COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *McKee v. Hicks,*
2023 BCCA 109

Date: 20230308
Docket: CA47882

Between:

Maxwell Robert Fox McKee

Appellant
(Plaintiff)

And

Dr. Tracy Eugene Hicks

Respondent
(Defendant)

Before: The Honourable Mr. Justice Groberman
The Honourable Mr. Justice Hunter
The Honourable Justice Marchand

On appeal from: An order of the Supreme Court of British Columbia, dated October 12, 2021 (*McKee v. Hicks*, 2021 BCSC 1981, Vancouver Docket S088087).

Counsel for the Appellant:	G. Collette
Counsel for the Respondent:	E. LeDuc J. Morris
Place and Date of Hearing:	Vancouver, British Columbia October 17, 2022
Place and Date of Judgment:	Vancouver, British Columbia March 8, 2023

Written Reasons by:
The Honourable Justice Marchand

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

Summary:

The appellant broke his right arm when he was five years old. The respondent, an orthopedic surgeon, negligently performed surgery on the appellant resulting in a permanent deformity. The appellant plans to work as an industrial electrician and has completed the first year of his apprenticeship. However, he has suffered symptoms in the past and there is a "likely risk" that he will develop "some complications in the future" which "could eventually lead to him having to switch careers, or work either less often, or for a shorter period of time." The respondent admitted liability at trial. The judge awarded $110,000 in non-pecuniary damages, including for loss of future housekeeping capacity, and $65,000 for loss of future earning capacity. The appellant challenges the judge's award for loss of future earning capacity and her decision not to make a separate award for loss of future housekeeping capacity.

HELD: Appeal allowed in part. The judge erred in principle by failing to consider relevant economic evidence when valuing the appellant's loss of future earning capacity. This led her to make an inordinately low and wholly erroneous estimate of his loss. Accordingly, the judge's award for loss of future earning capacity is set aside and replaced with an award of $250,000. The judge correctly determined that this was a case in which the award for loss of future housekeeping capacity was to be assessed as non-pecuniary damages. Accordingly, the appeal in relation to the appellant's loss of housekeeping capacity is dismissed.

Reasons for Judgment of the Honourable Justice Marchand:

Introduction

[1] In December 2006, the appellant, Maxwell Robert Fox McKee, broke his right arm just above the elbow. He was five years old. The respondent, orthopedic surgeon Dr. Tracy Eugene Hicks, negligently performed a closed reduction and casting of the fracture resulting in a malunion of the bones. The malunion created a permanent cubitus varus deformity of Mr. McKee's elbow.

[2] At trial, Dr. Hicks admitted liability. The only issue was damages. In reasons for judgment indexed as 2021 BCSC 1981, the judge awarded Mr. McKee $110,000 for non-pecuniary damages and $65,000 for loss of future earning capacity. The judge did not make a separate award for loss of future housekeeping capacity. Instead, she took the difficulties Mr. McKee is expected to have with heavier household tasks into account in making her award for non-pecuniary damages.

[3] Mr. McKee appeals the judge's award for his loss of earning capacity. He says the judge:

- Erred in law by failing to apply the appropriate principles for assessing his loss;
- Erred in mixed fact and law by discounting the evidence of an occupational therapist, Paul Pakulak, for reasons wholly unsupported by the evidence;
- Erred in law by providing inadequate reasons for finding the award to be "sound and reasonable"; and
- Erred in law by making a wholly erroneous estimate of his loss.

[4] Mr. McKee also appeals the judge's failure to make a separate award for his loss of housekeeping capacity. He says the judge erred in law by failing to make a reasoned award based on the evidence before her.

[5] Dr. Hicks maintains the judge made no errors in her assessments, her assessments were appropriate and she adequately explained the awards she made.

[6] For the reasons that follow, I would allow the appeal in part. In my view, the judge erred in principle by failing to consider relevant economic evidence when assessing Mr. McKee's future loss of earning capacity. This led her to make an inordinately low and wholly erroneous estimate of the impairment Dr. Hicks' negligence caused to that capacity. I would set aside the judge's award of $65,000 for loss of future earning capacity and substitute an award of $250,000. I would dismiss the appeal in relation to Mr. McKee's loss of housekeeping capacity.

Background

[7] Mr. McKee was born in May 2001. He was a very active child. In December 2006, he fell off a kitchen cabinet and broke his right arm just above the elbow. Soon after Dr. Hicks' negligent treatment of Mr. McKee's injury, Mr. McKee's mother became concerned that something was wrong. As a result of her advocacy,

Mr. McKee was seen by a pediatric orthopedic surgeon, Dr. Shafique Pirani, for a second opinion.

[8] In January 2007, Dr. Pirani removed Mr. McKee's cast revealing an obvious deformity in Mr. McKee's arm. Significant healing had already occurred. Dr. Pirani felt it would be too risky to try to correct the deformity and it would be better to allow for further healing with the hope of remodelling in the future.

[9] Dr. Pirani reassessed Mr. McKee in March and December 2007. He described the deformity in Mr. McKee's arm as "cosmetically unacceptable and unsightly" but it was not causing any functional symptoms at that time. Dr. Pirani explained that the deformity would persist and discussed the possible long-term outcomes with Mr. McKee's parents, including vulnerability to posterolateral rotary instability, referred to as "PLRI".

[10] Mr. McKee was diagnosed with ADHD when he was nine years old and type 1 diabetes when he was about ten, but managed both conditions well. He advanced through school without any academic difficulties. He was self-conscious about his deformity and shied away from athletics but was able to fit in socially with his peers.

[11] By the age of ten, Mr. McKee had pain, tightness and an uncomfortable popping sensation in his right elbow when playing a particular video game. On April 6, 2011, Dr. Pirani reassessed Mr. McKee. In his view, Mr. McKee's symptoms were consistent with Mr. McKee developing PLRI. Dr. Pirani did not recommend any treatment.

[12] In high school, Mr. McKee decided to pursue a career in the trades. He was accepted into a dual credit program at BCIT that allowed him to take classes that counted towards his first-year apprenticeship in the BCIT electrician program as well as his high school graduation. He successfully completed the program and graduated from high school.

[13] In 2019, Mr. McKee obtained his first job while still in high school. He worked at a Bosley's pet store. He experienced pain and tightness in his right arm, which

was similar to the symptoms he experienced when he was younger. His symptoms were typically triggered by heavy lifting (especially overhead) or repetitive motions such as mopping. The pain and tightness typically went away after five to fifteen minutes of rest.

[14] In February 2020, Mr. McKee began working as an apprentice electrician at Horizon Electric. He experienced pain, tightness and a popping sensation in his elbow but was able to discharge all of his duties without missing any work due to his symptoms.

Expert Evidence

[15] Mr. McKee adduced evidence from five experts, one of whom had been retained by Dr. Hicks. Dr. Hicks adduced evidence from four experts. Only one of the medical experts, Dr. Pirani, was cross-examined on their report.

