COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Ng v. Corness,*
2023 BCCA 185

Date: 20230503
Docket: CA48195

Between:

Teresa Wing Shuen Ng and Tony Chun Chau

Appellants
(Defendants)

And

Ryan Shawn Corness

Respondent
(Plaintiff)

Before: The Honourable Mr. Justice Harris
The Honourable Madam Justice Stromberg-Stein
The Honourable Justice Dickson

On appeal from: An order of the Supreme Court of British Columbia, dated March 3, 2022 (*Corness v. Ng*, 2022 BCSC 334, Vancouver Docket M195196).

Counsel for the Appellants:	M.H. Wright J.E. Fergusson
Counsel for the Respondent:	S. Wheeldon G. Cameron
Place and Date of Hearing:	Vancouver, British Columbia February 27, 2023
Place and Date of Judgment:	Vancouver, British Columbia May 3, 2023

Written Reasons by:
The Honourable Madam Justice Stromberg-Stein

Concurred in by:
The Honourable Mr. Justice Harris
The Honourable Justice Dickson

Summary:

The appeal is from the assessment of damages for past and future loss of earning capacity, future loss of renovation earning capacity and cost of future care on the basis the awards were too high because the judge erred by failing to account for residual earning capacity, by improperly basing the awards on replacement costs and by awarding costs for future care without the necessary evidentiary foundation. Held: Appeal dismissed. The judge applied the relevant law to the facts she found arising from the evidence led, the issues raised, and the positions taken at trial. The appellants have not identified any errors of fact, law, or principle. Nor are the awards so inordinately high that they can be said to be a wholly erroneous estimate of the damages.

Reasons for Judgment of the Honourable Madam Justice Stromberg-Stein:

Overview

[1] Following a 10-day trial, the trial judge awarded damages to the respondent, Ryan Corness, arising from injuries he sustained in a serious motor vehicle accident for which the appellants, Teresa Ng and Tony Chau, admitted liability. The appellants submit the judge erred in her assessment of damages for past and future loss of earning capacity, future loss of renovation earning capacity, and cost of future care. They say the awards are too high because the judge failed to account for residual earning capacity; improperly based the awards on replacement labour costs; and awarded costs for future care without the necessary evidentiary foundation.

[2] It is my view the trial judge applied the relevant law to the facts she found arising from the evidence led, the issues raised, and the positions taken at trial. The appellants have not identified any errors of fact, law, or principle. Nor are the awards so inordinately high that they can be said to be a wholly erroneous estimate of the damages.

[3] For the reasons that follow, I would dismiss the appeal. In doing so, I would note that this Court has had an influx of appeals raising similar issues. A number of these decisions have attempted to clarify the process for calculating damages for future losses, but none purport to change established principles and well-settled law.

As is summarized in *Reilly v. Lynn*, 2003 BCCA 49, leave to appeal ref'd, 29761 (8 January 2004) the scope of appellate interference in appeals of this nature is limited:

> [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.

[4] It is an error of law to use an incorrect basis for determining whether a loss of earning capacity has been suffered: *Ploskon-Ciesla v. Brophy*, 2022 BCCA 217 at para. 31; *Neufeldt v. Insurance Corporation of British Columbia*, 2021 BCCA 327 at para. 105; *Rab v. Prescott*, 2021 BCCA 345 at para. 24. Challenges to findings of fact are reviewable on a standard of palpable and overriding error: *Housen v. Nikolaisen*, 2002 SCC 33 at para. 10.

Background

[5] On May 26, 2018, the date of the accident, Mr. Corness was 33 years old and had an eighth-grade level of education. Mr. Corness worked at his own successful floor installation business, Performance Hardwood (the "Company"). He had initially worked as a sole proprietor from 2010 to 2013, but incorporated the Company and became its sole owner and shareholder in 2014.

[6] The Company provided labour for floor installation services to primarily commercial developer clients, who would pay the Company per square foot of installed flooring. Mr. Corness performed the installation work himself, but would also hire and supervise labourers on a piecework subcontractor basis. He additionally took care of client relations and business administration. Mr. Corness had a strong work ethic and business drive, and was exceptionally skilled at floor installation; he had the ability to achieve high-quality results in substantially less time than it took other installers. Mr. Corness also had a side business renovating and

selling homes. He and his spouse had purchased, renovated and sold two houses, and were, before the accident, renovating a third house.

