COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Zenone v. Knight,*
2024 BCCA 200

Date: 20240529
Docket: CA48109

Between:

Francesca Laura Zenone and Michael Henry Mahlmann

Appellants
(Defendants)

And

Emily Knight

Respondent
(Plaintiff)

Before: The Honourable Madam Justice Stromberg-Stein
The Honourable Mr. Justice Voith
The Honourable Justice Skolrood

On appeal from: An order of the Supreme Court of British Columbia, dated January 21, 2022 (*Knight v. Zenone*, 2022 BCSC 99, Vancouver Docket M155706).

Counsel for the Appellants:	C.C. Godwin
Counsel for the Respondent:	J.M. Rees R.K. Fischer
Place and Date of Hearing:	Vancouver, British Columbia May 6, 2024
Place and Date of Judgment:	Vancouver, British Columbia May 29, 2024

Written Reasons by:
The Honourable Madam Justice Stromberg-Stein

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

Summary:

The respondent was awarded damages for injuries she sustained in two motor vehicle accidents for which the appellants admitted liability. The trial judge found that the respondent's entire medical condition at the time of trial, including a disc herniation that occurred several years later, was causally related to the motor vehicle accidents. The appellants say the judge erred in finding that the respondent's disc herniation was caused by the motor vehicle accidents and in assessing damages for loss of future earning capacity and cost of future care. Held: Appeal allowed in part. The award for cost of future care is remitted to the trial judge to specify which items have been allowed and in what amount. The balance of the appeal is dismissed. The judge did not shift the burden of proof onto the appellants to disprove that the accidents caused Ms. Knight's disc herniation. The judge's conclusion that the disc herniation was causally related to accidents was based on the weight of the evidence and it was open to him to draw a common-sense inference of causation. The judge did not err by failing to apply the test for loss of future earning capacity, or by basing the award on speculative future events.

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

Introduction

[1] The respondent, Emily Knight, was injured as a result of two motor vehicle accidents. The appellants admitted liability. Following a nine-day trial, Ms. Knight was awarded damages as follows:

Non-pecuniary loss:	$200,000.00
Past wage loss:	$47,056.50
Loss of future earning capacity:	$627,508.00
Cost of future care:	$85,843.00
Loss of housekeeping:	$30,000.00
In-trust claim:	$50,000.00
Special damages:	$16,500.00
TOTAL:	$1,056,907.50

[2] The trial judge's reasons are indexed at 2022 BCSC 99. The focus of this appeal is whether the judge erred in finding that Ms. Knight's disc herniation, which

she was diagnosed with approximately four years after the second accident, was caused by the accidents, and whether the judge erred in his awards for loss of future earning capacity and cost of future care. The appellants say the trial judge erred:

> (a) by not applying the "but for" test and instead reversing the onus to require the appellants to prove on a balance of probabilities that Ms. Knight's post-accident disc herniation was not caused by the accidents;
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> (b) by deciding the issue of causation using his perception of "logic", when the only evidence was that the disc herniation was not causally related to the accidents;
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> (c) by not applying the law concerning the assessment of damages for loss of future earning capacity and by basing his valuation on speculative future events; and
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> (d) by making a general award for costs of future care, rather than analyzing each item claimed.

[3] While I conclude the award for costs of future care was modest in the circumstances, I would allow the appeal with respect to that award and remit the issue of costs of future care to the trial judge. In my view, the remaining grounds for appeal should be dismissed.

Background

[4] The first accident occurred on October 18, 2013. Ms. Knight was stopped at a red light when she was rear-ended by a vehicle driven by the appellant, Ms. Zenone. Ms. Knight reported pulling over to calm herself before continuing on her way. She was not hospitalized.

[5] In the days following the first accident, Ms. Knight reported neck and back pain. She took some time off work, but not a significant amount. Over the following months, she reported increased pain, stiffness and tightness in her neck, upper back

and hips, and headaches and anxiety. She saw her family doctor and was prescribed depression and anti-inflammatory medication. She also received treatment from a physiotherapist, chiropractor and kinesiologist.

[6] The second accident occurred approximately 15 months later, on January 5, 2015. Ms. Knight was driving to work and was stopped at a light. She was rear-ended by a vehicle driven by the appellant, Mr. Mahlmann. The collision resulted in Mr. Mahlmann's vehicle becoming partially lodged underneath the rear of Ms. Knight's vehicle. Ms. Knight was transported to the hospital by ambulance and was discharged later that day.

[7] The results of the second accident were more severe. Ms. Knight felt immediate pain, nausea and anxiety. In the months following the second accident, she reported increased neck and back pain and stiffness, severe migraines, and anxiety and depression. Ms. Knight saw her family doctor and was prescribed increased depression and anti-inflammatory medication, physiotherapy treatment and psychological counselling.

[8] At the time of the first accident Ms. Knight was approximately 26 years old. She was working as a legal assistant at the firm Whitelaw Twining in Vancouver, and was a single mother with one child.

[9] At the time of the second accident Ms. Knight was enrolled in a paralegal program but temporarily dropped out. She was away from work from the date of the second accident until March 2015 when she returned to Whitelaw Twining through a graduated return to work program. In May 2015, she left her employment feeling she was unable to keep up with the pace of the job. She briefly worked at a different law firm from May to August 2015, at which point she moved to Harris and Company where she completed her paralegal studies and transitioned to working as a paralegal.

[10] Ms. Knight was employed at Harris and Company until February 2018 when she returned to Whitelaw Twining. The reason for her departure was that she felt

she was unable to perform in her new role as a paralegal, which involved a high volume of document review. The level of concentration and apparent lack of mobility associated with this type of work increased her pain and discomfort, which increased her depression. After transitioning back to Whitelaw Twining, Ms. Knight had some success working in a hybrid legal assistant/paralegal role.

[11] Ms. Knight's work supervisors generally had very positive things to say about her work, and her earnings increased, despite her apparent difficulties.

[12] At some point around 2017, Ms. Knight began taking pain medication, Oxycocet, which was prescribed by her family doctor to help her deal with the pain caused by her injuries. Ms. Knight's consumption of Oxycocet gradually increased to 10 pills per day by the time of the trial. She reported memory and concentration issues resulting from her pain and consumption of Oxycocet.

[13] In September 2018, Ms. Knight reported radiating pain from her lower back down her legs. This sensation worsened over several days and was accompanied by a partial loss of bladder control. She was diagnosed with a herniated disc and underwent emergency surgery on November 2, 2018.

[14] In December 2018, Ms. Knight reported not being able to stand, and an MRI revealed that the corrective surgery had not been completely successful. Her pain symptoms worsened and her consumption of pain medication increased. At that time, Ms. Knight was pregnant with her second child and further surgical intervention was not advised. Her second child was born in December 2019, and from that point until December 2020, Ms. Knight was on maternity leave. She reported being unable to breast feed her son or pick him up, and became increasingly depressed.

[15] Ms. Knight returned to work in December 2020, but found it to be extremely difficult. She worked until January 2021, and went on medical leave. She had not returned to work as of the date of the trial in April 2021.

[16] Generally speaking, Ms. Knight's medical condition at the time of the trial was characterized by significant pain and tightness in her shoulders and back, severe headaches, depression, anxiety and cognitive deficits.

[17] Ms. Knight's pre-accident medical history was largely unremarkable. She lived an active life, which included caring for her child, attending the gym, playing soccer, running and hiking. She had no significant history of anxiety or depression but on occasion had taken anxiety medication to calm herself during travel. She was in two minor car accidents during her high school years, around 2005 or earlier. The injuries from those accidents resolved within two years. Ms. Knight had surgery for an ovarian cyst in 2006, and took pain medication while recovering from that procedure. She had no shoulder or back problems and no concussive injuries, although she reported periodic headaches consistent with her menstrual cycle.

Trial Judgment

Evidence at Trial

[18] A number of witnesses provided evidence at trial. The lay witnesses were Ms. Knight's partner, her brother, a co-worker, and two lawyers for whom Ms. Knight worked. Their testimony concerned Ms. Knight's work and home life prior to the accidents and her difficulties following the accidents. This evidence was not significantly challenged and was accepted by the trial judge.

