COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Jurczak v. Mauro,*
2013 BCCA 507

Date: 20131120
Docket: CA040907

Between:

Paula Cheri Jurczak

Appellant
(Plaintiff)

And

Victor Mauro

Respondent
(Defendant)

Before: The Honourable Madam Justice Newbury
The Honourable Mr. Justice Frankel
The Honourable Madam Justice Stromberg-Stein

On appeal from: Supreme Court of British Columbia, April 19, 2013
(*Jurczak v. Mauro*, 2013 BCSC 658, Vancouver Registry No. M085184)

Oral Reasons for Judgment

Counsel for the Appellant:	T.J. Delaney and A.J. Ritchie
Counsel for the Respondent:	M.G. Murphy
Place and Date of Hearing:	Vancouver, British Columbia November 15, 2013
Place and Date of Judgment:	Vancouver, British Columbia November 20, 2013

Summary:

The appellant was injured in a car accident in 2006. She appealed the trial judge's damage award for loss of future earning capacity on the basis that the amount did not accord with his findings of fact regarding her ability to work.

Held: Appeal allowed. The trial judge found the appellant was not able to work as many hours as she would have but for the accident. He also found the economist's report that valued this loss to be credible and reliable. While it was open to the trial judge to calculate the damages based on the impairment of a capital asset approach (as opposed to a mathematical approach) he erred by failing to award an amount that reflected his factual findings. The award for loss of future earning capacity was so inordinately low that it amounted to a wholly erroneous estimate of the appellant's damages.

[1] STROMBERG-STEIN J.A.:

Overview

The respondent, Victor Mauro, rear-ended the car driven by the appellant, Paula Cheri Jurczak, on December 22, 2006. Six years later, following a trial, Ms. Jurczak was awarded $316,518.67 in damages. Included in this award is $120,000 for loss of future earning capacity.

[2] This appeal raises one issue: whether the award for loss of future earning capacity is so inordinately low that it amounts to a wholly erroneous estimate of Ms. Jurczak's damages.

[3] Ms. Jurczak was 37 years old at the time of the accident and was working as a child and family therapist. She worked about a quarter of her time at an agency and, for five years before the accident, she was trying to develop her own private practice. The most she had ever worked was a maximum of 23 hours per week. At the time of the accident, she received approximately $24 per hour for her agency work, and between $45 and $95 per hour in her own practice. At the time of the trial, she was the only person in B.C. certified in Development, Individual Differences, Relationship-based ("DIR") Floortime consulting, a relatively new therapy for treating autistic children. Because of this, she was in demand and chose to do no agency work. Her private practice earnings had increased to between $125 and $150 per hour.

[4] The trial judge assessed Ms. Jurczak's past wage loss up to the time of trial at $110,000, which represented the midpoint between the economist's estimate that she would have earned $43,061 working only at the agency and $176,863 working only in private practice, based on the assumption that Ms. Jurczak would work 23 hours per week. The trial judge rejected Ms. Jurczak's submission that she wished to work 30 hours per week and would have but for the accident.

[5] The trial judge applied this finding of fact - that Ms. Jurczak intended to work 23 hours per week - to his analysis of her claim for loss of future earning capacity. He found that her injuries impaired her ability to see clients for more than 15 hours per week, given the strenuous nature of her practice. He also found that she would earn less if she pursued less physically demanding work, as her DIR Floortime practice was in high demand. He considered the economist's estimate that Ms. Jurczak's loss would be $167,000 if she worked exclusively for an agency and $755,000 if she worked exclusively in private practice. However, when quantifying this loss, the trial judge applied a different methodology than he did for her past wage loss. He decided the mathematical approach was not appropriate for determining her loss of future earning capacity and quantified Ms. Jurczak's loss at $120,000.

[6] The issue on this appeal is whether Ms. Jurczak can establish that the trial judge's award for loss of future earning capacity is so inordinately low that it is an erroneous estimate of damages. For the reasons below, I find she has met this burden. The judge's findings of fact support a significantly higher award. In many cases, predicting the future may require a difficult, case-specific assessment. In this case, Ms. Jurczak's loss is relatively straightforward. The trial judge's determination of her loss does not reflect his findings of fact and I would therefore allow this appeal.

