COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *McHatten v. Insurance Corporation of British Columbia,* 2023 BCCA 271

Date: 20230707
Docket: CA47707

Between:

Samantha Ashley McHatten

Appellant
(Plaintiff)

And

Insurance Corporation of British Columbia

Respondent
(Third Party)

Before: The Honourable Madam Justice Fenlon
The Honourable Mr. Justice Voith
The Honourable Justice Marchand

On appeal from: An order of the Supreme Court of British Columbia, dated July 29, 2021 (*McHatten v. McCrea*, 2021 BCSC 1471, Vancouver Docket M158142).

Counsel for the Appellant:	J.M. Cameron G. Cameron
Counsel for the Respondent:	C.C. Godwin
Place and Date of Hearing:	Vancouver, British Columbia June 2, 2023
Place and Date of Judgment:	Vancouver, British Columbia July 7, 2023

Written Reasons by:
The Honourable Madam Justice Fenlon

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

Summary:

The appellant, who was 19 when she was injured in a motor vehicle accident, contends the judge erred in principle in assessing damages for her loss of future earning capacity. Held: Appeal allowed. The judge's reasons are insufficient to permit appellate review, as the basis for the judge's award cannot be discerned from the reasons or the record. Although the judge correctly chose the capital asset approach, he failed to compare the appellant's likely future earnings if the accident had not happened and the appellant's likely future earnings after the accident. In the context of this case, it is appropriate to reassess the damages, and the award is increased from $200,000 to $450,000.

Reasons for Judgment of the Honourable Madam Justice Fenlon:

[1] The issue on this appeal is whether the trial judge erred in principle in assessing the appellant's loss of future earning capacity, and if so, whether the award adequately compensates the appellant for her loss.

At trial

[2] The appellant was injured in February 2014 when a car in which she was a passenger was rear-ended. She was 19 years old at the time, and had been working full-time at a retail company earning minimum wage for about a year following graduation from high school. The judge described the impact of the accident on the appellant's life this way:

> [160] Without question, the [motor vehicle accident] was a significant turning point in the plaintiff's life. It resulted in her having to quit her job at age 19 and move in with her mother and other relatives. She was left with a sense of loss and despair. Her self-confidence was significantly eroded. Although she was initially able to keep working for more than a year after the MVA, her back pain reached the point where she could no longer work and she resigned her position at Mad Hatters. Although she initially took some steps to find other work, there is no evidence as to what steps she took or whether she would have physically and psychologically been able to endure other employment if she had found it.

[3] The appellant had been out of the workforce for six years preceding trial, five of which were due to the injuries sustained in the car accident. The judge found that the accident caused the appellant to suffer:

- chronic back pain that has continued to the present and will likely continue into the future;

- fibromyalgia; and
- anxiety that developed into depression and, for several months, a panic disorder.

The judge found the injuries had persisted with only modest relief from the date of the accident until mid-2018 when the appellant's symptoms eased, "not entirely, but significantly enough that she felt ready to return to the workforce or to school or both": at para. 153. That changed when the appellant suffered a stroke (unrelated to the accident) in November 2018 which caused loss of peripheral vision and cognitive difficulties including problems with language function and memory. Those deficits largely resolved, other than the permanent loss of peripheral vision, but they disabled her from working for about one year.

[4] In assessing damages for loss of future earning capacity, the judge correctly instructed himself on the legal principles to be applied, concluding that it was appropriate to use the capital asset approach: at paras. 179–186. He was satisfied that the appellant had proved a real and substantial possibility that the injuries caused by the accident would limit her future earning capacity: at para. 188.

[5] The judge recognized that the appellant's total absence from the workforce for the six years prior to trial (five due to the accident) would make it difficult for her to find employment but found that this difficulty was offset to some extent by her "youthful age of 26," her enthusiasm and motivation, the improvement in her symptoms and her close and supportive family: at para. 189. The judge then considered the factors weighing against her resumption of employment, identifying her short work history, minimal education and impaired capacity to take advantage of all types of employment in a competitive labour market: at para. 191.

[6] The judge ultimately awarded the appellant $200,000 for loss of earning capacity, saying:

> [192] Considering the evidence as a whole, and recognizing the foregoing positive and negative contingencies (which I have concluded net out to an appropriate reduction in the award of 30%), I award the plaintiff a total of $200,000 for loss of future income earning capacity.

On appeal

[7] The appellant contends the judge made three errors in his assessment of damages for loss of future earning capacity:

1. Providing insufficient reasons to explain his award;

2. Failing to compare future earnings absent the accident with likely future earnings after the accident; and

3. Adopting a 30% negative contingency unrelated to the facts of the case.

[8] An award of damages is a fact-finding exercise that will not be interfered with lightly. An appellate court may only intervene if the judge has applied an incorrect principle of law, or awarded an amount either so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage: *Reynolds v. M. Sanghera & Sons Trucking Ltd.*, 2015 BCCA 232 at para. 14. For the reasons that follow, I respectfully conclude that the judge made errors in principle warranting appellate intervention in this case.

