COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Lun v. Hann,*
2023 BCCA 288

Date: 20230627
Docket: CA48681

Between:

Tam Yuk Lun and Toyota Credit Canada Inc.

Appellants
(Defendants)

And

Steven Christopher Hann

Respondent
(Plaintiff)

Before: The Honourable Justice Dickson
The Honourable Justice Butler
The Honourable Justice Skolrood

On appeal from: An order of the Supreme Court of British Columbia, dated October 20, 2022 (*Hann v. Lun*, 2022 BCSC 1839, Vancouver Docket M192836).

Oral Reasons for Judgment

Counsel for the Appellants:	M-H. Wright J.A. MacIver
Counsel for the Respondent:	G. Cameron J.M. Kindrachuk
Place and Date of Hearing:	Vancouver, British Columbia June 23, 2023
Place and Date of Judgment:	Vancouver, British Columbia June 27, 2023

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Summary:

The appellants appeal an award for future loss of earning capacity. They contend the judge erred materially (1) by forgetting, ignoring and/or misconceiving the evidence in concluding that there was a real and substantial possibility that the respondent's injuries would lead to a future loss of earning capacity causing a pecuniary loss; and (2) in quantifying damages for future loss of earning capacity and in applying specific contingencies. Held: Appeal dismissed. The judge's factual and legal conclusions were supported by the evidence, she committed no material errors of law or principle or palpable and overriding errors of fact in connection with the future loss of earning capacity award, and that award was not inordinately high. Accordingly, there is no basis for appellate intervention.

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DICKSON J.A.:

Introduction

[1] On May 18, 2018, Steven Hann was injured in a motor vehicle accident. He was almost 26 years old, generally healthy, and employed as a project manager for Belfor Property Restoration when it happened. As a result of the accident, Mr. Hann suffered soft tissue injuries to his mid and low back. By the time of trial, they continued to cause him "discomfort, and with varying frequency and intensity, ongoing pain and restriction": at para. 58.

[2] In reasons indexed at 2022 BCSC 1839, Justice Shergill awarded Mr. Hann total damages of $443,772.60, including $90,000 in non-pecuniary damages, $330,000 for future loss of earning capacity and $14,152 for cost of future care.

[3] The defendants appeal the award for future loss of earning capacity. They contend the judge erred materially:

1. by forgetting, ignoring and/or misconceiving the evidence in concluding that there was a real and substantial possibility that Mr. Hann's injuries would lead to a future loss of earning capacity causing a pecuniary loss; and

2. in quantifying the damages for future loss of earning capacity and in applying specific contingencies.

[4] The judge applied the relevant law to the facts as she found them. Her conclusions were supported by the evidence and, in my view, the appellants' assertion that she forgot, ignored or misconceived evidence is baseless. The judge provided detailed reasons in which she clearly grappled with the substance of the live issues and the body of evidence before her. The appellants have not identified any errors of law or principle or palpable and overriding errors of fact, and the award for future loss of earning capacity is not so inordinately high as to be wholly erroneous. For these reasons and those that follow, I would dismiss the appeal.

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Standard of Review

[5] This Court outlined the highly deferential standard of review applicable to damage awards in *Deegan v. L'Heureux*, 2023 BCCA 159:

> [41] The standard of review for damage awards is highly deferential: *Westbroek v. Brizuela*, 2014 BCCA 48 at para. 27. An appeal court may not alter a damage award made at trial merely because, on its view of the evidence, it would have come to a different conclusion. An appeal court may intervene only where there was no evidence upon which the trial judge could have reached their conclusion, where the judge proceeded upon a mistaken or wrong principle, or where the result at trial was so inordinately high or low that it must be a wholly erroneous estimate of the damage: *Woelk v. Halvorson*, [1980] 2 S.C.R. 430, 1980 CanLII 17 at 435–436.
>
> [42] The standard of review for findings of fact, including inferences drawn from those facts, and findings of mixed fact and law is palpable and overriding error: *Housen v. Nikolaisen*, 2002 SCC 33 at paras. 19–23; *H.L. v. Canada (Attorney General)*, 2005 SCC 25 at paras. 53–56. The standard of review for questions of law is correctness: *Housen* at para. 8.