Medical Expert Evidence

[16] Dr. Pirani became Mr. McKee's treating orthopedic surgeon in 2007. As noted above, he saw Mr. McKee three times in 2007 and once in 2011. In his report dated January 19, 2011, he stated that Mr. McKee's prognosis was guarded. He identified four potential future complications arising from the deformity of Mr. McKee's elbow. The one of ongoing relevance to Mr. McKee's case is known as "tardy PLRI".

[17] In his testimony, Dr. Pirani described tardy PLRI as resulting from a stretching of ligaments across the outside of the elbow that causes pain and instability in the elbow two to three decades after a deformity occurs. When he last saw Mr. McKee in 2011, he detected symptoms consistent with the possibility of Mr. McKee developing PLRI. Dr. Pirani recommended that if Mr. McKee developed elbow symptoms in the future he should have follow-up care with an elbow specialist. He testified that the results of surgically correcting a cubitus varus deformity are "variable".

[18] Dr. Hugh Anton is a physiatrist who conducted an independent medical examination of Mr. McKee in November 2018 on behalf of Dr. Hicks. He produced a

report dated November 14, 2018 that Mr. McKee adduced at trial. In that report, Dr. Anton indicated that Mr. McKee's chief subjective complaint was pain in the area of his right elbow with activities that load the elbow, including exercises such as push-ups and repetitive use of a computer mouse while gaming. In Dr. Anton's view, Mr. McKee's symptoms were suspicious for PLRI. Dr. Anton described that PLRI may cause a variety of complaints including pain, popping, or a feeling of instability with activities that load the elbow.

[19] Dr. Anton indicated that if Mr. McKee's pain got worse, he could try topical pain relievers. He also recommended that Mr. McKee be assessed for PLRI by a surgeon with expertise in disorders of the elbow. If a diagnosis of PLRI were confirmed, Mr. McKee could consider physiotherapy or obtain an opinion regarding surgical options.

[20] In terms of prognosis, whether Mr. McKee did not have PLRI or had PLRI that was treated non-surgically, in Dr. Anton's view Mr. McKee would be left with permanent deformity, symptoms and functional limitations "even in the best case." Specifically, he will have reduced tolerance for activities that load the elbow joint, including pushing, lifting and carrying. The significance of Mr. McKee's functional limitations would depend on his future activities.

[21] Dr. Anton believed that, generally, the demands of working in a trade would be greatest during apprenticeship. He was concerned not only with the question of whether Mr. McKee would be able to tolerate the demands of working as an industrial electrician, but also whether he could successfully complete his apprenticeship. Dr. Anton indicated that Mr. McKee would "probably have some difficulty performing heavier household tasks and home maintenance, though [he could] likely manage most tasks through pacing and taking breaks as needed."

[22] Dr. John Oliver is an orthopedic surgeon who prepared a report on behalf of Dr. Hicks in response to the reports of Drs. Pirani and Anton. He did not examine Mr. McKee. In his view, Mr. McKee's right elbow symptoms were most likely "due to strain of the lateral soft tissue structures that occurs with certain repetitive activities."

[23] Dr. Oliver noted that Dr. Anton's report did not confirm a diagnosis of PLRI. If a diagnosis of PLRI were confirmed by an orthopedic surgeon with a sub-specialty in the treatment of elbow conditions, Dr. Oliver stated that treatment "would include conservative options before possible surgical options." In his view, surgery could reliably restore function.

[24] Based on Mr. McKee's apparent ability to complete the physical requirements of a year of his apprenticeship and the fact that Mr. McKee had not consulted with an orthopedic surgeon, Dr. Oliver further stated that Mr. McKee's "functional limitations will likely persist at current levels." He recommended that Mr. McKee follow a program of non-surgical treatments, including topical anti-inflammatory medication and appropriate activity modification. Based on Mr. McKee's successful completion of a year of his apprenticeship, Dr. Oliver was of the view that Mr. McKee would be able to continue to pursue a career as an electrician. In his opinion, Mr. McKee's functional limitations were unlikely to worsen.

Functional Capacity Evaluations

[25] Mr. Pakulak assessed Mr. McKee on January 22, 2019 and prepared a functional capacity evaluation report for him dated May 3, 2019. Mr. Pakulak concluded that Mr. McKee demonstrated the physical capacity to be employed full-time at up to a medium strength level, with certain limitations including with respect to strength tolerance and repetitive forceful use of his right arm and hand. In his view, Mr. McKee's "overall capacity to compete for work in an open job market has been reduced due to his ongoing physical limitations."

[26] With regard to specific job categories, Mr. Pakulak concluded that Mr. McKee had the capacity to work part-time or full-time as a retail salesperson but lacked the capacity to work part-time or full-time at a competitive or sustainable pace as an electrician. He explained that although both jobs are classified as requiring medium to heavy level strength, the classifications do not account for differences in the frequency and repetitiveness of the physical demands of the two jobs. In his view, working as an electrician required more repetitive lifting, carrying and forceful use of arms and hands than working as a retail sales clerk.

[27] In his testimony, Mr. Pakulak also clarified that he was not suggesting Mr. McKee could not pursue a career as an electrician, only that sustainability and competitiveness as an electrician would be "significant issues" for him.

[28] Regarding household chores, Mr. Pakulak reported that Mr. McKee's "limitations related to functional strength and repetitive forceful use of the right hand would be likely to interfere" with his capacity to perform the more physically demanding aspects of home maintenance and yard work. He reported that Mr. McKee "may" need assistance with such tasks.

[29] Tania Percy is an occupational therapist who prepared a report responding to Mr. Pakulak's report on behalf of Dr. Hicks. She did not assess Mr. McKee but offered a number of critiques of Mr. Pakulak's report. Of central importance to Mr. McKee's appeal, she considered it inconsistent for Mr. Pakulak to conclude that Mr. McKee could meet the demands of working part-time or full-time as a retail sales clerk, but not an electrician, when the strength demands of the two positions were comparable.

[30] In her view, it was "premature and inaccurate" for Mr. Pakulak to conclude that it was not viable for Mr. McKee to work as an electrician given his age and stage of physical development, the lack of guidance on exercises to optimize his ability to work in this or a comparable trade, and his capacity to work in another occupation with comparable strength demands. Further, the fact that Mr. McKee had successfully completed the first year of his apprenticeship was the "most valid measure" that he had sufficient functional capacity to perform work as an electrician on a durable basis.

[31] Finally, Ms. Percy concluded that Mr. McKee's tolerance for heavier home maintenance tasks may be compromised by the aggregate demands of that type of home maintenance work plus work as an electrician. However, she suggested Mr. McKee could undertake heavy home maintenance work on lighter workdays or weekends.

