

CANADA / JUDGMENT

Baylis v. Laybolt

2022 BCCA 423

COURT

British Columbia Court of Appeal

DECIDED

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2022 BCCA 423 Baylis v. Laybolt

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

Baylis v. Laybolt,

2022 BCCA 423

Date: 20221213

Docket: CA47802

Between:

Todd Paul Baylis and Allied Power and Communications Ltd.

Appellants

(Defendants)

And

Eileen Ruth Laybolt

Respondent

(Plaintiff)

Before:

The Honourable Madam Justice Saunders

The Honourable Mr. Justice Groberman

The Honourable Mr. Justice Harris

On appeal from: An order of the Supreme Court of British Columbia, dated

September 13, 2021 (Laybolt v. Baylis, 2021 BCSC 1798,
Victoria Docket M184217).

Counsel for the Appellants:

R.C. Brun, K.C.

J.J.L. Brun, K.C.

Counsel for the Respondent:

D.D. McKnight

Place and Date of Hearing:

Vancouver, British Columbia

November 7, 2022

Place and Date of Judgment:

Vancouver, British Columbia

December 13, 2022

Written Reasons by:

The Honourable Mr. Justice Harris

Concurred in by:

The Honourable Madam Justice Saunders

The Honourable Mr. Justice Groberman

Summary:

This is an appeal of awards for past and future loss of income arising from a personal injury trial. The appellants contend the judge erred in failing to recognize that any loss of income was not caused by the accident, but by medical conditions unrelated to the accident. They say that, in any event, the award of damages for past loss of income is inordinately high, and that neither award properly factors in applicable contingencies. Held: Appeal dismissed. The judge did not fall into any legal errors. He reached conclusions of fact based on the evidence that led him to reject the defence theory of why the respondent reasonably chose to retire as a result of injuries suffered in the accident. His award of past wage loss is not inordinately high.

Reasons for Judgment of the Honourable Mr. Justice Harris:

Introduction

- [1] This is an appeal of a trial judgment awarding Eileen Laybolt damages for injuries arising from an accident in which she was struck by a load that fell from a truck driven by Todd Baylis. Mr. Baylis and Allied Power and Communication Ltd., the appellants in this appeal, admitted liability. The only awards for damages under appeal are for past loss of earnings and loss of future earning capacity.
- [2] At the heart of the appeal is the contention that the judge erred in law in awarding damages for past and future income loss when any lost earnings resulted from health conditions that were unrelated to the accident.
- [3] As I shall discuss, the issues on appeal are ultimately issues of fact. I am persuaded that there was an evidentiary foundation for the judge's assessment of damages in respect of both past wage loss and loss of future earning capacity.

Background

- [4] I will discuss the background in more detail in connection with my analysis of the alleged errors. For the moment, the following is sufficient to place the issues in context.
- [5] Ms. Laybolt was injured in a motor vehicle accident on November 26, 2016, when the load of a passing truck fell on her as she stood on the sidewalk.
- [6] The judge accepted that the accident caused a mild traumatic brain injury. She also suffered from neck, upper back or shoulder pain, and headaches.
- [7] Ms. Laybolt was 62 at the time of the accident, and 67 at the time of trial. She worked as a dental hygienist.
- [8] After the accident, she returned to her regular four-day work schedule on December 12, 2016. From May 1, 2017, she reduced her schedule to three days a week. It is not disputed on appeal that this reduction in hours was a result of the injuries from the accident.
- [9] Ms. Laybolt more or less maintained this schedule until stopping work on November 22, 2018. She stopped work because she received a cancer diagnosis and needed surgery and follow-up treatment. Although she expected to return to work on various dates, she suffered post-operative complications and required further treatment. Ultimately, she anticipated returning to work in September 2020, but in March 2020, she decided to retire.
- [10] The judge awarded \$72,326 for past wage loss. This award excluded lost wages during the time Ms. Laybolt was off work for her cancer treatment. It included, however, \$50,000 in respect of what appears to be the period after September 2020 (the planned return to work date), and the date of trial. Only this portion of the award is appealed.

- [11] The judge awarded \$175,680 for loss of future earning capacity. The judge found Ms. Laybolt's decision to retire in March 2020 was reasonable. The award was premised on Ms. Laybolt working until age 70, and factored in a contingency that, in light of her cancer, she would not work at the same frequency as before the accident. The judge deducted \$100,000 from an expert's present value of her future earnings until age 70 of \$275,680 (taking into account employment contingencies and average mortalities).

