COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Tigas v. Close,*
2024 BCCA 223

Date: 20240618
Docket: CA48773

Between:

Ryan Tigas and Arabella Tigas

Appellants/
Respondents on Cross Appeal
(Defendants)

And

Andria Close

Respondent/
Appellant on Cross Appeal
(Plaintiff)

Before: The Honourable Madam Justice Newbury
The Honourable Mr. Justice Harris
The Honourable Mr. Justice Skolrood

On appeal from: An order of the Supreme Court of British Columbia, dated November 28, 2022 (*Close v. Tigas*, 2022 BCSC 2065, Vancouver Docket M189982).

Counsel for the Appellants:	K.E. Jamieson, K.C.
Counsel for the Respondent:	E.M. Patel J.R. Kendall
Place and Date of Hearing:	Vancouver, British Columbia May 13, 2024
Place and Date of Judgment:	Vancouver, British Columbia June 18, 2024

Written Reasons by:
The Honourable Mr. Justice Harris

Concurred in by:
The Honourable Madam Justice Newbury
The Honourable Justice Skolrood

Summary:

This case concerns the quantum of damages for past and future loss of income stemming from a motor vehicle accident. On appeal, the appellants argue that the trial judge erred by failing to apply the Rab v. Prescott framework to determine whether there was a real and substantial possibility of a loss, along with the likelihood and quantum of that loss. On cross appeal, the respondent argues that the trial judge erred in assessing future loss resulting in a substantial undervaluation.

Held: Appeal and cross appeal dismissed. While the judge did not explicitly proceed through the Rab framework, it is clear that he did not misapply the test. It was open to the judge on the evidence before him to find that the respondent's injuries would have a modest impact on her earning capacity over her lifetime. The award properly reflects that finding, and is not ultimately unreasonable.

Reasons for Judgment of the Honourable Mr. Justice Harris:

Introduction

[1] The issues in this appeal and cross appeal concern damages awarded for past and future loss of income earning capacity following a motor vehicle accident. The appellants, defendants at trial, contend that the trial judge erred in principle by failing properly to apply the test for determining both whether there was a real and substantial possibility of a loss of past and future income earning capacity, and the relative likelihood of such losses occurring. The respondent, plaintiff at trial, argues that the trial judge did not make the errors alleged by the appellants, but erred in principle in assessing the quantum of damages for loss of future earning capacity, resulting in a substantial undervaluation of the loss.

[2] For the reasons that follow, I would dismiss both the appeal and the cross appeal.

Background and Trial Judgment

[3] The respondent, Andria Close, was injured in a motor vehicle accident in 2017. She was 33 years old at the time of the accident. The trial judge found the appellants, Ryan and Arabella Tigas, 100% at fault for causing the accident. Liability is not in issue on appeal.

[4] The trial judge awarded $160,000 non-pecuniary damages, $99,321.75 past loss of income, $163,980.64 loss of future earning capacity, and other incidental awards not in issue on appeal.

[5] Prior to the accident, Ms. Close had been an elite athlete who won a scholarship to play field hockey in the United States. She attended Kent State University from fall 2002 to spring 2004. Unfortunately, her field hockey career was cut short by injury and concussions. She returned to Canada and, in fall 2004, she began to attend UBC.

[6] Ms. Close struggled with her studies at UBC, which intermittently spanned a period of almost 10 years. She has dyslexia, which was diagnosed in Grade 7. At trial, Ms. Close testified that she did not receive adequate accommodation from the University. While she experienced some academic success in the 2013–2014 session, her time at UBC was marred by failed courses and course withdrawals. In 2015, she was required by the University to withdraw. The judge found that either Ms. Close's dyslexia was a serious impediment, or she was not a strong student, or both.

[7] The judge found that before the accident, Ms. Close often exhibited an enthusiastic, "can-do" attitude, driven in part by her high energy level. But he also found that from at least 2014, she suffered bouts of anxiety and depression which she treated with medication and vigorous exercise. In February 2016, Ms. Close attended the emergency department at Lions Gate Hospital because of a panic attack.

