COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Hartman v. MMS Homes Ltd.,*
2023 BCCA 400

Date: 20231102
Docket: CA47929

Between:

MMS Homes Ltd. and Maninder Sekhon

Appellants
(Defendants)

And

Ginger Hartman

Respondent
(Plaintiff)

Before: The Honourable Mr. Justice Fitch
The Honourable Mr. Justice Hunter
The Honourable Mr. Justice Voith

On appeal from: An order of the Supreme Court of British Columbia, dated November 4, 2021 (*Hartman v. MMS Homes Ltd.*, 2021 BCSC 2165, New Westminster Docket M185753).

Counsel for the Appellants:	M.H. Wright J.E. Fergusson
Counsel for the Respondent:	J.S. Malik D. Luddu
Place and Date of Hearing:	Vancouver, British Columbia February 16, 2023
Place and Date of Judgment:	Vancouver, British Columbia November 2, 2023

Written Reasons by:
The Honourable Mr. Justice Fitch

Concurred in by:
The Honourable Mr. Justice Hunter
The Honourable Mr. Justice Voith

Summary:

The appellants challenge the trial judge's awards for past and future loss of earning capacity. They argue that the judge erred by making no allowance for general labour market contingencies and insufficient allowance for specific contingencies that would have resulted in a much-reduced award. Held: Appeal dismissed. The judge's findings underlying the award for past loss of earning capacity have not been shown to reflect palpable and overriding error. Those findings justified the award that was made. On the evidence before her, the judge did not err in principle by failing to reduce the award for future loss of earning capacity to account for general labour market contingencies. Although the judge did not expressly consider whether, absent the accident, the respondent would have worked full-time to the age of 65 given her background and past priorities, the judge was also required to consider positive contingencies. Given the respondent's ambition and career goals, there is a high likelihood that she would have earned more than the $45,000 annually estimated by the trial judge. Any future absences from the workplace or periods of part-time work would be more than offset by higher earnings. Accordingly, the damages awarded were fair and reasonable and should not be interfered with.

Reasons for Judgment of the Honourable Mr. Justice Fitch:

I. Introduction

[1] On January 26, 2015, the respondent sustained serious injuries when a pickup truck towing a lumber-loaded utility trailer rear-ended her. Liability for the accident was admitted by the appellants.

[2] The appellants challenge the trial judge's award of damages made in relation to past and future loss of earning capacity. The appellants do not challenge the $150,000 award for non-pecuniary damages, the $162,855 award for cost of future care, or the small $2,310 award for special damages.

[3] The appellants concede that the judge correctly articulated the law governing assessment of the loss of earning capacity. The essence of their complaint is that the judge did not apply the law correctly to the circumstances of this case. More specifically, the appellants say the judge failed to consider and give effect to negative contingencies—both general and specific—that should have resulted in a much-reduced award. They submit that the failure to do so resulted in a wholly erroneous assessment of the respondent's absent accident earning capacity.

[4] The focus of the appeal is on the award for loss of future earning capacity. The award was premised on the notion that, but for the accident, the respondent would have worked full-time to age 65 at an annual salary of $45,000—a sum matching the salary from her job in the financial services sector that was terminated a few months before the trial began.

[5] The judge concluded there was a real and substantial possibility the respondent would return to work in the future on a part-time basis notwithstanding her generally poor prognosis. She assessed the relative likelihood of this happening to be 50%. Accordingly, she assessed the respondent's future loss of earning capacity to be 75% of her anticipated, uninjured, full-time earnings, or $33,750 per year. Using an economic multiplier provided by an economist who testified on behalf of the respondent at trial, the judge determined the present value of the respondent's future loss of earning capacity to be $640,338.

[6] The award granted for loss of future earning capacity reflects the respondent's probability of survival based upon mortality statistics for Canadian females of her age. It does not, however, factor in labour market contingencies, such as probable participation rate in the workforce, periods of unemployment, and part-time work. The appellants submit that the award should be adjusted to reflect at least a 20% deduction for these general labour market contingencies.

[7] With respect to specific contingencies, the appellants submit the judge erred: (1) by failing to consider the real and substantial possibility that the respondent would not, absent the accident, have worked full-time to the age of 65; and (2) by failing to assess the relative likelihood of this occurring and reduce the award accordingly. The appellants say there is a real and substantial possibility, well grounded in the evidence, that the respondent would have prioritized family obligations and the pursuit of personal interests over full-time remunerative work. In the result, the appellants submit that the award for future loss of earning capacity should be reduced by a further 50% to reflect negative contingencies specific to the respondent.

[8] Adopting this approach, the appellants say the award for loss of future earning capacity should be reduced by 70%, from $640,000 to $192,000.

[9] The judge awarded $36,000 for past loss of earning capacity, subject to a deduction for income tax to be determined by counsel. The appellants submit that the respondent failed to demonstrate a real and substantial possibility of a past event resulting in an income loss. They seek an unspecified reduction in the award made for past loss of earning capacity.

[10] For the reasons that follow, I would dismiss the appeal.

II. Background

1. The Respondent and Her Injuries

[11] The respondent was 37 years old when the accident occurred. She was 42 at the time of the trial. She is a married mother of three boys, born in 2004, 2007 and 2009. She was not employed at the time of the accident.

[12] The respondent and her husband both testified at trial. The respondent also called several friends who knew her before and after the accident. In addition, she called Russell McNeil, an occupational therapist with expertise in functional capacity evaluations, and Kevin Turnbull, an economist with expertise in calculating the present value of future pecuniary losses. Finally, the respondent led medical evidence from Dr. Nguyen, a physiatrist, and Dr. Luitingh, her family doctor. Apart from reading in certain questions and answers given by the respondent on examination for discovery, the appellants adduced no evidence at trial.

