COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Chandi v. Sekhon,*
2025 BCCA 222

Date: 20250626
Dockets: CA48986; CA48987

Docket: CA48986

Between:

Karandeep Singh Chandi
and Jaswinder Singh Chandi

Appellants/
Respondents on Cross Appeal
(Defendants)

And

Pravdeep Sekhon

Respondent/
Appellant on Cross Appeal
(Plaintiff)

- and -

Docket: CA48987

Between:

Resty Cruz

Appellant/
Respondent on Cross Appeal
(Defendant)

And

Pravdeep Sekhon

Respondent/
Appellant on Cross Appeal
(Plaintiff)

Before: The Honourable Madam Justice Horsman
The Honourable Justice Fleming
The Honourable Justice Mayer

On appeal from: An order of the Supreme Court of British Columbia, dated March 15, 2023 (*Sekhon v. Cruz*, 2023 BCSC 319, Vancouver Docket M1812489).

Counsel for the Appellants/Respondents on Cross Appeal:	R.C. Brun, K.C. J.J.L. Brun, K.C.
Counsel for the Respondent/Appellant on Cross Appeal:	P.R. Bisbicis R.N. Bisbicis E.F. To
Place and Date of Hearing:	Vancouver, British Columbia April 10, 2025
Place and Date of Judgment:	Vancouver, British Columbia June 26, 2025

Written Reasons by:
The Honourable Madam Justice Horsman

Concurred in by:
The Honourable Justice Fleming
The Honourable Justice Mayer

Summary:

The respondent suffered injuries in two motor vehicle accidents, which the appellants admitted liability for. At trial, the judge awarded damages for past and future loss of income earning capacity. On appeal, the appellants allege that the judge committed various errors in his assessment of both these heads of damages. On cross-appeal, the respondent argues the judge erred in applying a 5% contingency deduction to the future loss of earning capacity award to account for his pre-existing back condition.

Held: Appeals and cross-appeal dismissed. The trial judge did not err in his assessment of damages. Specifically, the trial judge did not err in finding that there was a real and substantial possibility that a subsequent accident may have caused the same injuries given the respondent's pre-existing back condition. Nor did he make a reversible error in applying a 5% contingency deduction to the future loss of earning capacity award to account for that possibility. The trial judge also did not err in failing to apply that 5% contingency deduction to the award for past loss of earning capacity, as the evidence did not support the possibility of a pecuniary loss in the pre-trial period absent the motor vehicle accidents.

Reasons for Judgment of the Honourable Madam Justice Horsman:

[1] The appellants appeal an award of damages for past and future loss of earning capacity to the respondent for injuries he suffered in two motor vehicle accidents. The appellants admitted liability for the accidents.

[2] The most significant, and persistent, injury was to the respondent's lower back. The trial judge found that the respondent had suffered income loss as a result of the accidents because this injury had limited his opportunity to work overtime hours. He awarded the respondent $30,484 for past loss of earning capacity, and $336,055 for future loss of earning capacity. The appellants allege that the trial judge committed various errors in his assessment of damages. They seek an order setting aside, or alternatively reducing, the damages awarded for loss of earning capacity.

[3] The respondent cross-appeals the award on the basis that the judge erred in applying a 5% contingency deduction to the award for future loss of earning capacity to account for his pre-existing back condition. The respondent alleges that this deduction is unprincipled, and unsupported by the medical evidence.

[4] For the reasons that follow, I would dismiss the appeals and the cross-appeal.

Background

The accidents and the respondent's injuries

[5] The first accident occurred on February 18, 2017 (the "First Accident"), and the second on January 24, 2019 (the "Second Accident"). Both were rear-end collisions. The respondent described the impact of the First Accident as "a pretty big jolt", and stated that he was pressed into his seatbelt. He described the impact of the Second Accident as a "big jolt" that moved the position of the vehicle he was travelling in.

[6] The trial judge found that the respondent suffered soft tissue injuries to his neck, upper back, and low back in the First Accident, and that his symptoms were exacerbated by the Second Accident. The most significant of these injuries was to the respondent's low back. The trial judge found that the respondent experienced persistent low back pain that impaired his ability to participate in activities at the same level as before the accidents. These findings are not challenged on appeal.

[7] The respondent's medical experts opined that the respondent's prognosis for recovery was poor, and that he had reached maximum medical recovery. The trial judge largely accepted these opinions for the purpose of assessing damages, other than applying a modest contingency deduction to certain heads of damages to account for the possibility of improvement over time with proper treatment. These findings are also not challenged on appeal.

[8] After the First and Second Accidents, the respondent was involved in multiple subsequent accidents consisting of three slip and falls, a sports injury to his knee, and two motor vehicle accidents (collectively, the "Subsequent Accidents"). The details of the two subsequent motor vehicle accidents are as follows:

1. On August 26, 2019, the respondent was sitting in his parked work vehicle when a truck backed into the front of his vehicle (the "Third Accident"). The respondent testified at trial that he immediately felt a twinge in his back, and thereafter experienced some back pain. The pain had returned to baseline level by the end of 2019.

2. On September 9, 2021, the respondent was rear-ended by a pick-up truck while driving his work vehicle (the “Fourth Accident”). He felt a “jolt” that was similar to the impact he experienced in the First Accident. The respondent testified that the Fourth Accident “definitely” hurt his lower back, causing him to participate in massage therapy and physiotherapy, and to take pain pills.

[9] At the time of the First Accident, the respondent was working for the provincial Ministry of Transportation and Infrastructure (the “Ministry”) as an Assistant Bridge Construction Supervisor. This position fell within the Ministry’s “Scientific/Technical Officer”, or “STO”, classification. On or about September 16, 2019, the respondent changed positions, accepting a job with the Ministry as a Bridges Area Manager. This was classified as an Administrative Officer or “AO” position. The AO position was mostly office-based, and therefore less physically demanding than the STO position.

