COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Dynamic Air Solutions Ltd. v. Yu,*
2025 BCCA 91

Date: 20250325
Docket: CA49791

Between:

Dynamic Air Solutions Ltd. and Chan Wai Chan

Appellants/
Respondents on Cross Appeal
(Defendants)

And

Yi Hao Yu

Respondent/
Appellant on Cross Appeal
(Plaintiff)

Before: The Honourable Madam Justice Fenlon
The Honourable Mr. Justice Grauer
The Honourable Justice Riley

On appeal from: An order of the Supreme Court of British Columbia, dated March 13, 2024 (*Yu v. Dynamic Air Solutions Ltd.*, 2024 BCSC 415, Vancouver Docket M197324).

Counsel for the Appellants/Respondents on Cross Appeal:	J.D. James
Counsel for the Respondent/Appellant on Cross Appeal:	A.P. Lam
Place and Date of Hearing:	Vancouver, British Columbia March 7, 2025
Place and Date of Judgment:	Vancouver, British Columbia March 25, 2025

Written Reasons by:
The Honourable Justice Riley

Concurred in by:
The Honourable Madam Justice Fenlon
The Honourable Mr. Justice Grauer

Summary:

The respondent Mr. Yu was driving his motorcycle in the curb lane, passing vehicles in the centre lane on the right. Meanwhile, the appellant Mr. Chan, who was parked in the curb lane, opened the door of his truck, without checking for vehicles coming up behind him. An accident ensued in which Mr. Yu was thrown from his motorcycle. The trial judge apportioned liability 50/50 and assessed Mr. Yu's damages at $413,000. Both parties appeal the trial judge's decision on apportionment of liability. The appellants also appeal the finding that Mr. Yu's back injury was caused by the collision, and the trial judge's damages assessment. HELD: appeal and cross-appeal dismissed. No basis has been shown to interfere with the trial judge's decision on liability, apportionment, causation, or assessment of damages.

Reasons for Judgment of the Honourable Justice Riley:

Introduction

[1] The respondent Mr. Yu was driving his motorcycle in the curb lane, passing to the right of a line of vehicles stopped in traffic in the centre lane. Meanwhile, the appellant Mr. Chan, parked in the curb lane, opened the door of his truck (registered to the co-appellant Dynamic Air Solutions Ltd.), without checking his surroundings. Mr. Yu was thrown from his motorcycle as it hit the open door of Mr. Chan's truck. He sued the appellants for damages in connection with his resulting injuries.

[2] In reasons for judgment indexed as *Yu v. Dynamic Air Solutions Ltd.*, 2024 BCSC 415, the trial judge determined both parties were at fault, apportioned liability 50/50, and assessed the respondent's losses at $413,000, making the appellants liable to pay damages of one-half that amount. Both parties seek to revisit that result on appeal. The appellants say the trial judge erred: (i) in finding them liable in negligence and apportioning liability on a 50/50 basis, (ii) in finding that the respondent's unresolved lower back injury was caused by the accident, and (iii) in his assessment of the respondent's damages. The respondent cross-appeals on the issue of apportionment of liability.

The Trial Judge's Reasons

[3] The trial judge found both Mr. Yu and Mr. Chan to be generally credible witnesses, though each of them gave slightly self-serving accounts of their own actions leading up to the accident.

[4] With regard to Mr. Yu, the trial judge did not accept his testimony that he was only travelling 10 to 20 kilometers per hour when he drove down the curb lane. Nor did he accept Mr. Yu's somewhat equivocal denial of the statement attributed to him by Mr. Chan, that he was in a hurry to meet friends for lunch. In all other respects, the trial judge found Mr. Yu to be an honest and reliable witness. Indeed, the judge found that Mr. Yu was a stoic individual who "underplayed his injuries and overplayed his capacity": reasons at para. 65.

[5] With regard to Mr. Chan, the trial judge did not accept his initial account that the driver's side mirror on his truck was extended and that he looked in it prior to opening the door. Relying on a photograph taken at the scene, and inconsistency between Mr. Chan's trial testimony and his examination for discovery, the trial judge concluded that the side mirror was folded in, and as a consequence Mr. Chan must not have checked it before opening the door.

[6] On the issue of liability, the judge began by noting that under the reasoning in *Salaam v. Abramovic*, 2010 BCCA 212 at paras. 19–21, the statutory responsibilities of drivers under the *Motor Vehicle Act*, R.S.B.C. 1996, c. 318 (*MVA*) are relevant to, but do not exhaustively delineate, the applicable standard of care.

