

CANADA / JUDGMENT

Charters v. Jordan

2024 BCCA 351

COURT

British Columbia Court of Appeal

DECIDED

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2024 BCCA 351 Charters v. Jordan

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

Charters v. Jordan,

2024 BCCA 351

Date: 20241017

Docket: CA49195

Between:

Jolene-Ann Charters

Appellant

(Plaintiff)

And

Gary Lewis Jordan and Phung Nhi Luong

Respondents

(Defendants)

Before:

The Honourable Madam Justice Fenlon

The Honourable Mr. Justice Abrioux

The Honourable Madam Justice Horsman

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

June 5, 2023 (Charters v. Jordan, 2023 BCSC 954, Vancouver Docket M200182).

Counsel for the Appellant:

D. Bradshaw

E. Lay

Counsel for the Respondents:

M.H. Wright

Place and Date of Hearing:

Vancouver, British Columbia

September 6, 2024

Place and Date of Judgment:

Vancouver, British Columbia

October 17, 2024

Dissenting Reasons by:

The Honourable Mr. Justice Abrioux

Written Reasons by:

The Honourable Madam Justice Horsman (Page 25, para. 97)

Concurred in by:

The Honourable Madam Justice Fenlon

Summary:

The appellant, who was 29 at the time of trial, was struck by the door of a parked car as she was riding her bicycle. Her injuries included a fractured right wrist. At the time of trial, the appellant continued to experience pain in her wrist, and she required accommodations in her employment as a server and a residential painter. The trial judge found that the appellant had reached maximum medical recovery within a few months of the accident. The trial judge concluded that the wrist injury had not affected the appellant's ability to earn an income, and he awarded no damages for future loss of earning capacity. The appellant says the judge made factual and legal errors in reaching this conclusion. Held: Appeal allowed.

Majority (per Justice Horsman, Justice Fenlon concurring): An award of \$80,000 for future loss of earning capacity is substituted for the judge's award of \$0. The judge erred in failing to address the question of whether there was a real and substantial possibility of a future loss of income, which was a distinct question from whether the appellant had suffered an income loss by the time of trial. The fact that the appellant's symptoms were currently manageable did not answer

the question of whether they might cause some pecuniary loss over the remaining decades of the appellant's working life. The required analysis could fairly be done on the record and the trial judge's findings. There was no need to remit the matter to the trial court.

Dissent (per Justice Abrioux): No reviewable error has been established. The judge articulated and correctly applied the legal framework. While there were alternative conclusions to be drawn, his dismissal of the future loss of earning capacity claim was supported by the facts as he found them, and the inferences drawn from the facts he found were reasonable.

Reasons for Judgment of the Honourable Mr. Justice Abrioux:

Introduction

- [1] The appellant, Ms. Charters, was injured in a motor vehicle accident in which she was riding her bicycle. At the time of trial, the principal ongoing injury was to her right wrist. At trial, Ms. Charters was awarded non-pecuniary damages, damages for past loss of income earning capacity, damages for costs of future care, and special damages. She also advanced a claim for loss of future earning capacity, which the trial judge dismissed.
- [2] Ms. Charters argues that the trial judge's decision not to award damages for loss of future earning capacity warrants intervention by this Court because it is based upon a palpable and overriding error of fact as well as an error of law. Specifically, she says that having found the wrist injury might lead to a future loss of capacity, the judge committed a material error in that he forgot, ignored, and/or misconceived the evidence in concluding that Ms. Charters had not established a "real and substantial possibility" that this injury would lead to a future pecuniary loss.
- [3] For the reasons that follow, I would dismiss the appeal.

Background

- [4] On January 12, 2019, Jolene-Ann Charters was riding her bicycle in Vancouver when she was struck by the door of a parked car that opened in front of her. Ms. Charters was thrown forward, landing on her left side, left elbow, and right wrist. She was transported by ambulance to the hospital, where an X-ray confirmed a right wrist fracture. Approximately one week after the accident, she reported feeling pain and discomfort in her right hip. A few months later, in May 2019, she reported mild knee pain.
- [5] The respondents admitted liability for the accident.
- [6] Ms. Charters was 25 years old at the time of the accident, and 29 at the time of trial. She was active, engaging in a variety of outdoor activities and exercising regularly at the gym. Following the accident, she reported intermittent pain and limitations posed primarily by her wrist, but for the most part continued to engage in the same activities as she had prior to the accident.

