COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Maingot v. Wankowicz,*
2023 BCCA 89

Date: 20230224
Dockets: CA47746; CA47747; CA47748

Docket: CA47746

Between:

Robert John Steven Maingot

Appellant/
Respondent on Cross Appeal
(Plaintiff)

And

**Janina Wankowicz, Jennifer Wankowicz,
and Heather Elise Johnston**

Respondents/
Appellants on Cross Appeal
(Defendants and Third Parties)

And

West Coast Fuzion Homes Inc. and Evidence Productions Inc.

Respondents
(Defendants and Third Parties)

- and -

Docket: CA47747

Between:

Robert John Steven Maingot

Appellant/
Respondent on Cross Appeal
(Plaintiff)

And

**Heather Elise Johnston, Janina Wankowicz, and
Jennifer Wankowicz**

Respondents/
Appellants on Cross Appeal
(Defendants and Third Parties)

And

West Coast Fuzion Homes Inc. and Evidence Productions Inc.

Respondents
(Defendants and Third Parties)

- and -

Docket: CA47748

Between:

Robert John Steven Maingot

Appellant
(Plaintiff)

And

West Coast Fuzion Homes Inc., Evidence Productions Inc., Janina Wankowicz, Jennifer Wankowicz, and Heather Elise Johnston

Respondents
(Defendants and Third Parties)

Before: The Honourable Chief Justice Bauman
The Honourable Mr. Justice Harris
The Honourable Mr. Justice Willcock

On appeal from: An order of the Supreme Court of British Columbia, dated August 16, 2021 (*Maingot v. Wankowicz*, 2021 BCSC 1596, Vancouver Docket M146655).

Counsel for the Appellant:	T.J. Delaney J. Chohan
Counsel for the Respondents/Appellants on Cross Appeal:	A. Mersey, K.C. M. Sobkin E.J. Segal
Place and Date of Hearing:	Vancouver, British Columbia December 14, 2022
Place and Date of Judgment:	Vancouver, British Columbia February 24, 2023

Written Reasons by:
The Honourable Mr. Justice Harris

Concurred in by:
The Honourable Chief Justice Bauman
The Honourable Mr. Justice Willcock

Summary:

This is an appeal from an award of loss of future earning capacity. The appellant, plaintiff in the motor vehicle action, submits the award is too low, and contends the trial judge made a palpable and overriding error in assessing the prospects of his return to work, and erred in the legal method she employed to assess future earning capacity. The respondents, defendants in the motor vehicle action, cross appeal the awards of past income loss and future earning capacity. They submit no awards should have been made under these heads of damages because the plaintiff's injuries are too remote to be compensable and the legal chain of causation has been interrupted. Held: Appeal and cross appeal dismissed. The judge's assessment on remoteness was reasonable and open to her on the evidence. The judge's conclusion on the appellant's prospects of returning to work were likewise supported by evidence and her assessment discloses no palpable and overriding error. Finally, the judge did not err in the legal approach she used to assess future earning capacity as the substance of her analysis was correct.

Reasons for Judgment of the Honourable Mr. Justice Harris:

Introduction

[1] Mr. Maingot, appellant here and plaintiff in the motor vehicle action below, appeals the trial judge's award of loss of future earning capacity, contending it is too low. He claims the trial judge made a palpable and overriding error in assessing the prospects of his return to work and erred in the legal method she employed to assess future earning capacity. The respondents, defendants in the motor vehicle action, cross appeal the awards of past income loss and future earning capacity. They say no such awards should have been made because the injuries rendering Mr. Maingot incapable of working are unrelated to the two motor vehicle accidents alleged to have caused them. They submit Mr. Maingot's incapacity was not caused in fact or in law by the accidents and that his injuries are, in any event, too remote.

[2] It will be convenient to address the cross appeal issues first before considering whether the award for loss of future earning capacity is premised on legal error.

Background

[3] Mr. Maingot was injured in two motor vehicle accidents. The first on October 18, 2012. The second on November 20, 2013.

[4] He was also injured on July 16, 2015, at his home, when a large piece of moulding fell from above Mr. Maingot's front door and struck him on his head. In reasons indexed at 2021 BCSC 1596, the judge concluded that the injuries he suffered on that day were divisible injuries from those suffered in the motor vehicle accidents. The judge found liability and assessed damages. As the damages were divisible, they were assessed separately. The injuries suffered by Mr. Maingot from the moulding incident and the damages arising from them are irrelevant to this appeal. It is not necessary to refer to them again.

[5] The judge found that the damages arising from the two motor vehicle accidents were indivisible as between the accidents. The principal injuries arising from the 2012 accident were soft-tissue injuries to his neck, shoulder, and back; pain in his left leg; and headaches. The judge found that Mr. Maingot was still experiencing headaches and soft-tissue soreness from the 2012 accident at the time of the 2013 accident, but that he had experienced significant improvement. By the spring of 2015, Mr. Maingot was suffering from chronic pain to his neck, shoulders and back caused initially by the 2012 accident, but aggravated and made chronic by the 2013 accident. At trial, in 2021, Mr. Maingot continued to suffer a chronic level of pain associated with his soft-tissue injuries that the judge found was caused by the two accidents together.

[6] The judge found that the soft-tissue injury to Mr. Maingot's neck caused his migraine headaches. Those headaches were initially caused by the 2012 accident. By the following year, they had reduced to approximately three times a week, and maintained that same frequency through 2016. The judge found the 2013 accident contributed to the chronicity of Mr. Maingot's headaches.

[7] Although suffering from these injuries, Mr. Maingot was not incapacitated from working. He worked hard and successfully, enjoying considerable financial success, particularly in 2017 and 2018, the most financially rewarding years of his professional life.