Issues on Appeal

[7] Ms. Jurczak appeals the trial judge's award for her loss of earning capacity on two grounds:

1. The assessment of loss of future earning capacity was so inordinately low as to amount to a wholly erroneous estimate; and

2. The award for loss of earning capacity should not be net of taxes.

[8] With respect to the second ground of appeal, both parties agree the trial judge erred in making the award for loss of earning capacity net of taxes. Section 98 of the *Insurance (Vehicle) Act*, R.S.B.C. 1996, c. 231, which limits recovery to net income, only applies to an award for past loss. Absent this error, Ms. Jurczak's award would have been roughly $160,000.

[9] The appeal concerns damages for loss of future earning capacity and whether an award for $160,000 is wholly erroneous. Ms. Jurczak agrees the trial judge did not overlook or misapprehend the evidence. She is not challenging any of the trial judge's findings of fact. She argues however, even on the trial judge's assessment of the evidence, the award for loss of future earning capacity is so inordinately low as to be a wholly erroneous estimate.

[10] There appears to be two parts to Ms. Jurczak's argument: 1. The trial judge focused on her work pattern and intentions before the accident rather than how the accident affected her capacity; and 2. Had the trial judge applied the same technique he used to determine her past income loss, he would have awarded at minimum $460,000 (which is the midpoint between the economist's estimates) or the maximum loss, calculated to be approximately $1,415,000 (based on the assumption she would work 30 hours per week). She submits fair compensation would be around $800,000.

[11] The respondent submits the appeal should be dismissed. The respondent argues a court is required to consider the circumstances of a particular case when determining an appropriate award: *Gregory v. Insurance Corp. of British Columbia*, 2011 BCCA 144; *Dhillon (Guardian ad litem of) v. Mischki*, 2000 BCCA 95. The assessment of a loss is a fact-intensive, case-specific inquiry, and the trial judge is in the best place to determine what is fair and reasonable: *Gregory*. Here, the trial judge was fully apprised of the evidence and the law, and based his decision on the relevant considerations with respect to Ms. Jurczak's circumstances.

[12] The respondent further submits that the trial judge was right to assess damages based on an impairment of a capital asset because the future in this case was not easily measurable. Ms. Jurczak upgraded her skills and embarked on a different course of employment following the accident. The respondent's position is that the trial judge is in the best position to determine an appropriate award and this Court should be reluctant to interfere.

Trial Judge's Findings

[13] Before specifically addressing Ms. Jurczak's arguments, I will review some of the trial judge's findings.

[14] With respect to Ms. Jurczak's reliability, the learned trial judge made the following comments:

> [74] The defendant argues that the Court should be concerned about the reliability of the plaintiff's evidence, due to a number of inconsistencies that appear when comparing her evidence to objective facts, and to comments that she made on earlier occasions:
>
> 1. With respect to the MVA:
>
> (a) The defendant disagreed with the plaintiff's account of how fast he was travelling at the time of impact.
>
> (b) She overstated to Dr. Shuckett the dollar value of the damage to her vehicle caused by the MVA.
>
> 2. With respect to the significance of other incidents which potentially may have caused injury:
>
> (a) The plaintiff failed to advise any of her doctors, treating and consulting, about the 2011 accident.
>
> (b) She told different doctors different things about whether or not she had symptoms from an incident in 2008 when she had been hit by a stroller. She reported to her family doctor, Dr. Parnes, that she developed neck stiffness and pain in her right knee after the stroller incident, but told Dr. Shuckett that she had not been injured at all.
>
> 3. She tends to understate the significance of her other health problems, including:
>
> (a) her kidney condition;
>
> (b) the extent of the symptoms reported to Dr. Beckman in
>
> 2000; and
>
> (c) the stroller incident of 2008.
>
> 4. She told different doctors different things at different times. For example:
>
> (a) There are inconsistencies when comparing her evidence to what she reported to various doctors concerning when she had been able to return to work on a full-time basis.
>
> (b) She told different doctors different things about whether or not she had symptoms from an incident in 2008 when she had been hit by a stroller.
>
> (c) She told different doctors different things about the extent to which she considered herself recovered at various times.
>
> (d) She told Dr. Shuckett that her neck pain was always there to some degree but advised Dr. Wade that it was intermittent.
>
> 5. She testified inconsistently about the need and/or possibility of re-training if she were to do a less strenuous type of work:
>
> (a) She testified that she would have to stop working if she were going to re-train, but also stated that she completed the DIR training while working at essentially her current level of 15 hours per week.
>
> (b) She testified that she would not be able to go back to agency work because she would need to obtain medical certification as to her fitness. However, other evidence suggests that such certification may be unnecessary.
>
> 6. Her self-description about her own abilities has internal consistencies in it:
>
> (a) The description of the person who is partially disabled:
>
> i. She requires three days to clean her bathroom, and takes numerous trips to

her car to unload a box of paper.

ii. She is in great pain, and has difficulty going out for dinner or a movie. She cannot walk more than 15 to 20 minutes, and then may be curled up on the bed due to muscle spasms.

