

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Behnke v. Pannu*,
2025 BCCA 182

Date: 20250606
Docket: CA49781

Between:

Zachary Jordan Behnke

Appellant/
Respondent on Cross Appeal
(Defendant)

And

Varinder Singh Pannu

Respondent/
Appellant on Cross Appeal
(Plaintiff)

Before: The Honourable Justice Dickson
The Honourable Mr. Justice Butler
The Honourable Madam Justice DeWitt-Van Oosten

On appeal from: An order of the Supreme Court of British Columbia, dated
March 1, 2024 (*Pannu v. Behnke*, 2024 BCSC 362, New Westminster Dockets
M221202; M242617).

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Cross Appeal:

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Cross Appeal:

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Place and Date of Hearing:

Vancouver, British Columbia
March 18, 2025

Place and Date of Judgment:

Vancouver, British Columbia
June 6, 2025

Summary:

This appeal is from an order awarding the respondent damages for injuries sustained in two motor vehicle accidents. The appellant alleges a number of factual and legal errors in the judge's conclusions on causation, apportionment of damages, and assessment of damages. The respondent cross-appeals the judge's assessment of non-pecuniary damages.

Held: Appeal and cross-appeal dismissed. The judge did not err as alleged, or at all. He was entitled to draw the inferences and make the findings of fact he did, and the appellant has shown no palpable and overriding error capable of justifying appellate interference. Similarly, the judge made no reviewable error in finding that the respondent's injuries were indivisible. There is also no basis to interfere with his assessment of damages.

Reasons for Judgment of the Honourable Mr. Justice Butler:

[1] Varinder Singh Pannu commenced two actions seeking damages for injuries suffered in two motor vehicle accidents. The actions were heard at the same time. Following a seven-day trial, Justice Elwood awarded approximately \$540,000 in total damages. Liability was admitted by Zachary Behnke, the driver of the vehicle involved in the first accident. The judge dismissed Mr. Pannu's claim against Nancy Wong, the driver of the vehicle involved in the second accident. In this appeal, Mr. Behnke argues the judge committed multiple errors including in his findings of fact and credibility, his conclusions on the indivisibility of Mr. Pannu's injuries, causation, and the assessment of fault and apportionment of damages with respect to a workplace accident and the second motor vehicle accident. He also alleges the judge erred in assessing the various heads of damages. Mr. Pannu cross-appeals the award for non-pecuniary damages.

[2] The judge's reasons are detailed, comprehensive, and respond to the arguments advanced at trial. I am not persuaded he erred as alleged or at all. I would dismiss the appeal and the cross-appeal.

Background

[3] The first motor vehicle accident occurred on March 8, 2018 (the "First Accident"). On November 14, 2018, Mr. Pannu slipped and fell at work (the "Workplace Accident"). He missed work for several days following that accident and WorkSafe BC allowed his claim for health care benefits. The second motor vehicle accident took place on February 20, 2020 (the "Wong Accident").

[4] At trial, Mr. Behnke acknowledged that Mr. Pannu suffered injuries to his neck, back and right shoulder in the First Accident. However, he argued that Mr. Pannu did not suffer an injury to his left shoulder—his most significant injury—in that accident. The judge rejected that argument and found that the injuries to

Mr. Pannu's neck, back and both shoulders were caused by the First Accident: at para. 150.

[5] In arriving at these conclusions, the judge considered Mr. Pannu's testimony, his medical history, clinical records, and the expert evidence. Mr. Behnke submitted the clinical records were inconclusive, that Mr. Pannu's evidence should be rejected, and accordingly that there was not an adequate foundation for the expert opinions. The judge observed Mr. Pannu's evidence was "less than perfect" and that he had a tendency to exaggerate some aspects of his testimony, but found "the basic narrative of his injuries, symptoms and limitations is credible and reliable": at paras. 85–86. The judge concluded the asserted inconsistencies did not "impeach the core aspects of Mr. Pannu's testimony" even though they cast some doubt on his evidence and, in particular, the duration of his symptoms: at para. 92.

[6] The judge found Mr. Pannu's injuries were aggravated by both the Workplace Accident and the Wong Accident, but dismissed Mr. Behnke's contention that he should not be liable for any aggravation of the injuries from the First Accident that Mr. Pannu suffered as a result of the two subsequent accidents.

[7] Liability for the Wong Accident was hotly contested at trial. The judge found Mr. Pannu's evidence was "vague" in that he appeared to have little recollection of the accident and the surrounding circumstances: at para. 28. He testified his vehicle was struck when Ms. Wong drove into the middle lane in which he was driving. Ms. Wong did not agree. She recalled turning into the curb lane and remaining in that lane when Mr. Pannu's vehicle struck her car. However, the notes of the ICBC adjuster who interviewed Ms. Wong were inconsistent with her testimony. The judge accepted the notes could be used to assess the credibility and reliability of Ms. Wong's evidence, but not as evidence of how the accident happened. The judge concluded, in spite of those evidentiary limitations, that the adjuster's notes raised a significant concern about the reliability of Ms. Wong's testimony.

[8] In light of his concerns about the reliability of the evidence of both parties, the judge concluded Mr. Pannu failed to prove on a balance of probabilities that Ms. Wong breached her duty of care or was at fault for the Wong Accident: at para. 48. The judge also found the defendants had failed to prove that Mr. Pannu

was at fault for that accident. Given these conclusions, the judge dismissed the claim against Ms. Wong and made no finding of negligence on the part of Mr. Pannu. Ms. Wong initially appealed that decision, but her appeal has been abandoned.

[9] The most contentious issue on this appeal is whether the judge erred in failing to reduce the damages awarded because of the aggravation of injuries Mr. Pannu experienced following the Workplace Accident and the Wong Accident. In addition to concluding that Mr. Pannu's neck, back and shoulder injuries were caused by the First Accident, the judge concluded that some of his injuries, including to the left shoulder, were aggravated by the subsequent accidents: at paras. 151, 158. However, the judge also found the injuries to Mr. Pannu's neck, back and both shoulders (suffered or aggravated in the accidents) were indivisible: at para. 151.