[8] Beginning in 2019, Mr. Maingot's health (particularly his mental health) deteriorated dramatically. The parties accept that, in the two years preceding trial, Mr. Maingot experienced significant cognitive decline and somatic symptom disorder ("SSD"), with symptoms of major depression. By the time of trial in 2021, he was unemployable. The judge's assessment of the causes of this decline, and whether and to what extent Mr. Maingot might be able to return to work, lie at the heart of the issues on appeal.

[9] The respondents argue on appeal, as they did at trial, that Mr. Maingot's SSD explains his incapacity to work now, and possibly into the future, but that this illness is legally unrelated to the accidents. They say the accidents were not a substantial contributing cause in fact of the SSD, nor were they a proximate legal cause. Other factors in Mr. Maingot's life explain the emergence of his SSD. He had been working extraordinarily hard for a number of years, which detrimentally affected his marriage. Pre-existing osteoarthritis caused him to develop excruciating hip pain that was unrelated to the accidents. The hip pain led to hip surgery from which Mr. Maingot did not recover well. And, on top of all this, he lost his job and was unable to find another of a similarly rewarding kind.

[10] The respondents argue that these causal factors, occurring some seven years after the first accident, render Mr. Maingot's current incapacitation too remote from the accidents to permit a finding that the accidents are the legal cause of his current disability. These factors break the chain of causation. They note that the injuries suffered in the accident were not disabling for years, and that in the interim period between the accidents and the trial, Mr. Maingot achieved considerable professional and financial success.

[11] The judge disagreed. She concluded the accidents *were* a substantial contributing cause of Mr. Maingot's chronic pain and headaches. She found that his chronic pain continued to trial, and causally contributed to Mr. Maingot's SSD. This finding of fact laid the foundation for a determination of whether, and the extent to which, the accidents caused past and future loss of earning capacity.

[12] The judge accepted, however, aspects of the respondents' theory of the case. The judge found the accidents were not the only legally relevant causes of Mr. Maingot's mental injury:

> [263] While I agree that Mr. Maingot's current disability is primarily his mental injury, I also find that the impacts of Mr. Maingot's osteoarthritis significantly contributed to him developing SSD, including: the pain Mr. Maingot experienced starting in 2016–2018 related to his osteoarthritis, the mental impact of this pain, the hip surgery itself, and the recovery process from that surgery. I must also consider the likelihood that Mr. Maingot would have suffered SSD as a result of years of hip pain and the subsequent surgery alone. I find that this likelihood is not insignificant**.**
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> [264] Because I have found there is a measurable risk that Mr. Maingot would have developed SSD because of this independently existing condition, I must take this into account in my award of damages: *Moore* at para. 43. Rather than apply a discount factor to Mr. Maingot's damages as suggested by Ms. Johnston, I prefer to approach the assessment of his damages with the understanding that some portion of those losses are properly attributable to Mr. Maingot's pre-existing osteoarthritis and his psychological difficulties in recovering from the related surgery. This reflects the principle that a tortfeasor is not required to return a plaintiff to a better position than they would be in but for the tort: *Blackwater* at para. 78. [Emphasis added.]

[13] At trial, Mr. Maingot disputed that any other factors were legally relevant contributors to his SSD. He opposed any reduction in his claim for damages. When it came to the assessment of his claims for loss of earning capacity, he advanced the argument that he should recover substantially all his lost wages before trial and should be compensated for future income loss on the basis that he is permanently unemployable with, at best, a very poor prognosis of ever being able to work again. He sought damages in respect of loss of future earning capacity in the amount of approximately $3.5 million.

[14] The judge recognized the primary cause of his current unemployability was his SSD, but found, however, that some part of his past wage loss he would have suffered in any event, regardless of the accidents. Going forward, she found that there was a real and substantial probability (not just possibility) that Mr. Maingot would be able to return to work in his field within a matter of years. In the result, she awarded Mr. Maingot $660,000, representing three years of what she had found was his base annual income of $220,000.

[15] The judge summarized her conclusions at the beginning of the judgment. It is helpful to set out the salient findings here, even at the risk of repeating what I have summarized, since they are a brief, but accurate, recitation of what is found later in the detailed analysis in the judgment:

> [12] It is these physical injuries from the 2012 and 2013 Accidents that are responsible for Mr. Maingot's ongoing chronic pain, and it is Mr. Maingot's chronic pain that is currently responsible for his cognitive and mood-related injuries.
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> [13] I also find that Mr. Maingot's debilitating hip pain started in 2016 and was caused by his underlying osteoarthritis, and not by the 2015 Incident or either of the Accidents. I find that his hip pain was largely addressed by his hip surgery in early 2019, but had a lasting psychological effect on him.
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> [14] While the underlying osteoarthritis was a pre-existing condition, and contributed to Mr. Maingot's chronic pain and the development of his current mental injuries, it is a non-tortious cause of these injuries. I find that Mr. Maingot would have experienced hip pain and would have had to undergo surgery regardless of the Accidents, but the hip pain and surgery are not the sole cause of his current chronic pain or mental injury.
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> [15] I find that Mr. Maingot's difficulties with vision, and with his hands are also pre-existing conditions for which none of the defendants are liable.
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> [16] Overall, I find that the Accidents are a non-*de minimus* cause of Mr. Maingot's ongoing headaches and chronic pain, and that Mr. Maingot's headaches and chronic pain are the foundation of his current mental injuries, including somatic symptom disorder ("SSD") with depressive symptomology, and cognitive challenges.
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> [17] I find that while Mr. Maingot's physical injuries are not debilitating on their own, they are now chronic and contribute to his mental injuries. Mr. Maingot's SSD in particular is debilitating, and has rendered him currently incapable of competitive employment or self-employment.
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> [18] However, I also find that Mr. Maingot's debilitating SSD did not develop until almost seven years after the 2012 Accident and almost six years after the 2013 Accident. In the intervening years, Mr. Maingot had his most productive and lucrative employment period in his life. In the history of his injuries, Mr. Maingot's level of disability at trial is fairly recent, and it is also amenable to treatment.
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> [19] I find that if Mr. Maingot is able to access a multi-disciplinary pain treatment program and cognitive behavioural therapy, and follows the treatment recommendations of his doctors and Dr. Janke, he has a very strong likelihood of recovering from the mental injuries caused by the Accident to the point that he can resume working at his own business, or working in one of the sales or financial fields that he has significant experience in. That is, there is a real and substantial probability (not just possibility) that he will return to his pre-accident levels of employment