(b) The description of the person with abilities consistent with being fully recovered:

i. She embarked upon and successfully completed an intense certification program, and in a short time has been recognized in that organization as a leader. She travels to conferences, gives presentations, networks extensively, and works exclusively with the most challenging special needs children.

ii. She is able to support a three-year-old upside-down for 30 minutes, conduct a bear hug for the bulk of a session, and play tag with a nine-year-old for 40 minutes.

7. There are inconsistencies with respect to whether, before the MVA, she had intended to eventually stop working part-time at agencies and instead work full-time in private practice.

8. She testified that she moved into her parents' home to save money to purchase her own place and that things are tight financially, yet her income tax records clearly show that she is earning much more than she was prior to the MVA.

[75] I am satisfied that the plaintiff has not deliberately attempted to mislead me with respect to any of the foregoing. I am satisfied that she has attempted to tell the truth. Having said that, I am satisfied that there are a number of inconsistencies, some of which are noted above, which do have a bearing on her reliability. I am also satisfied that most of those inconsistencies are easily and innocently explainable by reference to the context in which she was speaking. When she said various things at various times to various doctors about the pain she was having, the difficulties it was causing her, and the extent to which she felt recovered, I am satisfied that each of those comments was true when she was speaking them. This is consistent with the evidence that her condition varied, that it continues to vary, and that she feels more pain and has more difficulties some days over others. I accept that.

[76] The issue that causes the greatest difficulty is her failure to report the 2011 accident to any of her doctors. This is of concern for several reasons, including:

1. her symptoms appear to increase in the several months following the accident; and

2. to what extent would the opinions of the doctors, especially Drs. Shuckett and Wade, be affected if they had known about this accident?

[77] The plaintiff argues that the only evidence about injuries from the 2011 accident is her evidence. She testified that she was not injured at all. However, in that regard, I am satisfied that the increase in her symptoms after that date is circumstantial evidence from which it can be inferred that she did suffer some injuries in that accident, and I consider that fact in assessing her damages.

[78] However, even that inference allows me to conclude no more than that those injuries created nothing more than a temporary aggravation of the injuries which she had already suffered in the subject MVA. I am satisfied of this because it is consistent with the plaintiff's failure to report the 2011 accident to any doctors. In other words, I am satisfied that if she were seriously injured, she would have sought medical attention.

[15] The trial judge accepted Ms. Jurczak generally told the truth to the best of her ability. He did not believe she was exaggerating the extent of her injuries. However, he found there were inconsistencies in her evidence and was troubled by the fact that she did not tell her doctors she was involved in another car accident in 2011. While the trial judge accepted that the 2011 accident did not result in serious injury, it did

likely increase her symptoms, although temporarily.

[16] The trial judge relied on his findings under the heading “Past Wage Loss” in considering loss of earning capacity. His findings in support of a past wage loss were as follows:

