumrah to be the most apposite.

Determination

- [85] In my view, none of these cases are entirely comparable. Mr. Kalsey's injuries have not had as significant an impact on him as those in Tolea, Johnstone, or Bidulka, and Mr. Kalsey is older and has a better prognosis than the 31 year old plaintiff in Flores (though that plaintiff had no mental injury).
- [86] While I consider Mr. Kalsey's injuries and prognosis are similar to that in Bhumrah, the impact on Mr. Kalsey, regarding his contributions to his family and particularly his daughter, weigh more heavily on him. His ability to help his extended family with physically demanding tasks, play horsey, and contribute to the cleanliness and maintenance of his home, are all important aspects of Mr. Kalsey's identity that have been negatively impacted by the Accidents. Despite his natural resilience, these limitations have negatively affected his mood and psychological integrity. I have also been asked to consider any potential award for loss of housekeeping capacity within this assessment.
- [87] I must also consider the contribution to Mr. Kalsey's current loss of enjoyment of life as a result of the Wheelchair Incident. Although not an independent cause of his current condition, I have found it likely would have had some negative impact on Mr. Kalsey's mood and pain experience.
- [88] Taking all of these considerations into account, I would award Mr. Kalsey \$90,0000 in non-pecuniary damages.

PAST LOSS OF EARNINGS

- [89] The parties agree that Mr. Kalsey lost \$25,148 in net income from CMBC in the five to six months following the Accidents when he was absent from work, working in a rehabilitation posting, or involved in a gradual return to work program. Mr. Benning calculated this amount, net of taxes, from Mr. Kalsey's employment records. Neither party takes any issue with this calculation as a starting point.
- [90] From this net \$25,148 amount, Mr. Benning subtracted \$9,433 that Mr. Kalsey "gained" as the difference between his higher salary at Interfor and his bus driving wage (which can largely be attributed to the \$12,000 bonus he received from Interfor in 2021). In doing so, Mr. Benning was following his instructions to assume that Mr. Kalsey's career change (and higher income) was caused by the Accidents. I have rejected that assumption, and so I find that it is not appropriate to reduce Mr. Kalsey's net past earnings loss in 2018 by his increased salary in 2020.
- [91] However, I do agree with the defendants that, as a result of changes to s. 83 of the Insurance (Vehicle) Amendment Act, R.S.B.C. c. 231 which came into force on May 17, 2018 (a few weeks before the First Accident), that third party insurance payments are now deductible from damages payable in tort in a motor vehicle claim under that Act, and that the right of subrogation by such third party insurers has now been eliminated.

- [92] The defendants say that the amount of benefits paid to Mr. Kalsey is \$18,797.46 and the plaintiff takes no issue with this calculation. I find that I must therefore subtract this amount from Mr. Kalsey's net wage loss, for a total net loss of \$6,350.
- [93] I note that no separate past wage loss calculation was performed for the First Accident alone. While any earning loss between the two Accidents is technically divisible, this loss was of short duration and Mr. Kalsey received a high percentage of his wage through his short-term disability benefits in this interim period. This divisible loss is therefore likely to be relatively small. If it is necessary to do so, I leave it to the parties to determine this amount or apply to the Registrar if they are unable to agree.