[10] The judge observed that damages for indivisible injuries could be reduced if a defendant can prove on a balance of probabilities that an intervening event "caused or contributed to the loss claimed regardless of the defendant's negligence" or if "the defendant proves a real and substantial possibility the plaintiff would have incurred the loss claimed in any event regardless of the defendant's negligence": at para. 63. However, he concluded in this case that it was not possible to "assess damages for the aggravation [from the Workplace Accident] separately from the original injury": at para. 151.

[11] Similarly, the judge did not reduce the damages awarded to take into account aggravation of the injuries from the First Accident that Mr. Pannu experienced after the Wong Accident. However, the judge did not explicitly state how he analyzed the cause of the aggravation resulting from that accident, nor whether or how he determined it was not possible to assess damages that might be awarded separately for the aggravation from any damages arising from the original injury.

[12] The judge referred to *Stapley v. Hejslet*, 2006 BCCA 34, to identify common factors that influence an award of non-pecuniary damages. He referred to *Callow v. Van Hoek-Patterson*, 2023 BCCA 92, for the proposition that the range for non-pecuniary damages can be determined by ascertaining the upper and lower end of the range for the same class of case. The judge concluded Mr. Pannu's

situation was, at a high level of abstraction, comparable to the plaintiff in *Callow*, except that Mr. Pannu had experienced more pain and inconvenience than the plaintiff in *Callow* because he had to undergo a surgical procedure to his left shoulder. The judge “added” \$10,000 to the non-pecuniary damage award because of the additional pain and inconvenience suffered as a result of the shoulder surgery. In addition, the judge included an additional \$10,000 as compensation for the discomfort Mr. Pannu experiences with housework. He awarded \$75,000 for non-pecuniary damages inclusive of the housekeeping award.

[13] The judge reviewed Mr. Pannu’s work history since the accident and concluded he had proved a past loss of income of \$27,400 which included missing five weeks of work after the First Accident and five weeks for the shoulder procedure.

[14] To assess the claim for a future loss of income or capacity to earn income, the judge applied the three-step process set out in *Rab v. Prescott*, 2021 BCCA 345. He concluded there was a potential for Mr. Pannu’s ongoing back and left shoulder pain to leave him with chronic pain that may limit his ability to work as an electrician and make him less capable of earning income in a trade for which he is qualified. He also concluded the evidence had established a real and substantial possibility that Mr. Pannu’s limitations would be permanent, even though there was some possibility his condition would improve. He found it most likely Mr. Pannu would be left with a partial disability.

[15] The judge approached valuation of the loss on the capital asset approach. He used Apraj Bassi, Mr. Pannu’s friend who testified at trial, as a comparator. He accepted they were on similar trajectories when the First Accident occurred. In the absence of detailed evidence, he accepted Mr. Bassi’s testimony that Mr. Pannu could have earned approximately \$100,000 a year in self-employment earnings. Assuming Mr. Pannu would work to age 65, the judge applied an appropriate multiplier to conclude the present value of expected life-time self-employment earnings was \$2,648,170. The judge determined Mr. Pannu had suffered a 20% loss of capacity and that it was appropriate to apply a further 20% general contingency to that estimated loss. Accordingly, he awarded \$423,707 for loss of future earning capacity.

[16] The judge also awarded \$12,584 for the cost of future care.

On appeal

[17] The appellant's factum raises numerous errors in judgment, which I would paraphrase for clarity:

- a) The trial judge erred in assessing Mr. Pannu's credibility and reliability as a witness;
- b) The trial judge erred in preferring Mr. Pannu's testimony where it conflicted with clinical records;
- c) The trial judge erred in assessing the impact of his credibility findings on the expert medical evidence;
- d) The trial judge erred in his assessment of causation;
- e) The trial judge erred in assessing fault and apportioning damages with respect to the second accident;
- f) The trial judge erred in assessing non-pecuniary damages;
- g) The trial judge erred in assessing damages for past loss of income;
- h) The trial judge erred in assessing damages for loss of future earning capacity; and
- i) The trial judge erred in awarding damages for cost of future care.

[18] At the hearing of the appeal, Mr. Behnke's arguments focused on three main issues.

[19] First, he argues the judge erred in concluding Mr. Pannu suffered an injury to his left shoulder in the First Accident. This argument concerns the three alleged errors identified above as a) to c). Mr. Behnke acknowledges that the standard of review applicable to this argument is deferential as he is challenging the judge's findings of credibility and fact.

[20] Second, Mr. Behnke submits the judge erred in failing to reduce damages payable by Mr. Behnke because of the injury, or aggravation to injury, caused by the Workplace Accident and the Wong Accident. He submits the judge erred in law in several ways. He argues the judge erred in failing to find liability and assess fault against Ms. Wong. However, his main contention is that the judge erred in concluding Mr. Pannu's injuries were indivisible. His arguments are premised on legal principles regarding causation and apportionment of damages. He says the judge erred by applying a presumption of indivisibility and wrongly imposed an onus on Mr. Behnke to prove that the subsequent accidents caused divisible injuries. Further, he submits the judge erred in failing to conclude that the Workplace Accident and the Wong Accident severed joint and several liability. As he contends the judge made legal errors, he submits that the standard of review applicable to these arguments is correctness. These arguments concern errors d) and e) as alleged in the appellant's factum.

[21] Finally, Mr. Behnke challenges the judge's assessment of each of the heads of damage. There are three aspects to this challenge. First, if this Court accepts that Mr. Pannu's left shoulder injury was not caused by the First Accident, he argues there should be a significant reduction to each head of damages. As I would reject the premise, I need not consider this aspect of the challenge to the damage awards. Second, he submits the judge's approach to assessment of non-pecuniary damages reflects an error in principle and the damage award should be reduced. Finally, he argues there was an inadequate evidentiary record to support the awards for past and future income loss. Mr. Behnke's arguments on damages concern the alleged errors f) to i) set out in his factum.

[22] As I have indicated, it is my view Mr. Behnke is unable to demonstrate the judge erred in fact or law as alleged. Given the focus of Mr. Behnke's submissions on appeal, I will consider the allegations of error under three headings:

- a) Did the judge err in concluding that Mr. Pannu suffered a left shoulder injury in the First Accident?
- b) Did the judge err in failing to order a reduction in damages because of the aggravation to Mr. Pannu's injuries suffered in the Workplace Accident and the Wong Accident?

c) Did the judge err in assessing damages?

