

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Young v. Huang*,
2023 BCCA 234

Date: 20230516
Docket: CA47972

Between:

Bryan Dwight Young, Jung Hee Seo, and Hyung Min Park

Appellants
(Defendants)

And

Zigan Huang also known as Vincent Huang

Respondent
(Plaintiff)

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

On appeal from: An order of the Supreme Court of British Columbia, dated
November 24, 2021 (*Huang v. Young*, 2021 BCSC 2276,
Vancouver Docket M172900).

Oral Reasons for Judgment

Counsel for the Appellants:

M-H. Wright
J.E. Fergusson

Counsel for the Respondent:

Y. Wong

Place and Date of Hearing:

Vancouver, British Columbia
May 16, 2023

Place and Date of Judgment:

Vancouver, British Columbia
May 16, 2023

Summary:

This is an appeal of an award of damages for loss of future earning capacity. The principal ground of appeal is that the judge erred by relying on statistical earnings averages that were not applicable to the individual circumstances of the plaintiff, thereby producing a speculative award not properly rooted in the evidence. Held: Appeal dismissed. In light of the approach taken by the defendants at trial and the live issues the judge had to address, the judge did not err in making use of the statistical evidence as she had been invited to do in order to assess damages.

HARRIS J.A.:**Introduction**

[1] This is an appeal of an award for future loss of earning capacity. The appellants contend that the plaintiff failed to prove his allegation that, but for the subject accident, there was a real and substantial possibility that he would have earned more in the future than he likely will earn. They say that the award was speculative and not rooted in the evidence, together with a series of other alleged errors. I note that counsel on appeal were not counsel at trial.

Background

[2] The respondent, Mr. Huang, was born in China. At the time of the accident, he was 19 years old and attending high school. In grade 11, he studied in the English language learner stream. In grade 12, he transferred to the regular stream.

[3] The accident occurred in May 2015, during grade 12. The accident caused Mr. Huang a mild traumatic brain injury (“MTBI”), soft tissue injuries, and abrasions. While the parties agreed that the soft tissue injuries, abrasions, and MTBI had mostly resolved, at the time of trial, Mr. Huang suffered “significant ongoing issues” of “anxiety and/or depression with associated cognitive deficits, and mild headaches.”

[4] After the accident, school became more difficult for Mr. Huang, although after transferring to another institution, he obtained his high school diploma. In December 2019, Mr. Huang began to work limited hours as a dishwasher. He was working 30 hours per week in that job at trial.

[5] The trial judge accepted that there was an important difference between the educational and vocational path Mr. Huang could have followed without the accident, and the one he must live with because of the accident. She determined that there was a real and substantial possibility that this would cause a pecuniary loss, and compensated Mr. Huang for that loss.

[6] The parties accept that the judge correctly articulated the principles she was to apply to assess whether Mr. Huang had proven, and then to quantify, loss of future earning capacity. The alleged errors on appeal turn on the application of the test to the evidence.

[7] The judge compared Mr. Huang's with and without accident futures. She found that, but for the accident, Mr. Huang would have developed greater English language competency, and been able to complete one or two years of post-secondary education.

[8] Drawing on statistical data, the trial judge compared the average earnings of BC males who have obtained a diploma or certificate after one to two years of post-secondary education (the "without accident" scenario), with the earnings of BC males with only a high school diploma (the "with accident" scenario). Deducting the residual earnings that Mr. Huang is now likely to make in his post-accident condition from earnings he was likely to make without a loss of capacity, she awarded him \$539,192 for loss of future earning capacity.

[9] In assessing the evidence, the judge rejected the appellants' submission that, even without the accident, Mr. Huang would never learn enough English to find remunerative work. She also refused to accept the appellants' "insinuation" that Mr. Huang had a "latent and pre-existing inability" to learn English at a level necessary for post-secondary education.

[10] I will provide more detail of the evidence when assessing the merits of the appeal.

The Alleged Errors

[11] The appellants contend that the judge erred in concluding that the evidence established a real and substantial possibility of a future event causing pecuniary loss. They contend that all the evidence demonstrated was that Mr. Huang's education was somewhat delayed, but not that he would have earned more, or that higher earnings were delayed, or that his career trajectory was altered as a result of the accident.