DIMINISHMENT OF FUTURE EARNING CAPACITY

- [20] In *Grewal v. Naumann*, 2017 BCCA 158, Justice Goepel described the proper assessment of both past and future earning capacity. While he dissented in the outcome, the majority agreed with the following summary of the relevant principles:
- [48] In summary, an assessment of loss of both past and future earning capacity involves a consideration of hypothetical events. The plaintiff is not required to prove these hypothetical events on a balance of probabilities. A future or hypothetical possibility will be taken into consideration as long as it is a real and substantial possibility and not mere speculation. If the plaintiff establishes a real and substantial possibility, the Court must then determine the measure of damages by assessing the likelihood of the event. Depending on the facts of the case, a loss may be quantified either on an earnings approach or on a capital asset approach: *Perren v. Lalari*, 2010 BCCA 140 at para. 32.
- [49] The assessment of past or future loss requires the court to estimate a pecuniary loss by weighing possibilities and probabilities of hypothetical events. The use of economic and statistical evidence does not turn the assessment into a calculation but can be a helpful tool in determining what is fair and reasonable in the circumstances: *Dunbar v. Mendez*, 2016 BCCA 211 at para. 21.
- [94] There are two general approaches to assess loss of future earning capacity: the "earnings approach" and the "capital asset approach." Both approaches are correct. The earnings approach will generally be more useful when the loss is easily measurable, and the capital asset approach is often resorted to when the loss is less amenable to precise calculation: *Perren v. Lalari*, 2010 BCCA 140 [Perren] at paras. 12 and 32.
- [95] The capital asset approach recognizes the intrinsic loss in value of a person's ability to work and earn income, as their capital asset. This approach considers the following factors: (i) whether the plaintiff has been rendered less capable overall of earning income from all types of employment; (ii) whether the plaintiff is less marketable or attractive as a potential employee; (iii) whether the plaintiff has lost the ability to take advantage of all job opportunities that might otherwise have been open; and (iv) whether the plaintiff is less valuable to himself as a person capable of earning income in a competitive labour market:

Brown v. Golaiy (1985), 26 B.C.L.R. 93d) 353; Gilbert v. Bottle, 2011 BCSC 1389 at para. 233; and Morgan v. Galbraith, 2013 BCCA 305 at paras. 53, 56.

- [96] A plaintiff may still be entitled to damages for loss of future earning capacity even where he or she has not suffered an actual loss of income. What is compensable is the lost capacity, not the lost income: Ibbitson v. Cooper, 2012 BCCA 249 at para. 19.
- [97] Recently, in Rab v. Prescott, 2021 BCCA 345, the Court of Appeal has clarified that, in order for a pecuniary damages award to be made where a loss of capacity is found, there must be a further consideration as to whether there is a real and substantial possibility of that loss materializing, and the relative likelihood of the loss occurring. The test was summarized as follows at para. 47 of that decision:
- [47] From these cases, a three-step process emerges for considering claims for loss of future earning capacity, particularly where the evidence indicates no loss of income at the time of trial. The first is evidentiary: whether the evidence discloses a potential future event that could lead to a loss of capacity (e.g., chronic injury, future surgery or risk of arthritis, giving rise to the sort of considerations discussed in Brown). The second is whether, on the evidence, there is a real and substantial possibility that the future event in question will cause a pecuniary loss. If such a real and substantial possibility exists, the third step is to assess the value of that possible future loss, which step must include assessing the relative likelihood of the possibility occurring--see the discussion in Dornan at paras 93-95.
- [98] The appropriate means of assessment will vary from case to case: Brown; Pallos v. Insurance Corp. of British Columbia (1995), 100 B.C.L.R. (2d) 260 (C.A.); and Pett v. Pett, 2009 BCCA 232. Regardless of the approach, the plaintiff must establish that there is a real and substantial possibility of a future event leading to an income loss: Perren at para. 32. The assessment of damages is a matter of judgment, not calculation: Rosvold v. Dunlop, 2001 BCCA 1 at para. 18. Though the capital asset approach is not a mathematical calculation, the court must still set out the factual basis of the award: Morgan at para. 56.

Parties' Positions

- [99] In his report, Mr. Benning calculated a future income loss of approximately \$650,000, based on the earnings approach. However, both parties agree that this calculation was based on assumptions that he was instructed to rely upon, but that were not fully supported by the evidence. Both parties also agree that this is a case where the capital asset approach is more appropriate.
- [100] Mr. Kalsey argues that three to four years' salary is an appropriate benchmark for Mr. Kalsey's loss of future earning capacity, relying on a number of cases where such an award was made for plaintiffs, generally in their early thirties, or younger: Miller v. Lawlor, 2012 BCSC 387 at para. 137 (21 years old at the time of the accident); Flores v. Burrows, 2018 BCSC 334; Lo v. Vos, 2019 BCSC 1306; Tolea. Based on Mr. Kalsey's current salary, he claims an award in the range of \$237,000 to \$316,000 under this head of damage. He says an award

at the upper end of that range is appropriate in light of the chronicity of his symptoms, his reliance on a flexible and accommodating employer, and his lack of job security in his current position.