[8] The judge proceeded to lay out Ms. Close's pre-accident employment history. While studying at UBC, she worked as a lifeguard and fitness instructor and, subsequently, she was employed at BC Ferries from 2015–2016. In September 2016, she was hired by the Watson Centre for Brain Health following a chance encounter with its founder, Howard Eaton, who had originally diagnosed her dyslexia. She was working at the Watson Centre at the time of the accident.

[9] The judge described her work at the Watson Centre, noting that Ms. Close worked mainly as a fitness room attendant, a “communications coordinator” (organizing presentations about the Watson Centre), and entering data of the vital signs of Watson Centre clients when they were exercising. He observed that she was enthusiastic about her work there, although she often found the work to be very taxing and she would be often exhausted and sometimes tearful by day’s end. The judge noted that Ms. Close reached her highest pre-accident salary at the Watson Centre, earning $55,000 annually.

[10] The judge then turned to consider the effects of the accident on Ms. Close’s life. Ms. Close unsuccessfully attempted to return to work at the Watson Centre shortly after the accident and then returned part time from July to October, 2018. She left the Centre in November 2018, because she found the work to be too demanding. The judge noted that Ms. Close made inquiries about returning to work at BC Ferries, but was informed that if work was available it would be entry level. Ms. Close started part-time work as a ticket taker at Grouse Mountain in December 2018. The judge found that Ms. Close was well-received at Grouse Mountain, and that she had been promoted to the position of Supervisor of Corporate Adventures, and then to Manager of Education. Her salary at the time of trial was $62,000 annually.

[11] The judge also found that Ms. Close had needed time off work from time to time, at least in part resulting from the accident, although she had also needed time off work before the accident owing to stress. The judge commented that Grouse Mountain had accommodated Ms. Close’s needs, though she continued to have difficulties with reading and writing “probably due largely to her dyslexia.” He remarked that her current position is the first she has held with a significant administrative component, including more extensive paperwork.

[12] The judge dealt next with non-pecuniary damages. His award is not in issue on appeal, although the size of the award ($160,000) indicates serious injuries of a

continuing nature. Relevant to his assessment of loss of earning capacity are his findings about the extent of her injuries. The judge found:

> [58] Based on the opinions of Drs. Simonett, Jung and Ganesan, I find that the Plaintiff's following injuries were caused or exacerbated by the accident:
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> (a) mechanical neck upper back pain;
> (b) soft tissue and facet joint injuries to her neck and mid-back;
> (c) costovertebral joint injury;
> (d) neurogenic thoracic outlet syndrome;
> (e) post-traumatic chronic headaches associated with whiplash;
> (f) chronic pain;
> (g) aggravation of pre-existing anxiety and panic symptoms;
> (h) generalized anxiety disorder (mild);
> (i) post-traumatic stress disorder;
> (j) mixed features of depression;
> (k) post-concussion symptoms; and
> (l) cognitive impairment including difficulty processing information.

[13] I propose here to describe the judge's treatment of loss of earning capacity in a summary way, since it is discussed more fully below. Suffice to say, the judge described the positions of the parties and the key points of difference between them. The parties were very far apart on the quantum of damages. Ms. Close was seeking $351,000 for past loss and $2.5 million for future loss. The defendants suggested an award of between $61,000 and $76,000 for past loss and $62,000 for future loss. Much of the difference between the parties was driven by contrasting views of Ms. Close's post-accident employment future in association with companies related to Mr. Eaton.

[14] The judge turned first to the past loss of income analysis. At the time of trial, Ms. Close was earning $55,000 at the Watson Centre. She submitted a chart of estimates that saw her receive raises of $20,000 per year from 2018 to 2021 inclusive, followed by a further salary increase of $105,000 in 2022. These amounts were supported by Mr. Eaton, who testified that the generous increases would have

reflected Ms. Close's salary had she remained employed by his companies in a without-accident world.