[23] Finally, I note Mr. Pannu's cross-appeal asserts that the judge erred in his assessment of non-pecuniary damages. His argument raises an issue similar to that raised by Mr. Behnke's appeal of the non-pecuniary damage award. I would arrive at the same conclusion about the cross-appeal; the judge did not err as alleged and the award for non-pecuniary damages was not inordinately low or high. Accordingly, I will consider the cross-appeal of that award at the same time as I consider Mr. Behnke's appeal of that award.

Did the judge err in concluding that Mr. Pannu suffered a left shoulder injury in the First Accident?

[24] Mr. Behnke concedes the judge's finding that Mr. Pannu's left shoulder injury was caused by the First Accident is a finding of fact entitled to appellate deference. He argues, however, that the judge made reviewable legal errors in assessing Mr. Pannu's credibility and reliability that justify setting aside his factual finding.

[25] Mr. Behnke points to statements in the judge's reasons that acknowledge inconsistencies, fabrications, or other causes for concern relating to Mr. Pannu's credibility and reliability. Despite having made a number of such findings, Mr. Behnke says the judge failed to consider all of this evidence in reaching his conclusion that these inconsistencies "[did] not impeach the core aspects of Mr. Pannu's testimony": at para. 92.

[26] This, Mr. Behnke says, is a legal error. On this point, he relies heavily on this Court's recent decision in *McGlue v. Girvan*, 2024 BCCA 208. Mr. Behnke asserts the trial judge's concerns about the plaintiff's credibility and reliability in *McGlue* are the same type of concerns the judge identified with Mr. Pannu's testimony. He also says Mr. Pannu's personal injury claims are in the same category as those in *McGlue*, which this Court described as falling "in a category for which [the plaintiff's credibility] was not only critical, but determinative": *McGlue* at para. 50.

[27] In *McGlue*, this Court concluded, given the trial judge's concerns about the plaintiff's credibility and reliability, that it was an error for her to give weight to the plaintiff's testimony in the absence of "corroborative objective evidence or

findings”: at para. 52. Mr. Behnke says the same analysis and remedy should apply here. He submits the judge’s concerns about Mr. Pannu’s credibility should have led him to conclude he could give no weight to Mr. Pannu’s testimony in the absence of corroborating evidence.

[28] Instead of taking this approach, the judge preferred Mr. Pannu’s evidence where it conflicted with clinical records from physicians and physiotherapists. Mr. Behnke addresses the clinical records tendered in evidence in some detail, and argues none of the contemporaneous notes corroborated Mr. Pannu’s testimony at trial that he suffered pain and injury in his left shoulder after the First Accident. Mr. Behnke submits the clinical records are evidence to the contrary; there are very few or no mentions of any reported injury or pain in Mr. Pannu’s left shoulder in the clinical notes until *after* the workplace accident that, Mr. Behnke submits, actually caused the left shoulder injury.

[29] Mr. Behnke argues the judge’s preference for Mr. Pannu’s testimony over the evidence of the clinical records is a reviewable error akin to the error in *McGlue*. He further submits the judge fell into the same error when, due to his concerns about Mr. Pannu’s tendency to exaggerate his symptoms, he gave limited weight only to the prognosis opinion in the expert reports tendered by Mr. Pannu. Mr. Behnke submits there was no logical reason for the judge to restrict his limiting of the weight given to the expert’s opinion only to prognosis. He says the whole expert opinion was tainted by the concerns the judge identified about Mr. Pannu’s credibility, and that the judge should have applied the same skeptical analysis to all of the opinions arrived at by the expert.

[30] In short, Mr. Behnke submits this Court should conclude, following *McGlue*, that the judge failed to give appropriate effect to his concerns about Mr. Pannu’s credibility, thus erring in law by failing to grapple with the most important issue: “whether the evidence presented at trial was sufficiently clear, convincing and cogent such that it could support a finding, on a balance of probabilities” that Mr. Pannu had sustained a left shoulder injury as a result of the First Accident: *McGlue* at para. 51. On the basis of this error, Mr. Behnke submits this Court

should reject the judge's conclusion that Mr. Pannu's left shoulder injury was caused by the First Accident.

[31] As should be evident from the summary of his arguments above, Mr. Behnke's submission on this issue hinges on his interpretation and application of this Court's decision in *McGlue*. If, as Mr. Behnke submits, corroborating evidence was required as a matter of law before the judge could give any weight to Mr. Pannu's evidence, then the rest of his argument would follow, and the judge's finding that Mr. Pannu's left shoulder injury was caused by the First Accident might well be vulnerable to appellate review.

[32] However, I am far from convinced that Mr. Behnke is correct in drawing so close a parallel between this case and *McGlue*. This Court's approach in *McGlue* must be considered in the context of the exceptional circumstances of that case, and does not describe the general approach to be taken in reviewing a judge's assessment of a plaintiff's credibility and reliability.

[33] In *McGlue*, the plaintiff's testimony was radically inconsistent and unreliable, and the trial judge found as a fact that the plaintiff had attempted to engage the defendant in a scheme to defraud their insurers by reporting that they were injured: at paras. 11, 18, 21–22. The trial judge explicitly stated, at para. 32 of her reasons, that she "must treat Mr. Girvan's evidence generally, and in particular his self-reported history of complaints to the physicians who assessed him, with caution, especially where his evidence lacks corroborative objective evidence or findings": cited at para. 23 of this Court's reasons in *McGlue*.

[34] On appeal, the Court found that the judge's conclusion was inexplicably inconsistent with her credibility finding and that she had failed to grapple with the critical issue:

[51] Despite acknowledging the relevant principles, the judge inexplicably concluded, with no additional analysis, that Mr. Girvan had proven causation for the bulk of his alleged injuries despite his lack of credibility and the resulting lack of weight that could be given to the experts' opinions. This, in my view, demonstrates a failure to grapple with the critical issue — whether the evidence presented at trial was sufficiently clear, convincing and cogent such that it could support a finding, on a balance of probabilities, that Mr. Girvan had sustained injuries as a result of the motor vehicle accident. ...

[35] *McGlue* does not, as Mr. Behnke seems to suggest, stand for the general proposition that where a judge has concerns about a witness's testimony, it is an error of law to accept that testimony without corroborating evidence. That is not the general, nor correct, approach to credibility assessment. It is well established that the trier of fact is entitled to accept some and reject some of a witness's testimony in light of the strengths or frailties in that witness's evidence: *R. v. Sanghera*, 2015 BCCA 326 at para. 28.