- [7] Before the accident, Ms. Charters had a varied employment and educational history. She made several unsuccessful attempts to pursue post-secondary education, attending college from 2011 to 2013, one semester in 2015, and one semester in 2017. She worked during various periods of time as a server, landscaper, baker, care aide and painter.
- [8] At the time of the accident, Ms. Charters was working as a baker. She missed six weeks of work at the bakery because of the accident. Three weeks after returning to work, she left that position for reasons unrelated to the accident. She then worked as a server until early 2020, when she moved to Powell River to be closer to her father. At that time, she began to work as a personal care aide. In March 2021, Ms. Charters commenced work as a server to supplement her income from her job as a care aide. Shortly thereafter, this employment was terminated because her client was concerned that Ms. Charters might be exposed to COVID-19 while working as a server.
- [9] In April 2021, Ms. Charters started to work as a house painter with DK Painting. She worked in this position until November 2022, when the painting business shut down temporarily over the winter months. This work resumed in 2022. During the summer of 2022, Ms. Charters also worked as a server.
- [10] Ms. Charters testified that, as a result of her injuries, she experienced certain challenges in performing her duties as a server, care aide, and painter. Her primary issue was intermittent soreness and fatigue in her wrist, which caused her discomfort when carrying trays as a server and completing various physical tasks as a painter and care aide. When working as a painter, she was also fatigued to the point that she declined extra work opportunities.
- [11] Ms. Charters' long-term career plans were uncertain before and after the accident. She considered working as a massage therapist or carpenter, but took no specific steps towards pursuing those vocations. Following the accident, she completed an online course to upgrade her high school math. At the time of the trial, she was taking an online course to upgrade her high school biology.

The Trial Reasons for Judgment

- [12] In reasons for judgment indexed at 2023 BCSC 954, Basran J. found that the accident caused Ms. Charters' right wrist fracture, which was her most significant and enduring injury. He accepted that the accident may also have triggered some mild hip and knee discomfort, but found that those injuries did not meaningfully restrict Ms. Charters aside from preventing her from doing specific exercises and causing her some soreness on long hikes: at paras. 53-57.
- [13] The judge awarded Ms. Charters' \$70,000 for non-pecuniary damages, \$2,500 for costs of future care, and \$1,150 for special damages.

- [14] He also awarded Ms. Charters \$5,000 for past loss of income which reflected the wages she lost during the six weeks she was absent from work at the bakery following the accident: at para. 116. Aside from those six weeks, the judge was not satisfied that the gaps in Ms. Charters' work were attributable to the accident. He did not accept Ms. Charters' assertion that but-for the accident, she would have continued to work full-time at the bakery until moving to Powell River: at paras. 68, 72, 75, 111, 113.
- [15] Central to this appeal are the judge's findings that:
- [77] In April, Ms. Charters began working as a painter for DK Painting. Darren Kochems owns and operates this business. He is a friend of Mr. McClinchey. The tasks Mr. Kochems assigned to Ms. Charters were quite physical. They included priming, sanding, brushwork, rolling, and cleaning up work sites. He was aware of her wrist injury and slightly modified her duties accordingly.
- [78] The painting work she performed for DK Painting is similar to the work she previously did for another painting company except it involves mostly interior painting. In her previous painting position, she had no issues or problems with her wrists but at DK Painting her wrist occasionally became sore and fatigued. She sometimes, but not more than 12 times, wore a wrist brace to ameliorate her right wrist pain symptoms. Approximately weekly, this work caused wrist soreness at the end of a shift but it did not cause pain symptoms in her hip or knee.
- [79] Mr. Kochems recalled that Ms. Charters wore a wrist brace approximately three to five times while working and she missed work two or three times because of medical appointments.
- [80] Mr. Kochems offered Ms. Charters additional work hours but she was unable to do more work for him because of her online studies and part-time work as a server, not because of pain symptoms caused by the Accident.
- [81] Ms. Charters stopped working for Mr. Kochems in November 2022 because he decided not to operate his painting business during the winter months. Mr. Kochems was entirely satisfied with Ms. Charters' work performance and he intends to rehire her when he resumes operating his painting business in 2023.
- [82] While working full-time for Mr. Kochems during the summer of 2022, Ms. Charters also worked 15 hours a week as a server in a bistro, for which she earned approximately \$700 per week.
- [Emphasis added.]
- [16] The judge declined to award Ms. Charters damages for future loss of income earning capacity. In his view, Ms. Charters' discomfort and pain resulting from her wrist injury was more appropriately dealt with as part of her claim for non-pecuniary damages: at para. 131.