[19] Seven witnesses provided expert opinion evidence.

[20] Dr. Maziar Badii, a rheumatologist with a specialty in the treatment of spine injuries, examined Ms. Knight at the request of her counsel and produced two medical reports dated May 6, 2016, and April 12, 2018. Dr. Badii diagnosed Ms. Knight with chronic myofascial pain syndrome in her neck and back and concluded that these injuries developed after the first accident and were aggravated by the second accident. In his first report, Dr. Badii was optimistic about Ms. Knight's prospects of recovery, but following his second assessment of Ms. Knight, he opined that there was little prospect of improvement in her condition.

[21] Dr. Stanley Jung, a chiropractor with training in the diagnosis and treatment of chronic pain, examined Ms. Knight at the request of her counsel and produced a report dated July 9, 2020. Dr. Jung diagnosed Ms. Knight with chronic pain and soft tissue injuries throughout her neck and back area. He concluded the soft tissue injuries were the cause of Ms. Knight's persistent headaches.

[22] Dr. Leslie Kiraly, a psychiatrist who examined Ms. Knight at the request of her counsel, provided a report dated May 4, 2019. He diagnosed Ms. Knight with chronic pain syndrome, which he found to be associated with her physical injuries and psychological factors. He also diagnosed Ms. Knight with a mild traumatic brain injury resulting from the second accident and post-traumatic stress disorder. Dr. Kiraly opined that Ms. Knight's improvement had plateaued at the time of his examination and there was a likelihood that her condition would worsen in the future. On cross-examination, the appellants challenged Dr. Kiraly's opinion due to his lack of training as a forensic psychiatrist and Ms. Knight's previous prescriptions for anxiety medications. The judge stated that Dr. Kiraly's 40 years of experience "dissuades me from limiting his report in that regard", and he found the amount of anti-anxiety medication prescribed to Ms. Knight prior to the accidents was "modest" and "of no significant concern": at para. 88.

[23] Dr. Andrew Woolfenden, a neurologist who examined Ms. Knight at the request of defence counsel, produced a report dated August 30, 2020. He subsequently reviewed additional documents and provided an addendum report dated January 13, 2021. Dr. Woolfenden agreed with the other experts that Ms. Knight suffered a spinal strain injury as a result of both motor vehicle accidents, as well as a mild traumatic brain injury in the second accident. He disagreed, however, about the source of Ms. Knight's ongoing pain, which he attributed in part to Ms. Knight's consumption of narcotic pain medication.

[24] Dr. Woolfenden was asked to consider whether Ms. Knight's disc herniation was causally related to the accidents. In Dr. Woolfenden's opinion, Ms. Knight's delayed onset of "referred" symptoms in late 2018 (leg pain and weakness) was

most consistent with a spontaneous onset of symptomatic spondylosis, which is a term for spine degeneration. He opined that Ms. Knight's "referred" symptoms were not attributable to the accidents, but also that "[i]t is not possible to disentangle to what extent MVA #1, MVA #2, and the unrelated low back problem which developed in September 2018 contribute to Ms. Knight's current low back pain."

[25] The judge concluded that he could place little emphasis on Dr. Woolfenden's report as it related to the causation of Ms. Knight's pain symptoms and stated:

> [90] …The simple fact is, as drawn out in cross-examination, that Dr. Woolfenden spent very little time with the plaintiff. There was only one visit. He noted he sets out two hours for each patient visit. He describes the activity of a usual visit for assessment as being in four parts. The first is a cognitive exam and testing related to concentration and other factors. This totals 15 minutes. The second part is a history, again noted to be about15 minutes. The third portion is a physical exam, which is again noted to be 15 minutes. The final section is an assessment of mood and anxiety levels, described as taking 10 to 15 minutes. That totals interaction with a patient of less than one hour. As was noted in cross- examination, relevant details, such as her occupation and her home responsibilities, were either not inquired of, or not noted in the report. One is left with the impression that the assessment was superficial.

[26] Dr. Simon Horlick, an orthopaedic surgeon who examined Ms. Knight at the request of defence counsel, prepared a report dated July 23, 2020. He subsequently reviewed additional documents provided by defence counsel and prepared an addendum report dated December 8, 2020. Dr. Horlick diagnosed Ms. Knight with chronic myofascial pain disorder and narcotic dependency. He opined that much of Ms. Knight's pain was related to her consumption of narcotic medication. The judge's impression of Dr. Horlick's evidence was that he was "particularly critical of the prescribing doctor's prescriptions for narcotics": at para. 91. On cross-examination, Dr. Horlick confirmed that in his view, "pain is pain", and it is sometimes difficult to determine where it comes from.

[27] Dr. Horlick was asked to consider whether Ms. Knight's disc herniation was causally related to the accidents. In his first report, he opined that "it does not appear that the herniated disc issue was directly or causally related to the accident given the lack of temporal association". After reviewing Dr. Woolfenden's report, Dr. Horlick

stated in his addendum report that he agreed with Dr. Woolfenden's opinion with respect to Ms. Knight's ongoing spine-related complaints. He stated, "Ms. Knight's subsequent development of lower extremity pain including a left-sided radiculopathy necessitating operative intervention…were not germane to the subject accidents".

[28] On cross-examination, Dr. Horlick testified that the motor vehicle accidents could have made Ms. Knight more susceptible to a disc injury. The judge summarized Dr. Horlick's evidence in this respect:

> [93] In regards to the disc herniation, Dr. Horlick noted that one can be entirely asymptomatic and essentially not know of the existence of a disc herniation in a circumstance where the herniation has not placed pressure on any nerves. He appeared to accept that a disc herniation could be brought on by normal activities, as opposed to significant traumatic events, but that being in two accidents might have made the plaintiff susceptible to a disc injury. Additionally, weight gain and reduced strength in one's core due to both weight gain and myofascial pain, could increase the risk of a disc herniation. It seems clear on the evidence here that the plaintiff suffered weight gain and general deconditioning after both the first and second accidents.

[29] Dr. David Morgan, a forensic psychiatrist who examined Ms. Knight at the request of defence counsel, produced a report dated September 3, 2020, which concentrated on Ms. Knight's psychological and psychiatric issues. Dr. Morgan diagnosed Ms. Knight with a major depressive disorder and a somatic symptom disorder, and opined that as a result of the disc herniation, Ms. Knight's pain-related disorders had worsened. He also opined that Ms. Knight had likely developed an opiate use disorder of mild severity. In Dr. Morgan's view, Ms. Knight's mental health deterioration and the exacerbation of her pain disorders were related to the disc herniation. On cross-examination, Dr. Morgan confirmed that Ms. Knight had developed heavy narcotic use prior to the disc herniation and that she was likely suffering from significant pain when she was first prescribed Oxycocet.

[30] Sharon Singh, a kinesiologist, conducted functional and work capacity evaluations of Ms. Knight on July 4, 2016, and January 15, 2021. Ms. Singh concluded that, at the time of the second assessment, Ms. Knight was unable to work in her chosen occupation and that Ms. Knight's physical limitations had increased from the time of the first evaluation.

[31] Two medical professionals provided fact evidence. Dr. Cheryl Guest was Ms. Knight's treating registered psychologist since August 2016. Dr. Guest described Ms. Knight as a compliant patient who was committed to recovery and noted that Ms. Knight presented suffering from anxiety, mood problems and difficulty driving.

[32] Dr. Hanna Surgenor was Ms. Knight's family physician since 2012. She described Ms. Knight's clinical presentation following both accidents, and confirmed that after both accidents Ms. Knight presented with significant pain in her neck and back, as well as headaches. Dr. Surgenor testified about discussions she had with Ms. Knight concerning the risks of narcotic pain medication and Ms. Knight's unsuccessful attempts to reduce or eliminate her dependence on the narcotic pain medication. With regard to Ms. Knight's medical status at the time of trial, Dr. Surgenor testified that Ms. Knight was continuing to strive to be physically active, and had seen some temporary relief from massage, physiotherapy and trigger point injection treatments. Despite this, Dr. Surgenor was of the view that Ms. Knight may require pain medication indefinitely.