[15] The Watson Centre, however, went out of business some time during the COVID-19 pandemic. Mr. Eaton testified that, despite the closure, Ms. Close would have been able to work at another of his start-ups, ABI, where she would work in sales and marketing and be a member of the "executive team". The judge noted that Ms. Close had no experience in sales and marketing, nor had she been asked if that kind of work interested her. The judge further explained that Mr. Eaton did not provide any documentary evidence to demonstrate the valuation, viability, or financial health of any of his companies, including ABI. Mr. Eaton was also unable to recall the salary of the director of sales that he did hire, who had been let go within four or five months of the time of trial.

[16] The judge found that he could not accept Mr. Eaton's testimony in support of Ms. Close's past earnings loss estimates "as anything more than enthusiastic speculation." The judge referred to two employees of Mr. Eaton's companies whose education was made known at trial, noting that they both held Master's degrees. Ms. Close, by contrast, held only a high school diploma. While he accepted that some entrepreneurs succeed without formal education, the judge ultimately accepted the economists' expert evidence that indicated a general labour market preference for higher education. He concluded that, for the years of 2018–2019, Ms. Close had a real and substantial possibility of earning $65,000 annually, slightly higher than her actual earnings at the time of trial.

[17] Then, dealing with loss of future earning capacity, the judge began by setting out the framework from *Rab v. Prescott*, 2021 BCCA 345 at para. 47, which I reproduce here for convenience:

> [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.

[18] The judge found that the first step had been made out, reasoning that Ms. Close's "chronic injury" brought her within the *Rab* framework. It was the second and third steps that the judge found raised difficulties for Ms. Close's claim.

[19] Ms. Close argued that the most probable post-accident scenario would see her earn $50,000 annually. Without the accident, she maintained that she would have continued to work for Mr. Eaton/ABI in a marketing and sales role, earning between $200,000 and $240,000 (which included salary, sales commissions, and shares in the business) until her retirement at age 70 or later. The judge found that estimate to be unsupported by the evidence, reasoning as follows:

> [90] … There was little evidence as to what ABI does, and no evidence to indicate that the Plaintiff's background particularly suited her to anything in the ABI business. It is purely speculative to regard her as a director of sales or marketing given her lack of experience in that world. To conclude that there is a real and substantial possibility that she would have been earning between $200,000 and $240,000 annually is untenable. It is speculative at best, but in my view, beyond speculative. Until early this month, November 2022, these figures would approximate the annual earnings of a doctor practicing family medicine in this province. Little evidence was given of ABI's business and no financial evidence was presented documenting ABIs earnings, revenue streams, overheads, etc. It is a start-up whose prospects are themselves speculative, quite apart from determining what Ms. Close's role would have been.

[20] Instead, the judge accepted that Ms. Close would work to age 70, and that her with-accident earnings were likely to remain similar to her current salary, which he rounded to $60,000 annually. Without the accident, the judge was satisfied that Ms. Close would have earned an annual salary of $70,000, owing to her pre-accident qualifications and her enthusiastic "go-getter" personality. The ongoing loss was therefore quantified at $10,000 annually until Ms. Close's retirement at age 70. In determining the present value of the loss, the judge directed the parties to follow the approach of the Tigases' economic expert, who considered labour participation along with a statistical likelihood of unemployment and the necessity or

choice of part-time work. Finally, the judge reviewed the positive and negative contingencies submitted by Ms. Close, and found that they would not alter his conclusions regarding loss of future earning capacity.

The Grounds of Appeal and Discussion

[21] The parties agree on the test a judge is required to apply to determine past and future loss of earning capacity. The object of the analysis is to assess the impact of an accident on a plaintiff's earning capacity by comparing pre- and post-accident scenarios. This necessarily engages analysing and comparing past and future hypothetical events, assessed on a standard of real and substantial possibility (not a balance of probabilities), weighed on the basis of the relative likelihood of the event occurring, all of which needs to be rooted in the evidence before the court: see *Rab* at para. 47.