- [17] At para. 106 of his reasons, (quoted at para. 63 below) the judge referred to the three-step analytical framework for assessing claims for damages in respect of a loss of future earning capacity, which this Court outlined in *Rab v. Prescott*, 2021 BCCA 345 at para. 47:
- [18] At the first stage of the *Rab* analysis, the judge found that because Ms. Charters' work as a painter and server aggravated her wrist injury, "it is possible that this injury could lead to a future loss of capacity": at para. 122.
- [19] As to the second stage, the judge stated:
- [130] I accept that Ms. Charters' wrist injury might lead to a loss of capacity but I am not convinced that there is a real and substantial possibility that this injury will cause a future loss of income. It has not affected her ability to earn income in varied roles as a care aide, server, or painter, all of which involve some level of physical exertion. Accordingly, I do not find that she has established that she is less capable overall, less marketable, or unable to take advantage of all jobs that may be available to her because of this injury.
- [131] I therefore conclude that Ms. Charters is not entitled to damages for future loss of income-earning capacity and that the periodic pain symptoms she experiences are more appropriately dealt with as part of her claim for non-pecuniary damages.
- [20] In reaching this conclusion, the judge accepted the evidence of some of the experts who testified at the trial, finding that:
- (a) Despite her occasional wrist discomfort, Ms. Charters is physically capable of working as a residential painter and server: at para. 124;
 - (b) Dr. Barry Vaisler (Orthopaedic Hand Surgeon) and Dr. J.P. Thompson (Orthopaedic Surgeon) opined that Ms. Charters' wrist symptoms are unlikely to degenerate: at para. 125;
 - (c) Mr. Jeff Padvaiskas (Functional Capacity Evaluator) opined that the appellant's future vocational abilities as a painter and server are consistent with her work history; the wrist injury is in the nature of discomfort or annoyance, rather than disability: at para. 126; and
 - (d) While Ms. Charters aimed to become a carpenter or registered massage therapist, she had not taken any steps towards those objectives. The evidence did not establish "that she would have successfully pursued these careers, so it is not necessary to consider them for the purpose of determining if there is a real and substantial possibility that [Ms. Charters'] wrist injury will lead to a future income loss": at para. 128.
- [21] Mr. Nicholas Altieri, an occupational therapist who provided expert evidence on behalf of Ms. Charters, was of the view she "may not be able to durably continue working as a painter and server". The judge did not accept this opinion because "[Ms. Charters] had no difficulty finding and keeping these positions over the past few years": at para. 127.

[22] As I shall return to below, these findings, including the impugned finding at para. 80 of the reasons (quoted at para.15 above) were made in relation to Ms. Charters' claims with respect to both past and future loss of earning capacity.

The Issues on Appeal

[23] As framed by the appellant, the issues on appeal are whether the judge erred by committing:

- (a) A palpable and overriding error of fact and/or misapprehension of evidence by finding that the appellant did not turn down additional hours from her painting job as a result of pain symptoms caused by the accident;
- (b) A palpable and overriding error of fact and/or misapprehension of evidence by finding that the appellant turned down hours from her painting job as a result of online studies and part-time serving work; and
- (c) An error of law by improperly assessing loss of future earning capacity.