> [120] I make the following findings of fact:
>
> 1. Prior to the MVA:
>
> (a) Between one-quarter and one-half of the total of the plaintiff’s hours worked were self-employed hours; the rest were salaried agency hours.
>
> (b) It was not the plaintiff’s intention to subsequently work full-time in self-employment.
>
> (c) It was not the plaintiff’s intention to work 30 hours per week in the future.
>
> (d) It was the plaintiff’s intention to continue working part-time doing agency work, and part-time doing self-employed billable work, in the same proportions as before the MVA, to a maximum total of 23 hours per week.
>
> (e) It was the plaintiff’s intention to change the nature of her private practice to include primarily DIR Floortime consulting clients.
>
> 2. Mr. Turnbull’s method of calculating the average number of hours worked each week is the preferred method, rather than relying upon the notes of Dr. Parnes with respect to what the plaintiff told her, or upon the plaintiff’s evidence, or the defendant’s arguments.
>
> 3. I am satisfied that the various assumptions, conditions and contingencies that Mr. Turnbull had regard to in preparing his report and forming his opinions were appropriate in the circumstances.
>
> 4. Prior to the MVA, the plaintiff was being paid approximately $24 an hour working for agencies. She was charging between $45 to $95 an hour in private practice. Since the MVA, she charges between $125 and $150 per hour in private practice. Mr. Turnbull has made minor assumptions increasing all of those figures to represent likely increases consistent with inflation and general labour force increases. I am satisfied that those assumptions are appropriate and accurate and within his expertise.
>
> 5. I am satisfied that the numbers of hours calculated by Mr. Turnbull in each of the years were hours for which she received direct payment (either as an employee or on a self-employed basis) and that unpaid administrative hours that the plaintiff filled were in addition to the hours calculated by Mr. Turnbull.
>
> [121] As a result of her injuries in the MVA, the plaintiff has been unable to work to her intended maximum of 23 hours per week.
>
> [122] The plaintiff’s choice to complete the courses for her DIR certificate after the MVA was an unusual one. This is because DIR Floortime work is far more strenuous than ordinary family child therapy whether in private practice or working for an agency. It is also far more remunerative.
>
> [123] The defendant is not entitled to benefit from the fact that the plaintiff has consistently earned more income since the MVA than prior to it. The reason for this occurrence is because she trained to do much higher paying work, and she has succeeded at it. If she had decided to do this, with no indication of a prior intention to do so, after the MVA, I would come to a different conclusion. However, it is clear from the evidence that it was always her intention to become a DIR Floortime consultant - she took the introductory courses in 2004. The fact that she has followed through with that to her financial benefit is not something that the defendant can rely on to deny that she has a wage loss.
>
> [124] The loss arises from the fact that, if not for the accident, she would have been able to work more hours at this higher paying work, and it was always her intention to do so. It was the inability to

work those additional hours at that higher paying rate which forms her past wage loss.

[125] On the basis of Mr. Turnbull's opinions, if she had continued to work full-time doing only agency work, her net income loss would be $43,061; on a full-time self-employment only basis, it would have been $176,863. The plaintiff's actual loss is somewhere between those two figures.

[126] Considering all of the foregoing, I am satisfied that the plaintiff's past wage loss to January 28, 2013, is $110,000 (net of taxes).

[Emphasis added.]

[17] In considering loss of earning capacity, the learned trial judge commented that he was relying on the findings noted above and additionally:

[143] I also find that:

1. Prior to the MVA, the plaintiff's intention was to work into the future at a combination of employment and self-employment hours in the same proportions as before the MVA and to a maximum of 23 hours per week.

2 The plaintiff would have had enough clients to fill the number of self-employed hours that she intended to work.

3. If the plaintiff did re-train to do less physically demanding work, she would earn significantly less than she is now earning.

4. As a result of the injuries suffered in the MVA, the plaintiff will continue to be unable in the future to work to her intended maximum of 23 hours per week.

…

[145] I have previously noted that I accept the opinion of Dr. Shuckett over that of Dr. Wade with respect to the unlikelihood of the plaintiff's condition improving in the future.

[146] I am satisfied that the plaintiff has suffered a permanent impairment as a result of the MVA and that there is a real and substantial possibility that she will suffer an actual loss as a result of the MVA.

[147] I am also satisfied that the amount of that loss will be affected by a number of contingent factors, including the following:

1. There is some possibility that the plaintiff's condition will improve, although this is not likely. There is also some possibility that her condition will deteriorate, although based on the evidence, this is also not likely.

2. There is some possibility, although it is unlikely, that the plaintiff's condition might improve if she pursues retraining and/or rehabilitation. On the other hand, there is also some possibility that, if the foregoing is pursued, she will have to take time off work, will suffer a loss of income as a result, and may never earn an amount as great as she is now earning.

[148] The evidence does not lead me to conclude that the plaintiff's pre-existing kidney and posture issues will cause her to suffer any wage loss in the future. Consequently, the evidence of those conditions plays no role in this determination.

[149] I am satisfied that the correct approach is not a mathematical one.

[150] Rather, the appropriate approach is to consider that the plaintiff's loss of earning capacity arises from her being less marketable as a result of her injuries. That loss of earning capacity is a loss of a capital asset and it is that loss that she is entitled to be compensated for.

[151] In all the circumstances and considering all of the foregoing, I am satisfied that the plaintiff's

> loss of a capital asset is properly valued at $120,000 (net of taxes). I award that amount for her loss of earning capacity.
>
> [Emphasis added.]

