

# IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Sekhon v. Cruz*,  
2023 BCSC 319

Date: 20230315  
Docket: M1812489  
Registry: Vancouver

Between:

**Pravdeep Sekhon**

Plaintiff

And

**Resty Cruz**

Defendant

- and -

Docket: Vancouver  
Registry: M200278

Between:

**Pravdeep Sekhon**

Plaintiff

And

**Karandeep Singh Chandi and Jaswinder Singh Chandi**

Defendants

Before: The Honourable Mr. Justice Gibb-Carsley

## Reasons for Judgment

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Place and Dates of Trial:

Abbotsford, B.C.  
November 28-30 and  
December 1-2, 5-9, 2022

Place and Date of Judgment:

Vancouver, B.C.  
March 15, 2023

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## I. INTRODUCTION

[1] The plaintiff, Pravdeep Sekhon, claims he was injured in two car accidents, the first occurring on February 18, 2017 (the “First Accident”), and the second on January 24, 2019 (the “Second Accident”) (collectively, the “Accidents”). He asserts that as a result of his injuries he suffers constant pain in his lower back and was unable to follow his desired career path as an on-site bridge construction supervisor.

[2] The defendant, Resty Cruz admits liability for the First Accident, and the defendants Karandeep and Jaswinder Chandi admit liability for the Second Accident. However, the defendants argue that Mr. Sekhon has inflated his damages claim. They say he exaggerates the extent of his injuries from the Accidents and how they have impacted his life. They also argue he concealed from the medical experts who examined him for this trial that he suffered subsequent injuries that have contributed to his current pain. As such, the defendants say the experts were deprived of the opportunity to provide an accurate evaluation of the causes, diagnosis, and prognosis of Mr. Sekhon’s injuries.

[3] The defendants also argue that Mr. Sekhon’s decision to alter his career path, from the more physically demanding role of a bridge construction supervisor to a more sedentary administrative role as a bridge area manager was motivated by his desire to reduce working night shifts and to spend more time with his family, and not as a result of his injuries. The defendants say that if Mr. Sekhon did, in fact, change his career path because of the injuries, his decision to stay on that path was not due to the injuries but instead for other personal reasons.

[4] As liability is admitted, this trial is to determine the quantum of Mr. Sekhon’s damages. The primary issue, both in complexity and the monetary gulf between the parties, relates to the assessment of Mr. Sekhon’s past and future loss of earning capacity. The difference largely turns on two issues. First, whether Mr. Sekhon changed his career trajectory due to the Accidents and, second, the amount of overtime income Mr. Sekhon would have worked if he had not changed jobs.

## II. BACKGROUND FACTS

### A. Background, Education, Employment and Accidents

[5] The plaintiff was born in November 1987 and is currently 35 years old. He was raised in British Columbia and as a youth spent extensive time working with his father when he was not attending school. He did so first in a landscaping business; mowing lawns and trimming yards from ages 11 to 15, and then at his family's blueberry and cranberry farm from ages 15 through his twenties.

[6] Mr. Sekhon initially attended Simon Fraser University in the Faculty of Science from September 2009 to June 2011, but did not complete that program. He graduated with a B. Tech (Civil Engineering) from the British Columbia Institute of Technology in May 2015. I accept that Mr. Sekhon was a good student and had several post secondary academic opportunities available to him.

[7] The parties provided an Agreed Statement of Fact ("ASOF"). The following facts from the ASOF are of particular relevance to the matters in issue:

- a) Mr. Sekhon is married to Diana Kang who is a family physician. The two have a daughter together, who was born in June, 2020. They are expecting a second child in May 2023;
- b) Mr. Sekhon was hired by the BC Ministry of Transportation and Infrastructure (the "Ministry") on May 20, 2015, as an Assistant Bridge Construction Supervisor ("Construction Supervisor");
- c) A Construction Supervisor is classified as a Scientific/Technical Officer ("STO") by the Ministry;
- d) Mr. Sekhon was involved in the First Accident on February 18, 2017, which is the subject of the M1812489 action. At the time of the First Accident, Mr. Sekhon was driving a 2017 Chevrolet Bolt motor vehicle (the "Chevrolet"). At the time of the First Accident the defendant Ms. Cruz was driving a 1999 Toyota Corolla motor vehicle. The total repair cost of the

Chevrolet as a result of material damage sustained in the First Accident, including parts and labour, was \$1,041.37 plus tax; and

- e) Mr. Sekhon was involved in the Second Accident on January 24, 2019, which is the subject of the M200278 action. At the time of the Second Accident, Mr. Sekhon was driving the Chevrolet and the defendant, Mr. Chandi, was driving a 2016 Toyota Rav 4. The total repair cost of the Chevrolet as a result of material damage sustained in the Second Accident, including parts and labour, was \$709.14 plus tax.

[8] In respect of the Accidents, I accept that in both the First and Second Accidents, there was minor damage to the vehicles involved. In direct examination, Mr. Sekhon described the impact of the First Accident as “a pretty big jolt” and he was “pressed into the seatbelt.” He described the impact of the Second Accident as a “big jolt” and described that the car he and his wife were travelling in “moved” as a result of the collision. In cross examination, he testified that he felt the impact of the Second Accident was smaller than the First Accident.

[9] Returning to facts set out in the ASOF:

- a) On or about September 16, 2019, the plaintiff left the Construction Supervisor, STO position and started working as a Bridges Area Manager at the Ministry (“Bridges Manager”). The Bridges Manager position is classified as an Administrative Officer (“AO”) by the Ministry; and
- b) Mr. Sekhon was on parental leave from June 6, 2020, to February 5, 2021. He did not work at all during this leave.

### **B. Mr. Sekhon’s Subsequent Accidents and Injuries**

[10] Mr. Sekhon suffered physical injuries in various ways and to varying degrees since the First Accident. Given the defendants focused on the importance of these injuries in their submissions with respect to damages, it is important to describe

these events in some detail. I will refer to these additional accidents collectively as the “Subsequent Accidents”.

[11] On June 18, 2018, Mr. Sekhon slipped and fell, resulting in an injury to one of his knees while working as an STO in Victoria, BC, on the McKenzie Interchange project.

[12] On August 26, 2019, Mr. Sekhon was involved in a motor vehicle accident while working (the “Third Accident”). He was sitting in his work vehicle when a contractor truck reversed into his vehicle. Mr. Sekhon testified at trial that he immediately felt a ‘twinge’ in his back and felt some pain after the Third Accident. On cross-examination he said that he felt a ‘jolt’ during the Third Accident that was ‘relatively comparable’ to the one he experienced during the First Accident, and bigger than the one he felt during the Second Accident. However, he said that by the end of 2019, his lower back pain returned to the ‘baseline’ pain that he felt following the Second Accident.

[13] On June 25, 2021, Mr. Sekhon was involved in a slip and fall incident at work. He was climbing down an embankment when his feet slipped underneath him. He testified that he fell onto his buttocks, and that he might have fallen onto his back.

[14] On August 18, 2021, Mr. Sekhon injured his knee playing Spikeball, an active and competitive outdoor team-based ball game, usually played in teams of two. Mr. Sekhon testified that his knee injury hurt a lot the day it happened, but that it got better over the next week or two. On cross-examination, Mr. Sekhon agreed that the knee injury did not resolve on its own, and that he had attended physiotherapy for it.

[15] On September 9, 2021, Mr. Sekhon was involved in a work-related motor vehicle accident (“Fourth Accident”). He was driving his work vehicle, a Subaru Cross-trek, and was rear-ended by a pickup truck. He testified that the accident “definitely” hurt his lower back and that as a result, he went for registered massage therapy, physiotherapy, and took “pain pills”. Mr. Sekhon testified that the jolt he felt in the Fourth Accident was slightly bigger than the jolt he felt in the Second Accident.

As a result of the Fourth Accident, Mr. Sekhon filed a Workers' Compensation Board ("WCB") claim reporting that he had injured his neck, shoulder, and back.

[16] At some point during the winter of 2021, Mr. Sekhon was injured in another slip and fall incident. He testified that he slipped and fell during his lunch break and fell onto his ribs, shoulder, and arm. However, despite this fall being only one year ago, he could not remember if his injuries were to the left or right side of his body.

### **III. EXPERT WITNESSES**

[17] Mr. Sekhon tendered expert reports and called the following experts:

a) Dr. John Fuller, Orthopaedic Surgeon:

i. Report dated August 11, 2021

b) Dr. R. Nairn Stewart, Psychiatrist:

i. Report dated September 11, 2022

c) Matt Gregson, Occupational Therapist:

i. Report dated September 25, 2021

d) Darren Benning, Economist:

i. Report dated October 22, 2021

[18] The Defendants tendered evidence from and called the following experts:

a) Dr. Catherine Paramonoff:

i. Report dated October 22, 2021

ii. Responsive report dated September 13, 2022

b) Mark Szekely, Economist:

- i. Responsive report dated December 2, 2021

[19] I will discuss the relevant portions of the expert evidence as it relates to each of the issues.

#### **IV. ISSUES**

[20] Given that the defendants admit liability, the issues in need of resolution relate to the assessment of damages to be awarded to Mr. Sekhon. Mr. Sekhon claims damages in the range of \$1,659,535.09 and \$3,434,194.09 comprised of the following:

- a) Non-pecuniary damages in the amount of \$100,000;
- b) Past wage loss in the amount of \$196,939;
- c) Future loss of earning capacity in the range of \$1,179,865 to \$2,954,524;
- d) Cost of future care in the amount of \$166,283;
- e) Special damages agreed to between the parties in the amount of \$13,031.69; and
- f) In-trust claim to compensate Mr. Sekhon's father, Malkit Sekhon, for performing yard work at Mr. Sekhon's house that Mr. Sekhon is no-longer able to complete in the amount of \$3,416.40.

[21] Mr. Sekhon also claims, if he is awarded damages, an amount for fees to financially manage his award. He says he is incapable of managing his funds to generate the assumed 1.5% to 2% return that is assumed in the calculation of present values of future streams of damage awards.

[22] Before assessing Mr. Sekhon's claim for damages, I will address two preliminary matters: the issue of Mr. Sekhon's credibility and the issue of causation.

## V. CREDIBILITY

[23] The defendants argue that the court must approach Mr. Sekhon's evidence in respect of the impact of the Accidents with caution. They assert that Mr. Sekhon is not credible and changes his story or omits facts when doing so supports his position. As I will discuss below, they point to his failure to disclose the Subsequent Accidents and the injuries he sustained from those accidents to the experts who performed independent medical examinations ("IMEs") of him. They say this diminishes the reliability of the experts' conclusions regarding the causation of Mr. Sekhon's injuries as well as his prognosis. They emphasize that many IMEs rely on the truthful and accurate self-reporting of a plaintiff's subjective account of his or her injuries and symptoms, and the impact of those conditions on day to day life.

[24] As one example, the defendants point to the fact that Mr. Sekhon did not inform Dr. Stewart of the Subsequent Accidents during her initial assessment of him. Instead, Mr. Sekhon only did so when Dr. Stewart called him after she had re-read her instruction letter, which referenced the Subsequent Accidents, and realized Mr. Sekhon did not advise her of those incidents. They say that this pattern of concealment generally applied with respect to Mr. Sekhon's other expert assessments. Accordingly, they say Mr. Sekhon did not accurately describe to the medical experts the extent to which his function and capacity may have been limited by the Subsequent Accidents, and that doing so naturally influenced the experts' conclusions.

[25] As well, the defendants say Mr. Sekhon's testimony should be approached cautiously because he admitted to being previously untruthful about the reasons why he did not want to pursue an interview process to reapply for his prior STO position. Specifically, he told his employer that he was unable to continue in the interview process because of his concerns about night shifts and his recent life events. In court, he testified that the real reason he could not pursue the job was due to the injuries from the Accidents.

[26] The defendants also say that Mr. Sekhon exaggerated his pre-accident fitness level and similarly exaggerated the nature and causes of his post-accident drop in activity level. The defendants say the common thread through Mr. Sekhon's omissions or mistruths is that they always favoured his case and he did so when it suited him.

[27] In respect of the assessment of credibility, of assistance are the oft-cited passages from *Bradshaw v. Stenner*, 2010 BCSC 1398, aff'd 2012 BCCA 296, leave to appeal to SCC ref'd, 35006 (7 March 2013):

[186] Credibility involves an assessment of the trustworthiness of a witness' testimony based upon the veracity or sincerity of a witness and the accuracy of the evidence that the witness provides (*Raymond v. Bosanquet (Township)* (1919), 59 S.C.R. 452, 50 D.L.R. 560 (S.C.C.)). The art of assessment involves examination of various factors such as the ability and opportunity to observe events, the firmness of his memory, the ability to resist the influence of interest to modify his recollection, whether the witness' evidence harmonizes with independent evidence that has been accepted, whether the witness changes his testimony during direct and cross-examination, whether the witness' testimony seems unreasonable, impossible, or unlikely, whether a witness has a motive to lie, and the demeanour of a witness generally (*Wallace v. Davis*, [1926] 31 O.W.N. 202 (Ont.H.C.); [*Faryna*] v. *Chorny*, [1952] 2 D.L.R. 152 (B.C.C.A) [*Faryna*]; *R. v. S. (R.D.)*, [1997] 3 S.C.R. 484 at para. 128 (S.C.C.)). Ultimately, the validity of the evidence depends on whether the evidence is consistent with the probabilities affecting the case as a whole and shown to be in existence at the time ([*Faryna*] at para. 356).

[187] It has been suggested that a methodology to adopt is to first consider the testimony of a witness on a 'stand alone' basis, followed by an analysis of whether the witness' story is inherently believable. Then, if the witness testimony has survived relatively intact, the testimony should be evaluated based upon the consistency with other witnesses and with documentary evidence. The testimony of non-party, disinterested witnesses may provide a reliable yardstick for comparison. Finally, the court should determine which version of events is the most consistent with the "preponderance of probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions" (*Overseas Investments (1986) Ltd. V. Cornwall Developments Ltd.* (1993), 12 Alta. L.R. (3d) 298 at para. 13 (Alta. Q.B.)). I have found this approach useful.

