COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Dhaliwal v. Stang,*
2025 BCCA 128

Date: 20250417
Docket: CA49606

Between:

Harjinder Singh Dhaliwal and
Black Top Cabs Ltd.

Appellants/
Respondents on Cross Appeal
(Defendants)

And

Tyler Lucas Stang

Respondent/
Appellant on Cross Appeal
(Plaintiff)

Before: The Honourable Madam Justice Bennett
The Honourable Mr. Justice Grauer
The Honourable Justice Winteringham

On appeal from: An order of the Supreme Court of British Columbia, dated December 21, 2023 (*Stang v. Dhaliwal*, 2023 BCSC 2248, Vancouver Docket M186030).

Counsel for the Appellants/ Respondents on Cross Appeal:	J.D. James J.E. Fergusson
Counsel for the Respondent/ Appellant on Cross Appeal:	M.D.C. Fahey P.H. Furtula
Place and Date of Hearing:	Vancouver, British Columbia December 13, 2024
Place and Date of Judgment:	Vancouver, British Columbia April 17, 2025

Written Reasons by:
The Honourable Justice Winteringham

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

Summary:

Appeal and cross-appeal of damages for injuries sustained in a motor vehicle accident. The appellants argue the judge erred in assessing damages for future loss of capacity to earn income by failing to find that a subsequent workplace accident sustained by the respondent brought an end to damages from the motor vehicle accident. The respondent cross-appeals and argues the judge erred in finding the injuries (from the two separate events) to be divisible by misapprehending the evidence and leading to inordinately low damage awards. Held: appeal dismissed; cross-appeal allowed, in part. The judge ignored material aspects of the doctor's testimony and made findings on causation and divisibility that were inconsistent with this evidence. This led to errors in the assessment of past and future loss of earning capacity and special damages.

Reasons for Judgment of the Honourable Justice Winteringham:

Overview

[1] This appeal (and cross-appeal) concerns damages arising from a motor vehicle accident (the "MVA"), and principally, the judge's award for loss of capacity to earn income, past and future. On July 16, 2016, the respondent (plaintiff), Tyler Lucas Stang, was crossing a street as a pedestrian when he was struck by a taxi driven by the appellant (defendant), Harjinder Singh Dhaliwal. Mr. Stang claimed against Mr. Dhaliwal and Black Top Cabs Ltd. for damages resulting from his injuries (the "MVA Injuries"). Mr. Dhaliwal contested liability.

[2] The judge found the appellants liable for the MVA, which caused several injuries to Mr. Stang, the most significant being an injury to his lower and mid back. The judge awarded Mr. Stang a total of $640,158.000 in damages, which included $450,000 for future loss of capacity to earn income: *Stang v. Dhaliwal*, 2023 BCSC 2248.

[3] At issue on this appeal and cross-appeal is the impact of a workplace injury (the "WCB Injury") that Mr. Stang sustained while lifting equipment at work (the "Workplace Accident") nearly four years after the MVA. On appeal, Mr. Dhaliwal contends that at the time of the WCB Injury, Mr. Stang had recovered from his MVA Injuries. Mr. Dhaliwal submits that the judge erred in law by failing to treat the WCB Injury as an independent intervening event that brought to an end the damages from

the MVA. Though the injuries were similar, the judge held that the MVA Injuries and the WCB Injury were divisible. The judge nonetheless found the MVA Injuries warranted an award of damages for future loss of capacity to earn income for the time period following the WCB Injury, though the award was much less than sought by Mr. Stang.

[4] Mr. Stang cross-appealed. His position is that the judge made a palpable and overriding error when he found the injuries to be divisible and that the evidence did not support this finding. Mr. Stang says that the trial judge's divisibility finding impacted the damage awards and the awards should have been higher. At the hearing of the appeal, Mr. Stang abandoned his appeal regarding the cost of future care award. Neither party challenged the judge's assessment of the award for pain and suffering ($130,000).

[5] For the reasons that follow, I would dismiss the appeal and allow the cross-appeal in part. In my view, the judge erred in finding the injuries divisible by misapprehending the evidence of an expert. The divisibility error impacted the judge's assessment of damages for past and future loss of earning capacity and special damages. The error did not impact the award for loss of housekeeping capacity.

Circumstances

[6] On July 16, 2016, Mr. Stang, then 24 years old, was walking across the street when he was struck by a taxi driven by Mr. Dhaliwal. While liability was a live issue at trial, the judge concluded that Mr. Dhaliwal was 100% liable for the MVA. The finding of liability is not appealed.

[7] Since graduating from high school in 2010, Mr. Stang had worked consistently as a labourer in different jobs. Before the MVA, Mr. Stang had begun a certification program to obtain his Red Seal designation in carpentry. In 2015, he moved from Alberta to British Columbia and enrolled in the third and fourth year carpentry program at the British Columbia Institute of Technology ("BCIT"). He started working for FirstOnSite Restoration in January 2016 after finishing the

program at BCIT. He completed the requirements for his Red Seal designation in 2016, but did not obtain his formal certificate until 2019. Before the MVA, Mr. Stang considered switching from carpentry to the field of elevator mechanics, but at the time of the MVA he was still working in carpentry.

[8] The MVA caused Mr. Stang to suffer injuries to his neck, both shoulders, left wrist, left groin, mid and lower back, left knee, and ankles: at para. 68. Regarding the back injury, the orthopaedic surgeon reported Mr. Stang suffered a soft tissue strain of muscles, ligaments, and facet joints and noted the "back pain is located in the mid and lower back region … primarily on the left side": at para. 69. He was off work as a carpenter for two years. Relevant to the issue of capacity to work, Mr. Stang went on a three-week tour with his rock band during the two years he was unable to work as a carpenter. The judge was required to consider employment capacity alongside Mr. Stang's participation in the band tour.

[9] Mr. Stang was scheduled to commence a graduated return to work ("GRTW") as a carpenter in May 2018. Three days into his GRTW, Mr. Stang resigned from his position as a carpenter. He says the position was too difficult with his MVA Injuries. Mr. Dhaliwal disputes that the MVA Injuries played a role in Mr. Stang's resignation, pointing to the fact that Mr. Stang did not seek any accommodation during the three days of the GRTW in carpentry.

[10] In May 2018, after leaving his carpentry job, Mr. Stang started his apprenticeship to become an elevator mechanic. He worked full-time as an elevator mechanic for nearly two years, from May 2018 through March 2020. This position was physically demanding and required heavy lifting, bending, overhead reaching, ladder climbing, and use of his back, shoulders, and hands.

[11] On March 9, 2020, Mr. Stang suffered the subsequent Workplace Accident while lifting a heavy piece of equipment with other workers. The Workplace Accident aggravated the MVA Injuries in his neck, back, and wrists. Mr. Stang did not return to work as an elevator mechanic after the Workplace Accident.

Judgment at Trial

[12] After establishing liability, the judge focused his reasons for judgment on the question of whether the MVA Injuries and subsequent WCB Injury were divisible, and with what consequence to the quantum of damages.

[13] To start, the judge made some critical credibility findings that ultimately impacted the assessment of damages:

> [58] I accept the defence's alternative submission regarding Mr. Stang's evidence. I view it with caution. I formed the impression during his testimony that Mr. Stang tends to view his situation in stark, binary terms. In other words, he sees himself as either "able to work" or "not able to work". There is little middle ground. I note that this view was, to some extent, mirrored by his former employer. After the Accident, the insurance restoration company indicated that they did not have any "light" work available for Mr. Stang. They would only take him back when he was cleared to perform full duties.
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> [59] However, for a period of two years post-Accident, Mr. Stang continued to take the position that he was totally disabled from working, despite pursuing other activities. In my opinion, the conception, planning, and execution of a cross-Canada tour with his band is inconsistent with the condition of a person who is totally disabled from working. Further, as noted, after two years, when his rehab team was ready to return him to work as a carpenter, he advised that he would be pursuing a different career path. I consider that chronology to indicate that he was ready for some form of employment before the planned GRTW.
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> [61] <u>These findings lead me to the conclusion that I must take the plaintiff's descriptions of the chronology of his condition with caution. I place greater weight on the events and the opinions of the experts.</u>
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> [Emphasis added.]