[10] The respondent was on parental leave from June 6, 2020 to February 5, 2021, and did not work at all during this period of time. In February 2021, following his parental leave, the respondent submitted and then withdrew an application to return to his STO position.

The trial

[11] On December 5, 2018, the respondent filed a notice of civil claim seeking damages for the injuries he suffered in the First Accident. On January 9, 2020, he filed a notice of civil claim in relation to the Second Accident. By consent, the two actions were heard together.

[12] The trial occurred over 10 days in November and December 2022. The appellants admitted liability, and thus the only issue at trial was the assessment of damages. The respondent was 35 years old at the time of trial, and working for the Ministry in the AO position as a Bridges Area Manager.

[13] The respondent tendered expert reports from an orthopedic surgeon (Dr. John Fuller), a physiatrist (Dr. R. Nairn Stewart), an occupational therapist (Matt Gregson), and an economist (Darren Benning). The appellants tendered response reports from a physiatrist (Dr. Catherine Paramonoff) and an economist (Mark Szekely). All of the experts testified at trial.

[14] The respondent sought an award of damages for past loss of earning capacity in the amount of $196,939, and future loss of earning capacity in the range of approximately $1.18 million to $2.95 million. The respondent's claim for damages for past loss of earning capacity was primarily based on his lost opportunity to work additional overtime hours. In relation to future loss of earning capacity, he similarly argued that his accident-related injuries restricted his ability to work overtime, as well as his ability to move into more lucrative employment in the private sector. The appellants' position was that the respondent did not establish a real and substantial possibility of a pecuniary loss, either in the past or in the future, and therefore should not be awarded any damages for loss of earning capacity.

[15] The reasons for the respondent's decisions to move from the STO position to the AO position, and then to submit and withdraw an application to return to the STO position, were contested at trial. The respondent testified that these decisions were motivated by his back injury. The appellants maintained that the respondent had other reasons that were unrelated to his back injury. The respondent's reasons for changing jobs were relevant because his claim for damages for loss of income earning capacity was based, to a significant extent, on the assertion that the job switch led to a loss of opportunity to earn overtime pay.

[16] There were inconsistencies in the evidence regarding the respondent's reasons for withdrawing his application to return to the STO position in 2021. The respondent testified that he did not ever intend to return to work as an STO because he knew he was incapable of performing the job duties. He stated that he initiated the application process as an "ego-boost" in the hope he would do well in the competition. The respondent gave different reasons for his decision to withdraw in a

work email sent on February 8, 2021, which stated that he was dissuaded by the hours of work and night shifts required of an STO.

[17] The appellants took the position that the respondent was not a credible or reliable witness, and that the experts' reports were also not reliable to the extent they depended on the respondent's self-reports. The appellants' challenge to the respondent's credibility was largely based on: (1) his failure to advise some of the expert witnesses about the Subsequent Accidents at the time they assessed the respondent, and (2) inconsistency in the reasons he gave to his employer and at trial for withdrawing his application to return to the STO position.

The trial judgment: 2023 BCSC 319 ("Reasons")

[18] The trial judge first addressed the respondent's credibility and reliability. The judge accepted that the respondent attempted to be truthful in his testimony, but found that his evidence "suffered from exaggeration" and that he "failed to grasp the importance of being under oath or the importance of precision in language": Reasons at para. 29. The judge was most troubled by the respondent's failure to disclose the Subsequent Accidents to some of the experts who examined him. This deprived the experts of the opportunity to "explore and examine those issues in a meaningful way": Reasons at para. 33. While the experts were cross-examined on the Subsequent Accidents, the judge found that the level of analysis was "less robust than what would be expected" if the respondent disclosed the information during the medical examinations: Reasons at para. 33.

[19] Accordingly, the judge concluded that the respondent's evidence had to be approached with caution. He found that similar caution was warranted in relation to the evidence of the experts who had not been advised about the Subsequent Accidents.

[20] On the issue of causation, the trial judge accepted that the appellant had suffered soft tissue injuries in the First and Second Accidents, most significantly to his low back. Specifically, the judge found that the First Accident was the initial cause of, and the Second Accident worsened, the respondent's back injuries.

Therefore, he concluded that the respondent established that "but for" the appellants' actions, he would not have suffered the injuries for which he sought compensation: Reasons at para. 47.

[21] The trial judge also found, based on the expert evidence, that the respondent suffered from a pre-existing back issue—a fused disc abnormality—that was asymptomatic prior to the First Accident. The judge concluded that this pre-existing condition was relevant to the assessment of damages:

> [46] …I also accept Dr. Fuller's opinion that it is more likely than not that in the absence of the trauma from the Accidents, Mr. Sekhon would not have developed his current conditions, but also find that Dr. Fuller's conclusions also mean that there was a possibility that Mr. Sekhon's pre-existing back injury would have caused him symptoms had the Accidents not occurred. This possibility will factor in to my final assessment of damages.
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> [Emphasis added.]

[22] The trial judge awarded the respondent non-pecuniary damages in the amount of $47,250, which included a contingency deduction of 10% to account for the possibility that his condition might improve with proper active rehabilitation treatment. He also awarded damages of $10,527 to compensate for the cost of future care. The parties agreed that special damages should be awarded in the amount of $13,032. None of these heads of damages are in issue on the appeals.