Analysis

Real and substantial possibility of future loss of earning capacity

[6] In *Rab v. Prescott*, 2021 BCCA 345, Justice Grauer outlined a three-step process for assessing loss of future earning capacity claims:

> [47] From these cases, a three-step process emerges for considering claims for loss of future earning capacity, particularly where the evidence indicates no loss of income at the time of trial. The first is evidentiary: whether the evidence discloses a *potential* future event that could lead to a loss of capacity (e.g., chronic injury, future surgery or risk of arthritis, giving rise to the sort of considerations discussed in *Brown*). The second is whether, on the evidence, there is a real and substantial possibility that the future event in

> question will cause a pecuniary loss. If such a real and substantial possibility exists, the third step is to assess the value of that possible future loss, which step must include assessing the relative likelihood of the possibility occurring—see the discussion in *Dornan* at paras 93–95.

[7] According to the appellants, the evidence did not support the judge's conclusion with respect to either step 1 or 2 of the *Rab* process. In their submission, she manifestly misconceived or ignored evidence, relied on Mr. Hann's own perception of his disability, and speculated in reaching her conclusions. This is apparent, they say, from an examination of the entire body of evidence and her analysis of Mr. Hann's future loss of earning capacity claim.

[8] In particular, the appellants say:

- Mr. Hann has not lost any income prior to trial and has been able to complete his work duties;
- while the evidence pointed to certain restrictions Mr. Hann faced due to his back injury, there was no medical opinion that he would not be able to perform his work duties in the future;
- Mr. Hann had no issues post-accident finding "new and better employment" despite his back injuries;
- Mr. Dean, who employed Mr. Hann as a project manager at Barclay Restoration at the time of trial, described Mr. Hann as an outstanding employee and testified that he would "do very well [in his company] as time progresses";
- the discomfort that Mr. Hann may feel at work, and how he may perceive his disability, is appropriately compensated by a non-pecuniary damage award; it does not provide a basis for a loss of future earning capacity award.

[9] In addition, the appellants say, the judge engaged in speculation, as revealed by some of her language in the reasons. For example, at para. 86, she stated "there

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is a real and substantial possibility that Mr. Hann may not be able to put in the additional hours required to earn those commissions", and, at para. 87, "there is a real and substantial possibility that Mr. Hann may suffer a pecuniary loss due to his injuries".

[10] I do not accept the appellants' submissions.

[11] When her reasons are read functionally and as a whole, in my view it is apparent that the judge based her conclusions on the evidence, not on speculation. The evidence and her findings of fact supported her conclusion that, owing to his soft-tissue injuries and their sequelae, there is a real and substantial possibility that a potential future event will cause him a pecuniary loss.

[12] The judge relied on the following evidence and findings of fact to support her conclusion in this regard:

- Mr. Hann's compensation consists in a base salary and commission: at paras. 77, 86;
- while the size of the potential commission depends on several factors, it is "connected quite closely to the number of hours worked": at paras. 80, 86, 90;
- Mr. Hann had not earned a commission during his time at Barclay primarily because the company experienced a decrease in business due to the pandemic: at para. 78;
- according to Mr. Dean, at this stage, Mr. Hann should be able to earn 1.5 to 2 times his current salary: at para. 90;
- in order to achieve this, he would need to work about 10 hours more per week: at paras. 90–91;

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- based on his level of experience, motivation and the earnings of some of his peers, Mr. Hann is capable of earning 1.5 to 2 times his salary at this stage: at para. 97;
- there is reliable and credible evidence that Mr. Hann's back injury restricts him from freely performing some of the activities that are necessary parts of his job: at para. 85;
- there is a real and substantial possibility that, owing to his back injury, Mr. Hann would not be able to put in the additional hours required to earn commissions: at para. 86.

[13] The judge's conclusion was open to her, based on this evidence and these findings, even if some of the evidence supported the appellants' contrary position. As Justice Marchand explained in *Kringhaug v. Men*, 2022 BCCA 186 at para. 73, the question is not whether contrary evidence was present on the record. It is not for this Court to reweigh the evidence. In my view, there is no proper basis for appellate interference with the judge's conclusion: *Woelk v. Halvorson*, [1980] 2 S.C.R. 430, 1980 CanLII 17 at 435–436.

[14] I would not accede to this ground of appeal.

Quantifying damages and applying specific contingencies

[15] The appellants go on to submit that the judge erred by:

- failing to take account of the possibility that Mr. Hann would not lose any income as a result of his injuries, which the judge found had a 15% likelihood of occurring, when making her final damages award; and
- referring to a 10% risk that the injuries would negatively impact Mr. Hann's income even though there was no evidence to that effect.