[14] The judge then turned to his assessment of whether Mr. Stang's current condition was attributable to the MVA, the Workplace Accident, or both. The parties led expert evidence related to the nature and extent of Mr. Stang's injuries—both before and after the Workplace Accident—including his psychological condition, his functional capacities, and his future earning potential.

Dr. Tarazi's evidence

[15] The main evidence relied upon by the judge to establish the extent of Mr. Stang's MVA Injuries, as well as the effect of the subsequent Workplace

Accident, was provided in two reports from an orthopedic surgeon, Dr. Fadi Tarazi; the first in 2019, prepared before the Workplace Accident (the "2019 Report"), and the second in 2022, after the Workplace Accident (the "2022 Report").

[16] Dr. Tarazi's evidence, largely accepted by the judge, was that the MVA had caused multiple musculoskeletal injuries and that Mr. Stang suffered chronic pain in his neck, shoulders, back, wrists, groin, knee, and ankles as a result: at para. 68. Dr. Tarazi's opinion in 2019 was that, given his MVA Injuries, Mr. Stang was "not suited" to work as a carpenter, but could work as an elevator mechanic, albeit with pain. The judge highlighted this aspect of Dr. Tarazi's 2019 Report, writing:

> [73] As to the issue of work capacity, Dr. Tarazi wrote:
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> In my opinion, as his pain is now chronic, he is not suited to return to his carpentry job anymore. He is now doing an apprenticeship for an elevator mechanic position. By his own account that job is less physical because there is less heavy lifting and bending. In my opinion he will likely be able to perform the job of an elevator mechanic for the rest of his working career, although with pain.

[17] The judge went on to highlight the following opinion of Dr. Tarazi:

> [74] The defendants note, for context, that at the time of Dr. Tarazi's [2019 Report], the plaintiff had been working for nine months in his apprenticeship as an elevator mechanic. Dr. Tarazi's opinion was that the plaintiff could perform that work until retirement, although with pain. I find this opinion important, and I return to it below.
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> [Emphasis added.]

[18] Dr. Tarazi examined Mr. Stang again in 2022, about two years after the Workplace Accident. Dr. Tarazi concluded that Mr. Stang was no longer able to work as an elevator mechanic. His opinion was that the MVA Injuries had left Mr. Stang vulnerable to the WCB Injury he subsequently sustained at work. He further stated that without those earlier MVA Injuries, Mr. Stang "… may never have been injured at work in March 2020 or any injury would most likely have been much less severe". The judge included the following excerpt from Dr. Tarazi's 2022 Report:

> [77] On the issue of causation Dr. Tarazi, wrote …:
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> > It is still my opinion that the [MVA] of July 16, 2016 has caused a cervical and thoracolumbar myofascial soft tissue strain which has been treated conservatively until now. Mr. Stang's neck and back have been rendered quite vulnerable and susceptible to further injuries by the [MVA]. I am not surprised that he suffered an aggravation in March 2020 at work. Absent the neck and back injuries that he sustained in the subject [MVA], he may never have been injured at work in March 2020 or any injury would most likely have been much less severe.
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> > …
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> [Emphasis added.]

[19] The judge found Dr. Tarazi's opinion on this point to be of significance on the issues of causation and indivisibility, writing:

> [80] Hence, in his [2022 Report], Dr. Tarazi's opinion on work capacity changed. His opinion in 2019 was that Mr. Stang could work as an elevator mechanic, although with pain. As of 2022, Mr. Stang was "not suited for a job of an elevator mechanic anymore." I consider that change to be important and determinative.
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> [Emphasis added.]

[20] The judge stated his findings on the expert evidence and concluded that Dr. Tarazi's opinions were uncontroverted. However, he found Dr. Tarazi's language, in some respects, to be intentionally vague: at para. 112. The judge accepted "Dr. Tarazi's opinion that the [MVA Injuries] resulted in [Mr. Stang] not being suited for carpentry work", but due to the vagueness of Dr. Tarazi's language, he found it necessary to "interpret that statement in light of the [functional capacity evaluation] and psychiatric evidence": at para. 113.

Causation and divisibility

[21] Next, the judge turned to the section of the reasons he entitled "Causation and Indivisibility". The judge stated his conclusion on this point at the outset, noting that he had found "the cause of Mr. Stang's injuries can be separated":

> [116] However, based upon my analysis below, I find that the causation of Mr. Stang's injuries can be separated. In other words, I find that the [MVA] caused certain injuries. The degree of those injuries, and the disability arising from them, was described by Dr. Tarazi in 2019. Thereafter, the WCB Injury caused an aggravation of the underlying condition. The resulting symptoms of the WCB Injury are, again, described by Dr. Tarazi (in his [2022 Report]). As discussed below, [Mr. Stang's] condition was worse in 2022 when Dr. Tarazi re-examined him. Hence, I am able to discern the effect of the [MVA] and that a worsening of that condition was caused by the WCB Injury. I further find that the losses flowing from each injury are divisible.

[22] After determining that the cause of the injuries could be separated, the judge considered the case law dealing with multiple events and divisibility. The judge started with *Athey v. Leonati*, [1996] 3 S.C.R. 458, 1996 CanLII 183 [*Athey*], where Justice Major wrote for the Court:

> 25 In the present case, there is a single indivisible injury, the disc herniation, so division is neither possible nor appropriate. The disc herniation and its consequences are one injury, and any defendant found to have negligently caused or contributed to the injury will be fully liable for it.

[23] The judge next turned to *Bradley v. Groves*, 2010 BCCA 361 and reproduced the following paragraphs:

> [17] *Athey* was a case involving both multiple tortious and non-tortious causes. The plaintiff had been injured in two [MVAs]. While still recovering, he herniated a disc in his back during stretching at the gym. The question before the Court was how the damages should be apportioned between the tortious and non-tortious causes.
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> [18] The Supreme Court of Canada found apportionment between tortious and non-tortious causes contrary to the principles of tort law, and therefore impermissible. The liability for any injury caused or contributed to by a tortious action should be borne jointly and severally by the tortfeasors, and not attributed to non-tortious action.
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> …
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> [37] … If a trial judge finds on the facts of a particular case that subsequent tortious action has merged with prior tortious action to create an injury that is not attributable to one particular tortfeasor, then a finding of indivisibility is inevitable … The first accident remains a cause of the entire indivisible injury suffered by the plaintiff under the "but for" approach to causation endorsed by the Supreme Court of Canada in *Resurfice Corp. v. Hanke*, 2007 SCC 7, [2007] 1 S.C.R. 333. As noted by McLachlin C.J.C. in that case, showing that there are multiple causes for an injury will not excuse any particular tortfeasor found to have caused an injury on a "but-for" test, as "there is more than one potential cause in virtually all litigated cases of

> negligence" (at para. 19). It may be that in some cases, earlier injury and later injury to the same region of the body are divisible. While it will lie for the trial judge to decide in the circumstances of each case, it is difficult to see how the worsening of a single injury could be divided up.

[24] Lastly, the judge highlighted *Blackwater v. Plint*, 2005 SCC 58 at para. 78 where the Court stated the "… rules of causation consider … whether 'but for' the defendant's acts, the plaintiff's damages would have been incurred on a balance of probabilities".

[25] After considering the principles governing causation and divisibility, the judge recognized "the authorities indicate that it is difficult to see how a worsening of a single injury can be divisible"; nevertheless, the judge found that in this case the "evidence establishes exactly that": at para. 122.

[26] Explaining his finding on divisibility, the judge stated in "[a]pplying the reasoning in *Blackwater* to the facts of this case … the evidence does not meet the 'but for' test for causation": at para. 123. On this point, the judge found Mr. Stang's best evidence came from Dr. Tarazi, who stated "if the [MVA] had not occurred, then [Mr. Stang] 'may' not have suffered the [WCB] Injury (on a balance of probabilities)". The judge then repeated, at para. 123, the relevant excerpt from Dr. Tarazi's 2022 Report:

> I am not surprised that he suffered an aggravation in March 2020 at work. Absent the neck and back injuries that he sustained in the subject [MVA], he may never have been injured at work in March 2020 or any injury would most likely have been much less severe. It is the [MVA] injury and ongoing neck and back pain which made it much more likely that he would suffer this aggravation and where his pain would continue until now.