The Live Issues at Trial

- [12] In light of the appellants' position on appeal, it is important to identify the positions of the parties at trial.
- [13] At trial, the appellants advanced the argument that Ms. Laybolt had demonstrated that she was capable of working close to her usual hours for nearly two years before her cancer diagnosis. She then stopped work for treatment of her cancer, which was unrelated to the accident. The appellants contended at trial that her cancer treatment ended her career, not the car accident. The appellants argued that the car accident was never disabling, even in the acute phase of her injuries. The obstacles to her return to work did not arise from the accident, and there was no causal link between the accident and her failure to return to work in late 2020. The appellants buttressed this argument by noting that during Ms. Laybolt's time off work for cancer treatment, her soft tissue injuries and headaches were much improved, and were not a barrier to her returning to work. As a result, Ms. Laybolt had failed to prove any past wage loss after she started her cancer treatment, or any loss of future earning capacity attributable to the accident. As counsel said to the judge:

It's not the accident causing the end of her career it's -- it's the cancer and/or the lack of willingness to continue working.

Indeed, counsel went so far as to argue that the onus was on Ms. Laybolt to prove that the cancer had nothing to do with her decision to retire.

- [14] Ms. Laybolt, for her part, argued that her injuries caused or contributed to her decision to retire. By the time she decided to retire, she had come to appreciate how hard it had been to continue to work because of her injuries before her cancer diagnosis. She was concerned about the risks to her health if she returned to work once the issues arising from her cancer treatment had resolved, and was unsure whether as a result of headaches, pain, and some cognitive problems, she was really capable of going back. But for those issues, she would have returned to work once her cancer treatment issues had resolved, and would have likely worked longer than she originally planned to make up for income lost when she was undergoing her cancer treatments.
- [15] It is evident from the reasons that the judge understood the live issues and addressed them. First, the judge identified the need for the appropriate causal connection between the injury caused by the accident, and a loss of either past or future earning capacity. At para. 88 the judge noted:

A claim for past loss of earnings is for the loss of earning capacity or the loss of the value of the work that the plaintiff would have performed but was unable to perform because of the injury (Rowe v. Bobell Express Ltd., 2005 BCCA 141, at para. 30).

- [16] In the next paragraph, the judge quoted a text that identified the issue as assessing the loss of the value of the work the plaintiff would have done but for the accident, but now will be unable to do. The recognition of the importance of establishing the causal connection also runs through his analysis of the future loss claim.
- [17] I point this out here because the reasons reflect the critical question on which the parties joined issue: was there the necessary causal connection between the injuries caused by the accident and the decision not to return to work, or was that decision in fact caused by Ms. Laybolt's cancer? As the judge observed:
- [126] The defendants' position is that there should be no award for loss of future earning capacity as it is highly unlikely that, in the aftermath of her cancer diagnosis and treatment, the plaintiff would have continued to work three days per week until age 70. Also, and in any event, if her earning capacity has been diminished at all, it is the result of her cancer diagnosis and treatment. The defendants also say that any loss of earning capacity due to a head injury did not disable the plaintiff from her employment beyond the first two weeks.
- [127] I note at the outset that unfortunately, the defendants in this case took no alternative position with respect to this head of damages. The problem with this approach of course is that the court is left only with the plaintiff's argument on an issue that is factually and legally nuanced.
- [18] As I shall explain, the judge addressed the issue as joined. He made findings on this question that were open to him on the evidence. I am not persuaded that he fell into error. In short, the defence position was all or nothing. The decision to retire had nothing to do with the accident. She was, the defence argued, capable of returning to work, but if she could not, the sole reason for not doing so was the cancer diagnosis or her personal preferences.
- [19] In answering that question as posed, the judge either explicitly or implicitly rejected the defence position on the facts. He found that the accident injuries caused or contributed to a reasonable decision to retire, even though that decision was made at a time when she was still suffering from the side effects of her cancer treatment. Implicitly, the judge must be taken to have rejected the claim that the reason she retired was her cancer diagnosis, or that her cancer prevented her returning to work as planned on or about September 2020, or at all. This is a determination on the facts. As such, it is reviewable only if a palpable and overriding error can be identified. I do not think the findings turn on any errors of law.