[7] In 2014, Mr. Corness was diagnosed with a bulged disc, which caused pain in his back and down his leg and interfered with sleeping and sitting. In March 2015, he was diagnosed with lumbar degenerative disc disease and spinal stenosis and a doctor told him he may need to change his job. On June 12, 2015, after Mr. Corness received a cortisone injection from a neurosurgeon, his back pain resolved and did not bother him for over two and a half years.

[8] Mr. Corness said the accident caused headaches, wrist, shoulder, back and neck pain, and depression and anxiety. His shoulder pain and headaches mostly resolved in six months. The wrist pain lasted six to eight months. The lower back pain was the most serious injury and had not resolved by the trial.

Trial Judgment

[9] The judge awarded Mr. Corness damages in the amount of $1,866,675.88, set out in the reasons for judgment as follows, at para. 174:

Non-pecuniary damages	$120,000
Past loss of earning capacity	$189,900
Future loss of earning capacity	$1,385,500
Cost of future care	$68,297.50
Special damages	$102,978.38
Total	*$1,866,675.88 *Rounded up to $1,867,000

[10] The judge found Mr. Corness to be generally a credible witness: he neither understated his pre-accident injury or pain, nor overstated his post-accident pain: at para. 47.

[11] The judge reviewed the evidence of the expert witnesses: Dr. Heran (neurosurgeon); Dr. Sangha (physiatrist); Dr. Maloon (orthopedic surgeon);

Dr. Falconer (neurologist); and Ms. Chisholm (occupational therapist). The judge concluded the appellants were liable for the whole of Mr. Corness' damages because, although the severity of his disability and limitation was likely due to his pre-existing back condition, he was asymptomatic at the time of the accident, the accident caused a new and consistent period of disability and limitation, and his symptoms following a work-related post-accident back injury on March 13, 2020, were indivisible from his accident-related injuries.

[12] The judge's consideration of the effects of Mr. Corness' pre-existing back condition and post-accident back injury have not been challenged on appeal. There is no challenge to the negative contingency of 15% applied to the damage awards at issue to reflect the prior back injury. There is no challenge to the judge's conclusion that even with surgery Mr. Corness will not regain his former abilities and will not be able to engage in the heavy labour of renovating homes: at para. 100. The judge concluded Mr. Corness had lost his unique competitive advantage and was reliant on hiring subcontractors as replacement labour. She found Mr. Corness had lost his capacity to earn income as a floor layer, and from the labour he provided renovating properties, and had established a real and substantial possibility of a pecuniary loss: at para. 119.

[13] The appellants have not appealed the award for special damages, which includes the amount of $90,000 for replacement renovation labour costs due to Mr. Corness' loss of labour capacity.

[14] Mr. Corness' economist, Ms. Cara Brown, provided an opinion on his past and future losses based on estimates of wages paid to other contractors to do the labour he previously supplied. As I discuss in further detail below, the judge relied on Ms. Brown's calculations to assess Mr. Corness' past and future loss of income, including his future loss of renovating capacity.

Discussion

[15] The appellants concede the judge set out the correct legal tests but maintain she erred in fact, in principle, and/or misapplied the law.

[16] The respondent submits the appellants raised two new issues on appeal in their factum. In oral argument, the appellants abandoned the first of these issues, being whether COVID-19 might have had an impact on Mr. Corness' business. They conceded there was no evidence led at trial and no submissions made about any potential impact. The second issue is the appellants' assertion the judge failed to consider Mr. Corness' ability to earn income as a manager with another company. The respondent submits this was not an issue at trial. I will consider this issue below.

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

[17] The three-step method for assessing future loss of earning capacity was summarized in *Rab* as follows:

> [47] ... The first [step] 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 [step] 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.

[18] A judge's assessment of damages for future loss of earning capacity may be based on an earnings approach or capital asset approach: See, e.g., *Morgan v. Galbraith*, 2013 BCCA 305. The earnings approach assesses the plaintiff's estimated annual income multiplied by the remaining years of work and discounted to reflect current value: *Pallos v. Insurance Corp. of British Columbia* (1995), 100 B.C.L.R. (2d) 260 at para. 43 (C.A.). The capital asset approach considers a number of factors, including whether the plaintiff has been rendered less capable overall of earning income from all types of employment; is less marketable or attractive as a potential employee; has lost the ability to take advantage of all job opportunities that might otherwise have been open; or is less valuable as a person capable of earning income in a competitive labour market: *Brown v. Golaiy* (1985), 26 B.C.L.R. (3d) 353 (S.C.).