Past loss of earning capacity

[23] The trial judge began his analysis of the respondent's claim for past loss of earning capacity by reviewing the relevant case law. He noted that an award for past earnings loss—which is intended to compensate a plaintiff for what they would have earned prior to trial but for the accident—may require consideration of hypothetical events that need not be proven on a balance of probabilities. No issue is taken on appeal with the judge's statement of the governing legal principles.

[24] The respondent's claim for past income loss was divided into two time periods. From the date of the First Accident (February 18, 2017) to the date he stopped working in an STO position (September 16, 2019), the respondent claimed that he was unable to work as much overtime as he would have but for the First and

Second Accidents. In the second time period, from the job switch on September 16, 2019 until trial, he maintained that he suffered a pecuniary loss due to the relatively fewer opportunities for overtime work in his new role as an AO than in his previous role as an STO. The appellant argued that he had switched jobs due to his back injury, and therefore the pecuniary loss was caused by the First and Second Accidents.

[25] The trial judge found that the respondent had not established a loss of earning capacity in the first time period. The respondent tendered evidence about the overtime hours available to a private contractor working on bridge construction projects. However, the judge concluded that the evidence did not establish a link between the overtime hours available to a private contractor and a Ministry employee. As there was no evidence with respect to the specific amount of overtime hours available to an STO employee, as well as no specific evidence the respondent was offered and refused overtime, the judge concluded that the respondent had not established that the accident caused him a loss of income while he was employed as an STO.

[26] The trial judge reached a different conclusion in relation to the second time period, after the respondent left his STO position for the AO position. The judge accepted that the respondent's accident-related injuries were the primary factor for the change in his employment. Specifically, the judge accepted that as a result of his injuries, the respondent decided to move from a more physically demanding role (the STO job) to a more sedentary administrative role (the AO job).

[27] The trial judge found that the respondent suffered a loss as a result of the change in positions because of the reduced opportunity to work overtime. He stated:

> [116] I accept the evidence of Mr. Sekhon and his current supervisor in the AO position, Maziar Kazemi, that while there is overtime available in the AO position, it is limited. As made clear in their evidence, overtime availability generally arises where there is a need for urgent or unexpected work. In the AO position, such circumstances primarily consist of cases involving "bridge strikes"—i.e., when a vehicle collides with a bridge—or during other catastrophic events such as flooding, where bridges are potentially damaged or their integrity is compromised. Accordingly, taking the testimony of Mr. Kazemi, Mr. Baker and Mr. Sekhon collectively, I am satisfied that there is

> generally more overtime available to an individual working as an STO than an individual working as an AO.

[28] The judge assessed the value of this loss by looking to the amount of overtime the respondent worked as an STO. The respondent's pay records reflected that the ratio between his total hours (including overtime) and regular hours (excluding overtime) fluctuated from 1.04 to 1.3 over the relevant period, peaking in 2019. The judge concluded it would be fair to the respondent to weigh the loss of overtime closer to the 2019 ratio. As such, the judge determined that the respondent was entitled to compensation equal to 30% of his salary from the date he moved to the AO position until the time of trial, other than the time he was away from work on paternity leave. After adjustment for income tax and Employment Insurance premiums, this resulted in a past income loss of $30,483.76.

[29] Finally, the judge turned to the appellants' argument that a contingency deduction ought to apply to any award for past loss of earning capacity to reflect the likelihood that the respondent remained in the AO job for reasons unrelated to his accident-related injuries; that is, his dislike of working night shifts and his desire to spend more time with his family. This argument focussed on the respondent's decision in February 2021 to withdraw his application to return to his STO job.

[30] The trial judge concluded on the evidence that the respondent's back injury was not the only reason for his decision to withdraw his application to return to the STO position. However, this did not impact his assessment of damages:

> [131] …the relevance of his mixed feelings about returning to the Construction Supervisor, STO position is minimal to my findings. I have already concluded above that Mr. Sekhon left the STO position as a result of the Accidents. Mr. Sekhon clearly had *some* concerns that his injuries would prevent him from comfortably working as an STO when the opportunity to return to the position materialized. Those concerns are sufficient to warrant compensation for his lost overtime opportunity as an AO to the date of trial, since he has established, based on the evidence, a pecuniary loss in the circumstances.
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> [Emphasis in the original.]

[31] Accordingly, the trial judge did not reduce the award of damages for past loss of earning capacity to account for any contingencies.

Future loss of earning capacity

[32] The trial judge rejected the respondent's claim that he was entitled to damages for loss of future earning capacity on the basis that there was a real and substantial possibility he would have eventually moved into the private sector as a consultant, and earned a substantially higher salary. The trial judge found that the respondent's plans to become a private consultant were only "speculative and aspirational": Reasons at para. 153. Furthermore, the judge concluded that there was insufficient reliable evidence to permit a calculation of what a private sector bridge consultant would earn.

[33] The trial judge found that the evidence did establish a real and substantial possibility of a pecuniary loss in the future arising from the limited availability of overtime in the AO position. Similar to the manner in which he assessed income loss in the pre-trial period, the judge concluded that the assessment of damages for future loss of earning capacity should be based on the premise that, but for the First and Second Accidents, the respondent would have worked the equivalent of 1.3 times his yearly base salary as an STO until his retirement at age 65. This resulted in a future loss of earning capacity of $439,135.

[34] The trial judge then applied a "modest negative contingency" deduction of 15% to reflect the possibility that the respondent's condition could improve, restoring his ability to work more overtime: Reasons at para. 179. The judge reasoned that only a modest contingency deduction was warranted given the opinions expressed by the medical experts that the appellant had reached maximum medical recovery. This contingency deduction is not challenged on appeal.