[36] In short, *McGlue* was an exceptional case, and does not stand for the broad proposition that Mr. Behnke would draw. Further, I am unconvinced that the circumstances of this case are comparable to those in *McGlue*. Unlike the trial judge in *McGlue*, the judge here, after acknowledging the inconsistencies and frailties in Mr. Pannu's evidence, explicitly found that the "core aspects" of his testimony were unimpeached: at para. 92. That conclusion was open to the judge, and his credibility assessment is entitled to significant appellate deference: *R. v. G.F.*, 2021 SCC 20 at paras. 81, 99; *R. v. Gilbert*, 2024 BCCA 310 at para. 32.

[37] For this reason, I do not accept the underlying premise of Mr. Behnke's argument: that the judge was not entitled to prefer and accept Mr. Pannu's testimony where it conflicted with or was not corroborated by other evidence. The judge correctly noted that "the absence of a reference in a clinical record to a symptom is not determinative of the non-existence of the symptom": *Edmondson v. Payer*, 2012 BCCA 114 at para. 29. He was entitled to accept Mr. Pannu's direct evidence that he suffered an injury to his left shoulder after the First Accident, without corroboration from the clinical records.

[38] Furthermore, contrary to Mr. Behnke's submission, there was both a legal and logical basis for the judge's decision to limit the weight he gave to the expert's opinion on prognosis, given his finding that Mr. Pannu had tended to exaggerate his symptoms. As Mr. Pannu submits, exaggeration does not mean fabrication; the judge accepted the *existence* of Mr. Pannu's symptoms but was not prepared to entirely accept his evidence as to their *extent*. It was consistent, then, to afford less weight to the expert's prognosis (which depended heavily on Mr. Pannu's assessment of the severity of his own symptoms) but to accept the expert evidence on causation, which simply concerned the existence and cause of those symptoms.

[39] In short, I see no reviewable error in the judge's approach to assessing Mr. Pannu's credibility and reliability. His factual finding that Mr. Pannu's left shoulder injury was caused by the First Accident is entitled to deference in the absence of a palpable and overriding error. The fact the clinical records do not specifically advert to a left shoulder injury is not sufficient, in itself, to ground such an error. The judge considered all of the evidence before him and reached the reasoned and reasonable conclusion that the plaintiff's left shoulder injury was caused by the First Accident.

[40] I would not accede to this ground of appeal.

Did the judge err in failing to order a reduction in damages because of the aggravation to Mr. Pannu's injuries suffered in the Workplace Accident and the Wong Accident?

[41] Mr. Behnke alleges the judge made a number of interrelated errors which led him to err in his assessment of causation generally, and of fault and apportionment of damages with respect to the Wong Accident. He refers to numerous authorities involving plaintiffs who suffered personal injury, divisible or indivisible, in more than one accident or trauma. Meaning no disrespect, I found Mr. Behnke's factum difficult to follow in part because it refers to complex legal principles, but does so without a clear focus on the particular circumstances of the individual cases. In this area of law, statements of legal principle unattached to the circumstances of a case and relevant findings of fact are unhelpful.

[42] In fairness to Mr. Behnke, his submissions on this issue were broadly focused because his appeal challenges the judge's conclusions at each step of Mr. Pannu's personal injury claim: liability, apportionment of fault, causation and damage assessment. To the extent that his submissions on this issue relate to his argument that the left shoulder injury was not caused by the First Accident, I need not consider them further in light of my conclusion that the judge did not err in finding the left shoulder injury was caused by the First Accident.

[43] Having arrived at that conclusion, Mr. Behnke's remaining arguments are the judge erred:

- 1) in his assessment of fault for the Wong Accident. Specifically, he argues the judge erred in failing to find Mr. Pannu wholly or partially at fault for that

accident, and in failing to apportion fault between Mr. Behnke and Mr. Pannu;

- 2) in finding that Mr. Behnke's injuries (in particular to the left shoulder) were indivisible, either by misapplication of principle or law, including in making a presumption of indivisibility; and
- 3) in law or in the application of legal principles concerning causation and apportionment when he failed to reduce damages payable by Mr. Behnke for the aggravation of injuries suffered by Mr. Pannu in the Wong Accident and the Workplace Accident.

Assessment of fault for the Wong Accident

[44] Mr. Behnke argues the judge erred in law in concluding Mr. Pannu was not at fault for the Wong Accident. Referring to paras. 46–47 of the reasons, Mr. Behnke says the judge considered four possible scenarios concerning the circumstances of the accident. These four scenarios were: Ms. Wong turned from an intersection directly into the middle lane in which Mr. Pannu was driving; Ms. Wong swung wide as she turned from an intersection into the curb lane adjacent to the lane in which Mr. Pannu was driving; Ms. Wong turned from an intersection into the curb lane but immediately changed lanes into the middle lane; or Mr. Pannu made an unsafe lane change into the curb lane where Ms. Wong was driving. Mr. Behnke notes that three of the four scenarios would result in a finding of negligence on the part of Ms. Wong, while the fourth requires a finding of negligence against Mr. Pannu. He further submits that, because the judge found Ms. Wong did not breach her duty of care, he “must have accepted the fourth scenario” which would mean Mr. Pannu failed to pull safely into the curb lane behind Ms. Wong. Mr. Behnke further argues that as neither party argued inevitable accident, the judge “was required to draw an inference of negligence” on the facts he found and, having failed to do so, erred in law.

[45] In advancing this argument, Mr. Behnke attempts to avoid having this Court assess the judge's findings through the lens of a deferential standard of review. Nevertheless, he sets out the evidence about the circumstances of the accident in some detail and his submissions invite this Court to find that the judge's conclusion on the question of fault was clearly and materially incorrect.

[46] Mr. Pannu argues the judge did not err in law in concluding that Ms. Wong had failed to prove he was at fault for the Wong Accident. Alternatively, he submits that if this Court is inclined to reconsider liability it should conclude Ms. Wong was at fault for the Wong Accident. In doing so, he refers at length to the evidence at trial to argue the judge erred in failing to find fault against Ms. Wong. In reply, Mr. Behnke argues Mr. Pannu is unable to make that argument because he has not cross-appealed the dismissal of the case against Ms. Wong.