Vocational Assessments

[32] Derek Nordin is a certified vocational evaluator. He prepared a vocational assessment report for Mr. McKee dated September 24, 2019. In Mr. Nordin's opinion, Mr. McKee had the intellectual capacity to complete his trades training and undertake "other kinds of post-secondary education." Based on Mr. McKee's reports of physical difficulties during his practicum at BCIT and Mr. Pakulak's assessment, Mr. Nordin concluded that Mr. McKee would likely not be able to cope with the physical demands of completing his apprenticeship nor work as an industrial electrician or in other occupations with similar physical demands.

[33] Mr. Nordin provided information regarding suitable alternative careers for Mr. McKee, such as sales, digital animation and photography. Mr. Nordin provided average earnings for electricians and workers in these alternate fields. He noted that, depending on Mr. McKee's self-consciousness about his right arm, his self-confidence or "how he presents to a given employer" could impact his future career development. Finally, Mr. Nordin expressed his view that Mr. McKee may require some form of accommodation in at least some of the potential careers he could choose.

[34] In cross-examination, Dr. Hicks put statistics from 2007 to Mr. Nordin. These statistics suggested that the completion rate for apprenticeships is low as compared to other types of post-secondary education. When asked if that was a "fair statement", Mr. Nordin said "I don't have enough knowledge to answer that question." Dr. Hicks then put specific statistics to Mr. Nordin to the effect that the completion rate for apprenticeships was 7.6% for both sexes and 7.8% for males. When Dr. Hicks asked Mr. Nordin if he had "any reason to suggest those numbers have changed since 2007," Mr. Nordin replied, in part:

> I would say I do and that's because I think there's been… in the last 10 years, new interest in people going into the trades because there's… better paying jobs that don't require university education… [I]n my experience, there's been a strong demand for tradespeople and many [companies]… don't have enough qualified tradespeople. So my guess is – and I'm just guessing – that that number would probably be a bit higher than that. I mean 7 percent is quite low.

[35] Dr. Colleen Quee Newell is a vocational rehabilitation consultant who prepared reports dated January 13 and February 18, 2021 on behalf of Dr. Hicks. Her second report responded to Mr. Pakulak and Mr. Nordin's reports.

[36] In her view, Mr. McKee was capable of completing his apprenticeship program and achieving journeyman status. She recognized that his long-term employment capacity was likely dependent on his ability to manage the medium strength and upper extremity requirements of the job. She considered it to be a positive sign that he had coped with work-related discomfort by taking short periods of rest and had not missed any work due to his right arm symptoms. Dr. Quee Newell indicated that she would defer to the appropriate medical experts regarding Mr. McKee's long-term capacity for the physical demands of work as an electrician.

[37] In the event that Mr. McKee was unable to durably maintain employment as an industrial electrician, Dr. Quee Newell provided evidence regarding alternative occupations that may suit Mr. McKee, including construction electrician, electronics technician, power engineer and photographer. She also provided evidence regarding typical wage rates in these alternative fields.

[38] In her responsive report, Dr. Quee Newell took issue with a number of Mr. Nordin's conclusions, including his conclusion that Mr. McKee did not have the capacity to work as an industrial electrician. She noted that the trade is modernizing and technology improving.

Economic Expert Evidence

[39] Darren Benning and Douglas Hildebrand are economic consultants. Mr. Benning provided a "Future Income Loss" report dated January 5, 2021 for Mr. McKee. Mr. Hildebrand prepared a responsive report dated February 24, 2021 for Dr. Hicks. Both reports provided future income loss projections and future income loss multipliers for various possible vocations for Mr. McKee.

Reasons for Judgment of the Trial Judge

Background

[40] The trial judge began her reasons with a review of the factual background. She noted that Mr. McKee and his mother were highly credible and reliable witnesses. She then reviewed Mr. McKee's education, his employment history and the expert evidence.

[41] The judge noted that the primary points of disagreement between the experts were (1) Mr. McKee's prognosis and (2) whether Mr. McKee would have become an electrician but for the injury and if he could still pursue that career despite his injury.

Expert Evidence

[42] The judge found Dr. Pirani to have been "a neutral witness, who presented his evidence in a fair, thoughtful, and reasonable manner despite extensive cross-examination." She accepted his opinions that Mr. McKee's prognosis is guarded and that "some complications from the type of malunion Dr. Hicks caused can take decades to develop."

[43] Regarding Mr. McKee's functional capacity, the judge found that some of Ms. Percy's comments reduced the weight she could place on Mr. Pakulak's opinion. In the judge's view, Mr. Pakulak "did not provide a sufficiently reasonable explanation [as to] why he concluded Mr. McKee could perform retail work that he classified as medium to heavy strength, but could not do electrician work with the same strength requirements." The judge was "not convinced there was a sufficient foundation for [Mr. Pakulak] to conclude the repetitive nature of tasks must be greater in electrician work."

[44] Despite these comments, the judge was not persuaded that Ms. Percy's critiques justified completely disregarding Mr. Pakulak's opinions. In particular, the judge did not accept Ms. Percy's opinion that Mr. McKee's work as an electrician for one year was a more reliable long-term indicator of his suitability for that career than the results of Mr. Pakulak's functional capacity evaluation.

[45] The judge noted Ms. Percy's acknowledgement that Mr. McKee reported some complaints during Mr. Pakulak's functional capacity evaluation and "would likely benefit from modification to tasks if symptoms become present." In the judge's view, "[m]odification and accommodations are clearly relevant to Mr. McKee's overall competitiveness in the labour market."

[46] The judge further indicated she was relying on the non-expert evidence tendered by Mr. McKee about what work as an electrician entails. Various lay witnesses with experience working as an electrician described working in awkward positions and performing a lot of repetitive work, especially hand movements, including twisting and pulling. The judge made special note of a common task performed by electricians, namely "pipe bending", which requires strength and rotational movements. Given that Mr. McKee reported some symptoms while working, in the judge's view, the totality of the evidence justified "viewing Ms. Percy's conclusions with some caution."

[47] Ultimately, the judge accepted that Mr. Pakulak's opinion provided "some support" for Mr. McKee's position that he may experience future limitations working full-time as an electrician. At the same time, she also accepted Ms. Percy's opinion that the functional capacity evaluation results did "not necessarily support differentiating between Mr. McKee's capacity to perform retail work versus work as an electrician."

[48] Regarding the vocational expert evidence, the judge noted that Mr. Nordin relied on Mr. Pakulak's conclusion regarding Mr. McKee's physical limitations. Because the judge attached reduced weight to Mr. Pakulak's opinion, she likewise attached reduced weight to Mr. Nordin's conclusions that Mr. McKee would likely not be able to cope with the physical demands of completing his apprenticeship or working as an industrial electrician. However, she did not discount Mr. Nordin's conclusions entirely.

[49] The judge found Dr. Quee Newell's opinion helpful regarding available career alternatives for Mr. McKee.

Non-Pecuniary Damages and Loss of Housekeeping Capacity

[50] After setting out the legal principles governing non-pecuniary damages, the judge noted that Mr. McKee sought an award of $135,000 while Dr. Hicks suggested $65,000.

