COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Sharma v. Sagoo,*
2024 BCCA 319

Date: 20240909
Docket: CA49206

Between:

Shiv Raj Sharma

Appellant
(Plaintiff)

And

Rupinderjit Sagoo, Canuck Security Services Limited, and Honda Canada Finance Inc.

Respondents
(Defendants)

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

On appeal from: An order of the Supreme Court of British Columbia, dated July 4, 2023(*Sharma v. Sagoo*, 2023 BCSC 1136, New Westminster Docket M199896).

Counsel for the Appellant:	G. Cameron W. Andrews, Articled Student
Counsel for the Respondents:	C.C. Godwin
Place and Date of Hearing:	Vancouver, British Columbia May 14, 2024
Place and Date of Judgment:	Vancouver, British Columbia September 9, 2024

Written Reasons by:
The Honourable Justice Skolrood

Concurred in by:
The Honourable Madam Justice Newbury
The Honourable Mr. Justice Harris

Summary:

The appellant appeals the awards of non-pecuniary, cost of future care and loss of past and future earning capacity damages, as well as a 10% negative contingency deduction ordered by the judge. The appellant argues that the judge failed to appreciate or deal with evidence establishing the extent and consequences of his injuries.

Held: Appeal allowed in part. The evidence at trial did not support a specific 10% negative contingency. The cost of future care damages claimed by the appellant were supported in the evidence and the judge failed to explain her decision to order reduced amounts. The award of non-pecuniary damages was not inordinately low. The appellant failed to establish that the judge erred in her assessment of past and future loss of earning capacity.

Reasons for Judgment of the Honourable Justice Skolrood:

[1] On March 11, 2016, the appellant, Dr. Sharma, was injured when his vehicle was struck from behind by a vehicle driven by the respondent, Mr. Sagoo (the "Accident"). Liability was admitted, thus the central issues at trial were the nature and extent of the injuries suffered by Dr. Sharma and the quantum of damages.

[2] On July 4, 2023, the judge issued reasons for judgment (2023 BCSC 1136) in which she awarded total damages of $405,122.74, broken down as follows:

a)	Non-pecuniary damages	$99,000
b)	Past loss of earning capacity	$38,669.04
c)	Future loss of earning capacity	$256,500
d)	Cost of future care	$6,600
e)	Special damages	$4,353.70

[3] These amounts included a 10% negative contingency applied by the judge to the awards for non-pecuniary damages and past and future loss of earning capacity.

[4] Dr. Sharma now appeals each head of damages other than the award for special damages. He also challenges the judge's application of the 10% negative contingency. In his factum, Dr. Sharma took the position that the awards of non-pecuniary and cost of future care damages could be remedied by this Court, whereas the awards for past and future loss of earning capacity require a new trial. In oral submissions, however, Dr. Sharma changed his position and argued that the judge's alleged errors in respect of all heads of damage are sufficiently inter-related such that a new trial is required on all heads in issue.

Background

[5] I will provide a brief overview of the background facts and evidence led at trial and then will review the evidence in more detail as needed when addressing the grounds of appeal raised by Dr. Sharma.

Personal History

[6] Dr. Sharma is an optometrist. He graduated from the Southern School of Optometry in Memphis, Tennessee in 2013 and was licenced to practise optometry in British Columbia the same year. He was 29 years old at the time of the Accident and 36 at the time of trial. He married his wife, Ms. Bharwaj, in 2013. They have two children, a daughter born in 2017 and a son born in 2020.

[7] Prior to the Accident, Dr. Sharma was physically fit and active. He engaged in a number of recreational activities including working out and playing hockey and basketball (RFJ at para. 14).

Pre-Accident Employment

[8] In August 2013, Dr. Sharma set up an optometry practice in an optical store operated by his parents in Surrey, BC. He testified that he worked six days per week, however business was initially slow as he attempted to grow a patient base. He typically worked from 8:00 or 9:00 am until 6:00 pm, seeing about six to eight patients per day, with examinations taking approximately 30–45 minutes per patient.

[9] From August 2013 until the date of the Accident in March 2016, Dr. Sharma worked full-time in the optometry practice. He testified that before the Accident, business was improving as he was seeing more patients. He anticipated that this trajectory would continue as he became more experienced.

Post-Accident Condition

[10] As noted, the Accident occurred on March 11, 2016. Dr. Sharma testified that in the immediate aftermath of the Accident, he experienced shooting pain in his neck, radiating into his arm, and low back pain connecting to his legs. He saw his

family doctor within a week of the Accident and was prescribed various pain and anti-inflammatory medications. In the ensuing months and years, he received chiropractic, physiotherapy and massage treatments, although as the judge noted, there were significant gaps in time where he undertook no treatments (RFJ at para. 21).

[11] In April of 2016, Dr. Sharma experienced difficulty walking and was unable to put weight on his right foot. An MRI disclosed a peroneal nerve tear. Dr. Sharma was given the option to have surgery but he elected not to.

[12] Dr. Sharma testified that despite treatment, he has continued to experience pain in the right side of his neck, shoulder and down through his right arm. The pain is exacerbated by his work which involves repetitive movements when engaging in clinical testing procedures.

