COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Mundy v. Chernichen,*
2024 BCCA 261

Date: 20240621
Docket: CA48628

Between:

Darin Keith Mundy and Darin's Plumbing Ltd.

Appellants
(Defendants)

And

Kyla Marie Chernichen

Respondent
(Plaintiff)

Before: The Honourable Madam Justice Saunders
The Honourable Madam Justice Fenlon
The Honourable Madam Justice DeWitt-Van Oosten

On appeal from: An order of the Supreme Court of British Columbia, dated October 3, 2022 (*Chernichen v. Mundy*, 2022 BCSC 1704, Vernon Docket M56134).

Oral Reasons for Judgment

Counsel for the Appellants:	A.L. Murray, K.C.
Counsel for the Respondent:	R.D. Irving
Place and Date of Hearing:	Vancouver, British Columbia June 20, 2024
Place and Date of Judgment:	Vancouver, British Columbia June 21, 2024

Summary:

The appellants are the driver and owner of a vehicle that rear ended the respondent's car. They challenge the award of damages for loss of future earning capacity, contending the judge failed to consider positive contingencies.

Held: Appeal dismissed. Although the judge did not expressly identify specific contingencies, it is evident from the live issues at trial and the record that she did consider them. There is no basis on which this Court could interfere with the judge's assessment of damages for loss of future earning capacity.

[1] **FENLON J.A.**: The appellants are the driver and owner of a vehicle that rear-ended the respondent's car in Vernon in October 2018. The appellants acknowledged liability for the accident and admitted it had caused the respondent's injuries. Following a trial to assess the damages, the judge made the following awards (at para. 106):

Non-pecuniary damages	$110,000
Past loss of income	$ 16,500
Loss of future earning capacity	$450,000
Cost of future care	$ 62,016
Special damages	$ 3,600

[2] On appeal, only the award of damages for loss of future earning capacity is in issue. The appellants contend the judge erred in her assessment of those damages by failing to account for contingencies.

Background

[3] For the purposes of this appeal, the following background will suffice. At the time of the accident, the respondent was 34 years old. She was a single mother who lived an active life that included camping, hiking, swimming, biking and other sports, in addition to caring for her young son. It is common ground that the respondent was a stoic and hard working person who had been employed continuously in various positions since high school. After graduating from Simon Fraser University, the

respondent worked in a physically demanding job as a server. A colleague described her as energetic, efficient and a hard worker.

[4] Just before the accident occurred in October 2018, the respondent had begun considering options outside of the hospitality industry, including working at a care home which would require further education.

[5] After the accident, the respondent gradually returned to work as a server, but required accommodation. In 2019, she enrolled in the Therapy Assistant program at Okanagan College, graduating in the summer of 2021, and has worked in that job since then.

[6] The judge found that as a result of the accident, the respondent had suffered injuries to her neck, shoulder, upper back and gluteal muscles, as well as to her left C5-7 facet joints, which caused her ongoing pain, stiffness, and muscle tension headaches: at para. 40. The judge characterized the respondent's pain as chronic and aggravated by activity, finding the injuries were permanent and unlikely to improve over time: at para. 41.

On appeal

[7] The appellants accept that the judge correctly set out the law governing assessment of future income loss. However, they say she did not apply it correctly. The impugned assessment is set out at paras. 88–91 of the reasons for judgment which I set out here:

> [88] Based on the evidence at trial, and in particular the assessment performed by Ms. Wright, I am satisfied that Ms. Chernichen's injuries have resulted in a loss of capacity. But for her injuries, Ms. Chernichen was a person who worked hard and would have had no difficulty maintaining full time hours in her chosen profession. I am satisfied this is no longer the case. I find that Ms. Chernichen will not be able to work full time as a therapist assistant, or an equivalent job, for the rest of her working life.
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> [89] While Ms. Chernichen suggested in her testimony that her ideal position would be a 0.72% position, I am mindful of Ms. Wright's assessment that Ms. Chernichen does not have a realistic view of her own objectively measured limitations. I find that a realistic view of Ms. Chernichen's future is that her injuries will limit her to work at 60% capacity for the remainder of her working life.