[35] The trial judge also found it appropriate to reduce the respondent's award for future loss of earning capacity by an additional 5% to reflect his pre-existing back condition. In explaining this contingency deduction, the trial judge stated:

> [180] …Dr. Fuller opined that the fusing of the joints made Mr. Sekhon's back more susceptible to overloading, and thus back injury. Indeed, in the facts of this case, the Fourth Accident was described by Mr. Sekhon as an equivalent impact to the First Accident, and both involved the same type of rear-end impact. While I am satisfied that the First Accident was the cause of

> Mr. Sekhon's lower back injury, the facts of this case demonstrate that Mr. Sekhon may well have been in the same situation at present due to the Fourth Accident. Put another way, I find that Mr. Sekhon's lower back abnormality, which made him vulnerable to lower back injury, must be accounted for in assessing his damages. As Dr. Fuller stated that it was difficult to determine the probability that the back abnormality would become an issue, I will only reduce the award by 5%.
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> [181] I also note that in applying these negative contingencies, I am factoring the two additional motor vehicle accidents Mr. Sekhon had after the Accidents that are the subject of this trial. As set out above, given Mr. Sekhon was not forthcoming about these additional accidents to the medical experts, it strikes me as improper that he receive a benefit of any certainty expressed by the experts regarding the causes and prognosis of his injuries. While not assigning a specific reduction for this factor as a negative contingency, holding back relevant information from the medical examiners somewhat undermines the certainty of the prognosis and causes of the lower back injuries and warrants the negative contingency adjustments set out above. Further, on the evidence before me, I find no support for a positive contingency that offsets these negative contingencies.
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> [Emphasis added.]

[36] Finally, the trial judge reduced the award for future loss of earning capacity by $15,252.76 to account for the fact that the respondent would not earn overtime during his anticipated eight-month parental leave in 2023.

[37] With all of these deductions applied, the respondent was awarded $336,055 in damages for future loss of earning capacity.

On appeal

[38] The appeal and cross-appeal raise the following issues in relation to the award of damages for future loss of earning capacity:

(a) Did the judge err in making a contingency deduction to account for the respondent's pre-existing condition in the absence of medical evidence supporting the deduction? (the cross-appeal)

(b) Did the judge err in applying a 5% contingency deduction to account for the respondent's pre-existing condition when such a deduction was too low in light of the evidence and the judge's factual findings? (the appeal)

[39] The appeal raises three issues in relation to the award of damages for past loss of earning capacity:

(a) Did the judge err in failing to apply a negative contingency deduction to account for the Subsequent Accidents?

(b) Did the judge err in finding that the respondent recovered relatively quickly from the Third and Fourth Accidents, when such a finding was reliant on the respondent's self-reports, which were not credible?

(c) Did the judge err in overcompensating the respondent by failing to account for the fact that the respondent earned a higher income when he moved to the AO position?

[40] In relation to both heads of damages, the appellants argue that the trial judge failed to consider whether the award was fair and reasonable. I did not understand this to be a stand-alone ground of appeal but rather tied to the other errors alleged.

Standard of review

[41] The relevant standard of review principles were recently summarized by Justice Fleming in *Insurance Corporation of British Columbia v. Dhaliwal*, 2025 BCCA 142:

> [48] It is well established that an award of damages is subject to a highly deferential standard of review on appeal. An appellate court may intervene only where there was no evidence to support the trial judge's conclusion, the judge proceeded on a mistaken or wrong principle, or the award was so inordinately high or low that it must be a wholly erroneous estimate of the damage: *Deegan v. L'Heureux,* 2023 BCCA 159 at para. 41; *Charters v. Jordan*, 2024 BCCA 351 at para. 27.
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> [49] The standard of review for findings of fact, inferences drawn from those facts and findings of mixed fact and law is palpable and overriding error: *Deegan* at para. 42; *Charters* at para. 25. A trial judge's assessment of damages raises questions of fact or of mixed fact and law: *Gregory v. Insurance Corporation of British Columbia*, 2011 BCCA 144 at para. 14; *Ledwon v. Baines*, 2021 BCCA 239 at para. 16; *Charters* at para. 26. Where a question of mixed fact and law involves a legal principle that is readily extricable from the factual context, the standard of correctness applies: *Housen v. Nikolaisen*, 2002 SCC 33 at paras. 33–35.

Analysis

[42] The determination of the parties' challenges to the trial judge's award for future loss of earning capacity is substantially dispositive of many of the remaining issues in relation to the award for past loss of earning capacity. As such, it is convenient to begin with the competing challenges to this head of damages.

The award for future loss of earning capacity

Legal framework: assessing damages where there is a pre-existing condition

[43] It is common ground on this appeal that the trial judge correctly stated the general principles that apply in assessing a plaintiff's claim for future loss of earning capacity. Specifically, the trial judge cited the three-step approach set out in *Rab v. Prescott*, 2021 BCCA 345:

> [47] …The first [step] is evidentiary: whether the evidence discloses a *potential* future event that could lead to a loss of capacity (e.g., chronic injury, future surgery or risk of arthritis, giving rise to the sort of considerations discussed in *Brown*). The second is whether, on the evidence, there is a real and substantial possibility that the future event in question will cause a pecuniary loss. If such a real and substantial possibility exists, the third step is to assess the value of that possible future loss, which step must include assessing the relative likelihood of the possibility occurring—see the discussion in *Dornan* at paras 93–95.
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> [Emphasis in the original, cited in the Reasons at para. 133.]

He also referenced the final step in the analysis: consideration of whether the award is fair and reasonable in all of the circumstances: Reasons at para. 134.