[13] According to Dr. Sharma, his injuries have adversely impacted his professional and personal life in a significant way. I will address the professional impacts below. In terms of personal impacts, the judge summarized Dr. Sharma's evidence as follows:

> [28] The plaintiff says his tendency now is to simply lay down and scroll on his phone at the end of a day. The plaintiff says that he is physically and emotionally drained at the end of a workday, and has trouble getting up in the morning or engaging with his family. He is not as involved as a father or partner as he would like to be.
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> [29] The plaintiff says his inability to help as much makes him feel "inadequate". The plaintiff says he is drinking more alcohol than he would like to deal with his pain and the depression he feels. He says, given his father's alcohol abuse, he is concerned about his own drinking, particularly in front of his kids.
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> [30] The plaintiff attributes the couple's lack of physical intimacy to post-Accident pain and resentment.

Post-Accident Employment

[14] Dr. Sharma continued to practise optometry after the Accident and in the ensuing years he expanded his business and professional activities:

a) In 2017, he was elected to the Board of BC Doctors of Optometry, the professional association for optometrists, for a three-year term, which was renewed in 2020 for a further term during which Dr. Sharma served on the Association's executive. He withdrew from the board in May 2020;

b) In January 2019, he purchased the retail portion of his parents' optical business;

c) In January 2020, he hired his first locum optometrist to conduct patient examinations. Dr. Sharma received a portion of the fees billed by the locum, although he argued that the locum would have been unnecessary but for his injuries;

d) In March 2020, at the onset of the COVID pandemic, Dr. Sharma started an online sales business to sell optometric products; and

e) In May 2022, Dr. Sharma purchased a property and opened a second clinic. At the time of trial in February 2023, he was working two days per week at each clinic, with a day off (Wednesday) between seeing patients. Dr. Sharma attributes the shortened four-day work week to his injuries.

The Medical Evidence

[15] Dr. Sharma tendered expert medical reports from three physicians: Dr. Kelly Apostle (orthopaedic surgeon); Dr. Paul Bishop (spine medicine); and Dr. David Koo (physiatrist). The defendants did not adduce any medical evidence.

[16] Dr. Apostle diagnosed Dr. Sharma as having suffered a peroneal nerve tear (described in her report as "an acute tear at the intersection of the peroneus brevis at the base of the right fifth metatarsal") which she opined was caused by the Accident. Dr. Apostle found that when she saw Dr. Sharma in September 2021, he had ongoing restrictions with respect to recreational activities such as running, hiking or aggressive physical activity. She was of the view that these restrictions are likely to be permanent. However, Dr. Apostle also opined that Dr. Sharma's foot injury was

unlikely to interfere with his ability to work as an optometrist or his regular day-to-day activities.

[17] Dr. Bishop diagnosed Dr. Sharma's injuries resulting from the Accident as chronic mechanical neck pain, soft tissue injury to the right scapula and right elbow and hand symptoms secondary to peripheral neuropathy. Dr. Bishop noted that Dr. Sharma reported managing his chief complaint of right-sided neck pain by modifying his pre-accident work schedule, from 40–48 hours per week to 30, along with his recreational activities. Dr. Bishop opined that Dr. Sharma's neck pain was chronic given that it had continued for four years post-Accident and that accordingly his long-term prognosis was poor.

[18] Dr. Koo diagnosed Dr. Sharma as suffering from soft tissue injuries to the cervical, thoracic and lumbar spine and the periscapular region, all causally related to the Accident. The most pressing problems when Dr. Koo saw Dr. Sharma in October 2022 were persistent right neck and shoulder pain. Dr. Koo characterized Dr. Sharma's overall level of disability as "moderate" with "mildly" restricted and painful neck range of motion, as well as neck, upper back and right shoulder pain. Dr. Koo noted Dr. Sharma's report of escalating pain throughout his work day and worsening accumulation of pain with sequential days worked. Dr. Koo suggested that Dr. Sharma's "chronic injuries likely preclude him from full-time employment as an optometrist on a durable basis. He is likely better working part time, and preferably with non-consecutive days to allow his symptoms to reset back to baseline levels in order to allow him to live with as manageable pain as possible".

[19] Dr. Koo also referred to Dr. Sharma's pre-existing cervical degenerative changes and opined that they "likely predate the accident…and were previously asymptomatic and would have remained so absent the effects of the accident".

Economic Evidence

[20] Both parties relied on evidence from expert economists, whose opinions largely form the basis for the parties' positions on the key issue in dispute — Dr. Sharma's damages claim for loss of future earning capacity.

[21] Dr. Sharma's expert, Mr. Sturgess, calculated a past loss of income for Dr. Sharma from the date of the Accident to trial in early 2023 of $197,000. His loss calculation comprises three components: i) lost fees from reduced patient visits; ii) additional costs paid to locums to fill in for Dr. Sharma; and iii) lost retail sales resulting from seeing fewer patients. Of note, Mr. Sturgess calculated Dr. Sharma's largest annual income loss of $116,283 to have occurred in 2021. The three components of the loss were broken down as follows: lost fees ($3,591); additional locum fees ($60,029); and lost retail sales ($52,663). As he did not have any financial information post-2021, Mr. Sturgess used the same figure for 2022 and pro-rated for 2023.