Discussion

The Standard of Review

[24] Ms. Charters submits that the trial judge made errors of fact and law in reaching his decision not to award damages for future loss of earning capacity.

[25] Ms. Charters' first two grounds of appeal--challenging the trial judge's findings that she did not turn down additional work because of her wrist injury, but rather because of her other work and online studies--raise potential errors of fact. The standard of review applicable to questions of fact, including factual inferences, is "palpable and overriding error": *Housen v. Nikolaisen*, 2002 SCC 33 at paras. 19-23.

[26] Ms. Charters' third ground of appeal challenges the trial judge's decision not to award damages for future loss of earning capacity. In particular, she submits that the trial judge made an error of law in his application of the framework for assessing future loss of earning capacity. In her factum, Ms. Charters characterizes this as an error of law. However, a trial judge's assessment of damages is a question of mixed fact and law: *Gregory v. Insurance Corporation of British Columbia*, 2011 BCCA 144 at para. 14; *Ledwon v. Baines*, 2021 BCCA 239 at para. 16.

[27] For a question of mixed fact and law, the standard of review will only be correctness if the legal principle at issue is readily extricable from the factual context: *Housen* at para. 27. A trial judge's decision on whether to award damages is generally not such a case. Instead, the well-recognized standard of review applicable to damage awards is highly deferential, and an appellate court is not to intervene merely on the basis that it would have come to a different decision: *Westbroek v. Brizuela*, 2014 BCCA 48 at para. 27; *Deegan v. L'Heureux*, 2023 BCCA 159 at para. 41. As this Court emphasized in *Deegan v. L'Heureux*:

[41] An appeal court may intervene only where there was no evidence upon which the trial judge could have reached their conclusion, where the judge proceeded upon a mistaken or wrong principle, or where the result at trial was so inordinately high or low that it must be a wholly erroneous estimate of the damage: *Woelk v. Halvorson*, [1980] 2 S.C.R. 430, 1980 CanLII 17 at 435-436.

The Parties' Positions

[28] Ms. Charters argues that the judge misapprehended certain facts, challenging his findings that:

- She did not miss additional work hours as a painter because of pain symptoms caused by the accident; and
- She turned down additional work hours as a painter because of online studies.

[29] In her factum, Ms. Charters argues that she testified that she turned down additional hours at DK Painting due to wrist symptoms, and emphasizes that she was not cross-examined on this evidence. Furthermore, Ms. Charters submits that the judge's finding that she did not miss time from work due to pain symptoms, but rather because of online courses, "appears to originate from the ambiguous and speculative testimony of Mr. Kochems", her employer at the painting position: Appellant's Factum at para. 23. She asserts that these misapprehensions constitute palpable and overriding errors in that they were material and could reasonably have affected the judge's conclusions.

[30] The respondents' position is that the judge was not required to accept all of Ms. Charters' evidence. They acknowledge that the ongoing problems in her wrist satisfied the first stage of the Rab analysis, that is, that the evidence discloses a potential future event that could lead to a loss of earning capacity. At the second stage, however, they say it was for Ms. Charters to prove that there was a real and substantial possibility that this minor ongoing problem would cause a pecuniary loss in the future. The judge did not accept that she had done so and there was evidence on the record from both the lay and expert witnesses to which he referred in his reasons, that supported this conclusion.

Analysis

The Alleged Errors of Fact

[31] In light of Ms. Charters' submission that the trial judge materially misapprehended her and Mr. Kochems' evidence concerning additional painting hours and other work opportunities, it is helpful to set out the key portions of that testimony, as set out in her factum.

[32] Ms. Charters testified that when she was offered additional painting hours, she turned down these hours because of the way that her body, specifically her wrist, felt. She further testified that there were a few occasions where she left early or took an extra day off because of her wrist issues:

Q. Did you ever work any overtime in this position?

A No.

Q And was it ever offered to you?