[9] I turn now to the first ground of appeal.

1. Insufficiency of reasons

[10] It is an error of law justifying appellate intervention if reasons are insufficient to permit review of the judge's decision. However, this error is not made out simply because a logical connection between the evidence and the decision cannot be discerned on the face of the judgment. The court must also look to the record and the live issues in the case to determine whether the basis for the decision is thereby made clear: *Shannon v. Shannon*, 2011 BCCA 397 at para. 9, citing *R. v. Gagnon*, 2006 SCC 17; *Ecobase Enterprises Inc. v. Mass Enterprise Inc.*, 2017 BCCA 29 at paras. 7–9.

[11] It was common ground at the hearing that the judge's reasons for awarding $200,000 for loss of future earning capacity cannot be discerned from his judgment.

As to whether the basis for the award could be discerned from the record, the respondent submits, with some ingenuity, that it is possible to work back from the award to explain how the judge arrived at the figure. First, says the respondent, the figure of $200,000 must be grossed up by 30% to reflect the negative contingency applied by the judge, resulting in a sum of $285,814. That figure can then be compared to the statistical evidence, excerpted by the judge at para. 132, that the appellant would have earned $1,179,546 over her lifetime had the accident not occurred. The respondent submits this demonstrates that the judge must have found the appellant's future earning capacity to have been reduced by 24.23%.

[12] With respect, I am unable to accept this submission. Working back from the number awarded to show how it could have been reached does not explain the judge's reasoning. That is so because a broad range of awards could be supported in the same way—there is nothing in the record that supports the award of $200,000, nor a reduction in the appellant's future earning capacity of 24.23%, as opposed to a multitude of other possibilities.

[13] There may well be cases where the award made accords precisely with one party's submissions at the end of trial, making it possible to discern the basis for the decision—but this is not such a case. At trial the respondent proposed an award of $50,000 on the basis of the appellant's close to full recovery, or in the alternative $150,000 if the judge should find that the appellant's transition back to full-time work would take a few years longer. For her part, the appellant sought an award representing a 60% discount from lifetime earnings of $1.179 million, or about $700,000 before contingencies.

[14] In summary on this ground of appeal, the judge's reasons are insufficient to permit appellate review of the award for loss of future earning capacity.

2. Comparison of likely future earnings with and without the accident

[15] As noted above, the judge chose to assess loss of future earning capacity using the capital asset approach rather than an earnings approach: see *Perren v. Lalari*, 2010 BCCA 140 at para. 32. The earnings approach is generally used when a

plaintiff has a stable history of pre-accident earnings over several years and their future earnings can be determined post-accident, as in *Steenblok v. Funk* (1990), 46 B.C.L.R. (2d) 133, 1990 CanLII 3812 (C.A.). In that case, the measure of lost earning capacity was determined to be the difference between the plaintiff's pre-accident salary and the salary that he could command in the new position he was required to take on as a result of his injuries. In such a case, it is possible to mathematically calculate the loss of earnings into the future.

[16] In the present case, the judge was faced with a relatively youthful plaintiff who had only one year of retail employment before and after the accident and who had been out of the workforce for six years by the time of trial. The appellant had not established a career when the accident occurred, nor had she done so by the time of trial. I agree with the parties that the judge's choice of the capital asset approach to quantify the claim for loss of future earning capacity was the correct one.

[17] The appellant submits that while the judge chose the correct approach, he erred in assessing the value of her possible future loss. She says that the judge failed to effectively compare the likely future of her working life if the accident had not occurred with her likely future working life after the accident, and failed to explain how, and indeed whether, he used the economic statistics in the evidence before him.

[18] The respondent points out that the appellant's loss did not lend itself to a precise calculation, and that the judge was obliged to make the best estimate he could on the evidence before him.

[19] As has oft been noted, assessing loss of future earning capacity is a particularly difficult exercise for a trial judge. The central task involves comparing the plaintiff's likely future working life if the accident had not happened with the plaintiff's likely future working life after the accident: *Rosvold v. Dunlop*, 2001 BCCA 1 at para. 11; *Pololos v. Cinnamon-Lopez*, 2016 BCSC 81 at para. 133. That comparison must be grounded in the evidence before the judge, as limited as it may be.

[20] The capital asset approach to valuing loss of future earning capacity is less exact and mathematical than an earnings approach. Nevertheless, the valuation cannot be done wholly at large; the judge cannot simply pluck a number from the air without any explanation as to how they got there: *Dornan v. Silva*, 2021 BCCA 228 at paras. 151, 158.