[28] The defendants also referred me to *Hardychuk v. Johnstone*, 2012 BCSC 1359:

[10] The typical starting point in a credibility assessment is to presume truthfulness: *Halteren*. Truthfulness and reliability are not, however,

necessarily the same. A witness may sincerely attempt to be truthful but lack the perceptive, recall or narrative capacity to provide reliable testimony. Alternatively, he or she may unconsciously indulge in the human tendency to reconstruct and distort history in a manner that favours a desired outcome. There is, of course, also the possibility that a witness may choose, consciously and deliberately, to lie out of perceived self-interest or for some other reason. Accordingly, when a witness's evidence is demonstrably inaccurate the challenge from an assessment perspective is to identify the likely reason for the inaccuracy in a cautious, balanced and contextually sensitive way.

[29] I find the above passage from *Hardychuk* relevant for my assessment of Mr. Sekhon's testimony. While he attempted to be truthful, I found his evidence suffered from exaggeration. In that regard, I found Mr. Sekhon a complicated witness. I found he genuinely intended to be truthful, but failed to grasp the importance of being under oath or the importance of precision in language. For example, in direct examination he testified that before the Accidents he was able to keep his heartrate at 200 beats per minute for 45 minutes while exercising at the gym. On cross-examination he resiled from that statement and said that he must have misunderstood the question because he would only be able to keep his heartrate at such a high level for a few minutes. I perceived that he made both statements earnestly, although I do not accept that he misunderstood the first question. In my view, it was an exaggeration of his fitness level. While the statement of exercising to a high level is relatively minor in the constellation of facts, to me it points to Mr. Sekhon's tendency to exaggerate in a manner that favoured his version of events.

[30] Another example, also dealing with his physical abilities before and after the Accidents, was his description of the weights he lifted. He testified that after the Accidents he did not like to exercise at the gym because he was embarrassed that he could only lift "one or two pound weights". Again, I found this to be an exaggeration. As corroborated by Mr. Friedmann, I have no doubt that Mr. Sekhon lifted less weight than he did before the Accidents, but find the description of lifting "one or two pound" weights an exaggeration. These exaggerations, while perhaps

not overtly intended to deceive, are unhelpful to the court because they do not advance the fact-finding process.

[31] Another problem created by exaggerations made under oath is that they erode the judge's confidence in the veracity of a witness's testimony. This is especially so when the consequence of each exaggeration favours the witness's case. In this sense, the exaggerations not only cast a shadow on the truthfulness of the statements made by Mr. Sekhon to the court, but also on what he told the expert medical practitioners when he self-reported the effect of his injuries and his pre-accident and post-accident condition.

[32] I am most troubled, in respect of Mr. Sekhon's credibility, by his failure to disclose his other injuries to the experts who examined him for this case. When asked about the other injuries Mr. Sekhon suffered in the Subsequent Accidents, each expert testified that it would have been important for them to know of these injuries. They said that in the normal course of their examinations, they would ask an examinee about other events that might have impacted her or his health. I find it a glaring omission that Mr. Sekhon would not mention the Subsequent Accidents to the experts. After all, in most cases, the primary purpose of an expert conducting an IME is to determine the cause of a plaintiff's injuries and provide a diagnosis and prognosis of those injuries. Without a complete picture of a plaintiff's medical history, and especially other motor vehicle accidents with a similar mechanism of injury to the Accidents, the value of the opinions are lessened.

[33] I recognize it is possible that the experts, if properly informed, would have found the Subsequent Accidents had no impact on Mr. Sekhon's current injuries. However, by not disclosing the details of those events to the experts, they were deprived of the opportunity to explore and examine those issues in a meaningful way. I note the experts were asked about the Subsequent Accidents in cross-examination at trial and generally did not change their opinion, but I find that the level of analysis was less robust than what would be expected had Mr. Sekhon been forthcoming during his medical examinations. The impact of my concerns, as will be

discussed below, is that I will approach the opinions of the experts who were unaware of the Subsequent Accidents more cautiously.

[34] In summary, in respect of my assessment of Mr. Sekhon's credibility, I found him generally credible. However, his testimony was encumbered by a patina of exaggeration. I am left with the impression that he overstated both his pre-accident level of health and the post-accident impacts of his injuries on his life. Further, his failure to disclose the Subsequent Accidents to the experts reduces the force of those experts' attribution of the long-term impacts in this case solely to the Accidents.

[35] In coming to these conclusions, I want to be clear that I do not doubt, based on his testimony and the testimony of the experts, that Mr. Sekhon suffered an injury as a result of the Accidents, and that as a result he suffers pain that has negatively impacted aspects of his life and work. However, based on his general tendency to exaggerate during testimony, I approach his evidence with caution. As well, issues with Mr. Sekhon's credibility influence my assessment of both his long-term prognosis as well as my reliance on his statements regarding how wedded he was to his future plans for work and life.

## VI. CAUSATION

### *i. Law*

[36] The most basic principle of Canadian tort law is that the plaintiff must be placed in the position or she would have occupied had it not been for the defendant's negligent conduct—no better or worse: *Athey v. Leonati*, [1996] 3 S.C.R. 458, 1996 CanLII 183 at para. 32.

[37] Before damages are assessed, causation must be established on a balance of probabilities: *Franklin v. Coco*, 2022 BCSC 1929 at para. 75, citing *Blackwater v. Plint*, 2005 SCC 58 at para. 78. To that end, causation involves two distinct inquiries. First, the defendant's breach must be the factual cause of the plaintiff's loss.

Second, the breach must be the legal cause of the loss, meaning that the harm must not be too remote. See *Nelson (City) v. Marchi*, 2021 SCC 41 at paras. 96–97.

[38] The test for factual causation is often described using the “but for” standard. Namely, the plaintiff must show on a balance of probabilities that “but for” the defendant’s negligent act, the injury would not have occurred. Inherent in the phrase “but for” is the requirement that the negligence of the defendant was necessary to bring about the injury. Put differently, the onus rests on the plaintiff to prove that the injury would not have occurred without the defendant’s negligence. See *Ediger v. Johnston*, 2013 SCC 18 at para. 28, citing *Clements v. Clements*, 2012 SCC 32 at para. 8.

[39] Scientific proof of causation is not required, and common-sense inferences from the facts may suffice: *Borgfjord v. Boizard*, 2016 BCCA 317 at para. 55, leave to appeal to SCC ref’d, 37210 (9 February 2017).

[40] As well, the defendant’s negligence need not be the *sole* cause of the plaintiff’s injuries, only a *necessary* one: *Yip v. Saran*, 2014 BCSC 1283 at paras. 55. Defendants must take their victims as they find them, even if the plaintiff’s injuries are more severe than they would be for a normal person (i.e., the thin skull rule). However, the defendant need not compensate the plaintiff for any debilitating effects of a pre-existing condition which the plaintiff would have experienced anyway (i.e., the crumbling skull rule). See *Athey* at paras. 32–35.

## **ii. Parties’ Position**

[41] Mr. Sekhon asserts that he has satisfied the “but for” test for causation. He submits that the expert evidence establishes that the First Accident caused his injury and that the Second Accident exacerbated his symptoms. Mr. Sekhon points to the consensus amongst the experts that the First Accident was the cause of Mr. Sekhon’s lower back injury and that the Second Accident exacerbated that injury.

[42] As I understand the defendants' argument in respect of causation, they say the court should be cautious in finding that it was only the subject Accidents which caused Mr. Sekhon's current injuries and resulting damages. The defendants point to the Subsequent Accidents, and argue that they were of relatively equal force as the Accidents. Accordingly, they say those latter accidents contributed, exacerbated or prolonged Mr. Sekhon's lower back injury.

[43] The defendants also submit that because Mr. Sekhon failed to advise the experts who examined him about the Subsequent Accidents, the experts were unable to provide a reliable opinion regarding the cause of Mr. Sekhon's back injury. Specifically, the defendants argue that the fact that Mr. Sekhon described the impact of the Fourth Accident as comparable to the First Accident suggests that he would have suffered the same injury from the Fourth Accident. Again, I understand the defendants' argument as suggesting that the totality of evidence does not support finding that the First and Second Accidents are the sole cause of Mr. Sekhon's current injuries. As such, the defendants say they should not be responsible for damages arising from the Subsequent Accidents.

### ***iii. Analysis and Determination***

[44] In respect of determining the cause of Mr. Sekhon's back injury, I am persuaded by the evidence of Dr. Fuller that a structural anomaly in Mr. Sekhon's back—namely, a “false joint” between the transverse process of L5 and the top of the sacrum/tailbone—created circumstances that made Mr. Sekhon vulnerable to an overload in his back. In his report, Dr. Fuller opined that Mr. Sekhon would be more vulnerable to trauma because of the asymmetry of his back structure, as follows:

21 ... This impact [the First Accident] would have caused an overload to his axial skeleton/ neck and back; in this case with primary reference to the low back. Overload would initially have been in extension/backward bending against the seat back and headrest followed by forward flexion/forward bending against the seatbelt.

...

23. With reference to the low back, this structure would be subjected to an overload in extension followed by flexion. The seatbelt provides limited protection in that a degree of forward movement of the trunk is possible while

the pelvis is relatively fixed by the lap section of the seatbelt. This would cause an overload to the interval between L5, the lowest vertebra/bone in the low back, and the sacrum back/tailbone. As indicated, there is a developmental variation on the left at this level which can be considered to have been rendered symptomatic by the physical overload involved during the impact of this motor vehicle accident. Symptoms remain relatively localized to this area of the low back.

24. With reference to the structural variation involving this patient's low back, the transverse process of L5 on the left is enlarged and forming a false joint with the top of the sacrum/tailbone. This is a not unusual structural variation. However, with a significant overload there would be a force through the junction between the low back and the tailbone, that is the L5 vertebra and the sacrum. Given the fact that the left side is relatively anchored by this abnormal joint while the right side is normally mobile, the forces would have been transmitted in an asymmetrical and abnormal manner. It is therefore reasonable to suggest that the ligamentous structures supporting this level of the low back would have been asymmetrically overloaded, making them more vulnerable to trauma and therefore persistent symptoms.

[45] Dr. Stewart opined that with “respect to his mid and low back pain, the pain is mechanical in nature – that is, muscular pain related to his position and activities – and it is a direct result of his injuries in the 2017 collision [First Accident] aggravated by the January 2019 collision [Second Accident]”. Per Dr. Stewart, Mr. Sekhon sustained soft tissue injuries to his neck, mid and low back in the February 2017 collision. The other experts also opined that the First Accident was the cause of Mr. Sekhon's lower back injury.

[46] I accept, based on the expert evidence, that Mr. Sekhon suffered from pre-existing back issues related to his fused disk abnormality as discussed in the opinion of Dr. Fuller, but it was asymptomatic prior to the First Accident. In the First Accident, Mr. Sekhon suffered soft tissue injuries to his neck, upper back and low back. His symptoms were exacerbated by the Second Accident. 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.

[47] Given the forgoing, I am satisfied, on balance, that the First Accident was the initial cause of, and the Second Accident worsened, Mr. Sekhon's current back injuries. As such, Mr. Sekhon has satisfied the test that "but for" the defendants' actions he would not have suffered the injury to his lower back.

[48] While I am satisfied that the First Accident was the initial cause of Mr. Sekhon's lower back injury, and that injury was exacerbated by the Second Accident, I will consider the effect of Mr. Sekhon's subsequent injuries when calculating damages. As I will describe below, it is well-settled that a defendant should only be required to compensate a plaintiff for injuries caused by the defendant's actions.

[49] Having found that Mr. Sekhon has met his burden of establishing that his injuries were caused by the Accidents, I now turn to the assessment of his damages.

## VII. DAMAGES

### A. Non-Pecuniary Damages

#### i. Law

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

[51] In *Stapley v. Hejslet*, 2006 BCCA 34, leave to appeal to SCC ref'd, 31373 (19 October 2006), the Court of Appeal provided a list of common factors that influence the assessment of non-pecuniary damages:

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

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

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

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

- g) impairment of family, marital and social relationships;
- h) impairment of physical and mental abilities;
- i) loss of lifestyle; and
- j) the plaintiff's stoicism (as a factor that should not, generally speaking, penalize the plaintiff: *Giang v. Clayton*, [2005] B.C.J. No. 163 (QL), 2005 BCCA 54).

See also *McCliggott v. Elliott*, 2022 BCCA 315 at para. 47.

[52] Mr. Sekhon's circumstances, before and after the Accidents, must be considered to determine what award will place him in the position he would have occupied had it not been for the defendants' negligence. As best as money can do, Mr. Sekhon is to be compensated to put him in no better or worse a situation than if the Accidents had not occurred.

[53] The defendants must take Mr. Sekhon as he is, and the assessment of non-pecuniary damages is necessarily influenced by the plaintiff's personal experiences in dealing with their injuries and the consequences of these injuries: *Thomas v. Foskett*, 2020 BCCA 322 at para. 68. This is so even if his injuries are more severe than they would be for another person. However, to reiterate, the defendants are not required to compensate Mr. Sekhon for any debilitating effects of a pre-existing condition which he would have experienced anyway: *Athey* at paras. 32–35.

## **ii. Parties' Position**

### **a) Mr. Sekhon's Position**

[54] Mr. Sekhon argues that he is entitled to non-pecuniary damages of \$100,000. He argues that this is a fair amount to compensate him for his pain and suffering due

to the Accidents. He asserts that this amount also appropriately factors for his loss of housekeeping capacity. In support of his claim he provided the following cases:

- a) *Mannella v. Obregon*, 2020 BCSC 715: The court awarded \$80,000 for non-pecuniary damages (approximately \$89,000 when adjusted for inflation); and
- b) *Bal v. Makichuk*, 2022 BCSC 1695: The court awarded \$95,000 for non-pecuniary damages.

[55] Mr. Sekhon asserts that he is a stoic, and has tried to make the best of a bad situation by taking a job that allows him to still work with bridges for the Ministry at the same pay grade as before, albeit without the availability of overtime. However, he says he does not feel the same passion for the Bridges Manager, AO job that he did for his Construction Supervisor, STO job. In respect of his activities, he testified that he can still participate in the activities he did before, but it causes him pain and he cannot perform them to the level he did before the Accidents. He argues that he should not be penalized or have his non-pecuniary damages reduced just because he is still able to do these activities, or generally for his stoicism.