[44] The arguments on appeal as they relate to the award for future loss of earning capacity focus on the third step of the *Rab* analysis: the assessment of the value of the future loss. The third step requires a trial judge to assess the relative likelihood of the possibility of a future loss occurring. The quantification process involves comparing the plaintiff's likely future if the accident had not occurred, and their future with the accident: *Murphy v. Snippa*, 2024 BCCA 30 at para. 130. The analysis may involve consideration of contingencies, both positive and negative. A party relying on a specific contingency must be able to point to evidence that

supports the occurrence of the contingency as a realistic, as opposed to speculative, possibility: *Murphy* at para. 132; *Dornan v. Silva*, 2021 BCCA 228 at para. 92.

[45] In *Dornan*, this Court set out the framework for the contingency analysis where the question is whether damages should be reduced to account for the plaintiff's pre-existing condition. As explained in *Dornan*, when considering the impact of a pre-existing condition, it is necessary to distinguish between two legal concepts: causation and compensation. The causation principle, as set out in *Athey v. Leonati*, [1996] 3 S.C.R. 458, 1996 CanLII 183 at paras. 32–35, is that tortfeasors must take their victims as they find them. Therefore, a defendant is fully liable for the unexpectedly severe injuries of a "thin skull" plaintiff: *Dornan* at paras. 40–41.

[46] However, different principles apply in assessing damages. While a "thin skull" plaintiff is entitled to compensation for their injuries even when they are more severe than might ordinarily be expected, they are not insulated from "having to account for the consequences that may flow from that predisposition in any event": *Dornan* at para. 44. Put another way, if there is a measurable risk that the pre-existing condition would have detrimentally impacted the plaintiff in the future regardless of the defendant's negligence, this risk may be accounted for in assessing damages through a reduction of the award: *Dornan* at para. 45, quoting *Athey* at para. 35.

[47] The distinction between the treatment of pre-existing conditions as an issue of causation and compensation was illustrated on the facts of *Dornan*. In that case, the trial judge found that the plaintiff's concussion-related injuries were caused by the accident, and not by any debilitating effects of previous concussions he had suffered. Thus, the defendant was fully liable for the injuries. However, in assessing damages the trial judge applied a negative contingency deduction to the awards for non-pecuniary loss, past and future loss of earning capacity, and future care costs to account for the real and substantial possibility that, absent the accident and given his lifestyle, the plaintiff would have suffered a further concussion that would have resulted in similar post-concussive symptoms. In rejecting the argument that these findings were inconsistent, Grauer J.A., writing for the Court, explained:

> [48] The first finding concerned causation—for what injuries the defendants were liable. The second concerned compensation—what the plaintiff was at risk of experiencing if the accident had not occurred.

[48] A further issue addressed in *Dornan* was whether a contingency deduction could be applied at all where the pre-existing condition was not degenerative but rather required an external event to trigger the relevant symptoms. This Court held that that there was no principled reason why a contingency deduction could not be supported by a combination of the vulnerability inherent in the plaintiff's pre-existing condition and the enhanced potential for future repeat trauma arising from his lifestyle. As explained by Grauer J.A.:

> [75] I conclude that to support a contingency deduction, the law does not require that the "measurable risk" involved be wholly inherent in the plaintiff's pre-existing condition, without the need for any external event to act upon it in order to give rise to a debilitating effect. The question is whether, given the pre-existing condition, there was a real and substantial possibility of future debilitating symptoms absent the accident. That real and substantial possibility may arise solely from the nature of the pre-existing condition itself, or require an external event acting upon that condition. In either case, the possibility must be real and substantial, not speculative.
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> [76] The fact remains that with the exception of *Graham*, counsel were unable to point to any case applying a contingency where such an external event arising from future behaviour was a necessary part of the measurable risk. It follows that such cases will be rare. Under what circumstances might they arise?
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> [77] In my view, that must depend on the facts of each case, but I would observe that the measurable risk must be based on a real and substantial possibility arising from the combination and interaction of the pre-existing condition and the external event. In the vast majority of cases, the risks commonly encountered on this rather dangerous planet will not suffice to establish a real and substantial possibility. People have accidents in cars and riding bicycles, people trip and fall, people are hit by falling branches, and are knocked over by inobservant drivers, pedestrians, skaters and cyclists. People wrench their knees playing recreational sports, and hurt their backs working out in their basements or digging in their gardens. Such events can happen to anyone, but, in the case of most individuals, are not predictable. Any affect they might have on the individual's pre-existing condition would be speculative, not real and substantial possibilities. As such, they would not give rise to a "measurable risk", at least in the absence of being combined with some extreme vulnerability.
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> [Emphasis added.]

[49] On the facts of *Dornan*, the Court held that there was evidence to support the trial judge's finding of a real and substantial possibility that, absent the accident, the plaintiff would have suffered a further concussion resulting in serious post-concussive symptoms. However, the Court found that the trial judge had erred in failing to undertake a meaningful analysis of the relative likelihood of such an injury occurring, resulting in a deduction that was inordinately high. As a result, after conducting its own assessment of relative likelihood, the Court reduced the trial judge's contingency deductions applicable to non-pecuniary damages, past and future loss of earning capacity, and future cost of care.

(a) Did the judge err in applying a contingency deduction to account for the respondent's pre-existing condition? (the cross-appeal)

[50] The respondent argues that there was no evidence to support the trial judge's finding of a real and substantial possibility that, regardless of the appellants' negligence, the Fourth Accident may have caused him similar injuries due to his pre-existing back condition. The respondent relies on the evidence of Dr. Fuller that it is impossible to predict whether a person with the respondent's pre-existing back condition will become symptomatic over time. In other words, this was not the type of pre-existing condition that was necessarily degenerative. The respondent says, furthermore, that there was no "non-speculative medical evidence" to establish that his back injury was worsened by the Fourth Accident. Instead, the lay and medical evidence suggested that the respondent's actual injuries from the Fourth Accident were transient, rather than persistent and debilitating.