[7] The trial judge took note of three particularly relevant *MVA* provisions, as follows: (a) section 144 sets out the general duty of all motorists to exercise due care and attention in the operation of a motor vehicle, with reasonable consideration for others using the road; (b) section 158 sets outs the general prohibition against passing other vehicles on the right, and the exceptions in which a motorist is allowed to do so; and (c) section 203 provides that a person must not open the door of a vehicle on the side available to moving traffic unless it is reasonably safe to do so.

[8] The trial judge also cited a fourth provision, s. 183, which provides that a person operating a "cycle" has the same rights and duties as a driver of a vehicle. As we will see below, this provision became relevant in the trial judge's consideration of prior case law interpreting what is now s. 158.

[9] Upon considering these provisions and the relevant case law, the trial judge concluded that: (a) Mr. Chan breached the requisite standard of care owed to Mr. Yu when he opened the driver's door of his truck when it was not safe to do so, and (b) Mr. Yu was contributorily negligent "in the manner in which he drove alongside the parked cars", which the judge described as a "manifestly unsafe manoeuvre": reasons at paras. 74, 85.

[10] The trial judge went on to hold that the negligence of each party contributed to the accident and more specifically that: (a) if Mr. Yu had been more patient in staying in the middle lane rather than turning into the curb lane to pass stopped traffic, the accident would have been avoided; (b) if Mr. Yu had positioned his motorcycle closer to the middle of the gap between the vehicles in the middle lane and the parked vehicles in the curb lane, the accident would have been avoided; and (c) if Mr. Chan had properly checked his mirrors or paid more attention to approaching traffic, the accident could have been avoided: reasons at para. 88.

[11] The trial judge next considered apportionment of liability under s. 1 of the *Negligence Act*, R.S.B.C. 1996, c. 333. He reasoned that responsibility is to be determined on the basis of fault (as opposed to degrees of causation), and that blameworthiness is a function of the extent to which each party's conduct departs from the standard of reasonable care expected of that party in the circumstances: reasons at paras. 89–90, citing *Pruett v. Robert*, 2023 BCSC 49 at para. 106, and *Zawadzki v. Calimoso*, 2011 BCSC 45 at paras. 10–12.

[12] Applying those principles to the facts as he found them, the trial judge allocated fault equally between the parties. The judge explained that neither party "exhibited an extreme lack of care", but both "should have performed better in the circumstances", such that "[e]ach bears a comparable level of blameworthiness":

reasons at para. 91, citing *Bates v. Buchanan*, 2023 BCSC 687 at paras. 65–68; *Cipllaka v. Albert-Moore*, 2023 BCSC 457 at paras. 30–32.

[13] On the issue of causation, the only point of contention was whether Mr. Yu met his burden of proving that his continuing lower back injuries were caused by the accident. The trial judge was satisfied that they were. He said, among other things, "[b]ased on the evidence, it is clear that the [a]ccident contributed to the plaintiff's lower back injuries": reasons at para. 92. The judge's reasoning for this conclusion is found at para. 93 of the reasons, which reads as follows:

> [93] The experts agreed that the failure to report back pain immediately after an Accident is not determinative or unusual, particularly if a primary complaint must be addressed (the knee pain in the present case). Furthermore, I find that the combination of the plaintiff's stoicism and lack of treatment explains the gap to the first formal complaint of back pain in the spring of 2018. The plaintiff's uncle noted limitations at work from an early stage. There is no other more likely cause for these injuries proffered by the medical practitioners or available from the evidence. Although problems with their assumptions somewhat undercut the medical practitioners' opinions, I do not find that their basic conclusions on causation were negated.

[14] The judge went on to assess damages as follows:

(a) Non-pecuniary damages: $80,000 (subject to a 15% reduction for failure to mitigate as explained in paragraph 15 below). The non-pecuniary damages award is in issue on appeal only to the extent that the trial judge factored in Mr. Yu's back injuries, which the appellants say should not have been taken into account because causation had not been proven.

(b) Past income loss: $80,000. The judge considered that Mr. Yu's back injuries were at least part of his reason for working only two days per week, although another reason was Mr. Yu's interest in completing his home renovation project. The judge determined that the most appropriate way to value the loss was through a capital award of $80,000, which could be justified as either: (i) one-half of the amount claimed, taking into account that the claim did not account for unpaid work and work for which Mr. Yu received debt forgiveness rather than income, or (ii) one year's

salary for an average 35-year old mechanic in B.C., as reflected in the opinion of an economist whose report was tendered by the plaintiff.

(c) Future loss of earning capacity: $240,000. The trial judge reasoned that this quantum was reflective of approximately three years salary for an average 35-year old mechanic in B.C. The judge also "cross-check[ed] the reasonableness of this figure against a more mathematical earnings-type approach", representing a 15% loss of capacity by reference to the present value of potential lifetime earnings for an average mechanic in B.C., determined by the plaintiff's economist to be $1,652,573. The trial judge considered this to be a reasonable reflection of Mr. Yu's loss of capacity, considering that he could still perform "sedentary, light, and medium-strength work, and is only partially restricted from heavy work".