- [101] With respect to his current position at Interfor, Mr. Kalsey testified that he is only able to manage his current role with significant accommodations from his employer, such as the use of a sit-stand desk, the ability to organize his day according to his physical symptoms, and the ability to adjust his work hours to attend medical appointments (with his supervisor's approval).
- [102] Looking ahead, Mr. Kalsey testified that his job is not as secure as it appears; he believes that the Acorn Mill operates at a loss and could be subject to closure in the future. Mr. Kalsey also testified that, in recent months, multiple supervisors have been let go without replacement. While he has discussed opportunities at larger mills, accepting these roles would require relocating to the interior of BC, away from his family, whose personal and professional roots are in the Lower Mainland. In addition, these prospective opportunities are at much larger sites and would likely involve significantly greater physical demands which he worries are beyond his current physical capabilities.
- [103] In addition, Mr. Kalsey argued that he was relatively young at the time of the Accidents, with approximately 25 to 30 professional earning years ahead of him. He says he now suffers from functionally and vocationally limiting chronic pain which is unlikely to ever resolve completely. No matter the avenue for estimating his loss, Mr. Kalsey says that there is a real and substantial likelihood that he will suffer a loss of future earning capacity as a result of the Accidents.
- [104] The defendants submit that there is no real and substantial possibility of a future event leading to an income loss.
- [105] On the evidence, they say Mr. Kalsey is working at his full capacity, albeit in a flexible and accommodating environment and with mild pain and functional limitations to his home life. The only accommodation he requested from his employer was a height-adjustable desk. Mr. Kalsey's evidence is that he loves his job and he has no intention of leaving it. The defendants point to Mr. Kalsey's recent bonus, based on both company and individual performance, as an indication that the company's performance is positive despite Mr. Kalsey's concerns about the financial future of the Acorn Mill.
- [106] If the court is inclined to award future loss of earning capacity, the defendants submit that half a year to one year of his earnings are an appropriate award for loss of earning capacity to reflect the small likelihood of Mr. Kalsey's losses. Although such awards are often based on the plaintiff's salary at the time of trial, the defendants say that it is more appropriate to make this award based on his lower salary as a bus driver. For this proposition, they cite *McColm v. Street*, 2018 BCSC 984, where Justice Warren made an award on the basis of that plaintiff's pre-accident salary, rather than his salary at trial.

[107] Relying on Mr. Benning's statement of Mr. Kalsey's annual base rate of \$56,492 at the time of the First Accident and of \$62,771 at the time of the Second Accident, the defendants suggest an award in the \$30,000 to \$60,000 range. The defendants acknowledge that, because of the many premium and overtime shifts generally available to bus drivers at CMBC, Mr. Benning did not rely on either of these base rates, but say that Mr. Kalsey's income prior to the Accidents never exceeded his base rate in the years before the Accidents.

Determination

[108] I agree with the parties that Mr. Benning's earnings-based loss calculations are not reliable indicators of Mr. Kalsey's future income losses. Mr. Benning's calculations rely on a number of assumptions that he was asked to make, but that were ultimately unsupported by the evidence. For example, Mr. Benning was asked to assume that Mr. Kalsey would lose up to three weeks of his annual income in his new position at Interfor due to the Accidents, and that he would retire approximately ten years early. Neither of these assumptions are supported by the evidence before me, and they make a significant difference to the calculations provided by Mr. Benning.