**b) Defendants' Position**

[56] The defendants argue that Mr. Sekhon's injuries are not so severe as to warrant a large award for pain and suffering. They argue that with proper medical treatment, such as active rehabilitation, his symptoms could improve. Accordingly, the defendants say the amount should be limited to a range of \$40,000 to \$60,000, before being reduced to account for contingencies. The defendants submitted the following cases to support their position:

- a) *Cegielka v. Grace*, 2020 BCSC 115: The court awarded \$40,000 in non-pecuniary damages;

- b) *Leung v. Mok*, 2020 BCSC 1456: The court awarded \$45,500 in non-pecuniary damages after applying a 35% reduction for pre-existing conditions and injuries;
- c) *Harle v. Williams*, 2020 BCSC 1684: The court awarded \$50,000 in non-pecuniary damages; and
- d) *Devito v. Watson*, 2020 BCSC 1106: The court awarded \$65,000 in non-pecuniary damages.

[57] The defendants argue that Mr. Sekhon is still able to do all of the activities he did before the Accidents, but acknowledge that he does them less frequently and suffers some level of pain either when performing the activities or after. A basis for the defendants' position is that they say Mr. Sekhon exaggerated his level of activity before the Accidents, as well as the negative impacts of the injuries on his life. The defendants assert that because Mr. Sekhon is still able to participate in activities—including family vacations and driving trips, and physical activities with his friends like Spikeball and lifting weights at the gym—his damages should be limited.

[58] Finally, the defendants assert that any award of non-pecuniary damages must be reduced to reflect Mr. Sekhon's Subsequent Accidents and injuries that are unrelated to the Accidents. As I understand this argument, the defendants say that even without the First and Second Accidents, Mr. Sekhon would still have physical symptoms from the Subsequent Accidents. They emphasize that at least in the case of the Fourth Accident, it was a similar type of rear-end collision of a similar force to the First Accident. The defendants argue that any pain and suffering resulting from the Subsequent Accidents should not be their responsibility; in other words, they say they should not be required to compensate Mr. Sekhon for pain and suffering unrelated to their actions.

### ***iii. Analysis and Determination***

[59] Mr. Sekhon testified that while “he was not an Olympic athlete” prior to the First Accident, he was physically active. He attended the gym regularly with his

friends and was able to lift weights and do cardio exercises. That he worked out at a gym was corroborated by the testimony of his friend, Mr. Friedmann. Indeed, Mr. Sekhon and Mr. Friedmann were driving to the gym when the First Accident occurred.

[60] Mr. Sekhon further testified that prior to the Accidents he went on hikes and was generally able to participate in life's activities without pain. While I accept that he was more active before the Accidents, I note that in direct examination he gave an example of one of his pre-Accident activities as hiking at Joffre Lakes. However, in cross-examination it was determined that Mr. Sekhon actually hiked Joffre Lakes after the First Accident. In my view, this demonstrates both that I must approach Mr. Sekhon's recollection of both his pre-Accident and post-Accident activities with caution. It also demonstrates that after the First Accident, he was able to complete what he described as a "strenuous and primitive" hike without any memorable lower back pain.

[61] In any event, the primary focus of his evidence was his inability to do his work as an STO, Bridge Supervisor, after the Accidents because the work was too physically demanding. During his testimony about no longer being able to work actively on large-scale bridge projects, Mr. Sekhon became emotional. I accept that Mr. Sekhon gained esteem and purpose through his work on large bridge construction projects in British Columbia. He testified that each time he drives his family or friends over the Ironworker Memorial Bridge spanning the Second Narrows, he tells them that he worked on the bridge's upgrade project.

[62] I also accept that as a result of the injuries from the Accidents, Mr. Sekhon endures pain in his lower back, and this pain has resulted in him being less able to participate in the activities in which he participated prior to the Accidents. Specifically, I find that Mr. Sekhon is unable to attend the gym or participate in weight lifting activities to the same extent as he did before the Accidents. The testimony of Mr. Sekhon, which was corroborated by his gym partner, Mr. Friedmann, was that while Mr. Sekhon still attends the gym, he does so less

frequently and with less intensity. However, I do not accept that Mr. Sekhon is prevented from attending the gym altogether.

[63] To that end, I accept that Mr. Sekhon feels frustrated and “embarrassed” that he can no longer lift the weights in the way he did before. However, as referenced in my discussion of Mr. Sekhon’s credibility above, based on his tendency to exaggerate and Mr. Friedmann’s evidence, which I accept, I reject Mr. Sekhon’s testimony that generally he is able to lift only one or two pound weights at the gym. While this may seem a trivial point, establishing non-pecuniary damages is an assessment of the degree of a plaintiff’s pain and suffering. In respect of his claim that he cannot go to the gym and exercise anymore, I find that he can attend the gym, but he now lifts less weight than he did before the Accidents.

[64] Mr. Sekhon further testified that his relationship with his wife has been impacted by his injuries. He described that he has difficulties being intimate due to pain. However, his wife was not called to provide evidence on these aspects of Mr. Sekhon’s testimony. Again, given that he was prone to exaggerate, I approach Mr. Sekhon’s testimony on this point with caution.

[65] Mr. Sekhon testified that before the Accidents, he was able to play video games for several hours at a time on a local area network (“LAN”), and that this activity was a way for him to connect with his friends. Since the Accidents, he says he cannot play video games continuously for hours and so he plays less. According to Mr. Sekhon, his ability to play with his friends is thus limited because one cannot participate sporadically during a game. Mr. Friedmann somewhat contradicted Mr. Sekhon’s evidence on this point, by stating that Mr. Sekhon still plays video games, but does so less frequently and needs to take breaks to stretch. Again, while this is a mild difference, it is a matter of degree and relevant to the assessment of damages to compensate a plaintiff for pain and suffering.

[66] In all, I accept that Mr. Sekhon’s back causes him pain and that this pain has negative impacts on his life. As discussed above, non-pecuniary damages are

intended, as much as money can, to compensate Mr. Sekhon for that pain. As is well-settled by the law, the defendants must take a plaintiff as they find him. In this case, Mr. Sekhon had a pre-existing lower back condition that appears to have contributed to his lower back injuries, as best described by Dr. Fuller in my excerpt from his report set out above.

[67] In particular, I find that the following evidence, which I find as fact, supports an award for non-pecuniary damages:

- a) Mr. Sekhon's general and regular symptoms of back pain as a result of the Accidents;
- b) Mr. Sekhon's change in employment due to the Accidents (as discussed below) to a role he does not enjoy to the same degree as his previous STO position;
- c) Mr. Sekhon's reduced capacity to engage in and enjoy recreational activities due to his injuries as caused by the Accidents, including going to the gym and playing video games with his friends; and
- d) the negative impacts of Mr. Sekhon's pain symptoms as caused by the Accidents on his interpersonal relationships, including his ability to play with his children.

[68] Having reviewed the authorities relied upon by the parties with respect to non-pecuniary damages, I find the following two cases provide the most helpful guidance.

[69] In *Harle*, a 27-year-old landscaper and business owner suffered soft tissue injuries to his neck, right shoulder and upper back as a result of his vehicle being struck while he was attempting to make a left-hand turn. The plaintiff's mood was also impacted as a result of the motor vehicle accident. His injuries improved over time but did not resolve completely. He only missed one day of physically demanding work, and was able to continue physical activities at a reduced capacity.

The impact of his symptoms on his ability to work comfortably was considered in assessing non-pecuniary damages. Justice Basran awarded \$50,000 in non-pecuniary damages.

[70] In *Devito*, a 25-year-old heavy duty mechanic suffered soft tissue injuries to his neck and lower back when he was involved in a rear-end motor vehicle accident as a passenger while stopped at a red light. The plaintiff's neck pain resolved within a few months but he was still experiencing lower back pain at trial, with relatively persistent mild to moderate discomfort. His lower back pain affected his ability to perform some heavier tasks at work as well as in his personal life and he had to reduce his recreational activities. The plaintiff suffered a prior workplace injury to his lower back that was not interfering with his ability to work at the time of the accident. Justice B.D. MacKenzie awarded \$65,000 in non-pecuniary damages.

[71] I find that in the circumstances of this case, in which Mr. Sekhon is able to do the things he did before but with less intensity or with some immediate or subsequent discomfort, it is appropriate to award him at the low-end of a range of \$50,000 to \$65,000. The evidence before me was that Mr. Sekhon is still able to participate in many of the activities he participated in before, albeit needing to take more breaks, lest his back issues become aggravated. Examples of activities that Mr. Sekhon has undertaken since the Accidents that appear similar to his activities prior to the Accidents include the following, demonstrating that the impact of his injuries is not completely debilitating:

- a) frequent trips to Hawaii with his family;
- b) hiking at Joffre Lakes;
- c) at least two driving trips from British Columbia to Alberta with his wife;
- d) a 5,000 km driving trip with his wife, mother-in-law and a friend of the mother in law to the Southwestern United States. Mr. Sekhon testified that on this trip the hikes were short, and that the group took frequent breaks.

However, I find that he wholly participated in the trip and did all of the hikes with and the driving for the group;

- e) a family vacation to Disneyland and Universal Studios;
- f) three or four trips to Las Vegas since February 2017;
- g) continuing to be able to play video games and go to the gym, albeit less frequently and with less intensity; and
- h) playing Spikeball with his friends, although less often and with lower intensity than he did before the Accidents.

[72] In referencing activities in which Mr. Sekhon can still participate, I accept that his participation comes at a cost to him of pain. As such, I recognize that he is not able to participate in these activities at the same intensity level as before the Accidents, and that he must take more breaks and risks suffering flare-ups of pain if he over-exerts himself. However, in my view, his ability to participate in some manner in these activities contrasts this case with other awards of non-pecuniary damages where injuries have had more profound impacts on a plaintiff. I make such a comparison because, in determining an award for pain and suffering, I am attempting to balance the negative impact the Accidents have had on Mr. Sekhon's life with his ability to still participate in the activities he did before.

[73] In setting an amount for non-pecuniary damages, I have also accounted for the possibility that Mr. Sekhon's symptoms may improve with active rehabilitation, as recommended by Dr. Paramonoff. Dr. Paramonoff determined that she would have to defer a longer-term prognosis of Mr. Sekhon's condition because he was still suffering from the acute phase related to the Fourth Accident. However, she found she was able to conclude as follows:

It is my opinion that Mr. Sekhon will likely have a prolonged course of recovery a lower back pain, given the accumulative effect of the soft tissue injuries (multiple motor vehicle accidents), post-MVA muscle imbalance/deconditioning, and confounding factors.

[74] Taken in conjunction with her opinion that Mr. Sekhon needs to undertake further exercise programs with a kinesiologist to improve his deconditioning, I find Dr. Paramonoff's opinion suggests there is a possibility that Mr. Sekhon's condition will improve if he receives additional active rehabilitation treatment to address his deconditioning and improve his functioning. I set this probability as relatively modest, reflected in a 10% contingency, given the other experts' conclusions that Mr. Sekhon's conditions are unlikely to fully resolve.

[75] As well, I reject Mr. Sekhon's claim that his non-pecuniary damages should be increased to compensate him for a loss of his housekeeping expenses. The evidence presented at trial showed his house in disarray, prompting defendants' counsel to ask, with some sincerity, whether the house had been burgled prior to the photographs being taken. The photographs failed to persuade me that the disorder was resultant from Mr. Sekhon's injuries. In particular, the photographs of the inside of his house showed that many of the items adding to the untidiness were small, such as juice boxes and used tissues on the bedroom floor. In my view, the photos did not indicate a lack of home maintenance arising from an injury, in that the disorder did not appear to be particularly related to heavy items or items that would cause Mr. Sekhon pain in tidying up. As such, I find it would be inappropriate to require the defendants to provide compensation to maintain Mr. Sekhon's home when it appears that maintaining a clean home is not an important aspect of Mr. Sekhon's life. In other words, I am not convinced that any purported loss in his ability to maintain a clean home has contributed to the pain and suffering caused to Mr. Sekhon by the Accidents.

[76] However, I will adjust the award of non-pecuniary damages upward slightly to compensate Mr. Sekhon for his loss of capacity to perform his own yard work pain-free. I accept that due to his previous work with his father's landscaping company, Mr. Sekhon would have some expertise and ability in completing his own yard work. Further, I accept that much of the yard work, including mowing the lawn, trimming the hedges, and cleaning the gutters, is now more difficult for Mr. Sekhon due to his back injury.

[77] Given the foregoing, I conclude that an appropriate award for non-pecuniary damages for Mr. Sekhon's pain and suffering is \$52,500, to be reduced by a 10% contingency to account for some improvement to his condition with proper active rehabilitation treatment. I conclude that while Mr. Sekhon's non-pecuniary damages are at the low end of the range of \$50,000 and \$60,000, I increased it to compensate him for his loss of enjoyment and ability to perform yard work. After applying the 10% contingency to the award of \$52,500, Mr. Sekhon's non-pecuniary damages award is \$47,250.

## **B. Past Loss of Earnings**

### **i. Law**

[78] Compensation for past loss of earning capacity is to be based on what the plaintiff would have, not could have, earned had the injury not occurred: *Rowe v. Bobell Express Ltd.*, 2005 BCCA 141 at para. 30 ; *M.B. v. British Columbia*, 2003 SCC 53 at para. 49.

[79] The plaintiff need not establish earnings loss on a balance of probabilities, since what would have happened between the date of the accident and prior to trial is essentially hypothetical, as are predictions regarding future losses. As the Court of Appeal stated in *Smith v. Knudsen*, 2004 BCCA 613:

[29] ... What would have happened in the past but for the injury is no more "knowable" than what will happen in the future and therefore it is appropriate to assess the likelihood of hypothetical and future events rather than applying the balance of probabilities test that is applied with respect to past actual events.

[80] A hypothetical possibility will be taken into consideration as long as it is a real and substantial possibility and not mere speculation: *Athey* at para. 27; *Morlan v. Barrett*, 2012 BCCA 66 at para. 38.

[81] In *Rowe* the court emphasized that a claim for past wage loss is more properly referred to as a past loss of capacity, the loss of which can be measured in different ways:

[30] Thus, in my view, a claim for what is often described as “past loss of income” is actually a claim for loss of earning capacity; that is, a claim for the loss of the value of the work that the injured plaintiff would have performed but was unable to perform because of the injury.

[31] Evidence of this value may take many forms. As was said by Kenneth D. Cooper-Stephenson in *Personal Injury Damages in Canada*, 2nd ed. (Scarborough, Ont.: Carswell, 1996) at 205-06,

... The essence of the task under this head of damages is to award compensation for any pecuniary loss which will result from an inability to work. “Loss of the value of work” is the substance of the claim – loss of the value of any work the plaintiff would have done but for the accident but now will be unable to do. The loss framed in this way may be measured in different ways. Sometimes it will be measured by reference to the *actual earnings* the plaintiff would have received; sometimes by a *replacement cost evaluation of tasks* which the plaintiff will now be unable to perform; sometimes by an assessment of reduced *company profits*; and sometimes by the amount of secondary income lost, such as *shared family income*.