[51] In the judge's view, the negative impact of Mr. McKee's deformity was significant. She noted that Mr. McKee had occasionally experienced physical sensations, including pain, tightness and an uncomfortable popping sensation from the age of ten. She also found that there was a "likely risk" that Mr. McKee would develop "some complications in the future."

[52] The judge reviewed a number of comparable cases put forward by the parties but did not find any particularly helpful. The fact that Mr. McKee was so young when he was injured and would not experience a complete recovery distinguished his case from the authorities relied on by Dr. Hicks. On the other hand, the "relatively minor physical symptoms" experienced by Mr. McKee distinguished his case from the authorities he had put forward.

[53] The judge next noted that Mr. McKee sought a separate award of $60,000 for loss of housekeeping capacity while Dr. Hicks submitted that no such award was justified in this case.

[54] The judge cited *Kim v. Lin*, 2018 BCCA 77 at paras. 27–37 for the "well established" principle that "loss of housekeeping capacity may be included in an award for non-pecuniary damages, or as a separate pecuniary head of damages." In her view, there was no dispute that Mr. McKee would "probably have difficulties performing heavier household task[s] and home maintenance in the future." He was, therefore, "clearly… [entitled] to damages in some form for a loss of housekeeping capacity."

[55] In all the circumstances, "especially given the plaintiff's young age," the judge found it appropriate to compensate Mr. McKee for his loss of housekeeping capacity

in the award for non-pecuniary damages. The judge awarded Mr. McKee $110,000 for non-pecuniary damages, including lost housekeeping capacity.

Loss of Future Earning Capacity

[56] The judge began her analysis of whether and how much Mr. McKee is entitled to for his loss of future earning capacity by setting out the applicable legal principles. Neither party takes issue with this aspect of the judge's reasons.

[57] The judge next detailed the positions of the parties. Mr. McKee asserted that he had permanent physical limitations and would not be competitively employable as a journeyman electrician. He submitted that his loss should be measured by the difference between what he was likely to earn in the future (as a retail clerk, graphic designer or photographer) and what his income would have been as an industrial electrician. On this basis, he sought an award of $1.5 million for his loss of future earning capacity.

[58] Dr. Hicks' position was that Mr. McKee was not entitled to damages for loss of future earning capacity because he was on his chosen career path. In the alternative, Dr. Hicks submitted that an award of $65,000 would be the "high point" for such an award based on roughly two years of Mr. McKee's annual income. Dr. Hicks relied on *Barron v. Wine*, 2021 BCSC 711 and *Lambert v. Dong*, 2021 BCSC 249 in support of his alternative position. In those cases, the trial judges awarded the plaintiffs roughly two years of their pre-trial annual incomes in what were, in Dr. Hicks' submission, somewhat similar circumstances.

[59] The judge rejected Dr. Hicks' primary position as "too narrow" and concluded that Mr. McKee had established his entitlement to an award for loss of future earning capacity. She reasoned:

> [110] I am satisfied, based on the medical expert evidence discussed earlier in this judgment, that Mr. McKee has established (i) an impairment to his earning capacity and (ii) a real and substantial likelihood that he is less capable of earning income in the future than he would have been absent the injury. I am satisfied on the expert medical evidence that his prognosis is guarded. The evidence is clear that he has in the past suffered some symptoms, even if those have not been long-lasting or serious. However, I

> rely on Dr. Pirani's opinion that there remains a risk of complications in Mr. McKee's future. I also find, overall, the vocational expert evidence does establish that there is a risk he will have [fewer] opportunities available to him in the future because of possible complications with his injury. I conclude he is entitled to damages for loss of future earning capacity.

[60] The judge next considered whether she should employ the capital asset approach or the earnings approach to value Mr. McKee's loss. She determined that the earnings approach was "best used where there is an established pattern of pre-injury earnings, and those earnings are easily calculated" and was not appropriate in Mr. McKee's case.

[61] Although the judge accepted that Mr. McKee had shown himself to be driven and hard-working, she was not satisfied he had established his chosen career path as an industrial electrician to be a "near certainty" as had been done in *Orregaard v. Clapci*, 2020 BCSC 1726, an authority relied on by Mr. McKee. Even accepting that Mr. McKee had higher chances than most of completing his apprenticeship, the judge found that the "evidence that the completion rate for apprenticeships is quite low" was "a significant factor to consider."

[62] Finally, the judge assessed Mr. McKee's loss of future earning capacity. As the adequacy of her reasons is at issue, I set them out in full:

> [117] Determining an appropriate quantum of damages for future income loss is particularly difficult in this case because the plaintiff was very young when injured.
>
> [118] As noted, the plaintiff submits that damages of $1.5 million is appropriate, but that is based on the income approach, which I do not agree is appropriate. The defendant's position is that no damages should be awarded, but in the alternative, he submits $65,000 is justified. He bases this on the similarity of Mr. McKee's circumstances to the plaintiffs' in *Lambert* and *Barron*. I agree those cases provide helpful guidance.
>
> [119] I have considered all the expert evidence, and turned my mind to the negative and positive contingencies in this case. Specifically, Mr. McKee may be able to work for a number of years in the trades without symptoms, or he may require accommodations from future employers to handle symptoms, that could eventually lead to him having to switch careers, or work either less often, or for a shorter period of time. The primary complicating factor in assessing Mr. McKee's loss is that at 19 years old, he is not established in any career.

> [120] In my view, the defendant's alternative position of $65,000 for Mr. McKee's loss of future earning capacity is sound, and reasonable, and I make that award.

Standard of Review

[63] 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.

[64] 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.

Loss of Future Earning Capacity

[65] There was no dispute between the parties at trial regarding the principles for assessing Mr. McKee's loss of future earning capacity and, on appeal, Mr. McKee takes no issue with the judge's statement of the principles. Rather, Mr. McKee takes issue with the judge's application of the principles.

[66] Although not stated in precisely the same words, the judge correctly outlined the three-step process involved in assessing Mr. McKee's loss of future earning capacity. In *Rab v. Prescott*, 2021 BCCA 345, Justice Grauer stated the process this way:

> [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.

[67] The judge clearly found that Mr. McKee satisfied the first two steps. Regarding step one, she accepted Dr. Pirani's opinion that Mr. McKee's prognosis was guarded and found there was a "likely risk" that he would develop "some complications in the future." Regarding step two, she found there is a risk that he will have fewer opportunities available to him in the future because of these possible complications. Although she did not expressly state that this risk amounted to a real and substantial possibility of pecuniary loss, this is clearly implied by her reasons. After all, she found that Mr. McKee "may require accommodations from future employers to handle symptoms, that could eventually lead to him having to switch careers, or work either less often, or for a shorter period of time."