[22] In terms of future loss, Mr. Sturgess used the $116,000 (rounded) figure from 2021 and calculated the present value of that loss annually until Dr. Sharma reached the age of 70, assuming he would retire at that age. The present value of the loss calculated on this basis is $2,886,000. Mr. Sturgess also did a calculation assuming Dr. Sharma retires early at age 60. Under that scenario, Mr. Sturgess assumed a loss of $116,000 annually to age 60 and then a total loss of income of $597,752 annually to age 70. The present value of the loss under this scenario is $5,666,000.

[23] The defendants' expert, Mr. Tidball, prepared two expert reports. The first dealt with Dr. Sharma's past income loss and the second report was in response to Mr. Sturgess' calculation of future income loss. Mr. Tidball calculated Dr. Sharma's past income loss at $46,000 (net). Mr. Tidball's assessment was based in part on the fact that Dr. Sharma experienced a growth in patient visits in the period of 2016 to 2019, i.e., after the accident, and that he achieved the maximum patient load in 2019. While the number of patients seen decreased in 2020 and 2021, it was Mr. Tidball's view that there were factors contributing to that decrease that were unrelated to Dr. Sharma's injuries. For the same reason, Mr. Tidball opined that Dr. Sharma's future losses would not exceed the virtually nominal amount of $3,590 found by Mr. Sturgess for 2019.

The Judge's Reasons

[24] The judge made the following findings concerning Dr. Sharma's injuries resulting from the Accident:

> [82] At the time of the Accident, the plaintiff was a young man in good physical health, who was fit and active. He had some pre-existing disc degeneration, as was indicated by Dr. Koo. Subsequent to the Accident, the plaintiff tore his left rotator cuff while exercising. The repetitive motions required by his job exacerbated the plaintiff's Accident-related injuries. On the evidence before me, I find the plaintiff suffered soft tissue injuries to his neck, shoulders, and back, which result in right arm pain and numbness, and a peroneal tear to his right foot. He experiences episodic headaches. Over time, the plaintiff's injuries have focused on his neck, shoulder, and arm on his right side. The plaintiff's foot has recovered but he still feels pain at times which is aggravated by longer walks, prolonged standing, or walking on rough terrain.

[25] With respect to the pre-existing degenerative disc condition, the judge found that there was a real and substantial possibility that Dr. Sharma would have suffered the losses he claims to some degree, regardless of the Accident. That factor, along with other "significant life changes", including starting several new businesses, growing professional responsibilities, and the births of his children, led the judge to apply a negative contingency of 10% to the awards of non-pecuniary, past and future income loss damages (RFJ at para. 79).

[26] With respect to non-pecuniary damages, Dr. Sharma sought an award of $180,000, whereas the defendants submitted that $115,000 was an appropriate award. Both parties relied on a number of authorities in support of their positions. The judge stated:

> [85] I accept the plaintiff has suffered minimal loss in terms of his personal relationships, and that he does not enjoy certain activities to the same level he did pre-Accident due to discomfort in his foot, neck and shoulder. However, I also note that while not at the same level, the plaintiff has continued to exercise, and take walks and vacations with his wife.
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> [86] I do not find, on a balance of probabilities, that the difficulties that the plaintiff experiences in his relationship and personal life, including his increased use of alcohol, are entirely, or even primarily, attributable to Accident-related injuries.
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> [87] The plaintiff is entitled to be compensated for the losses suffered as a result of these Accident related injuries.

> [88] The authorities cited by the plaintiff involved plaintiffs who had suffered severe, chronic and often degenerative physical and psychological injuries. I do not find these cases to be particularly helpful.
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> [89] I find the cases cited by the defendant to be more analogous to the circumstances of the plaintiff, particularly [*Fatla v. McCarthy,* 2022 BCSC 577]. There, the plaintiff suffered injuries similar to those of the plaintiff. Expert evidence tendered at trial showed her injuries had impacted nearly every aspect of her life to some degree. She was awarded $110,000 in non-pecuniary damages.
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> [90] In consideration of the [*Stapley v. Hejsley,* 2006 BCCA 34] factors, and on review of the cases cited by the parties, non-pecuniary damages are set at $110,000. For the reasons set out above, a 10% negative contingency is applied to this award.

[27] Applying the 10% negative contingency, the award was reduced to $99,000.

[28] In terms of past and future loss of earning capacity, the judge considered the evidence of the expert economists but found that she had "difficulty with the projections made by both" largely because the data each relied on to form their opinion was incomplete (RFJ at para. 98). In particular, the judge found that projections of lost client visits supplied by Dr. Sharma, which was a central component of the income projections arrived at by the experts, were "overly ambitious and not supported in the evidence" (RFJ at para. 108).

[29] With respect to past loss, while the judge again generally rejected the opinions of both experts, she based her past loss award on Mr. Sturgess' loss calculation to the end of 2018 of $53,752. She noted that both experts found no loss in 2019 and, in her view, the projected losses for 2020 to the date of trial were "unreliable and speculative" (RFJ at para. 114). Applying a 20% tax rate and the 10% negative contingency, the judge awarded past loss damages of $38,699.04.

