

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Ricketts v. Tatla*,
2023 BCSC 314

Date: 20230303
Docket: M181932
Registry: Vancouver

Between:

Wayne Manuel Ricketts

Plaintiff

And

Gurmeet Singh Tatla and Gurpreet Tatla

Defendants

Before: The Honourable Justice Basran

Reasons for Judgment

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Place and Dates of Trial:

Vancouver, B.C.
October 24–28, 31, and
November 1, 2022

Place and Date of Judgment:

Vancouver, B.C.
March 3, 2023

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Introduction

[1] On June 9, 2017, the plaintiff, Wayne Ricketts, was driving his 2003 Lincoln Navigator northbound on Osler Street, in Vancouver, BC. At the intersection of Osler Street and West 72nd Avenue, the defendant, Gurpreet Tatla, driving a vehicle owned by the defendant, Gurmeet Tatla, failed to stop at a stop sign and collided with Mr. Ricketts' vehicle (the "Accident"). At the outset of trial, the defendants admitted liability for the Accident.

[2] Mr. Ricketts was in good physical, mental, and emotional health prior to the Accident, which caused a concussion, chronic pain in his neck and back, as well as several cognitive and mental health problems.

[3] Mr. Ricketts seeks damages for his pain and suffering, past and future loss of income earning capacity, loss of housekeeping capacity, and cost of future care. He also seeks special damages.

[4] For the reasons that follow, I have concluded that Mr. Ricketts is entitled to:

a) Non-pecuniary damages:	\$130,000
b) Past loss of income-earning capacity:	\$4,000
c) Future loss of income-earning capacity:	\$458,411
d) Cost of future care:	\$10,000
e) Special damages:	<u>\$3,717</u>
Total:	<u>\$606,128</u>

[5] Mr. Ricketts is not entitled to damages in respect of loss of housekeeping capacity.

Credibility Assessment

Legal Principles

[6] It is useful to set out the principles governing credibility determinations. In assessing the truthfulness of the testimony of any witness, I am guided by the test set out in *Faryna v. Chorny*, [1952] 2 D.L.R. 354 at 357, 1951 CanLII 252 (B.C.C.A.):

[...]. In short, the real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions. [...]

[7] In assessing credibility, I will apply the factors described by Justice Dillon in *Bradshaw v. Stenner*, 2010 BCSC 1398 at para. 186, aff'd 2012 BCCA 296:

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

The Parties' Positions on Credibility

[8] Mr. Ricketts asserts that his evidence was not undermined on cross-examination and his testimony was consistent internally and with the other evidence adduced at trial. He did not exaggerate his condition and has pushed through his injuries despite his chronic pain.

[9] The defendants argue that Mr. Ricketts' credibility is questionable. They assert that he exaggerated the extent of his social activities prior to the Accident and that on one occasion, he told a counsellor that he had to switch jobs after the Accident due to its physically demanding duties, when, in fact, he continued doing the same type of work, bathtub reglazing, both pre- and post-Accident. The defendants also challenge Mr. Ricketts' statement made to Dr. Koo, a physiatrist, in written testing, that he could not sit for more than half an hour when in fact he sat for one hour and 20 minutes during his interview with Dr. Koo. They point out that Mr. Ricketts sat in court for an hour at a time.

Analysis of Mr. Ricketts' Credibility

[10] In my view, Mr. Ricketts' evidence was generally credible. He did not overstate his position, exaggerate his condition, or embellish his evidence. He made reasonable admissions and on the very few occasions when there was some inconsistency between the evidence at trial and the evidence he provided during examinations for discovery, he took responsibility for these inconsistencies and did not try to rationalize or justify them.

[11] His evidence was substantially consistent with the evidence provided by Lynn Munro, his common law spouse, and his former friends, Alexis Montero and Gladis Rivera.

[12] I disagree with the defendants' characterization that Mr. Ricketts exaggerated the extent of his social activities prior to the Accident. His description of the frequency, extent, and nature of these events was corroborated by Ms. Munro and it is substantially consistent with the evidence of Mr. Montero and Ms. Rivera. Importantly, they all agreed on the events that took place such as dinners together and salsa dancing, with only minor distinctions in their evidence on the frequency of some of these events. In the context of the whole of Mr. Ricketts' evidence, I have no concerns about these minor differences.

[13] My only concern in respect of Mr. Ricketts' credibility involves his failure to produce invoices in respect of his earnings as a bathtub reglazer from 2019 to 2022. He controls this information and he did not provide a reasonable explanation for not producing those invoices. As discussed later in these Reasons, I took his failure to provide these invoices into consideration in respect of his claim for damages for past loss of income earning capacity and I used a methodology that does not rely on this information in respect of the calculation of his future loss of income earning capacity. I am not satisfied that any further adverse inference is required as a consequence of his failure to produce these invoices.

[14] Aside from the invoices issue, Mr. Ricketts' evidence was generally credible because it was consistent internally and externally, forthright, moderate, rational,

and believable. I also accept the credibility of the evidence of Ms. Munro, Mr. Montero, and Ms. Rivera.

Non-Pecuniary Damages

Relevant Legal Principles

[15] Mr. Ricketts must prove that the Accident caused his injuries. He need not establish that the admitted negligence of the defendants was the sole cause of his injuries, but he must demonstrate a substantial connection between the Accident and his physical and psychological injuries: *Thompson v. Helgeson*, 2017 BCSC 927 at paras. 28–30.

[16] Some of the relevant factors in assessing non-pecuniary damages include:

- a) the plaintiff's age;
- b) nature of the injury;
- c) severity and duration of the pain;
- d) disability;
- e) emotional suffering;
- f) loss or impairment of life;
- g) impairment of family, marital, and social relationships;
- h) impairment of physical and mental abilities;
- i) loss of lifestyle; and
- j) the plaintiff's stoicism (as a factor that should not penalize the plaintiff)

See *Stapley v. Hejslet*, 2006 BCCA 34 at para. 46.

The Plaintiff's Position on Non-Pecuniary Damages

[17] Mr. Ricketts emphasizes that before the Accident, he had no physical limitations or any type of health issues. Since the Accident, he experiences constant and chronic pain that he will likely have for the rest of his life according to Dr. Koo and Dr. Hawkeswood, the two psychiatrists who testified at trial.