[22] This Court has analysed the principles involved in assessing loss of earning capacity on numerous occasions: see, e.g., as cited by the trial judge, *Stienlauf v. Deol*, 2022 BCCA 96 at paras. 52–56. The principles involved in assessing past and future hypothetical events relevant to both past and future loss of earning capacity claims are the same. In the context of loss of future earning capacity claims, the Court in *Rab*, at para. 47 as noted above, set out the following approach, identifying the pathway to a determination of whether a loss of earning capacity has been caused by an accident and its quantification:

a. assess whether the evidence discloses a potential future event that could lead to a loss of capacity;

b. if so, assess whether, on the evidence, there is a real and substantial possibility that the future event in question will cause a pecuniary loss;

c. if so, assess the value of that possible future loss, including assessing the relative likelihood of the possibility occurring.

[23] The trial judge stated that the ultimate award must be assessed for its overall fairness and reasonableness: at para. 86, citing *Miscisco v. Small*, 2001 BCCA 576 at para. 2.

[24] This Court has also been clear that a failure to engage in the proper analysis is an error in principle (see, e.g., *Bains v. Cheema*, 2022 BCCA 430 at para. 24), although not necessarily a fatal error. Appeals are from orders not reasons, and even in the absence of a judge making explicit findings of fact in accordance with the imperatives in *Rab*, the award may prove to be justifiable on the evidence, or the basis of the award may be capable of being discerned on the record, and attract deference.

[25] It is convenient to address some aspects of the issues on the appeal and cross appeal together, since they share some common features. Both parties allege the judge failed, in different parts of his analysis, properly to evaluate steps two and three of the *Rab* approach.

[26] The appellants argue the judge did not evaluate what reasonable alternatives were available to Ms. Close had she not been injured, given her skills and aptitudes along with the challenges she faced in life. As a result, they say the judge, without evidentiary support, overestimated both her past and future earning capacity, thereby making an inordinate award. In respect of the cross appeal, they say the judge was entitled to reject, as wholly speculative, the employment future with Mr. Eaton and ABI that the plaintiff argued supported a substantial income, both in the past and future, which the accident foreclosed.

[27] For her part, Ms. Close accepts that the judge did not explicitly undertake an assessment in accordance with *Rab*, but contends that his failure to do so did not lead to an inordinately high award. Setting to one side the issue of potential employment with ABI, she maintains that the awards are supportable on the record. Where the judge did err, she argues, is in his evaluation of the evidence about her employment prospects with ABI if the accident had not happened. Ms. Close says the judge erred in failing to recognize that she had established a real and substantial

possibility that she would have been employed by ABI, and then in failing to assess that loss by reference to the likelihood of it occurring. In her contention, the error stemmed from the judge's imposing on her, effectively, the burden of demonstrating on a balance of probabilities that she would have been employed by ABI but for the accident.

[28] It is clear from a review of the reasons that (apart from his consideration of ABI) the judge did not explicitly engage in the analysis of steps two and three as mandated by *Rab*. However, it does not follow that the basis of his award, consistent with the *Rab* approach, cannot be discerned from the judgment. Importantly, the judge made a finding of fact, at para. 87, that "there is a real and substantial possibility of only a small loss of future earning capacity for Ms. Close."