[19] Guided by the established legal principles set out in *Rab*; *Dornan v. Silva*, 2021 BCCA 228; and *Lo v. Vos*, 2021 BCCA 421, the judge concluded Mr. Corness had lost his capacity to earn an income as a floor layer as a result of the accident, and had established a real and substantial possibility of a pecuniary loss: at para. 119.

[20] Given his strong work ethic and high standards, the judge determined there was a real and substantial likelihood Mr. Corness would have continued to work as a floor layer at his pre-accident level for years, but would have transitioned to administrative or management duties for some years before retiring: at para. 121.

[21] The judge was assisted by Ms. Brown's report in assessing quantum. Ms. Brown's report included estimates of replacement wages paid to a lower-end worker ($71,500 per year), a mid-range worker ($103,000 per year), and a higher-end worker ($121,000 per year). Ms. Brown calculated Mr. Corness' potential past loss and potential future loss to arrive at a lump sum value that was discounted to present value using British Columbia's mandated discount rate.

[22] Although Mr. Corness testified he paid his best contractor floor installer $120,000 per year, the judge assessed damages based on Ms. Brown's calculations of replacement wages paid to a mid-range worker at $103,300 per year, to the age of 53. She considered Ms. Brown's opinion that the present value of replacement wages, considering labour and age-related contingencies, was $1,491,913.

[23] The judge then contemplated other positive and negative contingencies, including Mr. Corness' pre-existing disc condition, and what might happen in the future. She agreed that there was a real and substantial possibility that Mr. Corness' back would have worsened without the accident at some point in the future, though found it was not likely this would have occurred for at least 10 years: at paras. 130, 135. The judge concluded a 15% reduction was appropriate to capture the negative contingency of Mr. Corness' pre-existing condition. Therefore, she awarded him damages in the amount of $1,190,000.

[24] The appellants submit the judge erred in her award for damages for future loss of earning capacity by failing to consider Mr. Corness' residual capacity to earn income and by awarding amounts based on the replacement costs of his labour.

Did the trial judge err in failing to consider Mr. Corness' residual capacity to earn income?

[25] The appellants submit the judge failed to account for Mr. Corness' residual capacity to earn income. In oral submissions, counsel for the appellants referred to other employment options Mr. Corness theoretically could have obtained given his demonstrated management capabilities running his own company. They submit Mr. Corness cannot be compensated by the appellants for choosing to stay at his own company and incurring losses. This is, in effect, an argument that Mr. Corness failed to mitigate his losses. This argument relates to the second new issue Mr. Corness says the appellants have raised for the first time on appeal.

[26] The appellants rely on this Court's decision in *Neufeldt* as authority for the proposition that the plaintiff must prove a lack of residual earning capacity: *Neufeldt* at para. 127.

[27] In *Neufeldt* this Court determined the trial judge had erred by failing to adjust an award for loss of future income to account for the possibility that the plaintiff may have been able to work part-time in a big box store:

> [127] The expert evidence in this case was that there was a possibility the respondent might not be able to return to any work. However, there was also a possibility he could engage in gainful employment. That had to be weighed. The failure to make any allowance for that prospect reflects either the placement of an inappropriate burden upon the appellants, or a failure to give some weight to possibilities that corresponds to their likelihood. In light of the fact the respondent advanced a claim for over twenty years of lost income earning capacity, it was incumbent upon the judge to say something more about the possibilities he had to weigh than to simply conclude that "no evidence was led to support any ability of the plaintiff to take those positions or that any employer would hire someone with the symptoms which the plaintiff continues to experience" (at para. 128), or to summarily dismiss the question as follows:
>
> > [135] I have reviewed the small amount of evidence about the possibility that the plaintiff might be able to work part-time in a big box

> store for minimum wage, but given the lack of any concrete evidence supporting this possibility, I decline to make any order in that regard.
>
> [128] The trial judge was not being asked to "make an order" that the respondent was capable of working. He was, rather, weighing a claim that required the respondent to establish the loss of his income earning capacity. Assessment of the loss of income earning capacity in this case required that specific consideration be given to the residual capacity of the respondent.

