

# **Bal v. Makichuk**

British Columbia Judgments

British Columbia Supreme Court

Vancouver, British Columbia

L.A. Warren J.

Heard: May 9-13, 2022.

Judgment: September 28, 2022.

Docket: M191680

Registry: Vancouver

**[2022] B.C.J. No. 1834** | 2022 BCSC 1695

Between Jaskarnjit Singh Bal, Plaintiff, and Maureen Makichuk, Defendant

(95 paras.)

## **Counsel**

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Counsel for the Plaintiff: B. Yu, G. Mann, Articled Student.

Counsel for the Defendant: N. Badesha.

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#### **Introduction**

**1** The plaintiff, Jaskarnjit Singh Bal, claims damages for injuries sustained in a car accident that occurred on August 22, 2017, in the intersection of Griffiths Avenue and Edmonds Street in Burnaby, British Columbia (the "Accident"). Liability has been admitted.

**2** Mr. Bal alleges that the Accident caused injuries to his right knee, right ankle, right elbow, right wrist, back, and neck that resulted in pain in those areas, headaches, depression, and anxiety. Although he has recovered from the knee, ankle, elbow, and wrist injuries, he continues to suffer from periodic headaches, daily pain in his neck and back, and the mood symptoms. He claims non-pecuniary damages, past wage loss, damages for loss of future earning capacity, damages for cost of future care, and special damages. In total, he quantifies his claim at between \$175,536.98 and \$245,536.98.

**3** The defendant concedes that Mr. Bal sustained the physical injuries he alleges in the Accident, and that those injuries have resulted in pain and driving anxiety. However, the defence disputes the severity and extent of Mr. Bal's injuries and associated symptoms, and submits that any ongoing symptoms are mild and non-disabling. The defence quantifies the claim at between \$54,392 and \$64,392, conceding the claims for damages for cost of future care of \$2,920 and special damages of \$1,241.98.

#### **Summary of the Evidence**

##### **The Plaintiff's Background and Pre-Accident History**

**4** Mr. Bal was 26 years old at the time of the Accident and 31 years old at the time of the trial.

**5** Mr. Bal resides with his parents, sister, and grandparents in the family home in Surrey. He is single and not in a romantic relationship.

**6** Mr. Bal graduated from high school in 2008. When asked about his marks in high school, he testified that he "got Cs".

**7** After high school, Mr. Bal attended BCIT in 2008/09 where he studied joinery and cabinet-making. He testified that the project work involved a lot of bending, lifting, reaching, and prolonged standing. He had no difficulty with the physical demands of the program. However, he struggled with the academic aspects, his grades were poor, and about a year into the program, he withdrew.

**8** After withdrawing from BCIT, Mr. Bal opened a Booster Juice smoothie bar with his cousins. They ran that business for two to three years but it was not profitable. He and his cousins sold the business "back to head office". Mr. Bal's duties while operating the Booster Juice included taking orders, scheduling, and food preparation.

**9** While working at Booster Juice in 2012 and 2013, Mr. Bal also worked part time for United Protection Services as a security guard. He testified this involved a lot of standing. He earned minimum wage in that position.

**10** After selling the Booster Juice business, Mr. Bal took a job as a delivery driver for Greyhound. His duties included loading his truck, planning his route, and then delivering packages. He said the packages weighed between 15 and 70 pounds. He had no difficulty performing his duties. He worked at Greyhound for about two years between 2013 and 2016, and he left because Greyhound "closed down".

**11** After leaving Greyhound in 2016, Mr. Bal worked about 40 hours a week as a delivery driver for K&H Couriers ("K&H"). He used his own car to deliver packages. His duties included picking up packages, loading his van, and making deliveries. He said the packages weighed between 20 and 50 pounds. He had no difficulty performing his duties. He was paid a commission, the quantum of which varied depending on the nature of the delivery. He maintained that job until the Accident.

**12** Mr. Bal testified that before the Accident he was happy and led an active and social life. For many years he participated in martial arts, first taekwondo and then Brazilian jujitsu. He said he practiced martial arts about four times a week. He also enjoyed playing recreational volleyball with his family. He testified that he had no mood issues and specifically, did not suffer from anxiety or depression.

**13** Prior to the Accident Mr. Bal was in good health. He has a history of ear surgeries to repair a congenital condition. The surgeries were successful and he has no hearing loss. He had eye surgery to repair his retina before the Accident, which was also successful. He was involved in a car accident in 2011, but he could not recall having sustained any injuries in that accident. He was involved in another car accident in 2016. He said he sustained an injury to his knee and possibly

his neck and back, but his symptoms resolved quickly, he did not miss any work as a result, and he had fully recovered before the Accident, which occurred in August 2017. He testified that he had no symptoms in his back or neck for several months before the Accident.

**14** Mr. Bal's testimony about his pre-Accident personality and lifestyle was corroborated by his brother, Gurjot Bal. According to Gurjot Bal, before the Accident Mr. Bal was energetic, active, expressive, positive, outgoing, social, and never complained of physical discomfort.