[109] However, I do find that Mr. Kalsey has suffered a loss of a capital asset with respect to his earning capacity as a result of the Accidents. Although he suffered various workplace injuries (physically and mentally) prior to the Accidents, they all resolved within a reasonably short period of time, and he was committed to his job and employer at CMBC prior to the Accidents. Although I find that the Accidents were not the legal cause of Mr. Kalsey's decision to take the position at Interfor, I also find that the Accidents made what was a difficult and physically demanding job, more immediately unsustainable for Mr. Kalsey. Both Ms. Hull and Ms. Wilson agree that Mr. Kalsey is no longer able to meet the physical demands of a bus driver based on his functional testing results. Mr. Kalsey and Ms. Hull's evidence satisfies me that it is not only the static and lengthy sitting required, but also the arm positioning and reaching, that aggravate Mr. Kalsey's primary physical injuries from the Accidents (his neck and shoulders).

[110] Furthermore, although I cannot give any weight to Mr. Kalsey's musings about the profitability of the Acorn Mill - that would have required evidence from someone more qualified and familiar with Interfor's overall financial status - I do find that Mr. Kalsey's current position in the forestry sector is inherently less secure than his unionized position at CMBC. Should Mr. Kalsey lose his current position for any number of possible reasons, I am satisfied on the evidence that, due to the Accidents, Mr. Kalsey would need to find employment with a similarly accommodating and supportive employer. I also find that his previous bus driving position would no longer be available to him.

[111] In terms of future promotions at CMBC, Mr. Kalsey had been making meaningful progress toward that goal before the Accidents, and there was a real and substantial possibility that he would have eventually succeeded. The prospects for upward job mobility at Interfor are much less clear, although I am not convinced that Mr. Kalsey could not manage a larger

work site in the future, particularly if he can access recommended treatment and care. However, as he is not the sole (or even primary) breadwinner in his family, a relocation to a larger work site away from the Lower Mainland is not a realistic possibility for his family.

- [112] Finally, Mr. Kalsey has lost the significant pension benefits that he had at CMBC. At CMBC, Mr. Benning assesses that this was worth approximately 14% of his income. At Interfor, he now accesses a matching program worth up to 9% of his income. When I remove the unsupported assumptions that Mr. Benning was directed to make, and consider the ambit of real and substantial possibilities in terms of Mr. Kalsey's future income with and without the Accidents, in my view, some accounting for this loss is still appropriate.
- [113] Overall, I find that Mr. Kalsey's employment prospects and earning capacity have been meaningfully diminished by the Accidents, and that all four factors set out in Brown apply to his situation.
- [114] With respect to the Rab framework for determining the appropriate award where a loss of capacity is made out, it is inherent in my finding that Mr. Kalsey has experienced a loss equivalent to the diminished value of his capital asset, and that this constitutes a present - not just a "potential future" - pecuniary loss. Much like a home with a crack in its foundation, his capital asset has decreased in value, regardless of whether that loss of value will ever be realized in the form of income.
- [115] However, as I understand Rab and the cases it relies upon, it is not sufficient to grant a pecuniary damages award for a loss of value of a capital asset alone, there must also be a real and substantial possibility that an event will require the plaintiff to draw upon that diminished capital asset, which will then render this present capital loss a future loss of income. I must then go on to assess the likelihood of such an event, and factor the relative likelihood of such an event into any award I make under this head of damages.
- [116] This is not a case where Mr. Kalsey's capacity to earn income in a field that he would never realistically have worked in has been compromised. Nor is it a case where Mr. Kalsey is so close to retirement that his capital loss is unlikely to ever manifest itself as a loss of income. To the contrary, Mr. Kalsey's earning capacity has been diminished in the very field he was working in at the time of the Accidents, and he likely has another 20 years or so of remunerative wage earning in his future. Furthermore, I have found that, as an element of his capital asset loss, he has lost some of his previous job security and flexibility, and potentially some upward mobility, which make a future loss of income a real and substantial possibility.