[47] Dealing first with the latter argument, I am not persuaded Mr. Pannu cannot reply to the appellant's assertion the judge erred in failing to find Mr. Pannu wholly or partially at fault for the Wong Accident by arguing Ms. Wong was at fault for that accident. Although Ms. Wong is not a party to the appeal, Mr. Behnke is able to challenge the Wong Accident liability findings from trial because of their importance to the damages question: whether fault should have been apportioned to Ms. Wong as a second tortfeasor responsible for indivisible damages suffered by Mr. Pannu. This is a live issue on Mr. Behnke's appeal of the damages award.

[48] It would be unfair to allow Mr. Behnke to allege the judge erred in failing to find liability against Mr. Pannu, but prevent Mr. Pannu from arguing—in defence of the judge's order against Mr. Behnke—that the judge erred in the opposite direction. As the trials of the actions were heard at the same time, and the evidence about the interconnected issues involving indivisible damages was presented in both actions, I see no principled reason why Mr. Pannu should be precluded from advancing the argument by way of rebuttal that the judge ought to have concluded that Ms. Wong's negligence caused the Wong Accident. If this Court were to agree with Mr. Pannu that Ms. Wong should have been found at fault for the Wong Accident, it could not substitute a finding of liability against her, it would only dismiss Mr. Behnke's appeal on that ground.

[49] Turning to Mr. Behnke's main argument, I am not persuaded the judge was wrong in law in concluding that neither party to the Wong action had established negligence against the opposing party on a balance of probabilities. The judge's conclusions are findings of mixed fact and law that are entitled to deference on appeal. To make the findings, the judge had to consider the evidence to assess the parties' credibility and reliability, and make findings of fact. He also had to apply the proper onus of proof. In arriving at conclusions on negligence, he was not, as Mr. Behnke suggests, obliged to infer negligence in the absence of proof.

[50] It must be remembered that Mr. Pannu and Ms. Wong testified to two very different versions of the circumstances leading to the accident and the judge found reasons to question the reliability of the evidence of both. The judge found Mr. Pannu's evidence "vague". He could not recall important details including the time, whether it was dark or light, what the weather was like, or whether there was a traffic light at the intersection of Main and National. He believed Ms. Wong had not turned at the intersection but had pulled out of a parking spot on Main into the middle lane where he was travelling. Ms. Wong testified to a clear recollection of events. She remembered the time of day and where she was headed. She testified to turning into the curb lane, which had a clear opening for her vehicle, from the intersection when Mr. Pannu's vehicle turned into her lane and struck her vehicle. However, the statement made by Ms. Wong to the ICBC customer service representative suggested she had turned from the intersection into the middle lane. Further, contrary to Ms. Wong's assertion that she had spoken to the ICBC employee on the evening of the accident, the service representative said she reported the incident six days later.

[51] After noting the problems with the evidence of both parties, the judge concluded there was no reliable evidence to support a finding that Ms. Wong was at fault, and, as a result, Mr. Pannu had not proven on a balance of probabilities that Ms. Wong breached her duty of care: at para. 48. He also concluded the defendants had failed to prove on a balance of probabilities that Mr. Pannu was at fault for the accident: at para. 50.

[52] Mr. Behnke refers to *Singleton v. Morris*, 2010 BCCA 48, at paras. 31–39, in support of the proposition that the judge erred in law in failing to infer negligence against Ms. Wong given the findings he made. In my view, the circumstances in the present case bear no similarity to those in *Singleton*, which provides no support for Mr. Behnke's position.

[53] Even if this had been a case with circumstantial evidence from which an inference of negligence could be drawn, Mr. Behnke's position is simply incorrect. In *Singleton*, the Court addressed the issue of when an inference of negligence *may* be drawn from circumstantial evidence, but stated clearly and explicitly that "in cases such as this, the trial judge may—but is not required to—draw an inference of negligence from the fact there was a rear-end collision": at para. 38. In other words, the failure to draw an inference does not give rise to an error of

law. In order to establish error for failing to draw an inference from available evidence, Mr. Behnke would have to demonstrate that the judge committed a palpable and overriding error in his findings of fact and drawing of inferences. He has not attempted to do so.

[54] The greater impediment Mr. Behnke has in relying on *Singleton* is that, in this case, there was no evidence—circumstantial or otherwise—establishing a *prima facie* case of negligence. That was the situation in *Singleton* because the defendant had rear ended the plaintiff's vehicle while it was at a stop. As this Court noted, in those circumstances, the burden of proof shifts to the defendant to establish an explanation of how the accident may have occurred without negligence. By contrast, the judge's difficulty in the present case was that there was no evidence on which the judge could safely rely to determine how the accident happened, or which of the parties was at fault. As the judge correctly noted, each party bore the onus of proving the other party's fault. Having found that neither party had satisfied the burden of proof to establish negligence, he was unable to determine how the accident happened and found neither party at fault.

[55] Contrary to Mr. Behnke's argument, the judge was not required to find that Mr. Behnke had established Mr. Pannu's negligence because, having rejected three of the four possible scenarios that suggested negligence on Ms. Wong's part, he was left with only one scenario as to how the accident occurred. Negligence cannot be determined based on possible scenarios, it must be based on findings of fact and inferences drawn from those findings. The judge was simply unable to make findings of fact that allowed him to determine on a balance of probabilities that the Wong Accident was caused by the negligence of one or both of the drivers.

[56] While it is unusual for a trial judge to arrive at such a conclusion, it is not an error in law to do so. Nor was it an error to arrive at conclusions on negligence based on the burden of proof. In *McPhee v. British Columbia (Ministry of Transportation and Highways)*, 2005 BCCA 139, at paras. 19–20, Justice Southin referred with approval to Lord Brandon's statement in *Rhesa Shipping Co. SA v. Edmonds*, "The Popi M", [1985] 2 All E.R. 712:

...[t]hat the judge is not bound always to make a finding one way or the other with regard to the facts averred by the parties. He has open to him the third alternative of saying that the party on whom the burden of proof lies in relation to any averment made by him has failed to discharge that

burden. No judge likes to decide cases on burden of proof if he can legitimately avoid having to do so. There are cases, however, in which, owing to the unsatisfactory state of the evidence or otherwise, deciding on the burden of proof is the only just course for him to take.