> capacity and productivity, although he will likely require ongoing management of his physical and psychological injuries to do so.

On Appeal

Standard of review

[16] In *Reilly v. Lynn*, 2003 BCCA 49, leave to appeal to SCC ref'd, 29761 (8 January 2004), this Court described the standard of review of a damage assessment in the following terms:

> [99] We cannot alter a damage award simply because, on the evidence, we would come to a conclusion different from that of the trial judge. However, we may vary a damage award if we conclude that the trial judge in assessing the damage award applied a wrong principle of law (as by taking into account some irrelevant factor or leaving out of account some relevant one); or if the amount awarded is either so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage.

[17] It is an error of law to use an incorrect basis for determining whether a loss of earning capacity has been suffered: *Ploskon-Ciesla v. Brophy,* 2022 BCCA 217 at para. 31; *Neufeldt v. Insurance Corporation of British Columbia,* 2021 BCCA 327 at para. 105; *Rab v. Prescott,* 2021 BCCA 345 at para. 24.

[18] Challenges to findings of fact are reviewable on a standard of palpable and overriding error: *Rab* at para. 23.

Did the judge err in her assessment of causation and remoteness?

[19] As I have already described, the position of the respondents on the cross appeal is that Mr. Maingot's current mental health conditions are unrelated to the accidents, either because the accidents did not cause those conditions in law or in fact, or they are in any event too remote.

[20] In their factum, the respondents focus on remoteness and the doctrine of *novus actus interveniens,* that is an intervening act that is of sufficient magnitude to break the chain of causation between the tort and the plaintiff's injuries. They suggest that the judge dealt only with their arguments related to the former, and not the latter. It appears to me that, on a fair reading of the judgment, the judge dealt

with both. Importantly, she applied the "but for" test for causation, and concluded that the accidents played more than a *de minimis* causal role in contributing to the development of Mr. Maingot's SSD.

[21] The problem with the respondent's argument is that the judge's finding that the accident was more than a *de minimis* contributing cause to the development of Mr. Maingot's SSD is a finding of fact, reviewable on a standard of palpable and overriding error. The respondents have not identified such an error. Rather, they have identified certain of the judge's findings of fact and argued that the judge ought to have concluded, based on them, that the chain of causation was broken or that any residual causal contribution should be treated as *de minimis* and, therefore, legally irrelevant.

[22] Certainly, the judge accepted that the termination of Mr. Maingot's employment, his osteoarthritis, his hip surgery, and his difficult recovery from surgery were all factors that played a role in the deterioration of his mental health. As noted above, she also concluded that those factors were relevant to the proper assessment of Mr. Maingot's damages, on the theory that a defendant need not put a plaintiff into a better position than he would have been in but for the accident.

[23] These factors, however, did not displace the judge's finding of fact that the accidents were non-*de minimus* contributing causes of Mr. Maingot's SSD. Impliedly, at least, the judge rejected the *novus actus interveniens* theory on the facts. The judge's finding on this key question is rooted in her acceptance of expert evidence establishing that the accidents had caused chronic pain and headaches, which in turn had contributed to the onset of Mr. Maingot's cognitive decline and SSD. In particular, the judge accepted the evidence of Dr. Janke regarding Mr. Maingot's mental and cognitive status: at para. 282. As further examples, the judge noted:

> [287] I find that Mr. Maingot's cognitive difficulties are most likely a result of a combination of his ongoing chronic pain that was previously manageable, Mr. Maingot's efforts to medicate that pain, and his development of a mood disorder that is affecting his sleep and coping abilities.
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> ...

> [289] As a result, there is evidence in the record to support any number of diagnoses and causal chains for the various parties to rely upon. The evidence that I found most compelling, however, and that best corresponds to the admissible evidence at trial in all its variety and contradictions, is the evidence of Dr. Janke.
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> [294] Dr. Janke diagnosed Mr. Maingot with somatic symptom disorder, with the underlying pathophysiological processes being his chronic pain in his neck and lower back and headaches, with clearly manifested symptoms of major depression. He explained this diagnosis as being a situation where the patient's "limitation is based upon their perception of their pain, not on any objective measurement of limitations."
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> [295] I accept this diagnosis, and find that Mr. Maingot is currently suffering from somatic symptom disorder, with symptoms of major depression, related to his chronic soft-tissue injuries caused by the Accidents. While there is no independent diagnosis of major depression in this case, Mr. Maingot's affect on the stand, as well as the reports of his friends and family members, also tend to support the existence of those symptoms.
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> [296] I have found that the tortious physical bases of Mr. Maingot's SSD are his chronic pain symptoms arising from the 2012 and 2013 Accidents, and not the 2015 Incident and the MTBI Mr. Maingot suffered at that time. I therefore find this injury to be divisible as between the Accidents and the Incident.
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> ...
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> [299] Despite the significant length of time since both of the Accidents, I find that causation of Mr. Maingot's ongoing neck, shoulder and back pain has been established with respect to the 2012 and 2013 Accidents. The medical evidence before me further establishes that those soft-tissue injuries are the cause, at least in part, of Mr. Maingot's current mental and cognitive injuries. I find that Mr. Maingot's current symptoms are not too remote from the 2012 and 2013 Accidents.