A It was, yes.

Q Was overtime regularly available or was this an every once in a while type of thing?

A Regularly available. Darren had -- he had many jobs lined up. There was always work - work available.

Q What was the reason that you didn't work any of this overtime?

A Because of the way my body felt, the way my wrist felt.

Q Did you miss any time from this position as a result of wrist issues?

A Yes, I do believe that there are a few occasions that I did leave early or, you know, he allowed me to take an extra day off.

Q Do you believe that your wrist issues prevented you from working additional hours?

A Yes.

[33] Mr. Kochems testified that during Ms. Charters' employment, he had offered her additional hours and that she had turned down these hours because of exhaustion. He went on to testify that she had told him that she was unable to take on more work due to school and her part-time work as a server:

Q Did you ever offer Ms. Charters more hours than the usual amount that she would typically work in a day?

A Yes.

Q And what did she say when you asked her?

A She was just too exhausted after eight hours to work any more, but I did offer her more work, not saying more than eight hours a day, just more jobs that I had.

Q So you offered her more work and what did she say to that offer?

A No, she was unable due to -- due to her having to go to school and working part-time as a server.

[34] It was suggested to Mr. Kochems in cross-examination that Ms. Charters had turned down some jobs because of having to go to school or serving, and he agreed with this statement:

Q For the work offers that you made, I understand that she turned down some jobs at times because of having to go to school or having a different parttime job; is that accurate?

A Yes.

[35] Mr. Kochems then stated:

Q So it seems at times there was a bit of a scheduling conflict from your understanding?

A Yes.

[36] Ms. Charters submits that the judge lost sight of her testimony that she turned down hours as a painter due to exhaustion and her overall physical condition. She says the judge misstated Mr. Kochems' evidence and did not deal with her own evidence regarding the link between her wrist injury and her decision to turn down further painting opportunities. She also argues that Mr. Kochems' evidence regarding hours of work and her exhaustion was ambiguous and that the judge erred in not linking the exhaustion she experienced from work to her turning down Mr. Kochems' offers of further work and, furthermore, to the injury to her wrist.

[37] The respondents submit that this evidence does not assist Ms. Charters, because it was not established that the exhaustion was linked to her current condition, in particular to her wrist. They point to her very active lifestyle outside work, emphasizing that she returned to rock climbing two months after the accident (an activity that is physically demanding on the wrist), that she swam regularly, and that she went to the gym three times a week. They also point out that Ms. Charters had two jobs at various periods after the accident. The respondents say that all of this could well have resulted in exhaustion at the end of an eight-hour shift of residential painting.

[38] The respondents argue that it was for Ms. Charters "to tie down" the cause of her exhaustion, and they say that she failed to do so.

[39] They maintain that, in any event, the judge relied on other evidence in concluding that Ms. Charters declined further work due to her online schooling and her work as a server, as outlined at para. 126 of the reasons. This evidence included that of Dr. Vaisler, Dr. Thompson and Mr. Padvaikas, who opined that Ms. Charters' ongoing wrist symptoms were more in the nature of an annoyance or irritation and were not disabling from a vocational perspective.

Applicable Principles

[40] At this juncture, it is helpful to review the principles that apply when an appellate court considers whether a trial judge has made a palpable and overriding error of fact or mixed fact and law.