[18] These medical experts along with Dr. Jung, a clinical psychologist, also agree that Mr. Ricketts suffers from psychological injuries. Dr. Jung diagnosed Mr. Ricketts with an adjustment disorder with mixed mood and anxiety and a somatic symptom disorder. These psychological injuries are inextricably linked to Mr. Ricketts' chronic pain symptoms and his prognosis for resolution of these symptoms is guarded.

[19] Dr. Koo and Dr. Hawkeswood also agree that Mr. Ricketts suffers from light and sound sensitivity as well as problems with memory and concentration. His energy levels have decreased, his mood has worsened, he is often sad, and sometimes difficult to be around. Ms. Munro characterizes him as a different person after the Accident. He is stoic as evidenced by his continuation of a physically demanding job in order to meet his financial commitments.

[20] With respect to the quantum of his non-pecuniary damages, Mr. Ricketts relies on the following cases and submits that the Court should award him \$150,000 under this head of damage:

- *Verjee v. Dunbrak*, 2019 BCSC 1696 (\$150,000);
- *Hauk v. Shatzko*, 2020 BCSC 344 (\$150,000);
- *Hawkins v. Kumar*, 2019 BCSC 1896 (\$140,000); and
- *Vo v. Navarro*, 2021 BCSC 1534 (\$160,000).

The Defendants' Position on Non-Pecuniary Damages

[21] The defendants accept that Mr. Ricketts suffered some injuries as a result of the Accident and continues to suffer some symptoms. These include neck pain, chronic mechanical low back pain, headaches, and fatigue. They submit that he may have also suffered a mild concussion and some ongoing issues of anxiety and depression.

[22] With respect to the quantum of Mr. Ricketts' non-pecuniary damages, the defendants rely on the following cases and submit that he is entitled to \$80,000 under this head of damage:

- *Tyler v. Sowinski*, 2022 BCSC 878 (\$85,000);
- *Bucholtz v. Zhang*, 2020 BCSC 571 (\$85,000); and
- *Tang v. Duong*, 2020 BCSC 85 (\$80,000).

Findings of Fact on Non-Pecuniary Damages

Mr. Ricketts' Pre-Accident Condition

[23] Mr. Ricketts was born on February 10, 1966. He is currently 57 years old and was 51 at the time of the Accident.

[24] Prior to the Accident, Mr. Ricketts led an active life. He worked as a bathtub reglazer, frequently went for long walks with his partner, Ms. Munro, socialized with friends, and enjoyed hobbies in his workshop. Bathtub reglazing is physically demanding work that requires frequent bending, stooping, and lifting of equipment and materials.

[25] Mr. Ricketts was in good shape, and had no physical, cognitive, or psychological limitations prior to the Accident. Ms. Munro echoed this characterization of Mr. Ricketts' condition prior to the Accident. In the two years before the Accident, Mr. Ricketts did not have any medical appointments or require any prescription medication. He enjoyed going to bars, concerts, and comedy clubs.

[26] In addition to long walks with Ms. Munro, Mr. Ricketts played basketball, soccer, and tennis. For approximately a year, he took salsa dancing lessons.

[27] In 2001, Mr. Ricketts was involved in a motorcycle accident in which he sustained a fracture to his C5 vertebrae. Within 18 months, he made a full recovery and had no ongoing symptoms.

[28] In 2009, Mr. Ricketts began a relationship with Gladis Rivera. Their romantic relationship did not last long but they remained friends and he frequently socialized with her and her new partner, Alexis Montero. Mr. Ricketts developed a close relationship with Ms. Rivera's grandson, Diego. They frequently spent time together playing baseball, catch, soccer, and going to the park. Mr. Montero, Ms. Rivera's

husband, confirmed that Mr. Ricketts and Diego used to play soccer and basketball together when Diego was younger.

[29] Mr. Ricketts and Ms. Munro met in high school and reconnected in 2012. She moved to British Columbia in 2013 and they have lived together since then. Ms. Munro testified that she was attracted to Mr. Ricketts because of his carefree and fun-loving attitude. She recounted that prior to the Accident, he loved to laugh and play pranks. In addition to their frequent walks, they enjoyed camping trips, and spending time with friends.

Circumstances of the Accident

[30] On June 9, 2017, Mr. Ricketts was the driver and sole occupant of his 2003 Lincoln Navigator. Mr. Ricketts was travelling northbound on Osler Street in Vancouver, BC. While passing through the intersection of Osler Street and West 72nd Avenue, Gurpreet Tatla failed to stop at a stop sign prior to entering the intersection and collided with Mr. Ricketts' vehicle. The airbags in Mr. Ricketts vehicle deployed. The damage to both vehicles was significant and both were deemed to be a total loss.

Mr. Ricketts' Post-Accident Condition

[31] Immediately after the Accident, Mr. Ricketts experienced pain in his neck and back. He was also dazed and confused. Emergency responders stabilized his neck and removed him from his vehicle on a flat board and into an ambulance that took him to Vancouver General Hospital ("VGH").

[32] Mr. Ricketts recalls that in the immediate aftermath of the Accident, he was groggy, confused, in pain and was trying to catch his breath because the wind was knocked out of him. At VGH, he experienced intense pain in his neck, shoulders, and back.

[33] As an example of his confusion, when he got into a taxi after being discharged from VGH, he gave the taxi driver the address of the home he grew up in in Mississauga, Ontario instead of his residence in Vancouver. When he arrived at

his residence, he remained tired, sore, and confused. He experienced light and sound sensitivity and recalls that the taxi ride was excruciatingly painful because he could feel every little bump along the way.

[34] The day after the Accident, he was sore, groggy, dizzy, and sensitive to light and sound. The sound of car horns jolted him.

[35] After the Accident, Mr. Ricketts also experienced memory problems. For example, he forgot about an appointment at a concussion clinic. More recently, two weeks prior to the commencement of trial, he forgot about a dental appointment. These memory problems are unusual for Mr. Ricketts because he used to pride himself on having an excellent memory. He describes the problems with his memory as a daily struggle. He forgets how to do routine activities and where he puts things. He tries to compensate by writing things down and using a calendar board. None of this was necessary before the Accident.