[28] In my view, there is no merit to the argument in this case. The judge did not fail to account for the possibility of Mr. Corness' residual employment prospects because, unlike in *Neufeldt*, Mr. Corness was, and has been, gainfully employed by his Company post-accident. Mr. Corness' situation is markedly different from that in *Neufeldt*, where the trial judge made an award for over twenty years of lost income earning capacity that failed to account for any prospect of the plaintiff's residual working capacity.

[29] In this case, Mr. Corness had, in all likeliness, the highest-paying and most viable job available to him after the accident given his skills and level of education. The judge accepted that Mr. Corness would carry on working at the Company post-accident, just not by doing the physical labour. Even if higher paying management jobs were theoretically available, Mr. Corness' burden of demonstrating a lack of residual earning capacity does not translate into a requirement he find a higher-paying job.

[30] I agree with Mr. Corness that this is a new issue the appellants raise for the first time on appeal; this argument is entirely unresponsive to the nature of the evidence before the judge. There was no evidence rendering it realistic that Mr. Corness could transform his floor installing career into some other role in a way that was more profitable than what he was doing managing his own Company: See *Boucher v. Bemister*, 2023 BCCA 17 at para. 23.

Did the trial judge err by assessing Mr. Corness' loss based on replacement labour costs?

[31] The appellants submit a number of errors flow from the judge's use of replacement labour to assess loss. The appellants submit the judge ought to have

used the capital asset approach, and that an appropriate award would be one to two years' income based on Mr. Corness' tax returns showing an annual income of $89,000.

[32] I would note the appellants' argument concerning the use of replacement labour to assess loss has evolved over the course of the proceedings. At trial, the appellants' economist, Mr. Benning, was asked to comment on the estimates of economic losses in Ms. Brown's report and to provide alternative estimates of loss based on certain assumptions. Mr. Corness asserts Mr. Benning's economic report signalled an agreement that replacement labour cost was an appropriate method for valuing his claim for loss of earning capacity. The appellants counter that Mr. Benning purported to comment on Ms. Brown's economic report in rebuttal, but never said he agreed with Ms. Brown's approach to quantifying loss.

[33] In my view, Mr. Benning neither explicitly condoned Ms. Brown's methodology, nor stated it was problematic. Appellants' trial counsel argued in closing submissions that Mr. Corness had failed to establish an entitlement to either past or future loss of income, but did not explicitly take issue with the methodology used in Ms. Brown's report. Rather, trial counsel's focus was to attack the adequacy and accuracy of Mr. Corness' financial records and to urge the judge not to make an award on such a shaky financial record.

[34] In their submissions before this Court, the appellants rely primarily on *Reynolds v. M. Sanghera & Sons Trucking Ltd.*, 2015 BCCA 232 to challenge the judge's use of replacement labour to assess loss.

[35] The plaintiff in *Reynolds* was also self-employed by a closely-held company. His working capacity was reduced by one-half as a result of a motor vehicle accident for which the defendants admitted liability. The trial judge assessed the plaintiff's loss of future earning capacity according to the costs he incurred to hire replacement labour. On appeal, this Court concluded the trial judge had erred in quantifying loss in this manner, commenting:

> [28] Earning capacity is an asset. The value of Mr. Reynolds' lost earning capacity is the income Mr. Reynolds (or, in this case, ENI, as the "alter ego" of Mr. Reynolds) could have earned if that earning capacity had not been lost. Such valuations could be relatively straightforward if a plaintiff could show, for example, that they did in fact hire an additional employee to compensate for the lost "capacity". In such circumstances, the additional wages quantify the loss. The value of lost opportunities or sales could also help quantify the value of the lost earning capacity.
>
> [29] Although there was some evidence at trial upon which the judge could find that Mr. Reynolds did incur additional costs to replace his own labour following the accident, such evidence was vague and difficult to isolate from the otherwise increasing expenses and revenues. The judge found that it would take one full-time employee to replicate the lost capacity of Mr. Reynolds, and assigned the value of that employee to the lost capacity. But such a valuation would only be appropriate if, but for the injuries sustained, Mr. Reynolds could have increased ENI's net income by an equivalent amount.