[Underlining added in *Rowe*; other emphasis in original.]

[82] Thus, similar considerations arise in the court’s assessment of hypothetical events in the context of damages for a plaintiff’s past wage loss and future loss of earning capacity. In both circumstances, the court must consider and compare potential scenarios of a plaintiff’s life that are not knowable with exactitude. In a trio of recent cases, the Court of Appeal provided guidance as to the proper analytic framework to assess a plaintiff’s loss of earning capacity: e.g., *Dornan v. Silva*, 2021 BCCA 228; *Lo v. Vos*, 2021 BCCA 421; *Rab v. Prescott*, 2021 BCCA 345. This framework is applicable to both past wage loss and future loss of earning capacity, inasmuch as both deal with an assessment of the lost potential of a plaintiff to earn income.

[83] These cases left unchanged the fundamental principles of calculation of lost earning capacity but set out a three-part test for assessing the loss, summarized in *Rab* as follows (albeit with reference specifically to claims of future rather than past loss):

[47] ... a three-step process emerges for considering claims for loss of future earning capacity, particularly where the evidence indicates no loss of income

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

**ii. Parties' Position**

**a) Mr. Sekhon's Position**

[84] In his closing submissions, Mr. Sekhon argued that as a result of the Accidents he lost the potential to earn \$196,939 from the date of the First Accident to the date of trial. Mr. Sekhon divides this claim into two periods of time. First, he says he lost \$108,214 (adjusted for after-tax income by Mr. Benning) from the date of the First Accident to the date he left his job as a Construction Supervisor, STO and started in his current role as a Bridges Manager, AO. This aspect of the claim relates to the potential overtime he passed up while still working as a Construction Supervisor. Second, Mr. Sekhon says he lost the potential to earn wages of \$88,725 (also adjusted by Mr. Benning to reflect the after-tax income) from the date he changed to the Bridges Manager, AO job to the start of this trial. This portion of the claim is also based on the potential overtime he says he lost by virtue of changing jobs. Mr. Sekhon is not claiming a past earnings loss for 2020 because he was on parental leave for much of that year.

[85] I note that in his report, Mr. Benning calculated Mr. Sekhon's *total* after-tax loss of income from 2017 to October 2022 as \$108,214. This differs from the claim made to the court by Mr. Sekhon of \$196,939. Mr. Sekhon argues that the amount of \$108,214 only represents his loss from 2017 to 2019 when he became an AO and that an additional amount of \$88,725 must be included to account for his loss incurred in 2021 and 2022.

[86] The amount of \$88,725 that Mr. Sekhon claims as his loss of past earnings for 2021 and 2022 is calculated as his loss of \$50,487 (1,355 hours at \$37.26) for

2021 and \$38,238 (1,006 hours at \$38.01) for 2022. I note that these amounts are not adjusted to account for income tax and Employment Insurance deductions.

[87] Mr. Sekhon claims that the Accidents caused him to work fewer overtime hours when he was an STO, and to change from the STO to the AO work classification, thus also restricting his opportunity to work overtime. More specifically, he argues that during the first period described above, his injuries caused him to turn down overtime that was available to him. During the second period, he says that he missed out on the opportunity to have as much overtime because the AO position does not offer the same quantity of overtime as the STO position. Thus, Mr. Sekhon suggests that the success of his claim for past wage loss will depend on whether this Court accepts or rejects the following three propositions:

- a) Mr. Sekhon turned down additional overtime hours as an STO between the First Accident and September 2019 (when he transitioned to the role of an AO) due to his low back pain as caused by the Accidents;
- b) Mr. Sekhon left his STO position in September 2019 due to his low back pain as caused by the Accidents; and
- c) Mr. Sekhon withdrew his STO 24 application because of his low back pain as caused by the Accidents.

[88] For his calculations, Mr. Benning assumed, as provided to him, that an individual working as an STO would annually work 1,826.25 regular hours, based on a 37.5-hour work week. As well, Mr. Benning assumed an STO would work an additional 460 hours of “time and a half” and 230 hours of “double time” in overtime work. The sum of these figures is 2,516.25 hours of work per year—i.e., approximately 50 hours worked per week. Based on these assumptions, Mr. Benning calculated that Mr. Sekhon lost the following number of overtime hours as a result of the Accidents:

- a) 2017 – 400.70 hours of “time and half” and 154 hours of “double time”;

- b) 2018 – 356 hours of “time and a half” and 168 hours of “double time”; and
- c) 2019 – 287.34 hours of “time and half” and 115 hours of “double time”.

[89] Given that much of the argument at trial focused on the calculation of lost or foregone overtime pay, the parties introduced the concept of straight time equivalent (“STE”) hours. An STE hour is, as the name suggests, a method to convert overtime hours to regular hours. For example, one “double time” overtime hour is equivalent to 2 STE hours; similarly, 2 hours of “time and a half” work is equivalent to 3 STE hours. The assumed annual working hours provided to and used by Mr. Benning can be converted to STE hours as follows:

- a) 2017: 909.05 STE—i.e.,  $(400.7 \times 1.5) + (154 \times 2)$ ;
- b) 2018: 870 STE—i.e.,  $(356 \times 1.5) + (168 \times 2)$ ; and
- c) 2019: 661.01 STE—i.e.,  $(287.34 \times 1.5) + (115 \times 2)$ .

[90] Based on these assumptions, Mr. Benning calculated Mr. Sekhon’s lost opportunity of working the additional available overtime shifts.

***b) The Defendants’ Position***

[91] In essence, there are two prongs to the defendants’ argument against Mr. Sekhon’s claim for past lost earnings. First, they say Mr. Sekhon made a choice to leave the STO role for the AO role for reasons other than his injuries. Second, they say Mr. Sekhon has not established there was additional overtime that would have been available to him absent his transition to the AO position. In either scenario, the defendants say that Mr. Sekhon suffered no loss of wages due to the Accidents.

[92] Among other things, the defendants assert that Mr. Sekhon changed from the STO job to the AO job not because of the injury, but because he no longer wanted to work night shifts. They also point to the fact that Mr. Sekhon’s salary increased when

he took the position of Bridge Supervisor in April 2019 from the salary he was making as an STO and, as such, he suffered no pecuniary loss.

**iii. Analysis and Determination**

[93] In my view, to assess Mr. Sekhon's past wage loss, I must resolve the following four questions:

- a) First, as a result of the Accidents did Mr. Sekhon lose the opportunity to work additional overtime as an STO from the time of the First Accident to the date he took the AO position?
- b) Second, did Mr. Sekhon leave the STO position to the AO position because of his injuries?
- c) Third, while in the AO position, did Mr. Sekhon lose out on working additional overtime? If so, in what amount?
- d) Fourth, did Mr. Sekhon not return to the STO position because of the Accidents, or for a reason unrelated to the Accidents, or some combination of both?

[94] I will deal with each question in turn, applying the framework provided by the Court of Appeal in *Rab*.

**a) Did Mr. Sekhon Lose the Opportunity to Earn Overtime in the STO Job due to the Accidents?**

[95] Mr. Sekhon was hired by the Ministry in the Transportation Level Entry Program ("TELP") on April 9, 2015. As I understand the evidence, this program allows individuals to gain experience in the transportation industry, and in this case was akin to an apprenticeship for an assistant bridge construction supervisor.

[96] Mr. Sekhon completed the TELP on June 8, 2017, and was then assigned full duties of a Construction Supervisor as an STO. He worked as an STO until September 16, 2019, when he took on the role of Bridges Manager as an AO.

Mr. Sekhon was on parental leave for eight months from June 6, 2020 to February 5, 2021.

[97] In order to assess whether Mr. Sekhon lost the opportunity to work additional overtime, it is helpful to assess the overtime he actually worked during his time at the Ministry. In my view, this provides the best evidence as to what hours were available and worked by Mr. Sekhon. As set out in the ASOF, Mr. Sekhon worked the following regular and overtime hours from 2015 to the date of trial:

- a) between May 17, 2015, and December 26, 2015, Mr. Sekhon worked 1,106 regular hours and the equivalent of 81 STE (28 x 1.5 and 19.5 x 2) overtime hours. The total STE overtime hours and regular hours Mr. Sekhon worked expressed as a ratio of his regular hours is  $1,187/1106$ , or 1.07;
- b) between December 27, 2015, and December 24, 2016, Mr. Sekhon worked 1,820 regular hours and the equivalent of 204.5 STE hours (49 x 1.5 and 65.5 x 2). The total STE overtime hours and regular hours Mr. Sekhon worked expressed as a ratio of his regular hours is  $2,024.5/1820$ , or 1.11;
- c) between December 25, 2016, and December 23, 2017, Mr. Sekhon worked 1,820 regular hours and the equivalent of 437.5 STE hours (89 x 1.5 and 152 x 2). The total STE overtime hours and regular hours Mr. Sekhon worked expressed as a ratio of his regular hours is  $2,257.5/1820$ , or 1.24;
- d) between December 24, 2017, and December 22, 2018, Mr. Sekhon worked 1,820 regular hours and the equivalent of 513.5 STE hours (165 x 1.5 and 133 x 2). The total STE overtime hours and regular hours Mr. Sekhon worked expressed as a ratio of his regular hours is  $2,333.5/1820$ , or 1.28;

- e) between December 23, 2018 and December 21, 2019, Mr. Sekhon worked 1,820 regular hours and the equivalent of 549.5 STE hours (111 x 1.5 and 191.5 x 2). The total STE overtime hours and regular hours Mr. Sekhon worked expressed as a ratio of his regular hours is  $2,369.5/1820$ , or 1.30;
- f) between December 22, 2019, and June 6, 2020, Mr. Sekhon worked 840 regular hours and the equivalent of 131 STE hours (8 x 1.5 and 59.5 x 2). The total STE overtime hours and regular hours Mr. Sekhon worked expressed as a ratio of his regular hours is  $971/840$ , or 1.16. I note that for a portion of this year Mr. Sekhon was on parental leave;
- g) between February 6, 2021, and December 18, 2021, Mr. Sekhon worked 1,567.18 regular hours and the equivalent of 61 STE hours (10 x 1.5 and 23 x 2). The total STE overtime hours and regular hours Mr. Sekhon worked expressed as a ratio of his regular hours is  $1,628.18/1,567.18$ , or 1.04. I note that for a portion of this year Mr. Sekhon was on parental leave; and
- h) between December 19, 2021, and October 22, 2022, Mr. Sekhon worked 1,540 regular hours and the equivalent of 39 STE hours (8 x 1.5 and 13.5 x 2). The total STE overtime hours and regular hours Mr. Sekhon worked expressed as a ratio of his regular hours is  $1,579/1,540$ , or 1.03.

[98] Importantly, as previously stated, the loss Mr. Sekhon claims is based on Mr. Benning's calculations. These calculations are based on assumptions of the hours worked in a week by an STO, that Mr. Sekhon attempted to prove at trial through the evidence of Ian Baker, Provincial Manager of Structural Construction Services for the Ministry, regarding available overtime hours for contractors on major bridge construction projects. Mr. Baker acknowledged that there is a great deal of variety in the work on bridge construction projects, which number roughly between 40 to 50 projects at any given time, depending primarily on their size, location, and

completion-time sensitivity. However, Mr. Baker testified that on average, contractors' hours peak at approximately 60 hours per week during the dry summer season, spanning roughly from April to October. These hours then, on average, reduce to approximately 50 hours per week during the 'shoulder' season, and reach an average low of 40 hours per week during the winter.

[99] I found Mr. Baker to be a credible and knowledgeable witness. However, based on the questions he was asked, he did not provide evidence as to the overtime typically available to STO employees. I was unable to find the nexus in his testimony regarding contractors' overtime opportunities to those of STOs. Indeed, Mr. Baker, in responding to the questions asked of counsel, testified as to how many hours a week contractors, not STO employees, typically worked on a project at a given time of the year. Thus, a fundamental problem I have with Mr. Sekhon's position in calculating his loss of overtime potential since the Accidents is that it appears to be based on evidence that specifically is not related to his own employment history and circumstances—namely, as an STO employee.

[100] Indeed, on cross-examination, Mr. Baker advised that around 90% of workers on bridge construction projects are externally-sourced contractors, with the remaining 10% workforce being constituted from internal Ministry employees. I was not provided with evidence that the STO employee and the private contractor are treated identically in terms of overtime opportunities. However, there was evidence that the STO and private contractors are treated differently in some regards. For example, Mr. Baker testified that the STO employee would get "dibs" over the contractor on choosing which projects they worked, as long as they were qualified for the project. In my view, this demonstrates that there are differences in the treatment of Ministry employed STOs and private contractors. While I accept that Mr. Baker's testimony regarding contractors was that these private contractors, once hired, stood in the place as a delegate for the Ministry to perform the quality assurance role in bridge construction and performed the same function as an STO, I was not provided with evidence that they are offered the same number of overtime hours.

[101] In summary, I am not satisfied that Mr. Sekhon established a direct link between the evidence regarding the number of overtime hours available to a private contractor and the overtime hours available to an STO employee – or if that STO employee would be expected to take all of the overtime available to a private contractor. From the evidence before me, I am unable to determine whether the overtime available to a private contractor corresponds directly to the potential overtime hours available to a government employed STO.

[102] Given Mr. Sekhon did not adduce evidence with respect to the specific amount of overtime hours available to STOs, and instead relies entirely on evidence concerning private contractors, I find that he has not established a sufficient evidentiary basis to support his submissions that the STO employee works the equivalent hours of overtime as a private contractor.

[103] Another factual problem with Mr. Sekhon's position is that he did not adduce specific evidence that he was offered and refused overtime. He merely testified that due to his injuries, after the Accidents he generally tried to limit "his hours to what was necessary to get the job done due to increased low back pain while at work". Among other things, I would expect if Mr. Sekhon was constantly offered overtime to complete time-sensitive projects and refused, it would impact his superiors' view of his work. To that end, Mr. Sekhon testified that he was criticized at work for "working banking hours", because he would not work the long hours required.