Causation

[33] In describing Ms. Knight's pre-accident condition, the judge found that Ms. Knight "was an extremely active and driven young woman" who was able to balance her career, parenting responsibilities and numerous physical endeavours: at para. 112. In his view, "[t]here was nothing of significance in her previous medical history that would suggest her current symptoms are related to a pre-existing medical condition"; nor was there any suggestion that Ms. Knight had a tendency towards addiction: at para. 113.

[34] The judge addressed the two factors which the appellants argued were not causally related to the accidents and which contributed to Ms. Knight's medical condition. The first was Ms. Knight's disc herniation. The second was Ms. Knight's dependency on narcotic pain medication. I would note on appeal the appellant is not

suggesting Ms. Knight's dependency on narcotic pain medication is not causally related to the accidents.

[35] With regard to the disc herniation, the judge found there was "no evidence to suggest…that somehow [Ms. Knight] was a likely target or bound to have a disc herniation", a conclusion he found to be supported by "consistent evidence that…there was no history or indication of back problems, despite [Ms. Knight's] aggressive physical activity": at para. 116. The judge accepted Dr. Horlick's evidence that "often a disc herniation can be asymptomatic until such time as the herniated disc impacts nerves in the back" and that "[Ms. Knight's] general medical condition, and particularly her pain, increased as a result of the effects of the disc herniation, at least temporarily": at para. 117. The judge continued:

> [117] …There is, however, no evidence confirmative of how this disc herniation came to be. Logic, however, suggests that but for the accidents, a person such as the plaintiff, someone who was actively playing competitive soccer, running on an almost daily basis, and working out in the gym frequently, is not likely someone who had undetected back problems that would lead to a disc herniation. However, someone who had injuries from two accidents, in which it is clear that those injuries include injuries to her back, is someone who might eventually suffer a disc herniation. I note Dr. Surgenor's notes about immediate complaints of back pain after the second accident.
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> [118] The plaintiff needs to prove on a balance of probabilities that a compensable injury is caused or contributed to by the accidents for which the defendants in tort are liable. It is clear that the back injury generally was caused by the accidents. The balance of probabilities favours the plaintiff here. The defendants have an onus, once this is found, to show some evidence that the disc herniation is in fact a result of a crumbling skull, to use the common parlance. There is simply no evidence advanced of that. I accept that it is more likely than not that the disc herniation was caused or contributed to in a significant way by the back injury the plaintiff suffered in these accidents.

[36] With regard to Ms. Knight's consumption of narcotic pain medication, the judge accepted that narcotic pain medication may result in an aggravation of pain symptoms and discomfort. However, in his view, Ms. Knight's dependency on such medication was causally related to the accidents because "[a]s a result of the injuries suffered in the accidents, she began to use narcotics to control her pain": at para. 119.

[37] In conclusion, the trial judge stated:

> [121] I have concluded that the significant impact of the accidents, and particularly the second accident, is more likely than not the cause of the disc herniation that the plaintiff suffered from. In doing so, I note that this injury and pain from the disc herniation itself was temporal, and does not appear to contribute much to her current condition. I further conclude that any difficulties the plaintiff has related to the overuse of narcotic medication is more likely than not a consequence of pain management techniques employed by knowledgeable medical practitioners to deal with the overwhelming pain the plaintiff experienced as a result of injuries from the two accidents.
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> [122] Considering all the evidence, and considering particularly the medical evidence, I am of the view that the entirety of the plaintiff's medical condition, as she presented in court, is causally related to the accident. I have noted above the apparent narcotic addition and find that to be causally related to the accident. I have noted above the disc herniation and the effects of that, which by the way, was surgically repaired, as related to the accident. I find the plaintiff's present significantly damaged mental health condition, her anxiety, her depression, and the signs of modest PTSD, to be causally related to the accident. Her deconditioning and her weight gain are also causally related to the accident and, specifically, the effects of her pain condition that prohibited her from her usual regime of exercise.
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> [123] Finally, the pain conditions testified to, which have become chronic, are causally related to the accident.

Assessment of Damages

[38] The appellants take issue only with the judge's awards for loss of future earning capacity and cost of future care.

[39] The judge described his task with respect to loss of future earning capacity as follows:

> [151] The calculation of loss of future earning capacity or opportunity is often challenging for the court. It is often said and perhaps trite to note that the court is asked to look into a crystal ball and assess what the future holds for this plaintiff and what loss, if any, it is reasonable to determine she will suffer in the future. Of course, that in itself is not as simple as it sounds, because the test is not really whether the plaintiff has proven she will suffer an actual loss, but rather whether or not she has proven there has been an impairment in her income earning capacity which would result in a future loss.

[40] The trial judge found the task to be "made somewhat easier by the facts" as he found them, which established that as a result of Ms. Knight's chronic myofascial

pain, depression, anxiety and mild traumatic brain injury, she was "simply physically unable to do much, if anything, in her current condition", and there was no medical evidence to suggest a "magic bullet" that would result in a future ability to earn income: at para. 152. However, the judge also found:

> [152] …[T]he evidence on balance still creates some prospect for hope. That prospect involves success, which she has not had to date, in finding a way to deal with her pain. The evidence also suggests that prospect may be enhanced if she is able to deal with the seemingly negative effects on her pain levels and her health generally of her apparent addiction to opioids resulting from prescribed medication that she received for her injuries after the two accidents.

[41] The judge accepted Ms. Knight's assessment of her annual income as $71,000 per year and commented:

> [153] …Based on a somewhat hypothetical, though clearly possible future return to some sort of work, I would calculate the plaintiff's gross wage loss, based on an actual total loss for a five-year period of time, followed by a significant reduction in her ability to earn income after five years.
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> [154] Clearly under current conditions, the plaintiff is motivated to recover but unable on her own to do so. It is more likely than not reasonable that she would have to deal with her opioid dependency prior to beginning significant work on dealing with her residual pain. Again, I am relying on the medical evidence before me that the unfortunate effect of opioid dependency has the effect of enhancing pain, rather than ameliorating it, when one becomes dependent. What I would envision as an optimistic plan for her recovery would be a five-year period of time of total wage loss during which she deals with the opioid dependency and then deals with a full pain management program, similar to what she has been attempting to enrol herself in on her own …
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> [155] After those initial five years, I would suspect and the evidence confirms that the plaintiff will continue to suffer from pain, but I am optimistic that even with those pain levels she would be able to earn some income. I would assess this income after five years of absence quickly reaching approximately $40,000, which would be something close to half-time work as a paralegal, or perhaps a two-third position as a legal assistant. She would be 38 years of age at the time and would then suffer at minimum a $31,000 annual loss for the remaining 27 years of her work life.
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> [156] Based on this analysis, I would determine her gross potential loss from five years of no employment and the balance of her work career on a part-time basis at $1,192,000 (five years at $71,000 = $355,000; 27 years at $31,000 = $837,000; total $1,192,000).

[42] Positive contingences were applied to account for the fact that Ms. Knight was “an exemplary employee”, which the judge found “would likely result achieving a substantially higher rate of pay per annum than the notional $71,000 applied in these calculations”: at para. 158. Negative contingencies were applied to account for the prospect that Ms. Knight’s health would improve, that she would have another child, that she would become voluntary or involuntarily unemployed, and for early demise and non-related future injuries: at paras. 159–160.

[43] Together, the judge viewed these contingencies as warranting a reduction of approximately one-third, or $397,294, leaving a compensable loss of $794,706. Assuming a 32-year continuing work career from the date of trial and applying the 1.5% discount rate, the judge arrived at a figure of $627,508 for loss of future earning capacity.

[44] With regard to cost of future care, the judge accepted that psychotherapy was a necessary and reasonable medical treatment. The judge summarized Dr. Guest’s testimony concerning a recommended course of psychotherapy treatment as being “weekly psychotherapy sessions for one year, decreasing thereafter to once every two weeks, and then after a few years, perhaps down to as little as once a month”: at para. 166. One year of intense psychotherapy would cost $12,000, reduced to $6,000, and then to $3,000, which together constituted, in the trial judge’s view, “the lowest amount needed on an ongoing basis”: at para. 166.