### **The Accident**

**15** As noted, the Accident occurred on August 22, 2017. Mr. Bal was driving north on Griffiths Avenue in a 2004 Hyundai Accent. The defendant had been southbound on Griffiths Avenue in a 2001 Honda Civic. As the parties reached the intersection at Edmonds Street, coming from opposite directions, the defendant turned left across the path of Mr. Bal's vehicle, resulting in the Accident. Both of the vehicles were "written off" by ICBC.

**16** Mr. Bal testified that at impact, his right knee struck the centre console of his vehicle, knocking the console loose.

**17** Mr. Bal's father picked him up at the scene of the Accident and drove him to the Skytrain. He took the Skytrain home. He was emotional and recalls crying on the Skytrain.

### **Post-Accident Condition and Treatment**

**18** Mr. Bal testified that the day after the Accident he was suffering from pain in his neck, right elbow, right knee, right ankle, right wrist, neck and low back, as well as headaches.

**19** Mr. Bal said he noticed the pain in the right knee, ankle, and wrist the night of the Accident and that the pain in these areas resolved within about a week. He said he noticed the pain in the right elbow the night of the Accident and that it resolved within a few weeks.

**20** Mr. Bal testified that he continues to suffer from pain in his neck and low back, and he continues to have headaches.

**21** Mr. Bal testified that he first noticed back pain the day after the Accident. He characterized it as initially "pretty bad". He said it was difficult for him to walk, twist, and bend. He said any fast movement, such as catching something, was painful. He said the back pain was constant and he experienced it every day. He testified that the back pain started to improve by about 2018, after he attended active rehabilitation and learned management strategies. Since 2018 he has continued to suffer from daily back pain but it is not as severe as it was initially and he has "found ways to cope". For example, he is vigilant about avoiding activities that aggravate his symptoms, he carefully plans out each day to avoid or minimise pain triggers, he exercises regularly, does not sit

for long periods, and does not walk for more than about 45 minutes at a time. The back pain is aggravated by sitting, standing, walking, fast movements, and bending over.

**22** Mr. Bal testified that he first noticed neck pain the day after the Accident. He said he still experiences neck pain on a daily basis. He said his neck is stiff and the pain is aggravated by twisting and turning his neck. He said that to shoulder check while driving he has to twist his whole body.

**23** Mr. Bal testified that he had a headache the day after the Accident. He said the pain was in his temples and at the back of his head. He characterized the level of pain generated by the headache as "moderate". He experienced headaches every day for the first few days following the Accident. He said the severity of the headaches has lessened since then, as has the frequency. He said he had a headache a "handful of times" in the year before the trial.

**24** Mr. Bal has not taken much medication for his pain. He said he tried Advil but it did not help.

**25** Mr. Bal testified that he has experienced symptoms of depression since the Accident. He was initially concerned about how long the pain would last and he felt sad about the pain preventing him from participating in activities he used to enjoy, such as martial arts and volleyball. He said he feels out of control and that the feeling of sadness has decreased his motivation to do things - it is even hard to get up in the morning and get ready for the day. He said he continues to experience these feelings.

**26** Mr. Bal testified that he has also experienced anxiety since the Accident, which he indicated stemmed from feeling a lack of control. He has anxiety while driving, especially in intersections. He said he has flashbacks of the Accident a few times a day when driving through intersections. He said he has not been a passenger in a vehicle for a long time because the lack of control feels uncomfortable. He experiences anxiety while walking. He said the anxiety causes him to take longer to get out of the house in the morning. He has developed a ritual involving getting up earlier, drinking coffee, and spending time with his dog, which helps him calm down before starting his day. He said he continues to experience this kind of anxiety on a daily basis.

**27** Mr. Bal testified that he has experienced fatigue since the Accident, which he attributes to his Accident-related injuries. He said before the Accident he usually slept about seven hours a night. He said he now gets about five hours of sleep a night, and that his sleep is interrupted three to four times a night as a result of pain. He said that the ongoing fatigue causes him to take longer to get ready for his day.

**28** Mr. Bal has attended both physiotherapy and active rehabilitation sessions, during which he learned exercises for his back. He said he goes to the gym five or six times a week where he does those exercises.

**29** Mr. Bal attended more than 100 sessions of psychological counselling at No Fear Counselling.

He said the counselling helped him develop coping strategies for his anxiety. His last session at No Fear was in September 2021. He stopped going because ICBC stopped funding the sessions. He said he would like to attend more counselling in the future.

### **Post-Accident Employment and Activities**

**30** Mr. Bal was working as a driver for K&H at the time of the Accident. He took a few days off work and then he received a letter from BCIT advising him that he had been accepted into an accounting program to start in September 2017. The program would lead to a CPA designation in two years, if pursued full time, and in four years, if pursued part time. Mr. Bal quit his job at K&H and enrolled in the accounting program, full time, in September 2017. He acknowledged that irrespective of the Accident he would have quit his job as his plan was to take the full-time program if he got accepted.