[51] The trial judge's reasons for the 5% contingency deduction are not without difficulty. Paragraph 180 of the reasons for judgment (reproduced above) is relatively clear in reflecting the trial judge's finding that the 5% deduction is tied specifically to the Fourth Accident. However, at paragraph 181 (also reproduced above), the trial judge states that "these negative contingencies" factor in both the Third and the Fourth Accidents, as well as the respondent's failure to disclose the Subsequent Accidents to his medical experts. I presume, given the use of the plural form, that "these negative contingencies" comprise of both the 15% contingency deduction to

reflect the prospect of improvement and the 5% contingency deduction relating to the respondent's pre-existing condition.

[52] Reading these two paragraphs together, I interpret the 5% contingency deduction to rest primarily on the real and substantial possibility that the Fourth Accident would have led the respondent to experience the same back symptoms even without the First and Second Accidents. The trial judge's observations in paragraph 181 do not appear central to his analysis of the contingency deduction to account for the respondent's pre-existing condition. Instead, the trial judge was simply stating his general concern with the respondent's failure to advise some of the medical experts who examined him about the Subsequent Accidents. The judge viewed the resulting uncertainty in the medical opinions as a factor that buttressed the negative contingency deductions that he applied. However, the Subsequent Accidents (other than the Fourth Accident) did not, on their own, warrant a negative contingency deduction.

[53] The question on the cross-appeal, accordingly, is whether there is evidentiary support for the 5% contingency deduction or whether, as argued by the respondent, the trial judge engaged in speculation in accounting for the respondent's pre-existing condition.

[54] In considering this argument, it is necessary to distinguish between two scenarios: (1) the possibility that the respondent's pre-existing condition could degenerate on its own, and (2) the possibility that the Fourth Accident could have caused the same injuries absent the First and Second Accidents. Many of the respondent's arguments on appeal focus on the first scenario. The same is true of the evidence of Dr. Fuller that the respondent relies on in support of his arguments. The respondent correctly points out that Dr. Fuller's evidence largely undermines any suggestion of a real and substantial possibility that the respondent's back condition would degenerate over time. For example, Dr. Fuller gave this evidence in cross-examination:

> Q. Would you refer to this bony structure as a quote unquote ticking time bomb so to speak, that it would be –

> A. No. No. The – one of the fundamental problems of these things is that you have no idea how frequent they are. Because we don't X-ray people that don't have back pain. And so that we will never practically speaking know how often a person will develop these variations in structure and therefore we will not know the incidence or the percentage of likelihood that they will become symptomatic. So that – that question is really impossible to answer.

[55] However, the 5% contingency deduction applied by the trial judge was not premised on the potential degeneration of the respondent's pre-existing back condition. Instead, it was premised on the potential impact of an external event; that is, another motor vehicle accident that applied similar force to the respondent's back. In my view, there was support in the evidence, including the medical evidence, for the trial judge's conclusion that this was a real and substantial possibility.

[56] In his expert report, Dr. Fuller described the First Accident and the Second Accident as involving "mechanism[s] of injury" that were "reasonably similar", as well as involving "similar patterns of overload" to the respondent's neck and back. He also described the respondent's vulnerability to such a mechanism of injury due to his pre-existing condition in the following terms:

> 26. As indicated, this patient does present with a structural variation involving the low back which on the balance of probability rendered him more vulnerable to the physical overloads involved in these similar rear-end collisions of February 18, 2017 and January 24, 2019.
>
> [Emphasis added.]

[57] In cross-examination, Dr. Fuller testified as follows:

> Q. And is it also possible that subsequent accidents could have caused lower back pain, putting a force through this joint, this bony structure?
>
> A. Well, subsequent accidents of course in general. Depending on the nature of the said accident, could also contribute to some form of symptoms, yes.
>
> …
>
> Q. If Mr. Sekhon was involved in subsequent accidents with – what he reported to you were of similar force and effect, would it be possible for this joint, this structure, to have that same force go through it resulting in further injury to this – the lower back?
>
> A. Well, yes, obviously, in the sense that if they're going to postulate that the accidents – the [indiscernible] in the accidents contributed to his

> symptoms currently, then any further accident would similarly have a further contribution.

[58] The respondent's evidence was that the Fourth Accident—which was also a rear-end collision—was similar in its force and impact to the First Accident.

[59] Based on this evidence, in my view it was open to the trial judge to apply a negative contingency deduction. This was not a case that concerned general, and unpredictable, hypothetical risks arising from ordinary life activities of a type described at paragraph 77 of *Dornan*. There was no uncertainty about the occurrence of the Fourth Accident; it had occurred prior to trial. The only uncertainty was with respect to what impact the Fourth Accident would have had on the respondent, absent the First and Second Accidents.

[60] I do not agree with the respondent's argument that a contingency deduction was foreclosed by evidence that he experienced transient increased pain from the Fourth Accident, and returned to his baseline level of chronic pain from the First and Second Accidents within a matter of months. The question for the judge was whether, absent the First and Second Accidents, there was a real and substantial possibility that the Fourth Accident would have led to the same level of baseline chronic pain. I see no reversible error in the trial judge's conclusion that a real and substantial possibility was established on the evidence.

[61] Accordingly, I would dismiss the cross-appeal.

(b) Was the 5% contingency deduction too low? (the appeal)

[62] Although the arguments tend to merge in the appellants' factum, I understand the appellants to challenge the 5% contingency deduction on two alternate bases:

(1) the trial judge ought to have found that the injuries for which the respondent sought compensation were caused or contributed to by the Third and Fourth Accidents (the causation argument); or

(2) the trial judge ought to have assessed a greater likelihood that, absent the First and Second Accidents, the respondent would have

experienced the same injuries to his low back (the compensation argument).