[45] The judge also discussed the recommendations of other experts, who suggested a variety of treatments including trigger point injections, physiotherapy, psychiatry, massage, acupuncture, and attendance at an exercise club and chronic pain clinic.

[46] Ms. Knight’s position was that $5,000 annually for treatment over 20 years was an appropriate calculation for her costs of future care. Applying the discounting

rate of 2% resulted in the amount of $85,843, which the judge accepted as reasonable, stating:

> [173] In light of what I have noted, and particularly in light of the ongoing requirement of Dr. Guest, at minimum of $3,000 annually, the approach advanced by the plaintiff for cost of future care is modest. Clearly, if evidence had been available about the cost of a pain program and the cost of a rehabilitative program related to narcotic dependency, those too would have been reasonable claims to advance as noted earlier for cost of future care.

Standard of Review

[47] A trial judge's findings of fact, inferences of fact, and weighing of evidence are reviewed on the standard of palpable and overriding error: *Housen v. Nikolaisen*, 2002 SCC 33 at paras. 10, 19, 23; *Nelson (City) v. Mowatt*, 2017 SCC 8 at para. 38.

[48] In *Benhaim v. St-Germain*, 2016 SCC 48, the Supreme Court of Canada endorsed the following descriptions of what is meant by palpable and overriding error:

> [38] … Stratas J.A. described the deferential standard as follows in *South Yukon Forest Corp. v. R.*, 2012 FCA 165, 4 B.L.R. (5th) 31, at para. 46:
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> > Palpable and overriding error is a highly deferential standard of review . . . . "Palpable" means an error that is obvious. "Overriding" means an error that goes to the very core of the outcome of the case. When arguing palpable and overriding error, it is not enough to pull at leaves and branches and leave the tree standing. The entire tree must fall.
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> [39] Or, as Morissette J.A. put it in *J.G. v. Nadeau*, 2016 QCCA 167, at para. 77 (CanLII), [translation] "a palpable and overriding error is in the nature not of a needle in a haystack, but of a beam in the eye. And it is impossible to confuse these last two notions."

[49] A judge's findings on causation are a question of fact: *Benhaim* at para. 36. Likewise, the assessment of damages is generally a fact-finding exercise: *Meghji v. British Columbia (Ministry of Transportation and Highways)*, 2014 BCCA 105 at para. 78. Accordingly, this Court will not interfere simply because it would have come to a different conclusion. Appellate intervention will only be justified where the judge applied an incorrect principle of law, where there was no evidence upon which the trial judge could have reached their conclusion, or where the amount awarded

was so inordinately low or so inordinately high that it can be said to be "wholly erroneous": *Ostrikoff v. Olivera*, 2015 BCCA 351 at para. 2, citing *Woelk v. Halvorson,* [1980] 2 S.C.R. 340 at 435; *Reynolds v. M. Sanghera & Sons Trucking Ltd.*, 2015 BCCA 232 at para. 14.

Discussion

Did the judge err by not applying the "but for" test and instead placing the onus on the appellant to prove that Ms. Knight's disc herniation was not caused by the accidents?

[50] The appellants submit the judge erred by shifting the onus onto them with respect to causation of Ms. Knight's disc herniation. They say the onus always fell on Ms. Knight to prove that the accidents caused the disc herniation and the judge's reasons reveal a breach of this basic principle. The appellants note that the judge did not refer to any legal authority with respect to the test for causation.

[51] I would not accede to this ground of appeal. The judge did not shift the onus onto the appellants to disprove that the accidents caused Ms. Knight's disc herniation. I see no error in the judge's discussion of the applicable legal principles that would justify this Court's intervention.

[52] There is no standalone requirement that a judge cite legal authority. This is because "[t]rial judges are presumed to know the law with which they work day in and day out": *R. v. Burns*, [1994] 1 S.C.R. 656 at 664. The question is not whether the judge explicitly instructed themselves on the legal principles they are bound to apply, but whether the judge's reasons reveal an incorrect application of those principles. If the judge's reasons are alleged to be insufficient for that purpose, the question becomes whether the reasons, considered along with the record, permit meaningful appellate review: see *Zhao v. Fang*, 2022 BCCA 227 at paras. 22–23.

[53] The judge did not cite any caselaw but counsel had provided the relevant legal authorities to the judge, and he clearly turned his mind to the issue of causation. He stated the burden fell on Ms. Knight "to prove on a balance of probabilities that a compensable injury is caused or contributed to by the accidents

for which the defendants in tort are liable." Once Ms. Knight met her burden, the judge continued, it was up to the defendants "[t]o show some evidence that the disc herniation is in fact a result of a crumbling skull, to use the common parlance": at para. 118. The question here is not whether the judge's reasons were insufficient, but whether the judge's statement of the law and analysis reveal a misapprehension of the applicable legal principles.

[54] The test for showing causation is the "but for" test. It requires the plaintiff to demonstrate on a balance of probabilities that their injury would not have occurred "but for" the negligence of the defendant: *Athey v. Leonati*, [1996] 3 S.C.R. 458 at para. 14; *Clements v. Clements*, 2012 SCC 32 at para. 8.

[55] The "but for" test is to be applied in a "pragmatic" and "robust common sense fashion" and does not require "scientific evidence of the precise contribution the defendant's negligence made to the injury": *Clements* at paras. 9, 11, 46. Nor does it require the plaintiff to establish that the defendant's tortious act was the sole cause of the injury: *Athey* at paras. 17–19; see also *Blackwater v. Plint,* 2005 SCC 58 at paras. 78–81. In every case, there may be a myriad of other non-tortious factors which were necessary preconditions to the injury occurring. What is required is a "substantial connection" between the injury and the defendant's tortious conduct: *Resurfice Corp. v. Hanke*, 2007 SCC 7 at para. 23, citing *Snell v. Farrell,* [1990] 2 S.C.R. 311 at 327.

[56] In *Clements*, Chief Justice McLachlin explained:

> [10] A common sense inference of "but for" causation from proof of negligence usually flows without difficulty. Evidence connecting the breach of duty to the injury suffered may permit the judge, depending on the circumstances, to infer that the defendant's negligence probably caused the loss. See *Snell* and *Athey v. Leonati*, [1996] 3 S.C.R. 458. …
>
> [11] Where "but for" causation is established by inference only, it is open to the defendant to argue or call evidence that the accident would have happened without the defendant's negligence, i.e. that the negligence was not a necessary cause of the injury, which was, in any event, inevitable. As Sopinka J. put it in *Snell*, at p. 330:
>
> > The legal or ultimate burden remains with the plaintiff, but in the absence of evidence to the contrary adduced by the defendant, an

> inference of causation may be drawn although positive or scientific proof of causation has not been adduced. If some evidence to the contrary is adduced by the defendant, the trial judge is entitled to take account of Lord Mansfield's famous precept [that "all evidence is to be weighed according to the proof which it was in the power of one side to have produced, and in the power of the other to have contradicted" (*Blatch v. Archer* (1774), 1 Cowp. 63, 98 E.R. 969, at p. 970)]. This is, I believe, what Lord Bridge had in mind in *Wilsher* when he referred to a "robust and pragmatic approach to the . . . facts" (p. 569).
>
> [Emphasis in original.]