**31** Mr. Bal pursued the BCIT accounting program on a full-time basis for a year and a half. However, he said he needed to earn income so he reduced his participation to part time in the winter of 2018 and got a job. Mr. Bal did not do well in the program. His marks were poor and, ultimately, he withdrew. He does not attribute his lack of success in the accounting program to the injuries he sustained in the Accident.

**32** In March 2018, Mr. Bal started working as a delivery driver for SPUD, a grocery delivery business. His duties included lifting, what he described as little carts of groceries, for customers. He worked there for only a month. Although he had some difficulty bending over and lifting, he said his injuries did not affect his ability to do the work. He quit the job because he got a better job with Mercana Furniture ("Mercana").

**33** Mr. Bal's position at Mercana required him to perform general labour in a warehouse. He testified that his ongoing back symptoms would have prevented him from doing the required lifting, but he was accommodated by being assigned to a forklift driver position. This relieved him from having to do the heavy work. He worked full time at Mercana for about two months, earning minimum wage. He quit that job in June 2018 because he got a better job at Radion Laboratories ("Radion").

**34** Mr. Bal's job at Radion was similar to his job at Mercana but it paid a little better. He worked full time earning \$17 an hour. Again, his primary duty was to drive a forklift, but he also did some shipping and receiving. He testified that on occasion he performed some heavier work, such as building skids, but he would do that kind of work for only about an hour at a time because if he did it for longer it aggravated his back symptoms. He acknowledged that as a result of being able to work primarily on the forklift, his injuries from the Accident did not affect his ability to do his job at Radion.

**35** In December 2018, Mr. Bal broke his hand when he became angry and punched a wall. He quit his job at Radion because he could not work with a broken hand. He does not attribute his

anger to the injuries he sustained in the Accident. He testified that the hand injury has healed. Although the hand cramps up a bit at times, he has no ongoing pain and his use of it is not limited in any way.

**36** In February 2019, Mr. Bal got a job as a sales and installation technician for COIT Cleaning Services ("COIT"). He continues to work there selling specialized cleaning services for carpets, drapes, upholstery, blinds, and hard surfaces. He works full time and earns a flat daily rate plus commission. Payroll deposits into his bank account indicate that in the period prior to the trial he earned net pay of between \$1,217 and \$1,479 per two-week pay period.

**37** Mr. Bal testified that on a typical day he attends at the homes of several customers to perform measurements and provide quotes. Sometimes he has to pick up carpets and carry them to his vehicle. He said he has difficulty with this because of his back pain, but it has not proved to be a problem because he can call someone else in to pick up anything that is too heavy for him to lift or carry. He said he carries small items (such as 5 x 6 area rugs) and calls someone else in, typically once a day, to pick up heavier items (such as rugs that weigh between 50 and 100 pounds).

**38** Mr. Bal must drive a lot during a work day. He serves a large geographic area and spends a lot of time in his car. He said the ongoing neck and back symptoms from the Accident-related injuries make driving difficult. He said prolonged sitting (more than 30 minutes), bouncing, and shoulder checking cause pain. As a result, he carefully plans his day so he can take frequent breaks to stretch. He said he does this at almost every stop (about six per day). Mr. Bal testified that the driving also exacerbates his ongoing anxiety, but he has persevered because he needs a job. He manages the anxiety with his morning ritual.

**39** Mr. Bal testified that he considers himself to be a good salesperson and he believes his current employer is pleased with his job performance.

**40** Mr. Bal testified that his future career plans are up in the air. He said his ongoing back and neck pain would prevent him from performing heavy labour such as construction work. He said that before the Accident he was "open" to heavy labour.

**41** Mr. Bal testified that he no longer practices martial arts or plays volleyball because he does not want to risk aggravating his back and neck pain. He said since the Accident, doing anything that involves fast movement is out of the question. He said he walks his dog three times a day, for about 30 minutes per walk. He said if he walks for more than about 45 minutes he starts feeling pain in his low back. He said he has taken some vacations since the Accident and his injuries have not interfered with his enjoyment of those, or his social life generally.

**42** The testimony of Mr. Bal's brother, Gurjot Bal, suggested that Mr. Bal may have understated the impact of the Accident-related injuries on his lifestyle. According to Gurjot Bal, after the Accident Mr. Bal moved slowly and appeared to be in pain. He said Mr. Bal seemed tired, was

quiet, and "hibernated" in his room. He said Mr. Bal often declined his invitations to go out socially and sometimes would not even come out of his room when Gurjot Bal went to visit. He said Mr. Bal continues to keep to himself and is still significantly less active and less social than he was before the Accident.

### **Expert Medical Evidence**

**43** Mr. Bal relied on the expert evidence of Dr. Deepak Grover, an orthopaedic surgeon, who conducted an independent medical examination on December 30, 2021, and Dr. Suniti Pande, a psychiatrist, who conducted an independent medical examination on January 28, 2022. The defence relied on the expert evidence of Dr. Catherine Paramonoff, a physiatrist, who conducted an independent medical examination on December 8, 2021.