[27] The judge explained, in his view, the above-referenced paragraph "require[d] parsing": at para. 124. The judge then interpreted the paragraph to mean:

a) Absent the MVA, it is possible that the WCB Injury would not have occurred. "The use of the word 'may' indicates a possibility, not a probability": at para. 124(b)(iii).

b) If the MVA had not occurred, then Mr. Stang's WCB Injury would have occurred but would probably have been less severe: at para. 124(c).

c) "The phrase 'made it much more likely that he would suffer this aggravation' does not indicate that the [MVA] caused the WCB Injury, only that the [MVA] increased the chance of its occurrence": at para. 124(d).

[28] Following his interpretation of Dr. Tarazi's 2022 Report, the judge stated the following about causation:

> [125] On the basis of Dr. Tarazi's two reports, I find that there were two separate causes of [Mr. Stang's] current condition. The [MVA] caused a certain degree of disability. The WCB Injury caused a greater degree of disability.

[29] The judge wrote that his finding on this point was supported by changes in Dr. Tarazi's opinion from the 2019 Report to the 2022 Report. The judge noted that as of 2019, when Mr. Stang had been working as an elevator mechanic apprentice for nine months, Dr. Tarazi opined in his 2019 Report that Mr. Stang would be able to do that work for the entirety of his career, albeit with pain: at para 126(a). Dr. Tarazi revised his opinion after the WCB Injury in his 2022 Report, stating that Mr. Stang could not work as an elevator mechanic: at para. 126(b).

[30] Summarizing his analysis, the judge found that the MVA Injuries affected Mr. Stang's capacity to work as a carpenter, but did not limit his ability to work as an elevator mechanic: at para. 129. Thereafter, in 2020, it was the WCB Injury that made Mr. Stang unable to work as an elevator mechanic: at para. 129. The judge summarized his reasons for arriving at his opinion as follows:

> [128] In my opinion, the difference between the two injuries is further supported by the following:

a) The length of time between the two injuries, being almost four years.

b) The change in the location of the low back injury (from left side, to both sides).

c) The fact that the plaintiff worked as an elevator mechanic apprentice for almost two years before the WCB Injury occurred.

[31] The judge ultimately found that the MVA Injuries and the subsequent WCB Injury, although occurring in the same general areas, had separate causes: at para. 130. As a result, the judge found that the damages flowing from the two injuries were divisible.

Damages

[32] Despite finding the MVA Injuries and the WCB Injury were divisible, the judge found that "[t]he occurrence of the WCB Injury does not, of course, result in an end to the damages caused by the [MVA]": at para. 131. He proceeded to assess damages on the basis that the MVA damages continued after the WCB Injury.

[33] At trial, Mr. Stang claimed damages for past loss of earning capacity, future loss of earning capacity, loss of housekeeping capacity, cost of future care, and special damages. The judge rejected Mr. Dhaliwal's position that Mr. Stang had fully recovered from the MVA Injuries by 2018. However, he accepted that Mr. Stang's testimony should be treated with caution, given discrepancies between his testimony and the evidence. The judge noted, in particular, that Mr. Stang's planning and execution of a three-week cross-country tour with his band during the time he was off work between 2016 and 2018 was at odds with his testimony that he was totally disabled during that period of time: at para. 59.

[34] The judge awarded the following damages to Mr. Stang, summarized at para. 216:

i.	Non-Pecuniary Damages:	$130,000.00
ii.	Past Loss of Capacity:	$38,000.00
iii.	Future Loss of Capacity:	$450,000.00
iv.	Loss of Housekeeping:	$0.00
v.	Cost of Future Care:	$2,700.00
vi.	Special Damages:	$19,458.00
	Total:	**$640,158.00**

[35] The judge awarded Mr. Stang damages for loss of past earning capacity for the period before 2018, when he became employed as an elevator mechanic, but not after. The judge discounted that head of damage for at least two reasons: 1) Mr. Stang chose not to pursue the GRTW in carpentry and made a choice to change careers to the more lucrative elevator mechanic field; and 2) Mr. Stang had a greater capacity to work in that period than was reflected in his income, as evidenced by his musical undertakings: at paras. 148, 151.

[36] With respect to past loss of capacity, the judge clarified that he did not find "… Mr. Stang's entire claim for any loss of capacity terminated when he switched careers": at para. 152. However, because he had found the injuries divisible, the judge stated that any linkage from the post-WCB Injury income loss to the MVA could have been "substantially reduced" if Mr. Stang had "committed the same effort toward finding gainful employment (in any capacity) as he did to videogaming": at para. 153.

[37] The judge then considered how best to assess Mr. Stang's loss of future income in light of his holding that the MVA Injuries and the WCB Injury caused divisible losses. The judge concluded that, but for the WCB Injury, Mr. Stang might have suffered no loss of future income and continued to work as an elevator

mechanic. However, given that Mr. Stang could not work as an elevator mechanic after the WCB Injury, the judge found that the MVA Injuries continued to affect Mr. Stang's income earning potential because he was limited in his ability to fall back on being a carpenter (the profession in which he was trained): at paras. 163–164. The judge accordingly held that Mr. Stang's future income would be less than if he had been able to continue working as a carpenter, but more than could be expected if he remained for the rest of his working life at an entry-level position, such as a cashier. On the basis of the evidence, the judge held that Mr. Stang was entitled to $450,000 in damages for loss of future income, being the difference between the expected earnings of a carpenter, and what the judge concluded would be Mr. Stang's likely future earnings: at paras. 187–188.

[38] The judge found that Mr. Stang was not entitled to damages for loss of housekeeping capacity and limited his awards for cost of future care and special damages to losses attributable to the MVA and not the WCB Injury.

On Appeal

[39] Mr. Dhaliwal appeals the damage award for future loss of capacity to earn income. He submits the judge erred in law in assessing this head of damage by failing to find that the independent intervening event—the Workplace Accident—brought an end to the MVA damages. Mr. Dhaliwal says he is only liable for damages for injury or disability that was caused by the MVA up to the time of the WCB Injury.

[40] In his alternative submission, Mr. Dhaliwal contends that if the judge was correct to find the MVA damages continued after the Workplace Accident, the judge overvalued the award for future loss of capacity to earn income.

Cross-appeal

[41] Mr. Stang grounds his cross-appeal in the judge's finding of divisibility regarding the MVA Injuries and WCB Injury. Mr. Stang says that the injuries were not divisible and that in arriving at this conclusion, the judge improperly relied on

Dr. Tarazi's written reports and failed to consider Dr. Tarazi's testimony on this point. This error, submits Mr. Stang, resulted in damage awards for past and future wage loss, housekeeping capacity, and special damages that were inordinately low.

Issues on appeal

[42] Because of the overlapping causation issues, it is convenient to address some aspects of the appeal and cross-appeal together. I have framed the issues as follows:

a) Did the judge commit an error of law or principle in failing to take into account an independent intervening event such that damages stopped at the time of the WCB Injury?

b) Did the judge commit an error of law or principle when he found the MVA Injuries and WCB Injury were divisible?

c) Did the judge err in his assessment of:

i. past loss of earning capacity;

ii. future loss of earning capacity;

iii. loss of housekeeping capacity; and

iv. special damages?

Standard of Review

[43] The standard of review on an appeal concerning whether injuries are divisible between causes or indivisible is deferential: *Alragheb v. Francis*, 2021 BCCA 457 at paras. 15–16. A finding of divisibility can only be challenged on the grounds that the judge misapplied the law by approaching the question in the wrong manner: *Khudabux v. McClary*, 2018 BCCA 234 [*Khudabux*]; *Neufeldt v. Insurance Corporation of British Columbia*, 2021 BCCA 327.