[21] The respondent submits that the judge's approach is no less arbitrary than awarding damages based on a plaintiff's annual income for one or more years as described in *Pallos v. Insurance Corp. of British Columbia* (1995), 100 B.C.L.R. (2d) 260, 1995 CanLII 2871 (C.A.). In that case, this Court identified three acceptable methods of assessing damages using the capital asset approach:

> 43 The cases to which we were referred suggest various means of assigning a dollar value to the loss of capacity to earn income. One method is to postulate a minimum annual income loss for the plaintiff's remaining years of work, to multiply the annual projected loss times the number of year remaining, and to calculate a present value of this sum. Another is to award the plaintiff's entire annual income for one or more years. Another is to award the present value of some nominal percentage loss per annum applied against the plaintiff's expected annual income. In the end, all of these methods seem equally arbitrary. It has, however, often been said that the difficulty of making a fair assessment of damages cannot relieve the court of its duty to do so. …
>
> [Emphasis added.]

[22] The respondent says the judge's approach is similar to the "annual income method", in which a judge assesses damages based on a number of years of salary. However, as this court said in *Rab v. Prescott*, 2021 BCCA 345 at para. 68, it is important to bear in mind the context of the cases in which that method has been used. After reviewing a number of such cases, Justice Grauer said in *Rab*:

> [72] These are the sort of cases this Court had in mind in *Pallos*, where the plaintiff continues to earn income at or close to his or her pre-accident level, but has suffered an impairment that may affect that plaintiff's ability to continue doing so at some point in the future. In such cases, using the plaintiff's immediate pre-accident income as a tool in assessing her lost capacity makes sense: see *Mackie v Gruber*, 2010 BCCA 464, where this Court upheld the trial judge's award of twice the plaintiff's average income in the five years leading up to the accident, which employment she continued thereafter but only with accommodations required by her injuries.
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> [Emphasis added.]

The case before us is not of this kind, and the trial judge's reasons do not reflect the application of principles such as those underlying the annual income approach. The appellant had not worked for six years post-accident and was not employed at the time of trial. Her future loss of earning capacity thus fell to be calculated using the general statistical evidence before the court.

[23] Both sides called experts to present statistical evidence about the general level of earnings the appellant might have achieved but for the accident. The parties agreed that earnings should be based on averages for individuals with three months to less than one year of post-secondary education. They also agreed that it was appropriate to use the converged statistics for male and female workers. Indeed, after adjusting for labour market contingencies, the experts' economic evidence was largely consistent.

[24] The judge also had evidence from various experts on the likelihood that the appellant's injuries would impact her capacity to work in the future. Although Dr. Hirsch, a physiatrist called by the respondent, opined that the injuries sustained by the appellant would have no long-term impact on her future earning capacity, a contrary opinion was expressed by another expert for the respondent, Dr. van den Berg, a psychologist specializing in vocational rehabilitation of individuals experiencing chronic pain. The trial judge noted Dr. van den Berg's testimony that the appellant's capacity to work in the regular market had been reduced by 30 to 40% as a result of her injuries: at para. 118. I note parenthetically that the judge purported to accept in its entirety the contradictory evidence of both experts: Dr. van den Berg at para. 142 and Dr. Hirsch at para. 145. However, the judge subsequently made an express finding that the appellant's injuries were likely to impact her capacity to earn income in future: at para. 188.

[25] The respondent submits that the statistical earnings evidence was of limited value since it was not "specific to the appellant". But where a young person does not have a settled history of earnings, statistical data is often the best evidence available. In any event, having proposed general statistical earnings for BC workers

as a basis to calculate lost earnings at trial, it is not open to the respondent to change tack on appeal.

[26] In my respectful view, in the circumstances of this case, it was an error for the judge not to analyze the economic evidence in comparing the appellant's with and without accident earnings. As Justice Goepel noted in *Grewal v. Naumann*, 2017 BCCA 158, dissenting but not on this point:

> [49] The assessment of past or future loss requires the court to estimate a pecuniary loss by weighing possibilities and probabilities of hypothetical events. The use of economic and statistical evidence does not turn the assessment into a calculation but can be a helpful tool in determining what is fair and reasonable in the circumstances: *Dunbar v. Mendez*, 2016 BCCA 211 at para. 21.
>
> [Emphasis added.]

3. 30% negative contingency

[27] The appellant contends the judge erred in determining that a 30% negative contingency should be applied to the award for loss of future earning capacity. She says the judge did not explain what factors he took into account in arriving at this figure and failed to assess "positive or negative contingencies in a fact-intensive and case-specific way".