[57] The "crumbling skull" doctrine, as adverted to by the judge, is not a doctrine of causation. Rather, as Justice Major explained in *Athey*, the "crumbling skull" is a shorthand for the broader principles that apply in determining the effect of a plaintiff's pre-existing condition on their ability to recover damages:

> [34] … The "crumbling skull" doctrine is an awkward label for a fairly simple idea. It is named after the well-known "thin skull" rule, which makes the tortfeasor liable for the plaintiff's injuries even if the injuries are unexpectedly severe owing to a pre-existing condition. The tortfeasor must take his or her victim as the tortfeasor finds the victim, and is therefore liable even though the plaintiff's losses are more dramatic than they would be for the average person.
>
> [35] The so-called "crumbling skull" rule simply recognizes that the pre-existing condition was inherent in the plaintiff's "original position". The defendant need not put the plaintiff in a position *better* than his or her original position. The defendant is liable for the injuries caused, even if they are extreme, but need not compensate the plaintiff for any debilitating effects of the pre-existing condition which the plaintiff would have experienced anyway. The defendant is liable for the additional damage but not the pre-existing damage … Likewise, if there is a measurable risk that the pre-existing condition would have detrimentally affected the plaintiff in the future, regardless of the defendant's negligence, then this can be taken into account in reducing the overall award … This is consistent with the general rule that the plaintiff must be returned to the position he would have been in, with all of its attendant risks and shortcomings, and not a better position.
>
> [Emphasis by underlining added; citations omitted.]

[58] In *Murphy v. Snippa*, 2024 BCCA 30, Justice MacKenzie further explained the implications of a plaintiff's pre-existing condition:

> [54] A pre-existing condition can have important legal implications, including the contingency analysis discussed in *Dornan v. Silva*, 2021 BCCA 228, at paras. 62–64.

> [55] A pre-existing condition may affect the plaintiff's entitlement to damages. The damages owed to the plaintiff consist of the difference between the plaintiff's "original position"—namely the position they would have been in had the accident never occurred—and their actual position after the negligently-caused injury (*Blackwater v. Plint*, 2005 SCC 58, at para. 78). A plaintiff who would have suffered some or all of the injuries resulting from the defendant's negligence, even absent that negligence, is sometimes referred to as a "crumbling skull" plaintiff. In such a case, the court determines what debilitating effects the plaintiff would have suffered in any event, and ensures the defendant is not held liable for those (*Athey*, at para. 35).
>
> [56] In the case of a plaintiff who suffers from a pre-existing condition that may get progressively worse, the question is whether there is a "measurable risk" that the pre-existing condition would have affected the plaintiff in the future, regardless of the defendant's negligence (see *Dornan*, at para. 45; and *Athey*, at paras. 35–36). If such a measurable risk is demonstrated, the overall damage award can be adjusted accordingly.
>
> [Emphasis in original.]

[59] Unlike the test for causation, which the plaintiff must establish on a balance of probabilities, the crumbling skull doctrine is predicated on hypothetical events; that is, the plaintiff would have experienced medical deterioration or injury absent the defendant's tortious act. Such hypothetical events will be taken into consideration as long as they are a real and substantial possibility, as opposed to mere speculation: *Grewal v. Naumann*, 2017 BCCA 158 at para. 48; see also *Murphy* at para. 59; *Athey* at para. 27. Therefore, the prospect of a crumbling skull simply results from an accumulation of evidence, rather than an explicit onus that must be met in every case: see *Rezaei v. Piedade*, 2012 BCSC 1782 at para. 45. Practically speaking, however, the burden of establishing a real and substantial possibility falls on the party who seeks to rely on it: *Lo v. Vos*, 2021 BCCA 421 at para. 39.

[60] Here, the appellants alleged that Ms. Knight's disc herniation was not causally related to the accidents because it resulted from the spontaneous onset of symptomatic spondylosis. This argument did not concern a hypothetical event; it went to the factual issue of "but for" causation. The crumbling skull doctrine was thus not engaged. However, the judge clearly did turn his mind to the likelihood that Ms. Knight would have suffered a disc herniation even if the accidents had not occurred. The judge's advertence to the crumbling skull doctrine is possibly

explained by the appellants' position at trial, which was that Ms. Knight could have sustained a latent disc herniation even if the accidents had not occurred.

[61] In light of the foregoing, I fail to see any error in the judge's understanding or application of the law. While it would have been preferable for the judge to more clearly outline his causation analysis, I do not read the judge's reasons as deciding the issue of causation on the basis that the appellants failed to establish a crumbling skull hypothetical. In my view, a holistic reading of the reasons reveals that the judge properly considered the issue.

[62] The judge began his discussion of causation by acknowledging the appellants' position, which was that the disc herniation was "not causally related" to the accidents. Next, he discussed the evidence concerning Ms. Knight's prior medical condition, which in his view revealed no prior indication that she "was a likely target or bound to have a disc herniation". The judge's critical finding followed—that someone with the type of back injuries suffered by Ms. Knight in the accidents was "someone who might eventually suffer a disc herniation." The causal inference found later in the judge's reasons—that "the disc herniation was caused or contributed to in a significant way by the back injury the plaintiff suffered in these accidents"—flowed from the judge's assessment of the evidence concerning Ms. Knight's pre- and post-accident condition, and was grounded in the fact that Ms. Knight had ultimately suffered a disc herniation.

[63] After setting out the law at para. 118, the judge stated that "[i]t is clear that the back injury generally was caused by the accidents. The balance of probabilities favours the plaintiff here." The appellants argue that this statement in particular demonstrates that the trial judge presumed causation for the disc herniation and effectively reversed the onus with respect to that particular injury. However, viewed in context, this statement is simply a reiteration of the basis for the judge's conclusion that, but for Ms. Knight's general back injuries suffered in the accidents, she would not have suffered a disc herniation. The judge addressed the prospect of a crumbling skull as just that, the hypothetical possibility raised by the appellants

that Ms. Knight could have suffered the disc herniation even if the accidents had not occurred, which the judge dismissed on the basis of the evidence before him.

[64] Finally, I would note that the judge found "the entirety of the plaintiff's medical condition, as she presented in court" was causally related to the accident, but characterized the disc herniation as "temporal" and found it did "not appear to contribute much to her current condition": at para. 121. In other words, Ms. Knight's uncontroverted injuries resulting from the motor vehicle accidents were found to be the primary cause of her pain and disability.

> **Did the judge err in deciding the issue of causation using his perception of "logic", when the only evidence before him was that the disc herniation was not causally related to the accidents?**

[65] The appellants' second ground of appeal is that the judge erred by concluding that the disc herniation was caused by the accidents, because the weight of the evidence was contrary to that finding. The appellants take issue with the judge's reliance on "logic" to decide the issue, which they say boils down to a conclusion that because the accidents occurred prior to the disc herniation, a causal link was established. In the appellants' submission, this form of temporal reasoning is a logical fallacy.

[66] Ms. Knight submits that the judge clearly grappled with the issue of whether the disc herniation was causally related to the accidents, and it was open to the judge to draw a common sense inference of causation based on the evidence before him.

[67] In my view, the judge's treatment of the evidence and conclusion on causation reveals no error that would justify this Court's intervention on appeal. Contrary to the appellants' submission, this case is not like *Neufeldt v. Insurance Corporation of British Columbia*, 2021 BCCA 327, where the judge failed to address the evidence concerning the issue of causation, which resulted in a finding without any basis.

[68] At trial, the appellants did not take issue with the fact that it was possible Ms. Knight had sustained a tear to the annulus of her lumbar disc or a mild disc protrusion in the second accident. Their theory, however, was that this was not a probable occurrence because, as stated by counsel in closing, "[t]he possibility of such defects in the lumbar disc is commonplace and can be asymptomatic…a disc tear or even a protrusion…could have been present even before either of the motor vehicle accidents or arising after."

[69] Dr. Woolfenden's report supported the appellants' theory, as did Dr. Horlick's report endorsing Dr. Woolfenden's opinion. The relevant portion of Dr. Woolfenden's report provided:

> 36. Studies within the literature do not clarify the typical length of time between an inciting injury and the onset of symptoms of radiculopathy but one would expect such symptoms to occur within weeks or less because of the close proximity of a herniated disc (if one were to occur) to the adjacent nerve root. The onset of radiculopathy years after trauma is far too long given the close proximity of the disc to the nerve root, the literature which shows that the majority of patients who develop radiculopathy do so spontaneously (References 1, 3), and the lack of evidence that mechanical stress contributes to disc herniation (Reference 1).

[70] There were several flaws in this opinion which were recognized by the trial judge, albeit more implicitly than explicitly.