[18] The trial judge accepted Ms. Jurczak was injured in the accident. He accepted the evidence of Ms. Jurczak's doctor, who diagnosed her as having myofacial pain syndrome and thoracic outlet syndrome. He accepted the doctor's opinion that she had probably reached her maximum improvement, which was a 70% recovery. He rejected her evidence that she had always intended to work 30 hours and only in private practice. The trial judge found as a fact that Ms. Jurczak would only have worked a combination of agency work and private practice to a maximum of 23 hours per week, but that as a result of her injuries she was able to work only 15 hours per week. This finding of a loss of eight hours a week formed the basis for her claim to past wage loss. The trial judge found her services were in demand and she would have had sufficient clients to fill 23 hours of self-employed work.

[19] The trial judge held the respondent could not benefit from the fact Ms. Jurczak earned more money after the accident, as she had always intended to become a DIR Floortime consultant.

[20] The trial judge recognized Ms. Jurczak's loss of capacity due to her injuries caused by the motor vehicle accident was her inability to work 23 hours per week.

[21] Notwithstanding these findings and his general acceptance of the economist's report calculating the present value of the loss of eight hours per week over her future working life, the trial judge valued Ms. Jurczak's loss of capacity at $120,000 (or $160,000 when grossed up).

Analysis

Standard of Review

[22] Appellate review of damage awards begins with the question: "under what circumstances can the trial judge's award for loss of future earning capacity be altered by this court?": *Parypa v. Wickware*, 1999 BCCA 88 at para. 60. Quoting the Supreme Court of Canada in *Woelk et al. v. Halvorson*, [1980] 2 S.C.R. 430 at 435-436, the Court cited the following principles on the standard of review of a damage award:

> It is well settled that a Court of Appeal should not alter a damage award made at trial merely because, on its view of the evidence, it would have come to a different conclusion. It is only where a Court of Appeal comes to the conclusion that there was no evidence upon which a trial judge could have reached this conclusion, or where he proceeded upon a mistaken or wrong principle, or where the result reached at the trial was wholly erroneous, that a Court of Appeal is entitled to intervene.

[23] The onus is on Ms. Jurczak to demonstrate that the trial judge erred in law or that the amount awarded was "so inordinately low ... that it must be a wholly erroneous estimate of the damage": *Nance v. British Columbia Electric R. Co.,* [1951] 3 D.L.R. 705 (P.C.).

Focus on Pre-accident Intentions Rather than Capacity

[24] The first of Ms. Jurczak's two arguments that the award for her loss of future earning capacity is "inordinately low" is that the trial judge erred by focusing on her work pattern and intentions before the accident, rather than on her capacity. As she notes, damages for loss of future earning capacity does not compensate projected future earnings, but the capacity to earn. In other words, it compensates for the loss or impairment of a capital asset: *Rosvold v. Dunlop*, 2001 BCCA 1.

[25] Ms. Jurczak argues the trial judge relied on estimates that assumed she would have been underemployed, working only 23 hours a week (instead of a conventional 35-40 hours per week). Ms. Jurczak may have intended before the accident to work 23 hours per week, but this does not mean that she would have continued to do so for the remainder of her working life. Ms. Jurczak had only just started her private practice about five years before the accident. It was clear by 2010, when demand for her services had increased, that she could earn significantly more income if she were physically able. She continued to develop her training while building her practice both before and after the accident. Moreover, the trial judge found that Ms. Jurczak would have been able to work more hours but for the accident. She submits that, taking these contingencies into account, the award should have fallen in the $755,000 to $1,415,000 range.

[26] A review of the trial judge's reasons demonstrates he was very much alive to how the accident affected Ms. Jurczak's capacity to work. Ms. Jurczak points out that the trial judge agreed she should be compensated for her inability to work more hours as a result of her injuries, but then he did not explain how he arrived at the valuation of that loss as being $120,000. I will turn to that issue.

Method of Calculation

[27] Ms. Jurczak submits that the award for loss of future earning capacity should have some relationship to the award for past income loss: *Heppner v. Schmand* (1998), 112 B.C.A.C. 265, 82 A.C.W.S. (3d) 901 (B.C.C.A.). The trial judge assessed Ms. Jurczak's past loss of earnings at $110,000, being the midpoint between the economist's estimates her of earnings of $43,000 for agency work and $176,000 for private practice, representing past wage loss from the date of the accident to the date of trial, a period of six years.