[29] Before examining the judge's reasoning in more detail, it is useful to set the live issues in context. The judge provided some of this context in his reasons:

> [36] Her earnings from 2012 to 2015 were as follows: 2012, $32,600; 2013, $37,389; 2014, $17,295; and 2015, $27,725.
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> [38] The Plaintiff was working at the Watson Centre at the time of her accident in 2017. Her salary when she worked there was $55,000 annually.
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> [40] In December 2018, Ms. Close began employment at Grouse Mountain, where she still works. She started there at $14.60 an hour. By June 2019, her annual salary was $42,500. In August 2021, her annual salary went up to $46,500. From January 2022 to now, her annual salary is $62,000.
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> [41] Ms. Close's actual earnings, from 2016 to 2021, were as follows (these earnings are sometimes lower than they would be according to the applicable annual salary, because of times when the Plaintiff missed work, both before and after the accident): 2016, $35,000; 2017, $50,245; 2018 $9,911 employment income and $7,602 employment insurance; 2019, $36,417; 2020, $30,582 employment income and $8,500 employment insurance, and COVID benefits; 2021, $18,316 employment income and $15,180 employment insurance.
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> [42] Ms. Close worked at the Watson Centre from September 2016 to the time of the accident in November 2017, for approximately a year and two months, when her annual salary was $55,000. Those were her highest 14 months of earnings in her working life up to that time. In earlier years, from 2014, when she was 30, to starting at the Watson Centre in 2016, she had been earning between $17,000 and at most $40,000 annually.

[30] As noted above, in respect of past loss of earning capacity, Ms. Close claimed $351,000 based on her position that, if she had not been involved in the accident, she would have worked at ABI and enjoyed a dramatic increase in her income, from $55,000 at the time of the accident to $240,000 in 2022. By contrast, the Tigases acknowledged that an award between $61,000 and $76,000 would be appropriate. This amount was justified primarily on their acceptance that, had Ms. Close not been injured, she would have continued to earn $55,000 until the Watson Centre closed in 2020, followed by some lesser amount between then and the trial in 2022.

[31] I observe that the judge directed a calculation of loss of past wages based on his finding that he was "prepared to find only that in 2018–2022, Ms. Close had a real and substantial possibility of earning $65,000 annually, which is just slightly over the pay raise she obtained at Grouse Mountain in January of this year": at para. 79. He went on to direct that past loss of earning capacity was to be calculated by using the amount of $65,000 as the pre-accident earnings for the five years between 2018 and 2022. This reflected the wholesale rejection of a claim based on escalating income at ABI as beyond speculation, and resulted in an award of $99,321.75 for past loss of earnings. It is worth noting here that this figure represents only a modest increase beyond that which the Tigases' had acknowledged was an appropriate award. I will return to the implications of this below.

[32] The parties were further apart in respect of damages for loss of future earning capacity. Ms. Close claimed $2,569,000. The Tigases said the award should be no higher than $62,000. Again, the difference turned, critically, on whether there was not only a real and substantial possibility of future employment at very high levels of remuneration at ABI, but also the relative likelihood of that remuneration being realized.

[33] The judge awarded $163,980.64 for loss of future earning capacity. That award reflected the judge's rejection of the proposition that ABI presented a real and substantial possibility of future remunerative employment to Ms. Close. It also

reflected a modestly more optimistic view of Ms. Close's future prospects than accepted by the Tigases, who viewed her future employment prospects as more in line with statistical averages for females with high school education and earnings in the recreation and fitness industry.

[34] It seems clear then that the judge reached conclusions about Ms. Close's without-accident prospects that are much closer to the position of the Tigases at trial than her own. This resulted from the judge's rejection of the prospects of an executive level, highly-remunerated future with ABI as speculative. At the same time, the awards made reflect only a small adjustment between her post- and pre- accident prospects.

[35] As I will explain below, the judge concluded that Ms. Close had demonstrated that she could beat the averages for individuals with her education level working in the industry she had primarily worked in, notwithstanding the challenges and difficulties she faced in life. I read the judgment as accepting that Ms. Close faced real difficulties, in any event of the accident, in building anything other than a modestly remunerative career, but that, even with the accident, she could outperform the market, as demonstrated by her relatively high salary at the Watson Centre. The award recognizes that the accident has caused her loss of earning capacity, but that she will do almost, but not quite, as well as she could have done if she had not been injured. It seems to me that that conclusion was open to the judge on the evidence, even if the foundation of it was not articulated expressly in terms of the *Rab* formula.