- [117] I do not take Rab to require that Mr. Kalsey lead evidence as to the stability of a particular industry or the financial health of his employer to allow this court to assess the relative likelihood of an event occurring that would convert his capital loss into an income loss. There are simply too many real and substantial possibilities that would have to be the subject of such evidence. In my view, it is sufficient that I do my best to factor in the likelihoods of various possible income losses in my overall assessment of this loss.
- [118] Mr. Kalsey currently earns more in his new position than he did as a bus driver, in large part due to his diploma which had been conferred after the Accidents. However, he has also experienced a relative loss of his employment security, a loss of his flexibility to work for other employers or to return to his previous career, a loss of a clear promotional track, and a loss of a larger pension benefit over the next 20 years - all of which make a loss of income a real and substantial possibility. Taking into account the relative likelihood of any of these losses materializing into a loss of income, I award \$100,000 for this loss of capacity.
- [119] As a reference, \$100,000 is just under a year and a half of Mr. Kalsey's bus driver salary. It is also roughly equivalent to a loss in the range of 6-8% from his present salary over the next 15-20 years.

COST OF FUTURE CARE

- [120] The plaintiff is entitled to compensation for the cost of future care based on what is reasonably necessary to restore him to his pre-Accident condition insofar as possible. When full restoration cannot be achieved, the court must strive to assure full compensation through the provision of adequate future care. This award is to be based on what is reasonably necessary on the medical evidence to preserve and promote the plaintiff's mental and physical health: *Milina v. Bartsch* (1985), 49 B.C.L.R. (2d) 33 (S.C.); *Williams v. Low*, 2000 BCSC 345; *Spehar v. Beazley*, 2002 BCSC 1104 at para. 55; and *Gignac v. Insurance Corporation of British Columbia*, 2012 BCCA 351 at paras. 29-30.
- [31] The test for determining the appropriate award under the heading of cost of future care is an objective one based on medical evidence. For an award of future care: (1) there must be a medical justification for claims for cost of future care, and (2) the claims must be reasonable: *Milina* at 84; and *Tsalamandris v. McLeod*, 2012 BCCA 239 at paras. 62-63.
- [121] Future care costs are "justified" if they are both medically necessary and likely to be incurred by the plaintiff. The award of damages is thus a matter of prediction as to what will happen in the future. If a plaintiff has not used a particular item or service in the past, it may be inappropriate to include its cost in a future care award. However, if the evidence shows that services previously rejected by the plaintiff will become essential or required in the future, the plaintiff can recover for such services: *Izony v. Weidlich*, 2006 BCSC 1315 at para. 74; *O'Connell v. Yung*, 2012 BCCA 57 at paras. 55, 60, 68-70.

- [122] The extent, if any, to which a future care costs award should be adjusted for contingencies depends on the specific care needs of the plaintiff. In some cases, negative contingencies are offset by positive contingencies and, therefore, a contingency adjustment is not required. In other cases, however, the award is reduced based on the prospect of improvement in the plaintiff's condition or increased based on the prospect that additional care will be required. Each case falls to be determined on its particular facts: Gilbert at para. 253.
- [123] An assessment of damages for cost of future care is not a precise accounting exercise: Krangle (Guardian ad litem of) v. Brisco, 2002 SCC 9 at para. 21.

Parties' Positions

- [124] In his report, Mr. Benning calculated the total present value of Mr. Kalsey's cost of future care needs as \$56,287 based on Ms. Hull's cost of future care report. This number reflects an average cost where a range is provided.
- [125] Mr. Kalsey claims just over \$68,000 with respect to his costs of future care, stating that he has made the case for the higher end of this range.
- [126] The most significant aspect of this amount is a claim for indefinite symptom management treatments such as physiotherapy, chiropractic treatments, and registered massage therapy 12 times per year, as well as eight to ten hours of home maintenance support and 16 hours of yard work support, until age 60. He also seeks the one-time cost of a kinesiologist or personal trainer to develop an active rehabilitative program with him, as recommended by Dr. Koo, and the cost of 12 psychological counselling sessions with a registered psychologist, as recommended by Ms. Hull, based on Dr. Morgan's report. Finally, he seeks lesser amounts for over-the-counter medications and recommended physiotherapy equipment.
- [127] Ms. Hull has provided the cost of these therapies and Mr. Benning has provided a cost multiplier for recurring future costs.
- [128] While the defendants agree with many of these recommended treatments in principle, they take issue with the extent, duration, and cost of many of them.