[30] Given the problems with the evidence identified by the judge, she found that it was not appropriate to employ the earnings approach to assessing future loss damages. She agreed with the defendants that "the capital asset approach is best suited to the present circumstances" (RFJ at para. 139). Applying that approach, the judge assessed damages in the amount of $285,000, representing three years worth of earnings of $95,000 annually, which is the equivalent of Dr. Sharma's total

earnings in 2019 (RFJ at para. 148). That amount was then reduced to $256,500 by reason of the 10% negative contingency.

[31] Finally, the judge awarded damages for cost of future care of $6,600. The judge agreed with the care items proposed by Dr. Sharma, but the costs approved covered only a fraction of the durations sought. I will address the judge's reasons for this award further below.

Issues on Appeal

[32] As noted, on appeal Dr. Sharma challenges the awards under all heads of damage other than special damages. Dr. Sharma alleges an "overarching error" in the judge's failure to "appreciate, grasp, and deal with" the evidence led at trial. More specifically, Dr. Sharma alleges that the judge erred in:

a) applying a 10% contingency deduction to the awards of non-pecuniary and past and future income loss damages;

b) awarding an amount of non-pecuniary damages that is inordinately low;

c) erring in principle in the assessment of past and future loss of earning capacity; and

d) awarding an amount for cost of future care on the basis that Dr. Sharma would not use items that were found to be medically recommended and necessary.

[33] The respondent submits that the judge applied the correct legal test to each head of damages and made awards based upon findings of fact grounded in the evidence before her.

Standard of Review

[34] The assessment of damages by a trial judge is a fact-based process and, as such, damages awards are entitled to significant deference on appeal. An appellate court may intervene "only where the trial judge made a palpable and overriding error

of fact, proceeded upon a mistaken or wrong principle, or awarded an amount so inordinately high or low as to constitute a wholly erroneous estimate of the damage": *Lamarque v. Rouse*, 2023 BCCA 392 at para. 27; *Murphy v. Snippa*, 2024 BCCA 30 at para. 43.

Discussion

[35] I will begin by addressing the first, second and fourth issues raised by Dr. Sharma as they are relatively straightforward. I will then turn to the most significant issue — Dr. Sharma's claim for loss of past and future earning capacity.

Did the judge err in applying a 10% negative contingency deduction?

[36] In *Dornan v. Silva*, 2021 BCCA 228, this Court distinguished general contingencies, which apply as a matter of human experience and are likely to be experienced by everyone, and specific contingencies that are unique to a particular plaintiff (at para. 92, citing *Graham v. Rourke* (1990), 74 D.L.R. (4th) 1 (Ont. CA), [1990] O.J. No. 2314 (QL) at paras. 46–47). A pre-existing medical condition may constitute a specific, negative contingency if, on the evidence, there is a real and substantial possibility that the pre-existing condition would detrimentally affect the plaintiff in the future regardless of the defendant's tortious conduct. If a real and substantial possibility is established, the court must then assess the relative likelihood of that possibility materializing: *Dornan* at paras. 63–64; *Murphy* at para. 76.

[37] The judge here justified her application of a 10% negative contingency on this basis:

> [79] Based on Mr. Sharma's pre-existing degenerative disc condition and the factors outlined above, I find there is a real and substantial possibility he would have suffered the losses he claims to some degree, regardless of the Accident. Significant life changes have impacted the plaintiff's personal and professional life, apart from the Accident. These include the initiation of several new business ventures, growing professional responsibilities, and the births of his children. For these reasons I find it appropriate to apply a negative contingency of 10% to the awards of damages for non-pecuniary losses, and past and future loss of income.

[38] Dr. Sharma submits that while the judge properly identified the real and substantial possibility test, the evidence did not support the application of a specific negative contingency. Nor did the judge assess in any meaningful way the likelihood of the contingency arising.

[39] The respondents submit that it can be inferred from the judge's reasons that she considered the relative likelihood of Dr. Sharma's pre-existing condition affecting his damages to be 10%.

[40] In my respectful view, the judge erred in applying the 10% negative contingency deduction. While the judge referred to various factors supporting the deduction, it is apparent that Dr. Sharma's pre-existing disc degeneration was the most significant consideration. However, the evidence did not support a finding that, absent the Accident, there was a real and substantial possibility that the condition would have caused Dr. Sharma problems in the future. Indeed, Dr. Koo's opinion was that the condition likely would have remained asymptomatic (see para. 19 above). That opinion was not challenged.

[41] Further, the defendants in their closing submission at trial acknowledged that there was no specific evidence with respect to contingencies. The defendants did so in support of a submission that the judge should apply a general 20% contingency deduction, which the judge did not do.

[42] In the circumstances, I find that the application of a 10% specific negative contingency absent any supporting evidence amounts to an error in principle: *Dornan* at para. 92. I would therefore set aside the contingency deduction.

Is the award of non-pecuniary damages inordinately low?

[43] Dr. Sharma submits that the non-pecuniary damages awarded by the judge were inordinately low and inconsistent with the evidence at trial establishing the "devastating loss" he suffered. Dr. Sharma notes that the $99,000 awarded (after application of the 10% contingency deduction) is below the range proposed by the defendants at trial. On this point, Dr. Sharma cites *Kaur v. Tse*, 2021 BCCA 137 at

para. 38 where Chief Justice Bauman observed that it was “striking” to note that the non-pecuniary award was “substantially” below the range submitted by the defendants.