[57] The judge found the state of the evidence to be unsatisfactory and this led him to determine liability on the basis of the parties' respective burdens of proof. As the parties have argued at some length, there was evidence the judge could have accepted to find one or both at fault. However, as a result of the shortcomings in the evidence, the judge was not satisfied that either party had met their burden of proof. I see no error in this conclusion.

[58] Having found neither party at fault for the Wong Accident, the judge was not required to, and did not, apportion fault to either Mr. Pannu or Ms. Wong. He was correct not to do so. As this was a trial considering two accidents in a single action, the judge could have apportioned fault either between defendants who were found to be at fault or, had he found Mr. Pannu to be negligent, between the three parties to the extent of their blameworthiness: *Alragheb v. Francis*, 2021 BCCA 457 at paras. 41–43. However, apportionment between tortious and non-tortious causes is not permitted by the *Negligence Act*, R.S.B.C. 1996, c. 333 and is contrary to the principles of tort law: *Athey v. Leonati*, [1996] 3 S.C.R. 458 at paras. 22–23; *Alragheb* at para. 26. Here, there was only a single tortious cause of the injuries: Mr. Behnke's negligence in the First Accident.

[59] I need not consider Mr. Behnke's remaining arguments to the extent that they allege errors regarding apportionment of damages. As fault cannot be apportioned to Mr. Pannu (or Ms. Wong), the remaining question is whether the judge erred in failing to reduce the damages payable by Mr. Behnke. Mr. Behnke argues the judge erred in concluding that Mr. Pannu's injuries were indivisible, and in failing to reduce the damages awarded after finding that his injuries were aggravated by both the Wong Accident and the Workplace Accident. His arguments posit errors of law or a failure to apply applicable principles of causation. As I will explain, I am of the view that he is unable to establish either.

Indivisibility of Mr. Pannu's injuries

[60] Aside from the assertion that the judge erred in finding the left shoulder injury was caused by the First Accident, the thrust of Mr. Behnke's argument is that

the judge erred by applying a rebuttable presumption of indivisible injury. Additionally, he argues the judge failed to conduct the proper analysis demanded by *Athey* and *Blackwater v. Plint*, 2005 SCC 58. He also submits that the judge erred in failing to properly consider Mr. Pannu’s “original position”.

[61] The starting point for consideration of Mr. Behnke’s argument is that a finding of indivisibility is a finding of fact, and the standard of review is deferential: *Alragheb* at para. 15. The conclusion that damage is indivisible is open to challenge on the grounds the judge misapplied the law by approaching the question in the wrong manner: *Khudabux v. McClary*, 2018 BCCA 234; *Neufeldt v. Insurance Corporation of British Columbia*, 2021 BCCA 327.

[62] The appellant’s arguments are replete with suggestions the judge failed to apply the correct “but for” test to assess causation of the left shoulder injury. I have already found that the judge did not err in finding that the left shoulder injury was caused by the First Accident. His submission that the judge failed to apply the correct test adds little to his argument that the judge made a palpable and overriding error in coming to that conclusion. The judge considered the evidence and the many arguments advanced by the defendants at trial but never lost sight of the basic question of causation. He concluded that Mr. Pannu’s left shoulder injury, and the other injuries conceded by the defendants, were caused by the First Accident. Further, while the injuries were aggravated by the two subsequent accidents, it was not possible to assess damages for the aggravation separately from the original injury: at paras. 150–151.

[63] I would reject the suggestion that the judge applied a presumption of indivisibility. The judge’s conclusion the left shoulder injury was indivisible was based on his finding that the Workplace Accident, and the Wong Accident, aggravated the injury originally caused by the First Accident: see paras. 151, 158. This approach was affirmed by this Court in *Neufeldt*, where Justice Willcock, writing for the Court, held:

[68] A second insult that aggravates an existing injury is frequently and correctly considered to contribute to an injury indivisible from the initial injury. As this Court observed in *Bradley v. Groves*, 2010 BCCA 361:

[37] We are ... unable to accept the appellant’s submission that “aggravation” and “indivisibility” are qualitatively different, and require different legal approaches. If a trial judge finds on the facts of a particular case that subsequent tortious action has merged with prior tortious action to create an injury that is not attributable to one

particular tortfeasor, then a finding of indivisibility is inevitable. That one tort made worse what another tort created does not automatically implicate a thin or crumbling skull approach (as in *Blackwater*), if the injuries cannot be distinguished from one another on the facts. Those doctrines deal with finding the plaintiff's original position, not with apportioning liability. The first accident remains a cause of the entire indivisible injury suffered by the plaintiff under the "but for" approach to causation endorsed by the Supreme Court of Canada in *Resurfice Corp. v. Hanke*, 2007 SCC 7, [2007] 1 S.C.R. 333. As noted by McLachlin C.J.C. in that case, showing that there are multiple causes for an injury will not excuse any particular tortfeasor found to have caused an injury on a "but-for" test, as "there is more than one potential cause in virtually all litigated cases of negligence" (at para. 19). It may be that in some cases, earlier injury and later injury to the same region of the body are divisible. While it will lie for the trial judge to decide in the circumstances of each case, it is difficult to see how the worsening of a single injury could be divided up.

[Emphasis added.]

[64] Here, the judge found the First Accident remained a cause of the continuing injury to the left shoulder that was aggravated by the subsequent accidents. He also found that he could not "divide up" the "worsening" (aggravation) of the shoulder injury. As noted, the fact that there are multiple causes for an injury will not excuse any particular tortfeasor found to have caused the injury on a proper application of the "but for" test. Mr. Behnke is correct to state that a court must also consider whether a subsequent accident caused a new injury or increased the symptoms in a manner unconnected to the first trauma. I consider that issue below, when I examine Mr. Behnke's assertion that the judge erred in failing to reduce damages for the aggravation of the injuries. However, I am of the view the judge properly considered that question and did not err in his approach to indivisibility.

[65] I also see no merit in the argument that the judge failed to apply the correct analysis from *Athey* or *Blackwater*.

[66] Mr. Behnke refers to para. 35 in *Athey* in support of his contention that the judge applied the incorrect analysis. In that paragraph, Justice Major discusses the "so-called 'crumbling skull' rule" which recognizes that "the defendant need not put the plaintiff in a position better than his or her original position" and "is liable for the additional damage but not the pre-existing damage": at para. 35. The crumbling skull rule has no application to the facts of this case as Mr. Pannu did

not suffer from injury or damage that pre-existed the First Accident. Mr. Pannu's "original position" was immediately prior to the First Accident at which time he did not suffer from any injury or susceptibility to injury.