[104] However, whatever criticism Mr. Sekhon may have perceived is contradicted by his positive performance reviews. For example, Mr. Sekhon received a positive year end review for his work as an STO. On May 16, 2018, his manager, Nick Sandhu, uploaded the following comments on Mr. Sekhon's performance:

Good work on the 72<sup>nd</sup> interchange project and Admirals/McKenzie project. You have a good understanding of ministry specifications and procedures. I support work goal to the Ministry Representative on a small bridge project in the near future. Please research and request the painting inspection course and welding inspection course.

[105] Similarly, the evidence at trial suggested that Mr. Sekhon was a "shoe-in" for the STO job, to which he re-applied in August 2020. I find it difficult to reconcile

Mr. Sekhon's testimony that he continually refused overtime, he says to the chagrin of his employer and in a manner that served to contrast him with other STO employees, with the fact that he seemed to remain a valued Ministry employee and one which Mr. Baker would readily want to employ in the same STO position.

[106] Finally, as set out above, I note that in the years following the First Accident and before Mr. Sekhon's transition to the role of Bridges Manager, AO, he worked *increasing* hours of overtime: i.e., 437.5 STE hours in the 2017 working year; 513.5 STE hours in the 2018 working year; and 549.5 STE hours in the 2019 working year.

[107] I conclude that Mr. Sekhon has not provided an evidentiary basis to establish that there was a pecuniary loss due to the Accidents from the date of the First Accident to the date he changed jobs from an STO to an AO. For greater clarity, I find that Mr. Sekhon has failed to meet the second step of the test set out by the Court of Appeal in *Rab*—i.e., that there is a real and substantial possibility his claimed lost capacity to accept available overtime work resulted in a pecuniary loss—because he has not provided evidence that he did not work overtime that would have likely otherwise been available to him from February 18, 2017, to September 16, 2019.

[108] In reaching this conclusion, I am guided by the Court of Appeal's findings in *Dornan*. There, the court reminded trial judges that when they consider possibilities and hypotheticals, any conclusions must be tethered to the evidence and not based on imprecise evidence, as difficult as that may be:

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

[109] As such, I find the assumptions provided to Mr. Benning as to the potential overtime available to Mr. Sekhon from the date of the First Accident to the date of trial require adjustment, as they are based on an estimated overtime potential that is unsupported by the evidence.

[110] However, this evidentiary lacuna regarding the available overtime to STOs is not fatal to the entirety of Mr. Sekhon's claim for past lost wages. I am persuaded that based on the evidence of Mr. Sekhon and Mr. Baker that there is more overtime available to a Ministry STO employee than to an AO employee. Accordingly, if Mr. Sekhon left the STO position for the AO role as a result of injuries caused by the Accidents, he still has a valid claim for past lost wages.

***b) Did Mr. Sekhon Leave the STO Job for the AO Job Due to the Accidents?***

[111] I accept that Mr. Sekhon left the STO job for the AO job as a result of the Accidents. In my view, his injuries were his primary, but not only, factor in his decision to leave the STO work.

[112] I found the testimony of Mr. Sekhon's physiotherapist, Shanna Wighton, compelling. Ms. Wighton treated Mr. Sekhon in 2018 while he was working as an STO in Victoria, BC, on an interchange project. Ms. Wighton testified that she was genuinely worried about the pain Mr. Sekhon appeared to be in when she treated him. She was concerned that the tenseness that she observed in Mr. Sekhon indicated he was "splinting", meaning that his muscles were protecting a deeper injury to his spine. However, she could find no cause of his pain and was troubled by her inability to treat Mr. Sekhon. The fact that Ms. Wighton appeared to clearly remember Mr. Sekhon, despite treating hundreds of patients in her busy practice, suggested that his lower back injury made an impression on her. Ms. Wighton's evidence thus establishes that Mr. Sekhon was experiencing significant amounts of back pain while working as an STO shortly before he applied to change to the role of AO.

[113] I also accept that Mr. Sekhon enjoyed his work as an STO more than his work in the AO position, although some of this may be based on nostalgia as opposed to an accurate recollection of the work. As stated above, Mr. Sekhon became emotional when testifying regarding his work on large-scale construction projects, and when reflecting on the fact that he no longer worked on those projects. Given

his clear passion for the STO role, I do not accept the defendants' contention that Mr. Sekhon applied and transferred to the AO position primarily because he wanted to work fewer night shifts. Instead, the more likely explanation, in my view, is that Mr. Sekhon left a role he greatly enjoyed because his pain prevented him from working in the position in a comfortable and capable manner.

[114] Thus, I find that but for the injuries he suffered as a result of the Accidents, Mr. Sekhon would have remained working as an STO and not made the shift to the AO position.

**c) Did Mr. Sekhon Forego Overtime by Taking the AO Job?**

[115] I accept, based on the evidence of Mr. Baker and Mr. Sekhon, that there is overtime available to a Construction Supervisor, STO position. However, as set out above, Mr. Baker's evidence fails to provide a sufficient basis for the assumptions used by Mr. Benning to calculate how much overtime an STO employee would be offered generally, and importantly how much Mr. Sekhon would have been offered specifically in the relevant time period.

[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.

[117] Given the foregoing, I accept that by taking the AO job, Mr. Sekhon lost an opportunity to take additional overtime hours. In this sense he has lost the capacity to earn potential income. In my view, applying the second step of the *Rab* test,

Mr. Sekhon has established that there is a real and substantial possibility that he has and will continue to suffer a pecuniary loss by not having the opportunity to work the additional overtime hours available in the STO position.

***d) What is the Amount of the Pecuniary Loss Suffered by Mr. Sekhon By Taking the AO Job?***

[118] In light of the difficulties I described above with Mr. Baker's (and by extension Mr. Benning's) evidence in assuming that the overtime worked by private contractors was identical to overtime worked by STO government employees, I must determine a principled basis for calculating Mr. Sekhon's loss that is tethered to the evidence. In light of the evidence available in this case, I conclude it is appropriate to calculate Mr. Sekhon's past lost wages using the ratio of his previous hours of overtime worked as against his regular worked hours. Specifically, I award Mr. Sekhon 30% of his salary for each of the years worked from September 16, 2019, to the date of trial, excluding the eight months he was on parental leave from June 2020 to February 2021, to compensate him for the overtime that was no longer available to him as an AO.

[119] I have arrived at 30% of this salary by having regard for the pattern of overtime worked by Mr. Sekhon while he was an STO. As will be discussed below in my calculation of Mr. Sekhon's future loss of earning capacity, I conclude that based on his past working behaviour, the ratio between the total (i.e., regular and overtime) hours Mr. Sekhon worked and his regular (i.e., non-overtime) hours fluctuated from approximately 1.04 and 1.3 over the relevant time period, peaking when he was an STO in 2019. Thus, I am satisfied that Mr. Sekhon's past wage loss can be compensated by providing him with an additional 30% of his salary from the date he became an AO to the date of trial. While his STE hours only reached 30% in 2019, I accept the evidence of Mr. Sekhon that when he was newly employed as an STO, he was offered less overtime because he had fewer skills and so would add less value working overtime. In my view, it is fairer to Mr. Sekhon to weight the lost overtime closer to the overtime he worked in 2019. Further, in setting the amount at 30% I am taking into account that in 2019, Mr. Sekhon was suffering from the injury.

However, as set out above, I am not persuaded that he was turning down overtime opportunities at such a rate as to cause concern to his employer. Accordingly, I find that 30% is a fair approximation of the overtime Mr. Sekhon would have worked had he stayed working as a Construction Supervisor, STO.

[120] In summary, with respect to Mr. Sekhon’s past wage loss claim, I find that he is not entitled to any past wage loss from 2017 to the start of September 2019 when he started the AO position, but is entitled to past lost wages from the date he changed positions to the date of trial. I will address the amount available to Mr. Sekhon for his parental leave below. In doing so, I acknowledge that I have used Mr. Sekhon’s AO income for 2021 as the basis of calculating his lost overtime for 2019. I have done so, because if I used his income from 2019, it would, in effect, double count a portion of the overtime he worked from January to August, 2019.

[121] As set out in the table below, I award Mr. Sekhon 30% of his with-accident income, as calculated by Mr. Benning, to represent the overtime he was unable to work. As Mr. Benning does in his report, I reduce that amount by 30%, to account for associated income taxes and EI premiums:

| <b>Year</b>        | <b>With Accident Income</b>             | <b>Gross Income Loss (Income x .3)</b> | <b>Associated Income Taxes/EI Premiums</b> | <b>Net Income Loss</b> |
|--------------------|---|--|--|------------------------|
| Sept. – Dec., 2019 | \$61,523 x 4/12 months<br>(\$15,380.75) | \$4,614.23                             | \$1,384.27                                 | \$3,229.96             |
| 2021               | \$61,523                                | \$18,456.90                            | \$5,537.07                                 | \$12,919.83            |
| 2022               | \$68,257                                | \$20,477.10                            | \$6,143.13                                 | \$14,333.97            |
| <b>Total</b>       |   |  |  | <b>\$30,483.76</b>     |

**e) Did Mr. Sekhon Stay in the AO Job Due to the Accidents**

[122] The remaining issue regarding Mr. Sekhon's past loss of income claim is whether it is appropriate in the circumstances to apply a contingency to the above-noted award. Specifically, the defendants submit Mr. Sekhon remained in the AO position—where I have found he had fewer overtime hours available to him—out of a dislike for working night shifts and a desire to spend more time with his family. They say these considerations are unrelated to his injuries as caused by the Accidents. Mr. Sekhon maintains that he remained in the position because of his injuries. I must now determine the relative likelihood that Mr. Sekhon decided to stay in the AO position due to the Accidents as compared to the likelihood that he did so for other unrelated reasons, or some combination of these factors.

[123] At trial, the parties intensely focused on Mr. Sekhon's application, made in February 2021, to return to his previous STO position. Mr. Sekhon testified that he never intended to return to work as an STO because he knew he would be unable to perform the work due to lower back pain. He was on parental leave at the time he initiated the application process and said that he wanted to apply for an "ego-boost", in the hopes that he would do well in the competition.

[124] On February 8, 2021, Mr. Sekhon wrote to Mr. Baker to inquire about STO jobs. I produce the text of the message in full, because in my view it is important in determining Mr. Sekhon's true motivations regarding his career choices:

Hello Ian,

I had a few questions regarding the STO 27 Bridge Construction Supervisor position. Before my current role, I was an assistant bridge construction supervisor for five years with the region. A large part of the reason that I decided to move over to my current job was the schedule of working as an assistant. With the projects on the board for the near future require mostly night work or are they more the standard 7 AM to 5 PM? I find myself missing working on construction projects, but don't think I could do the eight months straight of night shift anymore. Thanks.

[Emphasis added.]

[125] Mr. Sekhon was subsequently offered an interview for the STO job. However, on March 24, 2021, he removed his name for consideration from the competition. Again, the text of that email is important, in my view, and so I reproduce it fully:

Hi Annie,

thank you for the consideration. My interest in this position has changed with recent life events, so I would like to remove myself from the competition at this time.

Thanks again,

[126] Mr. Sekhon's email to Mr. Baker demonstrates that Mr. Sekhon had concerns about the night shifts and hours of work. Mr. Sekhon testified that the content of his email to Mr. Baker was not truthful. He said that he was not genuinely concerned with working night shifts, and that his reservations about working in the STO job related to his physical limitations caused by the injuries from the Accidents. He testified that he phrased his email in such a way to blunt any further inquiry from Mr. Baker as to why he was withdrawing. Mr. Sekhon also testified that he used the language of "recent life events" in his email to Ms. Annie Randhawa because it was a "nebulous" term which was sufficiently vague such that he would not be asked to explain it in detail. In all, Mr. Sekhon said that he would want to work in the STO job and that it was his injuries, not his concern over night shifts or the additional time spent with his family, that drove him to withdraw from the competition.

[127] The defendants point out that the timing of Mr. Sekhon's email to Ms. Randhawa removing himself from the STO competition was sent on March 24, 2021. This was within weeks of Mr. Sekhon's return to work after his parental leave. The defendants argue that Mr. Sekhon's change of heart on applying to the STO position relates more to his new circumstances as a father with a young child, and related concerns about working hours, than any concerns about his injuries. In other words, they assert that Mr. Sekhon's motivation to withdraw from the STO competition related to his desire to not work night shifts away from his family, and not because he did not think he could do the STO job physically.

[128] I find that based on the circumstances, it is not likely that the injuries were the sole reason for Mr. Sekhon to withdraw from the STO competition. The timing of his withdrawal from the competition coinciding with his return to work after his parental leave supports a finding that his withdrawal from consideration was not solely related to his injuries. In this regard, I reject Mr. Sekhon's evidence that he had no concerns about working night shifts that factored into his decision to withdraw from the STO competition.

[129] Further, the submission by Mr. Sekhon that he remained in the role of AO solely because of his injuries is inconsistent with his expressed concern to a superior over working night shifts. If Mr. Sekhon had concerns about the physical nature of the work, I believe he would have stated such concerns to Mr. Baker. It does not ring true to me that Mr. Sekhon would express concerns about his ability to work night shifts while not expressing his concern that he had physical limitations, if working night shifts was not a legitimate concern of his. Indeed, in my view, expressing a concern over working night shifts to his superior could plausibly make Mr. Sekhon seem a less desirable candidate for the STO role and as an employee generally in a similar way as expressing his concerns over his injury. Yet, he expressed the concern of working night shifts in his email on February 10, 2021.

[130] I conclude that, based on the totality of evidence surrounding his application for the STO role as set out above, Mr. Sekhon had concerns other than just his back injury which ultimately persuaded him to discontinue his candidacy for the position.

[131] However, 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.

[132] Given the foregoing, I will not adjust Mr. Sekhon's past wage loss for contingencies.

### C. Future Loss of Earning Capacity

#### i. Law

[133] Many of the considerations addressed above in the assessment of Mr. Sekhon's damages for his past loss of wages are relevant to the analysis of his claim for future loss of earning capacity, because both deal with hypothetical scenarios. The Court of Appeal recently provided a summary of the principles and process trial courts must apply in assessing a plaintiff's claim for future loss of earning capacity in *Ploskon-Ciesla v. Brophy*, 2022 BCCA 217:

[7] The assessment of an individual's loss of future earning capacity involves comparing a plaintiff's likely future had the accident not happened to their future after the accident. This is not a mathematical exercise; it is an assessment, but one that depends on the type and severity of a plaintiff's injuries and the nature of the anticipated employment in issue: *Gregory v. Insurance Corporation of British Columbia*, 2011 BCCA 144. Despite this lack of mathematical precision, economic and statistical evidence "provide[s] a useful tool to assist in determining what is fair and reasonable in the circumstances": *Dunbar v. Mendez*, 2016 BCCA 211 at para. 21, citing *Parypa v. Wickware*, 1999 BCCA 88 at para. 70.