[44] The question of whether a subsequent act breaks the chain of causation is a question of fact: *Hussack v. Chilliwack School District No. 33*, 2011 BCCA 258 at paras. 87–88. The analysis regarding intervening events are treated similarly to pre-existing conditions for the purpose of determining causation. The court must consider whether such an event would have affected the plaintiff's original position adversely in any event: *T.W.N.A. v. Canada (Ministry of Indian Affairs)*, 2003 BCCA 670 at para. 36.

[45] Challenges to findings of fact are reviewable on a standard of palpable and overriding error: *Rab v. Prescott,* 2021 BCCA 345 at para. 23, *Housen v. Nikolaisen*, 2002 SCC 33 at para. 10. A "palpable" error is one that is obvious and an "overriding" error is one that is "… associated with a conclusion or inference that was 'determinative in the assessment of the balance of probabilities with respect to that factual issue' …": S*wiss Reinsurance Company v. Camarin Limited,* 2015 BCCA 466 at paras. 61–62, citing *Schwartz v. Canada*, [1996] 1 S.C.R. 254, 1996 CanLII 217 at para. 35.

[46] Where the grounds allege a misapprehension of evidence, the misapprehension must go to the core of the reasoning process before it will warrant appellate intervention: *Airside Event Spaces Inc. v. Langley (Township)*, 2021 BCCA 306 at para. 43. The judge must have made a manifest error, ignored conclusive or relevant evidence, misunderstood the evidence, or drawn erroneous conclusions from it: *Parton v. Parton*, 2018 BCCA 273 at para. 32, citing *Toneguzzo-Norvell (Guardian ad litem of) v. Burnaby Hospital*, [1994] 1 S.C.R. 114 at p. 121; 1994 CanLII 106.

Discussion

1) Did the judge err by failing to consider an independent intervening event (the WCB Injury) brought an end to the MVA damages?

Parties' positions

[47] Mr. Dhaliwal agrees that the judge correctly stated the law at para. 159 with respect to the three-part test for assessing future loss of capacity to earn income

set out in *Rab*. However, he contends that the judge erred in the application of this test to find that the WCB Injury did not bring an end to the MVA damages. Further, the judge incorrectly assessed damages for future loss on the basis that the independent intervening event only affected Mr. Stang's capacity to work as an elevator mechanic and not his capacity to work as a carpenter. Mr. Dhaliwal contends that the WCB Injury "obliterated" any damages associated with the MVA, and that Mr. Stang did not suffer any future loss of capacity to earn income as a result of the MVA.

[48] On this ground, Mr. Stang submits the judge properly applied the law with respect to independent intervening events to find that the WCB Injury did not "obliterate" the MVA damages such that the MVA damages had come to an end by the time of the WCB Injury.

Legal principles

[49] The judge correctly stated the governing authority on the distinction between causation and damages, quoting the following paragraph from *Blackwater*:

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

[50] During oral argument and to drive home the point about the intervening event, Mr. Dhaliwal encouraged reliance on *Smith v. Shade*, 69 B.C.A.C. 233, 1996 CanLII 1906 [*Smith*]. He says that *Smith* is "on all fours" with the case at bar. In light of the Mr. Dhaliwal's reliance on *Smith*, it is useful to set out this case in some detail.

[51] In *Smith*, the plaintiff fell on the defendant's icy sloped driveway while returning a tarp he had borrowed. He fractured his right ankle and was unable to return to work for a period of time. When he did return to work, he continued to experience intense pain. Less than two years after the slip and fall, the plaintiff suffered an unrelated injury to his left knee. He also suffered from longstanding back problems that pre-existed the slip and fall, stemming from years of working physically demanding jobs.

[52] At trial, the judge concluded that the back injury and knee injury would have put an end to heavy work without the ankle injury, but found "[t]he ankle injury ha[d] reduced [the plaintiff's] capacity to earn income beyond the reduction attributable to the knee and back injuries alone": *Smith v. Shade*, [1994] B.C.W.L.D. 717, 1994 CanLII 2126 (S.C.) [*Smith* trial]. As a result, the judge awarded $25,000 for "… the additional effect of [the] ankle injury …" on the loss of future capacity to earn income: *Smith* trial at para. 37.

[53] The defendant appealed. A central issue on appeal was the effect of the plaintiff's ankle injury on his ability to earn income in the future, given his pre-existing back problems and the subsequent knee injury. The defendant conceded that the plaintiff was seriously impaired in his earning capacity but argued that the impairment was caused by the back injury and the left knee injury, not the ankle injury. The defendant submitted that the plaintiff should not receive anything for future capacity to earn income.

[54] In assessing the judge's reasons, this Court stated that "[t]he question on the facts before the learned judge was the extent to which the left knee injury obliterated … what would have otherwise been impairment from the right ankle injury": *Smith* at para. 8. The Court found the trial judge had made no error in arriving at the conclusion that the plaintiff had some impairment of earning capacity over and above the impairment from his knee and back. The appeal was dismissed.

[55] In my view, *Smith* is an example of a case where the Court did not find the subsequent event to "obliterate" the claim for loss of future capacity to earn income—even in circumstances where there had been a serious subsequent injury that was not connected to the tortious injury. In this way, I disagree that *Smith* is "on all fours" with the case at hand.

[56] Mr. Dhaliwal also relies on *Khudabux* to support his position that the damages for the earning loss ceased at the time of the WCB Injury. In *Khudabux*, the trial judge considered the plaintiff's pre-existing conditions and the injuries sustained from two motor vehicle accidents that occurred three years apart; the trial judge had found the plaintiff was entirely at fault for the first accident, and the plaintiff and defendant were both at fault for the second accident: *Khudabux v. McClary*, 2016 BCSC 1886 [*Khudabux* trial]. The trial judge assessed the damages globally at $75,000, then reduced the amount to $24,000 to account for the fact that "… [the plaintiff's] current condition is only marginally worse than what otherwise would have been the case" and to account for the plaintiff's contributory negligence in the second accident: *Khudabux* trial at paras. 206–208.

[57] The plaintiff appealed on the basis that the trial judge misapplied the legal framework for liability, divisibility, and damages. This Court approved of the trial judge's global assessment of damages and the reduction of that amount to account for the independent intervening event. The trial judge's approach was justified by the finding that there was "… 'a high probability that [the plaintiff] would be nearly as substantially incapacitated and affected as is now the case' …": *Khudabux* at para. 46, citing *Khudabux* trial at para. 206. The Court dismissed the plaintiff's appeal.

Analysis

[58] In my view, the judge in the case at hand embarked on the same exercise as reflected in *Smith* and *Khudabux.* The judge did not agree that the damages flowing from the MVA Injuries ceased (or were "obliterated") at the time of the WCB Injury.

Rather, he stated that "[t]he occurrence of the WCB Injury does not, of course, result in an end to the damages caused by the [MVA]": at para. 130.

[59] I agree with Mr. Stang's submission that the authorities Mr. Dhaliwal relies on, including *Smith* and *Khudabux*, involve plaintiffs who had either pre-existing conditions or experienced subsequent events causing conditions unrelated to the injuries caused by the tortious act. Mr. Dhaliwal's submission that these cases support his position the WCB Injury "obliterated" any damage claim after the WCB Injury is, with respect, misplaced. I agree with Mr. Stang's position on this point, as set out in his factum:

> All the cases referred to by the appellants … involve completely unrelated (and obviously divisible) pre- or subsequent conditions: *Jobling*: subsequent spinal disorder; *Penner*: a subsequent heart condition; *Smith*: the plaintiff sued for damages for a broken ankle, but the defence argued the loss of capacity was due to pre-existing injuries and a subsequent knee injury; *Edgar*: subsequent growth of a tumor responsible for symptoms; *Khudabux*: pre-existing conditions.

In the cases cited by Mr. Dhaliwal, the injured party had unrelated conditions—disabling on their own, independent of the tortious injury—and damages were reduced accordingly. Here, the judge found the WCB Injury did not result in an end to the damages caused by the MVA. That was a finding available to him on the evidence he accepted. I would not interfere with this finding.