[13] By all accounts, the respondent is an intelligent and very capable person. At the time of the accident, she was deeply involved in the education and recreational activities of her children. In addition to her parental responsibilities, she found time to coach a girls' soccer team. She also maintained a fairly intense personal fitness routine, playing in a soccer league every weekend, adhering to a running regime, and pursuing personal training. Her husband described the respondent as "driven." A friend described her as an energetic person who "vibrated

with energy." Although she did not use these words, I think it fair to say from the tenor of her factual findings as a whole that the judge found the respondent to be very capable, highly social, and something of a multi-tasking powerhouse of a person.

[14] The respondent was diagnosed with fibromyalgia after the birth of her oldest son in 2004. The judge found that the respondent overcame the prognosis she was given following her original diagnosis. Through diet, exercise and education, she was able to resume her fitness regime and educational pursuits, and have two more children. The respondent aspired to obtain a master's degree in counselling and, by approximately 2011, she had completed the third year of a four-year bachelor's degree.

[15] The judge rejected the appellants' position that the respondent's most significant ongoing symptoms are a result of her pre-existing fibromyalgia. This conclusion rests upon a sound evidentiary foundation, as fibromyalgia presents with symmetrical pain, whereas the respondent experienced only left-sided pain after the accident. The judge was satisfied that the respondent's fibromyalgia did not interfere with her ability to look after her household or children, and did not prevent her from continuing to pursue her active lifestyle. In short, the judge found that prior to the accident the respondent had a chronic, but manageable and non-progressive condition.

[16] The judge found that the accident caused injuries to the left side of the respondent's neck, shoulder, back, and pelvis. The judge found that these injuries resulted in serious, now chronic, myofascial pain, and cervicogenic headaches notable for their severity and duration, and left functional thoracic outlet syndrome which causes the respondent to experience numbness in her left arm.

[17] The judge noted that all of the medical evidence was to the effect that the respondent's prognosis for improvement was assessed as being guarded to poor. She found that the respondent would continue to suffer from the effects of the

accident and that while her symptoms might improve somewhat over time with appropriate treatment, she would never return to her pre-accident condition.

2. The Respondent's Pre- and Post-Accident Work History

[18] In 2003 and possibly into 2004, the respondent worked at a credit union where she met her husband. They married in 2003. The respondent left the workforce after the birth of the couple's first child. She assumed primary responsibility for running the household and caring for the needs of her family.

[19] As set out below, the respondent did not re-engage in remunerative work until after the accident.

[20] In 2012/13, the respondent noticed that her oldest son was struggling in school. She decided to begin home schooling all three children.

[21] In the fall of 2014, the respondent had discussions with her husband about her starting to look for part-time work she could do from home to help ease the financial stressors they were experiencing. As the respondent put it, "[w]e were just looking for part-time [work] at the time" (emphasis added). The respondent testified that it was important to her to have the capacity to work from home so she could continue home schooling the children. The respondent's plan to work part-time was delayed as a result of the injuries she sustained in the accident.

[22] In February 2016, about 13 months after the accident, the respondent started working part-time from home providing online technical support for TeamSnap customers. By the fall of 2016, the respondent was working full-time for TeamSnap. The respondent worked from her bed, using a laptop. She was not able to work in a position that required her to stand for any time. To address her worsening pain and more frequent headaches, the respondent began a pattern of self-medicating with painkillers and alcohol. Her ability to home school the children suffered to the point that she could no longer manage this commitment. By the end of the school year in 2017, the respondent and her husband decided that the children needed to attend public school. The respondent's contract with TeamSnap ended in October 2017.

[23] In December 2017, the respondent began working full-time hours from home for Shopify providing online customer support. The pace of the work was more intense than it was with TeamSnap. She continued to manage the demands of her work with painkillers and by consuming an increasing amount of alcohol.

[24] In June 2018, and largely in response to financial pressures, the respondent moved with her family to Armstrong, B.C. The children remained in the public-school system.

[25] The respondent was asked whether she had a plan when she moved to Armstrong about whether to keep working outside the home. She responded that, "I needed to keep working but we were working on paying down debt…so it could be optional or part-time." The respondent also spoke of her desire to have some additional freedom and flexibility as the children became older, and referenced again her personal goal of finishing her degree and becoming a counsellor.

[26] By the fall of 2018, the respondent was continuing to suffer from debilitating headaches. She stayed in her bedroom and largely withdrew from family life. She continued to self-medicate.

[27] By the end of 2018, the respondent had become very concerned about her overall health and pain levels. As her family needed her to work, she decided to look for other employment.

[28] In February 2019, the respondent was hired by a credit union as a financial advisor trainee. The pace was less intense. She completed her mutual funds designation within six months, but not without difficulty. She was promoted to the position of financial advisor in November 2019. She testified that she loved what she was doing.

[29] In early 2020, the respondent was diagnosed with fatty liver disease, a condition she worried was brought about through her overuse of pain medication and alcohol.

[30] In March 2020, the respondent stopped overusing painkillers and alcohol. The judge found that as a result of taking this step, the respondent experienced elevated pain-related symptoms that rendered her incapable of returning to work.

[31] In the summer of 2020, the respondent applied for and received CPP disability benefits.

[32] In the fall of 2020, the respondent was advised by the credit union that her job was being terminated.

[33] The respondent testified that she does not believe she could return to any kind of work without resorting to drugs and alcohol to manage her pain and disabling headaches.

[34] The respondent's husband testified that, since the accident, he has become the respondent's caregiver. He said the respondent is angry and mourns the loss of the person she used to be. She rarely leaves her room when she is home and can go for days without seeing her children.