[36] The appellants submit Mr. Corness failed to show that the Company's profits had increased by the cost of his replacement labour. The appellants say that like *Reynolds*, Mr. Corness gave evidence about what he could not do, but there was no proof he spent the amount of money that the economist, Ms. Brown, had assumed. The appellants say there was a variation in the Company's labour expense as a ratio of total expenses over the years, meaning it was not possible to discern with any sufficient degree of certainty what his losses were given the fluctuation in labour costs that would have occurred in any event, regardless of the accident. Put simply, the appellants submit the business records did not support the replacement labour cost the judge awarded.

[37] I would not accede to this argument. *Reynolds* is distinguishable from the facts here.

[38] To start, in *Reynolds*, the necessity of using replacement labour due to the nature of the plaintiff's injuries was not clearly established on the evidence. Further, the business record clearly did not support the award the trial judge made. In *Reynolds*, the plaintiff's company's financial records showed losses up until the year of the motor vehicle accident, when the company began to turn a profit. Mr. Reynolds claimed at trial that this increase was accomplished "only by assiduous

use of paid and unpaid replacement labour" for which he claimed he should be compensated: at para. 10 of the appeal reasons. On appeal, this Court remarked that there was "scant evidence" showing how Mr. Reynolds had managed to increase his revenue and income so significantly in the years following the accident, which was particularly problematic as the trial judge's award for lost earning capacity had more than doubled the plaintiff's income:

> [31] Considering that ENI did not earn more than approximately $26,000 in profits in the five years before the accident, adding $28,800 in income to ENI as the "alter ego" of Mr. Reynolds would more than double his income, according to the financial data adduced at trial. In reality, ENI earned an average of $32,000 following the accident, apparently due to increasing demand. While this increase in demand might have led to even greater profits had Mr. Reynolds been able to work at full capacity, I am of the opinion that there was no evidentiary basis to reasonably conclude that ENI's profits would have more than doubled but for Mr. Reynolds' reduced capacity. [Emphasis added.]

[39] By contrast, this is precisely the kind of straightforward valuation the Court in *Reynolds* contemplated at para. 28 of the judgment. The evidence was not "vague and difficult to isolate". Mr. Corness' replacement labour was a reasonable proxy for his loss based on the business record before the trial judge. There was clear, direct, and unequivocal evidence from Mr. Corness, whom the trial judge found credible, that he was *required* to find some kind replacement labour to meet the demands of his clients. Further, an assessment based on replacement costs was appropriate given the nature Mr. Corness' business model: a piecework, labour-based business where revenue is earned through labour, not selling materials.

[40] The appellants further submit the use of replacement labour gave rise to additional, related, errors. They claim the judge improperly assessed the quantum of Mr. Corness' loss as a one-to-one equivalent of the Company's loss. That is, the judge considered, without explanation, the cost of hiring a subcontractor to lay floors equal to Mr. Corness' pecuniary loss. In the appellants' estimation, this "narrow view" missed an assessment of the profits of his Company more generally; the judge failed to consider the reason for a reduction in sales, an increase in expenses, or changes in labour costs from 2018 to 2020.

[41] I do not agree. The propriety of considering Mr. Corness' loss as the Company's loss was squarely before the judge. At trial, the appellants argued that Mr. Corness' Company was a separate legal person that was not a party to the action, making its financial position moot. The judge was entitled to reject this submission, and to consider the loss of income suffered by Mr. Corness' Company, since it was closely held: *Rowe v. Bobell Express Ltd.,* 2005 BCCA 141 at para. 23. The legal principle articulated in *Rowe*, which enables a court to consider a plaintiff's losses as a company's losses, recognizes that a closely-held company can be considered a plaintiff's "alter ego" despite being a separate legal entity.

[42] This approach was clearly appropriate here. There was no reason to draw a distinction between the Company and Mr. Corness. He was the sole shareholder of the business.

[43] Indeed, the reports of both parties' economic experts were premised on an understanding that whatever funds remained in the Company that he did not withdraw were still his. It was not the case that this manner of quantification acted as a surrogate for what could have been proven or given an evidentiary foundation: *Gao v. Dietrich*, 2018 BCCA 372 at para. 62. The facts here are distinct from *Ostrikoff v. Oliveira*, 2015 BCCA 351, where the plaintiff had a newly-established business that made it difficult to establish the business' pre- and post-accident effects.