[24] The respondents have not attempted to establish that the judge's factual conclusions rest on palpable and overriding error. In my view, those findings of fact were open to the judge on the evidence. They are sufficient to dispose of the respondent's argument based on factual or proximate legal causation, subject to the remoteness argument.

[25] In respect of this argument, the respondents rely principally on *Mustapha v. Culligan of Canada Ltd.*, 2008 SCC 27, wherein the Supreme Court of Canada ("SCC") described the remoteness inquiry as follows:

> [12] The remoteness inquiry asks whether "the harm [is] too unrelated to the wrongful conduct to hold the defendant fairly liable" (Linden and Feldthusen, at p. 360). Since *The Wagon Mound (No. 1)*, the principle has been that "it is the foresight of the reasonable man which alone can determine responsibility" (*Overseas Tankship (U.K.) Ltd. v. Morts Dock & Engineering Co.*, [1961] A.C. 388 (P.C.), at p. 424).
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> [13] Much has been written on how probable or likely a harm needs to be in order to be considered reasonably foreseeable. The parties raise the question of whether a reasonably foreseeable harm is one whose occurrence is *probable* or merely *possible*. In my view, these terms are misleading. Any harm which has actually occurred is "possible"; it is therefore clear that possibility alone does not provide a meaningful standard for the application of reasonable foreseeability. The degree of probability that would satisfy the reasonable foreseeability requirement was described in *The Wagon Mound (No. 2)* as a "real risk", i.e. "one which would occur to the mind of a reasonable man in the position of the defendan[t] . . . and which he would not brush aside as far-fetched" (*Overseas Tankship (U.K.) Ltd. v. Miller Steamship Co. Pty.*, [1967] A.C. 617 (P.C.), at p. 643).
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> [14] The remoteness inquiry depends not only upon the degree of probability required to meet the reasonable foreseeability requirement, but also upon whether or not the plaintiff is considered objectively or subjectively. One of the questions that arose in this case was whether, in judging whether the personal injury was foreseeable, one looks at a person of "ordinary fortitude" or at a particular plaintiff with his or her particular vulnerabilities. This question may be acute in claims for mental injury, since there is a wide variation in how particular people respond to particular stressors. The law has consistently held — albeit within the duty of care analysis — that the question is what a person of ordinary fortitude would suffer: see *White v. Chief Constable of South Yorkshire Police*, [1998] 3 W.L.R. 1509 (H.L.); *Devji v. Burnaby (District)* (1999), 180 D.L.R. (4th) 205, 1999 BCCA 599; *Vanek*. As stated in *White*, at p. 1512: "The law expects reasonable fortitude and robustness of its citizens and will not impose liability for the exceptional frailty of certain individuals."
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> [15] As the Court of Appeal found, at para. 49, the requirement that a mental injury would occur in a person of ordinary fortitude, set out in *Vanek*, at paras. 59-61, is inherent in the notion of foreseeability. This is true whether one considers foreseeability at the remoteness or at the duty of care stage. As stated in *Tame v. New South Wales* (2002), 211 C.L.R. 317, [2002] HCA 35, *per* Gleeson C.J., this "is a way of expressing the idea that there are some people with such a degree of susceptibility to psychiatric injury that it is ordinarily unreasonable to require strangers to have in contemplation the possibility of harm to them, or to expect strangers to take care to avoid such harm" (para. 16). To put it another way, unusual or extreme reactions to events caused by negligence are imaginable but not reasonably foreseeable.

> [16] To say this is not to marginalize or penalize those particularly vulnerable to mental injury. It is merely to confirm that the law of tort imposes an obligation to compensate for any harm done on the basis of reasonable foresight, not as insurance. The law of negligence seeks to impose a result that is fair to both plaintiffs and defendants, and that is socially useful. In this quest, it draws the line for compensability of damage, not at perfection, but at reasonable foreseeability. Once a plaintiff establishes the foreseeability that a mental injury would occur in a person of ordinary fortitude, by contrast, the defendant must take the plaintiff as it finds him for purposes of damages. As stated in *White*, at p. 1512, focusing on the person of ordinary fortitude for the purposes of determining foreseeability "is not to be confused with the 'eggshell skull' situation, where as a result of a breach of duty the damage inflicted proves to be more serious than expected". Rather, it is a threshold test for establishing compensability of damage at law.

[26] More recently, the Court explained the doctrine of remoteness in *Nelson (City) v. Marchi*, 2021 SCC 41:

> [97] Second, the breach must be the legal cause of the loss, meaning that the harm must not be too far remote (*Mustapha*, at para. 11; *Saadati*, at para. 20; *Livent*, at para. 77). The remoteness inquiry asks whether the actual injury was the reasonably foreseeable result of the defendant's negligent conduct (*Mustapha*, at paras. 14-16; *Livent*, at para. 79). Remoteness is distinct from the reasonable foreseeability analysis within duty of care because it focuses on the actual injury suffered by the plaintiff, whereas the duty of care analysis focuses on the type of injury (*Livent*, at para. 78; Klar and Jefferies, at p. 565).

[27] This Court has also recently had occasion to summarize the principles governing a remoteness analysis and its interchangeable relationship with "effective or proximate cause" including the significance of *Mustapha* and *Nelson* in *Tellini v. Bell Alliance,* 2022 BCCA 106 at paras. 42–49.