3. Reasons for Judgment

(a) The Articulation of General Principles

[35] In reasons for judgment given November 4, 2021, and indexed as 2021 BCSC 2165, the trial judge began her analysis of the claim for loss of earning capacity (past and present) with this overview:

> [121] The purpose of an award for loss of earning capacity is to restore the plaintiff, as best as possible, to the position he would have been in had the accident not occurred. The plaintiff must establish an impairment in his earning capacity, and that there is a real and substantial possibility that the diminishment in earning capacity will result in a pecuniary loss: Perren v. Lalari, 2010 BCCA 140.
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> …
>
> [123] Both past and future loss of earning capacity address the same loss. However, there are differences in how this loss is assessed before trial and after trial. To the extent past loss of capacity relies on facts which are capable of proof, those facts must be proven on the balance of probabilities. To the extent past loss of capacity relies on hypothetical facts, the court must be satisfied that there is a real and substantial possibility of such facts occurring.

> The court may assess the likelihood of such hypothetical facts occurring, and discount or increase an award to reflect such contingencies. Future losses are almost always based on hypothetical facts, and are assessed on the standard of real and substantial possibility with consideration of relevant contingencies: *Rousta v. MacKay*, 2018 BCCA 29 at para. 14.
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> [124] In determining loss of capacity, the court must first determine if there is a loss of capacity. If there is a loss of capacity, the court must determine whether the loss of capacity will result in a pecuniary loss. A likelihood of a pecuniary loss must be valued by the court, grounded in the evidence, and the court must assess the relative likelihood of the possibility of such loss occurring: *Rab v. Prescott*, 2021 BCCA 345 at para. 47.

[36] I do not understand the appellants to take issue in principle with the judge's concise but faultless summary of the governing principles.

(b) The Award for Past Loss of Earning Capacity

[37] The judge then turned to consider the respondent's pre-trial (past) loss of earning capacity. The respondent asked the judge to accept that, but for the accident, she would have become a financial planner in 2015 earning $30,000 that year, and moving up to $55,000 by 2020. She sought an award of $77,000 for past loss of earning capacity representing the difference between what she said she would have earned as a financial planner absent the accident and what she actually did earn.

[38] The judge agreed the respondent suffered a loss of earning capacity attributable to the accident to the date of the trial, but was unable to accept all of the assumptions upon which the sought-after award was premised.

[39] The judge analysed the claim for past loss of earning capacity with reference to three time periods: the year of the accident (2015); from early 2016 (when the respondent began her employment with TeamSnap) to March 2020 (when she stopped overusing painkillers and alcohol); and, from March 2020 to the date of the trial.

[40] With respect to the year 2015, the judge said this:

> [127] I am satisfied that Ms. Hartman suffered a loss of earning capacity as a result of the accident. For most of 2015 she was unable to work at all. I

> accept that her intention was to begin working sometime in 2015, as the family had determined that their finances required her to make a contribution. Her inability to work following the accident in 2015 did result in a pecuniary loss. However, in valuing that loss, I do not agree that the Ms. Hartman has established a likelihood that she would have taken a full time position, similar to the position she took at the Credit Union in February 2019, or as a financial planner.
>
> [128] In 2015 Ms. Hartman was home schooling their children and was involved in many of the children's activities which would have interfered with a nine to five job. I find that there is a real likelihood that, but for the accident, Ms. Hartman would have started working at job which allowed her to work from home on a part time basis, similar to the position she ultimately did obtain at Team Snap in December 2015. She had no such job opportunities lined up at the time of the accident. Therefore, I find it reasonable that, but for the accident, she would have taken several months to find appropriate employment. I assess her loss of past earning capacity in 2015 to be $18,000, representing an income similar to what she achieved at Team Snap, discounted by one third to account for the time needed for her to find work in the ordinary course.

[41] I pause to make two observations regarding this past loss period. First, the conclusion that the respondent suffered a past loss of earning capacity as a result of the accident is framed by two unchallenged factual findings—that the respondent intended to recommence remunerative work sometime in 2015, and that she was unable to do so as a result of the injuries she sustained in the accident. Second, in concluding that, absent the accident, the respondent would only have worked on a part-time basis in 2015, the judge was making a prognostication about what the respondent likely would have done at this point in time. Obviously, the children were much younger in 2015 and they were being home schooled.

[42] The judge was not satisfied the respondent had established any pecuniary loss after she began working with TeamSnap until March 2020. It will be recalled that the respondent was (for the most part) employed on a full-time basis during this time by either TeamSnap or Shopify.

[43] The judge awarded a further $18,000 in damages for past loss of earning capacity between March 2020 and the date of the trial. She reasoned as follows:

> [130] I am satisfied that the predominant reasons for Ms. Hartman's current disability are the injuries she suffered in the accident. At this point, Ms. Hartman had stopped taking excessive doses of painkillers and has

> stopped relying on alcohol to numb her pain. I agree that her continued abuse of painkillers and alcohol was causing her harm, and was not sustainable. As a result, her pain rose to a level which did not allow her to work. If she was not on disability, I find that she would have earned approximately $45,000 at the Credit Union in 2020. I assess her loss from March 2020 to the date of trial, after taking into account her earnings and receipt of CERB, at $18,000.
>
> [131] In the result, I assess Ms. Hartman $36,000 in pre-trial loss of earning capacity.
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> [132] Pursuant to s. 98 of the *Insurance (Vehicle) Act*, R.S.B.C. 1996, c. 234 income tax must be deducted from this award. If the parties are unable to agree on the appropriate deduction, they may appear back before the Registrar to settle the deductions.

(c) The Award for Future Loss of Earning Capacity

[44] Relying on the opinion evidence of Kevin Turnbull, the respondent argued that she was permanently disabled, or nearly so, from engaging in remunerative employment in the future. She sought an award for future loss of earning capacity based on 2016 census data reflecting the median, full-time earnings of BC females with a bachelor's degree who are employed in the category of "other financial officers".