[68] Mr. McKee takes issue with the judge's handling of step three of the process. He submits that she failed to properly assess the value of his loss. He submits the judge erred in principle by (1) failing to compare his likely future working life if the injury had not occurred with his likely future working life now and (2) failing to undertake or articulate any analysis of the relative likelihood and timelines of relevant possibilities including:

> I. The likelihood Mr. McKee would achieve journeyman electrician certification in the absence of the injury;
>
> II. Mr. McKee's likely career trajectory in the absence of the injury;
>
> III. The likelihood of complications associated with the injury materializing in the future; and
>
> IV. The likelihood that with his injury he would not be completely and sustainably employable as an industrial electrician.

[69] Mr. McKee also submits that the judge erred in rejecting the earnings approach to assessing his loss of future earning capacity by relying on statistics that were put to, but not adopted by, Mr. Nordin regarding completion rates for apprenticeships. Mr. McKee maintains that, "[g]iven [his] demonstrated commitment,

plans and actions towards becoming an electrician, an earnings approach is more useful [than] the rough and ready capital asset approach" used by the judge.

[70] Mr. McKee further submits that the judge appears to have incorrectly considered the economic evidence to be relevant only to the earnings approach of assessing his loss. As a result, she did not articulate "an assessment of Mr. McKee's without-injury earning potential, what he was likely to earn with his injury, what the value of the asset he lost was or how much it had been impaired." Instead, she "simply pluck[ed] a number out of the air."

[71] In addition, Mr. McKee says the judge erred in finding that there was not "a sufficient foundation" for Mr. Pakulak to conclude that the repetitive nature of tasks must be greater in electrician work than in retail work. He says there was ample evidence distinguishing between the physical requirements of the work of a retail clerk and that of an electrician to support Mr. Pakulak's conclusion.

[72] Finally, Mr. McKee submits that these errors led the judge to make a wholly erroneous and inordinately low estimate of his loss.

[73] In my view, many of Mr. McKee's concerns are not well-founded.

[74] To begin, I can discern no error in the judge's treatment of the evidence of Mr. Nordin. When Mr. Nordin said he was "just guessing" that the statistics regarding the completion rates for apprenticeships would be "a bit higher" than the statistics from 2007, it was open to the judge to find that he was accepting the underlying premise that completion rates were quite low. This was, then, a legitimate consideration for the judge to consider in rejecting Mr. McKee's contention that, absent Dr. Hicks' negligence, it was a "near certainty" that he would have become an industrial electrician.

[75] Likewise, I can discern no error in the judge's treatment of the evidence of Mr. Pakulak. In particular, there was an evidentiary foundation for the judge to give reduced weight to Mr. Pakulak's evidence regarding Mr. McKee's capacity to work part-time or full-time as a retail salesperson but not at a competitive or sustainable

pace as an electrician (despite the fact that both jobs are classified as requiring medium to heavy level strength). Ms. Percy essentially offered the opposite opinion. Further, Mr. McKee himself testified about the heavy lifting and repetitive mopping tasks he performed as a retail clerk that resulted in similar symptoms to those he experienced working as an apprentice electrician.

[76] Next, I can discern no error in the judge's decision to employ the capital asset approach to assess Mr. McKee's loss. The objective of an award for loss of future earning capacity is to return the plaintiff to the position they would have been in had they not been injured: *Athey v. Leonati*, [1996] 3 S.C.R. 458, 1996 CanLII 183 at para. 32; *T.W.N.A. v. Clarke*, 2003 BCCA 670 at paras. 24-28. This task involves a comparison of the likely future of the plaintiff's working life without the injury to their likely future working life with the injury: *Rab* at para. 65, citing *Gregory v. Insurance Corporation of British Columbia*, 2011 BCCA 144 at para. 32 and *Pololos v. Cinnamon-Lopez*, 2016 BCSC 81 at para. 133.

[77] As the judge noted, there are two approaches to quantifying a loss of future earning capacity, namely the earnings approach and the capital asset approach. Both are intended to result in a fair estimate of the loss: *Perren v. Lalari*, 2010 BCCA 140 at para. 32; *Grewal v. Naumann*, 2017 BCCA 158 at para. 48 (Justice Goepel dissenting but not on this point). The earnings approach advanced by Mr. McKee is typically used in cases where there is an identifiable loss of income, for example, where the plaintiff has an established work history. The capital asset approach employed by the judge is typically used when that is not the case and the court makes an award for the plaintiff's loss of opportunity: *Kringhaug v. Men*, 2022 BCCA 186 at para. 43.

[78] In this case, Mr. McKee was only 19 years old at the time of trial. He was on his chosen career path and had successfully completed the first year of his apprenticeship without missing any work due to his injury. But the judge did not accept that, absent Dr. Hicks' negligence, it was a "near certainty" he would have followed this path. Further, Mr. McKee had not experienced any loss of income due

to his injury as of the date of trial. In such circumstances, this Court has held that "courts should generally undertake the capital asset approach": *Ploskon-Ciesla v. Brophy*, 2022 BCCA 217 at para. 17.

[79] Accordingly, the judge did not err in rejecting the earnings approach and adopting the capital asset approach. While the judge found there was a risk of complications in the future that might result in Mr. McKee requiring accommodations or a change in employment, the evidence did not support the calculation he advanced. That calculation was based on the difference in earnings between (1) Mr. McKee becoming and working to retirement as an industrial electrician absent Dr. Hicks' negligence and (2) Mr. McKee working to retirement as a retail clerk, graphic designer or photographer due to Dr. Hicks' negligence. However, this calculation would have been an inappropriate way to assess Mr. McKee's loss of future earning capacity given his young age, his successful completion of the first year of his apprenticeship and the fact that it was not a "near certainty" that he would have become an industrial electrician absent Dr. Hicks' negligence.

[80] Having appropriately settled on the capital asset approach for assessing Mr. McKee's loss of future earning capacity, there were a number of methods open to the judge to assess that loss. In *Pallos v. Insurance Corp. of British Columbia* (1995), 100 B.C.L.R. (2d) 260, 1995 CanLII 2871 (C.A.), this Court identified three acceptable methods for doing so:

> 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 years 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.

[81] In this case, the judge seems to have considered the second of these methods to be appropriate. She awarded Mr. McKee $65,000, which was slightly more than two years of his then current annual income as a first-year apprentice

($30,000). She considered this award to be “sound, and reasonable”. The remaining question is whether that is so.

[82] In my respectful view, the judge did not err by failing to assign specific probabilities and timelines to various possible future events. Such precision was unrealistic and not required in a case such as this involving a young plaintiff early on in his career who faced an uncertain risk of future complications but who had not experienced any loss of income due to the injury to the date of trial: *Romanchych v. Vallianatos*, 2010 BCCA 20 at para. 15; *Sinnott v. Boggs*, 2007 BCCA 267 at para. 16. For example, in using the capital asset approach to assess the value of the plaintiff’s loss of future earning capacity in *Dornan v. Silva*, 2021 BCCA 228, this Court did not assign specific probabilities and timelines to various possible future events as Mr. McKee suggests the judge was required to do in this case: see *Dornan* at paras. 162-174. “[T]he task of the court is to assess damages, not to calculate them on some mathematical formula”: *Parypa v. Wickware*, 1999 BCCA 88 at para. 36, citing *Mulholland (Guardian ad litem of) v. Riley Estate* (1995), 12 B.C.L.R. (3d) 248 (B.C.C.A.) at para. 43.