[63] On either basis, the appellants say that the respondent's damages for loss of future earning capacity should be reduced by 50%.

Causation

[64] The appellants' arguments on causation do not identify any error of law or principle by the trial judge. Rather, they say that the judge's factual finding that the First and Second Accident caused all of the respondent's injuries reflects palpable and overriding error. The alleged error, as I understand it, is that having found that the respondent's evidence was not credible, the trial judge should not have accepted his evidence that he returned to his pre-existing baseline level of pain within a short period after the Third and Fourth Accidents. The appellants say that the respondent's failure to disclose the Subsequent Accidents to some of the medical experts ought to have led the judge to reject the respondent's self-reports of the speed of his recovery.

[65] The appellants' criticism of the respondent for failing to advise some of the medical experts about the Subsequent Accidents—which is a persistent theme of their submissions on appeal—must be placed in context. The appellants' medical expert, Dr. Paramonoff, was clearly aware of both the Third and Fourth Accidents. The instruction letter she was given noted the Third Accident, and asked her to opine on whether it caused or contributed to the respondent's symptoms and conditions. Dr. Paramonoff indicated in her report that during the assessment, the respondent disclosed several slip and fall incidents, his sports injury, and both the Third and Fourth Accidents to her. She opined in her report that the Third Accident likely resulted in a "temporary aggravation of residual baseline symptoms". Her evidence regarding the Fourth Accident was, in effect, that due to its recency, it was difficult to say how long the exacerbation of his back injury would continue.

[66] In this context, I am not persuaded that the trial judge's factual findings on causation reflect palpable and overriding error. The appellants had the opportunity to

present medical evidence on the causative effect (if any) of the Subsequent Accidents, including the Third and Fourth Accidents, but failed to do so. While it was certainly open to the trial judge to be concerned about the respondent's failure to be completely forthright with other medical experts, including his own expert Dr. Fuller, that concern did not oblige the trial judge to find that the Subsequent Accidents caused or contributed to the respondent's injuries. This is particularly so in light of the appellants' failure to tender medical evidence in support of the findings they say ought to have been made on the issue of causation.

[67] In addition, the fact that the judge approached the respondent's testimony "with caution" does not mean that he was bound to reject all of the respondent's evidence: Reasons at para. 35. Furthermore, the respondent's evidence that he had returned to baseline within a relatively short period of time after the Third and Fourth Accidents was supported by other evidence at trial, including medical evidence and evidence from lay witnesses regarding their observations of the respondent's pain levels at the relevant times.

[68] For these reasons, I see no basis for appellate interference with the trial judge's findings that the respondent's injuries were caused by the First and Second Accidents.

Compensation

[69] The appellants alternatively argue that, having found there was a real and substantial possibility that the Fourth Accident would have resulted in the same injuries absent the First and Second Accidents, the trial judge erred in principle in his approach to assessing the likelihood of that possibility. The appellants say that as a result of this error, the contingency deduction was too low.

[70] For the reasons I have stated, in my view it was open to the trial judge, as a matter of principle and in light of the evidence in this case, to apply a contingency deduction to the award for future loss of earning capacity. I interpret the trial judge's reasons to limit this negative contingency deduction to the Fourth Accident. This appears to me to be consistent with the evidence. The real and substantial

possibility arose from Dr. Fuller's evidence that the respondent's pre-existing condition left him vulnerable to experiencing a back injury from the loads involved in a rear-end collision. None of the other Subsequent Accidents involved a similar mechanism of injury.

[71] As explained in *Dornan*, a trial judge's finding of a real and substantial possibility does not end the analysis. Once that finding is made, a trial judge is then required to engage in further assessment of the relative likelihood of the substantial possibility occurring in order to determine the appropriate deduction.

[72] The basis for the trial judge's assessment of the relative likelihood in this case is not clearly expressed. His analysis consists of one sentence: "[a]s Dr. Fuller stated that it was difficult to determine the probability that the back abnormality would become an issue, I will only reduce the award by 5%": Reasons at para. 180. It is difficult to know precisely what the judge intended by the reference to the probability that the respondent's pre-existing condition "would become an issue". It is true that Dr. Fuller opined that it would be very difficult to anticipate whether, and when, the respondent's back condition would degenerate. However, the 5% contingency deduction was not based on the possibility of degeneration, but rather the possibility of the Fourth Accident causing the same injury even without the First and Second Accidents.

[73] The appellants say the trial judge's analysis is insufficient to understand the basis for the relatively minor contingency deduction applied to account for the respondent's pre-existing back condition. They stress that there was no uncertainty about the occurrence of the external event in this case because the Fourth Accident had actually occurred prior to trial. Furthermore, the Fourth Accident, on the evidence, was a similar rear-end collision that could be expected to involve similar overloads as the First and Second Accidents.

[74] While the appellants' submissions have some force, it is also true that no medical expert (including the appellants' expert Dr. Paramonoff) directly opined on the question of whether the Fourth Accident could be expected to cause the

respondent's injuries even absent the First and Second Accidents. While I am persuaded that there was a sufficient basis in the evidence of Dr. Fuller for the trial judge to find that a measurable risk existed, the evidence is not strong. As Dr. Fuller testified, whether a similar injury to the respondent's low back would occur in another accident depended on such variables as the respondent's posture position at the time of the impact, and the mechanism of the accident.

[75] Where a trial judge applies a specific contingency deduction but does not articulate a basis for their analysis of relative likelihood, the question on appeal is whether the evidence supports the judge's findings: *Steinlauf v. Deol*, 2022 BCCA 96 at para. 75. In my view, the evidence in this case is capable of supporting a contingency deduction, but is not strong enough to support a significant deduction. I see no basis on the evidence to interfere with the trial judge's assessment that a 5% contingency deduction was justified.