[67] Mr. Behnke also submits the judge failed to adopt the proper approach to assessment of damages as set out in *Blackwater*. That principle is not controversial. In that case, the calculation of damages for sexual assault was complicated by the plaintiff's personal history that included trauma suffered in his childhood before attending the school and trauma for non-sexual abuse that was statute-barred. The Court noted the difficulty in untangling the different sources of damage and loss but observed that "the law requires that it be done, since at law a plaintiff is entitled only to be compensated for *loss caused by the actionable wrong*": at para. 74 (emphasis in original).

[68] Mr. Behnke argues the judge failed to untangle the sources of damage and loss and thus made an award that compensated him for losses that were not caused by the actionable wrong. This argument presumes the judge's finding that Mr. Pannu's injuries were aggravated by the Workplace Accident and the Wong Accident was also a finding that the injuries were divisible. In my view, the judge did not err in refusing to reduce the damages awarded even though he found the injuries were aggravated, as I discuss in the next section.

Aggravation of injuries

[69] In considering whether the judge erred as Mr. Behnke alleges, it is helpful to return to *Athey*, which sets out relevant, non-controversial principles, including:

- It is not necessary for a plaintiff to establish that the defendant was the sole cause of injury, "as long as a defendant is part of the cause of an injury, the defendant is liable": at para. 17;
- The law does not permit apportionment (reduction of damages) between tortious and non-tortious causes as that would be contrary to the principle that a plaintiff is to be restored to the position they

would have enjoyed but for the negligence of the defendant: at paras. 20, 23; and

- A defendant is only liable for injuries caused by his or her negligence: at para. 24.

[70] The Court specifically dealt with independent intervening events, “where an unrelated event, such as a ... non-tortious accident, occurs after the plaintiff is injured”: at para. 31. It did so to explain why in *Jobling v. Associated Dairies Ltd.*, [1981] 2 All E.R. 752 (H.L.) and *Penner v. Mitchell* (1978), 89 D.L.R. (3d) 343 (A.B.C.A.), damages were reduced to account for supervening diseases or adverse medical conditions. The Court explained:

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

[71] While the use of the term “original position” is somewhat awkward to describe the effect of supervening diseases or medical conditions, the concept is clear. Supervening diseases or medical conditions are independent intervening events, like an intervening trauma that has a non-tortious cause. The task of a court is to make findings of fact to ensure that a tortfeasor is liable only for the damages they caused. Of course, the damages a tortfeasor causes includes loss or damage arising from an injury that is indivisible; in other words, in circumstances where it is “neither possible nor appropriate” to divide the loss or damage suffered into separate causes: *Athey* at para. 25.

[72] The determination of indivisibility is a finding of fact. Mr. Behnke's arguments suggest the judge made an error of law, but I am not persuaded he did so. Indeed, the judge correctly stated the legal principle to be applied when considering whether damages for an indivisible injury should be reduced because of an intervening event:

[63] Accordingly, damages for indivisible injuries may be reduced if the defendant proves on a balance of probabilities that an intervening event – such as a slip and fall - caused or contributed to the loss claimed regardless of the defendant's negligence (a past fact). Damages may also be reduced if the defendant proves a real and substantial possibility the plaintiff would have incurred the loss claimed in any event regardless of the defendant's negligence (a hypothetical contingency).

[Emphasis added.]

This is an accurate description of the two ways in which a defendant can prove that damages for an injury that is otherwise indivisible could be reduced.

[73] As the cases recognize, both are difficult to establish when dealing with an injury caused in one accident and aggravated in subsequent accidents. Here, the judge concluded, having recognized that it may be possible to reduce damages as stated in para. 63, that the injury to the left shoulder was indivisible and that it was not possible to assess damages for the aggravation caused in the Workplace Accident separately from the original injury caused in the First Accident: at para. 151.

[74] I recognize that the judge did not specifically articulate a similar finding in relation to the Wong Accident. His findings on causation and indivisibility, with a particular focus on the left shoulder injury, are set out at paras. 150–160. While he does not state that he was unable to assess damages separately for the Wong Accident, as he does for the Workplace Accident, when I read the reasons contextually, I must conclude he arrived at the same conclusion of indivisibility with respect to the injuries aggravated by the Wong Accident, as he did for the Workplace Accident.

[75] As indicated, the judge correctly stated the legal principle to be applied. He focused on the question of indivisibility and whether damages could be assessed separately for the aggravation of the injury in the Workplace Accident because the main argument advanced by the defendants at trial was that the left shoulder injury was caused by that accident. The judge stated his significant findings:

- he rejected the defendants' argument that the shoulder injury was caused by the slip and fall (at para. 155);

- he found that all of the injuries were caused by the First Accident (para. 150);
- he determined the left shoulder injury was aggravated by the Workplace Accident, and, along with the back pain, by the Wong Accident (at para. 158); and
- that Mr. Behnke “is fully liable for the damages resulting from injuries to Mr. Pannu’s neck, back and both shoulders” (at para. 157).

[76] It would be incongruous to find that the judge ignored the question of whether damages for the aggravation of the injuries could be assessed separately for the Wong Accident when he had directly considered that issue with regard to the more contentious Workplace Accident. Further, he could not have arrived at his conclusion that Mr. Behnke is “fully liable” for the damages without having considered that question.

[77] In summary, I would not give effect to the grounds of appeal challenging the judge’s conclusions on liability, causation, and indivisibility of damages, and his refusal to reduce the damages awarded to Mr. Pannu because of the aggravation of his injuries suffered in the Workplace Accident and the Wong Accident.

Did the judge err in assessing damages?

[78] As noted above, Mr. Behnke challenges the judge’s assessment of non-pecuniary damages, damages for loss of past income, damages for loss of future income, and cost of future care. For the most part, these grounds of appeal rely on arguments about the judge’s errors in finding facts and assessing causation which I have already rejected. As I will explain, I see no errors in the judge’s assessment of damages.