[83] However, with the greatest respect to the trial judge, she overlooked a critical step that she herself identified in her assessment of Mr. McKee’s loss of future earning capacity. At para. 104 of her reasons for judgment, the judge stated:

> [104] When a plaintiff is young and not yet established fully in his career with no established pattern of employment, quantifying a loss is more “at large” tha[n] a mathematical exercise: *Sinnott v. Boggs*, 2007 BCCA 267 at para. 16. Notwithstanding that, the Court of Appeal has noted that it can be appropriate to look at mathematical aids to assist in quantifying the loss. In *Jurczak v. Mauro*, 2013 BCCA 507 at para. 37, the court stated:
>
> > [37] With that said, <u>if there are mathematical aids that may be of some assistance, the court should start its analysis by considering them</u>. For example, in *Henry v. Zenith* (1993), 31 B.C.A.C. 223 at paras. 44-48, 82 B.C.L.R. (2d) 186 (C.A.), this Court held that a trial judge’s failure to consider an economist’s projections of a plaintiff’s lost future earning capacity contributed to the judge committing an error in principle, which “resulted in a wholly erroneous estimate of the damages”.
>
> [Emphasis added.]

Yet, once the judge rejected the earnings approach, she failed to consider available and highly relevant economic evidence in measuring Mr. McKee's loss of future earning capacity. This was an error in principle.

[84] *Dornan* is instructive on this point. In that case, this Court held that the trial judge erred in awarding the plaintiff $300,000 for his loss of future earning capacity "without any explanation of how he got there": *Dornan* at para. 158. As in this case, the judge in *Dornan* had ignored the economic evidence before him when assessing the plaintiff's future loss of earning capacity under the capital asset approach. This Court described the economic evidence as a "necessary starting point" and, citing *Grewal* at para. 49, a "helpful tool" for assessing the value of the plaintiff's without-accident earning capacity as a capital asset: *Dornan* at para. 165.

[85] Since the judge erred in principle by failing to consider relevant economic evidence in measuring Mr. McKee's loss of future earning capacity, this Court may intervene and alter the damage award for Mr. McKee's loss: *Woelk* at 435. As will become clear, the judge's error led her to make an inordinately low and wholly erroneous estimate of Mr. McKee's loss. This is another basis upon which this Court may intervene and alter the damage award for Mr. McKee's loss.

[86] It was common ground at trial that, absent Dr. Hicks' negligence, Mr. McKee had the capacity to work full-time as an industrial electrician. In fact, in his final written submissions, Dr. Hicks was critical of Mr. Nordin for failing to "explore generally higher paying occupations in the trades and technologies commensurate with the plaintiff's vocational profile." Although Dr. Hicks took this position in support of his submission that, if necessary, Mr. McKee could find alternative remunerative employment, his position necessarily implied that Mr. McKee's without injury earning capacity was perhaps even greater than that of an industrial electrician.

[87] Mr. Benning projected the present value of Mr. McKee's lifetime earnings as an industrial electrician to age 65 (net of the usual labour market and survival contingencies) to be $3,092,655. Mr. Hildebrand's projections put the number at $3,113,013. In light of these calculations, the judge's award of $65,000 represents

an impairment of Mr. McKee's earning capacity of approximately two per cent, which I consider on the judge's findings to be so inordinately low as to be a wholly erroneous estimate of his loss. The award reflects only a very slight possibility that Mr. McKee will require accommodations from future employers that may result in him either working less often or for a shorter period of time. Further, in my view, it does not make any provision at all for the fact that Mr. McKee may have to switch careers.

[88] In *Schenker v. Scott*, 2014 BCCA 203 and *Dornan*, this Court considered itself well-positioned to evaluate the plaintiffs' loss of future earning capacity claims based on the findings made by the trial judges in those cases. I consider this to be a similarly appropriate case to do so.

[89] The key findings made by the judge in this case are:

- Mr. McKee's prognosis is guarded. Some complications can take two to three decades to develop. Mr. McKee has in the past suffered symptoms. Although those symptoms "have not been long-lasting or serious" there is a "likely risk" of complications in Mr. McKee's future: at paras. 52–53, 86, 110.

- Mr. McKee may experience limitations in his ability to work full-time as an electrician in the future: at para. 66.

- Mr. McKee may require workplace modifications and accommodations in the future, which would adversely affect his overall competitiveness in the labour market: at para. 64.

- "[T]here is a risk [Mr. McKee] will have [fewer] opportunities available to him in the future because of possible complications with his injury": at para. 110.

- "Mr. McKee may be able to work for a number of years in the trades without symptoms, or he may require accommodations from future employers to handle symptoms, that could eventually lead to him having to switch careers, or work either less often, or for a shorter period of time": at para. 119.

- Even though Mr. McKee has better chances than most of completing his apprenticeship due to his "aptitude and work ethic," it is a "significant factor" that the completion rate for apprenticeships is "quite low": para. 115.

[90] Given Mr. McKee's young age, it is impossible to identify with specificity all of the real and substantial possibilities in relation to his with and without injury career paths. The following are certainly deserving of consideration:

- Absent Dr. Hicks' negligence, it is a real and substantial possibility that Mr. McKee would not have completed his electrician apprenticeship nor achieved the lifetime earnings of an industrial electrician to age 65 or 70 as projected by the economists;

- Despite Dr. Hicks' negligence, it is a real and substantial possibility that Mr. McKee will complete his electrician apprenticeship and work full-time as an industrial electrician with only modest accommodations having a modest impact on his lifetime earnings;

- Because of Dr. Hicks' negligence, it is a real and substantial possibility that Mr. McKee will require more significant accommodations resulting in him working less often or for a shorter period of time or switching careers.

- If Mr. McKee is required to switch careers, it is a real and substantial possibility that he can find similarly remunerative employment. But, he would likely be out of the workforce for a significant period of time to retrain and would therefore likely experience a significant setback in his earnings as he worked to gain experience and seniority in a new field.

- If Mr. McKee is required to switch careers, it is a real and substantial possibility that many opportunities, including work in retail sales, will not be available to him. There is a corollary to Ms. Percy's opinion that if Mr. McKee can meet the medium to heavy strength demands of working in retail he should be able to do so as an industrial electrician. The corollary is that if

> Mr. McKee cannot meet the medium to heavy strength demands of working as an industrial electrician he would likewise be unable to meet the medium to heavy strength demands of working in other fields, including retail sales. As such, he may have difficulty finding alternative employment, experience longer periods of unemployment and/or have to settle for less remunerative employment.