[71] First, both Dr. Horlick and Dr. Woolfenden testified under cross-examination that a patient may present without significant neurologic (i.e., radiculopathy) symptoms despite the presence of a disc herniation. This was contrary to Dr. Woolfenden's observation that "one would expect such symptoms to occur within weeks or less", which underlined his opinion (and in turn, Dr. Horlick's opinion) on causation. In one such instance, Dr. Woolfenden testified as follows:

> Q: …I guess anyone can have a disc herniation without neurological symptoms?
>
> A: You can -- you can be asymptomatic with a disk herniation all the way down to asymptomatic. In fact, it's quite common.
>
> Q: And can you also have a disk herniation that's asymptomatic -- or, sorry, that has pain but doesn't have any neurological symptoms?

A: You can. Especially at the outset. How chronic disk herniation contributes to back pain is actually still highly debated, but one of the mechanisms or one of the pathologic processes when the disk first herniates is the disk is like a jelly donut. So there's the annulus fibrosis…-- ...

...

...which is the tissue that holds it in, and then the nucleus pulposus is the jelly or the stuff in between. And the first thing that occurs with a disk herniation is the annulus tears, and it's just like a cut on your skin. It can be painful, and that's how you can have an initial tear with pain, and you can have focal pain, and it seems to be quite clear-cut that that occurs and it makes sense.

But once a disk herniation occurs and it doesn't press on the nerves, and of course like a cut, you know, the cut heals and your pain goes away. How a disk protrusion might contribute to chronic back pain in somebody is hotly debated as to it may not to it may lead to some chronic pain, and nobody really knows because there is no correlation between the degree of imaging of degenerative changes in your spine and the degree of pain in somebody who has chronic pain.

Q: That was actually my next question. So I won't ask you, but if disk herniation isn't putting pressure on a nerve, it's very unlikely that, you know, they will exhibit neurological symptoms?

A: Correct. Yeah. The answer to that is correct. Yes. The disk is mobile. So movement can induce that, but if it never touches the nerve, you won't have the neurologic symptoms.

[72] Dr. Horlick confirmed that a disc herniation may be asymptomatic, and opined that it was possible the motor vehicle accidents had made Ms. Knight more susceptible to such an injury:

Q: [A disc herniation] can be completely asymptomatic?

A: Completely asymptomatic.

Q: For instance, if the herniation at the time isn't putting pressure on any nerve, you would very likely be asymptomatic?

A: It can be.

Q: And would you agree with me that symptoms can vary greatly with people that have suffered or have had a disk herniation?

A: Yes.

Q: And would you agree with me then that an asymptomatic disk herniation can be brought about by normal activity and normal movements and not necessarily a huge inciting event? What I mean by that is someone lifting a huge amount or a very heavy amount and it kind of spontaneously happening that way?

A: Yes, it can.

Q: And would you agree that Ms. Knight being involved in these two motor vehicle accidents, that that made her more susceptible to this disk herniation taking place at a later date?

A: I can't give an answer. I don't know the answer to that.

Q: But it's possible?

A: It's possible.

[73] The judge accepted that a disc herniation can be asymptomatic for some period of time, which was directly contrary to a stated basis for Dr. Woolfenden's, and in turn Dr. Horlick's, contrary opinions on causation.

[74] Second, the appellants' position that Ms. Knight's disc herniation was not causally related to the accident also rested on the assertion, relying on Dr. Woolfenden and Dr. Horlick's evidence, that most disc herniation injuries result spontaneously rather than from mechanical stress or other discrete events. In his report, Dr. Woolfenden discussed research concerning the common risk factors for disc herniation, which established that most disc herniations develop as a result of age and hereditary factors, with more old than young, and more males than females being affected.

[75] However, the task of attributing causation for Ms. Knight's disc herniation was not simply a statistical exercise. Some consideration of Ms. Knight's specific characteristics and circumstances was required. It may be true that the majority of patients who develop symptomatic disc herniation injuries do so spontaneously due to aging and genetic factors, but also true that a victim of motor vehicle trauma is not a typical patient and may in fact be more susceptible to such an injury, as Dr. Horlick testified.

[76] The judge's rejection of Dr. Woolfenden's opinion on causation turned on his view that Dr. Woolfenden's report was superficial because it lacked specific consideration of Ms. Knight's circumstances. At trial, the judge also raised concerns about the weight that could be given to Dr. Horlick's opinion given the short length of time that Dr. Horlick spent on his report.

[77] The judge's concerns about the superficial nature of the expert opinions on causation, and his focus on factors specific to Ms. Knight, reveal that the judge was alive to the need to determine the issue of causation based on the facts before him, rather than the statistics-based assertions made by the appellants' expert witnesses. The judge found that as a result of the injuries Ms. Knight sustained in the motor vehicle accidents, Ms. Knight *in particular* was "someone who might eventually suffer a disc herniation". In that vein, the judge observed that Ms. Knight had sustained lower back injuries and that Dr. Surgenor had noted Ms. Knight's immediate complaints of localized pain, which corresponded with several aspects of the evidence, including Dr. Woolfenden's description of the etiology of disc herniation injuries beginning with focal pain, with the later development of referred symptoms; and Dr. Horlick's testimony under cross-examination that Ms. Knight could have been made more susceptible to a disc injury as a result of the accidents. I also note that Ms. Knight complained of referred symptoms earlier than September 2018.

[78] The judge's finding that Ms. Knight was not a likely target for a disc herniation, coupled with Dr. Horlick's testimony under cross-examination and the uncontroverted fact that Ms. Knight had indeed suffered a disc herniation, provided a basis for the judge to find an evidentiary link between the disc herniation and the accidents, from which a common sense inference of causation could be made.

[79] I agree with the appellants that part of the judge's causation analysis relied on the temporal sequence of events. However, contrary to the appellants' submission, it was not impermissible for the judge to rely on a temporal sequence. Rather, the judge was simply required to exercise caution when doing so. As Justice Dardi explained in *Midgley v. Nguyen*, 2013 BCSC 693:

> [171] The court must be cautious when inferring causation from a temporal sequence; that is, from a consideration of pre-accident versus post-accident condition. In cases where causation is asserted primarily on a temporal relationship between the negligent conduct and injury in question, the authorities mandate that a "close scrutiny of the evidence is required because the inference from a temporal sequence to a causal connection is not always reliable": *Hardychuk* at para. 130. See also: *Madill v. Sithivong*, 2012 BCCA

> 62 at para. 20; *White v. Stonestreet*, 2006 BCSC 801 at paras. 74-75. However, the authorities recognise that temporal reasoning is not an illegitimate analysis if invoked in the appropriate circumstances: *Erickson v. Sibble*, 2012 BCSC 1880 at para. 223.

[80] In my view, the judge did not solely rely on a temporal connection. He considered the impact of Ms. Knight's immediate injuries on her risk of developing a disc herniation and compared that risk to her pre-accident likelihood of developing the same condition. This was contrasted by the appellants' expert evidence, but that evidence was undercut in several key respects as recognized by the trial judge.

[81] I do not accept that the judge's conclusion on causation was contrary to the weight of the evidence. In my view, this is not a case in which appellate intervention is justified because there was no evidence upon which the finding of causation could be made. Accordingly, I conclude the judge did not commit a palpable and overriding error of fact in his treatment of the evidence and ultimate conclusion on causation for the disc herniation.

Did the judge err in assessing damages for loss of future earning capacity by failing to apply the law and by basing the award on speculative future events?

[82] The appellants submit the judge erred in in law by failing to apply the test for loss of future earning capacity, and erred in fact by basing the award on speculative future events which had no basis in the evidence. The appellants again point out that the judge did not cite to the relevant legal authority, being this Court's trilogy of decisions in *Dornan v. Silva*, 2021 BCCA 228, *Rab v. Prescott*, 2021 BCCA 345 and *Lo*.

[83] As I have already discussed, the issue is not whether the trial judge explicitly referred to caselaw setting out the applicable legal principles, but whether his reasons reveal a misapplication of those principles. Here, I note that this Court's decisions in *Dornan*, *Rab* and *Lo* were released after the closing of arguments at trial, although these cases were likely available to the trial judge. Nevertheless, the principles set out in the trilogy of cases are not novel and have been the applicable law for a considerable time: *Ploskon-Ciesla v. Brophy*, 2022 BCCA 217 at para. 8.