[12] The appellants submit that the judge erred by assuming that a certain level of education would result in a guaranteed level of income, and compounded the error by relying on statistical averages of BC males with certain educational levels. Rather, the judge ought to have assessed the individual characteristics of Mr. Huang to assess whether he fit within those statistical averages.

[13] While, as I see it, these are the primary criticisms directed at the judge, other more specific errors are alleged to which I shall return.

Discussion

[14] It is not disputed that the judge correctly stated the applicable law. The judge concluded both that the evidence disclosed a potential future event that could lead to a loss of capacity, and that there was a real and substantial possibility that the event in question will cause a pecuniary loss. On this latter point, she specifically disagreed with the defendants' contention to the contrary.

[15] In my view, these conclusions were supportable on the evidence. The expert evidence suggested that Mr. Huang was likely to suffer from anxiety, depression, and chronic headaches indefinitely. These psychological injuries caused cognitive deficits in memory and concentration that persisted unabated over seven years and showed no sign of stopping. As a result, the trial judge determined that, because of the accident, Mr. Huang was less proficient in English, and had failed to achieve the level of education that he would have otherwise.

[16] The judge rejected the argument that Mr. Huang never had the capacity to learn enough English to undertake any post-secondary training. She considered and rejected the suggestion that the fact that Mr. Huang had failed some courses showed that he could not learn sufficient English to attend a post-secondary level institution. She rejected the defendants' submission that any loss of future earnings award should be reduced by 50% for the contingency that Mr. Huang would never learn enough English to find remunerative work. She concluded at paras. 62 and 65:

[62] I find that there was a real and substantial possibility that, absent the Accident, Mr. Huang would have developed English language competency sufficient to graduate high-school and successfully complete some post-secondary education. In making this finding, I rely on the evidence that Mr. Huang was making progress in English acquisition before the Accident and had received favourable comments from his ELL teachers in Grade 12. After the Accident, he was able to pass Communications 11 and 12 in his first year at Coquitlam College. Thereafter, he passed University Writing.

...

[65] ... Had the Accident not occurred, it is most likely that Mr. Huang would have obtained his high school diploma at the end of the Fall 2015 Semester. Between then and the end of 2020, he would have had 15 semesters to complete the 30-60 credits (roughly 10-20 courses) that is the equivalent of one to two years of post-secondary education.

[17] In my opinion, it is not speculative to conclude that these findings support a conclusion that Mr. Huang would suffer a pecuniary loss. At the beginning of his working life, Mr. Huang found himself less proficient in the language of the job market, and with less education than he would have obtained but for the accident. I agree with Mr. Huang that the judge's findings go beyond a mere delay in his achieving his educational or employment capacity. The judge implicitly accepts, by relying on the statistics, that Mr. Huang would not achieve the earnings of BC males who had obtained a "College, CEGEP or other non-university certificate or diploma" in programs of one to two years. Reading the trial judge's reasons fairly, and as a whole, it is clear that she viewed the plaintiff as having a fundamentally different vocational and educational future because of the accident from what he would have had without the accident.

[18] The judge used an earnings approach to quantify damages. On appeal, it was suggested that it would have been preferable if the judge had adopted a capital asset approach given Mr. Huang's youth, lack of an established career path, and uncertain employment prospects. The appellants do not, however, suggest that the judge erred in principle in adopting an earnings approach, as she was invited to do by the parties, nor have they explained how adopting one approach rather than another would have led to a different result.

[19] I begin by observing that I do not think the judge committed any error in principle in using an earnings approach, or tying her analysis into the economic and statistical evidence available to her. Indeed, this Court has directed trial judges to have regard for that kind of evidence. I agree that this was a reasonable place for the judge to begin.

[20] In adopting an earnings approach, the judge relied on a comparison of the earnings of BC males with high school graduation and BC males with a "College, CEGEP or other non-university certificate or diploma" in programs of one to two years. The difference between the two grounded her estimate of Mr. Huang's loss.