On Cross Appeal

[36] On the cross appeal, the central question is whether the judge erred in principle in his treatment of the suggestion that ABI provided an immensely valuable real and substantial possibility of a without-accident future. Ms. Close contends that the judge erred by holding her to a balance of probabilities standard in respect of her potential without-accident career path. She also says he failed to separate considerations pertinent to quantification from those relevant to the existence of a

real and substantial possibility. Finally, she contends, the judge made palpable and overriding errors in his assessment of the evidence. If we accept Ms. Close's argument on cross appeal, she submits that we should substitute an award between $2.3 and $2.5 million—a figure that represents only a minimal discount from assuming near certainty in Ms. Close obtaining employment with ABI into an indefinite future and earning very substantial remuneration over her working life.

[37] In my view, there is no merit to these arguments. I cannot detect in the reasons any basis to conclude the judge applied the wrong evidentiary standard. To the contrary, the judge properly stated the test in *Rab*, and while he did not expressly indicate his progress through the stages of the test, I can see nothing to suggest he misapplied it. In short, the judge found, in para. 90 (see above at para. 19), both that it was purely speculative to regard her as occupying the position of director of sales or marketing given her education and experience, and that the prospect of ABI establishing itself as a potential employer, given the lack of evidence of its viability and earnings, was also speculative. Moreover, the judge characterized the possibility that Ms. Close would earn incomes in the range contended for (between $200,000 and $240,000) as untenable and beyond speculative. These conclusions amount to findings that: at the second stage of *Rab*, Ms. Close had failed to discharge her burden to show that there was a real and substantial possibility that, without the accident, she would have had a career with Mr. Eaton or ABI; and that, following that finding, at the third stage of *Rab*, there was no likelihood that she would have earned income on the scale argued for. It seems to me that the judge addressed both steps two and three of the *Rab* approach in rejecting Ms. Close's case by applying the correct evidentiary burden.

[38] Furthermore, I do not think the judge made any palpable or overriding errors in his findings. Ms. Close's case was essentially dependant on the following evidence from Mr. Eaton: that he was an entrepreneur who had hired Ms. Close into the Watson Centre; that he proposed to continue to employ her at ABI once the Centre closed; that he planned to employ her in an executive sales and marketing role at ABI; and that he anticipated that, given her inherent talents, personality, drive,

and intelligence, she would flourish and be richly rewarded as ABI established itself in its market sector. The judge did not accept that evidence, pointing out several reasons why he considered it to be untenable and beyond speculative.

[39] Of course, the judge was entitled to accept all, some, or none of the evidence proffered. In rejecting the bulk of Mr. Eaton's evidence, it follows that it was open to the judge not to accept Ms. Close's theory of the case. Ms. Close does not point to any evidence the judge misapprehended, or findings not supported by the evidence. Certainly, the judge did not refer to all of the evidence, but he explained the fundamentals of his rejection of her case. On appeal, Ms. Close's argument does not rise above rearguing the case at trial, and depends on criticizing the judge for not drawing the inferences she thinks he should have drawn or finding the facts she thinks he should have found. That, however, does not demonstrate legal error warranting appellate intervention.

[40] I would dismiss the cross appeal.

On Appeal

[41] I turn now to the appeal. The Tigases contend that the judge erred by failing to identify and consider career alternatives that were, applying a real and possible standard, foreclosed to Ms. Close by reason of the accident, as well as the likelihood of those becoming available. If we allow the appeal, the Tigases urge us to substitute an award of $55,000 based on one year of pre-accident income. For this approach, they rely on the majority decision in *Pallos v. Insurance Co. of British Columbia* (1995), 100 B.C.L.R. (2d) 260 at para. 43, 1995 CanLII 2871 (C.A.), as recognized by this Court as appropriate "where the plaintiff continues to earn income at or close to his or her pre-accident level, but has suffered an impairment that may affect that plaintiff's ability to continue doing so at some point in the future": *Rab* at para. 72.