The Errors Alleged

- [20] The appellants contend the judge erred:

1. in concluding the motor vehicle accident injuries sustained by Ms. Laybolt reasonably justified her decision to retire in March 2020, at a time when she was prevented from returning to employment as a consequence of non-accident-related health conditions;
2. in assessing an award for loss of future earning capacity to age 70, in the amount of \$175,680, in a wholly erroneous fashion that fails to take into account all of the evidence and applicable contingencies; and
3. in assessing past loss of income in the amount of \$50,000 for lost earnings, in the period between January 2020 and May 2021, when Ms. Laybolt was prevented from returning to her employment for all or most of that interval as a consequence of non-accident-related health conditions.

Ms. Laybolt's decision to retire

- [21] As will be apparent, I do not think the premise of the first alleged error, that Ms. Laybolt was prevented from returning to employment as a consequence of non-accident-related health conditions, is sound. This is the factual claim the judge rejected implicitly when he found that her decision not to return to work was reasonable given her accident-related injuries.
- [22] The judge was invited to find as a fact that Ms. Laybolt's decision to retire was unrelated to her injuries, and solely caused by her cancer. In accepting that Ms. Laybolt's accident-related injuries justified her decision to retire, the judge necessarily rejected the defendant's theory of the case. The judge found that the decision to retire resulted from the injuries suffered in the accident. It was not caused by her cancer. In my view, the judge must be taken to have rejected the assertion that her cancer prevented her returning to work in or about September 2020. The judge assessed the reasonableness of her decision to retire, made in March 2020, in the light of her accident-related injuries. This was a factual determination that was responsive to the live issue in the trial, and was open to the judge on the evidence.
- [23] The judge began his analysis of loss of earning capacity by referring to the defendant's position and the medical evidence:
- [94] Except for the first two weeks following the accident, the defendants say that the plaintiff was able to perform her duties four days a week for the first four and a half months after she returned to work and then three days a week until November 2018. In their submission, the plaintiff cannot now attempt to ascribe her post-November 2018 difficulties at work to the accident when she performed her work competently and reliably for more than two years following the accident.
- [95] Looking at the medical evidence, according to Dr. MacKean's May 2019 report, the plaintiff's injuries from the 2016 accident are, again, a whiplash-associated disorder involving the neck and upper back with post-concussion symptoms and post-traumatic headaches. In her May 21, 2019 report, Dr. MacKean recommended that she not go back to work following her

chemotherapy treatment because "[s]he will probably have increased neck and upper back pain and increased headache symptoms", even if she were to return on a part-time basis. At trial, Dr. MacKean confirmed that continuing to work would cause the plaintiff's pain symptoms to worsen.

- [96] In his July 2018 report, Dr. Cameron diagnosed the plaintiff as having sustained a mild traumatic brain injury with associated symptoms of anxiety, depression, headaches, as well as soft-tissue and musculoskeletal injuries due to sustaining whiplash at the time of the accident. He opined that "it is probable that she will remain permanently partially disabled because of her ongoing complaints and chronic pain present as a result of a soft tissue and musculoskeletal injuries that she sustained at the time of the accident, and associated post traumatic headaches.
- [24] At para. 102, the judge noted that Ms. Laybolt had intended to return to work in March 2020, but decided instead to retire, not out of medical necessity, but because working as a dental hygienist caused her pain and aggravated her injuries. The judge accepted that this was so. In connection with assessing past wage loss at para. 104, he found that her decision to retire was reasonable, and that but for the accident she would have returned to work, notwithstanding her cancer diagnosis, albeit on a reduced scale. While it is unclear what the judge's conclusions were on exactly when she would have returned to work, it is evident that he found both that she would have returned to work, but for the accident, and that her cancer did not prevent her from doing so. By the time she could have returned to work, in or about September 2020, the side effects of her cancer treatment were substantially resolved. This addresses the causation requirement, and amounts to a rejection of the defendant's position on the facts.
- [25] As part of the judge's assessment of Ms. Laybolt's pecuniary damage claim, he found these facts which are relevant to loss of future earning capacity:
- [112] In the subject claim, the plaintiff was 67 years old at trial. I have found above that her neck, upper back, or shoulder pain from the 2016 accident are, fortunately, no longer a concern and she has minimal problems with headaches. Dr. McKean recorded this and she also concluded there was a Grade II whiplash involving the neck and upper back (more on the left than the right) from the accident. Dr. Cameron concluded the plaintiff suffered a mild traumatic brain injury as a result of the 2016 accident. I have found above that he has exaggerated the issue of headaches in the plaintiff's case and, generally, there is limited medical evidence about the plaintiff's headaches. The plaintiff also describes problems with memory and concentration.
- [26] On a fair reading, the judge accepted that the plaintiff continued to suffer cognitive difficulties associated with her mild traumatic brain injuries. This is important because Ms. Laybolt also complained of what she called "chemo brain" which would undoubtedly have made her job more difficult. This problem had, however, on the evidence, resolved once Ms. Laybolt finished her treatment, and was not an impediment to a return to work in

September 2020. The same was true of some problems with her hands caused by the drugs she had been taking.