**44** There is substantial agreement in the evidence of Dr. Grover and Dr. Paramonoff. Both expressed the opinion that Mr. Bal suffered myofascial injuries in the neck and lower back in the Accident. Dr. Paramonoff also noted a right knee contusion, which had resolved, as well as "post-concussive symptoms", which had also resolved. Dr. Grover expressed the view that the injuries resulted in cervicogenic headaches, and chronic neck and back pain. Dr. Paramonoff did not express any contrary opinion. It was the opinion of both Dr. Grover and Dr. Paramonoff that the Accident caused the injuries in question and that Mr. Bal will likely continue to experience some level of symptoms permanently.

**45** In Dr. Grover's opinion, the injuries in question left Mr. Bal with a "degree of general disability which is better, but still present", and which impacts some of his activities of daily living and recreational activities, as well as his ability to drive. In his opinion, it is more likely than not that Mr. Bal will continue "to suffer a degree of general disability permanently". In Dr. Grover's opinion, the injuries also caused a "degree of vocational disability". In his opinion, Mr. Bal "will likely continue to have some degree of pain while at work leading to impaired productivity and reduced employability for physically demanding jobs", and that this vocational disability "is likely to be permanent given the length of time that has elapsed since the subject accident". In cross-examination, Dr. Grover emphasized that his opinion is not that Mr. Bal cannot do physical activities but rather that he experiences pain that is functionally limiting.

**46** As I understood her evidence, Dr. Paramonoff did not disagree with Dr. Grover's assessment of the functional limitations caused by the injuries, in the sense that the pain Mr. Bal experiences is functionally limiting notwithstanding the absence of any medical contraindication from participating in activities. However, in her view, Mr. Bal is able to participate in activities, including "work activities", with appropriate adaptations such as taking micro breaks to decrease static prolonged positioning, pacing and prioritizing activities, ensuring optimal ergonomics and movement mechanics, and with improved physical conditioning to increase tolerance.

**47** Dr. Grover recommended that Mr. Bal continue with a program of home-based exercises and stretching, with access to a gym and swimming pool. He suggested that Mr. Bal be referred to a

clinical psychologist for treatment of his driving-related anxiety. Dr. Paramonoff recommended participation in a regular exercise program and suggested that Mr. Bal have access to 24 sessions with a kinesiologist or physiotherapist for program guidance, and technique supervision and correction. In addition, she specifically recommended over-the-counter analgesic medication as needed.

**48** The only area of potentially material difference in the opinions of Dr. Grover and Dr. Paramonoff concerns prognosis. Dr. Grover expressed the opinion that Mr. Bal has "reached the point of maximal medical improvement" and he is likely to continue to suffer some degree of pain and functional impairment in his activities of daily living, ability to drive, and vocational abilities, permanently. In cross-examination, he acknowledged that Mr. Bal could experience some improvement if he follows the recommendations for exercise but he emphasized that it is more likely than not that Mr. Bal's symptoms will not materially improve.

**49** In Dr. Paramonoff's opinion, Mr. Bal will likely have a "prolonged course of recovery" and will likely experience moderate symptom/symptom management improvement by building muscle strength and managing the "confounding factors" (mood symptoms, psychological issues, and decreased sleep). However, it is her view that this will not eliminate the symptoms and that Mr. Bal will likely have a residual baseline of symptoms due to the Accident-caused injuries. In cross-examination, she reiterated that she expects only moderate improvement with properly focussed exercise.

**50** The only expert evidence pertaining to Mr. Bal's psychological symptoms was that of Dr. Pande. She diagnosed Mr. Bal with mild generalized anxiety disorder, with test results indicating moderate to severe anxiety and severe depression, most likely caused by the Accident. In her opinion, Mr. Bal is not functionally disabled in his vocational pursuits, or his daily living, recreation, social, or household activities by his psychological symptoms. She recommended a consultation with a community psychologist for medication recommendations, which she said are effective in the treatment of anxiety in concert with psychological coping mechanisms. She did not recommend additional counselling for Mr. Bal because, in her opinion, the clinical records from No Fear Counselling indicate that he has already learned the appropriate coping mechanisms.

## **Discussion**

### **Credibility**

**51** As noted by Mr. Bal's counsel, the plaintiff's credibility is vitally important in a personal injury case involving subjective symptoms such as those upon which Mr. Bal's case is based. The Court must be very careful when assessing a plaintiff's credibility "when there is little or no objective evidence of continuing injury and when complaints of pain persist for long periods extending beyond the normal or usual recovery": *Price v. Kostryba* (1982), 70 B.C.L.R. 397 at 399, 1982 CanLII 36 (S.C.).

**52** Fortunately, Mr. Bal was entirely credible. He was soft-spoken, agreeable, reasonable, and consistent in his testimony. He presented as a stoic witness with a tendency to downplay or understate his symptoms. He made several admissions against interest. His credibility was not impugned by the defence. I have no difficulty accepting his testimony generally, although I believe his account of the impact of his symptoms on his life was understated.