[21] The appellants contend that the judge erred in assuming, without evidence, that Mr. Huang's personal circumstances corresponded to the average male, when the evidence suggested the contrary.

[22] It is important, however, to note that the parties agreed that it was appropriate to start with the statistical evidence. As the judge said, "[t]he parties agree that, on the 'with Accident' scenario, Mr. Huang's earnings should be assessed at \$68,238 annually, based on the analysis provided by economist Curtis Peever, using the table for BC males with a high school diploma or equivalent."

[23] Having determined an appropriate "with accident" amount, the trial judge proceeded to determine the "without accident" amount. Again, relying on Mr. Peever's statistical anchors, she used a figure based on the average earnings of BC males who obtained a one or two year college certificate or diploma, adjusted

with a “risk and choice” multiplier. This was based on her finding that if the accident had not occurred, Mr. Huang would have obtained greater English language competency, and completed one to two years of post-secondary education. Deducting the earnings of the “with accident” scenario from those of the “without accident” scenario, the trial judge arrived at her damages award.

[24] At the core of the appellants’ complaint on appeal is the suggestion that the judge erred in relying on the statistical averages in assessing the with and without accident scenarios. This error underlies the suggestions both that the judge erred in concluding that Mr. Huang had demonstrated a real and substantial possibility of pecuniary loss, and the quantification of that loss. It is said that the judge erred in treating Mr. Huang’s individual circumstances as being appropriately captured in the average statistics. Mr. Huang, it is argued, was not an average male to which the statistics relating to different levels of educational attainment apply. The appellants give various examples of what they say differentiates Mr. Huang from the average male. These include such matters as Mr. Huang’s challenges in learning English, restrictions on the hours he could work because of his visa, possible plans about returning to China, retirement, realistic career paths open to him, and his work history. As a result, the judge simply speculated, they say, that a certain level of education would guarantee a certain level of earnings and full-time employment until the age of 70. In short, the judge failed to engage in an appropriately individualized enquiry, properly rooted in the evidence, to assess both whether Mr. Huang had demonstrated entitlement to an award for future income loss and its quantification.

[25] In approaching this issue, I think it important to remember that appellate review always must be sensitive to and appreciate what the live issues at trial were, and the positions the parties took. In my opinion, the appellants are advancing positions on appeal that do not reflect their position at trial. Certainly, at trial, the appellants argued that Mr. Huang had not proven a real and substantial possibility of a future event causing income loss, but they also acknowledged that it would be appropriate to use the statistical evidence showing with accident earnings of about \$68,000 based on the table for BC males with a high school diploma or equivalent.

This concession occurred in an exchange in which the judge noted that the original proposal by the appellants was to take a figure with the accident that was less than that proposed by the plaintiff. The appellants then accepted that a higher amount should be taken.

[26] As part of this exchange, the judge commented on the method to be adopted. She noted that all were agreed that:

... You deduct the with-accident scenario from the without-accident scenario, apply any contingencies, and that's your answer.

But you're saying, and I put it to you because it's in my experience unusual for a defendant to say I should take a with-accident scenario that's actually less than the plaintiff is proposing.

[27] Counsel then accepted that the judge should take the higher average earnings proposed by the plaintiff, which were based on the statistical evidence.

[28] It seems to me that if the appellants accepted that the statistical evidence for males with a high school diploma or equivalent should be used to assess Mr. Huang's with accident earnings, they cannot complain that the judge then used her finding that, without the accident, he would have achieved a one or two year college certificate or diploma, as a foundation to assess his without accident potential earnings. In the circumstances of this case, if the average statistics were acceptable for one term of the equation, they were acceptable for the other.

[29] It may very well be that there are cases in which statistics based on averages may be of only limited value in assessing losses where a person's individual circumstances do not readily fit the average. I would not give effect to that argument here, given the position taken by the appellants at trial. The judge simply approached this aspect of the valuation as she was invited to do.