[36] Mr. Ricketts sometimes loses his train of thought while speaking and does not recall what he was talking about. He also often has difficulty finding the words he wants to use while speaking. There was coherence between his description of these symptoms and his testimony at trial.

[37] Mr. Ricketts also continues to have light sensitivity. At any given time, he carries five or six pairs of sunglasses with him because he is unable to drive in bright conditions without wearing them but he often loses them.

[38] Mr. Ricketts frequently experiences pain symptoms since the Accident. He no longer enjoys doing most of the activities he did prior to the Accident. For example, he is unable to go for long walks or play any sports after a day of work because of a lack of energy and frequent and ongoing neck and back pain. Instead, when he returns from work, he lies down in bed in a room with blackout curtains, and sometimes does not get back up until the next day. Ms. Munro testified that when Mr. Ricketts comes home from work, she must turn off music and draw the blackout curtains because of his sensitivity to light and sound.

[39] Mr. Ricketts has ongoing cognitive symptoms since the Accident. He is forgetful, easily irritated, and short tempered. In addition to light and sound sensitivity, he continues to experience dizziness, headaches, and fluctuating pain in his neck and back, depending upon his workload. He has these symptoms every day.

[40] Many of Mr. Ricketts' relationships have suffered or severed since the Accident. For example, he had a falling out with his father, sister, Ms. Rivera, and Mr. Montero. He has become short tempered and irritable and this has caused strain on his long-term relationship with Ms. Munro.

[41] Mr. Ricketts' pain symptoms in his neck and back have not improved to any noticeable degree from the date of the Accident to present. He only obtains temporary relief from therapeutic treatments. His pain symptoms subside when he is not working and worsen when he does. The mechanical activity involved in his work as a bathtub reglazer triggers his pain symptoms.

[42] I do not think there is any merit to the argument that Mr. Ricketts' neck injury in 2001 contributed in anyway to his current symptoms. This is because there is no evidence that he suffered from pain symptoms between 2002 and 2017 after he recovered from this accident. I accept that he had fully recovered from this earlier accident prior to the subject Accident.

Medical Expert Evidence

Dr. Jung – Clinical Psychologist

[43] Dr. Jung is a registered clinical psychologist. He interviewed Mr. Ricketts in person on June 23 and 30, 2021 and conducted a telephone interview with Ms. Munro on July 6, 2021. He prepared an expert report dated August 13, 2021. In addition to interviewing Mr. Ricketts, Dr. Jung also administered several standardized psychological tests to him.

[44] Dr. Jung diagnosed Mr. Ricketts with adjustment disorder with mixed mood and anxiety and somatic symptom disorder with mild to moderate predominant pain.

These diagnoses are consistent with the physical injuries and ongoing pain symptoms experienced by Mr. Ricketts. Dr. Jung opines that the Accident caused these injuries.

[45] Dr. Jung further noted that Mr. Ricketts was active and healthy prior to the Accident but has become short tempered, sad, prone to daily outbursts, and less social than he was before the Accident. He exhibits symptoms of driving anxiety, dislikes large group social events, and feels pressure to keep working to maintain the payments on the house he bought in Powell River. Accordingly, his biggest concern is how much longer he will be able to work. He worries about his future.

[46] Dr. Jung also noted that Mr. Ricketts ruminates about negative events and his future. He finds it interesting that Mr. Ricketts continues to work because approximately 70% of those who ruminate to an extent similar to Mr. Ricketts do not work at all. This suggests that other factors, such as financial stress, are the reason that he keeps working at his current level.

[47] Dr. Jung's prognosis, the likelihood that Mr. Ricketts will return to his pre-Accident psychological state, is guarded. He recommends a medication review with a psychiatrist, 12 sessions of weekly psychological treatment, followed by three months of bi-monthly sessions, and up to 12 additional weekly sessions if his treatment recovery becomes protracted. Dr. Jung also recommends an evaluation by a physiatrist regarding Mr. Ricketts' response to rehabilitation and a referral to an occupational therapist to assess his functional limitations and possible further occupational therapy. He also notes that Mr. Ricketts may require a vocational assessment to identify his residual vocational skills and aptitude to identify areas of alternate work.

Dr. Koo – Physiatrist

[48] Dr. Koo is a qualified physical rehabilitation specialist. He assessed Mr. Ricketts on November 22, 2021 and produced an expert report dated December 7, 2021.

[49] Dr. Koo diagnosed Mr. Ricketts with the following injuries and conditions:

- a) concussion with chronic post concussive syndrome;
- b) whiplash soft tissue injuries to the cervical, thoracic, and lumbar spine and shoulders;
- c) moderate depressed mood and anxiety; and
- d) pain and anxiety related insomnia.

[50] Based on Mr. Ricketts' description of a constellation of symptoms including headaches, dizziness, nausea, vomiting, noise sensitivity, sleep disturbance, fatigue, sadness, frustration, impatience, forgetfulness, poor concentration, blurred vision, light sensitivity and restlessness, Dr. Koo concluded that Mr. Ricketts probably sustained a concussion caused by the Accident.

[51] In Dr. Koo's opinion, the majority of Mr. Ricketts' post-Accident emotional, cognitive, and physical concerns are related to his concussion resulting in chronic post concussion syndrome. He also concluded that Mr. Ricketts' post-Accident emotional deterioration was caused by the Accident, as shown by his reduced vocational tolerance, financial stresses, chronic pain, chronic sleep disruption, recurring headaches, and loss of pleasurable recreational activities and ability to contribute to household management.

[52] Dr. Koo found that Mr. Ricketts developed chronic disturbed sleep from the Accident, which is also likely contributing to his daytime fatigue, reduced durability to carry out his normal work and vocational activities, as well as lowered emotional resilience. He believes that Mr. Ricketts likely has chronic cervical strain associated with neck pain aggravation. He also finds that there is evidence of soft tissue injury in Mr. Ricketts' lower back. Dr. Koo found that the Accident caused Mr. Ricketts' injuries.