Physical Therapies

- [129] With respect to the ongoing physical therapies, Mr. Kalsey relies on the opinion evidence of Drs. Koo and Morgan that pain-relieving therapies are important to his improvement, particularly his mental injuries. He says that the unrebutted evidence of Drs. Koo and Morgan underscores the importance of ongoing treatment in order to manage his symptoms and carry on with the level of functionality he currently possesses. Ms. Hull further opines that, based on the opinions of Drs. Koo and Morgan, her recommendations are "reasonable to maintain Mr. Kalsey's current level of functioning and reduce the

frequency and severity of debilitating symptom flare-ups."

- [130] The defendants rely on Ms. Wilson's records review report in which she opines that there is no basis for ongoing passive therapies. In her oral testimony, she clarified that this was based on research that indicates that treatments beyond the first two years of injury are generally not of medical assistance, although she also acknowledged that this research relates to the majority of people whose symptoms resolve in that period. Ms. Wilson acknowledged that Mr. Kalsey is not part of this majority and, in oral evidence, she proposed some amount of such treatments, though less than that suggested by Dr. Koo or Ms. Hull.
- [131] The defendants also note that prior to the Accidents, the plaintiff was attending regular chiropractic treatments and massage therapy. The defendants submit that the plaintiff would have continued with this regular treatment regardless of the Accidents, and that this usage was significantly more than Ms. Hull recommended. Therefore, the defendants say there should be no award, or only a small award, for these treatments.
- [132] While it is true that Mr. Kalsey was attending such treatments regularly even before the Accidents, the evidence establishes that this was supported by a robust benefits plan likely directed at a workforce in regular need of such preventative maintenance. There is no indication that Mr. Kalsey would have required such regular treatment in his new position. However, due to the Accidents, the evidence now establishes that these treatments are medically recommended and that he has a more acute need for them, and that he will use them.
- [133] In my view, 12 treatments a year for the various modalities (physiotherapy, chiropractic treatment, massage therapy, and/or acupuncture) as recommended by Ms. Hull is more than reasonable. It is, in fact, less than recommended by Dr. Koo in his report, where he recommended 12 sessions of each of these modalities per year.
- [134] I do not consider that Mr. Kalsey has established that he will need these treatments indefinitely, but I am satisfied that these treatments will assist to attenuate his work and home life losses until close to his retirement age. He may need more to supplement these therapies at first and perhaps fewer later. The award I make is intended to allow for the possibility of more treatments in the next few years, and fewer later, but on average, 12 treatments per year over the next 15 years. Taking into account the range of the cost of these possible treatments, and allowing that they may include some of the more costly treatments in that range, I award the annual amount of \$1,250/year for 15 years. Applying the cost of care multiplier to this and with some rounding, I award Mr. Kalsey \$16,000 for these purposes.

Housekeeping and Yard Support

- [135] With respect to Mr. Kalsey's claim for housekeeping support, Mr. Kalsey relies on Ms. Hull's findings that, while Mr. Kalsey is physically capable of performing day-to-day cooking, cleaning, laundry, yard and house maintenance tasks, "he will need to outsource or delegate select tasks to avoid significant symptom flare up that may adversely impact his overall functioning." In particular, "he will have difficulty with cleaning tasks that require repetitive end-range reaching with his right arm (e.g., vacuuming, scrubbing, wiping down countertops, etc.)" and he "is not suited to yard or maintenance tasks that require sustained or repetitive right arm movements, particularly with simultaneous repetitive or sustained stooping demands (raking, shoveling dirt, shoveling snow), or lifting or carrying demands that exceed a light to entry-level medium strength level (e.g. lifting bags of dirt, debris) and he will need to employ an adaptive approach to these tasks."
- [136] The defendants say that Mr. Kalsey is able to do all his housekeeping and home maintenance tasks, and that he accomplishes the heavier tasks with pacing. The defendants submit that this loss is therefore more in line with a loss of amenities and should be compensated solely by the non-pecuniary award. They would accept a modest amount of \$5,000 to \$10,000 for Mr. Kalsey's losses in relation to yard work, housekeeping, and home maintenance combined.
- [137] I have compensated Mr. Kalsey through his non-pecuniary damages award for the loss to his sense of self-esteem and the additional difficulty of the housekeeping, home renovation, and maintenance work that he previously performed effortlessly and without assistance. However, this does not address the cost of performing specific tasks that Mr. Kalsey is no longer able to perform. Most notably, Mr. Kalsey used to regularly undertake home improvement tasks but, after the Accidents, Mr. Kalsey's family has had to hire contractors for this type of work. Ms. Hull's findings regarding Mr. Kalsey's limited over-shoulder arm strength are notable, and confirmed by Mr. Kalsey's own evidence. I also accept Ms. Hull's opinion that help with heavier tasks, like snow shovelling, will allow Mr. Kalsey to be more durable in his current work position.
- [138] Considering the ranges for the costs of both of these services, with an emphasis on the heavier yard work and home maintenance, and the relevant multipliers provided by Mr. Benning to the age of 60, I award Mr. Kalsey \$10,000 for these heavier labour-related costs of future care.