[28] The trial judge did not adopt the same method for calculating her loss of future earning capacity, which the economist indicated was $167,000 for agency work and $755,000 for work in private practice. Instead of taking the midpoint, $460,000, he awarded $120,000. This was only $10,000 more than the award for six years of past lost earnings. The trial judge did not indicate how he reached the amount of $120,000 and it is not clear on the record where that figure comes from. Perhaps it was from the method of calculation used in *Brown v. Golaiy* (1985), 26 B.C.L.R. (3d) 353 (B.C.S.C.), which determined an appropriate award for loss of earning capacity was one year's salary, but it is not clear from his reasons.

[29] Noteworthy is a comment from Madam Justice Garson on the sufficiency of reasons in the context of a damage award for loss of future earning capacity in *Gregory*, at para. 16: "[a] judge's reasons must be adequate to justify and explain the result, but an appeal court cannot intervene merely because it believes the trial judge did a poor job expressing herself." In this case, we are left to speculate as to how the trial judge assessed Ms. Jurczak's loss of capacity claim. Implicit in his reasons is a rejection of the economist's

assessment of the loss; however, he does not provide an explanation for the basis of his assessment of the loss.

[30] One way of assessing loss of future earning capacity involves a consideration of a multiplier of annual income. The approach is resorted to where the loss is not easily measurable: *Perren v. Lalari*, 2010 BCCA 140. Regardless of the approach, “mere speculation of future loss of earning capacity” is insufficient to justify damages, and “[a] plaintiff must always prove… that there is a real and substantial possibility of a future event leading to an income loss”: *Perren* at paras. 31, 32. In any event, adjustments should be made to reflect contingencies that might arise over the course of the plaintiff’s working life.

[31] The Supreme Court of Canada in *Athey v. Leonati,* [1996] 3 S.C.R. 458, made the following remarks regarding hypothetical events and the burden on a plaintiff to establish loss:

> [27] Hypothetical events (such as how the plaintiff's life would have proceeded without the tortious injury) or future events need not be proven on a balance of probabilities. Instead, they are simply given weight according to their relative likelihood… A future or hypothetical possibility will be taken into consideration as long as it is a real and substantial possibility and not mere speculation. [Citations omitted.]

[32] In this case Ms. Jurczak has proven her loss and the loss is easily measurable. As indicated above, the trial judge held:

> [146] I am satisfied that the plaintiff has suffered a permanent impairment as a result of the MVA and that there is a real and substantial possibility that she will suffer an actual loss as a result of the MVA.
>
> [147] I am also satisfied that the amount of that loss will be affected by a number of contingent factors, including the following:
>
> 1. There is some possibility that the plaintiff’s condition will improve, although this is not likely. There is also some possibility that her condition will deteriorate, although based on the evidence, this is also not likely.
>
> 2. There is some possibility, although it is unlikely, that the plaintiff’s condition might improve if she pursues retraining and/or rehabilitation. On the other hand, there is also some possibility that, if the foregoing is pursued, she will have to take time off work, will suffer a loss of income as a result, and may never earn an amount as great as she is now earning.
>
> …
>
> [149] I am satisfied that the correct approach is not a mathematical one.
>
> [150] Rather, the appropriate approach is to consider that the plaintiff’s loss of earning capacity arises from her being less marketable as a result of her injuries. That loss of earning capacity is a loss of a capital asset and it is that loss that she is entitled to be compensated for.

[33] The trial judge did not err by rejecting a purely mathematical approach. However, his assessment of the impairment of the capital asset must also reflect his findings of fact regarding Ms. Jurczak’s impaired ability to work into the future.

[34] When determining whether there should be damages for loss of future earning capacity, the court is required to look into the future, which cannot be known with any certainty. Mr. Justice Finch (as he then was)

provided some guidance to help determine what factors courts ought to be considered: *Brown v. Golaiy* at para. 8:

> [1] whether the plaintiff has been rendered less capable overall from earning income from all types of employment;
>
> [2] whether the plaintiff is less marketable or attractive as an employee to potential employers;
>
> [3] whether the plaintiff has lost the ability to take advantage of all job opportunities which might otherwise have been open to him, had he not been injured; and
>
> [4] whether the plaintiff is less valuable to himself as a person capable of earning income in a competitive labour market.