[28] I accept that whether the type of injury suffered by the plaintiff is reasonably foreseeable is to be assessed at the time of the accident. The respondents argue that viewed in that way, these types of injury are not reasonably foreseeable. They say that there is no evidence that it is reasonably foreseeable that a person of ordinary fortitude would develop SSD six or seven years after suffering minor soft-tissue injuries in two motor vehicle accidents. They say, to the contrary, a person of ordinary fortitude would reasonably be expected to recover from the

physical injuries suffered in these accidents without any consequential mental injury arising many years after the accidents.

[29] The judge rejected the respondents' argument at para. 298, without directly addressing the issue of whether it was reasonably foreseeable that a person of ordinary fortitude would develop a mental injury caused by soft-tissue injuries giving rise to chronic pain:

> Chronic soft-tissue injuries, and mental and cognitive injuries related to them, are well-established foreseeable injuries arising from motor vehicle accidents: *Greenway-Brown v. MacKenzie*, 2019 BCCA 137 at para. 94. While there may were many issues of causation in fact in this case with respect to Mr. Maingot's panoply of injuries, which I have addressed above, there is no issue of causation in law.

[30] Mr. Maingot argues that the respondents' reliance on *Mustapha* is misplaced. That case dealt with psychiatric injury in the absence of any physical injury. He says that the reference to a person of "ordinary fortitude" must be understood in that context, and has no application where physical injury contributes to mental injury.

[31] I agree that *Mustapha* was a claim relating solely to what is sometimes called "nervous shock" and did not engage any underlying physical injury. Moreover, the cases discussing remoteness, cited by the SCC, are all cases dealing with nervous shock standing alone. There is, therefore, some basis to contend that the remoteness analysis in *Mustapha*, to the extent that it introduces the notion of what type of injuries it is reasonably foreseeable a person of ordinary fortitude might suffer, applies only to mental injury standing alone.

[32] I observe, however, that the SCC in *Nelson,* cited above, expressly relied on paras. 14–16 of *Mustapha* in explaining the principle of remoteness. Those paragraphs refer to a person of "ordinary fortitude". *Nelson* was not a claim for mental injury; it involved damages for physical injury.

[33] I note, too, that in *Greenway-Brown,* 2019 BCCA 137, leave to appeal to SCC ref'd, 38696 (12 December 2019), cited by the judge, this Court appears to have accepted that the same foreseeability analysis articulated in *Mustapha* applies to

claims in negligence for both mental and physical injury. In that case, the Court at para. 94 acknowledged the factual difference between claims for mental injury only and claims for mental injury contributed to by physical injury:

> It is also my view that the injuries asserted by the appellant were of a substantially different nature than the injury asserted in *Mustapha*. Mr. Mustapha had to show that it was reasonably foreseeable that a person of ordinary fortitude would suffer mental injury from seeing flies in the bottle of water. He failed to do so because his reactions were considered to be highly unusual and very individual. Here, the appellant had to show that it was reasonably foreseeable that a person of ordinary fortitude would suffer soft-tissue injuries in one or more minor motor vehicle accidents, leading to chronic pain and other psychological problems. These are not the kinds of injuries that are too remote to allow recovery for negligence in a motor vehicle accident. The injuries may have been more serious than expected, less serious than asserted, or they may not have been established at all. But in my opinion, it cannot be said that they were not reasonably foreseeable. [Emphasis added.]

[34] The view taken by this Court was consistent with the judgment of Brown J. in *Saadati v. Moorhead*, 2017 SCC 28, at para. 37:

> [37] None of this is to suggest that mental injury is always as readily demonstrable as physical injury. While allegations of injury to muscular tissue may sometimes pose challenges to triers of fact, many physical conditions such as lacerations and broken bones are objectively verifiable. Mental injury, however, will often not be as readily apparent. Further, and as *Mustapha* makes clear, mental *injury* is not proven by the existence of mere psychological *upset*. While, therefore, tort law protects persons from negligent interference with their mental health, there is no legally cognizable right to happiness. Claimants must, therefore, show much more — that the disturbance suffered by the claimant is "serious and prolonged and rise[s] above the ordinary annoyances, anxieties and fears" that come with living in civil society (*Mustapha*, at para. 9). To be clear, this does not denote distinct legal treatment of mental injury relative to physical injury; rather, it goes to the prior legal question of what constitutes "mental injury". Ultimately, the claimant's task in establishing a mental injury is to show the requisite degree of disturbance (although not, as the respondents say, to show its classification as a recognized psychiatric illness). [Emphasis added.]

[35] I proceed, therefore, on the basis that the remoteness analysis asks whether it is reasonably foreseeable that a person of ordinary fortitude would suffer a type pf injury, whether that injury be physical or mental or a combination of the two. Whether a person has suffered a mental injury may pose issues of proof. Whether a mental injury rises to a level to be compensable involves assessing whether the injury rises

above the ordinary annoyances, anxieties and fears of life, as explained both in *Mustapha* and *Saadati*. But, in this case, there is no question that Mr. Maingot is suffering from disabling mental health conditions contributed to by his physical injuries. *Greenway-Brown* supports the proposition that such injuries are reasonably foreseeable, even if they are more serious than might be expected or arise later than might be anticipated.

[36] In my opinion, the judge was entitled to rely on the principle recognized in *Greenway-Brown* and conclude that Mr. Maingot's SSD was not too remote to be compensable. I would not accede to this ground of appeal.

Did the judge err in her assessment of loss of future earning capacity?

[37] Mr. Maingot makes three arguments in support of his contention that the judge erred in her assessment of his damages for loss of future earning capacity. He says, first, that the judge made a palpable and overriding error in her determination that he would probably recover from his SSD and return to full employability. Mr. Maingot says the judge misapprehended Dr. Janke's evidence on that point.