[79] The standard for reviewing a trial judge’s assessment of damages is deferential. Unless there was no evidence capable of supporting the judge’s conclusion, he erred in principle, or the result was so inordinately low or high as to be “wholly erroneous”, there is no basis for appellate intervention: *Woelk v. Halvorson*, [1980] 2 S.C.R. 430 at 435; *McPhail v. Ross*, 2025 BCCA 139 at para. 50.

Non-pecuniary damages

[80] The judge began his analysis of non-pecuniary damages by identifying a number of comparable cases to determine the appropriate range: *Callow*. He concluded, applying this comparative approach, that the appropriate baseline for non-pecuniary damages in the case before him was the same as in *Callow*, that is, \$55,000. He then added an additional \$10,000 to compensate for the pain and inconvenience of Mr. Pannu's shoulder surgery, and another \$10,000 to compensate for the difficulty and discomfort of performing housework.

[81] Mr. Behnke says the judge made a legal error by taking a "tariff-like" approach. Mr. Behnke's position is that the judge ought to have stopped at the \$55,000 award drawn from *Callow*, and that when he proceeded to award additional lump sums as compensation for other factors, he strayed from the legally correct approach by adopting a "proprietary approach", treating each factor as an asset with its own value, rather than assessing non-pecuniary damages holistically.

[82] Mr. Pannu agrees that the judge erred in assessing non-pecuniary damages, but his position is that the baseline drawn from *Callow* was erroneously low, because the judge considered comparable cases involving soft-tissue injury, instead of cases where the plaintiff had to have surgery. In response to Mr. Behnke's argument, Mr. Pannu says there was nothing wrong with adjusting the *Callow* baseline upwards in recognition of aggravating factors, and that adjusting non-pecuniary damage awards to account for loss of housekeeping capacity is consistent with the authority, and particularly the approach this Court recently took in *Huag v. Funk*, 2023 BCCA 110.

[83] I am disinclined to interfere with the judge's assessment of non-pecuniary damages. Neither party alleges that the judge made a factual error, or that the evidence was incapable of supporting his conclusions. Both say the judge erred in principle. I do not accept Mr. Behnke's argument that it was an error in principle to adjust the baseline upwards to accommodate for the specific factors of this case. The judge did not apply a proprietary approach, and treat Mr. Pannu's pain and suffering as though it had an objective economic value; he simply identified the various factors that weighed in his holistic assessment of the appropriate damages

award. To the extent that he seems to have broken down how each factor influenced the dollar value of his assessment, this is not a legal error.

[84] On the other hand, I would also reject Mr. Pannu's argument that the judge made a legal error in relying on comparator cases, like *Callow*, where the plaintiff suffered a soft-tissue injury. He was clearly alive to the distinguishing feature of the case before him, namely Mr. Pannu's surgery, and adjusted the award upwards from the baseline on that basis. However, as Mr. Behnke points out in his reply to Mr. Pannu's cross-appeal, the cases Mr. Pannu put before the judge as comparators, and which he now asks this Court to apply as comparators, are all distinguishable. The judge's determination of what cases were comparable is entitled to deference; I see no legal error in his treatment of the cases put before him.

[85] Finally, I am not satisfied that the judge's assessment of damages was so inordinately high or low as to be "wholly erroneous": *Woelk*. Mr. Behnke seeks an award of \$55,000; Mr. Pannu seeks an award in the range of \$130,000–\$140,000. The award actually made of \$75,000 falls somewhere in the middle of the range of what the parties themselves seek, and the range of awards in comparable cases. Given that I can identify no error in the judge's analysis, I cannot conclude this award is wholly erroneous. I would not accede to either Mr. Behnke's appeal or Mr. Pannu's cross-appeal on this point.

The other damage awards

[86] Part of Mr. Behnke's argument challenging the judge's assessment of past loss of income and future loss of income depends on submissions I have already rejected, namely that the judge erred in finding that Mr. Pannu's left shoulder injury was caused by the First Accident and that Mr. Behnke was liable for this injury. That is the sole basis for his argument that the judge's assessment of cost of future care was erroneous, and accordingly, I need not address that submission other than to say, in light of my conclusion above, that Mr. Behnke advances no basis to disturb the judge's assessment of cost of future care.

[87] Other than relying on the arguments I have rejected above, Mr. Behnke says the judge erred in his assessment of both past loss of income and future loss of income by reaching a conclusion with no basis in the evidence. He says that the

judge's awards under these heads of damages were based on hearsay and otherwise unreliable evidence about Mr. Pannu's self-employment income.

[88] The judge's assessment of damages for both past and future loss of income did turn to a significant extent on his acceptance of testimony of Mr. Bassi, who the judge found to be an appropriate comparator. The judge found that Mr. Pannu was on a career trajectory similar to that of Mr. Bassi when the accident happened. Mr. Behnke says Mr. Bassi's evidence was either hearsay or lay opinion evidence unsupported by documentation, and that it was an error for the judge to put any weight on this evidence.

[89] The difficulty with this argument is that there was evidence before the judge to support the findings he made. This is not a case where there was no evidentiary basis for the judge's conclusions. Mr. Bassi testified, and the judge was entitled to accept some or all of this testimony, even where it was not corroborated by documentation. To the extent that Mr. Bassi had an opinion about Mr. Pannu's earning potential, this was, of course, lay opinion evidence. But the judge did not rely on Mr. Bassi's opinion; he drew his own inferences based on the similarities he found in Mr. Pannu and Mr. Bassi's career trajectories, and Mr. Bassi's testimony about his own earnings. The judge did express hesitation about accepting some of Mr. Bassi's evidence, but as I have already explained, it is not an error for a trier of fact to accept some but not all of a witness's testimony.

[90] I see no palpable and overriding error in the judge's assessment of Mr. Bassi's testimony. There was a basis in the evidence for the conclusions the judge reached about Mr. Pannu's loss of past and future income. Further, I see no legal error in his statement of the test. I also cannot conclude the judge's award was so inordinately high as to be wholly erroneous. As Mr. Pannu submits, the judge's award fits into the range of awards in comparable cases.

[91] In short, I find no reviewable error in the judge's assessment of damages. For these reasons, I would not accede to this ground of appeal.

Disposition

[92] I would dismiss the appeal and the cross-appeal.

“The Honourable Mr. Justice Butler”

I AGREE:

“The Honourable Justice Dickson”

I AGREE:

“The Honourable Madam Justice DeWitt-Van Oosten”