[28] I would not agree with that characterization of the judge's reasons. He identified a number of case-specific positive and negative contingencies which he concluded "netted out" to a negative contingency of 30%: at paras. 189, 191. However, in my opinion, it does not follow that a 30% discount should be applied to any award for loss of future earning capacity. That is so for two reasons. First, it is evident from the reasons that the judge, in setting out the factors he relied on to arrive at a discount of 30%, was addressing only the likelihood of the appellant "returning to the workforce" after a six year absence:

> [189] Although she has been out of the workforce for over six years (five of those years attributable to the MVA), as Mr. Lawless pointed out, that there are several factors in the plaintiff's favour that will likely give her a better-than-average chance of returning to the workforce, including:
>
> - at her relatively youthful age of 26, she is at the beginning her prime working years;

> - she is enthusiastic and motivated to return to the workforce;
> - her pain symptoms have significantly improved over time; and
> - she has a close and supportive family.
>
> …
>
> [191] However, I find that the following factors weigh against her:
>
> - her work history is short, her education is minimal and her resume will be consequently weak;
> - she has been rendered less capable overall and has lost the ability to take advantage of earning income from all types of employment that were within her pre-MVA capabilities; and
> - she is less marketable or attractive as an employee to potential employers as well as less valuable to herself as a person capable of earning income in a competitive labour market.
>
> [Emphasis added.]

[29] The judge listed the above factors in responding to the opinion of Mr. Lawless, a vocational consultant, whose opinion he summarized at para. 94 of the reasons for judgment: “the probability of a return to work after injury diminishes sharply after six months of unemployment and is almost nil after 24 months of unemployment”. The judge did not accept Mr. Lawless’s view of the improbability of the appellant returning to the workforce after such a long absence, concluding instead that the factors favouring her return outweighed the factors against. However, the likelihood of the appellant returning to work was but one factor to be assessed in considering the applicable contingencies. More significantly, neither party submitted that damages should be based on the appellant never working again. The appellant contended, rather, that her damages should be based on loss of 60% of her projected lifetime earnings. A reduction in damages to reflect the likelihood that the appellant would find work again would make sense if the starting point for the assessment was the loss of all earnings over a lifetime based on the appellant not being able to re-enter the workforce. But it is not apparent why that same reduction should be applied to an assessment of loss based on the appellant working, but at a reduced level—for example at 40% of what she would have been able to do but for the accident.

[30] Second, even if the judge did not intend to restrict the 30% discount to the likelihood of the appellant returning to the workforce, the factors he identified include the appellant's loss of capacity which is already incorporated in the projected average earning data prepared by Mr. Peever and Mr. Gosling (included in the reasons at paras. 103 and 132), who provided projected earnings at different rates of loss of capacity. Accordingly, without some explanation in the reasons about what the foundational award was based on, it is not possible to discern whether the judge counted this impact twice, once in determining the appellant's projected earnings based on the impact of her injuries, and again in determining the contingency discount.

Conclusion

[31] In light of the errors in the judge's reasons, the award for loss of future earning capacity must be set aside. Both parties urge us to conduct our own assessment rather than to remit the single issue to the trial court given the length of time that has passed since the accident and the attendant costs of a retrial.

[32] Appellate courts will reassess damages "where the unchallenged findings of fact and the evidentiary record are sufficient, and the interests of justice strongly weigh against ordering a new trial": *Neufeldt v. Insurance Corporation of British Columbia*, 2021 BCCA 327 at para. 130. I conclude that this is an appropriate case to conduct the assessment. The judge's findings are clear that the appellant's injuries due to the motor vehicle accident will have an impact on her future earning capacity. He also found, based on Dr. van den Berg's evidence, that the appellant's capacity for work had been reduced by 30 to 40%. The respondent's economic evidence establishes likely earnings for the appellant absent injuries from the accident, and the parties on appeal agree that the converged male/female statistics should be used in this case.

[33] With these facts in hand, and relying largely on the respondent's evidence, it is thus possible to assess future loss of earning capacity. Using a 35% loss of capacity to work full-time—reflective of Dr. van den Berg's evidence—and applying that percentage to Mr. Gosling's tables, results in an award of $412,841 (.35 x

$1,179,546). This number takes into account negative labour market contingencies, as Mr. Gosling had already applied the relevant discount. It should then be amended to include the positive contingency of benefits which both experts agreed should be assessed at 10%, or $41,284, for a total of approximately $450,000.

[34] The appellant submits that a further 10% positive contingency should be added to reflect a real and substantial possibility that she would have furthered her education beyond one year of post-secondary but for the accident. However, there is no finding that the appellant's injuries currently prevent her from returning to school, and indeed there is evidence to the contrary. In my view any other fact-specific positive and negative contingencies would offset each other and I would accordingly not adjust the award further.

Disposition

[35] I would allow the appeal and vary the order to provide for an award of damages for loss of future earning capacity of $450,000.

"The Honourable Madam Justice Fenlon"

I AGREE:

"The Honourable Mr. Justice Voith"

I AGREE:

"The Honourable Justice Marchand"