[45] Assuming the respondent worked to the age of 70, the amount of the award sought, which the respondent implicitly accepted should be adjusted for labour market contingencies, was $914,340.

[46] In the alternative, the respondent sought an award reflecting the full-time earnings of BC females with a bachelor's degree who are employed in the category of "other financial officers", but whose earnings fall within the first quartile—the bottom 25%—of this broad occupational category.

[47] Adjusted for labour market contingencies and assuming the respondent worked to the age of 70, the respondent's alternative position was that the award sought for future loss of earning capacity should be $649,685.

[48] In the event the judge concluded she had some residual earning capacity, the respondent submitted that a modest reduction of the award (no more than 10–20%) was warranted.

[49] The focus of the appellants' submission at trial on the claim for future loss of earning capacity was that the respondent's complaints were largely attributable to her pre-existing fibromyalgia and would have arisen absent the accident.

[50] In addition, the appellants argued that the scenarios posited by Mr. Turnbull were not reliable, because the respondent had not completed her bachelor's degree and was employed as a financial advisor, not a financial planner.

[51] The appellants also argued that it was unlikely the respondent would have returned to full-time work and remained continuously employed on a full-time basis until the age of 70. They noted her evidence that she moved to Armstrong with the intention of working on a full-time basis for a limited period of time, wanted to prioritize being at home with her children at that time, and looked forward to having personal time and pursuing other educational and employment prospects once the children were older. No specific contingency deduction was suggested to take account of the relative likelihood that the respondent would not work full-time to the age of 70.

[52] The appellants relied on the functional capacity assessment of Mr. McNeil to argue that the respondent was not fully disabled and was capable of doing sedentary work.

[53] Finally, the appellants argued that the respondent left her employment at the credit union due to symptoms largely related to her pre-existing fibromyalgia. In the alternative, if the court found the respondent's accident-related injuries would result in some limitation on the types of employment she could accept, the capital asset approach was said to be the appropriate way of valuing her loss. The position of the appellants was that the respondent should be awarded the equivalent of a one-year loss of capacity of $46,000, reduced by 40% to recognize that a substantial portion of her symptoms were attributable to fibromyalgia.

[54] The judge found Mr. McNeil's assessment of the respondent's residual capacity to perform sedentary work to be overly optimistic and not reflective of her

actual abilities as of the date of trial: para. 137. She noted that Mr. McNeil evaluated the respondent at a time when she was abusing painkillers and alcohol to manage her pain. Further, while Mr. McNeil assessed the respondent's physical limitations, her disability resulting from crippling headaches was not adequately accounted for. Finally, the respondent was found to be working at the expense of virtually all other aspects of her life, including by sacrificing relationships with her husband and children. The judge found as a fact that full-time work is not sustainable for the respondent.

[55] The judge found, at para. 138, that with treatment, the respondent may be able to perform sedentary work on a part-time basis for a sympathetic employer prepared to support her with ongoing accommodations.

[56] The judge was satisfied that the respondent had established a potential future event that could lead to a loss of capacity and a real and substantial possibility that the future event will cause a pecuniary loss. The respondent was thus found to have met the first two steps of the required analysis set out in *Rab v. Prescott*, 2021 BCCA 345.

[57] While the appellants challenged these two findings in their factum, the issue was not pursued in oral argument. I will say only that there is no merit in the argument advanced by the appellants in writing on this point. Thus, the primary issue on appeal is whether the judge failed to have regard to negative contingencies in valuing the likely extent of the future loss.

[58] In quantifying the loss, the judge rejected the respondent's position that the occupation of financial planner was a reasonable proxy for her ability to earn income into the future. She found that the respondent's income at the credit union provided a reasonable basis upon which to assess her future loss: para. 141.

[59] The judge rejected the respondent's position that she would never be able to work again and quantified the likelihood that she would return to part-time

employment in the future. The judge awarded damages for loss of future earning capacity with these findings in mind.

[60] As noted earlier, the award was: (1) premised on the respondent working full-time to age 65 taking only statistical mortality rates into account; and (2) adjusted downward to reflect the respondent's residual capacity to work. The judge did not adjust the award for labour market contingencies of a general nature nor did she, at least expressly, consider any other positive or negative contingencies specific to the respondent, including by assessing the relative likelihood that she would not work full-time to age 65 or progress in her educational achievements and rise above the static income level the judge imputed to her from trial to retirement. She said this:

> [139] I am satisfied that Ms. Hartman has established a future loss of capacity. Ms. Hartman is less capable overall of earning income from all type[s] of employment. Because of her need for accommodations, she is less attractive as an employee. She is less valuable to herself as a person capable of gaining employment in a competitive job market.
>
> [140] I am satisfied that there is a real and substantial likelihood that Ms. Hartman's loss of earning capacity will result in a pecuniary loss. In quantifying her loss, however, I am unable to agree with the opinion of Mr. Turnbull, as his opinion is based on the average income of female financial planners in BC, and females with a bachelor's degree. I am not satisfied that Ms. Hartman has established an intention to work as a financial planner, or that such work is a reasonable proxy for her earning ability into the future. Ms. Hartman has also not obtained a bachelor's degree. As such, I am not persuaded that the calculations performed by Mr. Turnbull are appropriate in this case.
>
> [141] Rather, I find that Ms. Hartman's income at the Credit Union is a reasonable basis upon which to assess her future loss. Ms. Hartman earned $41,500 over 11 months in 2019. Over a 12-month period, her annual earnings would have been approximately $45,000, but for the accident. I also do not agree that there is no possibility Ms. Hartman will return to work in the future, notwithstanding her injuries. I assess the relative likelihood of Ms. Hartman returning to work on a part time basis to be 50%. I assess Ms. Hartman's future loss of earning capacity to be 75% of her anticipated, uninjured, full time earnings, or $33,750 annually.
>
> [142] Mr. Turnbull provided an appendix which allows for a calculation of a present value, taking into account mortality only, which he testified was appropriate for situations where a person is projected to work in the future, although less than they would have before the injury. This table is appropriate in the case before me. Applying the relevant multiplier to age 65, I determine

> the present value of Ms. Hartman future loss of earning capacity to be $640,338.
>
> [Emphasis added.]