### **Findings on the Plaintiff's Condition and Causation**

**53** As already noted, the defence does not dispute that Mr. Bal sustained injuries to his right knee, right ankle, right elbow, right wrist, back, and neck, or that those injuries resulted in pain in those areas, as well as headaches, depression, and anxiety. There is no dispute that the injuries to Mr. Bal's knee, ankle, elbow and wrist caused temporary pain in those areas and resolved within a few weeks of the Accident. There is no dispute that Mr. Bal continues to suffer from pain in his neck and back, as well as anxiety and depression. However, the defence disputes the severity of Mr. Bal's ongoing symptoms and the extent to which they impact his functionality and enjoyment of life, and submits that the evidence establishes that he is likely to improve.

**54** As already noted, I generally accept Mr. Bal's account of the nature, severity, and progression of his symptoms, and the impact they have on his functionality and enjoyment of life, although I find his account was somewhat understated. Where the testimony of his brother differed, I prefer his brother's account. I am satisfied and find that:

- \* Mr. Bal sustained injuries to his right knee, right ankle, right elbow, and right wrist in the Accident that caused him pain in the affected areas, but that these injuries fully resolved within a few weeks;
- \* Mr. Bal sustained soft tissue (myofascial) injuries to his neck and low back in the Accident;
- \* as a result of the neck and back injuries he suffered from significant pain in his neck and back for at least several months, and likely for about a year, that made it difficult for him to walk, twist, bend, or make any quick movement;
- \* his neck and back symptoms started to improve by about 2018, after he attended active rehabilitation;
- \* since 2018 he has continued to suffer from daily back and neck pain that is aggravated by sitting, standing, walking, twisting, fast movements, and bending, but the pain is not as severe as it was initially;
- \* his soft tissue injuries also caused daily headaches of moderate severity for a few days after the Accident;
- \* the severity of the headaches has lessened since then, as has the frequency, with the headaches now occurring infrequently;

\* as a result of the Accident, Mr. Bal has suffered from anxiety, including driving-related anxiety, depression, and sleep disturbance; and

\* the anxiety and depression persist and continue to impact Mr. Bal on a daily basis but he manages the symptoms with coping mechanisms he learned through psychological counselling.

**55** As alluded to, the area of most significant dispute is the likelihood of improvement in Mr. Bal's condition. However, after carefully reviewing the evidence of Dr. Grover and Dr. Paramonoff, I conclude that there is only a slight difference in their opinions on this point. Dr. Grover expressed the opinion that Mr. Bal has "reached the point of maximal medical improvement" and he is likely to continue to suffer some degree of pain and functional impairment in his activities of daily living, ability to drive, and vocational abilities, permanently. Dr. Paramonoff is slightly more optimistic, expressing the view that Mr. Bal will likely experience moderate symptom improvement by building muscle strength. Dr. Grover acknowledged that improvement is a possibility but, in his view, not likely. The difference then is simply a matter of degree, with the probability of moderate improvement being less than even in Dr. Grover's view and more than even in Dr. Paramonoff's view, with Dr. Paramonoff nevertheless opining that even with improvement Mr. Bal will likely have a residual, permanent baseline of symptoms.

**56** I accept the prognosis of each of Dr. Grover and Dr. Paramonoff. I have no basis upon which to prefer one view over the other. I find that each reflects a real and substantial possibility, with equal probability of occurring. Accordingly, I find that there is a possibility of Mr. Bal's symptoms improving moderately, if he follows the exercise recommendations, and that it is equally probable that he will experience no material improvement even if he adheres to the recommended exercise program.

### **Non-pecuniary Damages**

**57** An award of non-pecuniary damages is intended to compensate for pain, suffering, and loss of enjoyment of life prior to the trial and into the future. In *Stapley v. Hejslet*, 2006 BCCA 34 at para. 46, leave to SCC ref'd, 31373 (19 October 2006), the Court of Appeal set out a non-exhaustive list of factors to be considered in determining the amount of non-pecuniary damages to award. That list includes the age of the plaintiff, the nature of the injury, the severity and duration of the pain, the extent of disability, the existence of emotional suffering, the loss or impairment of life, the impairment of relationships, the impairment of physical and mental abilities, and the loss of lifestyle. I have taken these factors into consideration.

**58** Awards of non-pecuniary damages in other cases provide a useful guide, however, the specific circumstances of each individual plaintiff must be considered. This is because any award of damages is intended to compensate for the pain and suffering experienced by a specific individual: *Stapley* at para. 45.

**59** I am satisfied that Mr. Bal's injuries have had a significant impact on his lifestyle and enjoyment of life. Again, I found him to be a stoic person who had the tendency to understate his symptoms and their effect. I accept the evidence of his brother about the changes in Mr. Bal's personality and activity level after the Accident.

**60** Before the Accident Mr. Bal was a happy person who lived an active, social, and pain-free life.

**61** As a result of the Accident, Mr. Bal endured a high level of pain for several months to a year. Five years post-Accident, he continues to endure less severe but still daily neck and back pain that is aggravated by sitting, standing, walking, twisting, fast movements, and bending. Although there is some possibility of improvement, that will require ongoing participation in a focussed exercise regime and he will almost certainly be left with a residual, permanent baseline of symptoms. He is a young adult who faces many years of ongoing daily pain.