Active Rehabilitation

- [139] Dr. Koo recommends weekly kinesiology sessions for three months and twice-monthly sessions for the following six months, with continuing monthly follow up until Mr. Kalsey is independent with his tailored progressive exercise program. Ms. Hull recommends a total of 16 to 20 sessions on this basis at a rate of \$60 to \$85/hourly session.

- [140] The defendants rely on Ms. Wilson's records review in which she recommends reducing this program by half, on the basis that Ms. Kalsey had a personal trainer prior to the Accidents. While Ms. Wilson conceded in her testimony that a kinesiologist offered different services than a personal trainer, she also suggested the lower cost of a personal trainer over a kinesiologist, partly because of her conclusion that Mr. Kalsey is already "educated in his physical being."
- [141] With respect to the defendants' reliance on Ms. Wilson's report, I cannot give any weight to her disagreement with Ms. Hull as to what is best for Mr. Kalsey, given that only Ms. Hull met with and tested Mr. Kalsey's functional capacity. Ms. Wilson's opinion regarding 50% reductions to his treatment recommendations for causal reasons in this respect (and others) is outside of the scope of the purpose of her report or the basis of her qualification. As it stands, Ms. Hull recommends fewer sessions than Dr. Koo did in his report, and the cost range she suggests is for either a personal trainer or a kinesiologist. Given that 20 sessions is still less than what is recommended by Dr. Koo, and my pecuniary and non-pecuniary awards reflect a greater optimism for Mr. Kalsey's recovery based, in part, on the availability of these treatments, I award Mr. Kalsey the upper limit of Ms. Hull's cost estimates with respect this item at \$1,700.

Psychological Counselling

- [142] Based on Dr. Morgan's recommendation, Ms. Hull recommends a course of 12 sessions of CBT. In oral testimony, Dr. Morgan endorsed this as an appropriate initial course in his oral testimony. While these sessions could be provided by an experienced registered clinical counsellor or a licensed psychologist, Dr. Morgan was of the clear view that psychologists, who must be licensed and specifically trained in this technique, would be more reliably effective in delivering this treatment to Mr. Kalsey.
- [143] The defendants rely on Ms. Wilson's report to argue that the provision of CBT can be adequately provided to Mr. Kalsey by a registered clinical counsellor, and that should be the cost basis for this future care item, at a savings of \$75 to \$95/session.
- [144] I prefer the evidence of Dr. Morgan to that of Ms. Wilson in this respect for many reasons, including that Dr. Morgan is more qualified to diagnose and treat mental disorders, and actually examined Mr. Kalsey.
- [145] I award Mr. Kalsey the cost of 12 psychological counselling sessions with a registered psychologist (12 initial sessions at \$225/session) at a cost of \$2,700. Because this course is to be delivered within the next year or so, I do not consider it necessary to apply a cost of future care multiplier.