[61] The evidence of Mr. Turnbull the judge relied upon to conclude that it was appropriate in this case to have regard only to statistical mortality rates in calculating the present value of the respondent's loss emerged in cross-examination. He was asked whether the income multiplier table he prepared (Table D), which was relied on by the judge to estimate the present value of the respondent's future loss of earnings, factored in labour market contingencies for non-participation in the workforce, unemployment and part-time work. The entirety of the exchange is reproduced below:

> Q And I just want to ask you about the contingencies in this chart. Does this –
>
> A Sorry, this chart? What are you referring to?
>
> Q Oh, sorry, Table D with the cumulative losses from start.
>
> A Yeah.
>
> Q Do those include contingencies for participation, unemployment and part-time work?
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> A No, it's just -- Table D is just a straight $1,000 being adjusted for mortality risk and -- and present value. There's no – you'd have to -- to use Table D, you would apply some kind of contingency net number to it in some notional sense.
>
> Q And do you know – there's no additional number in here, so how would -- how would the trier of fact determine what -- how to reduce for those contingencies?
>
> A Well, I mean, they would have -- I guess it would be depending on the evidence and all the rest of it, but usually stuff like Table D is often used for, you know, more of a situation where you're looking at a person's earnings and say, okay, she can earn such and such amount now, but she would've been able to work a little more. So, you know, it's more based on the sort of idea of a differential like 10,000 a year or 12,000 a year, something like that. If a person sort of can't work at all, then you kind of end up looking back using those other tables as more of a base to, you know, plus or minus from.
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> [Emphasis added.]

[62] The issue was not clarified in re-examination and neither counsel referred to Mr. Turnbull's evidence on this point in their closing submissions.

III. Analysis

1. Standard of Review

[63] The standard of review for damages awards is highly deferential: *Kringhaug v. Men*, 2022 BCCA 186 at para. 39. It was explained in *Reilly v. Lynn*, 2003 BCCA 49, leave to appeal ref'd [2003] S.C.C.A. No. 221, in these 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. The two cases often cited in this court in this regard are *Woelk v. Halvorson*, [1980] 2 S.C.R. 430 and *Cory v. Marsh* (1993), 77 B.C.L.R. (2d) 248 (C.A.).

2. The Award for Past Loss of Earning Capacity

[64] As the judge explained, an award of damages for past loss of earning capacity compensates a plaintiff for the loss of the value of the work they would have performed but were unable to perform due to the accident-related injury: *Rowe v. Bobell Express Ltd.*, 2005 BCCA 141 at para. 30. The standard for past hypothetical events is whether there is a real and substantial possibility that the events would occur. If the plaintiff meets this standard, the court must then determine the measure of damages by assessing the likelihood of the event: *Grewal v. Naumann*, 2017 BCCA 158 at para. 48.

(a) For 2015

[65] In their factum, the appellants condemned as speculation the judge's finding that, but for the accident, the respondent would have commenced part-time employment no later than April 2015. They argued that the respondent had taken no steps prior to the accident to obtain employment, and adduced no evidence of employment opportunities available to her in 2015.

[66] In my view, the appellants' argument on this issue founders on the clear and dispositive factual findings made by the judge. Specifically, the judge found that the

respondent delayed her intention to return to the workforce on a part-time basis as a result of the accident. She accepted that the respondent's intention was to begin working in 2015. She found that the respondent would have secured work and been employed on a part-time basis for a substantial portion of 2015 had she not been injured. She concluded that the respondent's inability to work following the accident resulted in a pecuniary loss. The factual findings upon which this portion of the award for past loss of earning capacity was based have not been shown to reflect palpable and overriding error. Counsel conceded as much and effectively abandoned the ground in oral argument.

(b) From March 2020 to the Date of the Trial

[67] The appellants similarly submit it was speculative for the judge to conclude that, absent the accident, the respondent would have remained employed from March 2020 to the date of the trial. They note that the respondent's position at the credit union was terminated because of "restructuring" in September or October 2020. They submit there was no evidence the respondent would have had a similar paying position available to her at that time. They further submit that the award fails to have regard to contingencies underlying the assumptions upon which this portion of the award for loss of past earning capacity is based. They highlight here the respondent's desire to homeschool her children, her desire for more personal time, and her intention to pursue her education.

[68] I see no merit in these submissions.

[69] First, the arguments made on appeal were not put to the trial judge. The appellants argued in the trial court that any wage loss suffered by the respondent from March 2020 to the date of the trial was caused wholly, or at least primarily, by her pre-existing fibromyalgia. This argument was rejected by the judge. She found that by March 2020, the respondent was no longer able to work, having ceased her reliance on painkillers and alcohol to manage the accident-related symptoms. The appellants conceded that if the judge rejected their primary position, the past wage loss award for this period, based on the wage the respondent was then making,

should be limited to $16,961.25, which is $1,038.75 less than what the judge awarded. While the judge did not address the past wage loss contingencies relied on by the appellants on appeal, she was not asked to. Her reasons were properly responsive to the live issues in the case: see *Dresser v. Kim*, 2023 BCCA 49 at para. 28.