(d) Costs of future care: $25,000. This represented 50% of the amount claimed, on the basis of the judge's finding a reduced likelihood that Mr. Yu would actually pursue future treatment given his focus on other aspects of his life to the exclusion of obtaining "appropriate treatment".

[15] The trial judge also held that there should be a further 15% reduction in the non-pecuniary damages award, based on Mr. Yu's failure to mitigate by seeking out appropriate treatment and declining medications that might have reduced the extent of his loss. The judge gave reasons why this reduction was only applied to the non-pecuniary damage award, but it is unnecessary to say more about this because neither party takes issue with the judge's failure to mitigate analysis.

[16] The trial judge left it open to the parties to resolve between themselves any statutory deductions, taxes, management fees, gross ups, or interest adjustments, with leave to request a further hearing on those issues if necessary.

Analysis

Issue 1: Liability and Apportionment

[17] Under this heading, I consider the position of the appellants that the trial judge erred in finding Mr. Chan negligent, and the positions of both parties that the trial judge erred in apportioning liability on a 50/50 basis.

[18] The appellants advanced a number of arguments in support of their position that the trial judge erred in finding that Mr. Chan was negligent. I will deal with each of them in turn.

[19] First, the appellants say the trial judge erred in failing to address not only the respondent's contributory negligence, but also the respondent's negligence. The appellants say the judge was obliged to independently assess Mr. Yu's negligence, as distinct from his contributory negligence. The reasoning here is that contributory negligence involves an analysis of the extent to which an alleged tort victim (in this case, Mr. Yu) failed to take reasonable care for his own safety, whereas negligence at large calls for an analysis of whether an alleged tortfeasor (in this case, Mr. Yu) owed an independent duty of care to an alleged victim (in this case, Mr. Chan) and breached the relevant standard of care.

[20] The appellants argue that when properly analyzed, the facts of this case indicate that: (i) Mr. Yu as an operator of a motorcycle owed an independent duty of care to Mr. Chan as another user of the road, (ii) Mr. Yu breached this duty by passing vehicles on the right in contravention of s. 158(1)(b) of the *MVA*, (iii) Mr. Yu was not lawfully in the curb lane, and (iv) consequently, Mr. Chan owed Mr. Yu no independent duty of care, or alternatively did not breach the relevant standard of care by failing to look out for someone who should not have been where he was.

[21] I do not find this argument convincing for several reasons. To begin with, I do not find the principled distinction between negligence on the one hand and contributory negligence on the other to have any significance in view of the factual matrix at play in this case. Both parties were motorists who owed a duty of care to

others on the road. This is not a situation where Mr. Yu owed no duty of care to Mr. Chan, such that his only duty might have been to be reasonably prudent in looking out for his own safety, in which case the distinction between negligence and contributory negligence could have some relevance. The trial judge fully appreciated this, noting at the very beginning of his legal analysis that all motorists have a duty to take reasonable care for others on the road.

[22] Furthermore, and in any event, whether one were to characterize Mr. Yu's conduct as contributory negligence in failing to have regard for his own safety, or independent negligence toward Mr. Chan, on the particular facts of this case, one ends up in the same place. The trial judge found that the actions of both parties were contributing causes to the accident. In other words, but for the negligent actions of both Mr. Yu and Mr. Chan, the accident would not have happened. In such a circumstance, s. 1(1) of the *Negligence Act* provides that each negligent party is liable in proportion to their fault. That is exactly how the trial judge approached the matter. In these circumstances, I see no need for the trial judge to have conducted any additional analysis of Mr. Yu's liability in negligence toward Mr. Chan.

[23] Next, the appellants say the trial judge erred with respect to the nature of Mr. Yu's negligence. This, of course, could have a bearing on Mr. Yu's degree of fault or blameworthiness, which could in turn affect the judge's apportionment of liability. The appellants also say the nature of Mr. Yu's negligence has a bearing on whether Mr. Chan was negligent at all, a point which may overlap to some extent with the argument I have already considered.

[24] In any event, the argument of the appellants rests on their interpretation of s. 158(1)(b), which effectively states that a driver must not overtake and pass on the right of another vehicle except when there are one or more "unobstructed" lanes in the driver's direction of travel. The appellants say that in this case, Mr. Yu passed other motorists on their right by entering the curb lane, which, the appellants submit, was "obstructed" by parked vehicles. Accordingly, the appellants submit that Mr. Yu

was in breach of s. 158(1)(b) and was unlawfully in the curb lane at the time of the accident, such that fault for the accident lay entirely with him.