[16] I am not persuaded by these submissions either.

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Quantifying damages

[17] The judge recognized that her task was to conduct an evidence-based assessment of Mr. Hann’s loss, not a mathematical calculation. Reading her reasons functionally and as a whole, I am satisfied that is what she did. However, in doing so, in my view, she expressed her findings in connection with hypothetical scenarios in terms that were unrealistically precise and mathematical in character. Although I would not endorse this manner of proceeding, it does not detract from the actual nature of the exercise she appropriately undertook.

[18] Based on the mathematical language employed by the judge, I do not accept that she failed to take account of the possibility that Mr. Hann would not lose any income as a result of his injuries. On the contrary, that possibility was built-in to her percentage-based approach.

[19] The judge reasoned as follows at para. 107:

> [107] Using the applicable multipliers results in a total possible loss of approximately $820,000 under Scenario 1; $406,000 under Scenario 2; and no loss under Scenario 3. In my view, there is a 15% likelihood of Scenario 1 occurring, leading to a possible future loss of about $123,000; a 70% chance of Scenario 2 occurring leading to a possible future loss of about $285,000; and a 15% chance of Scenario 3 occurring, resulting in no future loss. Recognizing that this is an assessment and not a precise mathematical calculation, I have rounded off these numbers and I assess Mr. Hann’s future loss of earnings at approximately $410,000.

[20] To arrive at a total loss of future earning capacity award of approximately $410,000 before making a general contingency deduction of 20%, the judge (1) multiplied the total possible loss she assessed under each scenario with the likelihood of that scenario occurring; and (2) aggregated the respective likely losses for each scenario. It was not necessary for her to make a separate deduction to account for the 15% likelihood that Mr. Hann would not lose any income as a result of his injuries.

[21] It follows that the judge did not fail to take account of the likelihood that Mr. Hann would not lose any income as a result of his injuries.

Specific contingencies

[22] Finally, the appellants submit that, in considering positive and negative contingencies, the judge found there to be a 10% risk that the accident-related injuries will negatively impact Mr. Hann’s future earning capacity in part because (1) his condition may “deteriorate over time”; and (2) his injuries may impact his marketing abilities: at para. 108. The appellants say there was no evidence that Mr. Hann’s condition may deteriorate over time and that the only evidence about his injuries impacting his marketing abilities concerned his getting sore after playing 12 to 15 holes of golf.

[23] The judge’s finding that there was a 10% risk that the injuries will negatively impact Mr. Hann’s future earning capacity was supported by several factors, including the possibility that his condition may deteriorate over time, the potential impact of his injuries on his marketing abilities, and the risk that he may lose his job and not be able to find similarly accommodating employment: at para. 108.

[24] As the appellants acknowledge, there was some evidence that the injuries may impede Mr. Hann’s ability to play golf as a marketing technique.

[25] There was no evidence directly to the effect that Mr. Hann’s condition may deteriorate over time. However, it was open to the judge to take account of this contingency in light of the evidence that Mr. Hann has suffered some “setbacks” or “flare-ups” and his impairments are expected to persist into the future: at paras. 22, 35.

[26] Similarly, there was no evidence directly to the effect that Mr. Hann is at risk of losing his job and having to find less accommodating employment. However, it was open to the judge to take account of this contingency, given that the record shows there has been a decrease in business and different employers in the industry provide different levels of flexibility to project managers.

[27] Bearing in mind the foregoing, in my view there was some evidence capable of supporting the judge’s finding that there was a 10% risk that Mr. Hann’s injuries

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will negatively impact his future earning capacity. Accordingly, there is no basis for this Court to intervene: *Woelk* at 435–436.

[28] I would not give effect to this ground of appeal.

Disposition

[29] The judge's factual and legal conclusions were supported by the evidence, she committed no material errors of law or principle or palpable and overriding errors of fact in connection with the loss of future earning capacity award, and that award was not inordinately high. Accordingly, there is no basis for appellate intervention.

[30] I would dismiss the appeal.

[31] **BUTLER J.A.**: I agree.

[32] **SKOLROOD J.A.**: I agree.

[33] **DICKSON J.A.**: The appeal is dismissed.

"The Honourable Justice Dickson"

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