[70] Second, it would not have been unreasonable for the judge to conclude that, absent the accident, the respondent would have secured a similar paying position after her job at the credit union was terminated. The respondent certainly had no difficulty securing remunerative employment once she made the decision to return to the workforce. As the appellants' counsel conceded at trial, the respondent is a "determined" person who was (despite her injuries) successful at TeamSnap and Shopify. The appellant's counsel also conceded that she was "very successful" in her work with the credit union. Against this background, it was entirely reasonable for the judge to base this portion of the award for past loss of earning capacity on the assumption that, absent the accident, the respondent would have been able to promptly secure a similar paying position following the termination of her job with the credit union.

3. The Award for Future Loss of Earning Capacity

(a) General and Specific Contingencies

[71] In *Graham v. Rourke*, (1990), 74 D.L.R. (4th) 1, 1990 CanLII 7005 (Ont. C.A.) at paras. 46–47, Doherty J.A. explained that contingencies can be placed into the following two categories:

> …general contingencies which as a matter of human experience are likely to be the common future of all of us, e.g., promotions or sickness; and "specific" contingencies, which are peculiar to a particular plaintiff, e.g., a particularly marketable skill or a poor work record. The former type of contingency is not readily susceptible to evidentiary proof and may be considered in the absence of such evidence. However, where a trial judge directs his or her mind to the existence of these general contingencies, the trial judge must remember that everyone's life has "ups" as well as "downs". A trial judge may, not must, adjust an award for future pecuniary loss to give effect to general contingencies but where the adjustment is premised only on general contingencies, it should be modest.

> If a plaintiff or defendant relies on a specific contingency, positive or negative, that party must be able to point to evidence which supports an allowance for that contingency. The evidence will not prove that the potential contingency will happen or that it would have happened had the tortious event not occurred, but the evidence must be capable of supporting the conclusion that the occurrence of the contingency is a realistic as opposed to a speculative possibility: [*Schrump v. Koot* (1997), 18 O.R. (2d) 337], at p. 343 O.R.

The discussion in Graham has been cited with approval by this Court on numerous occasions: see *Hussack v. Chilliwack School District No. 33*, 2011 BCCA 258 at para. 93; *Dornan v. Silva*, 2021 BCCA 228 at para. 92; *Steinlauf v. Deol*, 2022 BCCA 96 at para. 91.

(b) General Contingency Principles

[72] While I do not propose engaging in an exhaustive survey on the jurisprudence respecting general contingencies, several general principles may be identified.

[73] First, there is no automatic or mandatory general contingency deduction: *Thornton v. School District No. 57 (Prince George)*, [1978] 2 S.C.R. 267, 1978 CanLII 12 at 283; *Lewis v. Todd*, [1980] 2 S.C.R. 694, 1980 CanLII 20, at 714; *Wright v. Kelly Estate*, [1982] B.C.J. No. 1959 at para. 11; *Dunn v. Heise*, 2022 BCCA 242 at para. 63.

[74] Second, not all general contingencies are adverse; not all the vicissitudes in life are harmful: *Andrews v. Grand & Toy Alberta Ltd.*, [1978] 2 S.C.R. 229, 1978 CanLII 1 at 253, citing *Bresatz v. Przibilla* (1962), 108 C.L.R. 541, from the Australian High Court, at p. 544; *Hussack* at para. 92; *Shapiro v. Dailey*, 2012 BCCA 128 at para. 36 (where the reality that successful employees generally earn more with increasing age and experience was a positive contingency the trial judge was entitled to consider in finding that the positive and negative contingencies were balanced).

[75] Third, where it is determined to be appropriate to make a deduction for general contingencies, the amount of the deduction will depend on the totality of the circumstances, including the nature of the plaintiff's employment and work history:

Andrews at 253. The application of “usual” labour market contingencies for non-participation in the workforce, unemployment and part-time work or part-year work may be inappropriate where the plaintiff has a long history of full-time employment, close attachment to his or her work, and a supportive employer: *Kringhaug* at para. 95; *Steinlauf* at paras. 92–96.

[76] Fourth, where an adjustment is based only on general contingencies, it should generally be modest: *Andrews* at 253; *Graham* at para. 46; *Kringhaug* at para. 90. As Chief Justice Dickson observed in *Andrews* (at 253), there are many public and private schemes (employment insurance and short and long-term disability benefit schemes) which cushion employees from the adverse consequences of negative general contingencies. In *Penso v. Solowan* (1982), 35 B.C.L.R. 250 (C.A.), 1982 CanLII 436 (B.C.C.A.) at para. 17, it was noted that 20% appears to be the maximum general contingency deduction in the absence of unusual factors. Indeed, some commentators have noted that the current trend for both general and specific contingencies is toward moderation and a more realistic evaluation of the vicissitudes of life: K. Cooper-Stephenson and E. Adjin-Tettey, *Personal Injury Damages in Canada*, 3rd ed. (Toronto: Carswell, 2018) at 534, 543.

(c) Failure to Reduce the Award for General Labour Market Contingencies

[77] In my view, judges have an obligation to consider whether to reduce a damages award to take account of general contingencies, but exercise a case-specific discretion in determining whether to do so: *Campbell-MacIsaac v. Deveaux*, 2004 NSCA 87 at para. 102.

[78] There are two features in this case that complicate the issue of whether this Court should intervene to modestly reduce the award to reflect general labour market contingencies.

[79] First, the respondent, by relying on Mr. Turnbull’s evidence, implicitly acknowledged that the award should be reduced to reflect generally applicable labour market contingencies. Standing alone, this strongly militates in favour of

modestly reducing the award for the future loss of earning capacity. However, the judge determined not to make this reduction because she understood Mr. Turnbull's evidence to be that it was appropriate to consider mortality only where a person is projected to work in the future, although less than they would have before the injury.