- [27] Returning to loss of future earning capacity, the judge accurately laid out the legal framework to assess them. He then focused on the evidence:
- [132] Turning now to the evidence, the plaintiff testified that the only occupation she has had during her adult life is as a dental hygienist. Prior to the accident she did not experience physical pain or discomfort while performing her work, nor did she require any assistance or accommodation. She said she loved her job including the patients themselves and the sense of satisfaction she got from seeing a patient improve their hygiene. She explained that she was never the subject of complaints or disciplinary action at work, nor of poor performance reviews. Before the accident she said her "general plan" was to retire at age 67 and would "maybe work on relief" if someone was needed on short notice.
- [133] After returning to work two weeks after the accident, she testified that working four days per week was "exhausting" and that she "wasn't coping well". She said she experienced neck and back pain as well as headaches, she more trouble with the computer and it took longer to do things. Unlike before the accident, she started to come in early and stay late so things were more organized for the start of the day and to complete things at the end of the day.
- [134] In cross-examination, she said that after the accident she "was working differently" than she was before. When asked about reducing her workweek from four days to three, she said that she loved her work before the accident but it became a "chore" to go to work. She said she managed to maintain her three-days-a-week schedule until her cancer surgery in November 2018 because she could "power" through the three days and then have four days off. She did not know how difficult that was until after her surgery.
- [135] When pressed in cross-examination about the impacts of the positional strain of working as a dental hygienist, the plaintiff responded that even though she received treatment for work-related pain before and after the accident, she would work even if she was in pain. She agreed that, once she ceased working, she noticed an improvement of symptoms like headaches and pain and she assumed this was from not working. When asked whether she would return to work if it was offered and she did not have cognitive problems or headaches, the plaintiff responded that "absolutely" she would and she emphasized that she missed her work, her patients and her colleagues.
- [28] Ms. Laybolt's evidence about how difficult she found her job after the accident, and the change from before, was corroborated by work colleagues. For example, her employer had never heard her complain of pain or headaches before the accident, nor had he seen her struggling with equipment. Others described her post-accident lack of energy, regular headaches, exhaustion, and memory and concentration problems.
- [29] The judge relied on the evidence that Ms. Laybolt would probably remain permanently partially disabled with respect to work capabilities as a result of the accident. Importantly:

- [142] Dr. MacKean recommended in her May 2019 report that the plaintiff not go back to work as a dental hygienist. She opined that the plaintiff "will probably have increased neck and upper back pain and increased headache symptoms if she did return to work as a dental hygienist, even on a part time basis". She also concluded that the plaintiff "is at the point of maximum medical improvement following injuries sustained in the motor vehicle accident that occurred on November 26, 2016".
- [143] In my view the evidence is that the plaintiff's decision to retire in March 2020 was not taken lightly. She had originally hoped to return to work in March 2018 following her surgery, but due to various complications that arose from the surgery and chemotherapy, she revised her plan to return to work in September 2019. She then developed issues with her hand as a result of her cancer medication and intended to return to work in March 2020.
- [30] After describing the meeting at which Ms. Laybolt explained her decision to retire, and her evidence about some further challenges she had when she attempted to clean her sons' teeth at the office, the judge concluded:
- [148] As above, she plaintiff does not have to prove that she retired out of necessity; she must show only that her decision to retire was a reasonable one (Riley, at para. 83). While medical evidence is not required to justify the reasonableness of that decision (Tannberg v. Hare, 2021 BCSC 30, at para. 135, citing Gill, at paras. 22, 26), here there is some evidence from Dr. MacKean to that effect. In all of the circumstances I have little difficulty in finding that the plaintiff's decision to retire early was reasonable.
- [149] In light of the evidence, I find the plaintiff has established that her accident-related injuries have impaired her capacity to earn income, that those injuries are likely to persist in the future if she were to resume her work as a dental hygienist and that there is a real and substantial possibility that she will suffer a loss of income as a result. I accept the plaintiff's evidence that, but for the 2016 accident, she would have continued to work as a dental hygienist until the age of 70. While the plaintiff may have had a tentative plan to retire at age 67 prior to the accident (and subsequent cancer diagnosis), it is clear that she flourished in her occupation, which brought her a sense of purpose and satisfaction. She also lost income due to cancer and associated treatments, which she says would have required her to work beyond age 67 in any event.
- [31] It is clear, in my view, that the judge found that the necessary casual connection existed between Ms. Laybolt's accident-related injuries and her decision to retire. The judge evidently rejected the defendant's argument that the sole reason she retired was because of her cancer diagnosis. The critical point is that the judge found that it was likely that her accident-related injuries would recur, as Dr. MacKean suggested, if she were to resume work. Dr. MacKean's evidence suggested Ms. Laybolt's symptoms would return if she resumed working, even though they were much ameliorated during the time she was not working. It will be recalled that Ms. Laybolt stoically pushed through pain, headaches, and exhaustion at considerable cost while she was working three days a week.