[60] Relatedly, Mr. Dhaliwal also submits that the judge failed to take into account whether the intervening event affected all of the Mr. Stang's capacity; that is, if the WCB Injury caused the loss of capacity to be an elevator mechanic, then it also caused the loss of capacity to be a carpenter, which he says requires the same level of capacity. He points to paras. 170 and 177 as reflecting the error, where the judge's starting point for assessing the loss was represented by the difference between Mr. Stang's "without Accident" earnings as a carpenter, with no restrictions or limitations, against his post-Accident earning potential with limits on his ability to work as a carpenter. On this point, Mr. Dhaliwal restates his position that the trial judge should have found that the WCB Injury eliminated all of the damages resulting from the MVA Injuries.

[61] Trial reasons are to be read functionally and contextually and as a whole in the context of the live issues at trial: *R. v. G.F.*, 2021 SCC 20 at paras. 68–69. In this case, the judge repeatedly turned to the WCB Injury in the context of causation, divisibility, and the assessment of damages. In my view, when I read his reasons as a whole, I do not agree with Mr. Dhaliwal that the judge failed to take the WCB Injury into account when assessing damages. Prior to his assessment of loss of future earning capacity, the judge made the following findings about the WCB Injury:

a) He rejected Mr. Stang's submission that the WCB Injury was a "mere blip" along the timeline of his physical condition, noting the facts did not support this submission; in particular, Mr. Stang had worked as an elevator mechanic for almost two years before the WCB Injury but was not able to return to that occupation after the WCB Injury, and he made a WCB claim for disability benefits after the Workplace Accident: at paras. 43–45.

b) He found that Mr. Stang sought to downplay the effect of the WCB Injury on his current condition: at para. 60.

c) He found the WCB Injury caused a greater degree of disability: at para. 125.

d) He stated that if Mr. Stang had not suffered the WCB Injury, it is possible that he would have worked his entire career as an elevator mechanic and suffered no (future) loss of capacity to earn income. He found that Mr. Stang's elevator mechanic earnings would exceed his carpentry earnings, but that this version of the future did not transpire: at para. 163.

e) He found that Mr. Stang is now in a position where he cannot work as an elevator mechanic (due to the WCB Injury) and he is limited in his ability to fall back on being a carpenter (due to the MVA Injuries). He kept in mind his use of the term "limited" when quantifying the loss: at para. 164.

[62] The judge's reasons demonstrate that the WCB Injury was a significant factor when he assessed the loss. The judge found, as a result of the WCB Injury, Mr. Stang will have to pursue a career other than an elevator mechanic, and that he was "… limited in his ability to fall back on being a carpenter due to the [MVA Injuries]": at para. 164. That limitation, the judge found, will cause a pecuniary loss: at para. 166(e). It is my view the judge's findings on this point are inconsistent with the notion that the WCB Injury obliterated Mr. Stang's claim for loss of future earning capacity caused by the MVA.

[63] In my view, the judge properly considered the governing legal framework to assess whether the WCB Injury ended Mr. Stang's claim for loss of future earning capacity. Based on the evidence he accepted, the judge concluded it did not. In particular, he found that the MVA Injuries continued to limit Mr. Stang's ability to work as a carpenter after the WCB Injury.

[64] For these reasons, I conclude that the judge made no error here. I would not accede to this ground of appeal.

2) Did the judge err when he found the MVA Injuries and the WCB Injury were divisible*?*

Parties' positions

[65] Mr. Stang's position is that the judge failed to properly assess the evidence regarding the issue of indivisibility. He submits this error influenced the judge's determination of the extent and severity of his injuries and disability and resulted in damage awards that were inordinately low.

[66] Mr. Dhaliwal takes the position that the judge correctly determined that the MVA Injuries and WCB Injury were divisible.

Legal principles

[67] Before setting out the legal principles on causation and indivisibility, the judge stated "… the causation of Mr. Stang's injuries can be separated": at para. 116. He discerned the effects of the MVA to be those described in Dr. Tarazi's 2019 Report,

and found that those effects were worsened by the WCB Injury. The judge concluded that "the losses flowing from each injury are divisible": at para. 116.

[68] The judge started his iteration of the legal principles governing causation and divisibility at para. 117 where he stated:

> a) The primary test for factual causation is the "but for" test. The plaintiff must show that "but for" the defendants' negligence, the damage or loss would not have occurred. Put another way, the defendants' negligence must be necessary to bring about the damage or loss. However, the negligent conduct is not required to be the sole or predominant cause of the injury. Further, factual causation is determined in a "robust common-sense fashion": *Clements v. Clements*, 2012 SCC 32 at paras. 9–10.
>
> b) Indivisible injuries are those that cannot be separated or have liability attributed to the constituent causes. Divisible injuries are those capable of being separated out and having their damages assessed independently. An example of a divisible injury is of one defendant injuring a plaintiff's foot and of another defendant injuring the plaintiff's arm.

[69] To establish causation, the plaintiff must show that "but for" the defendant's negligence, the damage or loss would not have occurred; or put another way, the defendant's negligence was necessary to bring about the damage or loss: *Athey* at para. 14. The causation test is not to be applied too rigidly or with scientific precision; in some circumstances, an inference of causation may be drawn from the evidence without positive scientific proof: *Athey* at para. 16.

[70] Also relevant is Justice Major's analysis in *Athey* about apportionment:

> [19] The law does not excuse a defendant from liability merely because other causal factors for which he is not responsible also helped produce the harm … It is sufficient if the defendant's negligence was a cause of the harm …
>
> [20] This position is entrenched in our law and there is no reason at present to depart from it. If the law permitted apportionment between tortious causes and non-tortious causes, a plaintiff could recover 100 percent of his or her loss only when the defendant's negligence was the sole cause of the injuries. Since most events are the result of a complex set of causes, there will frequently be non-tortious causes contributing to the injury. Defendants could frequently and easily identify non-tortious contributing causes, so plaintiffs would rarely receive full compensation even after proving that the defendant caused the injury. This would be contrary to established principles and the essential purpose of tort law, which is to restore the plaintiff to the

> position he or she would have enjoyed but for the negligence of the defendant.
>
> [Internal citations and underlining omitted.]

[71] As stated earlier, indivisible injuries are those that cannot be separated or have liability attributed to the constituent causes; divisible injuries are those capable of being separated out and having their damages assessed independently: *Bradley* at para. 20.

Analysis

[72] In my view, the judge correctly set out the legal framework for assessing multiple injuries resulting from different events and determining divisibility. However, for the reasons that follow, I have concluded, respectfully, that the judge erred when he found that the MVA Injuries and WCB Injury were divisible. Mr. Stang advanced several different theories about how the judge erred when he dealt with the issue of divisibility. In my view, only one question requires consideration: Did the judge make a palpable and overriding error by misapprehending and ignoring evidence? In my view, he did.

[73] In this case, Dr. Tarazi was the only medical expert who provided an opinion about the cause of Mr. Stang's physical injuries and the consequences thereof. He wrote two opinions, three years apart—the 2019 Report, written after the MVA, and the 2022 Report, written two years after the WCB Injury. Understandably, the judge focused on Dr. Tarazi's reports as he analyzed the parties' positions about causation and divisibility. In particular, the judge focused his causation analysis on the following paragraph from the 2022 Report:

> … I am not surprised that he suffered an aggravation in March 2020 at work. Absent the neck and back injuries that he sustained in the subject [MVA], he <u>may</u> never have been injured at work in March 2020 or any injury would <u>most likely</u> have been much less severe. It is the [MVA] injury and ongoing neck and back pain which made it <u>much more likely</u> that he would suffer this aggravation and where his pain would continue until now.
>
> [Emphasis added.]

[74] The judge determined the paragraph "require[d] parsing" and deciphered its meaning by drawing inferences from the disputed portions of the 2022 Report: at paras. 124–127. The judge concluded that Dr. Tarazi's use of the word "may" means it was simply possible—but not probable—that the WCB Injury would have occurred without the MVA Injuries: at para. 124. As a result, he found the injuries had separate causes and were divisible.