Medications and Medical Equipment

- [146] Mr. Kalsey seeks to recover the costs of 12 to 24 tablets of Advil/week, as well as the cost of symptom management aids like massage balls and foam rollers, with a replacement time of five or more years respectively, for his lifetime. His prescription medication costs are covered by his own and his wife's benefits programs.
- [147] The defendants note that his actual costs for this medication since the Accidents, as set out in his list of special damages, is less than Ms. Hull's anticipated costs going forward. In addition, Ms. Hull includes the cost of two to three tubes of Cryoderm gel annually, despite Mr. Kalsey only having a record of purchasing one tube since the Accidents.
- [148] While Mr. Kalsey says that he was not confronted with this evidence in cross-examination, he also did not provide any direct evidence of the extent of his usage of these over the counter medications at trial. I find that the \$130 annual cost he has actually incurred to date for Advil is fairly consistent with a usage closer to 12 tablets a week as estimated by Ms. Hull, and the best evidence of this cost going forward.
- [149] I award Mr. Kalsey the total cost of \$150/year for both over the counter medications, up to the age of 65. I also award Mr. Kalsey \$300 in total for the cost of the symptom management aids, based on Ms. Hull's estimate of costs and replacement requirements.
- [150] The total award for these costs, applying the cost multiplier to the over the counter medications and with some rounding, is \$3,150.

Determination

- [151] In total I award Mr. Kalsey \$33,550 for his costs of future care.

SPECIAL DAMAGES

- [152] Mr. Kalsey claims special damages in the amount of \$7,786.85 as of the first day of trial. The Defendants agree to most of these amounts with two exceptions:
- The defendants say that Mr. Kalsey's claim for \$1,557 for mileage incurred by Mr. Kalsey for attending various doctor and therapy appointments within the Lower Mainland is not claimable pursuant to *Rajan v. Budrueac*, 2020 BCSC 1056, where Justice Baker disallowed a similar claim as unreasonable; and
 - The defendants dispute their responsibility for Mr. Kalsey's chiropractic treatments from December 2, 2019 to February 2, 2020 (\$576) and his massage therapy treatments from December 6, 2019 to December 13, 2019 (\$240), on the basis that these expenses were incurred pursuant to injuries resulting from the Wheelchair Incident in November 2019.

[153] In response to the first objection, the plaintiff says that mileage claims are still regularly allowed, and refers to the recent case of *Martin v. Steunenberg*, 2021 BCSC 1411 at paras. 331-336, where the plaintiff's claim for \$6,514.65 in transportation and mileage to and from medical appointments within Metro Vancouver was only reduced by \$500 to offset mileage savings as a result not having to commute to and from work (a deduction which is not applicable to this case).

[154] In response to the second argument, Mr. Kalsey says that the evidence of the chiropractor and massage therapist called by the defendant is that they were treating both Mr. Kalsey's Accidents-related injuries and his injuries from the Wheelchair Incident during those sessions, not solely the latter.

[155] I would allow the mileage in this case: I consider the travel for these appointment was necessary and reasonable.

[156] I award Mr. Kalsey 50% of the costs of the therapies that were also provided in relation to the Wheelchair Incident, and therefore subtract \$408 from Mr. Kalsey's claimed special damages.

[157] Rounding these amounts, I award Mr. Kalsey \$7,380 in special damages.

CONCLUSION AND COSTS

[158] In conclusion, Mr. Kalsey is entitled to \$237,280 in damages from the defendants as follows:

No.

Description

Amount

a)

Non-pecuniary Damages:

\$90,000

b)

Past Loss of Earnings:

\$6,350

c)

Loss of Earning Capacity:

\$100,000

d)

Cost of Future Care:

\$33,550

e)

Special Damages:

\$7,380

TOTAL:

\$237,280

[159] Mr. Kalsey is entitled to interest pursuant to the Court Order Interest Act, R.S.B.C. 1996, c. 79. Having been successful in his claim, Mr. Kalsey is also generally entitled to his costs, subject to any offers or other matters that may require an adjustment to his costs entitlement. While I encourage the parties to settle these amounts, if the parties wish to address costs, they may make arrangements with the Registry in the next 30 days to make submissions before me for this purpose.

"Marzari J."

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