[53] Dr. Koo opines that the recurrent aggravation caused by Mr. Ricketts' inappropriate work demands, that exceed his current musculoskeletal limitations, are the most significant aggravator and the likely perpetuator of his chronic soft tissue

injuries. Dr. Koo notes that the significant improvement in Mr. Ricketts' neck and back pain in the two months he took off during the beginning of the COVID-19 pandemic, and the consistent improvement in his neck and back pain during the week of recuperation that he now intersperses with three weeks of full-time work, is strong evidence that Mr. Ricketts' ongoing work as a bathtub reglazer is likely to be poorly tolerated in the long run, carries a significant risk for recurring pain aggravation and reduced quality of life, and will negatively impact his non-vocational activity tolerances.

[54] Dr. Koo found that Mr. Ricketts' pain aggravation contributes to his recurring headaches and also interferes with the quality of his sleep. He believes that Mr. Ricketts may be capable of continuing to work as a bathtub reglazer working four days per week, on an ongoing basis, with a rest day midweek. If, however, he retrains into a sedentary-to-light strength occupation, he may be capable of maintaining full-time employment. For this reason, Dr. Koo strongly recommends that a vocational rehabilitation consultant be engaged to look at retraining options that are more appropriate to Mr. Ricketts in light of his chronic soft tissue injuries and post concussive symptoms in order to minimize his pain symptoms.

[55] Dr. Koo characterizes Mr. Ricketts' overall level of disability as severe. This is because the effort necessary to sustain his work prevents him from engaging in most other activities. He has to lie down for an hour or two after work and is not able to manage his non-work obligations. He prioritizes work because of his financial obligations. However, if he were to change to a more appropriate occupation that accommodates his long-term injuries and physical restrictions, his capacity to return to some vocational activities would be good.

[56] Dr. Koo's prognosis regarding Mr. Ricketts' residual mechanical neck and back pain is poor, given the duration and severity of his pain and stiffness to date, and in the context of his ongoing aggravation through regular and poorly suited employment. If he continues to work as a bathtub reglazer, Dr. Koo does not foresee a significant improvement in Mr. Ricketts' pattern of relapsing and remitting pain.

[57] Similarly, the persistence of Mr. Ricketts' post concussive symptoms is likely related to his employment as a bathtub reglazer.

[58] Dr. Koo recommends that Mr. Ricketts be provided with access to a vocational rehabilitation consultant to explore long-term employment opportunities that are more durable and consistent with his physical limitations. He also recommends that he be referred to an otolaryngologist with experience in noise sensitivity and hyperacusis management. In his opinion, Mr. Ricketts may also benefit from a trial of Botox injections if he experiences headaches that exceed more than 15 days per month. Dr. Koo also recommends ongoing psychological counselling and referral to a neuro-optometrist for a functional vision assessment.

[59] Dr. Koo recommends that Mr. Ricketts engage in an active rehabilitation program for 18 to 24 sessions in order to improve his strength, flexibility, endurance and cardiovascular fitness. After these sessions, he should do an independent exercise program with access to a gym, pool pass, and home exercise equipment.

[60] Dr. Koo further recommends the ongoing use of massage therapy, osteopathy, chiropractic treatment, acupuncture and/or physiotherapy to help reduce his pain and stiffness. He recommends these treatments be applied every one to two weeks on a rotational basis for one year if he is able to find suitable alternative employment, and on an ongoing basis for as long as he continues working as a bathtub reglazer.

[61] In response to the evidence of Dr. Hawkeswood that Mr. Ricketts is better off working as opposed to remaining sedentary, Dr. Koo responds that he needs parameters around his work activities because excessive and physically demanding work is not good for him over a sustained period of time, but neither is immobility. He needs to remain active within these two extremes.

[62] Mr. Ricketts' memory problems caused by the Accident are consistent with him forgetting about his concussion clinic appointment. Concussions can cause memory problems, as can a lack of sleep and headaches. It is notable that he forgot

about this appointment within the three months after the Accident, because this is the period when the concussion symptoms are typically most pronounced.

Dr. Hawkeswood – Physiatrist

[63] Dr. Hawkeswood is also a qualified physical and rehabilitation specialist. He evaluated Mr. Ricketts on January 9, 2020 and produced an expert report dated January 24, 2020.

[64] Dr. Hawkeswood diagnosed Mr. Ricketts with a Grade 2 whiplash associated disorder affecting the cervical, thoracic, and lumbar spines. He found that Mr. Ricketts has mechanical neck pain, upper thoracic strain, and generalized low back pain. He also diagnosed a mild concussion that “probably resolved completely” and headaches. He also found that Mr. Ricketts probably meets the DSM-V criteria for depression, somatic symptom disorder with pain, and a generalized pain disorder. Dr. Hawkeswood concluded that the Accident caused Mr. Ricketts’ injuries.

[65] Dr. Hawkeswood did not recommend “ongoing regular allied health treatments” which I interpret as physiotherapy, massage therapy, chiropractic treatments, and active rehabilitation. He did recommend that Mr. Ricketts obtain a gym pass.

[66] Dr. Hawkeswood opined that Mr. Ricketts’ prognosis for a complete recovery from the Accident was unlikely due to his chronic neck pain, but concluded that he has not yet reached “maximal medical recovery” and could do so by improving his conditioning and reducing the amount of tension in his body. He found that Mr. Ricketts does not have any household limitations and encouraged him to return to playing tennis and salsa dancing in a cautious and gradual manner.

[67] Dr. Hawkeswood also encouraged Mr. Ricketts to remain active by continuing to work and by keeping active on weekends. He found that there was no orthopaedic or neurological injury that would indicate that Mr. Ricketts is at increased risk of lifetime disability on account of the Accident, and therefore it will probably have a limited impact on his working career.

[68] Dr. Hawkeswood's expert report largely ignores Mr. Ricketts' chronic pain symptoms.

Analysis of Non-Pecuniary Damages

[69] Prior to the Accident, Mr. Ricketts was physically active, fun-loving and engaging. He enjoyed sports, music, dancing, and socializing with friends. He had several close relationships, including with Diego, and enjoyed playing sports and doing other physical activities with him. He also enjoyed doing hobbies in his rented workshop, including working on his motorbikes.