[25] The appellants cite *Jang v. Fisher*, 1990 CanLII 2147 (B.C.C.A.). Mr. Jang, a cyclist, was riding past vehicles on his right by going into the curb lane, where there were some parked cars. Ms. Fisher drove her vehicle from the centre lane into the curb lane as she approached an intersection. A collision ensued. The trial judge found that Ms. Fisher had no reason to expect a cyclist would be coming up behind her in the curb lane and therefore bore no responsibility for the collision. On appeal, Ms. Fisher sought to uphold the trial judge's decision, relying on what is now s. 158(1)(b) of the *MVA*. She submitted that since the curb lane was "obstructed" by parked vehicles, she had no reason to believe Mr. Jang would be using it to pass cars on the right. The outcome of the case therefore turned, at least in part, on whether the curb lane was "unobstructed" within the meaning of the statute.

[26] Justice Lambert identified the issue as whether, in the context of its use by a cyclist, "a lane can be regarded as 'unobstructed' if there are parked vehicles in the lane". His conclusion was that "if the parked vehicles leave ample room between the position in which they are parked and the marked lane line for a bicycle to pass freely then that is an 'unobstructed' lane for a cyclist": *Jang* at p. 4. Thus, the trial judge in *Jang* erred in stating that there was no basis for Ms. Fisher to expect that a cyclist would be driving through the curb lane in the manner in which Mr. Jang did. Ms. Fisher failed to "look over to her rear", when she ought to have done so. Accordingly, the trial judge erred in finding that Ms. Fisher was not liable: *Jang* at p. 4. Justice Lambert went on to determine that Mr. Jang was also contributorily negligent, in traveling down the curb lane next to moving traffic unsafely, such that he was unable to react to Ms. Fisher moving into the lane: *Jang* at p. 5.

[27] Relying on *Jang*, the appellants argue that the "prohibition" in s. 158(1) of the *MVA* applied to Mr. Yu because he was not operating his motorcycle in an "unobstructed" lane within the meaning of s. 158(1)(b). The plaintiffs say that when one considers the width of the gap between the centre lane line and the parked cars,

and the width of Mr. Yu's motorcycle, there was not "ample room" for Mr. Yu to pass freely between the parked cars and the marked lane line. The difficulty for the appellants is that the trial judge found otherwise.

[28] After referring to the operative passages from *Jang*, the trial judge reasoned that "the assessment of a party's conduct under s. 158(1) does not depend solely on the lane's character, but also on an assessment as to whether the particular vehicle at issue can safely travel down that lane". The judge rejected the argument of the appellants that the curb lane was "generally off-limits to anyone given the presence of the parked cars": reasons at paras. 81, 83. Rather, the judge was required to evaluate whether the gap was sufficiently wide to allow unobstructed passage by the particular vehicle in issue, in this case, Mr. Yu's motorcycle. I do not see any error of law in this reasoning.

[29] The judge went on to conclude, on his assessment of the evidence, that there was "technically sufficient room" for Mr. Yu's motorcycle to pass through the five to six foot gap between the vehicles in the centre lane and the parked vehicles in the curb lane. This is a finding of fact, or at best a conclusion of mixed fact and law, in respect of which the appellants have failed to demonstrate any palpable and overriding error.

[30] The appellants point to evidence about the actual distance between the vehicles in the centre lane and the truck Mr. Chan was operating, and the precise measurements as to the width of Mr. Yu's motorcycle to say that the gap was not "ample" within the meaning of the case law. The appellants say the trial judge considered only the width of Mr. Yu's motorcycle itself, and overlooked the motorcycle faring and the mirrors on the handlebars. The appellants say that when these additional parameters are taken into account, the gap was a matter of mere inches. With respect, I see this as rearguing the facts of the case on appeal, in the face of the trial judge's finding that there was "technically sufficient room" for Mr. Yu's motorcycle to drive between the vehicles in the centre lane and the parked vehicles in the curb lane. Although I appreciate that the question of whether there

was “ample room” is a qualitative one, I would not interfere with the trial judge’s conclusion that on the whole of the evidence before him there was in fact sufficient room for Mr. Yu to drive along the curb lane, so long as he did so safely.