[91] Mr. McKee was five years old when he broke his arm. He was 19 years old at trial. The judge found that complications can take two to three decades to develop. Therefore, the risk of complications found by the judge were "likely" to develop in the relatively near future but at a time when Mr. Hicks would be expected to be earning significantly more than a first-year apprentice. There is considerable uncertainty regarding both the path Mr. McKee would have taken absent Dr. Hicks' negligence and the path that lies ahead for him due to Dr. Hicks' negligence. However, based on the judge's findings of fact, I would put the impairment of Mr. McKee's without-injury earning capacity at approximately 10%, which on the economic evidence equates to approximately $310,000.

[92] This amount reflects the usual labour market and survival contingencies. Although specific negative contingencies (such as the risk of Mr. McKee's diabetes negatively affecting his without-injury lifetime earnings) are offset to some degree by specific positive contingencies (such as Mr. McKee's without-injury potential to have earned more than the average industrial electrician over his lifetime), I would apply a negative contingency of 20% to reflect the judge's concerns about the low completion rates for apprenticeships. I would therefore award Mr. McKee $250,000 for his loss of future earning capacity.

Loss of Housekeeping Capacity

[93] Mr. McKee submits that the judge erred in principle "when she found that [he] will have difficulty performing heavier household tasks and home maintenance in the future but then failed to make a separate pecuniary award for that loss." I do not agree.

[94] Because the decisions of this Court in *Kim v. Lin*, 2018 BCCA 77 and *Riley v. Ritsco*, 2018 BCCA 366 ("Riley") appear to have engendered some confusion as to the proper approach to awards for loss of housekeeping capacity, I will review the development of the basic principles in the area.

[95] The question of when a pecuniary award for a loss of housekeeping capacity should be made has been addressed in several decisions of this Court. A convenient starting point is *Kroeker v. Jansen* (1995), 4 B.C.L.R. (3d) 178. In that case, the plaintiff was injured in a motor vehicle accident, and suffered a diminution in her ability to perform household tasks. About sixteen months after the accident, the plaintiff married and, from that time, her husband took responsibility for tasks that the plaintiff was physically incapable of performing. The trial judge awarded pecuniary damages for the period after the plaintiff married. The defendant appealed, arguing that the plaintiff suffered no loss because she was not paying anyone to perform the work she, herself, was incapable of performing.

[96] This Court sat as a five-judge division in *Kroeker* to consider whether pecuniary damages can be awarded to plaintiffs for loss of housekeeping capacity where relatives or friends provide services without payment. The majority held that pecuniary damages should be awarded in such cases as a measure of the loss of capacity suffered by the plaintiff. The dissenting judges would have limited recovery to monetary amounts anticipated to be expended by the plaintiff.

[97] In *McTavish v. MacGillivray* 2000 BCCA 164, Justice Huddart expressed the concept in general terms:

> [63] … [I]t is now well established that a plaintiff whose ability to perform housekeeping services is diminished in part or in whole ought to be compensated for that loss. It is equally well established that the loss of housekeeping capacity is the plaintiff's and not that of her family. When family members have gratuitously done the work the plaintiff can no longer do and the tasks they perform have a market value, that value provides a tangible indication of the loss the plaintiff has suffered and enables the court to assign a specific economic value in monetary terms to the loss. This does not mean the loss is that of the family members or that they are to be compensated. Their provision of services evidences the plaintiff's loss of capacity and

> provides a basis for valuing that loss. The loss remains the plaintiff's loss of economic capacity.

[98] In *Liu v. Bains*, 2016 BCCA 374 the Court cited para. 63 of Justice Huddart's judgment at para. 25, and said:

> [26] It lies in the trial judge's discretion whether to address such a claim as part of the non-pecuniary loss or as a segregated pecuniary head of damage. In *McTavish* at paras. 68-69, the Court suggested that treating loss of housekeeping capacity as non-pecuniary loss may be best suited to cases in which the plaintiff is still able to perform household tasks with difficulty or decides they need not be done, while remuneration in pecuniary terms is preferable where family members gratuitously perform the lost services, thereby avoiding necessary replacement costs.
>
> [Emphasis added.]

[99] The Court in *Liu* appears to have mistakenly treated the judgment of Justice Huddart as the judgment of the Court in *McTavish*. It was, in fact, a concurring judgment. The Court's error was inconsequential because the majority judgment in *McTavish* was consistent with Justice Huddart's statements in the quoted paragraphs.

[100] What is important, however, is to recognize that in *Liu* the reference to "such a claim" is a reference to Justice Huddart's discussion of a situation in which a family member gratuitously performs work that a plaintiff is no longer capable of performing. It is in that situation the Court considered that a judge has discretion to treat the claim either as one for pecuniary damages or non-pecuniary damages.

[101] In *Kim v. Lin*, 2018 BCCA 77 at paras. 27-37, this Court again grappled with "the somewhat vexing issue" of when a pecuniary award should be made for a loss of housekeeping capacity. At para. 30, the Court quoted from Jamie Cassels & Elizabeth Adjin-Tettey, *Remedies*: *The Law of Damages*, 3d ed (Toronto: Irwin Law Inc., 2014) at 187–188 to explain the distinction between cases of pecuniary and non-pecuniary loss on the basis of whether a plaintiff has actually lost the capacity to perform housekeeping work:

> Where the plaintiff continues to perform the tasks but with difficulty, requires more time to complete tasks, or manages to get by without doing or intending

> to do these tasks, the loss may be compensated for as part of non-pecuniary damages for pain and suffering and loss of amenity. Specifically, compensation is intended for the plaintiff's pain in persevering with housework, loss of satisfaction in not contributing to the upkeep of one's home, and/or for having to live with a disordered and perhaps not a well-functioning home. There may be a fine line between situations of diminished capacity to perform tasks and when the plaintiff completes tasks with difficulty. Care needs to be taken in making these distinctions to ensure fairness to both plaintiff and defendant. A pecuniary award may be appropriate where the evidence indicates that a reasonable person in the plaintiff's circumstances should not be expected to continue to perform the tasks in question due to their injuries. Such a position avoids prejudicing plaintiffs who are stoic, or are unable to benefit from gratuitous services or afford to hire replacement services prior to trial.
>
> [Footnotes omitted in *Kim*. Emphasis added.]