[70] The medical experts agree that Mr. Ricketts sustained physical, cognitive, and psychological injuries as a result of the Accident. Dr. Koo and Dr. Hawkeswood diagnosed Mr. Ricketts with the following injuries:

- a) concussion;
- b) chronic mechanical neck and back pain;
- c) cervicogenic headaches; and
- d) depressed mood and anxiety.

[71] Dr. Koo and Dr. Hawkeswood agree that Mr. Ricketts' prognosis for a full recovery is guarded and they expect him to experience ongoing pain in his neck and back for the foreseeable future. I prefer the detailed and thorough opinion of Dr. Koo to that provided by Dr. Hawkeswood, primarily because Dr. Koo dealt with Mr. Ricketts' pain symptoms whereas Dr. Hawkeswood identified these symptoms but did not incorporate them into his analysis of Mr. Ricketts' prognosis.

[72] The Accident dramatically and negatively affected Mr. Ricketts' life. In addition to the chronic pain he experiences in his neck and back, he lacks energy and is short-tempered with those who are closest to him, including Ms. Munro. He experiences light and sound sensitivity and, as a consequence, he no longer socializes in bars, restaurants, or comedy clubs.

[73] Mr. Ricketts has problems with concentration and memory that he did not have prior to the Accident. For example, when reglazing bathtubs, he sometimes forgets which stages of the reglazing process he has already completed.

[74] Mr. Ricketts also suffers from psychological injuries such as depression, somatic symptom disorder, and adjustment disorder, as diagnosed by Dr. Jung. This once jovial and fun-loving individual now suffers mood issues and irritability that has negatively affected his relationships with Ms. Munro, his family, and other friends. He now lives a fairly quiet existence with very little socializing, because he has neither the energy nor the patience to be with others.

[75] I reject the defendants' assertion that Mr. Ricketts failed to mitigate his damages because he missed a single medical appointment. I also reject the assertion that he ought to retrain to take on a different, less physically demanding vocation. Mr. Ricketts has been reglazing bathtubs for almost twenty years and by all accounts, he is very good at his chosen work. Notwithstanding the physical nature of this work, it is difficult to imagine that he would be able to retrain at this relatively late stage of his career and earn a similar income. In my view, given his financial circumstances, age, and experience, it is unrealistic to expect that Mr. Ricketts will retrain and start a new career.

[76] As a result of the Accident, Mr. Ricketts is a fundamentally different person physically, mentally, cognitively, and socially. Having considered all of the relevant cases referred to by the parties and taking into account Mr. Ricketts' circumstances and prognosis, I conclude that he is entitled to \$130,000 in damages for pain and suffering caused by the Accident.

Loss of Income-Earning Capacity

Factual Findings

[77] Mr. Ricketts began working as a bathtub reglazer in 2004 when his father bought a business that performs this service. This physically demanding work involves bending, stooping, and kneeling, while spraying, wiping, and refinishing old

bathtubs. It also requires heavy equipment and tools that must be transported into the apartment or home in which the work is performed.

[78] Starting in approximately 2006, Mr. Ricketts worked full-time as a subcontractor for his father's bathtub reglazing business, Mr. Tubman. He earned approximately \$230 to \$250 for each bathtub he reglazed and sometimes more if the tub required stripping.

[79] In 2012, in addition to his full-time work with Mr. Tubman, he also began doing some bathtub reglazing jobs for KB Bathtub Savers ("KB"). KB is owned and operated by Karlo Banicevic. Following an argument with his father, Mr. Ricketts began working exclusively for KB in August 2018.

[80] Following the Accident, Mr. Ricketts took parts of three weeks off but then returned to work full-time despite his ongoing pain symptoms. He had recently purchased a home in Powell River and felt compelled to return to work because Ms. Rivera had co-signed the mortgage on this property and he wanted to ensure that he could continue to make the required payments.

[81] Mr. Ricketts experienced some relief from his pain symptoms when he did not work for two months in 2020 due to the COVID-19 pandemic. Based on this experience, when he returned to work, he asked Mr. Banicevic for a revised work schedule in which he works six days per week for three weeks followed by a week of rest. Mr. Banicevic acceded to this request because Mr. Ricketts does high quality, "almost perfect" work and Mr. Banicevic wanted to retain his services. Mr. Banicevic testified that he has plenty of work for Mr. Ricketts and that he could schedule him to work every week. However, Mr. Banicevic accommodates him because he is aware that Mr. Ricketts requires every fourth week off to rest and recover from his ongoing pain symptoms.

[82] Mr. Ricketts provided invoices for the number of bathtub reglazing jobs he completed from 2015 to 2018:

Year	Number of Invoices
2015	238
2016	218
2017	205
2018	172

[83] Puzzlingly, Mr. Ricketts did not provide these types of invoices for 2019 to 2022. He also did not provide an explanation for failing to provide this information.

[84] Mr. Ricketts' gross and net business income from 2015 to 2021 was:

Year	Gross Business Income	Net Business Income
2015	\$65,573	\$24,240
2016	\$72,236	\$25,021
2017	\$69,212	\$28,065
2018	\$81,077	\$47,278
2019	\$124,256	\$86,476
2020	\$120,930	\$83,298
2021	\$116,673	\$81,319

[85] In my view, using the average of Mr. Ricketts' net business income for 2019 to 2021 is a reasonable basis for calculating his future loss of income-earning capacity. This is because these are the three most recent years in which he earned income from operating his business. I decline to further reduce this income in light of his failure to produce invoices for these years because his income reporting presumably takes into account all of his business activities for those years. The average net business income earned by Mr. Ricketts from 2019 to 2021 was \$83,698.

[86] Mr. Ricketts enjoys physical labour and has no interest or experience in operating his own bathtub reglazing business. He prefers working as a subcontractor.

[87] Both Dr. Koo and Dr. Hawkeswood agree that Mr. Ricketts should reduce his work as a bathtub reglazer given that his job demands create ongoing pain symptoms in his neck and back that are alleviated when he is not working.

Functional Capacity Evaluation

[88] Andrew Hosking is a qualified physiotherapist. He evaluated Mr. Ricketts on August 4, 2021 and prepared an expert report dated September 1, 2021.