[31] The appellants go on to argue in the alternative that Mr. Yu was also in breach of s. 158(2)(a), the effect of which is that even where a driver is not prohibited from passing on the right pursuant to the restrictions in s. 158(1), the driver must not do so “when the movement cannot be made safely”. Of course, as the appellants themselves acknowledge, the trial judge made this finding. The judge reasoned that the conclusion about the lane’s character “does not end the inquiry into [Mr. Yu’s] conduct”, because even if he technically had the statutory authority to proceed down the curb lane, he had an obligation “to take due care”. The judge found that Mr. Yu did not do so, in breach of both his common law duty of care, and s. 158(2). The judge characterized Mr. Yu’s conduct in proceeding down the curb lane to be a “manifestly unsafe manoeuvre” in that he (a) ought to have simply waited in traffic rather than turning into the curb lane, (b) travelled down the curb lane “too quickly in the circumstances”, and (c) imprudently “shaded his motorcycle” toward the parked cars, rather than driving along the centre of the gap: reasons at para. 85.

[32] In their factum, the appellants rely on *Ormiston v. Insurance Corporation of British Columbia*, 2014 BCCA 276, a case in which a decision apportioning liability was set aside and the plaintiff’s claim was dismissed on appeal. *Ormiston* was a much different case. The plaintiff was riding a bicycle down a hill a fair distance behind a van. The van came to an abrupt stop. The plaintiff decided to pass on the right, but as he was doing so the van also moved to the right, and the plaintiff then veered off the road into a ditch. The van left the scene, so the matter was defended at trial by I.C.B.C. without any evidence from the van driver. The trial judge apportioned liability 70% to the driver and 30% to the plaintiff. On appeal, it did not appear to be disputed that cyclists, like drivers, are generally prohibited from passing on the right, and none of the statutory exceptions in s. 158 applied to the plaintiff’s conduct: *Ormiston* at para. 19. Furthermore, the Court found no support for the trial

judge's conclusion that the driver of the van was negligent: *Ormiston* at paras. 17–18. It was in this context that Justice Lowry ruled that the plaintiff "did a foolish thing" by passing on the right when not permitted to do so. The plaintiff "decided to take a chance and he was injured" and was therefore "the sole author of his misfortune": *Ormiston* at paras. 26–27.

[33] This case is distinguishable from *Ormiston* in two respects. First, none of the statutory exceptions in s. 158(1) applied to the actions of the plaintiff in *Ormiston*, such that he was in clear breach of the prohibition against passing on the right. By contrast, in the case at bar, Mr. Yu was not prohibited from passing on the right, because the trial judge found that he moved into a lane that was "unobstructed" because there was a big enough gap between the marked lane line and the parked vehicles for Mr. Yu's motorcycle to pass. Mr. Yu's problem was not that he was prohibited from doing what he did, but rather that he failed to do so safely. Second, and perhaps more importantly, there was no evidence that the defendant in *Ormiston* did anything wrong. By contrast, in the case at bar the trial judge found that Mr. Chan failed to have due regard for the safety of others when he opened the door of his truck on the side of the vehicle available to traffic.

[34] This leads me to the next argument advanced by the appellants, namely that the trial judge erred in finding that Mr. Chan was negligent. This argument relies in part on s. 203(1) of the *MVA*, which states that a person "must not open the door of a motor vehicle on the side available to moving traffic unless and until it is reasonably safe to do so". The appellants say that in the circumstances in which he found himself, Mr. Chan was "not required to take into account a small risk" that a motorcyclist would be proceeding down the curb lane at the point when he opened the door of his truck. I would not give effect to this submission. Recall the trial judge's finding that Mr. Chan opened the door on the side of his truck available to moving traffic without first checking to see if it was safe to do so. That conclusion, which is not directly challenged, and in any event finds ample support in the evidence, is dispositive on this issue. Moving traffic could include a motorcycle, a bicycle, or a scooter. The suggestion that Mr. Chan owed no duty of care, or did not

breach the relevant standard of care by opening his door in the manner that he did, ignores the clear wording of s. 203(1), bearing in mind that the provisions of the *MVA* are not dispositive but clearly inform the analysis as contemplated in *Salaam*.

[35] Another argument advanced by the appellants is that the trial judge erred in finding that Mr. Chan's conduct in opening the door was "the legal cause of the [a]ccident". The appellants point out that to meet the test for causation, Mr. Chan's conduct must have been shown to be not only a cause in fact of the accident, but also a cause in law. They cite *Borgfjord v. Boizard*, 2016 BCCA 317 at para. 56 for the proposition that where the damage suffered is too remote, or is not a sufficiently foreseeable result of the defendant's conduct, the legal component of causation will not be established. I find no merit in this submission. Section 203 of the *MVA* speaks to the hazard and associated foreseeable risk arising from the actions of a motorist who opens a door on the side of the vehicle available to moving traffic without checking to see if it is safe to do so. In this particular case, it was certainly foreseeable that when Mr. Chan opened the door of his truck, it could pose a hazard to any motorcyclist, cyclist, or scooter operator proceeding along the curb lane.

[36] Finally, both parties argue that the trial judge erred in his apportionment of liability between them. Each says the other bears a higher degree of fault.