[76] For these reasons, I would dismiss the appellants' challenge to the award of damages for future loss of earning capacity.

The award for past loss of earning capacity

[77] The appellants' grounds of challenge to the trial judge's award of damages for past loss of earning capacity evolved over the course of the hearing. The appellants' factum focussed on the allegation that there was no evidence to support the trial judge's finding that the respondent lost overtime opportunities with the move to the AO position. During the hearing, counsel for the appellants acknowledged that there was, in fact, evidence to support this finding. Specifically, there was evidentiary support in the respondent's pre-trial pay records (which reflected a decline in the overtime he worked as an AO as compared to an STO), and the evidence of the respondent's supervisor that he fully took advantage of overtime opportunities in the AO position. Counsel for the appellants confirmed that the grounds of appeal they were raising in relation to the award for past loss of earning capacity are the ones I have listed at paragraph 39 of this judgment.

(a) Did the judge err in failing to apply a negative contingency deduction to account for the Subsequent Accidents?

[78] For the reasons I have stated above regarding future loss of earning capacity, the trial judge did not err in applying a negative contingency deduction for the respondent's pre-existing back condition only in relation to the potential impact of the Fourth Accident. The same is true of the award for past loss of earning capacity. Other than the fact that the other Subsequent Accidents occurred, the appellants have identified no evidentiary basis for a finding of a real and substantial possibility that these other accidents would have resulted in the same injury to the respondent, absent the First and Second Accidents.

[79] As such, the only question is whether the 5% contingency deduction applied to the future loss of earning capacity award to account for the measurable risk that the Fourth Accident would have led to the same injuries should have applied to the award for past loss of earning capacity.

[80] In my view, the appellants have not demonstrated that the trial judge committed any error of fact or law in failing to apply the negative contingency deduction to the award for past income loss. The respondent continued to maintain his STO position for over two years following the First Accident on February 18, 2017. Therefore, if the First and Second Accidents had not occurred, and the respondent sustained the same back injury only following the Fourth Accident on September 9, 2021, the evidence demonstrated that he could have continued to work in the STO position for at least two years. In this hypothetical scenario, the respondent would not have suffered a pecuniary loss in the pre-trial period.

(b) Did the judge err in finding that the respondent recovered relatively quickly from the Third and Fourth Accidents, when such a finding was reliant on the respondent's self-reports, which were not credible?

[81] I have already stated my reasons for rejecting this ground of appeal in relation to the award for future loss of earning capacity. The appellants have not demonstrated that the trial judge made any palpable and overriding error in his factual findings on this issue.

(c) Did the judge err in overcompensating the respondent by failing to account for the fact that the respondent earned a higher income when he moved to the AO position?

[82] The appellants' final ground of appeal is that the trial judge erred in failing to deduct roughly $5,300 per year from the award for past loss of earning capacity, which represents the increase in salary that the respondent earned due his move from the STO position to the AO position. The appellants say this results in overcompensation because the respondent is compensated for the loss of employment opportunities as an STO at the same time as he retains the higher salary as an AO.

[83] At trial, the appellants relied on the respondent's higher salary as an AO to argue that there was no clear loss of income. While the trial judge acknowledged this argument at paragraph 140 of his Reasons, he did not address it in his analysis. Some context is required to address this argument.

[84] The salaries associated with the STO and AO positions formed part of the Agreed Statement of Facts at trial. As reflected in the Agreed Statement of Facts, the salary for the two positions is identical if one was comparing the same grid and step levels. However, a higher grid or step leads to a higher salary. At the time the respondent left his STO position on September 16, 2019, he was classified as an STO 18 (signifying grid level 18), Step 4. When he moved to the AO position on the same date, he was classified as AO 21, Step 4. He continued to hold this position as of the time of trial. The annual salary for an STO 18, Step 4 in September 2019 was $58,629.96, while the salary for an AO 21, Step 4 was $63,973.31. The appellants say that the difference (just over $5,300) ought to have been accounted for by the trial judge.

[85] The appellants' argument masks some nuances in the evidence. First, while the respondent's pay records disclose that he remained in the AO 21 position at the time of trial, what is not known is how quickly the respondent may have progressed to a higher grid or step level had he remained in his STO position. Second, and relatedly, at the time the respondent applied for and then withdrew his application to

return to the STO position in February 2021, the job posting was for an STO 24. The annual salary for an STO 24, Step 4 at that time was $71,298.93. Had the respondent succeeded in obtaining that position, he would have been earning just over $7,300 more annually than in his AO 21 job. As the respondent notes, this evidence suggests that there may have been a greater potential, in the pre-trial period, for a move up the salary grid in the STO position than in the AO position.

[86] Ultimately, the trial judge was engaged in an assessment of damages and not a calculation. The evidence before him suggested that the annual income between the two jobs was essentially comparable. There may, at different points in time, have been a salary differential—potentially higher or lower—depending on where on the grid levels the respondent's job was positioned. However, in my view the trial judge was not required to engage in this type of granular analysis. It was open to the trial judge to find that the respondent had suffered a pecuniary loss in the pre-trial period due to his reduced opportunity to work overtime hours. I am not persuaded that the method he adopted to assess the value of that loss reflects any reversible error.

[87] Accordingly, I would not accede to this ground of appeal.

Disposition

[88] I would dismiss the appeals and cross-appeal.

"The Honourable Madam Justice Horsman"

I AGREE:

"The Honourable Justice Fleming"

I AGREE:

"The Honourable Justice Mayer"