[89] Based on testing conducted by Mr. Hosking, he concluded that Mr. Ricketts demonstrated functional limitations in his ability to durably work as a bathtub reglazer and requires accommodations to continue doing this type of work. Specifically, he observed that Mr. Ricketts exhibits consistent limitations for activities that require stooping, standing, or kneeling. Based on video evidence at trial, these are positions and postures that Mr. Ricketts frequently assumes while working as a bathtub reglazer. Mr. Hosking noted that during testing, Mr. Ricketts showed clear signs of fatigue when in these positions for extended periods of time. Mr. Hosking acknowledges that Mr. Ricketts is able to do this work but his observations suggest that Mr. Ricketts will not be able to do so durably over a long period of time without intermittent breaks. This is because the cumulative effect of these postures causes fatigue.

[90] Mr. Hosking opined that Mr. Rickett's ongoing fatigue indicates that he currently works at a level that exceeds his durable capacity. He opines that Mr. Ricketts, therefore, has a high probability of reaching a point of inability to remain durably employed in his current role. These limitations reduce his ability to work in his current job so he has reduced competitive employability.

[91] Mr. Hosking found that Mr. Ricketts provided a consistent and full physical effort during the evaluation and his self reports of pain and his perceived level of

disability are generally consistent with the evaluation findings and are therefore considered reliable.

[92] Mr. Hosking also found that Mr. Ricketts does not meet the full physical demands for regular and seasonal household cleaning and he requires assistance with these activities. This finding was based on the testing conducted at Mr. Hosking's office. He did not assess Mr. Ricketts' ability to do this type of work in his own home.

[93] Mr. Hosking recommended six to eight sessions of physiotherapy to stabilize Mr. Ricketts' spine as well as active rehabilitation with a kinesiologist. He also recommends assistance with heavier and seasonal cleaning.

Past Loss of Income-Earning Capacity

Relevant Legal Principles

[94] The principles applicable to the assessment for past loss of income-earning capacity are:

- a) An assessment of a loss of income involves a consideration of hypothetical events.
- b) The plaintiff need not prove these hypothetical events on a balance of probabilities.
- c) A hypothetical possibility will be taken into account provided that the plaintiff establishes that it is a real and substantial possibility, and not mere speculation.
- d) Once a hypothetical possibility is established, the court must consider the likelihood of the event occurring in determining the measure of damages.
- e) A causal connection must be established, on a balance of probabilities, between the Accident and the pecuniary loss claimed.
- f) It is up to the trial judge to determine what approach to use to quantify the loss (i.e., an earnings approach or a capital asset approach).

See: *Grewal v. Naumann*, 2017 BCCA 158 at para. 48 (Goepel J.A. in dissent, but not on this point); *Smith v. Knudsen*, 2004 BCCA 613 at paras. 36–37; *Laxdal v. Robbins*, 2010 BCCA 565 at paras. 19–20.

[95] In *Rab v. Prescott*, 2021 BCCA 345 at para. 47, the court set out a three-step process to assess damages for the loss of future earning capacity:

- a) Whether the evidence discloses a potential future event that could lead to a loss of capacity?
- b) Whether, on the evidence, there is a real and substantial possibility that the future event in question will cause a pecuniary loss?
- c) If yes, the court must assess the value of that possible future loss, which must include assessing the relative likelihood of the possibility occurring.

[96] This three-step process applies to both past and future income earning capacity claims: *Siu v. Regehr*, 2022 BCSC 1876 at paras. 162–163.

[97] A contingency deduction to a past loss of income-earning capacity may be appropriate where the material risk impairs the plaintiff's ability to maintain employment regardless of the Accident: *Dornan v. Silva*, 2021 BCCA 228 at paras. 81–84; *Hussack v. Chilliwack School District No. 33*, 2011 BCCA 258 at paras. 100–102.

The Parties' Positions on Past Loss of Income-Earning Capacity

[98] Mr. Ricketts suggests that since the Accident, he has worked 25% less than he otherwise would have based on a review of the number of invoiced jobs he completed in 2015 and 2016 as compared to 2017 and 2018. He suggests this is in line with his decision to work three out of every four weeks. Based on his average net business incomes from 2018 to 2022, Mr. Ricketts asserts that his past loss of income-earning capacity is 25% of his net business earnings since the Accident, \$95,717.

[99] The defendants submit that Mr. Ricketts is entitled to two days of compensation for the days he actually missed following the Accident. Based on

average invoiced earnings of \$300 per day, the defence contends that Mr. Ricketts' past wage loss is \$600.

Analysis of Past Loss of Income-Earning Capacity

[100] To reiterate, Mr. Ricketts did not provide invoice information for the bathtub reglazing jobs he completed from 2019 to 2022. This information is in his control and he did not provide an explanation for his failure to produce it. In the absence of the invoices for the past four years, I am not prepared to accept his assertion that he has worked 25% less than he otherwise would have.

[101] I accept that Mr. Ricketts works three out of every four weeks but I note that he works six days a week during those three weeks. This suggests that he works 18 days in every four-week cycle as compared to 20 days per cycle prior to the Accident. This is akin to an approximate ten percent reduction in the number of days he works but it is unclear if this results in a lower number of jobs completed. Again, this cannot be ascertained because Mr. Ricketts did not provide invoices detailing the work he has completed over the past four years from 2019 to 2022, whereas he provided this information in respect of the previous four-year period from 2015 to 2018.

[102] Notably, Mr. Ricketts' net business income from bathtub reglazing has increased substantially in the years since the Accident. I accept that part of this increase is attributable to Mr. Banicevic paying him more per job than he earned when he worked for his father's company. However, in the absence of invoice information that describes how many jobs he completed from 2019 to 2022, and at what rate, I am not prepared to accept that there is a real and substantial possibility that Mr. Ricketts experienced any significant loss of past income earning capacity aside from the income he did not receive in the immediate aftermath of the Accident.

[103] I accept Mr. Ricketts' evidence that he took a day off after the Accident, worked alternating days for the following two weeks with assistance from Mr. Montero, took another full week off, then returned to work full-time. Mr. Ricketts is therefore entitled to \$4,000 in damages for past loss of income-earning capacity

based on estimated earnings of \$300 per day and taking into account the amounts he paid to Mr. Montero for assisting him during the period when he worked alternating days.