[44] There is likewise no merit to the appellants' related claim that the judge's quantification of projected Company earnings was made on insufficient evidence. The appellants submit Mr. Corness adduced no evidence to show that the Company would continue to be profitable but for the accident. They claim that notwithstanding this lack of evidence, the judge found that the Company would likely grow based entirely on Mr. Corness' skill as a floor layer and the fact that his business had continued to grow in the past.

[45] It is a notoriously difficult task for a judge to estimate the success of a business in a counterfactual scenario where the accident did not occur.

Nevertheless, that is the task that was before the judge. It is clear that, as in *Fedosenko v. Zahirfar*, 2018 BCSC 1297 at paras. 126–128, the judge's assessment was guided by what she felt was clearly established on the evidence before her, and the appellants can point to no reason to interfere with her assessment.

[46] The appellants submit the judge's use of replacement labour contributed to another error in quantum: the judge did not consider whether and to what extent Mr. Corness' managerial or administrative contributions to the business may have been responsible for generating its profits. By focusing on the cost of hiring an extra floor layer, they say the trial judge ignored the full extent and value of the services Mr. Corness supplied. The appellants appear to suggest that the judge failed to consider the possibility Mr. Corness may actually have been more valuable in managerial or administrative roles. They say Mr. Corness did not prove that the acceleration of his transition into a management role resulted in a loss to the Company.

[47] It is noteworthy that the judge refused to make an award for the cost of vocational testing, a future care cost recommended by Dr. Sangha, as she concluded Mr. Corness would likely continue to run his business "as that is the area of work in which he has knowledge, existing clients and is successful": at para. 163.

[48] It is my view the trial judge rightly considered the general legal framework for assessing future loss of income by focusing on putting the plaintiff in the position post-accident he would have been in but for the injuries caused by the defendant's negligence: at para. 104. There was no evidence that Mr. Corness was relatively more valuable in a managerial role. It is unrealistic and purely speculative to try to quantify what he should do given the real loss he has suffered, particularly in light of the clear evidence showing how uniquely valuable he was as a floor layer.

[49] Finally, the appellants submit the judge's approach failed to consider the effect that the surgery recommended by Dr. Heran would have on his ability to

perform his work duties. The appellants refer to the finding the judge made on the possibility Mr. Corness would get surgery to address his back pain:

> [166] ... Dr. Heran went further and recommended an L4/5 right side discectomy without fusion if steroid injunctions do not result in the plaintiff's symptoms subsiding. He stated that this procedure is low risk but requires a recovery time of three to six months during which the plaintiff could not perform any physical work at all. Surgical outcomes are generally favourable with 70% to 95% chance of significant improvement. Significant improvement means a 70% or more reduction in pain. Dr. Heran further opined that without surgery, the plaintiff's recovery is just a possibility. However, he opines that even with the surgery the plaintiff would not be symptom free. The plaintiff would gain functionality, but Dr. Heran would not recommend he return to the labour involved in floor installation. Ms. Chisholm costs personal care, surgery related physiotherapy, and home self-care equipment at $2,223 to $3,637. The plaintiff was not asked if he would undergo surgery if his treating neurosurgeon recommended it. However, given the plaintiff's aversion to dependency on pain medication, I find that he would undergo surgery as described and recommended by Dr. Heron if it would reduce pain symptoms. [Emphasis added.]

[50] The appellants submit that this finding means there was, therefore, a real and substantial possibility the respondent would enjoy a 75%–90% chance of significant improvement in his lower back symptoms that ought to have been reflected in the award for future loss. I disagree.

[51] The judge made a clear finding of fact that, *regardless of surgery*, Mr. Corness would never be able to continue to earn revenue through his labour:

> [107] Due to injuries caused by the Accident I find that, on a balance of probabilities, Mr. Corness has lost his career as a flooring installer. Surgery or not, he will not regain his ability to do what has set him apart from his peers. Further, he will not be able to engage in the heavy labour he previously contributed to in renovating his own properties. Even with serious daily medications he is in pain all the time. [Emphasis added.]

[52] This finding is sufficient to dispense with this argument. Drawing inferences from the judge's conclusions on the likelihood Mr. Corness would get the surgery, and its potential impact, does not detract from the judge's finding that Mr. Corness has lost his career as a flooring installer and renovator, surgery or not.