**62** Before the Accident Mr. Bal was active. He regularly participated in martial arts and enjoyed recreational volleyball. His pain prevents him from engaging in these activities. It is possible that, irrespective of the Accident, his participation would have gradually declined to some extent as he aged but he has been forced to give up these pursuits prematurely. In addition, he now has to be constantly mindful of what he is doing and how he is moving, and he has had to adjust his daily routine to ensure he takes breaks and stretches throughout the day, all of which detracts from his enjoyment of life.

**63** Mr. Bal has suffered with anxiety and depression attributed to the Accident for years. I accept Dr. Pande's evidence that he is not functionally disabled in his vocational pursuits by his psychological symptoms, but this is due to his diligence in employing coping strategies, including a morning routine that takes an extra hour out of his day. I do not accept that Mr. Bal is not disabled in his daily living, recreation, or social activities by his psychological symptoms. I accept Gurjot Bal's evidence in this regard. Mr. Bal has indeed become withdrawn and isolated, with a significantly less active social life. There is some prospect of improvement with medication but the psychological symptoms have already had a significant impact on Mr. Bal's enjoyment of life.

**64** Mr. Bal seeks an award of between \$90,000 and \$120,000 for non-pecuniary damages. I considered the following cases cited by his counsel: *Hendry v. Ellis*, 2015 BCSC 1186 (\$75,000 awarded in non-pecuniary damages, or about \$88,000 when adjusted for inflation); *Larson v. Bahrami*, 2017 BCSC 2308 (\$80,000 awarded in non-pecuniary damages, or about \$92,000 when adjusted for inflation); *Werner v. Ondrus*, 2013 BCSC 100 (\$73,000 awarded in non-pecuniary damages, or about \$88,000 when adjusted for inflation); *McConvey v. Hart*, 2013 BCSC 1058 (\$80,000 awarded in non-pecuniary damages, or about \$97,000 when adjusted for inflation); *Moritz v. Schmitz*, 2013 BCSC 668 (\$80,000 awarded in non-pecuniary damages, or about \$97,000 when adjusted for inflation); *Sekhon v. Gill*, 2019 BCSC 811 (\$110,000 awarded in non-pecuniary damages, or about \$121,000 when adjusted for inflation); and *Zubek v. Clarkson*, 2000

BCSC 148, aff'd 2001 BCCA 282 (\$80,000 awarded in non-pecuniary damages, or about \$128,000 when adjusted for inflation).

**65** The defence submits that an award of \$55,000 to \$60,000 is more appropriate, citing the following cases: *Smith v. Evashkevich*, 2016 BCSC 1228 (\$50,000 awarded in non-pecuniary damages, or about \$58,000 when adjusted for inflation); *Jones v. McLerie*, 2016 BCSC 763 (\$45,000 awarded in non-pecuniary damages, or about \$52,000 when adjusted for inflation); *Liu v. Zhang*, 2019 BCSC 778 (\$60,000 awarded in non-pecuniary damages); *Cheema v. Bains*, 2021 BCSC 1766 (\$50,000 awarded in non-pecuniary damages); and *Jansson v. Malone*, 2021 BCSC 585 (\$55,000 awarded in non-pecuniary damages).

**66** All the cases cited by counsel concern plaintiffs who, in general terms, sustained physical injuries similar to those sustained by Mr. Bal. The most significant differences are the severity of the ongoing physical symptoms, the presence of psychological symptoms, and the impact of the ongoing symptoms on the plaintiff's enjoyment of life.

**67** The cases relied on by the defence concern plaintiffs with ongoing symptoms and impacts that were less severe than those of Mr. Bal. For example, in *Smith* it was not accepted that the accident caused an anxiety or depressive disorder; in *Jones* the plaintiff's life was impacted to a relatively minor extent and no material psychological symptoms were noted; and in *Cheema* the ongoing pain was found to come and go (whereas Mr. Bal has daily pain) and no material psychological symptoms were noted. The impact on the plaintiff's life in *Jansson* was similar to that of Mr. Bal, but Mr. Bal's prognosis is less optimistic.

**68** Some of the cases relied on by Mr. Bal concerned plaintiff's with more severe ongoing symptoms. These include *Sekhon* and *Zubek*. The cases I found most helpful as comparators are *McConvey* and *Moritz*.

**69** The most significant factors in this case are Mr. Bal's relatively young age, the severity and constancy of his ongoing pain, the likelihood (near certainty) that he will have to live with a residual baseline of pain permanently, and the impact on his life of the ongoing physical and psychological symptoms that must be managed with exercise and coping mechanisms that further affect his enjoyment of life. Having considered all the authorities, I assess Mr. Bal's non-pecuniary damages at \$95,000.

### **Past Loss of Income**

**70** A claim for past loss of income or income earning capacity is based on the value of the work the injured plaintiff would have performed but was unable to perform because of his injury: *Rowe v. Bobell Express Ltd.*, 2005 BCCA 141 at para. 30.