[84] In *Rab*, this Court referred to a three-step process for considering claims for loss of future earning capacity. The first step is an evidentiary one: "[w]hether the evidence discloses a *potential* future event that could lead to a loss of capacity": at para. 47 (emphasis in original). Where the event giving rise to a future loss is manifest and continuing at the time of trial, this first step is a given: *Steinlauf v. Deol*, 2022 BCCA 96 at para. 52; see also *McKee v. Hicks*, 2023 BCCA 109 at para. 67.

[85] Next, the court must determine whether the plaintiff has demonstrated "a real and substantial possibility that the future event in question will cause a pecuniary loss": *Rab* at para. 47. The standard of proof under this stage "is a lower threshold than balance of probabilities, but a higher threshold than that of something that is only possible and speculative": *Gao v. Dietrich*, 2018 BCCA 372 at para. 34. Similar to the first step, "where…the evidence establishes that the accident caused significant and lasting injury that left the plaintiff unable to work at the time of the trial and for the foreseeable future, the existence of a real and substantial possibility of an event giving rise to future loss may be obvious": *Rab* at para. 29.

[86] The appellants say the judge failed to apply the first two steps of the analysis from *Rab*. I disagree.

[87] While the judge did not explicitly slot his analysis into the framework discussed in *Rab*, he clearly found a future event leading to a loss of capacity and a real and substantial possibility of pecuniary loss. In essence, the judge found that Ms. Knight's injuries rendered her disabled at the time of the trial, with some prospect of returning to the workforce if she was able to deal with her pain symptoms and dependence on opioid pain medication. In my view, the facts as the judge found them placed this case into the "more straightforward" class of cases involving loss of future earning capacity, in which "the first and second step of the analysis may well be foregone conclusions": *Ploskon-Ciesla* at para. 11.

[88] Once the plaintiff establishes a real and substantial possibility of a future event leading to income loss, the third step of the *Rab* analysis requires the court to assess the value of that possible future loss, which "must include assessing the

relative likelihood of the possibility occurring": *Rab* at para. 47. The plaintiff must prove the quantification of their loss on an earnings approach or a capital asset approach: see *Rab* at para. 46, citing *Perren v. Lalari*, 2010 BCCA 140 at para. 32.

[89] Where a plaintiff presents with injuries that have rendered them unable to work at the time of the trial and into the foreseeable future, the assessment of the relative likelihood of the future event grounding the plaintiff's claim may be "superfluous": *Rab* at para. 29. However, regardless of how apparent the plaintiff's injuries and associated loss of capacity are, "it will still be necessary to assess the probability of future hypothetical events occurring that may affect the quantification of the loss, such as potential positive or negative contingencies": *Ploskon-Ciesla* at para. 11. In sum, the valuation step of the *Rab* analysis requires the court to undertake "a comparison between the likely future of the plaintiff if the accident had not happened and the plaintiff's likely future after the accident": *Gregory v. Insurance Corporation of British Columbia*, 2011 BCCA 144 at para. 32.

[90] In this case, while not explicitly stated, the judge relied on the earnings approach to value Ms. Knight's future loss. The evidence painted a grim picture of Ms. Knight's future ability to earn income, but, had the accidents not occurred, it was "abundantly clear" that Ms. Knight would have succeeded as a paralegal in the Vancouver market. The judge accepted a figure of $71,000 for Ms. Knight's pre-accident earning capacity, but recognized this amount was "moderate" and that "the evidence…suggested that it would be possible for paralegals to earn substantially more".

[91] The judge forecasted a period of five years of total disability on the basis that the evidence revealed some prospect of future earnings if Ms. Knight was able "to deal with her opioid dependency prior to beginning significant work on dealing with her residual pain." Following this five-year period, the judge projected a permanent reduction in Ms. Knight's residual capacity to work as a paralegal or legal assistant and applied positive and negative contingencies.

[92] The appellants take issue with two specific aspects of the valuation analysis, in addition to their more general assertion that the judge failed to apply the correct test. They submit that there was no evidence suggesting that five years of total unemployment would be necessary for Ms. Knight to address her opioid dependency and complete a pain management program. The appellants also submit that the judge failed to articulate how, and on the basis of what evidence, he concluded Ms. Knight's earning capacity would be reduced by $31,000 per year to her age of retirement.

[93] I would not accede to these arguments, for the following reasons.

[94] At trial, Ms. Knight's position was that she was permanently disabled. She sought to prove the quantification of her damages under an earnings approach, relying on an annual loss of income of $71,000, subject to various contingencies.

[95] The appellants' primary position was that Ms. Knight should be awarded damages equivalent to one year of income, on the basis that her disc herniation and opioid addiction were not caused by the accidents. The appellants also made submissions to the effect that Ms. Knight would be able to successfully seek treatment and return to the workforce. However, Ms. Knight's inability to work at the time of trial and into the foreseeable future was never seriously in question. In closing submissions, counsel for the appellants conceded as much, and focused on Ms. Knight's prospects of recovery:

> The loss is difficult to find because it has to be real and substantial. She certainly is complaining right now. If you want to put her in to work right now, I'd agree 100 percent. She's just not going to be able to do it. That's not the issue. The issue must take into account the hypotheticals of the future which are based on possibilities.
>
> They're based on the best knowledge that we have which unfortunately doesn't have some of the evidence I think Your Lordship should have with respect to the -- the opiates and also what possible outcome there might be with respect to the suggested treatment.
>
> The only thing I can say there, My Lord, is I was impressed by how -- how [the expert witnesses] thought the treatment would be successful…
>
> So that bodes well. It's just that it doesn't look good right now just because of what she's going through, and I still say that that has much to do with

> unfortunately something that we don't have evidence of. I say it's not our onus to provide that to you. It would have been my friend. If they're trying to rely on that to say that this is the future, then they should have medical-legal opinion that supports that, and I'm presenting to you the idea that, you know, they don't have that…
>
> [Emphasis added.]

[96] The judge accepted the "prospect" that Ms. Knight would return to the workforce, but acknowledged that, to do so, she would need to successfully deal with her pain and dependence on opioid pain medication, which was something she had previously been unable to do.

[97] Thus, the starting point for the valuation analysis was the real and substantial possibility that Ms. Knight was rendered incapable of working as a result of the injuries she sustained. An assessment of the likelihood of that future event was largely superfluous, given that there was no medical evidence suggesting a clear path towards recovery and future income. The judge was, however, still required to assess the likelihood that Ms. Knight *would* recover and return to the workforce, and to account for the impact of that hypothetical event on the valuation of Ms. Knight's damages. The likelihood that Ms. Knight would return to the workforce was directly relative to, and determinative of, the likelihood that she would continue to experience the disability she presented with at trial.

[98] Rather than assessing the likelihood that Ms. Knight would return to the workforce, the trial judge effectively treated that hypothetical event as a certainty under his own five-year recovery plan. In my view, this was an error in principle, but one that did not operate to the detriment of the appellants. The judge's failure to account for the possibility that Ms. Knight would *not* successfully treat her condition removed uncertainty which could only increase her damages, given her apparent disability at the time of trial. The appellants have not pointed to any evidence suggesting Ms. Knight's recovery was foreseeable, let alone evidence suggesting that it was likely to occur in a shorter period than the five years postulated by the trial judge. In fact, the appellants focused their submissions at trial on the uncertainty of Ms. Knight's recovery. Contrary to the appellants' submission at trial, where the

evidence demonstrates a real and substantial possibility of a future event leading to income loss, it is not the plaintiff's burden to then disprove every other hypothetical future event which would serve to reduce their damages.

[99] The judge found that, following Ms. Knight's hypothetical return to the workforce, she would have a residual earning capacity of $40,000 working half-time as a paralegal or two-thirds time as a legal assistant.