> [90] I am satisfied that there is a real and substantial possibility that Ms. Chernichen will lose 40% of her lifetime earnings as a result of her injuries. Using an annual income of $50,000 as an approximate basis to value her loss, Ms. Chernichen's loss would be calculated at $454,534.
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> [91] I find that there is a substantial likelihood of Ms. Chernichen experiencing such loss. In the result I find that an appropriate assessment of Ms. Chernichen's loss of earning capacity is $450,000. This assessment reflects a fair and reasonable award for the loss which I have found Ms. Chernichen has a substantial likelihood of experiencing.
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> [Emphasis added.]

[8] The appellants submit this assessment omits a crucial step in the analysis prescribed by this Court in *Rab v. Prescott*, 2021 BCCA 345—accounting for contingencies when quantifying the value of the loss of future earning capacity. They say the judge accepted the worst case scenario, effectively concluding that the respondent would be limited to 60% working capacity for the remainder of her life. The appellants contend the judge thereby ignored all of the positive contingencies that could put the respondent in a better or reasonably comparable earning position and justify a lower award.

[9] It is settled law that a judge is required to adjust an award for future loss of earning capacity based on the relative likelihood of positive and negative contingencies established by the evidence. In the present case, the judge did not expressly address contingencies in her reasons. However, although it is preferable for judges to acknowledge the contingencies they have taken into account, the failure to refer to specific contingencies does not necessarily mean that a judge has failed to consider them.

[10] In *Tsalamandris v. McLeod*, 2012 BCCA 239, the appellants raised a similar ground of appeal, contending the judge had erred by not expressly applying a percentage likelihood to each contingency. Speaking for the Court, Harris J.A. concluded the trial judge was under no obligation to either assign percentage probabilities to her estimates of the likelihood of certain events, or to expressly discount the award by a percentage amount to reflect contingencies. He observed that the fact that the judge did not articulate these steps did not mean she had

ignored matters that she was required to take into account: see also *Romanchych v. Vallianatos*, 2010 BCCA 20 at para. 13.

[11] The question before us is whether the judge considered the relative likelihood of the contingencies realistically raised by the evidence. In this regard, her reasons must be read in the context of the record and the live issues at trial. In my view it is not surprising that the judge did not expressly address the many positive contingencies the appellants now identify on appeal, given that they were not put in issue at trial. In their closing submissions on future loss of earning capacity, the appellants simply submitted that because there were both positive and negative contingencies and multiple hypotheticals, the judge should take the approach taken in *Pallos v. Insurance Co. of British Columbia*, 1995 CanLII 2871 (BCCA), of awarding one or two years' annual income at $50,000 per year. When invited by the judge to elaborate on that position, counsel for the appellants asked the judge to consider two contingencies:

> 1. The respondent could be provided with accommodations by her employer so that she could work longer; and
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> 2. The respondent might find a different position within her current organization that allows her to work full-time.

[12] In contrast, the respondent identified a number of future hypotheticals to be taken into account, which the judge summarized as follows:

> 1. The respondent could be unable to continue working as a Therapy Assistant and could move to a Recreation Therapy Assistant ("RTA") position, which pays less than a Therapy Assistant position;
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> 2. The respondent could continue in her current position but would work 72% of full-time; and

3. The respondent could keep working at her current pace but may then become exhausted to the point where she is unable to work at all: at paras. 85–86.

I note that it is evident from this summary that the worst case scenario before the judge was not the respondent working at 60% of full-time, but the third hypothetical proposed by the respondent in which she would not be able to work at all.