[42] I have already noted that the award recognizes the judge's finding that Ms. Close had suffered a real and substantial possibility of a small loss of earning capacity in each year for the rest of her working life. This conclusion is rooted in the

judge's assessment of her pre-accident prospects, coupled with the degree to which the accident had exacerbated some pre-existing conditions and caused other injuries that limited her prospects.

[43] It seems to me that it was open to the judge, on the facts of this case, to conclude that Ms. Close's employment prospects were diminished over the *long term* by the accident, at least to some degree. Indeed, from a practical perspective, the appellants accept that some damages ought to be paid to reflect that reality. While the Tigases maintain that this Court should adopt the *Pallos* approach, I think the more significant issue relates to the quantification of the loss.

[44] I accept that Ms. Close did not have a pre-accident history of earning $60,000, and there is no explicit rationale for adopting the $70,000 figure for future loss purposes beyond a passing reference to Ms. Close's "pre-accident qualifications". But, in my view, there is support in the record for an award that modestly reflects the loss in earning capacity found by the judge.

[45] Ms. Close's earnings history showed some ability to beat the statistical averages captured by labour market earnings for individuals with her educational background. The judge was clearly impressed by Ms. Close's drive and determination, manifested among other ways by her athletic prowess. The judge commented on her personality as "naturally enthusiastic and stoic". Ms. Close had secured arguably above average remuneration at the Watson Centre and would likely have remained there until it closed. It is not implausible to think, although the judge made no explicit finding to this effect, that Ms. Close's income may have increased in some modest increments had she been able to continue working there after the accident. Subsequently, Ms. Close secured a job, and, even with her post-accident limitations, was earning $62,000 at the time of trial.

[46] Ms. Close's circumstances did not readily lend themselves to a more conventional *Rab* analysis, because the record did not disclose a variety of alternative occupations that could be evaluated to determine if they were foreclosed to her as real and substantial possibilities, or the likelihood that they were foreclosed

to her. This does not mean, however, that Ms. Close failed to discharge her burden to prove a loss. The judge was left, after his rejection of Mr. Eaton's evidence, with expert economic evidence led by both parties, a plaintiff with many pre-existing limitations, and some indication of her record of beating the odds. This latter point is reflected in the judge's direction to the parties to calculate the loss based on labour market statistics, in part, scaled up to reflect her actual experience. While Ms. Close had primarily worked in fitness and recreation, she had more expansive prospects than being a fitness trainer or close equivalent. She had, at Grouse Mountain at least, demonstrated a capacity to manage more administrative and organizational tasks. It was open to the judge to conclude, as I think he implicitly did, that Ms. Close was building a career at Grouse Mountain, had bright prospects there (or somewhere similar), but that the brightness of those prospects was dimmed somewhat by the injuries she suffered in the accident.

[47] This may well have been a case in which the judge could have decided he lacked sufficient evidence of actual and potential earnings, as well as a clear sense of future employment possibilities, and that he should make his assessment on the basis of the capital asset approach favoured by the Tigases and outlined in *Pallos*. I observe that the actual award is about three times Ms. Close's actual salary at the time of the accident. While awards under the *Pallos* approach often reflect one- or two-years' salary, the court may award more as appropriate. Indeed, awards of three years are not unheard of: see, e.g., *Oliver v. Loewen*, 2024 BCSC 604 at para. 142; *Sharma v. Sagoo*, 2023 BCSC 1136 at para. 148; *Patterson v. Solymosi*, 2019 BCSC 1508 at para. 105. An award of three years salary under the *Pallos* approach would, I think, have been immune to appellate intervention. The amount of the award is the key issue. I do not think it is inordinately high.

[48] I would dismiss the appeal.

"The Honourable Mr. Justice Harris"

I agree:

"The Honourable Madam Justice Newbury"

I agree:

"The Honourable Justice Skolrood"