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

[53] To assess Mr. Corness' past loss of earning capacity, the judge considered evidence of his pre-accident working habits, noting:

> [112] … One contractor testified that the plaintiff worked 45-55 hours over 5 days a week. He gave evidence that the plaintiff could complete a suite in six hours when it took him 10 hours. The plaintiff gave evidence that he did installations for 6-8 hours a day. The plaintiff's best contractor floor installer was paid $120,000 per year. The plaintiff's father was hired to do delivery and preparation work which the plaintiff had previously done himself.

[54] She assessed Mr. Corness' past loss of income at the amount calculated by Ms. Brown based on replacement wages paid to a contractor earning a mid-range income of $103,000 per year. She determined the total amount of past loss to be $316,500, which after 40% taxes amounted to $189,900: at para. 115.

[55] For largely the same reasons as canvassed above, the appellants submit that the judge erred in her assessment of the award for past loss of earning capacity by calculating Mr. Corness' past income loss as the amount incurred for replacement labour costs. Specifically, they maintain the judge not only failed to establish a real and substantial possibility of a past event leading to a loss, but also failed in the quantification of that loss.

[56] The evidence at trial demonstrated that the Company's profits increased from 2017 to 2018, but then decreased in 2019 and again in 2020. Mr. Corness testified that the sales and profits of the Company were lower because he was not working. The appellants claim he bore the onus to prove that the reduction in profits was caused by the appellant's negligence, but failed to do so.

[57] With respect, it is for the trial judge to determine whether, in fact, Mr. Corness established a loss on a balance of probabilities. The judge commented:

> [114] The defendants point out that the Company continued operating and increased revenue after the Accident. The fact is, the plaintiff was unable to contribute to the operations he once did. He had to hire one or more workers to compete the physical tasks he once performed. However, he did still contribute some labour, however at a much reduced amount. This is similar to the circumstance discussed by the Court in *Fedosenko* at paras. 124–130.

[58] There was evidence supporting the conclusion that Mr. Corness' Company would have earned the profits but for the accident as Mr. Corness' business was doing well. As the judge observed:

> [109] In the four years before the Accident, the [C]ompany tripled its revenue. The plaintiff submits that this level of increase in revenue would have continued to occur but for the Accident. A regular client testified the plaintiff never turned down work before the Accident but has turned down $450,000 in contracts since. The plaintiff turned down another $795,000 from another client. The plaintiff testified this is because he could not take on the work himself, and replacement workers were not able to complete the work at the same quality and productivity level. These contractors confirmed their inability to meet the plaintiff's levels.

[59] Read in conjunction with the judge's other findings on earnings, the judge's clear conclusion was that Mr. Corness had established a past loss of earning capacity. Her assessment of the quantification of that loss was reasonable and anchored in the evidence: *Ostrikoff* at para. 20. She pointed to and accepted evidence from witnesses and Mr. Corness that he had given up jobs he would have otherwise taken were it not for the accident. The judge found Mr. Corness to be a credible witness. In my view, the appellants have not established a misapprehension of the evidence or palpable and overriding error, and the judge's finding that Mr. Corness had established loss, and her quantification of that loss, is entitled to deference.

Did the judge err in making an award for loss of future renovation earning capacity?

[60] Before the accident, Mr. Corness purchased, renovated and sold two homes with the help of his spouse. In 2010, he purchased a house in Aldergrove that he renovated and sold in 2015. In February 2015, he purchased a house in Langley that he renovated and sold in five months. In January 2016, he purchased another house in Langley. Although he and his spouse initially planned to renovate and flip it, they decided to reside there permanently. They built a suite and a shop and moved into the suite in April 2018. Mr. Corness last worked on the house on May 19, 2018, one week before the accident.

[61] The judge concluded Mr. Corness had established he lost his ability to renovate homes using his own labour to the same extent as was possible pre-accident. She determined a future loss of renovating capacity was not speculative as Mr. Corness and his wife had a clear track record of renovating homes and testified they intended to continue to do so in the future: at para. 143. The judge concluded:

> [145] I find that it is likely that the plaintiff would have continued to renovate and sell investment properties to the age of 60 at the rate of one property every two years. Based on a current value of $25,000 per property which I attribute to loss of the plaintiff's labour contribution to renovations, I assess this loss at $230,000 under this head of damage using Ms. Brown's multiplier for guidance. This is reduced by the contingency reduction of 15% set out above, for an award of $195,500.