[75] Missed in the extensive body of evidence considered by the judge was any discussion about Dr. Tarazi's testimony where he explained the relevant aspects of his 2022 Report, and in particular, the implications of the WCB Injury. Dr. Tarazi's explanation was elicited during cross-examination. In my view, Dr. Tarazi clearly explained what he meant about the possibility or probability of whether Mr. Stang was prone to aggravation of his MVA Injuries. To that point, Dr. Tarazi testified as follows:

> Q: … is it your opinion that a healthy person who has not suffered any injury, whether to the back, neck, or shoulder, cannot suffer an injury while doing the kind of job the plaintiff was performing at [the elevator company], which included lifting the kind of heavy weight we talked about, climbing up and down stairs, and so on?
>
> A: No, a healthy young person can still get injured with that kind of job.
>
> Q: Okay.
>
> A: My opinion that I put in my report is that the [MVA] having injured -- caused multiple muscular injuries have made him more vulnerable and more likely to suffer further injuries down the road.
>
> Q: Doctor, precisely, based on what you have said, it is not your opinion that it was a [MVA] and whatever injury he sustained in it that caused the injury that he sustained at the workplace in March 2020?
>
> A: Well, there was an -- there be a work injury aggravated his pre-existing symptoms that he had --
>
> [interruption]
>
> …
>
> The Court: … I have written down that your opinion that the work injury aggravated his pre-existing symptoms.
>
> A: Yes. Because the -- pre-existing symptoms which were caused by the [MVA] when he was hit by a car. Absent the [MVA], he may never have been injured at work being young and healthy, or that injury would have been much less severe.

> Q: Or is it possible he may also have been injured doing the job he was doing even without the [MVA]?
>
> A: Yes, it's possible, but balance --
>
> Q: Because it --
>
> A: -- of the probabilities, that's my opinion.
>
> Q: Is it also possible that even without the --
>
> …
>
> The Court: We're getting into a back and forth here.
>
> …
>
> The Court: Dr. Tarazi, please continue your answer.
>
> A: Like I said, I include in my opinion in the second report is that the injury that he sustained at work he would most likely have been less severe if he had not been involved … in a [MVA].
>
> The Court: But when I hear "most likely" --
>
> A: Yeah.
>
> The Court: -- that's not possibly, most likely.
>
> A: Most likely. It's still possible that he could get injured. Of course.
>
> …
>
> A: Anybody can get injured at work. But it made -- the [MVA Injuries] made him much more likely to suffer this injury at work and the aggravation of his pain. Absent the [MVA], the pain that he experienced from the [Work Accident] would most likely have been less or maybe he wouldn't have been injured altogether at work in the absence of the [MVA].
>
> [Emphasis added.]

[76] In my view, the judge either ignored or misapprehended Dr. Tarazi's testimony when the judge decided the 2022 Report required interpretation. The judge's interpretation of Dr. Tarazi's report was inconsistent with Dr. Tarazi's testimony in at least two material ways.

[77] First, the judge tried to decipher the meaning of the following sentence from Dr. Tarazi's 2022 Report:

> Absent the neck and back injuries that he sustained in the subject [MVA], he may never have been injured at work in March 2020.

However, he interpreted the sentence without commenting on Dr. Tarazi's actual testimony about the meaning of that sentence. Without considering Dr. Tarazi's testimony on this point, the judge concluded that the above sentence meant: "Absent the [MVA], it is possible that the [WCB Injury] would not have occurred. The use of the word 'may' indicates a possibility, not a probability": at para. 124(b)(iii).

[78] The judge's interpretation contradicts the explanation Dr. Tarazi provided regarding causation:

> A: …the [MVA Injuries] made him much more likely to suffer this injury at work and the aggravation of his pain. Absent the [MVA], the pain that he experienced from the [Work Accident] would most likely have been less or maybe he wouldn't have been injured altogether at work in the absence of the [MVA].

Dr. Tarazi's testimony made clear that the MVA Injuries made Mr. Stang much more likely to suffer the WCB Injury. In my view, Dr. Tarazi's evidence, taken as a whole and which was not contradicted, established a probability and not a possibility about the impact of the WCB Injury.

[79] I agree with Mr. Stang that the judge's interpretation of the word "may" (based on a misapprehension of Dr. Tarazi's evidence) also contradicted other portions of Dr. Tarazi's reports. In the 2019 Report, Dr. Tarazi stated: "[h]e is now more prone to future injuries to his neck, back, shoulders and left hip because of the [MVA] of July 16, 2016" and in his 2022 Report, he concluded, "[h]is neck, back and left wrist injuries were further aggravated by the [WCB Injury] of March 2020".

[80] Second, the judge interpreted another sentence from the 2022 Report in a manner that is inconsistent with Dr. Tarazi's testimony, stating at para. 124(c):

> The partial sentence: "any injury would most likely have been much less severe" is not an opinion on causation. It is an opinion on severity. This is not a case, like *Athey*, where there was a single injury (disc herniation) that led to the damages. Instead, at best, Dr. Tarazi says that if the [MVA] had not occurred, then Mr. Stang's WCB Injury would have occurred, but would probably have been less severe.

[81] With respect, that is not how Dr. Tarazi explained this passage during his testimony. In my respectful view, he said quite the opposite. He testified that the MVA Injuries "… made [Mr. Stang] much more likely to suffer this injury at work and the aggravation of his pain. Absent the [MVA], the pain that he experienced from the [Work Accident] would most likely have been less or maybe he wouldn't have been injured altogether at work in the absence of the [MVA]". The judge's interpretation of the paragraph from the 2022 Report cannot stand alongside Dr. Tarazi's testimony, which the judge accepted.

[82] In my view, Dr. Tarazi's testimony, elicited during cross-examination, was not weakened or undermined by other evidence. Dr. Tarazi was the only witness who testified about Mr. Stang's physical injuries and causation. The judge specifically noted that "the most important issues addressed by the expert evidence relate to causation and divisibility. Dr. Tarazi was the only expert who addressed those issues": at para. 62. In his reasons for judgment, the judge identified Dr. Tarazi's two written reports and summarized them. However, he does not appear to make any reference to the testimony set out above or to any part of Dr. Tarazi's testimony on this point.

[83] I conclude that the judge misapprehended Dr. Tarazi's evidence when he ignored vital testimony about the role the MVA played in Mr. Stang's subsequent WCB Injury. He interpreted a paragraph from the 2022 Report in a manner that was inconsistent with the later testimony and other relevant portions of the reports. It is my view that overlooking this evidence constitutes a palpable error. The error is also overriding because, as stated by the judge, Dr. Tarazi was the only expert witness who addressed causation and divisibility: at para. 62. The error was one that went to the critical causation issue to be determined. In the result, the finding of divisibility cannot stand.

[84] I will turn next to consider whether this error impacted the damages assessment.

3) Did the judge err in his assessment of damages?

Parties' positions

[85] Both parties take issue with the judge's assessment of damages, for different reasons. Mr. Dhaliwal submits that if the judge did not err by failing to take into account the independent intervening event, the judge erred in his assessment of the loss of future earning capacity.

[86] In his cross-appeal and connected to the error about divisibility, Mr. Stang submits that the loss of future earning capacity was undervalued. Mr. Stang says that other heads of damages—other than the award for non-pecuniary damages—were similarly undervalued.

[87] Mr. Dhaliwal submits that if the cross-appeal is allowed, the matter of assessment of damages should be remitted to the trial court. Mr. Stang takes the position that the judge's fact finding was sufficient for this Court to embark on the damages assessment, taking into account the error.

Remedy and standard of review of damage awards

[88] Where the factual findings of the judge or the uncontested evidence adduced at trial could reasonably support the making of some award for loss of future earning capacity, this Court may remit to the trial court the determination of the entitlement to and quantification of the award. Where the trial judge has erred, but the judgment lacks the necessary factual findings and analysis, this Court will generally not speculate as to the correct award: *Bains v. Cheema*, 2022 BCCA 430 at para. 57.