[44] I would not accede to this ground of appeal. At trial, Dr. Sharma sought an award of $180,000 and, as is typical, cited a number of cases supporting that amount. The defendants argued that an appropriate award was $115,000, and similarly cited supporting case law.

[45] The judge assessed non-pecuniary damages in the amount of $110,000, again before the application of the contingency deduction. In arriving at that figure, she said:

> [85] I accept the plaintiff has suffered minimal loss in terms of his personal relationships, and that he does not enjoy certain activities to the same level he did pre-Accident due to discomfort in his foot, neck and shoulder. However, I also note that while not at the same level, the plaintiff has continued to exercise, and take walks and vacations with his wife.
>
> [86] I do not find, on a balance of probabilities, that the difficulties that the plaintiff experiences in his relationship and personal life, including his increased use of alcohol, are entirely, or even primarily, attributable to Accident-related injuries.

[46] The judge further found that the most analogous case cited to her was *Fatla v. McCarthy*, 2022 BCSC 57 (appeal allowed in part but not in respect of non-pecuniary damages, 2024 BCCA 311) in which non-pecuniary damages of $110,000 were awarded.

[47] In my view, the fact that the judge awarded damages below the amount proposed by the defendants does not give rise to a reviewable error. The parties to a personal injury action generally cite cases with a view to establishing a general range of damages, however, the actual assessment of damages is a fact-based, case specific process. Damages awarded in one case cannot bind a judge in another case dealing with a different plaintiff and a different set of facts. Moreover, it cannot be said here that the award was “substantially” below the amount proposed by the defendants, as was the case in *Kaur.*

[48] I accept that the judge's findings in support of the award are somewhat cursory and conclusory, however I do not agree that the they are untethered from the evidence. Rather, they reflect her findings of fact based on the evidence presented at trial, which she reviews in some detail in her reasons (see for example, RFJ paras. 22–38). Moreover, they are not inconsistent with the expert medical evidence. For example, Dr. Koo again opined that Dr. Sharma's injuries have resulted in a "moderate" level of disability (see para. 18 above).

[49] Given the highly deferential standard of review applicable to a judge's damages award, I am unable to find that the judge erred in her assessment of Dr. Sharma's non-pecuniary damages.

Did the judge err in her award of cost of future care damages?

[50] The test for awarding cost of future care damages is well-established. In *Peters v. Taylor*, 2023 BCCA 391 at para. 7, this Court endorsed the summary of governing principles set out in *Warick v. Diwell*, 2017 BCSC 68 at paras. 203–209, aff'd 2018 BCCA 53, including:

> [203] Claims made for future care must be both medically justified and reasonable. An award "should reflect what the evidence establishes is reasonably necessary to preserve the plaintiff's health": *Milina v. Bartsch* (1985), 49 B.C.L.R. (2d) 33 (S.C.) at paras. 199 and 201; aff'd (1987), 49 B.C.L.R (2d) 99 (C.A.).
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> [204] This requirement of medical justification, as opposed to medical necessity "requires only some evidence that the expense claimed is directly related to the disability arising out of the accident, and is incurred with a view toward ameliorating its impact": *Harrington v. Sangha*, 2011 BCSC 1035, at para. 151.

[51] At trial, Dr. Sharma sought an award for future care costs in the amount of $55,000, comprising 12 sessions with a psychologist, 30 sessions annually of treatments for soft tissue pain relief such as physiotherapy, massage therapy, osteopathy and/or acupuncture, custom orthotics replaced every two years and supportive shoes replaced annually. The defendants made minimal submissions on future care, other than to acknowledge there was evidence supporting the orthotics.

[52] The judge's analysis and findings under this head of damages are concise:

> [156] Despite the assertions of the plaintiff he has been diligent with medical treatment, there were, in fact, lengthy gaps until 2021 where the plaintiff did not seek medical care or other supportive treatments. While the lack of use of a particular item or service in the past is not determinative, it may be relevant to the court's analysis: [*Izony v. Weidlich,* 2006 BCSC 1315] at para. 74.
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> [157] I find the treatments recommended as being supported in the evidence. However, based on the plaintiff's prior history of stopping treatments, or undertaking them only periodically, I do not find the amounts proposed as reasonable nor realistic. I do not find, on a balance of probabilities, that he would access the treatments as he proposes. I award costs of future care as follows:
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> - Massage $95/visit x 5 for 4 years = $1,900
> - Physio $95/visit x 5 for 4 years = $1,900
> - Custom Orthotics/Supportive Shoes: $1,450
> - Psychologist: $225/visit x 6 sessions = $1,350
>
> Total award for costs of care: $1,900 + $1,900 + $1,450 + $1,350 = $6,600.

[53] As the judge observed, the cost of future care items claimed by Dr. Sharma were supported in the evidence. All were recommended by Dr. Koo. Dr. Apostle also recommended the custom orthotics and the supportive shoes.

[54] As the judge also observed, the lack of use of a particular treatment or service may be relevant to the court's assessment of future care costs. Again, from *Peters* (at para. 7, citing *Warick* at para. 208):

> While no award should be made in relation to an expense that the plaintiff will not actually incur (*Izony v. Weidlich*, 2006 BCSC 1315 at para. 74), the focus of inquiry when a justified item or service was previously unused, is whether it is "likely to be incurred on a going forward basis": *Gilbert v. Bottle*, 2011 BCSC 1389 at para. 251.