[80] Second, Mr. Turnbull's evidence was that the application of labour market contingencies to a similarly-situated plaintiff entirely disabled from working in the future would result in a 50% reduction of the award for loss of future earning capacity. The disconnect between Mr. Turnbull's evidence on this point and the modest deduction generally deemed to be appropriate to account for general contingencies is striking.

[81] Mr. Turnbull was not cross-examined on either of these issues. In the result, the evidence on these two points is neither explained nor is it self-evident.

[82] Against this unsatisfactory background, I am disinclined to attempt to fill in evidentiary gaps unaided by expert evidence or suggest that the judge misapprehended Mr. Turnbull's evidence in concluding that it was appropriate in a case of this kind to factor in mortality rates but not labour market contingencies. On the latter point, I am particularly reluctant to do so in circumstances where the appellants did not argue on appeal that the judge misapprehended Mr. Turnbull's evidence.

[83] Further, the judge did not take into consideration general contingencies of a positive nature, for example, that a relatively young person who was very close to completing her bachelor's degree, might economically benefit from promotions in the future.

[84] In my view, it would be unfair to the respondent to assume that any reduction in the award to reflect negative labour market contingencies would necessarily overshadow positive contingencies that contemplated the possibility of promotion, advancement and general good fortune.

[85] As I am not persuaded that the judge erred in principle on this point or that she misapprehended Mr. Turnbull's evidence, I would not interfere with the way in which the judge exercised her discretion in this case.

(d) Failure to Reduce the Award to Reflect Negative Contingencies Specific to the Respondent

[86] The appellants argue that the trial judge erred in quantifying the respondent's future loss by failing to consider seven specific contingencies that would have negatively affected her without accident future earnings.

[87] First, the appellants submit that the judge failed to consider that the respondent's pre-existing fibromyalgia would limit her ability to engage in uninterrupted, full-time work.

[88] Second, the appellants submit that the judge failed to consider whether an appropriate treatment plan—one that relies on prescribed pharmaceuticals rather than over-the-counter painkillers and alcohol—would allow the respondent to work more in the future than the judge believed possible.

[89] Third, they argue that because the respondent attached great importance to home schooling her children, she was unlikely to continue working full-time until her youngest child graduated from high school, if at all.

[90] Fourth, they point out that before the accident the respondent maintained a very busy schedule at home, making it more likely that she would have worked part-time and from home.

[91] Fifth, they point out that the respondent adduced no evidence that employment as a financial advisor was available to her after her position with the credit union was terminated in the fall of 2020.

[92] Sixth, they note the respondent's evidence that she had a personal goal of completing her bachelor's degree and that taking time out for educational pursuits would, at least temporarily, have reduced her earning capacity.

[93] Finally, they argue that the respondent did not prove that, absent the accident, there is a high likelihood she would have enjoyed a lengthy, full-time career. They point out that she had not taken steps to obtain employment prior to the accident, and that she made the decision to re-enter the workforce in 2015 to pay off debt. The purpose of doing so was to make future remunerative work for the respondent either optional or part-time. In short, the appellants assert that the judge erred in treating the possibility that the respondent would work full-time as a financial advisor until the age of 65 as a certainty.

[94] The appellants submit that these future hypothetical events constituted real and substantial possibilities which should have been evaluated by the judge according to their relative likelihood: *Dornan* at para. 64, 92–95. By failing to reduce the award by 50% to reflect these contingencies, the appellants say the judge failed to ensure the overall reasonableness of the award.

[95] The respondent counters that the onus was on the appellants at trial to point to evidence supporting an allowance for each of the identified contingencies on grounds there was a real and substantial possibility the respondent would not work full-time to the age of 65 or, in the alternative, that she would be able to work more than the judge predicted with appropriate medical management of her symptoms: *Graham* at para. 47; *Lo v. Vos*, 2021 BCCA 421 at paras. 38–39, 74. The respondent submits that the onus was not met in this case. She argues that some of the contingencies relied on by the appellants on appeal were not even raised at trial, while others are not supported by any evidence.

[96] I will deal with each of the appellant's arguments in turn.

[97] The failure to account for what the appellants say is a real and substantial possibility that the respondent's pre-existing condition would interfere with her ability to engage in full-time work founders on the factual findings made by the judge. Specifically, the judge found that the respondent's fibromyalgia did not interfere with her ability to manage a very active and physically demanding lifestyle. Further, the

judge found no evidence to support a finding that the respondent's fibromyalgia symptoms could be expected to worsen over the course of her life.

[98] With respect to the appellants' second complaint, the trial judge had no evidence before her that another treatment plan would have allowed the respondent to return to work without abusing painkillers and alcohol. Such a finding would have been entirely speculative. It is well-settled that the existence of a specific contingency must be proven by evidence that is capable of supporting a conclusion that the occurrence of the contingency is a real and substantial, as opposed to speculative, possibility: *Lo* at para. 74.

[99] With respect to the appellants' third complaint, it would appear that this contingency—time away from work to homeschool the children—is raised by the appellants for the first time on appeal. This explains why the contingency was not specifically addressed by the trial judge.

[100] As a general rule, this Court does not consider issues raised for the first time on appeal. As explained in *R. v. Gill*, 2018 BCCA 144 at para. 9, this Court is not a court of first instance and its traditional reviewing role may be compromised when issues are raised for the first time on appeal. In addition, entertaining new issues on appeal risks frustrating achievement of the goal of finality.

[101] But leaving this concern aside, I think it clear that home schooling the children when they were young was a priority for the respondent. However, the record is silent with respect to her intentions as the children aged. The appellants argue that, "[t]he respondent did not testify that she intended to cease home schooling prior to the completion of high school of her youngest." While technically true, this is so because the respondent was never asked about whether she would continue home schooling to the exclusion of pursuing employment as the children aged and became more involved in extracurricular activities traditionally associated with the school system. I would not give effect to this ground because it was not raised below and there is an inadequate evidentiary foundation upon which allowance could be made for this negative contingency.