[37] The appellants submit that Mr. Yu was at greater fault because he acted with intentionality in proceeding down the curb lane in a manifestly unsafe manner, too fast, and not in the centre of the available gap. He engaged in a manifestly unsafe manoeuvre by entering the curb lane, and continued to drive down the lane. They say his conduct was prolonged and intentional. The appellants contrast this with Mr. Chan's momentary and unintentional lapse in judgment in failing to check his mirror before opening the door. Against this backdrop, the appellants say that Mr. Yu's degree of blameworthiness was appreciably greater than that of Mr. Chan, and the trial judge ought to have apportioned liability 10% to Mr. Chan and 90% to Mr. Yu.

[38] The respondent takes issue with the suggestion that Mr. Yu's conduct involved any intentional departure from the standard of care expected of him. The evidence reflects that before entering the curb lane, Mr. Yu paused, assessed the situation, and formed the belief that it was safe to do so. He could see that the portion of the curb lane he intended to use was unobstructed. He was able to see Mr. Chan's truck, and noted that it was not on, the lights were off, and the side mirror was folded in. Although the judge found that Mr. Yu engaged in an objectively unsafe manoeuvre, at the time Mr. Yu held an honest subjective belief that it was safe for him to proceed as he did. The respondent contrasts this with the conduct of Mr. Chan, who was seated in a parked vehicle for at least five minutes, with the lights off and the side mirror folded in, and then opened his door into traffic with absolutely no regard for the safety of others. Thus, while Mr. Yu turned his mind to the safety of his actions, Mr. Chan did not. For all of these reasons, the respondent says liability ought to have been apportioned 90% to Mr. Chan and 10% to Mr. Yu.

[39] Disputes of this sort are generally settled at trial. There must be "very strong and cogent reasons" for revisiting a trial judge's decision on apportionment: *Moses v. Kim*, 2009 BCCA 82 at para. 33. In the absence of some extricable legal error, or a grossly disproportionate result, the appeal court will not interfere with a trial judge's apportionment of liability. In this case, the trial judge properly instructed himself on the relevant principles, and there is no extricable error in his assessment of the relative fault of either party. The trial judge took into account the degree of fault or relative blameworthiness of each party. In my view, his assignment of 50/50 liability is not grossly out of proportion to the degree of fault of either of them.

Issue 2: Causation

[40] The appellants contend that the trial judge erred in his assessment of causation with respect to the respondent's lower back injuries. More specifically, the appellants say the trial judge fell into error by having resort to the "material contribution" test. However, there is no reference to "material contribution" in the decision, and I cannot see how the judge's reasons, read as a whole, can be taken to rely on that concept. What the trial judge said is, "[b]ased on the evidence, it is

clear that the [a]ccident contributed to the plaintiff's lower back injuries": reasons at para. 92 (emphasis added). Read together with the following paragraph of the reasons and in light of the principle that the judge is presumed to know the law, one can easily understand the judge's use of the phrase "contributed to" as a reference to the burden on Mr. Yu to prove on a balance of probabilities that Mr. Chan's actions "caused or contributed to" the injury as contemplated in *Athey v. Leonati*, [1996] 3 S.C.R. 458 at para. 17. In other words, it is clear from the whole of paragraphs 92 and 93 of the reasons that the judge was satisfied on a balance of probabilities that the accident was at the very least a necessary contributing cause, if not the sole cause, of Mr. Yu's back injury.

[41] The appellants go on to argue that the trial judge misapprehended the evidence in relation to each of the four factual components of his finding that Mr. Yu's lower back injury was caused by the collision. I will address each of them in turn, keeping in mind that the ultimate question is whether the appellants have established palpable and overriding error by showing that the impugned findings were "identifiably wrong, unreasonable or unsupported by the evidence, and can be shown to have affected the result": *Vancouver Canucks Limited Partnership v. Canon Canada Inc.*, 2015 BCCA 144 at para. 90, citing *Housen v. Nikolaisen*, 2002 SCC 33 at paras. 10–14, 19, 22–23; *H.L. v. Canada (Attorney General*), 2005 SCC 25 at para. 55; *F.H. v. McDougall*, 2008 SCC 53 at para. 55.