**71** The Accident occurred on August 22, 2017. There is no dispute that after the Accident Mr.

Bal missed a few days of work at K&H due to his injuries. He then quit his job to return to school in September 2017, which he would have done irrespective of the Accident.

**72** Mr. Bal calculates his past wage loss at \$1,375. This is based on the fact that there are 11 days between August 22 and 31, and evidence that establishes his average daily net earnings at K&H were \$125 (\$125 X 11). The defence estimates Mr. Bal missed one week of work and calculates his past wage loss at \$230.08 based on his average weekly earnings in 2016.

**73** Neither approach is entirely appropriate. Mr. Bal's approach assumes he would have worked each of the 11 days between August 22 and 31, 2017, but the record does not establish that he worked on weekends. There were only eight weekdays between August 22 and 31, 2017. The defence approach of using 2016 average weekly earnings is not appropriate because Mr. Bal did not start working at K&H until June 2016.

**74** I assess Mr. Bal's past income loss at \$1,000, which is based on a loss of eight days work and average daily earnings of \$125 per day.

### **Future Loss of Income Earning Capacity**

**75** The Court of Appeal has discussed the principles governing claims for loss of earning capacity in numerous cases. In the oft-cited decision of *Morgan v. Galbraith*, 2013 BCCA 305 at para. 53, the Court, citing its earlier decision in *Perren v. Lalari*, 2010 BCCA 140, described the approach as follows:

... in *Perren*, this Court held that a trial judge must first address the question of whether the plaintiff had proven a real and substantial possibility that his earning capacity had been impaired. If the plaintiff discharges that burden of proof, then the judge must turn to the assessment of damages. The assessment may be based on an earnings approach ... or the capital asset approach ...

[Emphasis in original.]

**76** In *Ploskon-Ciesla v. Brophy*, 2022 BCCA 217 at paras. 7-10, the Court of Appeal recently restated the operative principles which had previously been revisited in *Rab v. Prescott*, 2021 BCCA 345:

[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. Although the judge did not have the benefit of *Rab* when he wrote his reasons, the principles summarized therein are not novel; they have been the applicable law for a considerable time.

[9] I will repeat those principles here, drawing heavily on *Rab*. I do so because it is clear the judge did not undertake the requisite steps when assessing damages, nor did he make the findings of fact necessary to quantify an award. This dearth of analysis leaves us to speculate on the basis for the award, as it did in *Schenker v. Scott*, 2014 BCCA 203 at paras. 55-56.

[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.

**77** I have already summarized Mr. Bal's work history. It reflects a wide variety of relatively low paying jobs and an unsettled career path. His income tax returns show the following amounts of annual income in each of the years noted:

2012	\$3,865
2013	\$13,910
2014	\$11,422
2015	\$15,032
2016	\$11,044

2017      \$5,742

2018      \$23,903

2019      \$23,656 plus \$5,488 in employment insurance

2020      \$39,239

**78** Mr. Bal submits that he has established a potential future event that could lead to a loss of capacity; specifically, his ongoing, and likely permanent, back and neck pain.

**79** Mr. Bal submits that he has also established a real and substantial possibility that this will cause a pecuniary loss. In this respect he says the evidence establishes that as a result of his injuries he is unable to perform heavy labour, his performance at school (including post secondary) demonstrates he is unsuited to academics, which rules out many "white-collar" careers, and, as he gets older, he naturally would have turned to heavy labour in order to earn more income than he has historically earned.

**80** Mr. Bal submits that there is a high likelihood of this loss occurring given his relative youth, a work history that shows an inclination to change jobs often, and his poor academic prospects. He submits that the capital asset approach to quantifying the loss is most appropriate given the relatively large number of future contingencies and the fact that he is currently employed but has established a significant diminishment in his earning capacity as a capital asset. He seeks an award of between \$80,000 and \$120,000, which reflects two to three years' current annual income of about \$40,000.

**81** The defence says Mr. Bal has not established a potential future event that could lead to a loss of capacity. Defence counsel submits the Mr. Bal's ongoing pain is mild and not disabling, such that he can fully perform his job at COIT, and without a functional capacity evaluation he has not established that he is not capable of heavy labour. The defence submits that Dr. Grover's opinion that Mr. Bal will likely continue to suffer from reduced productivity and reduced employability for physically demanding jobs should be given no weight because it was based on his general experience with typical patients and lacks a reliable factual foundation.

**82** The defence says Mr. Bal has also failed to establish a real and substantial possibility that his ongoing back and neck pain will cause a pecuniary loss, emphasizing that Mr. Bal has been able to maintain a full-time position at the various jobs he has had since the Accident, and the absence of evidence that he ever had the intention of seeking a position involving heavy labour.

**83** I have no difficulty finding that Mr. Bal has met the first step in the three-step process for establishing a loss of future earning capacity. The fact that Mr. Bal is performing in his current job does not mean that his earning capacity has not been impaired. I do not require a functional capacity evaluation to conclude that ongoing, likely permanent back and neck pain that is aggravated by everyday, common movements and precludes heavier tasks, can give rise to a potential future loss of capacity. Mr. Bal testified that common movements like sitting, standing, walking, fast movements, heavy lifting, and bending over aggravate his pain. Dr. Paramonoff accepted in cross-examination that it would be reasonable for Mr. Bal to report an aggravation of pain due to such activities, although she qualified her agreement with the words "at this time". As noted, she also acknowledged that she expected only moderate improvement with the type of exercise program she recommended.