[62] The appellants submit the judge erred by making an award for loss of future renovation earning capacity on the basis of replacement labour, as she failed to consider whether Mr. Corness had proved a real and substantial possibility of an actual pecuniary loss. In the appellants' submission, she failed to consider whether each flipped house would generate less profit to Mr. Corness than it would absent the accident, or whether "flipping" houses would continue to be profitable in the future. Further, they claim it was speculative to award damages for 12 years for flipped houses bought and sold over 24 years.

[63] This submission amounts to an attempt to ask this Court to retry the case and set aside the judge's findings of fact, which is not the function of this Court: *Khela v. Clarke,* 2022 BCCA 71 at para. 6. The trial judge accepted Mr. Corness' evidence that he performed nearly all of the labour for his home renovation side business and that he would have continued to do so but for the accident. There is no merit to this ground of appeal.

Did the judge err in her assessment of cost of future care?

[64] The judge assessed Mr. Corness' cost of future care at $80,350 and, applying a contingency of 15%, reduced the award to $68,297.50. The award included future

care costs for occupational therapy, office modifications, kinesiology, physiotherapy, injections, annual medications, outside maintenance and surgery-related costs.

[65] The appellants take issue with $14,633 in treatments being awarded in the absence of evidence of the likelihood Mr. Corness would incur the costs related to occupational therapy, office modifications, kinesiology, physiotherapy and injections. In addition, the appellants challenge the award of $284 annually for medication without considering the impact surgery would likely have on the need for medication.

[66] An award for cost of future care is "based on what is reasonably necessary on the medical evidence to promote the mental and physical health of the plaintiff": *Gignac v. Insurance Corporation of British Columbia*, 2012 BCCA 351 at para. 30. To make an award, the court must be satisfied there is an "evidentiary link drawn between the physician's assessment of pain, disability, and recommended treatment and the care recommended by a qualified health care professional": *Gignac* at para. 31 citing *Gregory v. Insurance Corporation of British Columbia*, 2011 BCCA 144 at para. 39. Assessing damages for future care is not a precise accounting exercise: *Krangle (Guardian ad litem of) v. Brisco*, 2002 SCC 9 at para. 21. It should reflect a reasonable expectation of what the injured person would require to put them in the position they would have been in but for the incident: *Pang v. Nowakowski*, 2021 BCCA 478 at para. 58.

[67] The judge was clearly alive to what was a reasonable award of cost of future care in Mr. Corness' case. She considered, at length, a cost of future care report based on recommendations by medical practitioners, and rejected some of the report's recommendations as "too speculative": at para. 157. There were no submissions on whether Mr. Corness would actually use the future care items recommended by the doctors, but there was evidence he had followed and participated in recommended treatments in the past, and we can infer he would continue to do so in the future. In my view, the judge's award was supported by the evidence. She was satisfied based on the medical evidence that the items she

awarded were reasonably necessary to promote Mr. Corness' mental and physical health, and her finding in this regard is entitled to deference.

[68] With respect to the award for medication, the appellants submit the judge erred in failing to apply a contingency to account for the likelihood that surgery would eliminate Mr. Corness' need for pain medication. They refer to the judge's finding, addressed above, that Mr. Corness would undergo the surgery recommended by Dr. Heran which they claim would result in a 70% or more reduction in pain. The appellants suggest reducing the award by a minimum of 70%.

[69] I reject the appellants' mischaracterization that a permissible inference from the judge's reasons is that there was a 70% likelihood Mr. Corness would improve from the surgery.

[70] The evidence was that surgery would bring a 70–95% chance of a 70% reduction in pain: at para. 51. The evidence was not that surgery would reduce his pain by 70%.

[71] The judge turned her mind to what effect surgery could have on Mr. Corness' potential to improve. There is no basis to interfere with the judge's assessment of cost of future care.

Disposition

[72] I would dismiss the appeal.

"The Honourable Madam Justice Stromberg-Stein"

I agree:

"The Honourable Mr. Justice Harris"

I agree:

"The Honourable Justice Dickson"