[55] Here, the judge relied on what she characterized (at para. 21) as the "significant gaps in time" between the Accident and trial in which Dr. Sharma undertook no treatments to support her finding that he would not access the treatments as proposed. However, as reflected in her award, she was apparently of the view that Dr. Sharma would make use of some of the services and treatments, but on a much more limited basis than what was claimed. For example, she awarded

$1,800.00 for 10 physiotherapy and massage treatments per year for four years, rather than the 30 treatments for 15 years sought by Dr. Sharma. Similarly, the judge awarded the costs of six visits with a psychologist rather than the 12 sought by Dr. Sharma and recommended by Dr. Koo. The award for custom orthotics and supportive shoes appears to contemplate a single purchase rather than a recurring need as suggested by Dr. Apostle.

[56] The judge was not obliged to accept the claim as advanced by Dr. Sharma, even though it was largely unopposed by the defendants. However, no explanation is provided by the judge for the specific values awarded, apart from her view that the larger amounts claimed were not reasonable or realistic given Dr. Sharma's past history of sporadic treatments. In particular, it is not possible to discern from the judge's reasons how, or if, the more limited amounts awarded meet the test of "reasonably necessary to preserve the plaintiff's health" (*Milina* at para. 201, cited above at para. 50).

[57] While the costs of future care award could be remitted to the trial court on the basis that it is not properly grounded in the evidence, given the relatively modest amount in issue and the fact that Dr. Sharma's claim was largely uncontested at trial, I would substitute an award of $55,000 as particularized by Dr. Sharma.

Did the judge err in her awards of past and future loss of earning capacity?

[58] Dealing first with past loss, the judge again awarded the sum of $38,699.04 which was based upon Mr. Sturgess' calculations for the years 2016–2018.

[59] While Dr. Sharma frames the alleged error as relating to both past and future loss of income capacity, in his factum he focusses almost exclusively on the future loss claim. Specifically, he does not identify any alleged error in the judge's assessment of past loss. Similarly, the respondents in their factum only address the future loss issue, no doubt as a result of how Dr. Sharma framed his arguments.

[60] In oral submissions, Dr. Sharma did address briefly the issue of past loss, arguing that the judge failed to account for a small loss identified by Mr. Sturgess in 2019 (approximately $3,500) and that the judge erroneously applied a taxation rate of 20%, notwithstanding that Mr. Sturgess had already calculated and applied the appropriate tax rate. This latter point is incorrect. The figures used by the judge are Mr. Sturgess' gross figures as set out in Schedule 1 to his report. The judge may well have missed the small loss found by Mr. Sturgess in 2019 but it is an inconsequential amount and, given that Dr. Sharma did not seriously contest the past loss award, I would not interfere with it.

[61] This brings me to the issue that lies at the heart of this appeal — the award for future loss of earning capacity.

[62] The parties agree that the judge correctly identified the analytical framework governing the assessment of damages for loss of future earning capacity, which has been addressed by this Court in numerous decisions: see for example *Rab v. Prescott*, 2021 BCCA 345 at para. 47; *Steinlauf v. Deol*, 2022 BCCA 96 at paras. 52–56.

[63] The analysis involves a three-step process, as set out by the judge at para. 118, citing from *Rab* at para. 47:

> 1. "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*)";
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> 2. "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"; and
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> 3. "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".

[64] At trial, the parties also agreed that Dr. Sharma satisfied the first two elements of the test, i.e., he proved the existence of a future event (chronic injury) that could lead to a loss of capacity and that there was a real and substantial

possibility that the event will cause a pecuniary loss. Where the parties diverged was on the valuation of that loss.

[65] Dr. Sharma relied upon the opinion of Mr. Sturgess who, as discussed above, provided a range of damages for future loss of $2,597,400 to $5,899,069 based on an earnings approach, with the low end premised on the assumption that Dr. Sharma would work until age 70 and the high end on the assumption that he would retire early at age 60. In addition, Dr. Sharma advanced a claim for the reduced sale value of his optometry business which he estimated to be approximately $3 million. Based on these figures, Dr. Sharma sought an award of $6 million.

[66] The defendants argued that the evidence did not permit an assessment of lost future earnings based on an earnings approach as the projections relied on were speculative. The defendants submitted that damages should be awarded using the capital asset approach and suggested three years of Dr. Sharma's 2019 pre-tax earnings from his optometric corporation of $95,000, for a total of $285,000. They proposed using the 2019 earnings because that was the year that Dr. Sharma saw the highest number of patients in the post-Accident period and thus the figure was a fair representation of his reasonable annual income derived from patient visits and associated retail sales.