[35] Quantifying a loss may be aided by some mathematical calculation, but there is no particular formula. As stated in *Rosvold v. Dunlop,* 2001 BCCA 1:

> [8] The most basic of those principles is that a plaintiff is entitled to be put into the position he would have been in but for the accident so far as money can do that. An award for loss of earning capacity is based on the recognition that a plaintiff's capacity to earn income is an asset which has been taken away. Where a plaintiff's permanent injury limits him in his capacity to perform certain activities and consequently impairs his income earning capacity, he is entitled to compensation. What is being compensated is not lost projected future earnings but the loss or impairment of earning capacity as a capital asset. In some cases, projections from past earnings may be a useful factor to consider in valuing the loss but past earnings are not the only factor to consider.
>
> ...
>
> [11] The task of the court is to assess damages, not to calculate them according to some mathematical formula. Once impairment of a plaintiff's earning capacity as a capital asset has been established, that impairment must be valued. The valuation may involve a comparison of the likely future of the plaintiff if the accident had not happened with the plaintiff's likely future after the accident has happened. As a starting point, a trial judge may determine the present value of the difference between the amounts earned under those two scenarios. But if this is done, it is not to be the end of the inquiry. The overall fairness and reasonableness of the award must be considered taking into account all the evidence.
>
> ...
>
> [18] The assessment of damages is a matter of judgment, not calculation. ...
>
> [Emphasis added; citations omitted.]

[36] This process is “an assessment rather than a calculation” and “many different contingencies must be reflected in such an award”: *Barnes v. Richardson*, 2010 BCCA 116 at para. 18. “Ultimately, the court must base its decision on what is reasonable in all of the circumstances. Projections, calculations and formulas are only useful to the extent that they help determine what is fair and reasonable”: *Parypa v. Wickware*, *supra*, at para. 70.

[37] With that said, if there are mathematical aids that may be of some assistance, the court should start its analysis by considering them. For example, in *Henry v. Zenith* (1993), 31 B.C.A.C. 223 at paras. 44-48, 82 B.C.L.R. (2d) 186 (C.A.), this Court held that a trial judge’s failure to consider an economist’s projections of a plaintiff’s lost future earning capacity contributed to the judge committing an error in principle, which “resulted

in a wholly erroneous estimate of the damages".

[38] In cases where the future is hard to predict, a global approach to assessing the loss of future earning capacity is preferable. However, in this case, given the trial judge's findings of fact, the future is not hard to predict. Ms. Jurczak intended to become a DIR consultant prior to her injuries and because of those injuries she can only work 15 hours per week. The trial judge found as fact that if she was physically able to work 23 hours per week, there was sufficient demand for her skills that she would be able to bill for those hours.

[39] Additionally, the award for loss of future earning capacity is supposed to compensate Ms. Jurczak for the next 20 to 22 years but is only $10,000 higher than the award for past wage loss.

[40] In my view, there is a reversible error in the trial judge's assessment of future loss of capacity. The trial judge's award bears no correlation to the award for past income loss; nor does it accord with the trial judge's findings regarding the effect of her injuries on her future ability to work

Conclusion

[41] Ms. Jurczak does not dispute the trial judge's findings of fact. Rather, she maintains the trial judge offered no explanation as to why he departed so significantly from the findings in the economist's report, which he appeared to accept as credible and reliable. Her argument is premised on the assumption the trial judge pulled the figure of $120,000 out of thin air, without having regard to the economist's calculations.

[42] It is obvious from the trial judge's analysis and reasoning that he rejected a purely mathematical approach to calculate Ms. Jurczak's loss of a capital asset. Instead, it appears he followed the approach in *Brown v. Golaiy* and awarded Ms. Jurczak $120,000. While the award represents two to three times Ms. Jurczak's average earnings before the accident and almost double her annual earnings afterwards, the amount has no foundation in the evidence.

[43] The trial judge was entitled to reject a mathematical approach in the circumstances of this case. However, given his factual findings, in my view the award for loss of future earning capacity is so inordinately low as to amount to an error.

[44] Having regard to the award for loss of future earning capacity or $110,000 representing a 6 year loss, and considering Ms. Jurczak has about 20-22 years to age 65 and possible retirement, I would increase the award for loss of future earning capacity to $400,000.

[45] NEWBURY J.A.: I agree.

[46] FRANKEL J.A.: I agree.

[47] NEWBURY J.A.: The appeal is allowed and the award is amended accordingly.

"The Honourable Madam Justice Stromberg-Stein"