[38] Second, Mr. Maingot contends that the judge employed the wrong test to the assessment of his loss of future earning capacity, resulting in a significant undervaluation of that loss.

[39] Third, Mr. Maingot contends that the award is inordinately low and a wholly erroneous assessment of his damages.

[40] Before turning to the first two alleged errors, it is not apparent to me that whether an assessment of pecuniary damages is inordinately high or low or wholly erroneous can be evaluated in the abstract. In such a case, appellate intervention has to be traced to some kind of legal error in the assessment of the evidence relied on to justify the award. This is so because, necessarily, the assessment of damages is attempting to evaluate a loss in the present value of a future stream of earnings caused by the tort. The analysis is not at large in the way that it might be thought of for nonpecuniary damages.

[41] I turn now to the first alleged error, that the judge made a palpable and overriding error in her determination of Mr. Maingot's future employment prospects. Mr. Maingot says that the error is to be found in her misapprehension of Dr. Janke's prognosis for Mr. Maingot's SSD. The judge had concluded that Dr. Janke's diagnosis was supported by the underlying facts concerning Mr. Maingot's injuries and their causes. At para. 300 of her reasons she stated that she preferred Dr. Janke's prognosis and treatment recommendations to those proffered by other experts. She noted in that paragraph that Mr. Maingot's psychiatric injury is primarily causing his current disability, and therefore the treatment and prognosis of that injury is most relevant. She found Dr. Janke's evidence was the most useful for that analysis.

[42] The error is found, according to Mr. Maingot, in paras. 301 and 305 of the judge's reasons, which read, respectively:

> Dr. Janke considers that Mr. Maingot is currently not competitively employable as a result of his SSD and related symptoms. However, he makes a number of strong recommendations, which, if followed, he considers would allow Mr. Maingot to return to work and productivity.
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> […]
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> Although [Dr. Janke] considered Mr. Maingot's prognosis "quite guarded" at the time of his report due to the extended period of time that he has suffered from chronic pain, depression, and anxiety symptoms, at trial, Dr. Janke was more optimistic that Mr. Maingot's condition would improve if he followed treatment recommendations. Further, this would improve his function and ability to return to his career. Dr. Janke was also unaware of the extent of Mr. Maingot's work performance in 2017 and 2018, and Mr. Maingot's own positive impression of his work performance and capabilities.

[43] Mr. Maingot contends that the judge erred in concluding that Dr. Janke resiled from, or softened, the prognosis found in his report, which he had not. As a result, the judge erred in thinking Dr. Janke's opinion was that Mr. Maingot would be completely healed and would return to work full time without any further earnings impairment within three years. Mr. Maingot points out that Dr. Janke had stood by his opinion and the recommendations found in his report, and had not been directly cross-examined on his prognosis. Indeed, in his cross-examination Dr. Janke confirmed the recommendations made in his report. In Mr. Maingot's estimation,

Dr. Janke's opinion, which the judge had said she accepted, gave a quite guarded prognosis of the prospects of Mr. Maingot recovering from his SSD, and lent support to a finding that there was an overwhelming probability he was permanently unemployable. There was, says Mr. Maingot, no evidence to support the judge's finding that he would return to work within a few years.

[44] There are, I think, two aspects to this ground of appeal. The first relates to the judge's interpretation of Dr. Janke's prognosis. The second relates more directly to what facts the judge found about the prospects of Mr. Maingot recovering sufficiently to be able to return to work. This latter point also relates to the second alleged error advanced by Mr. Maingot on appeal.

[45] Turning to the first point, while I agree that Dr. Janke's opinion at trial was substantially the same as that found in his report, I do not read the judge as concluding either that he had resiled or materially softened his opinion. Her conclusion went no further than saying that Dr. Janke was more optimistic in his evidence at trial that Mr. Maingot's condition would improve if he followed treatment recommendations. On the second point, I do not read the judge as finding that Dr. Janke's opinion was that he would be completely recovered in a few years and would return to work full time without impairment. Dr. Janke did not express any opinion on how long it would be before Mr. Maingot could return to work if he followed treatment recommendations.

[46] I tend to agree that the judge's comment that Dr. Janke was more optimistic in his evidence than his report is not entirely accurate. What matters, in my view, however, is not her characterization of his evidence, but whether her material findings of fact about Mr. Maingot's prospects of recovery rest on a material misapprehension of what Dr. Janke's opinion was, either in his report or in his *viva voce* evidence at trial. In my view, the conclusions reached by the judge were open to her on the evidence and are not contaminated by any potential mischaracterization of Dr. Janke's level of optimism.

[47] Dr. Janke's report diagnoses Mr. Maingot as suffering from SSD and opines on its causes. Those findings were accepted by the judge as set out above at para. 15 above. The critical portions of the report for the purpose of prognosis are found at paras. 76–77 of Dr. Janke's report:

> It would be my opinion that Mr. Maingot's prognosis remains quite guarded. He has had symptoms present for an extended period of time and it is recognized that long-standing depression and anxiety are resistant to change. I would also note that I would expect Mr. Maingot's responses to both medication and psychotherapy to be modulated by his pain experience. If there is resolution of pain in the cervical and lumbar areas with or without surgical intervention, I would expect there would be considerable improvement in Mr. Maingot's functioning. If the pain is unresolved, he will remain disabled both physically and psychologically.
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> To clarify, or to emphasize, if Mr. Maingot's pain is managed his mood will improve and depending on the degree to which improvement can be achieved he would be suitable for a return to work.