Future Loss of Income-Earning Capacity

Relevant Legal Principles

[104] The court’s assessment of a plaintiff’s future loss of income-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. The court engages in an assessment that depends on the type and severity of a plaintiff’s injuries, and the nature of the anticipated employment at issue. Economic and statistical evidence provides a useful tool to assist in determining what is fair and reasonable in the circumstances: *Ploskon-Ciesla v. Brophy*, 2022 BCCA 217 at para. 7.

[105] As noted earlier in these Reasons, in *Rab* at para. 47, the court set out a three-step process to assess damages for the future loss of income-earning capacity:

- a) Whether the evidence discloses a potential future event that could lead to a loss of capacity?
- b) Whether, on the evidence, there is a real and substantial possibility that the future event in question will cause a pecuniary loss?
- c) If yes, the court must assess the value of that possible future loss, which must include assessing the relative likelihood of the possibility occurring.

[106] The third step may involve either the “earnings approach” or the “capital asset approach”. The earnings approach is often appropriate where there is an identifiable loss of income at the time of trial. The capital asset approach is appropriate where the plaintiff suffered a loss of a capital asset rather than a loss of earning capacity. It is also helpful when a plaintiff has yet to establish a settled career path as it creates a more holistic picture of a plaintiff’s potential future: *Ploskon-Ciesla* at paras. 16–17.

[107] In *Dornan*, Justice Grauer stated that in undertaking the analysis of positive and negative contingencies, courts are required to assess what happened to the

plaintiff in the past, proven on a balance of probabilities. Then, they are required to assess what might happen to a plaintiff in the future. Courts can only consider future possibilities to the extent that they are real and substantial possibilities: *Dornan* at para. 94.

The Parties' Positions on Future Loss of Income-Earning Capacity

[108] Mr. Ricketts asserts that he has a chronic injury that renders him less capable of earning income, less marketable to potential employers, unable to take advantage of all job opportunities, and 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.).

[109] Mr. Ricketts contends that he is currently working 25% less because of his ongoing pain symptoms caused by the Accident and this may increase to a 50% reduction in his work capacity during the rest of his working life. Furthermore, he asserts that he intended to work until he reaches the age of 70 to 75 but because of the injuries he sustained in the Accident, he will probably have to retire earlier than he expected.

[110] Based on various scenarios, Mr. Ricketts estimates his future loss of income-earning capacity to be in the range of \$921,000 to \$1,382,000, less a 20% contingency based on the possibility that he may not have worked until he reaches age 70 absent the Accident.

[111] The defendants deny that Mr. Ricketts is entitled to damages for future loss of income-earning capacity, because in their view, the evidence does not show a real and substantial possibility that he will suffer a loss of income-earning capacity. The defendants also speculate that he could transition to running a bathtub reglazing business instead of doing the physical work himself.

[112] Alternatively, the defendants suggest that if the Court finds that Mr. Ricketts' back pain amounts to a loss of his capacity to earn income in the future, this case should be assessed as the loss of a capital asset. On this basis, Mr. Ricketts ought

to receive two years of his pre-Accident earnings, reduced by 15% to account for the contingency that he would have suffered chronic back pain in any event, given the physical nature of his work. The defendants therefore conclude that Mr. Ricketts future loss of income-earning capacity is \$117,300 based on two years of pre-Accident annual gross income of \$69,000 less a 15% contingency.

Analysis of Future Loss of Income-Earning Capacity

[113] Based on the findings of Mr. Hosking, as confirmed by the diagnoses of Dr. Koo and Dr. Hawkeswood, I am satisfied that the injuries sustained by Mr. Ricketts in the Accident, particularly the ongoing chronic pain in his neck and back, raises a real and substantial possibility that he will have to retire earlier than expected from his work as a bathtub reglazer, thereby causing a pecuniary loss.

[114] Prior to the Accident, Mr. Ricketts enjoyed the physical nature of his work and he took pride in doing it well. At the age of 51, he took on a substantial obligation by purchasing a house on a quarter-acre lot in Powell River. This purchase closed on June 30, 2017, nine days before the Accident occurred.

[115] I am satisfied that he intended to work until the age of 70 as a bathtub reglazer and there is no evidence, beyond mere speculation, that suggests otherwise. He is the primary income earner in his household and aside from some rental income from his Powell River residence, he does not have any other source of income. Mr. Ricketts' father worked into his seventies and I am satisfied that Mr. Ricketts would have done likewise but for the Accident.

[116] As described in detail earlier in these Reasons, Mr. Ricketts sustained several physical, mental, and cognitive injuries in the Accident. The medical experts agree that his condition is unlikely to improve. I accept Mr. Hosking's conclusion, as supported by the aforementioned doctors, that Mr. Ricketts will not be able to durably continue working as a bathtub reglazer for as long as he previously expected.

[117] The assertion that he could transition to operating a bathtub glazing business thereby relieving himself of the burden of doing this physical work is without foundation. By his own admission, administrative work does not suit him and there is nothing in his background or experience to suggest that he has the skills and acumen to run his own business.

[118] In my view, the earnings approach is appropriate in the circumstances of this case because Mr. Ricketts had a well established career path and earnings history.

[119] Where no economic opinion evidence is provided, it is appropriate for the Court to apply the multipliers found at Appendix E of CIVJI: Civil Jury Instructions, 2nd ed. (Vancouver: Continuing Legal Education Society of British Columbia, 2009) (loose-leaf 2021 update) in order to quantify the present value of future losses: *Dunn v. Heise*, 2021 BCSC 754 at paras. 202–03.

[120] Mr. Ricketts' work is physically demanding and it takes a significant toll on him. I accept the opinions of Dr. Koo and Mr. Hosking that Mr. Ricketts is unlikely to durably sustain this work for as long as he had originally intended. In my view, Mr. Ricketts is likely to continue working until he is approximately 62 years old but will have to retire eight years earlier than he expected because of the injuries he sustained in the Accident. But for the Accident, he probably would have worked until he turned 70.

[121] Mr. Ricketts is therefore entitled to the present value of eight years of his net business income in respect of his anticipated earnings from the ages of 62 to 70. On this basis, he is entitled to present value factor of 12.5434 (year 14 at age 70 at 1.5% discount rate) - 5.6972 (year 6 at age 62 at 1.5% discount rate) = 6.8462. Multiplying that by an annual net business income of \$83,698, the present value is \$573,013.