[67] The trial judge accepted the approach proposed by the defendants. In her view, the "circumstances and unknowns" rendered the earnings approach inappropriate (RFJ at para. 139). She therefore applied a capital asset approach and awarded damages in the amount of $285,000, reduced to $256,500 based on the application of the 10% negative contingency (RFJ at paras. 148–149). In support of her award, the judge found:

a) The future loss calculations proposed by Dr. Sharma were "too optimistically generous, unreasonable and unsupportable on the evidence" (RFJ at para. 136);

b) Dr. Sharma's theory that he would see an increasing number of patients as he became more experienced was belied by the fact that by the time of the Accident, he had been practising on his own for two-and-a-half years and was recognized within his field (RFJ at para. 137);

c) Dr. Sharma's projections did not account for other factors that, absent the Accident, would have impacted his income trajectory including his obligations to his young family and his management obligations in respect of two clinic locations and an online business (RFJ at para. 138); and

d) It is likely that the patient load necessary to support Dr. Sharma's projections of the number of patients he would have seen absent the Accident was not available (RFJ at para. 142).

[68] Dr. Sharma submits that the judge erred by failing to "effectively undertake the central task of comparing the likely future of [Dr. Sharma's] working life if the accident had not occurred with his likely future life after the [Accident]" (appellant's factum at para. 100). In particular, Dr. Sharma says that the judge did not address the uncontradicted evidence of a permanent disability that will adversely impact his earning capacity for the balance of his career. This failure led the judge to essentially default to the capital asset approach, notwithstanding that there was evidence to support an earnings approach.

[69] The respondents submit that the judge correctly identified and applied the proper test for assessing lost future earning capacity. They say that the judge fairly determined that, on the evidence before her, Dr. Sharma's projections of what his patient load would have grown to absent the Accident were not borne out, hence his projected future earnings losses were entirely speculative. In the circumstances, it was appropriate for the judge to employ the capital asset approach to assessing Dr. Sharma's future loss damages.

[70] In my view, it was open to the judge to reject the opinions of both experts, particularly the projections provided by Mr. Sturgess. Her statement (at para. 142)

that she is unable to find that Dr. Sharma's practice would have grown to the size he projected is a finding of fact based upon her assessment of the evidence. Dr. Sharma has not demonstrated that she committed a palpable and overriding error in making that finding.

[71] I would add that, while not addressed by the judge, there are two other significant flaws in the approach advanced by Mr. Sturgess. First, he again takes the loss found for 2021 of $116,000 and projects it to continue essentially unchanged into the future. However, the judge found that Dr. Sharma had not proven a loss in 2021, a finding that has not been disturbed on appeal. Thus, the 2021 figure cannot properly provide the foundation for the future loss assessment. Further, that amount is comprised largely of additional locum fees ($60,029) and lost retail sales ($52,663), yet there is nothing in the evidence that would support the assumption that those figures will remain static over the next 25–30 years.

[72] Second, the notion of a static ongoing loss is inconsistent with the pre-trial history of Dr. Sharma's business. In his report, Mr. Sturgess, relying on the income statements from Dr. Sharma's optometric corporation, charts a steady increase in revenues and earnings from the date of the Accident through 2021. For example, revenues were $144,822 in 2016 but climbed to $1,478,978 in 2021. Total pre-tax earnings in those years were $90,588 and $185,705 respectively.

[73] These factors reinforce the judge's finding that Dr. Sharma's claim, based upon Mr. Sturgess' projections, is wholly "optimistic and speculative" (at para. 142).

[74] I note that Dr. Sharma did not address specifically, in his factum or oral argument, the claim for loss of value in his business, apart from the general submission that the judge failed to properly address Dr. Sharma's future prospects in light of the Accident. Nor did the judge address this aspect of the claim in her reasons. However, given that it comprised a significant component of Dr. Sharma's future loss claim at trial, I will address it here.

[75] In my view, the claim has no foundation in the evidence and accordingly, the judge did not err in declining to award damages for that alleged loss. In his final submission, Dr. Sharma relied on evidence from Mr. Tidball that an optometry practice can be sold for a price based on a three to seven times multiplier of the annual profit. Dr. Sharma applied the mid point of that range, a five times multiplier, to his gross profits for 2021, as determined by Mr. Sturgess, of $537,208, resulting in a loss in the value of the business of approximately $3 million.

[76] The flaws in this analysis were accurately summarized by the defendants in their final oral submission:

> There's no expert evidence with respect to the valuation of a business. There's no expert evidence with respect to how to value it. When Mr. Tidball was asked on his cross-examination he was asked about generally speaking. And so he said the three to seven times profitability, but he also raised other factors. There's other factors to consider. There's location. There's competition. He talked about the big-box stores and suggested there's many factors other than just a multiple of profit in order to determine what the value of a business was. And if the plaintiff wants to advance such a claim, I would suggest it was incumbent upon them to put forward some expert evidence so that Your Justice could properly look at that to say well, what's the value of this business in order to come to that valuation.

[77] The gaps in the evidence identified by the defendants are magnified by the fact that there was no evidence that Dr. Sharma has a present intention to sell his business. Rather, as reflected in his future income loss claim, he expects to continue in practice until age 60 or 70. Thus any sale would not occur until at least 25 years into the future. Any attempt now to assess what Dr. Sharma's business might look like, how the optometric profession might be structured and what the prevailing market conditions might be at that time — all factors that would impact the value of the business — is nothing more than pure speculation.