[42] The first factual component of the trial judge's causation analysis was his finding that the medical experts accepted "the failure to report back pain immediately after an [a]ccident is not determinative" of causation: reasons at para. 93. It is fair to say both medical experts, Dr. MacKean and Dr. Giantomaso, gave evidence to this effect. However, the appellants say the judge's reliance on this point overlooks the concession of both experts in cross-examination that if Mr. Yu did not make any complaint about a lower back injury until the spring of 2018, this would undermine their opinions on causation. That submission is not entirely borne out by the record. Dr. MacKean did appear to concede this point, but cross-examination of Dr. Giantomaso did not undermine his opinion on causation nearly as much as the

appellants suggest. In cross-examination, Dr. Giantomaso accepted that if Mr. Yu failed to report any lower back pain until the spring of 2018 it would put causation "in question". However, in follow-up questions put directly by the trial judge, Dr. Giantomaso was asked whether the absence of any reports of lower back pain to treatment providers would alter his opinion. He said it would not, explaining that where a patient is distracted by more pressing sources of injury or pain, the medical records might not include any reference to chronic low back pain. Dr. Giantomaso added that without a prior history of low back pain or other injury, it "seems reasonable" that the accident was a direct cause of low back pain, and he could not see "any other reason" for this injury. On the whole of this evidence, I do not agree that the trial judge made any palpable and overriding error in his consideration of the expert opinions.

[43] The second factual component of the trial judge's causation conclusion was that the combination of Mr. Yu's stoicism and lack of treatment explained the "gap" in his reporting of lower back pain. Although the appellants take issue with this finding, there is ample support for it in the testimony of Mr. Yu and his uncle.

[44] The third factor cited by the trial judge was the evidence of Mr. Yu's uncle, noting his nephew's "limitations" shortly after his return to work. On this point, the appellants point out that while Mr. Wang gave evidence about Mr. Yu being visibly injured or hurt upon his return to work, he did not explicitly say Mr. Yu was experiencing or reporting lower back pain. In my view, the fact that Mr. Wang was not more specific as to the nature of Mr. Yu's visible "limitations" merely goes to the weight the trial judge chose to give to this factor, bearing in mind that it was merely one of four factual components of the causation analysis. It is also necessary to consider Mr. Wang's evidence in context. Mr. Wang testified that one of Mr. Yu's obvious limitations was in performing heavy-duty work involving lifting, which tied in with Mr. Yu's evidence that his debilitating flare-ups of back pain corresponded with lifting heavy objects. I therefore see no error in the judge's reliance upon Mr. Wang's evidence as a factor in his causation analysis.

[45] The fourth and final factual component of the judge's conclusion on causation was that no other "likely cause" for Mr. Yu's lower back injury emerged from the expert evidence. Dr. Giantomaso's evidence that 40 to 50 percent of people experience episodic, non-chronic back pain does not undermine this aspect of the judge's reasoning. This was a general observation, not specific to Mr. Yu, a relatively young man with no apparent physical limitations prior to the accident who, after the accident, experienced debilitating back pain often coinciding with physical exertion at a level that was previously well within his capabilities. As noted above, in responding to a question from the trial judge, Dr. Giantomaso expressly stated that, on all the information available to him, he could not see "any other reason" why Mr. Yu would have lower back pain.

Issue 3: Assessment of Damages

[46] Many of the arguments advanced by the appellants with respect to the trial judge's damages assessment rest on the assertion that the judge erred in finding that the respondent met his burden of proving his back injuries were caused by the collision. All of these arguments collapse in the wake of the conclusion under the preceding heading of these reasons.

[47] The appellants advance three other independent arguments, relating to past and future loss of earning capacity respectively.

[48] With regard to past loss of earning capacity, the appellants rely on *Rowe v. Bobell Express Ltd.*, 2005 BCCA 141 at paras. 30–31 in support of the proposition that past loss of earnings must be determined on the basis of what the plaintiff would have earned but for the collision, not what the plaintiff could have earned: see also *M.B. v. British Columbia*, 2003 SCC 53 at para. 49. The appellants say the trial judge's award failed to respect this principle, given the evidence about periods when the respondent chose not to work full time as a mechanic, preferring instead to focus his energies on home renovations and side jobs as a self-employed mechanic. The appellants say the trial judge failed to consider whether Mr. Yu would have made these same choices even if he had not been injured.

[49] I reject this argument. The trial judge expressly took into account that after the accident, Mr. Yu: (a) continued to work as a mechanic, but sometimes only on a part time basis, and (b) chose to work as his own renovation contractor, detracting from his earnings as a mechanic. The judge also took into account that while his back injuries were part of Mr. Yu's reason for working part time, another reason was that he wanted to complete his home renovations. The judge considered these circumstances to be too complex to allow for an earnings-based assessment, and therefore made a capital award of $80,000 for past loss of earnings, representing either (i) half the amount claimed or (ii) one year's salary for a 35-year old mechanic. The respondent points out, fairly in my view, that the capital award equivalent to a one year full time salary was made in compensation for loss of work capacity for a period of more than six and one half years from the date of the accident to the date of trial. Given the absence of any extricable legal error, and the highly deferential standard of review, there is no legitimate basis for revisiting this determination.