[8] Courts should undertake a tripartite test to assess damages for the loss of future earning capacity. In *Rab v. Prescott*, 2021 BCCA 345, Grauer J.A. clarified this approach. ...

...

[10] Justice Grauer in *Rab* described the three steps to assess damages for the loss of future earning capacity:

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

#### **First Step**

[11] With respect to the first step, I note two considerations as outlined in *Rab* at paras. 29–30. First, there are, broadly, two types of cases involving the loss of future earning capacity: (1) more straightforward cases, for example, when an accident causes injuries that render a plaintiff unable to work at the time of trial and into the foreseeable future; and (2) less clear-cut cases, including those in which a plaintiff's injuries have led to continuing deficits, but their income at trial is similar to what it was at the time of the accident. In the former set of cases, the first and second step of the analysis may well be foregone conclusions. The plaintiff has clearly lost capacity and income. However, in these situations, it will still be necessary to assess the probability of future hypothetical events occurring that may affect the quantification of the loss, such as potential positive or negative contingencies. In less obvious cases, the second set, the first and second steps of the analysis take on increased importance.

[12] Second, with respect to the second set of cases, that is, situations in which there has been no clear loss of income at the time of trial, the *Brown* factors, as outlined in *Brown v. Golaiv* (1985), 1985 CanLII 149 (BC SC), 26 B.C.L.R. (3d) 353 (S.C.), come into play.

The *Brown* factors are, according to *Rab*, considerations that:

[36] ... are not to be taken as means for assessing the dollar value of a future loss; they provide no formula of that nature. Rather, they comprise means of assessing whether there has been an impairment of the capital asset, which will then be helpful in assessing the value of the lost asset.

[37] If there has been a loss of the capital asset, the question then becomes whether there is a real and substantial possibility of that impairment or diminishment leading to a loss of income.

[13] For ease of reference, the *Brown* considerations set out at para. 8 of that decision include whether:

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

[14] Recall, however, that a plaintiff is not entitled to an award for a loss of earning capacity in the absence of any real and substantial possibility of a future event leading to income loss: *Rab*; *Perren v. Lalari*, 2010 BCCA 140. That is, even if the plaintiff makes out one or more of the *Brown* factors, and thus demonstrates a loss of earning capacity, this does not necessarily mean they have made out a real and substantial possibility this diminished earning capacity would lead to a loss of income in their particular circumstances. This is where the second step comes in.

### **Second Step**

[15] The reference to paras. 93–95 of *Dorman v. Silva*, 2021 BCCA 228, in para. 47 of *Rab*, above, regards the standard of proof at this stage: a real and substantial possibility. This standard of proof “is a lower threshold than a balance of probabilities but a higher threshold than that of something that is only possible and speculative”: *Gao v. Dietrich*, 2018 BCCA 372 at para. 34.

### **Third Step**

[16] As touched upon above, depending on the circumstances, the third and final step—valuation—may involve either the “earnings approach” or the “capital asset approach”: *Perren* at para. 32. The earnings approach is often appropriate where there is an identifiable loss of income at the time of trial, that is, the first set of cases described above. Often, this occurs when a plaintiff has an established work history and a clear career trajectory.

[17] Where there has been no loss of income at the time of trial, as here, courts should generally undertake the capital asset approach. This approach reflects the fact that in cases such as these, it is not a loss of earnings the plaintiff has suffered, but rather a loss of earning capacity, a capital asset: *Brown* at para. 9. Furthermore, the capital asset approach is particularly helpful when a plaintiff has yet to establish a settled career path, as it allays the risk of under compensation by creating a more holistic picture of a plaintiff’s potential future.

[134] If the three-step analysis set out above results in the award of damages for a loss of future earning capacity, the court must determine, as a final step, if the award is fair and reasonable in the circumstances: *Dhanda v. Thind*, 2022 BCSC 1003 at para. 56, citing *Lo* at para. 117.

## **ii. Parties’ Position**

### **a) Mr. Sekhon’s Position**

[135] Similar to his claim for past wage loss, Mr. Sekhon argues that because his injuries required him to leave the STO position he was put on a less lucrative career trajectory. He asserts that although the base salary of the STO and AO are identical, he has lost the opportunity to work overtime and to move into the private sector as a contractor. He asserts, relying on the earnings approach, that his future loss of earning capacity award should be between \$1,170,926 and \$2,954,524 from now until he retires at age 65, based on two potential scenarios.

[136] The first scenario Mr. Sekhon puts forward is that, had the Accidents not occurred, he would have worked as an STO until 2022 and then moved into the private sector, where he would have earned \$241,942.59 per year. This figure includes a salary of \$205,942.59 and a car allowance of \$36,000 per year. The present value of this amount to age 65, using Mr. Benning's actuarial multiplier, is \$4,666,346. From this amount, Mr. Sekhon deducts what he expects to make if he continues to work in the AO position to age 65, which is \$88,758.38 annually, consisting of \$75,884.38 of salary plus non-wage benefits of \$12,874. Applying Mr. Benning's actuarial multiplier to this amount to age 65 results in a lifetime "with accident" scenario of \$1,711,882. The resulting difference between the without-accident and with-accident income in this scenario is \$2,954,464, which forms the upper level of Mr. Sekhon's future loss of earning capacity claim.

[137] The second scenario presented by Mr. Sekhon is that, had the Accidents not occurred, he would have continued as an STO and not entered the private sector. In this scenario, Mr. Sekhon asserts he would have earned \$149,465.88 per year to age 65, which includes his base salary of \$75,884.38, overtime in the amount of \$60,707.50, and non-wage benefits of \$12,874. Applying Mr. Benning's economic multiplier results in a net present value for Mr. Sekhon's potential lifetime earnings to age 65 of \$2,882,748. As above, deducted from this amount is Mr. Sekhon's calculation of his "with accident" income to age 65 in the AO position which, using Mr. Benning's economic multiplier, is \$1,711,822. The resulting lost lifetime income is \$1,170,926 ( $\$2,882,748 - \$1,711,822$ ). I note that in his written submissions Mr. Sekhon incorrectly stated this amount as \$1,170,865.

[138] Mr. Sekhon also presented similar calculations using Mr. Benning's actuarial multiplier. I will not address these calculations, since I accept Mr. Benning's opinion that "[g]enerally, where the income stream is expressed on a full-time full year basis (including non-wage benefits), it is our opinion that the Economic multiplier be used".

[139] Courts have held that economic multipliers are typically more helpful than actuarial multipliers where the circumstances of the plaintiff likely approach those of

the average person: see *Basile v. Doyle*, 2022 BCSC 819 at para. 193. In this case, Mr. Sekhon has not been severely impacted by the Accidents or had major pre-accident health issues and so I find that the economic multiplier is appropriate.

**b) Defendants' Position**

[140] The defendants argue that Mr. Sekhon's claim for future loss of income earning capacity is based entirely on assumptions that were not supported by the evidence. Specifically, they assert that there is no clear loss of income in this case, because Mr. Sekhon is employed at a greater income level as an AO 24 (soon to be an AO 27) than he was as an STO at the time of the First Accident.

[141] The defendants argue that Mr. Sekhon's argument fails each of the three branches of the test set out by the Court of Appeal. In respect of the first branch, the defendants say Mr. Sekhon switched from the STO job to the AO job because he did not want to work night shifts, not due to the injuries sustained in the Accidents. As such, it was not the Accidents that caused the event resulting in a change of income earning scenario.

[142] The defendants argue that the change from the STO position to the AO position does not give rise to a real and substantial possibility that the change will result in a pecuniary loss to Mr. Sekhon. In other words, even if the Accidents were the cause of his change from the AO to the STO work, it does not result in any economic loss to him.

[143] In the alternative, the defendants argue that if the court finds that Mr. Sekhon has satisfied the first and second steps of the test set out in *Rab*, this case calls for an application of the capital asset approach to calculating the loss because there is no clear loss of income. They point out that Mr. Sekhon, at least with respect to his base salary, currently earns more as an AO than he did as an STO. The defendants assert that if the court applies the capital asset approach, an appropriate award is one year of salary or \$75,000. The defendants further argue that this amount must be reduced by 30% to 50% to account for contingencies: primarily: (1) that

Mr. Sekhon's symptoms may improve with more frequent and better physical conditioning; and (2) that there is insufficient evidence to find that Mr. Sekhon was unable to continue with his STO work due to his injuries. The resulting amount after applying the contingency is an award for future loss of earning capacity in the range of \$37,500 to \$52,500.

**iii. Analysis and Determination**

[144] As set out above, Mr. Sekhon presents two potential scenarios for his career trajectory that he says were real and substantial possibilities had the Accidents not occurred. The first scenario is that Mr. Sekhon would have worked as an STO until 2022 and then would have become a private sector contractor. The second scenario is that Mr. Sekhon would have continued to work as an STO until retirement.

[145] I conclude that Mr. Sekhon has failed to adduce sufficient evidence to establish that there is a real and substantial possibility he would leave the Ministry to become a private sector bridge consultant had the Accidents not occurred. Even if I am wrong that there is a real and substantial possibility that he would become a private consultant, I find that he has failed to provide an evidentiary basis to support his claim as to what private sector consultants earn.

[146] Mr. Sekhon testified that his plan was to work with the Ministry and then move to the private sector working as a bridge consultant. He spoke of the high earnings that individuals made in the private sector working as bridge contractors. In doing so he provided hearsay evidence regarding his colleague who was working for the Ministry on a project on a Friday and switched to a private contractor the following Monday—enjoying an increased salary and a \$3,000 monthly car allowance. The amount of the car allowance in particular made an impression on Mr. Sekhon, as he testified that it was more than he was making as a TELP at the time.

[147] In the calculations to assess what a consultant earned, Mr. Sekhon used an hourly amount of \$62.75. He arrived at this amount based on the following:

- a) Mr. Sekhon's understanding that consultants make between \$80 to \$100 per hour;
- b) Mr. Baker's testimony that consultant rates were between \$100 and \$150 per hour; and
- c) An STO 27 employee earning \$45.45 per hour.

[148] Mr. Sekhon then averaged the lowest rate he says a consultant would be paid (\$80) and the hourly rate of an STO 27 (\$45.45) to arrive at \$62.75 per hour for the consultant. To that amount he added a \$3,000 monthly car allowance.

[149] I have several problems in accepting Mr. Sekhon's evidence of a bridge consultant's income. First, Mr. Sekhon's evidence as to what a private sector consultant earns in the bridge construction industry is hearsay. Further, the amounts referenced were general and provide no real insight into the compensation structure for a consultant. Generally, I find his evidence on this point unhelpful.

[150] Second, as elicited in cross-examination, Mr. Baker's evidence set out what the Ministry pays the consulting firm—not the earnings of the individual consultant. Again, the rate at which a consulting firm pays its consultants, rather than what such firms charge for their consultants to the Ministry, was not in evidence. As such, while I have no reason to doubt its accuracy, Mr. Baker's evidence is not helpful for the purposes of determining what a private sector bridge consultant would earn.

[151] Third, the very nature of consultancy work is that it is not regular employment. The models presented by Mr. Sekhon assume full-time employment as a consultant for the next three decades. While the general evidence was that there was a demand for consultants, there was no specific evidence suggesting that a consultant would be gainfully employed on a continuous basis at a steady rate of employment.

[152] Fourth, a particular weakness of the evidence adduced by Mr. Sekhon with respect to private sector bridge consultancy income was his testimony regarding the car allowance. Mr. Sekhon testified that he understood that consultants receive a car

allowance of approximately \$3,000 per month. That amount was used by Mr. Benning, increasing the calculated annual income for consultants by \$36,000. However, there was no specific evidence regarding the details of the car allowance—for instance, whether \$3,000 represented a maximum rather than average amount; whether it was a discretionary amount provided to a consultant or if the amount must be used on a vehicle; and whether it was provided to every consultant by every private sector employer. Further, I note that in the assumptions provided to Mr. Benning to calculate Mr. Sekhon's income there was no reference to the fact that in his current AO position, the Ministry provided Mr. Sekhon a vehicle for his use. I find it troubling that the assumptions provided to Mr. Benning included a car allowance on one side of the equation, but failed to include the benefit received by Mr. Sekhon of having a vehicle supplied by his employer on the other. I note that this is not a criticism of Mr. Benning. The economists in these cases are provided with the assumptions upon which they perform their calculations. The vague details on the car allowance and the plaintiff's failure to acknowledge that the Ministry provides him with a vehicle are an example of the general lack of specificity of the evidence supporting Mr. Sekhon's argument that I should accept as viable his proposed scenario that he would work as a consultant and earn income of \$241,942.59 each year until the age of 65.

[153] Given the foregoing, I conclude that I do not have sufficient reliable evidence before me to justify a calculation of what a private sector bridge consultant would earn, and so decline to consider that scenario. I also find that Mr. Sekhon's plans to become a consultant were only speculative and aspirational. He had only worked in the STO job for two years before the First Accident and there was no evidence that he had taken any concrete steps to pursue a career in the private sector in those two years or after.

[154] In respect of whether it was a real and substantial possibility that Mr. Sekhon would pursue his goal of becoming a private bridge consultant, if, as Mr. Sekhon testified, his goal of being a private sector consultant was driven by monetary gain, there is no evidence that he took any steps to seek out private sector employment in

any other roles to increase his earning capacity. In making this statement, I am aware that Mr. Sekhon argues that after the Accidents he is relieved to have the security of a government job. However, I cannot reconcile his assertion that he was set on moving to the private sector to increase his earnings with the fact, on the record before me, that he has not pursued other private sector jobs that might not require physical activity.

[155] Using the language of the Court of Appeal in *Rab*, I find that Mr. Sekhon has failed to demonstrate a real and substantial possibility that he would have, in the future, become a private sector consultant had the Accidents not occurred, and that his inability to do so results in a pecuniary loss. Among other things, there is simply insufficient evidence to establish what, if any, loss might occur to Mr. Sekhon if he joined the private sector.