[102] The contingency based on the respondent's busy schedule at home—and the appellant's related argument that there is a real and substantial possibility that she would only have worked part-time—is also raised for the first time on appeal. As with the previous argument, I would not give effect to this argument even setting aside this concern.

[103] The evidence upon which the appellants rely is descriptive of a typical day in the respondent's life in the fall of 2014. The judge could not reasonably have concluded on the basis of this evidence that the respondent was describing how she wanted to live her life moving forward. Her evidence was nothing more than a snapshot in time, framed by the familial obligations that occupied her when the children were quite young.

[104] It seems to me that the appellants' position on this issue also ignores the respondent's evidence that she loved her job with the credit union and was interested in becoming a senior account manager and going into business banking. I note that when the respondent was asked in cross-examination whether she was motivated to get back to work she replied, "Absolutely. I am more than just a mother. I love my children dearly, but my job is to raise them up into the world into independent people. And then what is there for me? I want there to be a life for me, and that's what I want. And that car accident limited those choices…". The respondent's goal of returning to school, completing her master's degree and pursuing a career in counselling also undermines the appellants' position that the evidence supported a real and substantial possibility the respondent would focus on extracurricular activities to the exclusion of full-time work.

[105] The appellants' fifth point is that the respondent adduced no evidence to support a conclusion that she was likely to continue working as a financial advisor absent the accident. I see no merit in this argument. The judge was assessing the respondent's likely income stream but for the accident, not deciding that she would have continued to work until retirement as a financial advisor in a credit union. As *Andrews* makes clear, at p. 231, it is not the loss of earnings but a loss of earning

capacity for which compensation must be made. The respondent was qualified as a financial advisor. She was making $45,000 per year. It was conceded by the appellants' trial counsel that it was appropriate to use the salary she was making at the credit union in assessing her future loss. The judge's assessment of the respondent's loss was not based on her working for the next 23 years in the same job.

[106] With respect to the appellants' sixth point, the argument in favour of a contingency allowance for time the respondent would likely spend out of the workforce pursuing her education was also not advanced with any clarity at trial. But even if it was, the judge would have had to consider a related and positive contingency arising from the real and substantial possibility that completion of a bachelor's degree and attainment of a master's degree would substantially increase the respondent's future earning capacity.

[107] The appellants' final argument does, however, warrant closer scrutiny. As noted, the respondent was not working at the time of the accident. She was the primary caregiver to three young children. She had only recently discussed with her husband the possibility of attempting to find part-time work from home. When this discussion occurred, it appears to have been contemplated that the respondent would work outside the home to ease the financial burden on the family in the hope that doing so would make working in the future either optional or something she could do on a part-time basis. At the time of the accident, the respondent had not taken any steps to secure remunerative employment.

[108] Against this background, the appellants argue that the judge was required to consider whether the evidence gave rise to a real and substantial possibility the respondent would not work full-time to age 65. If the contingency was found to amount to a real and substantial possibility, the judge was required to assess its relative likelihood in quantifying the respondent's future loss. The appellants say the judge did neither.

[109] I am satisfied that this contingency was raised for consideration by the appellants' trial counsel. In fairness to the judge, the argument was neither well-focussed nor particularized and may have been obscured by the weight given to the appellants' principal submission that the respondent's future losses would more likely be attributable to fibromyalgia.

[110] I do not understand the appellants to suggest that this case be remitted to the trial court for reassessment of the award for loss of future earning capacity considering potential contingencies not expressly addressed by the trial judge, and I see no reason to do so.

[111] In my view, and on the evidence in this case, the judge was obliged to consider whether to discount the award for loss of future earning capacity on grounds that the respondent, given her work history and past priorities, may not have worked full-time to age 65. I accept that this analysis is nowhere apparent in the judge's reasons.

[112] At the same time, in conducting the required analysis, the judge would have been obliged to put the respondent's evidence as to the discussions she had with her husband in 2014 in context. As the respondent made clear in her testimony, those discussions reflected her intentions at a point in time. The respondent testified that she was looking for part-time work at that time and was prioritizing home schooling the children when they were 6–7 years younger than they were at the time of the trial.

[113] In addition, the judge would have been obliged to take account of the respondent's evidence that she loved her work at the credit union and was interested in pursuing a career as a senior account manager or become involved in business banking. She would also have been obliged to take account of the respondent's evidence that she had not given up on pursuing her master's degree in counselling. Finally, the judge would have been required to consider her positive assessment of the respondent's energy and capabilities—an assessment supported by the observation of the appellants' trial counsel in closing submissions that the

respondent proved herself to be a “determined individual” who was (despite her injuries) “very successful” when she did return to work.

[114] In short, the judge would have been required to have regard to both positive and negative contingencies affecting assessment of the respondent’s future loss. On the positive side of the ledger, I think it apparent, given the respondent’s aptitudes, determination and future career aspirations, that there is a real and substantial possibility she would have made much more than the $45,000 in annual earnings attributed to her by the judge. I would assess the relative likelihood of the respondent earning substantially more in the future than was attributed to her by the judge as being highly likely.

[115] In my view, any accounting for the contingency that the respondent would have decided, absent the accident, to work part-time or remain out of the workforce for periods of time, would be more than offset by the likelihood that she would make significantly more than $45,000 per year for much of her career.

[116] At the end of the day, I am satisfied the award is fair and reasonable.

[117] For these reasons, I am unable to give effect to the appellants’ submission that the award for loss of future earning capacity should be reduced.

IV. Disposition

[118] I would dismiss the appeal.

“The Honourable Mr. Justice Fitch”

I AGREE:

“The Honourable Mr. Justice Hunter”

I AGREE:

“The Honourable Mr. Justice Voith”