**84** Mr. Bal testified that he could not perform all the physical tasks associated with some of the work at Mercana and Radion. He has now ruled out heavy labour as a future career option. Mr. Bal was accommodated at both Mercana and Radion by being assigned to the forklift. At COIT he has been able to avoid heavy lifting. His credibility was not challenged and I accept his evidence about his functional limitations.

**85** Dr. Paramonoff expressed the view in her report that "there is no contraindication to work activities going forward", but I give this no weight in light of her agreement in cross-examination that Mr. Bal is in fact limited by his pain tolerance.

**86** The defence criticism of Dr. Grover's opinion is misplaced. Dr. Grover does not have a crystal ball - he is qualified to give an opinion about Mr. Bal's functional limitations based on his experience and expertise and Mr. Bal's subjective account. I accept his opinion that Mr. Bal's suitability for physically demanding jobs has been diminished.

**87** Mr. Bal's testimony about the nature and extent of his ongoing pain, the types of activities that aggravate it, the accommodations he received at Mercana and Radion, the nature of his work at COIT, and that he has now ruled out physical labour, considered together with Dr. Grover's opinion, is enough to satisfy me that the injuries Mr. Bal sustained in the Accident have limited his functional capacity leaving him unsuited to physically demanding jobs and that the limitations are likely permanent. As a result, he has been rendered less capable overall from earning income from all types of employment, he is less marketable or attractive as an employee to potential employers, has lost the ability to take advantage of all job opportunities that might otherwise have been open to him had he not been injured, and he has become less valuable to himself as a person capable of earning income in a competitive labour market (*Brown v. Golaiy* (1985), 26 B.C.L.R.

(3d) 353, 1985 CanLII 149 (S.C.)). There has been an impairment of the capital asset: see *Rab* at paras. 36 and 60.

**88** Moving to the second part of the test, for the reasons just stated I have found that the injuries Mr. Bal sustained in the Accident have limited his functional capacity leaving him unsuited to physically demanding jobs and that the limitations are likely permanent. However, that alone does not establish a real and substantial possibility that this will cause a pecuniary loss.

**89** At this stage, the material questions are whether there is a real and substantial possibility that but for the Accident Mr. Bal would have pursued a career involving heavy labour, and whether he would have earned more doing that than he will now earn. Bearing in mind that the threshold of real and substantial possibility is not as high as balance of probabilities, I am satisfied that the answer to both questions is yes. Mr. Bal's relatively young age, unsettled career path at the time of the Accident, history of relatively low earnings, poor academic performance, and testimony that he was open to a more physically demanding job is enough to persuade me that there is a real and substantial possibility that he would have gravitated toward a physically demanding job in order to increase his earnings even though he had not engaged in that kind of work prior to the Accident. Given the low earnings he has generated in the positions he has held to date (minimum wage or only slightly more than that), it is obvious that there is at least a real and substantial possibility he would have earned more in a heavy labour position, even in the absence of evidence of the specific earning potential of any particular position.

**90** I turn, finally, to assessing the likelihood of the loss occurring and quantifying the loss. I am not persuaded the likelihood is as high as Mr. Bal suggests. This is because he has proven to be a fairly successful salesperson, he has no experience working in a heavy labour position, and he acknowledged that he does not know if he would like that kind of work. If the Accident had not occurred there is a significant possibility that Mr. Bal would have pursued and succeeded in a career in sales and would not have contemplated a heavy labour position. In the circumstances, I assess the likelihood of the loss occurring as no better than moderate.

**91** As Mr. Bal is a plaintiff who is working and is earning more now than he was earning at the time of the Accident, the capital asset approach is appropriate for quantifying the loss: see *Rab* para 30. However, because, in my assessment, there is no more than a moderate likelihood of the loss occurring, I quantify it at one years' current earnings, or \$40,000.

### **Cost of Future Care**

**92** Mr. Bal's claim for damages for cost of future care was agreed to at \$2,920. This reflects the cost of 24 sessions with a kinesiologist (as recommended by Dr. Paramonoff), a gym pass (as recommended by Dr. Grover), and a trial of anti-anxiety or anti-depressive medications (as recommended by Dr. Pande).

### **Special Damages**

**93** Special damages have been agreed to at \$1,241.98.

**Conclusion**

**94** In summary, the damages awarded to Mr. Bal are:

Non-pecuniary damages: \$95,000

Past loss of income: \$1,000

Future loss of income earning capacity: \$40,000

Cost of future care: \$2,920

Special damages: \$1,241.98

Total: \$140,161.98

**95** Subject to further submissions, Mr. Bal is entitled to his costs. If the parties cannot agree or if there are circumstances of which I am unaware, they may make arrangements to speak to that issue.

L.A. WARREN J.

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