[48] Dr. Janke was cross-examined at trial. The cross-examination elaborated on the report. The trial judge summarized, accurately, in my view, the substance of what emerged:

> [301] Dr. Janke considers that Mr. Maingot is currently not competitively employable as a result of his SSD and related symptoms. However, he makes a number of strong recommendations, which, if followed, he considers would allow Mr. Maingot to return to work and productivity.
>
> [302] Many of the treatment recommendations are medication related. Dr. Janke notes a positive response to certain medications, but that the medication that Mr. Maingot currently takes has a history of causing him headaches. Despite Mr. Maingot's concerns about taking Cymbalta, stated above, I find that the evidence establishes that other similar medications may not give rise to these same side effects, and that in any event, liability for some medication side-effects is significantly different from liability for complete disability from employment. In any event, I find that Dr. Janke's recommendation of a comprehensive review of Mr. Maingot's medications in relation to treatment for his headaches, his pain, and the use of some anti-depressant medication, is overdue.
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> [303] Dr. Janke also strongly recommends that Mr. Maingot receive education through his treating physician regarding his medical reports, their nature, and his true condition. Mr. Maingot's misunderstanding of some of these reports, and Dr. Cameron's in particular, has likely contributed to a deterioration in his mental health. Education is also required with respect to his understanding of the cause of his cognitive difficulties, and in particular that they are not related to a brain injury, and are not permanent.

> [304] Dr. Janke also strongly recommends that Mr. Maingot receive psychological assistance, not simply through the counselling that he currently is undertaking, but with a more rigorous cognitive behavioural therapy approach.

[49] It is at this point that the judge made the comments in para. 305 which are challenged by Mr. Maingot, before concluding:

> [306] Overall, I find that although Mr. Maingot's pain in his neck and back, and his headaches, have now been chronic for many years, his psychiatric injury and functional disability is more recent and still amenable to being turned around with the proper combination of education, psychiatric treatment, and medication.

[50] In my view, if the allegedly offending phrase "was more optimistic" was excised from the judgment and the word "agreed" was substituted, it would not be plausible to argue that the judge had made a palpable and overriding error in her conclusions about Mr. Maingot's prognosis. Dr. Janke agreed that if Mr. Maingot underwent the necessary treatment he would be able to be employed again.

[51] I think it was open to the judge to draw the inference that she drew from the evidence. She examined the diagnosis, including the origins of the SSD, and concluded that if the recommendations were followed the underlying causes of the SSD would be alleviated. It is of some importance that the judge does not say that Mr. Maingot would return to an entirely pain-free condition if he followed treatment. It appears to have been her view that he could return to the condition that would allow him to work, as he had done before. The findings summarized above and quoted again below for convenience were open to her on the evidence:

> [18] However, I also find that Mr. Maingot's debilitating SSD did not develop until almost seven years after the 2012 Accident and almost six years after the 2013 Accident. In the intervening years, Mr. Maingot had his most productive and lucrative employment period in his life. In the history of his injuries, Mr. Maingot's level of disability at trial is fairly recent, and it is also amenable to treatment.
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> [19] I find that if Mr. Maingot is able to access a multi-disciplinary pain treatment program and cognitive behavioural therapy, and follows the treatment recommendations of his doctors and Dr. Janke, he has a very strong likelihood of recovering from the mental injuries caused by the Accident to the point that he can resume working at his own business, or working in one of the sales or financial fields that he has significant

> experience in. That is, there is a real and substantial probability (not just possibility) that he will return to his pre-accident levels of employment capacity and productivity, although he will likely require ongoing management of his physical and psychological injuries to do so.

[52] I turn now to the second alleged error, that the judge employed the wrong test to the assessment of Mr. Maingot's loss of future earning capacity, resulting in a significant undervaluation of that loss.

[53] Mr. Maingot points to two occasions, at paras. 19 and 378, where the judge said there was a real and substantial possibility or probability that he would return to work. This he says turns the issue on its head. He argues the question is not whether there is a real and substantial possibility he will return to work, but a real and substantial possibility that he will suffer a future income loss. Only then does one assess the chances of a return to work by factoring in negative contingencies. Hence, the proper question is whether there is a real and substantial possibility that he will remain off work owing to his injuries.

[54] Mr. Maingot notes that the judge accepted that he was unemployable at the time of trial and would remain off work for at least some time. He says, but for turning the issue on its head, the judge should have first made the finding that the plaintiff had demonstrated a real and substantial possibility that he would not work again, and then assessed the percentage chances affecting whether he might or might not be able to return to work. He says this wrong methodology led the judge to conclude that he would fully recover within a few years. He says: "By reversing the question to be answered, the trial judge wound up, effectively finding as a fact, the plaintiff would fully recover and return to work, unimpeded by his physical and mental injuries, within three years. This finding was made notwithstanding it concerns a hypothetical future event and was not supported by the medical evidence."

[55] I am unable to accede to this submission. In my opinion, it misreads the judge's analysis and her findings of fact when the portion of the judgment dealing with this issue is read generously in light of the whole of her judgment.

[56] There is a three-part test that courts are to follow when considering claims for loss of future earning capacity: *Rab; Dornan v. Silva,* 2021 BCCA 228; *Lo v. Vos,* 2021 BCCA 421. In the first two stages, the court must determine whether the evidence discloses a potential future event that could lead to a loss of capacity and whether, on that evidence, there is a real and substantial possibility that the future event in question will cause a pecuniary loss: *Rab* at para. 47. Successfully demonstrating an accident-related loss of capacity does not *necessarily* establish a real and substantial possibility of a future event leading to a loss of income: *Bains v. Cheema,* 2022 BCCA 430 at para. 22. In quantifying the loss, the court must assess the relative likelihood that the loss of capacity results in loss of income: *Dornan* at paras. 93–95.