[102] The Court adopted those views, saying:

> [33] Therefore, where a plaintiff suffers an injury which would make a reasonable person in the plaintiff's circumstances unable to perform usual and necessary household work — i.e., where the plaintiff has suffered a true loss of capacity — that loss may be compensated by a pecuniary damages award. Where the plaintiff suffers a loss that is more in keeping with a loss of amenities, or increased pain and suffering, that loss may instead be compensated by a non-pecuniary damages award. However, I do not wish to create an inflexible rule for courts addressing these awards, and as this Court said in *Liu*, "it lies in the trial judge's discretion whether to address such a claim as part of the non-pecuniary loss or as a segregated pecuniary head of damage": at para. 26.
>
> [34] Whichever option a court chooses, when valuing these different types of awards, courts should pay heed to the differing rationales behind them. In particular, when valuing the pecuniary damages for the loss of capacity suffered by a plaintiff, courts may look to the cost of hiring replacement services, but they should ensure that any award for that loss, and any deduction to that award, is tied to the actual loss of capacity which justifies the award in the first place.
>
> [Emphasis added.]

[103] *Kim*, itself, was a case where the plaintiff suffered what the Court described as "a true loss of capacity". She was incapable of performing many household tasks, and both her husband and mother-in-law undertook extensive responsibilities to do work that she could not perform.

[104] Shortly after the judgment in *Kim* was pronounced, but without having been referred to it, the Court addressed the issue of appropriate awards for loss of

housekeeping capacity in *Riley*. In that case, the plaintiff was able to complete ordinary housework, and the evidence did not suggest that he required the assistance of friends or relatives. His injuries, however, made housework more onerous for him. The trial judge rejected his claim for a segregated award of damages for loss of housekeeping capacity. This Court held that it was not an error to refuse a segregated award under that head:

> [101] It is now well-established that where a plaintiff's injuries lead to a requirement that they pay for housekeeping services, or where the services are routinely performed for them gratuitously by family members or friends, a pecuniary award is appropriate. Where the situation does not meet the requirements for a pecuniary award, a judge may take the incapacity into account in assessing the award for non-pecuniary damages.
>
> [Emphasis added.]

[105] It is important to recognize that what was being sought in *Riley* was not an award of pecuniary damages, but rather a segregated award of non-pecuniary damages to recognize a decline in the plaintiff's aptitude for housekeeping chores. The Court accepted that its assessment of non-pecuniary damages needed to recognize the plaintiff's diminished housekeeping abilities, but considered that the case did not call for a segregated non-pecuniary award:

> [102] I acknowledge what was said in *Kroeker* about segregated non-pecuniary awards "where the special facts of a case" warrant them. In my view, however, segregated non-pecuniary awards should be avoided in the absence of special circumstances. There is no reason to slice up a general damages award into individual components addressed to particular aspects of a plaintiff's lifestyle. While such an award might give an illusion of precision, or suggest that the court has been fastidious in searching out heads of damages, it serves no real purpose. An assessment of non-pecuniary damages involves a global assessment of the pain and suffering, loss of amenities, and loss of enjoyment of life suffered by a plaintiff. By its nature, it is a rough assessment and not a mathematical exercise.

[106] The decisions in *Kim* and *Riley* have led to some confusion in the trial court, with at least one judgment describing the two decisions as "apparently inconsistent" (*St. Jules v. Cawley*, 2021 BCSC 1775 at para. 71). The Supreme Court has frequently referred to the judgment of Justice Gomery in *Ali v. Stacey*, 2020 BCSC 465 in attempting to describe the effect of *Kim* and *Riley*. At para. 67 of *Ali*, Gomery

J. reconciled the practical operation of the Court's findings in *Kim* and *Riley* as follows:

> a) The first question is whether the loss should be considered as pecuniary or non-pecuniary. This involves a discretionary assessment of the nature of the loss and how it is most fairly to be compensated; *Kim* at para. 33.
>
> b) If the plaintiff is paying for services provided by a housekeeper, or family members or friends are providing equivalent services gratuitously, a pecuniary award is usually more appropriate; *Riley* at para. 101.
>
> c) A pecuniary award for loss of housekeeping capacity is an award for the loss of a capital asset; *Kim* at para. 31. It may be entirely appropriate to value the loss holistically, and not by mathematical calculation; *Kim* at para. 44.
>
> d) Where the loss is considered as non-pecuniary, in the absence of special circumstances, it is compensated as a part of a general award of non-pecuniary damages; *Riley* at para. 102.

[107] Much of what is said in *Ali* accurately reflects the approach this Court countenanced in *Kim* and *Riley*, and it has served the trial court well. That said, there are some nuances of this Court's jurisprudence that are not completely reflected in *Ali*.

[108] It is important to recognize that *Kim* and *Riley* dealt with somewhat different issues. *Kim* considered a situation of genuine incapacity – one where the injuries made it unreasonable to expect the plaintiff to perform some household tasks. *Kim* established that such claims are typically to be dealt with by awarding pecuniary damages. Further it states that such damages should generally be assessed with a view to the cost of obtaining replacement services on the open market.

[109] *Kim* recognizes, however, that the preference for awarding pecuniary damages in such cases is not absolute. A judge retains discretion to assess damages as non-pecuniary, where it is considered appropriate to do so. The case also suggests (citing *McIntyre v. Docherty*, 2009 ONCA 448) that, in some cases, full compensation for the loss of housekeeping capacity may require an award of both pecuniary and non-pecuniary damages.

[110] Especially in light of this Court's unanimous decision in *Riley*, I do not read *Kim* as suggesting that there is a discretion to award pecuniary damages in cases where the plaintiff remains capable of performing all household tasks but encounters some frustration or difficulty in doing them. Such cases are cases where the damages are non-pecuniary in nature.

[111] *Riley* was such a case. The Court acknowledged that the plaintiff's difficulties had to be considered in assessing the amount of non-pecuniary damages but rejected the idea that a segregated non-pecuniary award was necessary. It also suggested that segregated non-pecuniary awards should not be made absent special circumstances.

[112] To sum up, pecuniary awards are typically made where a reasonable person in the plaintiff's circumstances would be unable to perform usual and necessary household work. In such cases, the trial judge retains the discretion to address the plaintiff's loss in the award of non-pecuniary damages. On the other hand, pecuniary awards are not appropriate where a plaintiff can perform usual and necessary household work, but with some difficulty or frustration in doing so. In such cases, non-pecuniary awards are typically augmented to properly and fully reflect the plaintiff's pain, suffering and loss of amenities.

[113] In this case, the judge's finding that Mr. McKee would likely have difficulties with household tasks in the future was open to her. The finding did not amount to a finding that Mr. McKee would be incapable of performing household tasks in future. The trial judge did not suggest that Mr. McKee would have to engage others to perform household tasks for him.

[114] In the result, Mr. McKee's damages were properly assessed as non-pecuniary damages, in accordance with *Riley*. The judge made no error in choosing to address Mr. McKee's diminished ability to perform housekeeping tasks by augmenting her award of non-pecuniary damages.

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

Disposition

[116] I would allow the appeal in part. I would set aside the judge's award for loss of future earning capacity and substitute an award of $250,000. I would dismiss the appeal in relation to loss of housekeeping capacity.

"The Honourable Justice Marchand"

I AGREE:

"The Honourable Mr. Justice Groberman"

I AGREE:

"The Honourable Mr. Justice Hunter"