[89] As Justice Fitch noted in *Bains*, this Court may, alternatively and in appropriate circumstances, consider whether an award for loss of future earning capacity was justified despite the error, and if necessary, proceed to quantify the loss: *Rab* at paras. 59–63; *Ploskon-Ciesla v. Brophy,* 2022 BCCA 217 at paras. 54–56. In *Bains*, Justice Fitch set out the factors to consider in determining whether to quantify the loss on appeal:

> [59] In determining how best to proceed, this Court will have regard to the factual findings made by the judge, the extent to which uncontested evidence supports the making of an award, the amount in issue relative to the cost of a new trial, and the wishes of the parties. Ultimately, the interests of justice in the fair, accurate and efficient disposal of the litigation will drive the analysis.

[90] Mr. Stang asks this Court to determine the damages assessment once and for all. He submits that once the error is corrected regarding divisibility, the evidence is complete and this Court can conduct the assessment without disturbing the judge's findings of facts.

[91] In my view, as was the case in *Bains*, the assessment of damages is not a particularly difficult exercise, given "[t]he reasons for judgment reflect the judge's view of the evidence and witnesses, the errors found in the judge's reasons are discrete, and the record is ample enough …": *Bains* at para. 66. For these reasons, I consider it is possible to do justice in this case without remitting it back to the trial court. I find it would be in the interests of justice for this Court to reach its own conclusion respecting damages.

[92] With respect to the other heads of damage, I note that this Court's authority to vary damage awards is limited to circumstances "… where it has been shown that the judge's award was, in the result, 'palpably incorrect' or 'wholly erroneous' or that the judge made an error of law, misapprehended the evidence, considered irrelevant factors, or made an award without a foundation in the evidence …": *Laurin v. Tiemer*, 2025 BCCA 55 at para. 31, internal references omitted. Having established that the judge made a palpable and overriding error in his assessment of causation and divisibility, it is on this basis that this Court may alter the awards made under the remaining heads of damage.

Loss of future earning capacity

[93] Mr. Dhaliwal submits that the judge correctly determined that working as a carpenter with accommodations was a proper starting foundation to assess loss of future earning capacity, assuming the WCB Injury did not eliminate the damages associated with being a carpenter. The error, he says, was in failing to consider such

earnings and failing to take them into account in the assessment. Mr. Dhaliwal relies on the medical evidence available immediately before the Workplace Accident to prove that, at the time, Mr. Stang had recovered from the MVA Injuries and had the capacity to work as a carpenter. Mr. Dhaliwal submits that the post-MVA earnings calculations should have included working as a carpenter, with accommodations, and that this loss should be modestly calculated at $100,000.

[94] Mr. Stang takes the position that the judge's error regarding divisibility resulted in an undervaluation of this award, which was premised on the judge's erroneous conclusion that it was the WCB Injury—and not the MVA Injuries—that prevented him from working as an elevator mechanic. Mr. Stang submits that before the MVA, he was a healthy young man, with no pre-existing conditions and a record of working in the heavy labour field. Mr. Stang submits there was ample evidence to show he intended to change his occupation from a carpenter to an elevator mechanic even before the MVA, and there was a strong probability that he would have ended up in this field. Indeed, even after the MVA, Mr. Stang pursued this occupation.

[95] At trial, the judge made a number of findings about Mr. Stang's future employment prospects. The judge based the earnings calculations on the economist's without-MVA earnings as a carpenter with accommodation, less lifetime work as a cashier. The judge based his calculations on three factors:

a) But for the MVA, Mr. Stang would have worked as a carpenter for his working life.

b) After the MVA, Mr. Stang could not work as a carpenter.

c) After the MVA, Mr. Stang could work as a cashier.

[96] Mr. Stang argues that the judge should have considered his loss based on employment earnings as an elevator mechanic and those lifetime earnings were much higher than that for a carpenter. He says that the judge needed to consider that he was in the very early stages in his position as an elevator mechanic and

he was initially required to engage with “light” duties. Mr. Stang submits that as his duties increased and the work became harder, his MVA Injuries limited his capacity to complete required tasks. He says the judge’s error regarding divisibility impacted his assessment of future loss of earning capacity. He says accordingly, this award should be based on the estimate of his without-MVA elevator mechanic earnings to age 67 as $3,158,856 less the with-MVA earnings of $1,300,000 as a cashier (as approximated by the trial judge) for a loss of capacity award of $1,858,856.

[97] Mr. Stang had just started his working life at the time of the MVA. He was working in entry-level positions with periods of time attending classes. He started working in carpentry in Alberta. He learned about elevator mechanics and understood that their earnings were greater than carpenters. When he moved to the Lower Mainland in 2015, he attended courses at BCIT to complete his carpentry apprenticeship. He had worked only six months at FirstOnSite Restoration before the MVA. Though extremely early in his career, the judge found that Mr. Stang was qualified as a Red Seal carpenter and was capable of working in that capacity if the MVA had not occurred.

[98] I have concluded that the judge made a palpable and overriding error in relation to the medical evidence and the cause of the WCB Injury. The error impacted the judge’s assessment of loss of future capacity to earn income, as illustrated in the following paragraphs of the judge’s reasons:

> [163] If Mr. Stang had not suffered the WCB Injury, it is possible that he would have worked his entire career as an elevator mechanic and suffered no (future) loss of capacity to earn income. His elevator earnings would exceed his carpentry earnings. However, that version of the future did not transpire.
>
> [164] Instead, the plaintiff is now in a position where he cannot work as an elevator mechanic (due to the WCB Injury) and he is limited in his ability to fall back on being a carpenter due to the injuries in the Accident.

[99] The result of the judge's error as to causation/divisibility was to deprive Mr. Stang of his loss of earning capacity as an elevator mechanic. The judge based the award for loss of future earning capacity on the erroneous notion that Mr. Stang could not work as an elevator mechanic solely due to the WCB Injury. The judge

compensated him for his limited ability to fall back on being a carpenter, but not for his inability to work as an elevator mechanic. His work as an elevator mechanic clearly demonstrated a greater capacity than his work as a carpenter.

[100] Having found the MVA Injuries and the WCB Injury to be indivisible, it follows that the MVA, on a balance of probabilities, was a contributing causal factor to Mr. Stang's inability to work as an elevator mechanic. I agree with Mr. Stang that once the divisibility error is corrected, I consider it is possible to do justice in this case without remitting it back to the trial court. I find it would be in the interests of justice for this Court to reach its own conclusion because the record here is "ample enough": *Bains* at para. 66.

Quantification of loss of future capacity to earn income

[101] Mr. Stang started work as an elevator mechanic after two years of being off work following the MVA and after three days of his GRTW as a carpenter. After working as an elevator mechanic for two years, he suffered the WCB Injury and was unable to continue with the position. He did not return to elevator mechanics after the WCB Injury. The medical evidence established that he was unable to perform the work required.

[102] Mr. Dhaliwal takes the position that the Mr. Stang failed to prove that he could not work as an elevator mechanic, with accommodation. He says the insufficiency of evidence should limit any award for future loss of earning capacity to $100,000.

[103] Mr. Stang says that the award should have been based on the loss of capacity to work as an elevator mechanic. He makes the point that, prior to the MVA, he was a healthy young man, with no pre-existing conditions and a record of working in the heavy labour field. He was interested in elevator mechanics before the MVA and it was probable that he would have ended up in that field.

[104] In his reasons, the judge correctly determining that the first and second steps of the *Rab* inquiry were satisfied—the evidence disclosed a potential future event that could lead to a loss of capacity and there was a real and substantial possibility that the potential future event would cause a pecuniary loss to Mr. Stang: at paras. 162–168. However, the judge based his quantification of loss at the final step on Mr. Stang's future capacity to work as a carpenter and not as an elevator mechanic.