[50] I turn to the judge's award of $240,000 for loss of future earning capacity. Many of the appellants' arguments challenging this aspect of the judgment mirror the arguments about past loss of earnings and can be dismissed for the reasons given above. The appellants also argue that the trial judge erred in the third step of the three-part analysis outlined in *Rab v. Prescott*, 2021 BCCA 345 at para. 47. I do not agree. The trial judge considered and applied the three-step approach recommended in *Rab*. On the third step, valuation of the loss, the judge opted for a capital asset approach for the reasons given at paras. 118(a) through (d) of his judgment. An award of $240,000 represented roughly three years salary for a 35-year old mechanic in B.C. The judge then went further by "cross-checking" the capital asset award against the earnings approach, concluding that it equated to "a 15% loss of capacity as against the $1,652,573 present value of potential lifetime earnings" for a mechanic in B.C.: reasons at para. 119. The appellants may not agree with this determination, but have not shown any basis for overturning it.

[51] Finally, in relation to both past and future loss of earning capacity, the appellants take issue with the trial judge's reliance on an economist's opinion based

on the average income of a 35-year old mechanic. In support of this argument, the appellants cite *Fatla v. McCarthy*, 2024 BCCA 311, in which this Court rejected an argument that the trial judge erred in basing his loss of earning capacity analysis on the plaintiff's actual earnings history, rather than relying on an economist's opinion using labour market statistics for individuals in the plaintiff's chosen occupation. Justice Groberman reasoned that "damages for loss of future earning capacity are meant to be compensatory and are to be determined on an individual basis": *Fatla* at para. 33 (emphasis in original). Thus, the plaintiff's "actual earnings are a much more precise and individualized gauge" of earning capacity than "averages drawn from populations" that may have "little in common" with the plaintiff: *Fatla* at para. 37.

[52] In the case at bar, the appellants say the trial judge erred in relying on an economist's opinion based on labour market data, rather than taking a more "individualized approach" in line with the reasoning in *Fatla*.

[53] It is trite law that valuation of a plaintiff's loss of earning capacity may involve resort to either the earnings approach or the capital asset approach: *Perren v. Lalari*, 2010 BCCA 140 at para. 32. Under either approach, quantification of the loss must be individualized and grounded in the evidence, having regard to the plaintiff's circumstances: *Fatla* at paras. 33, 39, 41; *Gill v. Lai*, 2019 BCCA 103 at para. 8; *McHatten v. Insurance Corporation of British Columbia*, 2023 BCCA 271 at para. 19. Often, the best approach will be to base the award on the plaintiff's earnings history: *Fatla* at para. 37. However, the case law also recognizes that there may be circumstances where the earnings approach is unworkable or unsuitable. There may also be instances, under either the capital asset approach or the earnings approach, where uncritical reliance on a plaintiff's actual earnings history is unsuitable because it does not yield the most reliable indicator of the value of the plaintiff's loss of capacity. Thus, a consideration of "statistical" earnings evidence may assist in valuing the plaintiff's loss, under either the capital asset approach as in *McHatten* at paras. 20, 25–26, or the earnings approach as in *Young v. Huang*, 2023 BCCA 234 at paras. 12, 20–21, 35.

[54] In *Fatla*, the trial judge determined that the remuneration attached to the plaintiff's current position represented her earning capacity in an uninjured state: *Fatla* at para. 35. By contrast, in the case at bar, the trial judge did not consider Mr. Yu's earnings history to be a reliable indicator of his loss of earning capacity, for a number of reasons listed in his decision at paragraphs 110 to 111 (past loss) and 118 to 119 (future loss). These were case-specific, principled determinations, based on an individualized assessment of the evidence.

[55] It is important to note that Mr. Yu had been working in his chosen occupation for less than one year before the accident, and there were case-specific reasons why the trial judge did not consider his actual earnings history to be an accurate basis on which to assess his loss of future earning capacity. In these circumstances, the appellants have not demonstrated any reviewable error in the trial judge's decision to use the capital asset approach, or the judge's decision to base the award on an economist's opinion as to the average salary of a 35-year old mechanic.

[56] Even if it were shown that there was some error in the trial judge's approach, it is not clear that the resulting award was inappropriate, unjust, or unreasonable. One must bear in mind that on the trial judge's alternate (earnings-based) approach, the award of $240,000 represented a 15% loss of earning capacity for an average mechanic in B.C. over Mr. Yu's remaining working life. It was, in the circumstances, a modest award.

Conclusion

[57] I would dismiss both the appeal and the cross appeal.

"The Honourable Justice Riley"

I AGREE:

"The Honourable Madam Justice Fenlon"

I AGREE:

"The Honourable Mr. Justice Grauer"