**a. The Scenario of Mr. Sekhon Remaining as an STO until Age 65**

[156] Using the tests established by our Court of Appeal, I will now assess Mr. Sekhon's claim that his without-accident scenario would see him working as an STO until age 65.

[157] Under the first step of the *Rab* analysis, I accept that there is sufficient evidence that there is a potential future event that could lead to a loss of capacity. As set out above, I accept the experts' opinions that as a result of the First Accident, and as exacerbated by the Second Accident, Mr. Sekhon suffered an injury to his lower back that is unlikely to resolve fully. As stated by Dr. Fuller, "the prognosis for a complete resolution of [Mr. Sekhon's] residual symptoms with reference to the low back remains poor." However, as will be discussed below, I also accept the opinion of Dr. Paramonoff that there is a possibility that Mr. Sekhon's symptoms will improve with additional active rehabilitation treatment.

[158] Given the foregoing and having consideration for the factors set out in *Brown*, I conclude that Mr. Sekhon has lost capacity.

[159] In respect of the second branch of the *Rab* framework, I find that there is a real and substantial possibility that Mr. Sekhon's injury will lead to a pecuniary loss. I base this conclusion on my acceptance that the work as an AO does not offer the same opportunities for overtime as does the STO position—a role that Mr. Sekhon left as a result of the Accidents. As such, by no longer working as an STO, Mr. Sekhon has forgone the opportunity to seek out and earn additional income from overtime hours. As set out above, the evidence of Mr. Sekhon, Mr. Baker, and Mr. Kazemi were consistent that there are more overtime hours available to a Ministry employee working as an STO as opposed to an AO. In my view, the second step of the *Rab* analysis is satisfied and I will now turn to the quantification of that pecuniary loss.

[160] As will be discussed below, I do not agree with all of the assumptions relied upon by Mr. Sekhon to calculate his projected future loss of overtime earnings. However, I agree generally that in the circumstances of this case, the earnings approach is preferable to the capital asset approach. It is clear that Mr. Sekhon has foregone future income in the form of lost opportunity to work additional overtime hours, and that this loss, with some adjustments to Mr. Sekhon's assumptions, can be quantified.

[161] Mr. Sekhon relies on the evidence of Mr. Baker that, as an STO, he would have had 1,463 STE overtime hours annually available to him. As previously discussed, this figure in fact represents the amount of overtime hours Mr. Baker says are typically available to *contractors* working on major bridge construction projects. Mr. Sekhon suggests that this Court use the ratio of his potential earnings, with reference to Mr. Baker's testimony, and his current salary to calculate his lost future earning capacity. He calculates that, represented in STE hours, this ratio would be annual working hours of 3283/1820, or approximately 1.8 times his current annual salary.

[162] Mr. Sekhon bases this proposal on three assumptions.

[163] The first assumption is that Mr. Sekhon would have available to him all of the hours of overtime offered to an STO employee over the next three decades. The evidence adduced at trial through Mr. Baker and Mr. Sekhon only supported a general finding that STO employees do have overtime available to them, but that such overtime fluctuates across projects.

[164] The second assumption is that Mr. Sekhon would have taken all of the overtime shifts available to him as an STO. Yet, Mr. Sekhon's own evidence was that overtime offered to STOs is not mandatory.

[165] The third assumption is that Mr. Baker's testimony with respect to overtime hours available to contractors is equivalent to overtime available to STOs. As previously discussed, although I accept that overtime is available to STOs, I do not find it appropriate to assess the frequency or volume of such overtime with reference to contractors. I find that there was insufficient evidence before me that the roles of STOs and contractors on major bridge construction projects are sufficiently similar in terms of overtime structure for such a comparison to be apt in the circumstances.

[166] In my view, based on the evidentiary record, Mr. Sekhon's past work history, and the prior discussion of Mr. Baker's evidence, the above assumptions are not supported. In coming to this conclusion, I have considered the following factors:

- a) Mr. Sekhon's letter and discussions to Mr. Baker expressing concerns about night shifts. In my view, a concern about night shifts is some evidence that Mr. Sekhon would not be willing to work all additional overtime available to him and this finding is independent of his concerns about the physical demands of the job related to his injuries as discussed above;
- b) Mr. Sekhon has a young family with one young child and a second child due in May 2023. While this does not negatively reflect on Mr. Sekhon, he took parental leave with the first child, which indicates that he may be

inclined to balance work and family life. In my view, this suggests that he might not take all of the overtime available to him;

- c) Mr. Baker's evidence about the available overtime was general and was in respect to STO employees; and
- d) As discussed above and revisited below, prior to the Accidents, as an STO Mr. Sekhon did not work the number of overtime hours he now says an STO would work. Further, after he changed to an AO, Mr. Sekhon worked more hours of overtime than he says are available in that position. Both of these discrepancies call into question the real and substantial possibility of the accuracy of Mr. Sekhon's projected lost earnings.

[167] In my view, a principled basis to establish what overtime hours Mr. Sekhon would have likely worked as an STO but for the Accidents is to examine what overtime hours he worked while he was an STO employee before the Accidents as I did in calculating Mr. Sekhon's past wage loss. While his past behaviour in respect to overtime will not be a certain predictor of his future overtime working preferences, it will at least provide a better indication of Mr. Sekhon's actual working patterns, as compared to the numbers suggested by Mr. Baker.

[168] In paragraph 97 of this decision, I set out the ratios of Mr. Sekhon's STE overtime to his regular hours. In that analysis while an STO, Mr. Sekhon worked an additional ratio of between 1.04 to 1.3 STE overtime hours to regular hours.

[169] As set out above, I accept Mr. Sekhon's testimony that in 2015, he was employed as a TELP and as such was not sufficiently experienced to be offered large quantities of overtime. I further accept that Mr. Sekhon testified that after the First Accident in February 2017 he says that he worked as little as possible.

[170] However, a review of the actual overtime worked by Mr. Sekhon as an STO even before the Accidents demonstrates that it is a far cry from the overtime he claims he would have worked in the future. Mr. Sekhon asserts that without the

Accidents he would be offered and work the equivalent of a multiple of 1.8 times his base salary. However, he has never worked more than 1.3 times his base salary as an STO. There is a gulf between Mr. Sekhon's claims and his actual overtime wages that the evidence has failed to bridge. Put another way, Mr. Sekhon says that without the Accidents he would work 1463 STE hours of overtime from now until 65 years of age, despite never working more than 549.5 STE hours of overtime in the past.

[171] A review of the overtime worked by Mr. Sekhon as an AO also reveals that while there is less overtime available as an AO than as an STO, overtime is available to Mr. Sekhon as a Bridges Manager, AO which he has not accounted for in his comparative calculations.

[172] Given the foregoing, I find that an appropriate manner to calculate Mr. Sekhon's future loss of earning is to accept that he would have worked an equivalent of 1.3 times his yearly base salary as an STO, but for the Accidents.

[173] In arriving at this number, I have considered that, although the number is higher than the average of overtime worked by Mr. Sekhon from 2015 to 2017 (approximately 1.2 times his base salary), there is an observable trend of increasing overtime from 2015 to 2018. I have thus set the number higher to account for the evidence that overtime opportunities might have increased as Mr. Sekhon gained experience.

[174] As a result, I find that Mr. Sekhon's without-accident scenario, in which he would have continued to work as an STO until age 65, corresponds to an equivalent of 1.3 times his base salary of \$75,884.38, equalling \$98,649.69 salary per year. To this amount I add \$12,874 in non-wage benefits, for a total of \$111,523.69 per year to age 65. Applying Mr. Benning's economic multiplier of 19.287 results in a net present value for Mr. Sekhon's future without-accident earnings, rounded to the nearest dollar, of \$2,150,957.

[175] Mr. Sekhon's with-accident scenario, as set out above, is \$1,711,822. The difference between the net present values of his with- and without-accident future earnings, thus results in a future loss of earning capacity of \$439,135.

[176] Based on the foregoing, I am satisfied that Mr. Sekhon has established on the evidence that there is a real and substantial possibility that as a result of the Accidents, and in particular his inability to work as much overtime in the AO position as compared to the STO position, he has suffered a pecuniary loss in the amount of \$439,135.

[177] I will now turn to the third step of the *Rab* analysis, under which I am to consider the relative likelihood of future events occurring that could impact Mr. Sekhon's future circumstances, and to assign positive and negative contingencies to these events if appropriate.

[178] In my discussion of Mr. Sekhon's lost wage claim I conclude that, based on Dr. Paramonoff's prognosis, with active rehabilitation treatment for Mr. Sekhon's deconditioned state, his symptoms may improve. Such a development may, for example, allow Mr. Sekhon to return to the STO position, with an expected commensurate increase in his overtime. His future loss of earning capacity should be reduced to reflect this possibility.

[179] Given Dr. Paramonoff's guarded prognosis of improvement, and in the context of the other medical experts' concerns that Mr. Sekhon has reached maximal medical improvement, I will assign a modest negative contingency; I reduce Mr. Sekhon's future loss of earning capacity by 15%.

[180] I find it is appropriate to reduce Mr. Sekhon's future loss of earning capacity award by an additional 5% to reflect the structural abnormality in his back. 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%.

[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.

[182] After applying the negative contingency, I find that Mr. Sekhon is entitled to \$351,308 (being \$439,135 less a 20% contingency) for his loss of future economic earning capacity.

[183] Finally, given that Mr. Sekhon and his wife are expecting a child in May 2023, and that he testified he expects to take parental leave, his future loss of earning capacity must be reduced to account for that leave. Specifically, in calculating his loss of earning capacity, I must account for the overtime earnings Mr. Sekhon would have foregone anyway due to his anticipated 8-month parental leave. To that end, I reduce Mr. Sekhon's damages under this head by \$15,252.76. This figure represents 8/12 (or 67%) of the difference between his base salary and salary if he were working overtime (i.e., 0.67 of (\$98,649.69 - \$75,884.38)) used above. I have

not included the non-wage benefits in my calculation on the basis that there was no evidence before me that the non-wage benefit would apply during parental leave. In any event, as I am assessing the difference between the two salaries, the addition of non-wage benefits to both salaries would negate each other. I acknowledge that this is a crude method of calculating the amount of overtime Mr. Sekhon would have forgone during his parental leave, but I am satisfied that it is an appropriate approximation in the circumstances.

[184] After applying this adjustment, I find Mr. Sekhon is entitled to damages for future loss of earning capacity in the amount, rounded to the nearest dollar, of \$336,055.

#### **D. Cost of Future Care**

##### ***i. Law***

[185] The plaintiff is entitled to compensation for the cost of future care based on what is reasonably necessary to restore him to his pre-accident condition in so far as that is possible. When full restoration cannot be achieved, the court must strive to assure full compensation through the provision of adequate future care. The award is to be based on what is reasonably necessary on the medical evidence to preserve and promote the plaintiff's mental and physical health: see *Milina v. Bartsch* (1985), 49 B.C.L.R. (2d) 33 at 78, 1985 CanLII 179 (S.C.), aff'd (1987), 49 B.C.L.R. (2d) 99, 1987 Carswell 450 (C.A.); *Williams v. Low*, 2000 BCSC 345 at paras. 25, 58–62; *Spehar v. Beazley*, 2002 BCSC 1104 at para. 55, aff'd 2004 BCCA 290; and *Gignac v. Rozylo*, 2012 BCCA 351 at paras. 29–30.

[186] The test for determining the appropriate award under the heading of cost of future care is an objective one based on medical evidence. For an award of future care: (1) there must be a medical justification for claims for cost of future care; and (2) the claims must be reasonable: *Milina* at 84; *Tsalamandris v. McLeod*, 2012 BCCA 239 at paras. 62–63.

[187] Future care costs are “justified” if they are both medically necessary and likely to be incurred by the plaintiff. The award of damages is thus a matter of prediction as to what will happen in the future. If a plaintiff has not used a particular item or service in the past it may be inappropriate to include its cost in a future care award. However, if the evidence shows that previously rejected services will not be rejected in the future, the plaintiff can recover for such services: *Izony v. Weidlich*, 2006 BCSC 1315 at para. 74 and *O’Connell v. Yung*, 2012 BCCA 57 at paras. 55, 60, and 68–70.

[188] The onus is on the plaintiff to show that there is a reasonable likelihood that he will use the suggested services: *Golkar-Karimabadi v. Bush*, 2021 BCSC 990 at para. 107, citing *Lo v. Matsumoto*, 2015 BCCA 84 at para 20.

[189] The extent, if any, to which a future care costs award should be adjusted for contingencies depends on the specific care needs of a plaintiff. In some cases, negative contingencies are offset by positive contingencies and, therefore, a contingency adjustment is not required. In other cases, however, the award is reduced based on the prospect of improvement in the plaintiff’s condition or increased based on the prospect that additional care will be required. Each case falls to be determined on its particular facts: *Gilbert v. Bottle*, 2011 BCSC 1389 at para. 253. An assessment of damages for cost of future care is not a precise accounting exercise: *Cantrill v. Taylor*, 2021 BCSC 764 at para. 42, citing *Krangle (Guardian ad litem of) v. Brisco*, 2002 SCC 9 at para. 21.

## **ii. Parties’ Position**

### **a) Mr. Sekhon’s Position**

[190] Mr. Sekhon claims an amount of \$166,283 for his costs of future care. The recommended items are proposed by Mr. Gregson in his expert report, and have been converted to the following net present values by Mr. Benning:

- a) Occupational Therapy - \$1,427

- b) Active Rehabilitation - \$972
- c) Yard and Home Maintenance to Age 79 – \$155,756
- d) Adaptive Equipment Fund - \$1,918
- e) Ergonomic Equipment Fund - \$3,836
- f) Medication - \$395
- g) Psychological Assessment - \$1,979

[191] Mr. Sekhon asserts that all of the experts have made recommendations for future care. The evidence is that while the health treatments will not cure or resolve Mr. Sekhon of his lower back pain, they can provide temporary relief. As such, he says he should be awarded an amount to allow him to continue treatment.