[105] The judge quantified the loss by starting with Mr. Stang's without-MVA earning potential as a carpenter, which he found to be $1,756,000, as determined by Mr. Stang's economist. The judge did not reduce the without-accident earnings as a carpenter for contingencies, stating his assessment "is based upon the entirety of the evidence, including the positive and the negative contingencies:" at para. 188. The judge then compared the without-MVA earnings ($1,756,000) against the potential earnings of a "cashier", the alternative employment option advanced by the economist: at para. 173. With respect to the judge's determination of a comparator available occupation, I would not disturb his findings on this point. These calculations were based on the evidence presented at trial and were not impacted by the error regarding divisibility. As he assessed this occupation, the judge rejected the notion that Mr. Stang would always be at an entry level salary earnings position and he thus adjusted the actual earnings up slightly to reflect future advancement. The judge found the present value of Mr. Stang's earnings as a cashier to be $1,300,000. Based on his findings, the judge determined the loss attributable to the MVA to be approximately $450,000.

[106] As set out above, the judge erred by assessing the value of the future loss against the potential earnings of a carpenter, and not of an elevator mechanic. I do not agree with Mr. Dhaliwal that Mr. Stang failed to prove his incapacity to work in elevator mechanics. The restrictions on Mr. Stang's capacity to perform as an elevator mechanic were sufficiently demonstrated by Dr. Tarazi's evidence and Mr. McNeil's functional capacity evaluation. I also find that the probability that

Mr. Stang would have pursued elevator mechanics is strong because that is what he did.

[107] The economic evidence led at trial was that the without-MVA earnings (present value) of an elevator mechanic was $3,131,589, as calculated in the appellant's unchallenged income loss report of June 15, 2022. In my view, this is the correct starting point for quantifying the loss of future earning capacity caused by the MVA. The without-MVA elevator mechanic earnings to age 67 less the with-MVA earnings of $1,300,000 as a cashier (as approximated by the trial judge) would result in a loss of capacity award of $1,831,589.00.

[108] I next turn to consider contingencies. Regarding positive contingencies, the judge noted Mr. Stang's work history indicated he was ambitious and hard-working. Regarding negative contingencies, the judge identified the obsessive-compulsive personality traits as a hindrance: at para. 184. Evidently, the judge considered the positive and negative contingencies balanced out: para. 188.

[109] However, there is an additional negative contingency to consider. Throughout his reasons, the judge referred repeatedly to Mr. Stang's youth and the early stage of his working life. Related to this point, Mr. Stang's musical endeavours and video-gaming featured at trial. It is clear that Mr. Stang was unable to work as an elevator mechanic after the WCB Injury. However, in my view, this Court's re-assessment should demonstrate the likelihood of Mr. Stang continuing in that job to age 67; particularly given the work of an elevator mechanic was consistently described as heavier and the potential for injury greater. Mr. Stang may leave the workforce early, and the heavy nature of the work could impact his earning stream. Taking into account his youthfulness, his other interests (music and video-gaming), the heavy nature of the work, and his relatively short working life, I would reduce the award of future earnings by 20 percent. A reduction of 20 percent would reduce the figure to $1,465,271.20.

[110] In the result, and considering the overall fairness and reasonableness of the award in light of all the evidence (*Ploskon-Ciesla* at para. 60), I would adjust the loss of future earning capacity award from $450,000 to $1,465,000.

Loss of past earning capacity

[111] The judge awarded $38,000 for past loss of earning capacity. The judge did not allow any income loss for the period following the WCB Injury to the time of trial. The judge also deducted $10,000 because he was not convinced Mr. Stang could not work prior to June 2018: at para. 156. Mr. Stang submits that the total past wage loss claim is $135,319 and that is what he should be awarded. He submits that the judge erred because he did not account for any loss of earnings after the WCB Injury and improperly deducted $10,000 from the award. Mr. Dhaliwal submits this award be increased to no more than $76,000.

[112] First, I would not disturb the $10,000 deduction. Based on the evidence before him, and in particular the evidence of Mr. Stang's musical endeavours, the judge was satisfied that Mr. Dhaliwal had met his burden proving failure to mitigate. In his written closing submissions at trial, Mr. Dhaliwal submitted the judge should take account of "[Mr. Stang's] failure to mitigate his past income loss for not returning to work but opting for another income-yielding venture of performing music at public shows for a year after the [MVA]". In my view, the $10,000 reduction was made out on the judge's findings and he demonstrated no error in this part of his analysis.

[113] However, I would increase the past loss of earning capacity to include the loss following the WCB Injury up to the time of trial. In my view, the error regarding divisibility impacted the assessment of Mr. Stang's loss of past earning capacity. Here—and despite finding the "… WCB Injury [did] not … result in an end to the damages caused by the [MVA]": at para. 131—the judge disallowed any wage loss after the WCB Injury. This determination was directly connected to the divisibility error. Once the error regarding divisibility is corrected, it is my view that Mr. Stang

has proven the claim for loss of past earning capacity of $135,319, summarized as follows:

2016	$10,476.00
2017	$27,891.00
2018	$9,480.00
2019	$0.00
2020	$22,056.00
2021	$29,666.00
2022	$40,001.00
Total	**$135,319.00**

[114] I would reduce the total by $10,000, as did the judge, to find that Mr. Stang is entitled to an award of loss of past income earnings in the amount of $125,319, less deduction for taxes as required under ss. 95 and 98 of the *Insurance (Vehicle) Act*, R.S.B.C. 1996, c. 231.

Loss of housekeeping capacity

[115] Mr. Stang sought an award for the loss of housekeeping capacity. The focus of this aspect of the award was based on Mr. Stang's evidence that he had hoped to buy real property and then build his own home at some point in the near future. The judge dismissed Mr. Stang's claim for loss of housekeeping capacity for the following reasons:

a) Regarding housekeeping, Mr. Stang conceded that he has not needed assistance since the MVA: at para. 195(a); and

b) Mr. Stang's loss of his own construction services (which he valued at $100,000) following the MVA was too speculative based on the evidence presented: at para. 195(b) and (c).

[116] Mr. Stang submits that the judge disallowed his claim for loss of his own construction services based on the error regarding divisibility. However, in my view, the judge reached this conclusion because of the speculative nature of the evidence, finding the "… evidence does not establish a sufficient factual basis for a claim under this head of damage": at para. 195(c). The error regarding divisibility did not impact the balance of the judge's findings on this part of the claim. I would not interfere with the dismissal of the claim for loss of housekeeping capacity.

Special damages

[117] Mr. Stang sought special damages incurred from the MVA. The judge limited the special damages award to those expenses incurred before the WCB Injury on March 9, 2020, and awarded $19,458. The judge did not accept Mr. Stang's "$5,838.70 claim for the Saatva bed that was purchased in December 2018" but did not state his reasons for this conclusion: at para. 213. On this point, I note that Mr. Dhaliwal, in his written closing submissions, had objected to the claim for the Saatva bed on the basis that it "…was neither medically prescribed nor evidentiarily related to the plaintiff's [MVA] injuries". With respect to the Saatva bed, I would not interfere with the judge's disposition. This was a conclusion that was open to him to make, based on the evidence tendered and on the submissions of counsel.

[118] With respect to the balance of the special damages claim, I agree with Mr. Stang that the award should account for the error regarding divisibility. As such, the special damages award should be increased by $10,710.85 to include the post-WCB Injury expenses deducted by the judge which include: (1) $8,700 for St. John's Chiropractic, incurred after January 12, 2020; (2) $1,286.75 for the stationary bicycle, purchased May 18, 2021; and (3) the $724.10 one-third deduction from the mileage claim of $2,169.10 for travel to medical visits after the WCB Injury. In sum, I would increase the special damages award from $19,458 to $30,168.85.

Disposition

[119] For the reasons stated, I would dismiss the appeal. I have concluded that the judge erred by ignoring or misapprehending material aspects of Dr. Tarazi's

testimony, resulting in a palpable and overriding error in his assessment of divisibility. In my view, this error impacted the assessment of damages. For the reasons set out, I would allow the cross-appeal, in part, and adjust the damage awards as follows:

a) I would increase the award for loss of future earning capacity to $1,465,000.

b) I would increase the award for loss of past earning capacity to $125,319.

c) I would not interfere with the judge's dismissal of the claim for the loss of housekeeping capacity.

d) I would increase the award for special damages to $30,168.85.

"The Honourable Justice Winteringham"

I AGREE:

"The Honourable Madam Justice Bennett"

I AGREE:

"The Honourable Mr. Justice Grauer"