- [32] As I read the judgment, the judge relied on Dr. MacKean's opinion to conclude that the risk of accident-related deterioration on resuming work justified the decision to retire. The judge's assessment of reasonableness is, contrary to the appellants' submission, tied to the consequences of the accident injuries. It is not an assessment at large, unanchored in the consequences of the accident. It is not an assessment of reasonableness based on the cancer diagnosis. And, I reject the submission that a decision to retire can only be assessed for reasonableness if the injuries caused by the accident are the sole reason for retiring. The judge made a finding of fact that it was reasonable for Ms. Laybolt to decide to retire as a result of her accident injuries. That finding is entitled to deference.
- [33] I am also persuaded that it was open to the judge on the evidence to reject the defendant's contention that Ms. Laybolt's cancer diagnosis and treatment prevented her from returning to work. The physical and cognitive side effects of her treatment had largely dissipated by the time she had planned to return to work in September 2020. In any event, the judge was aware of the implications of her cancer treatment as it might affect her earnings because he discounted both her past and future income loss to reflect the contingency that her cancer would lead her to work less regularly than before. In handling the issue in this way, the judge weighed the extent to which her cancer would affect her ability to work. In treating it as a contingency, the judge was rejecting the defendant's contention that the cancer was a complete bar to a return to work.
- [34] In sum, in my view, the appeal on this ground is an attempt to reargue the case at trial. The complaint is that the judge got it wrong. The decision to retire was solely the result of the cancer diagnosis. The accident injuries did not prevent a return to work, and Ms. Laybolt should have given it a go. It was unreasonable of her not to do so. These are all propositions we must take the judge to have rejected on the evidence, as he was entitled to do.

Alleged failure to properly assess contingencies

- [35] I turn now to the second ground of appeal, that the judge erred in assessing an award for loss of future earning capacity to age 70, in the amount of \$175,680, in a fashion that fails to take into account all of the evidence and applicable contingencies.
- [36] The judge relied on an expert report that factored in only employment contingencies, average mortalities, and a contingency to adjust for Ms. Laybolt not working at the same frequency or capacity as before the accident as a result of her cancer diagnosis. The judge discounted the award by \$100,000 from \$275,680.
- [37] The appellants submit the judge erred in failing to make an allowance for the contingency that the assumptions upon which the award is based may prove to be wrong. In particular, the appellants submit the judge should have made a contingency to properly account for the possibility Ms. Laybolt would not work until she was 70, or that she would not return to work at all. The appellants refer to Ms. Laybolt's evidence that she had considered working to 67, or only to 65. They point out the possibility that other potential health restrictions could

become more problematic with age. They submit the judge erred in making no contingency deduction for the possibility that Ms. Laybolt would try to return to work one or two days a week; the evidence was clear, they argue, both that Ms. Laybolt would have been welcome to return to work at any frequency if she desired, and that she loved her job.