[78] For all of these reasons, it is my view that the judge did not err in applying a capital asset approach to assessing Dr. Sharma's future loss claim. However, I do agree with Dr. Sharma that the judge did not engage fully in the third step of the *Rab* test. Under that step, having already found a real and substantial possibility that Dr. Sharma's injuries would result in a future pecuniary loss, she was required to

assess the value of that future loss. While she declined to value the loss based on Mr. Sturgess' projections, she did not clearly identify an alternative basis for doing so. She said:

> [147] I consider that while the plaintiff may continue to experience the pain and discomfort brought about by the repetitive nature of his job, and he may need to retire early as a result of increasing pain caused by his Accident-related injuries. On this point, I note the plaintiff may have experienced physical pain in the future even without the Accident, related to pre-existing disc degeneration in his back, and repetitive nature of his work.
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> [148] Based on this analysis and using the capital asset approach, I award the plaintiff $285,000, which represents three years worth of earnings at an amount of $95,000 per year, which is the equivalent of his total wages in 2019.

[79] Respectfully, there are problems with the judge's analysis. For one thing, she again suggests that Dr. Sharma's pre-existing disc degeneration may have become symptomatic in the future regardless of the Accident yet, as discussed above, that is not supported in the evidence. More significantly, the judge does not appear to consider the medical evidence, particularly the opinion of Dr. Koo, that Dr. Sharma likely has a permanent disability precluding him from working full time as an optometrist. At the time of trial, consistent with Dr. Koo's opinion, Dr. Sharma was seeing patients four days per week.

[80] That said, given the frailties in Dr. Sharma's evidence that I have alluded to, I am not satisfied that the award granted by the judge was improper. Rather, it is my view that the award can be maintained on the evidence in the record: *Healey v. Mault*, 2024 BCCA 100 at para. 56; *Tigas v. Close*, 2024 BCCA 223 at para. 47.

[81] The future event giving rise to the expected loss is Dr. Sharma's ongoing chronic pain in his right neck, shoulder and arms. Again, Dr. Koo opines that his injuries will limit Dr. Sharma to part time work as an optometrist. In giving this opinion, I take Dr. Koo to be referring to Dr. Sharma's clinical practice dealing directly with patients. However, Dr. Sharma does not derive income solely from patient fees. Beginning in 2019, he diversified his business by purchasing his parents' retail business and then in 2020 he started an online sales business.

According to Mr. Sturgess, as reported to him by Dr. Sharma, the online business generated revenues of $202,304 in 2020 and $884,638 in 2021.

[82] This diversification has permitted Dr. Sharma to significantly grow the revenues within his optometric corporation, and his related earnings, since 2016, the year the Accident occurred. As set out above at para. 72, revenues grew from $144,822 in 2016 to $1,478,978 in 2021, with pre-tax earnings growing from $95,097 to $185,705 in the same period. Of particular note, in 2020 when there was a drop in patient visits due to the COVID-19 pandemic, revenues in the optometric corporation grew to $776,837 from $512,124 the previous year. Also of note, in 2021, Dr. Sharma personally saw the fewest number of patients since 2013, the year he commenced practice, yet 2021 was his most successful year (for which financial information was available) in terms of both total revenues and earnings. These figures are consistent with Mr. Sturgess' observation in his report that the steady increase in revenues in the period leading up to 2021 arises primarily from retail sales and online sales.

[83] This increase in revenues and earnings since the date of the Accident might suggest that Dr. Sharma has not in fact suffered any losses, at least after 2018, resulting from the Accident. However, Dr. Sharma claims that a portion of his loss is comprised of fees he has to pay to locums to see patients that he would otherwise see and lost retails sales because he generates more sales than the locums. As discussed above at para. 71, the loss found by Mr. Sturgess for 2021, and projected forward, of $116,000 included $60,029 in locum fees and $52,663 in lost retail sales.

[84] Again, the projected loss in 2021 was not established and, as I noted, the evidence in any event did not establish that the losses claimed by Dr. Sharma in respect of additional locum fees and retail sales would continue into the future. That said, there was evidence that Dr. Sharma had to pay locums to provide services in his clinics and accordingly, it is reasonable to infer that if he was able to see more patients, those costs would be reduced and he would earn more. Similarly, there was evidence to suggest that Dr. Sharma was able to generate more retail sales

than were the locums. In his report, Mr. Sturgess attributes this to his understanding, likely gleaned from Dr. Sharma, that the locums have no incentive to sell contact lenses and eye glasses as they do not participate in the revenues from these products.

[85] On this basis, it can be inferred that Dr. Sharma's reduced ability to see patients resulting from his chronic injuries will continue to cause him loss into the future. However, the loss is likely to be modest given the manner in which he has successfully diversified his business and the steady increase in revenues and earnings that he has been able to generate. Viewed in this light, while the judge did not strictly adhere to the third step in the *Rab* test, I cannot find that her award of $285,000 (before the contingency deduction) is inordinately low or wholly erroneous. I therefore would not accede to this ground of appeal.

Conclusion

[86] I would allow the appeal to the extent of setting aside the 10% negative contingency found by the judge and by substituting an award of $55,000 for the cost of future care. I would dismiss the appeal relating to non-pecuniary damages and past and future loss of earning capacity.

"The Honourable Justice Skolrood"

I AGREE:

"The Honourable Madam Justice Newbury"

I AGREE:

"The Honourable Mr. Justice Harris"