[57] It follows from the second part of the test that the question a judge must ask is whether there is a real and substantial possibility the future event will cause a pecuniary loss. The question is not, as Mr. Maingot argued, whether there is a real and substantial possibility that he will not be able to work again.

[58] In *Ploskon-Ciesla* this Court described how cases involving claims for loss of future earning capacity generally fit into two categories:

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

[59] In my view, the trial judge accepted that Mr. Maingot's case was straightforward in that the first and second steps of the test were foregone conclusions. Given the nature of his injuries, and the fact he already *was* rendered incapable of working at the time of trial and into the future, the judge accepted it was

evident that his capacity to earn income would be affected for at least some time into the foreseeable future. In my view, on the record, there was no live issue about the first two parts of the approach to be applied. The judge focused, and rightly so, on what were Mr. Maingot's prospects of returning to work, and at what level of functioning.

[60] Moreover, I do not agree with Mr. Maingot's statement about what the judge found. The judge did not, in my view, conclude that he would return to work full time in three years with no further impairment. This inference is taken from the judge awarding three years of his base income to compensate him for loss of future earning capacity. In my view, this oversimplifies the judge's analysis.

[61] First, the judge does not put a definite timeframe on when Mr. Maingot would be able to return to work. Second, she does not say that he would return full time. Third, the judge expressly acknowledges that other causes, for which the respondents are not liable, played a significant contributing role to the development of his SSD and, as a result, affect his future loss of income. It will be recalled that the judge found:

> [263] While I agree that Mr. Maingot's current disability is primarily his mental injury, I also find that the impacts of Mr. Maingot's osteoarthritis significantly contributed to him developing SSD, including: the pain Mr. Maingot experienced starting in 2016–2018 related to his osteoarthritis, the mental impact of this pain, the hip surgery itself, and the recovery process from that surgery. I must also consider the likelihood that Mr. Maingot would have suffered SSD as a result of years of hip pain and the subsequent surgery alone. I find that this likelihood is not insignificant.
>
> [264] Because I have found there is a measurable risk that Mr. Maingot would have developed SSD because of this independently existing condition, I must take this into account in my award of damages: Moore at para. 43. Rather than apply a discount factor to Mr. Maingot's damages as suggested by Ms. Johnston, I prefer to approach the assessment of his damages with the understanding that some portion of those losses are properly attributable to Mr. Maingot's pre-existing osteoarthritis and his psychological difficulties in recovering from the related surgery. This reflects the principle that a tortfeasor is not required to return a plaintiff to a better position than they would be in but for the tort: *Blackwater* at para. 78

[62] In my view, the judge accepted that Mr. Maingot's loss of capacity would lead to a loss of income. The judge found that the risk that Mr. Maingot would have

developed SSD independently of the accidents was not insignificant, and that some portion of his losses were attributable to SSD resulting from pre-existing conditions. The judge recognised that these significant and measurable possibilities had to be taken into account in assessing damages, but she declined to do so by ascribing a percentage discount. The implication of this is that the judge anticipated that it would take longer for Mr. Maingot to return to work than just three years, or that, if he did so, he might well suffer from some continuing loss of capacity. Furthermore, the judge found that there was substantial probability that Mr. Maingot would return to work at a level of functioning commensurate with his high performing years. Elsewhere in the judgment, she found that that outcome amounted to a very strong likelihood. Finally, the judge accepted that Mr. Maingot incurred a longer-term loss of capacity, and that he would need to be attentive to the management of both his chronic pain and his mental health over the rest of his working life: para. 378(d) and (e).

[63] The upshot of the foregoing is that I disagree that the judge unreasonably concluded that Mr. Maingot would return to work in three years, full time, with no further loss of earning capacity. The award of three years earnings at a base income of $220,000 per annum, reflects the judge's findings of fact that there was a substantial probability that he would be able to make a fully functional return to work and that there was a very strong likelihood that he would do so. She does not find that it is certain that he would do so. Moreover, the loss of future earning award reflects the measurable risk that Mr. Maingot would have suffered from SSD in any event and lost future income as a result.

[64] Mr. Maingot suggests that on his analysis of his loss of future earning capacity, the award should have been in the range of $2.6–$3.2 million depending on whether he worked to 65 or 69. The award of $660,000 represents 25.3% of $2.6 million and 20.6% of $3.2 million. But Mr. Maingot's analysis assumes a negligible prospect of any return to work, and takes no account of loss of future earning capacity attributable to non-tortious causes. The judge must be taken to have evaluated the prospects of Mr. Maingot making a fully functional return to work

at better than 50%, to which must be factored in a further significant discount to reflect the risk that Mr. Maingot would have incurred the loss of capacity in any event. When these factors are considered, it seems to me that the award reflects the judge's findings of fact and is readily supportable in light of them.

[65] As a postscript, I note that this judgment was rendered shortly before this Court fully clarified the methodology to be employed in assessing loss of future earning capacity, although the basic approach was embedded in the existing case law. Obviously, it would assist appellate review if trial judges more explicitly assessed possibilities and probabilities of future events leading to loss of future earning capacity against an assessment of the present value of future earnings, and avoided the potentially misleading appearance of simply picking a number of years out of a hat by means of a conventional award. I do not think the judge in this case did that, for the reasons I have explained, because it is clear that the award, although expressed arguably as a conventional award, is intended to reflect deeper findings of fact about causation and the prospects of recovery.

Disposition

[66] I would dismiss the appeal and the cross appeal.

"The Honourable Mr. Justice Harris"

I agree:

"The Honourable Chief Justice Bauman"

I agree:

"The Honourable Mr. Justice Willcock"