***b) Defendants' Position***

[192] The defendants assert that on the basis of their theory of the case—i.e., that with proper care Mr. Sekhon's circumstances will improve—Mr. Sekhon is entitled to an amount for his future care costs to assist with his recovery. However, the defendants submit that the total medically justified and reasonable amount for Mr. Sekhon's future care is \$3,048.50, comprised of the following:

- a) 8 hours of occupational therapy intervention, as recommended in Mr. Gregson's report. The defendants accept that \$118 per hour for 8 hours is reasonable, for a total of \$944;
- b) 12 kinesiology sessions at \$79 per session, for a total of \$948, as recommended in Mr. Gregson's report, to be incurred in the near future;
- c) \$5 for Tylenol and \$8 for Naproxen for a total lump sum present value of \$151 and \$244 respectively. However, the defendants say that Mr. Sekhon would require these medications in any event due to the

Subsequent Accidents, so assert that it is appropriate to reduce the amount by 50%, to a total of \$197.50; and

- d) ergonomic set up costs of \$959.00 which represents the amount claimed by Mr. Sekhon, reduced by 50% to account for what the defendants says is Mr. Sekhon's need for these items due to the Subsequent Accidents.

[193] The defendants argue that the cost for a kinesiologist's admission to a gym and travel in relation to those appointments is not appropriate, as there is no evidence that Mr. Sekhon is unable to use the services of a kinesiologist who works at a gym.

[194] Further, the defendants assert that the psychological assessment should not be awarded because Mr. Sekhon had pre-existing psychological conditions for which he was on medication at the time of the First Accident. They also assert that minimal if any evidence was presented regarding Mr. Sekhon's psychological condition following the Accidents, and he has not pleaded psychological injuries.

[195] Finally, the defendants submit that the yard and home maintenance services recommended in Mr. Gregson's report are not reasonable and not medically justified, and thus should not be awarded. They argue that Mr. Sekhon is capable of housework, home maintenance, and yard work. Further, they say that if Mr. Sekhon carries out an independent exercise program and works on building up muscle strength and balance, his condition may improve and he will have increased activity tolerance. He will thus be better able to manage the house work and yard work. Finally, the defendants say that in cross-examination, Mr. Gregson admitted that Mr. Sekhon should be capable of more yard and home maintenance with the use of adaptive aids.

### ***iii. Analysis and Determination***

[196] To reiterate, an award for cost of future care is justified if there is some evidentiary link between the physician's assessment of pain, disability, and recommended treatment and the care recommended by a qualified health care

professional: *Gregory v. Insurance Corporation of British Columbia*, 2011 BCCA 144 at para. 39. In my view, Mr. Sekhon has established that he is entitled to an amount of damages for his cost of future care to the extent that those treatments are recommended by the experts to improve Mr. Sekhon's functioning and capacity.

[197] The active rehab and occupational therapy claimed by Mr. Sekhon is warranted. Dr. Paramonoff opined that Mr. Sekhon is deconditioned, and that with improvements to his fitness levels he may see improvements to his functional capacity and a lessening of his pain symptoms. Further, I accept the concerns expressed by Dr. Paramonoff that Mr. Sekhon may suffer from kinesiphobia and have a reluctance to push his physical boundaries in an attempt to improve his symptoms. I conclude that a psychological assessment is warranted in that it may assist in restoring, as much as money can, Mr. Sekhon to his pre-Accident health which is the ultimate goal in awarding damages.

[198] I also accept Mr. Sekhon's claim for additional "over the counter" medication not covered by his health insurance. This amount is nominal, and I accept Mr. Sekhon's testimony that he takes medications to manage his pain symptoms when they flare up. For instance, during his testimony, Mr. Sekhon noted that he had been taking additional pain medication during the trial to assist him in managing the discomfort of remaining seated for extended periods of time while testifying.

[199] I reject Mr. Sekhon's claim for costs associated with yard and home maintenance to age 79. As discussed above in my analysis of Mr. Sekhon's non-pecuniary damages, where I increased his award to compensate for his inability to perform some yard work, I find that his injuries do not justify an award for costs associated with hiring others to provide him home and yard maintenance services. Mr. Sekhon testified that he can do most or all of the home and yard maintenance, but it takes him longer. In my view, it is therefore not appropriate to award him an amount to pay for services that he is able to do himself as pecuniary damages: *Huag v. Funk*, 2023 BCCA 110 at paras. 98, 100. As I will address below, I find that the assistance provided to Mr. Sekhon by his father is not exceptional or proves that Mr.

Sekhon is incapable of performing the yard work because the help does not exceed the realm of what a family member with experience in yard maintenance might provide a family member regardless of whether the injury occurred.

[200] However, I accept Mr. Sekhon’s evidence that in order to complete tasks around the home and yard, he requires equipment that is better-adapted to reducing flare-ups, such as lighter or more ergonomic equipment. As such, while not awarding an amount for others to complete the services, I will award Mr. Sekhon his claim for purchasing adaptive equipment.

[201] In the same vein, I award Mr. Sekhon an amount to purchase other ergonomic equipment for his home and home office. I accept doing so may assist in easing his symptoms by ensuring he is able to set up his home in a manner that best takes care of his injuries.

[202] In summary, I am satisfied that the following costs of future care are medically justified and will be used by Mr. Sekhon to improve his injuries, or symptoms arising from those injuries, that occurred as a result of the Accidents:

| <b>Item</b>                      | <b>Lump-Sum Present Value</b> |
|----------------------------------|-------------------------------|
| Occupational Therapy             | \$1,427                       |
| Active Rehabilitation            | \$972                         |
| Psychological Assessment         | \$1,979                       |
| Medication                       | \$395                         |
| Ergonomic Equipment Fund         | \$3,836                       |
| Adaptive Equipment Fund          | \$1,918                       |
| <b>Total Cost of Future Care</b> | <b>\$10,527</b>               |

[203] Accordingly, I award Mr. Sekhon the amount of \$10,527 as the lump sum net present value of his costs of future care.

### **E. Management Fees**

[204] As part of his future loss of earning capacity, Mr. Sekhon asked Mr. Benning to include in his calculations an amount for management fees to manage his financial investments. The purpose of including the amount is to increase the award by 3% to compensate Mr. Sekhon for expected fees paid to a professional to manage his award from this lawsuit. Mr. Sekhon argues that his testimony demonstrated that he has no financial expertise, and is unaware of his financial resources and how to manage money, such that he would require professional management of any award the court orders to ensure it generates a sufficient return.

[205] The defendants assert that while Mr. Sekhon may not be interested in investing his own money, it does not mean he is incapable of doing so. They point to Mr. Sekhon's testimony that he manages contracts and contractors in his work for the Ministry. Mr. Sekhon also testified in cross-examination that he looked at different mortgage rates and was able to find a desirable rate and apply for and secure the mortgage when purchasing personal real estate. The defendants argue that these attributes are not indicative of a person who is incapable of managing his financial affairs.

[206] In *Riding-Brown v. Jenkins*, 2015 BCSC 1751, Justice Baird set out the reasons a court might find that management fees are warranted:

[22] Management fees attempt to ensure that personal injury awards are not prematurely depleted as a result of the plaintiff's fecklessness in managing funds. This is done by providing the plaintiff with a sum to cover the costs of taking professional investment advice. The award is not automatic. The plaintiff must establish that he or she is unable, due to incapacity, injury or lack of acumen, to invest the funds so as to generate a sufficient level of return: *Townsend v. Kroppmanns*, 2002 BCCA 365, at para. 41 (affirmed 2004 SCC 10).

[207] This is not a case where there is a minor plaintiff or a plaintiff under a legal incapacity who will be required to pay for professional assistance to manage a court

award. It may be appropriate in circumstances where an individual has no capacity to manage his or her affairs to provide that an award accounts for the fees required to do so. Mr. Sekhon is not inept or incapable of managing his financial affairs. To the contrary, he is intelligent and well-educated. He holds a job that requires a high level of responsibility and ability to manage projects and, in a general sense, the finances associated with those contracts. The job description of his current role of AO includes the following as required tasks that, in my view, show that he is required to have at least some acumen regarding financial matters:

- a) Assessing the needs, negotiating with contractor and authorizing, as directed or according to unit prices, extra work that may require funding on a quotation;
- b) developing, monitoring and reporting budget;
- c) developing schedules, work assignments and job costings; and
- d) job costing finalizing project by resolving all claims to project contracts, completing budget modifications.

[208] Given that Mr. Sekhon's work responsibilities include some level of financial understanding, as they relate to budgeting and job costing, combined with his post-secondary education, I am satisfied that providing him with funding for additional management fees is not necessary.

[209] As further support for my conclusion that additional damages for management fees are not required in this case, I note that Mr. Benning testified that in usual economic circumstances, it is not difficult to realize a rate of return that is 2% above inflation, upon which the economic models are constructed in accordance with the *Law and Equity Act*, R.S.B.C. 1996, c. 253.

[210] Given the foregoing, I do not find that Mr. Sekhon has established that his circumstances warrant increasing his award by an amount to compensate him for professional fees related to managing his finances.

## F. Special Damages

[211] It is well established that an injured person is entitled to recover the reasonable out-of-pocket expenses incurred as a result of an accident. This is grounded in the fundamental governing principle that an injured person is to be restored to the position he or she would have been in had the accident not occurred: *X. v. Y.*, 2011 BCSC 944 at para. 281, citing *Milina* at 78.

[212] In this case, the parties agree that Mr. Sekhon incurred out-of-pocket expenses in the amount of \$13,031.69. Accordingly, I order that Mr. Sekhon is entitled to special damages in that amount.

## G. Mr. Sekhon's In-Trust Claim for Yard Work Services Provided by his Father

### i. Law and Parties' Position

[213] Mr. Sekhon claims that his father is entitled to \$3,416.40 to compensate him for the yard work services that he provides to his son, and that he would not otherwise have provided but for the Accidents. Mr. Sekhon says that if the Accidents had not occurred, he would do the tasks his father currently does for him, but that because he is unable to do them for himself, his father is required to step in to do the work.

[214] Specifically, Mr. Sekhon says that his father, Malkit Sekhon, assists him with outdoor landscaping (e.g., mowing grass and trimming hedges), as well as with cleaning the gutters and garage. Mr. Malkit Sekhon testified that he spends 2 hours about three times a month mowing the grass, and that he trims the bushes 2 times a year, which takes 1.5 hours each time. He testified that in the winter, when the grass does not need mowing, he collects leaves. In terms of cleaning the garage, Mr. Malkit Sekhon testified that the task takes him between 2 to 5 hours each time, and that he does it approximately 2 times per year. Cleaning the gutters, he says, takes him approximately 4 hours, and that he does so about 2 times a year.

[215] The law is clear that if a family member is required to provide services to a plaintiff as a result of an injury to the plaintiff, they may be compensated. The onus rests on the plaintiff to satisfy the court, on a balance of probabilities, that the family member providing the services suffered a direct pecuniary loss because of the time and effort put into the services, or that their efforts replaced housekeeping expenses that would have otherwise been incurred: *Popove v. Attisha*, 2019 BCSC 1587 at para. 57, citing *Star v. Ellis*, 2008 BCCA 164 at para. 17.

[216] The relevant criteria for the court to consider when assessing an in-trust claim are described in *Bystedt v. Hay*, 2001 BCSC 1735 at para. 180, aff'd 2004 BCCA 124:

- a) the services provided must replace services necessary for the care of the plaintiff as a result of a plaintiff's injuries;
- b) if the services are rendered by a family member, they must be over and above what would be expected from the family relationship;
- c) the maximum value of such services is the cost of obtaining the services outside the family;
- d) where the opportunity cost to the care-giving family member is lower than the cost of obtaining the services independently, the court will award the lower amount;
- e) quantification should reflect the true and reasonable value of the services performed taking into account the time, quality and nature of those services; and
- f) the family members providing the services need not forego other income and there need not be payment for the services rendered.

[217] In general, awards for in-trust services are thus made in cases involving care provided to seriously injured plaintiffs, or involving support services beyond what might normally be expected in a familial relationship. Standard compassion and care of relatives are not compensable under this head of damages; awards for in-trust claims recognize *extra* services provided by the family member at a reasonable cost. See *Popove* at para. 59.

*ii. Analysis and Determination*

[218] In my view, in the particular circumstances of this case, the help that Mr. Malkit Sekhon provides to Mr. Sekhon is within the normal range of assistance that he would provide his son regardless of whether the Accidents occurred. Having regard for the totality of evidence, the picture that emerged was of an extended family that is very supportive of and assistive to each other. Mr. Sekhon testified that his wife and child had several meals each week with his father and mother, and other meals each week with his wife's family. Both sets of grandparents have provided extensive caregiving to Mr. Sekhon's daughter, and the evidence at trial did not indicate that this would change in the future.

[219] Importantly, before the Accidents, Mr. Sekhon and his wife resided in a townhouse that had no yard and required no maintenance of the type currently provided by Mr. Malkit Sekhon. As such, I have no evidence as to what amount of help Mr. Malkit Sekhon would have provided to his son and daughter-in-law but for the Accidents living in their current circumstances—i.e., in a house requiring yard work.

[220] I also note that Mr. Malkit Sekhon previously owned a landscaping business and so is familiar with such tasks and would presumably have some expertise and ability in yard work. The hours he cited do not appear excessive to me and fall within a range of what a parent might do to assist his busy children. In this regard I note that Mr. Malkit Sekhon testified that his wife would babysit while he did the yard work. This suggests that doing the yard work was not a distinct or special endeavour to assist his son with household maintenance.

[221] Finally, as set out above in my discussion of non-pecuniary damages, I have increased the award under that head of damages to compensate Mr. Sekhon for the loss of his capacity to complete his own yard work, and his related loss of enjoyment.

[222] Given the foregoing, I am not persuaded that Mr. Sekhon has met the burden to establish that an in-trust award is warranted in this case.

## VIII. CONCLUSION

[223] In sum, I conclude that Mr. Sekhon is entitled to the following award of damages against the defendants, rounded to the nearest dollar:

|                                 |                  |
|---------------------------------|------------------|
| Non-pecuniary Damages           | \$47,250         |
| Past Loss of Earnings           | \$30,484         |
| Loss of Future Earning Capacity | \$336,055        |
| Costs of Future Care            | \$10,527         |
| Special Damages                 | \$13,032         |
| <b>Total</b>                    | <b>\$437,348</b> |

[224] Mr. Sekhon is entitled to his costs at Scale B, subject to any offers or other matters that may require an adjustment to costs. If the parties wish to address costs, they may make arrangements with Trial Scheduling to appear before me for that purpose within 30 days of receipt of these reasons.

[225] Should there be other issues upon which the parties are unable to agree based on my judgment or matters that need clarification, they have leave to appear before me for those purposes.

[226] I wish to thank counsel for both parties for their cooperation with each other and courtesy during this trial, and for their able and well-prepared submissions and presentation of the evidence.

“Gibb-Carsley J.”