[100] In my view, it cannot be said that the judge's assessment of Ms. Knight's residual earning capacity was untethered to the evidence, despite his flawed analytical approach. The evidence at trial established that Ms. Knight had suffered significant and compounding injuries that rendered her incapable of working in her chosen profession, and that her condition had deteriorated leading up to the trial, which culminated in the judge's finding that Ms. Knight was "unable to do much, if anything in her current condition." In my view, it was reasonable for the judge to conclude that Ms. Knight would never be capable of working full time in her established career even if she successfully pursued treatment. The judge's assessment of Ms. Knight's residual work capacity was roughly equivalent to what Ms. Knight had been realistically capable of prior to the deterioration of her condition.

[101] The judge did not lose sight of the need to compare Ms. Knight's likely pre- and post-accident earning prospects and to compensate Ms. Knight for the difference. The judge's principal error was his failure to assess the relative likelihood that Ms. Knight would recover and return to the workforce, but, in failing to do so, he simply assumed that some level of recovery and future income was certain. This operated to the benefit of the appellants, as did the judge's modest assessment of Ms. Knight's pre-accident income earning capacity. The judge also applied contingencies which reduced the award by one-third, and which constitute an assessment of the relative likelihood of the future event leading to a loss, albeit under the presumption that Ms. Knight's return to the workforce was a certainty. In

my view, the award of $627,508 for loss of future earning capacity was not a wholly erroneous estimate of Ms. Knight's damages and I would not disturb it.

Did the trial judge err by making a general award for cost of future care?

[102] The appellants take issue with the global nature of the award for costs of future care. They rely on the following portion of this Court's decision in *Sunner v. Rana*, 2015 BCCA 406, in which Justice Chiasson stated:

> [43] The appellants contend that the trial judge's reasons provide no indication of why he awarded the respondent $20,000 for the cost of future care. He claimed $36,000 which the judge described as "25% of the higher amount estimated by Mr. Teasley".
>
> [44] This Court addressed the issue in *Gregory v. Insurance Corporation of British Columbia*, 2011 BCCA 144; *Gignac v. Insurance Corporation of British Columbia*, 2012 BCCA 351; and *Johal v. Meyede*, 2014 BCCA 509.
>
> [45] In *Johal*, this Court stated:
>
> > [44] The difficulties posed by these reasons are three-fold:
> >
> > (1) The judge did not analyze each item of care to determine whether there was an evidentiary link between the caregiver's assessment of pain or disability and the recommended care;
> >
> > (2) it is not apparent that the judge had regard for the real and substantial possibility that the expense will be incurred or that he made an allowance for the contingency that the cost may not be incurred. It may be that he accepted Ms. Johal's submission as to the appropriate negative contingency, but it is not apparent from the reasons; and
> >
> > (3) the judge did not identify the specific amount awarded for each item claimed. Thus, as the appellants note, there cannot be a proper mandatory deduction pursuant to s. 83 of the *Insurance (Vehicle) Act*, R.S.B.C. 1996, c. 231 because one needs to first determine whether the item is a mandatory or discretionary benefit under s. 88 of Part 7 of the *Insurance (Vehicle Act) Regulation*, B.C. Reg. 447/83.
> >
> > [45] It may be, as Ms. Johal suggests, that the bulk of the claimed future care costs were supported by the evidence. For example, it may be possible to infer what amounts the judge specifically awarded for the Botox injections, and the seasonal cleaning and gardening assistance. The insurmountable difficulty in determining this issue on appeal lies in discerning from the reasons precisely which costs were allowed, in what amounts, and for what reason. In other words, the road map for the award was not developed in the reasons for judgment: there are individual items that were claimed by Ms. Johal that were neither accepted nor rejected by the judge. That being so,

> that part of the award must be set aside and a fresh determination made.
>
> [46] Thus, I would remit the matter to the judge for a fresh determination of the future care costs.

[103] Ms. Knight submits that the appellants' selective reliance on portions of the decision in *Sunner* is misleading. In her submission, the law does not require a trial judge to analyze each cost of future care item claimed and to identify specific amounts in the award.

[104] The judge accepted that Ms. Knight had an ongoing requirement for psychotherapy. Relying on Dr. Guest's testimony, he found that a recommended course of psychotherapy treatment would involve one year of weekly treatment, costing $12,000 annually, followed by "a few years" of treatment twice per month, costing $6,000 annually, and eventually monthly treatment costing $3,000 annually. In the trial judge's view, these expenses were reasonable and medically justified. The judge also discussed generally the treatment recommendations of Dr. Baddii, Dr. Kiraly, Dr. Jung and Dr. Woolfenden.

[105] Ms. Knight's position was that an award of $5,000 annually for 20 years was an appropriate method of calculating the costs of future care, which resulted in a present value of $85,843. She did not present a future care report containing an itemized breakdown of the costs of recommended treatments.

[106] The appellants agreed that Ms. Knight required psychiatry treatment, addictions treatment and physical rehabilitation. In their closing, they submitted it would be "reasonable, justifiable, and certainly in accordance with the case law" to award amounts for these types of treatments.

[107] The difficulty in this case is that, much like in *Johal v. Meyede*, 2014 BCCA 509, it is impossible to discern from the judge's reasons "precisely which costs were allowed, in what amounts, and for what reason": at para. 45. Clearly, the judge accepted that the costs for psychotherapy presented by Dr. Guest were reasonable and medically necessary. He also accepted that costs of a pain program

and rehabilitative program for narcotic dependency would be reasonable, but noted the lack of evidence about the cost of those treatments. In the result, however, the judge adopted the approach advanced by Ms. Knight, which sought a global sum based on a calculation of $5,000 per year over 20 years. Even with the benefit of the record, it is not possible to determine how much of the award was for psychotherapy, or for other treatments, and, if so, which treatments.

[108] With respect, it is my view that the judge was led into error. As this Court explained in *Johal*, and on several other occasions, it is not sufficient to simply identify a global sum as reasonable. It must be possible to discern the basis for an award for costs of future care on an item by item basis. This is for several reasons.

[109] Firstly, without analysis concerning which specific items are allowed or disallowed, it is impossible to determine whether the plaintiff has established the requisite evidentiary link between "the physician's assessment of pain, disability and recommended treatment and the care recommended by a qualified health care professional": see *Gregory* paras. 38–39.

[110] Secondly, under s. 83 of the *Insurance (Vehicle) Act*, R.S.B.C. 1996, c. 231, a defendant may apply "to deduct from the amount of a judgement certain…benefits that correspond to sums compensated in damages": *Storey v. Singh*, 2023 BCCA 485 at para. 5 (emphasis added). The purpose of s. 83 deductions is two-fold: to determine the amounts that will be paid to the plaintiff immediately, and to prevent double compensation: *Storey* at para. 5, citing *Blackburn v. Lattimore*, 2023 BCCA 224 at para. 5. Awarding a global sum for costs of future care, without specifying which items have been allowed and how much has been awarded for each item, removes a defendant's ability to properly apply for a deduction.

[111] Finally, it will often be necessary to adjust amounts awarded to account for positive or negative contingencies: see *Deegan v. L'Heureux,* 2023 BCCA 159 at para. 97; *Johal* at para. 44. Where a global sum has been awarded without any specific analysis of individual care items, it is not apparent that the judge considered

the real and substantial possibility that each expense will be incurred, or made an allowance for contingencies as may be required.

[112] In my view, the amount awarded in this case was modest, but the award cannot be upheld. Nor is it possible for this Court to substitute an appropriate award due to the lack of evidence regarding the costs of the items claimed and specific findings about the necessity of those items. The proper remedy is to set aside the award and remit the matter to the trial judge for redetermination.

[113] Given that I have not seen fit to interfere with any of the trial judge's factual findings, and given the appellants' position at trial regarding costs of future care, I would expect the resolution of this issue to be straightforward, and most likely by agreement between the parties.

Disposition

[114] I would allow the appeal only with respect to the award for costs of future care and remit that issue to the trial judge. I would dismiss the appellants' other grounds of appeal.

[115] Given the appellants' limited success, it is my view the respondent is entitled to her costs of this appeal.

"The Honourable Madam Justice Stromberg-Stein"

I agree:

"The Honourable Mr. Justice Voith"

I agree:

"The Honourable Justice Skolrood"