- [38] While it is true that the judge's analysis of other possible contingencies is arguably absent, I fail to see significant merit in this ground of appeal. The judge made a finding based on expert evidence that Ms. Laybolt would not be able to resume employment as a dental hygienist in the future: at para. 152. It not an error, but, rather, it is consistent with this finding to decline to make contingency adjustments for the possibility she returns to work.
- [39] Further, the judge was entitled, in my view, to set an age of 70 for assessment purposes. The evidence offers many reasons why Ms. Laybolt would have continued to work. She had lost income because of her cancer. Her job was an important and primary source of income. In short, she needed the money. Moreover, she loved her job, which gave her pride and satisfaction. Her pre-accident retirement plans were far from settled. It is not improbable that if her health stood up, she might have worked beyond age 70 at some level. There is ample evidence in the record to support the judge's conclusion.
- [40] Moreover, the award contemplates Ms. Laybolt working only for a further three years after trial. The need to be concerned about the importance of positive or negative contingencies is mitigated over such a short time. In any event, the contingency the judge applied, which is in excess of 35%, is, in my view, substantial. It is generous to the appellants. I can see no realistic basis to conclude that the result is unfair to them, or that the award is unreasonable. I would not accede to this ground of appeal.

Past loss of income

- [41] I turn to the final ground of appeal, that the judge erred in assessing past loss of income, in the amount of \$50,000, for lost earnings in the period between January 2020 and May 2021.
- [42] The appellants complain that the judge has failed to explain how he reached his conclusion and assessed the award which is, on any view of the evidence, inordinately high.
- [43] There is some force to this complaint. The judge offers little by way of explicit justification for the award and arguably plucks a number from the air. Having said that, I think it is possible to discern a foundation for the award in light of the evidence, the live issues at trial, and the judge's comments and findings more generally.
- [44] Ms. Laybolt's counsel conceded she could not work until September 2020 because of her cancer. This meant that a calculation of past wage loss offered by an expert had to be adjusted to account for the period Ms. Laybolt was not working because of her cancer treatment.

- [45] The judge concluded Ms. Laybolt would have earned \$50,000 from January 2020 to May 2021. It is not clear in his reasons how this number was calculated. I think, however, we should presume the judge made his assessment factoring in Ms. Laybolt's concession that she could not have returned to work before September 2020.
- [46] The judge referred to expert evidence that Ms. Laybolt would have earned \$70,491 in 2020, and \$31,390 in 2021 up until the date of the trial (totalling \$101,881). The expert evidence did not, however, expressly factor in a possible September 2020 return to work. The report assumed a March 2020 return to work. Necessarily, her potential income loss needed to be adjusted to recognize that Ms. Laybolt would not have returned to work before September.
- [47] The judge recognized the contingency that, as a result of her cancer diagnosis, Ms. Laybolt would not have been able to work at the same frequency as before, and she would have returned at a reduced level. He was satisfied, however, that, but for the accident, she would have returned to work as a dental hygienist, albeit on a reduced schedule. On this basis, he concluded she would have earned \$50,000.
- [48] Although I acknowledge the judge offers little by way of explanation, two points can be made.
- [49] First, the judge's analysis indicated he was alive to the September 2020 start date. At para. 92, he acknowledged Ms. Laybolt's assertion that, assuming she would have returned to work on September 1, 2020, and deducting any net earnings she actually earned until the date of trial (as well as the time lost from work in December 2016 as a result of the accident), her total claim for net loss of income was approximately \$105,000 (actually \$101,881). It is fair to infer that, in reducing the award for past loss wages from \$101,881 to \$50,000, he was factoring in a September return to work start date.
- [50] Second, as a benchmark, the parties appear to agree that the maximum wage loss from September 2020 to trial was approximately \$60,000. The effective reduction is, therefore, \$10,000 on \$60,000: a contingency reduction that is lower than that applied to the loss of future earning capacity. The judge was assessing a past wage loss rooted in a limited number of months immediately preceding trial. The award reflects a finding that the judge accepted that there was a substantial possibility that, assuming a September 2020 return date, Ms. Laybolt would not have succeeded in working her pre-accident hours because of her cancer. In the face of the evidence, the possible consequences of her cancer are, practically speaking, the predominant contingency leading to reduced hours in the months leading to trial. The work was there if she were able to do it. Many of the typical contingencies applicable to future events are not in play. A \$10,000 reduction relating to the past represents a contingency approaching 20% for that short period of time. The judge was in a privileged position to assess the various factors affecting her health and capacity to work. In my view, I cannot conclude that reducing the maximum possible award from \$60,000 to \$50,000 leads to an inordinately high award. In my view, the award is within a range reasonably open to the judge. I would not interfere with it.

Disposition

[51] I would dismiss the appeal.

"The Honourable Mr. Justice Harris"

I agree:

"The Honourable Madam Justice Saunders"

I agree:

"The Honourable Mr. Justice Groberman"

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