[13] After identifying these contingencies, the judge squarely addressed the central task of comparing the likely future of the respondent's working life if the accident had not occurred, with the respondent's likely future working life after the accident: *Dornan v. Silva*, 2021 BCCA 228 at para. 157. She concluded that, but for the accident, the respondent would have had no difficulty maintaining full-time hours in her chosen profession: at para. 88. While the judge did not explicitly express this as a percentage likelihood, her reasons must be read as inferring that this "without accident" future was a near certainty. In my view, that finding was available to the judge, given her findings that the respondent was a hard working and dependable employee who had worked continuously from an early age right up to the accident (other than during a short maternity leave).

[14] The judge then provided her assessment of the respondent's likely "with accident" future, finding she would work at 60% capacity in her chosen profession: at para. 89. Although the judge did not state in her reasons how she arrived at that figure, I agree with the respondent that this does not mean the judge did not conduct the prescribed analysis. To the contrary, the available inference is that 60% was the result of her weighted analysis of the available contingencies she had just reviewed. In the circumstances of this case, involving a relatively young plaintiff who had just begun to work in a new profession, requiring the trial judge to plot out every possible permutation and then try to assign reliable percentage likelihoods and adjust an award accordingly would be a task of perfection. As the respondent put it, "at best, it would transform the exercise from an assessment to a calculation. At worst, the assessment would devolve into the fictitious."

[15] The judge's assessment and reasons must also be viewed in the context of the capital asset approach. The judge was not using a loss of earnings method, which, being more akin to a mathematical calculation, is more amenable to specific contingency considerations. She was rather using a rough estimate of possible future earnings as a reality check on her estimate of loss. As the appellants recognized in their written submissions at trial, the task before the judge was a difficult one.

[16] On my reading of the judge's reasons in the context of the record, the judge rooted her estimate of loss in her finding that the respondent would not be able to sustain her current level of work, would have to reduce her hours to manage her exhaustion and pain, would experience no significant improvement in her condition, but would be able to continue to work to age 65. The 60% figure chosen by the judge thus represented a balancing of a number of future hypotheticals, both positive and negative.

[17] I turn now to the specific contingencies identified by the appellants at trial. As I have noted, in response to a question from the judge, the appellants identified two positive contingencies: first, the respondent might be able to continue working for longer in her current job through employer accommodations; and second, she could move into a different and less physically demanding position, such as an RTA position, which would enable her to work full-time.

[18] As to the first, there was no evidence that the respondent's current employer, the Interior Health Authority, could or would accommodate the respondent's limitations. To the extent the issue was addressed at all, the evidence tended towards a lack of accommodation: the general shortage of health care staff and the excessive demands on their time would make it less likely the respondent could receive help from coworkers when needed.

[19] In relation to the second contingency, the judge misapprehended the rate of pay for an RTA position, describing it as $14.00 per hour which even at full-time would still leave the respondent at a disadvantage. The respondent testified that

during a summer posting she normally received $19.00 per hour as an RTA at a private care facility, which was $8.00 less per hour than her work as a Therapy Assistant. It follows that even a full-time position as an RTA would not be equivalent to a full-time Therapy Assistant job. Indeed, the loss of earnings using a full-time RTA position as a comparator to full-time Therapy Assistant work is roughly equivalent to the damages the judge assessed based on 60% of a full-time Therapy Assistant.

[20] For completeness, I note that the positive contingencies the appellants raise for the first time on appeal ignore corresponding negative contingencies. For example, the appellants suggest new treatments could be tried so that the respondent is better able to manage her symptoms and work more, thus reducing her future wage loss. But it is also possible that the respondent's condition could worsen, making it less likely that she will be able to work at even 60%.

[21] In summary, despite Ms. Murray's able submissions, I can see no basis on which this Court could interfere with the judge's assessment that an award of $450,000 for loss of future earning capacity is fair and reasonable. I would accordingly dismiss the appeal.

[22] **SAUNDERS J.A.**: I agree.

[23] **DEWITT-VAN OOSTEN J.A.**: I agree.

[24] **SAUNDERS J.A.**: The appeal is dismissed.

"The Honourable Madam Justice Fenlon"