[122] I accept Mr. Ricketts' assertion that a fair reduction for contingencies is 20% based on the possibility that he may not have worked to age 70.

[123] Mr. Ricketts is therefore entitled to \$458,411 in damages for future loss of income-earning capacity.

Loss of Housekeeping Capacity

Relevant Legal Principles

[124] The principles applicable to the loss of housekeeping capacity are:

- Loss of housekeeping capacity may be treated as a pecuniary or non-pecuniary award. This is a question of discretion for the trial judge.
- A plaintiff who has suffered an injury that would make a reasonable person in the same circumstances unable to perform usual and necessary household work is entitled to compensation for that loss by way of pecuniary damages.
- Where the loss is more in keeping with a loss of amenities or increased pain and suffering while performing household work, a non-pecuniary damages award may instead compensate the loss.
- As the award is intended to reflect the loss of a capacity, the plaintiff is entitled to compensation whether or not replacement services are actually purchased.
- Evidence of the loss of housekeeping capacity is provided by the work being performed by others, even if done gratuitously.

See: *McTavish v. MacGillivray*, 2000 BCCA 164 at para. 63; *Kim v. Lin*, 2018 BCCA 77 at paras. 28–34.

The Parties' Positions on Loss of Housekeeping Capacity

[125] Mr. Ricketts relies on Mr. Hosking's finding that he does not meet the physical requirements for regular and seasonal household cleaning and Ms. Munro's evidence, along with his own, that she does most of the housekeeping chores. He seeks \$3,000 per year for ten years for a total damages award of \$30,000 in respect of lost housekeeping capacity.

[126] The defendants point out that Mr. Ricketts completed renovations and upgrades to the Powell River home he purchased and therefore submit that he is capable of doing household cleaning. He has therefore not proven his claim for

damages in respect of this head of damages. The defendants further submit that any loss of housekeeping capacity ought to be subsumed into the damages award for pain and suffering.

Factual Findings and Analysis on Loss of Housekeeping Capacity

[127] Mr. Ricketts performs physically demanding work. I recognize the financial imperative he faces in continuing to do this work but I am not convinced that he lacks the physical capacity to do household maintenance. He built a fence on his Powell River property and completed other work on this residence. This suggests that he chooses not to do household work and Ms. Munro did not testify that he is unable to assist with household chores.

[128] In my view, to whatever extent Mr. Ricketts is unable to do household work, this is more in keeping with a loss of amenities or increased pain and suffering while doing this type of work and it has been compensated in the award for non-pecuniary damages. Therefore, Mr. Ricketts is not entitled to additional damages for loss of housekeeping capacity.

COST OF FUTURE CARE

Relevant Legal Principles

[129] The principles applicable to the assessment of cost of future care are:

- a) Providing adequate damages for future care of an injured plaintiff is of paramount importance.
- b) The purpose of such an award is to provide for assistance directly related to the injuries caused by the accident.
- c) The test for determining an appropriate award is an objective one based on medical evidence.
- d) The focus should be on the plaintiff, with fairness to the other party being achieved by ensuring that the expenses are legitimate and justifiable.
- e) The plaintiff needs to show: (a) a medical justification for the items claimed; and (b) that the amount claimed is reasonable.
- f) “Medical justification” is broader than “medically necessary”.

- g) Medical experts need not expressly approve specific items of future care; it is sufficient if the totality of the evidence supports the award for specific items.
- h) Common sense should be employed in this assessment.
- i) No award should be included for items that would be incurred in the absence of the accident.

See: *Thompson* at para. 149.

The Parties' Positions on Cost of Future Care

[130] Mr. Ricketts asserts that he has incurred \$13,822 in treatments, medications, and counselling over the past five years since the Accident. He further notes that in their respective reports, Dr. Koo, Dr. Hawkeswood, and Mr. Hosking recommended vocational rehabilitation, Botox injections, psychological counselling, active rehabilitation, a gym membership, and physiotherapy. Mr. Ricketts claims \$10,000 for the costs of future care to cover the cost of physiotherapy, active rehabilitation, counselling, a gym pass, and medications.

[131] The parties agree that Mr. Ricketts will need up to 18 sessions with a registered psychologist. Dr. Hawkeswood indicated that Mr. Ricketts may need an exercise bicycle and a gym pass to facilitate aerobic activity. Dr. Koo recommended some ongoing physiotherapy, massage therapy, chiropractic treatment and osteopathy. The defendants submit that Mr. Ricketts is entitled to \$12,000 for the costs of future care.

Factual Findings and Analysis of Cost of Future Care

[132] Mr. Ricketts attended approximately 86 physiotherapy sessions, six active rehabilitation sessions, and eight counselling sessions between the date of the Accident and the first day of trial.

[133] I accept Mr. Ricketts claim for \$10,000 for the costs of physiotherapy, active rehabilitation, counselling, a gym pass, and medications. He is entitled to this

amount in respect of the cost of future care because these items are both reasonable and medically justified in the circumstances of this case.

SPECIAL DAMAGES

[134] The parties agree that Mr. Ricketts is entitled to \$3,717 for special damages. This consists of \$3,296 in amounts spent by Mr. Ricketts attributable to special damages as well as repayment of benefits in the amount of \$421 to Pacific Blue Cross pursuant to a subrogation agreement.

CONCLUSION

[135] Mr. Ricketts is entitled to a damages award of \$606,128 consisting of:

a) Non-pecuniary damages:	\$130,000
b) Past loss of income-earning capacity:	\$4,000
c) Future loss of income-earning capacity:	\$458,411
d) Loss of housekeeping capacity:	\$0
e) Cost of future care:	\$10,000
f) Special damages:	<u>\$3,717</u>
Total:	<u>\$606,128</u>

COSTS

[136] If the parties wish to make submissions on costs, they may be filed within 30 days of the date of this judgment. If the parties wish to make oral submissions on costs, or other matters related to the implementation of this judgment, they may make the necessary arrangements with Supreme Court Scheduling within this timeframe. If no submissions are received, the plaintiff will have his costs at Scale B.

“Basran J.”