[30] This conclusion also goes a long way to deal with the criticism that the judge did not deal adequately with positive and negative contingencies. In the first place, many relevant contingencies are already built into the average statistics. As explained by Mr. Peever, this multiplier accounts for the possibility that Mr. Huang

would be forced out of full-time work due to illness or poor economic conditions, or that he would choose to leave the labour market or work part-time for further education, travel, early retirement, or other reasons. Mr. Peever testified that, for the tables applied by the trial judge, this would result in a deduction of 22.6%. The judge applied a negative adjustment for general contingencies.

[31] Secondly, the judge addressed a number of specific contingencies raised in the evidence. The judge was not persuaded by the appellants' argument that Mr. Huang had a "latent and pre-existing inability" to learn English that warranted the application of a negative contingency of 50%. She dismissed the contention that Mr. Huang was incapable of learning English. At the same time, however, the trial judge also rejected positive contingencies argued by Mr. Huang. Mr. Huang suggested that it was reasonably likely that, without the accident, he would have been able to obtain a four-year bachelor's degree. The trial judge determined that such a positive outcome was not supported by the evidence. Instead, it was more likely that Mr. Huang would have been able to complete one to two years of post-secondary education.

[32] The trial judge recognized that, on the one hand, even without the accident, Mr. Huang was struggling to figure out a career path, had little support beyond his friends, and was unlikely to seek career guidance on his own. On the other hand, she found that he was an individual of "extraordinary determination and resiliency". For her part, the vocational expert, Ms. Thompson, determined that, even after the accident, Mr. Huang was "a man of average intellect". Without the accident, she opined that he would have been capable of working as a mechanic, an electrician, or a carpenter.

[33] I turn briefly to consider two further issues. First, the appellants contend the judge erred in not factoring in as a contingency the possibility that Mr. Huang would return to China. I would not give effect to this submission. Again, the trial judge was not invited to consider this contingency. It was not raised as a contingency at trial. She cannot be criticized for failing to take it into account. The issue is being raised

for the first time on appeal. I do not think we should take this contingency into account in these circumstances. As a general rule, parties have an obligation to raise issues such as this at trial, so that a judge has the opportunity to consider whether and what effect to give to an alleged contingency in light of all of the evidence.

[34] Secondly, I would not give effect to the argument that the award for cost of future care factored in a contingency for improvement in Mr. Huang's condition that was not reflected into the award for loss of future earning capacity. In my opinion, it is not obvious that the award for cost of future care was predicated on a contingency for improvement and, accordingly, there is no clear inconsistency between the facts underlying the two awards. Moreover, there was a substantial body of evidence, to which I will refer, supporting the view that Mr. Huang was permanently, partially disabled vocationally. The judge's analysis was reasonably open to her on the evidence.

[35] Taking all of this evidence together, determining that, but for the accident, Mr. Huang could have earned the same as an average BC male with a college, CEGEP, or other non-university certificate or diploma from a program of one to two years was a finding that was reasonably open to the trial judge.

[36] More specifically, the appellants complain, now, that the judge ought to have recognized that Mr. Huang's visa status would, in any event, have potentially limited the hours he could work and his earnings. This is not consistent, in my view, with their argument at trial that the current restrictions on his working hours were realistically likely to change so that he would be able to work longer hours in the future.

[37] Finally, while the appellants may have preferred that the trial judge consider the possibility of Mr. Huang recovering from his injuries, not assessing a negative contingency for this issue was supported by the evidence. Dr. Lu found that Mr. Huang's prognosis was "highly uncertain". Dr. Purtzki concluded Mr. Huang will suffer from attention difficulties "throughout his life" and did not "anticipate a

significant improvement”. Ms. Thompson determined that Mr. Huang is “permanently, partially disabled vocationally”. Dr. Robinson found that Mr. Huang is likely to experience post-traumatic headaches indefinitely. There was clearly an evidentiary basis for the judge to determine that Mr. Huang will suffer from his psychological injuries and cognitive deficits for the remainder of his working life, and thus to assign no contingency deduction on this basis.

[38] Despite the able submissions of counsel for the appellants, I would dismiss the appeal.

[39] **FITCH J.A.:** I agree.

[40] **VOITH J.A.:** I agree.

[41] **HARRIS J.A.:** The appeal is dismissed.

“The Honourable Mr. Justice Harris”