- [41] First, it is not necessary for a judge to expressly refer to every piece of evidence underlying a finding of fact. Rather, the question of whether a trial judge's reasons are sufficient, factually speaking, is a "very low bar" that is reached when the factual basis of a decision can be understood, looking to the reasons as well as the record, as the case may be: *R. v. G.F.*, 2021 SCC 20 at paras. 71-73. Only in a "very rare case" will a decision fail for factual insufficiency: *G.F.* at para. 71.
- [42] In addition, appellate courts are to assess reasons for judgment in a way that is "functional and contextual", considering whether they explain the judge's decision in light of the evidence before the trial court, the submissions of the parties, and the manner in which the trial unfolded: *G.F.* at para. 69, citing *R. v. R.E.M.*, 2008 SCC 51 at para. 17. Deficient reasons alone are not an independent ground for appeal: if the reasons are deficient on their face but the "what" and the "why" of the decision are clear based on the record, no error based on insufficiency has been committed: at para. 70, citing *R.E.M.* at paras. 38-40 and *R. v. Sheppard*, 2002 SCC 26 at paras. 46, 55.
- [43] It also is not for an appellate court to re-weigh the evidence a trial judge considers in coming to their decision, or to draw alternative inferences in the absence of a palpable and overriding error. As the Supreme Court of Canada articulated in *Housen* at para. 23:
23. We reiterate that it is not the role of appellate courts to second-guess the weight to be assigned to the various items of evidence. If there is no palpable and overriding error with respect to the underlying facts that the trial judge relies on to draw the inference, then it is only where the inference-drawing process itself is palpably in error that an appellate court can interfere with the factual conclusion. The appellate court is not free to interfere with a factual conclusion that it disagrees with where such disagreement stems from a difference of opinion over the weight to be assigned to the underlying facts.
- [Emphasis added.]
- [44] This Court recently considered the appellate standard of review in *Lee v. Bolduc*, 2024 BCCA 7. Madam Justice Newbury (dissenting, though not on this point) further clarified that questions about whether a trial judge misapprehended evidence (as specifically alleged in this case), made unreasonable findings or inferences, or made inferences not supported by the evidence are to be addressed prior to applying the "palpable and overriding error" standard: paras. 17-21, adopted by the majority of the division at para. 46. If an appellate court is satisfied that any such errors have occurred, the next step is to consider whether the error is both "palpable" and "overriding": at para. 46.

- [45] Historically, a "palpable" error has been described in several different ways: as an error that is "plainly seen" (Housen at para. 6), that is "obvious" and "determinative of the outcome of the case" (Saloman v. Matte-Thompson, 2019 SCC 14 at para. 33), and that "is in the nature not of a needle in a haystack, but of a beam in the eye": Saloman at para. 33. An error will be "overriding" where it is determinative of a case's outcome (Saloman at para. 33) in the sense that the decision cannot stand without it: Benhaim v. St-Germain, 2016 SCC 48 at para. 38.

The Trial Judge's Findings

- [46] In considering the loss of future earning capacity claim, the judge recognized that "Ms. Charters is relatively young and her right wrist symptoms have persisted since the Accident" and that her right hand was dominant: at paras. 20, 122.
- [47] The judge considered the first and second stages of the Rab framework. The first stage of the framework considers whether the evidence discloses a potential future event that could lead to a loss of capacity: Rab at para. 47. At para. 122 of his reasons, the judge found that Ms. Charters had satisfied the first stage because:
- She works as a residential painter and server and doing so periodically aggravates her right wrist symptoms. Her work actively engages her right wrist so it is possible that this injury could lead to a future loss of capacity.
- [48] The second step considers whether, based on the evidence, there is a "real and substantial possibility that the future event in question will cause a pecuniary loss": Rab at para. 47. The trial judge found that Ms. Charters had not satisfied this second step, stating that:
- [129] Ms. Charters' income has not varied substantially since the Accident. Taking into account the totality of the evidence regarding her work history since the Accident, I find that she will continue to work as a painter, server, or in another similar vocation.
- [130] I accept that Ms. Charters' wrist injury might lead to a loss of capacity but I am not convinced that there is a real and substantial possibility that this injury will cause a future loss of income. It has not affected her ability to earn income in varied roles as a care aide, server, or painter, all of which involve some level of physical exertion. Accordingly, I do not find that she has established that she is less capable overall, less marketable, or unable to take advantage of all jobs that may be available to her because of this injury.
- [49] Ms. Charters argues that, given that she testified that she had missed out on additional work opportunities because of pain in her wrist, and given that the trial judge found her evidence credible, it was a palpable and overriding error for the judge not to find a real and substantial possibility that a future event would lead to income loss. Ms. Charters says that the trial judge instead relied on the evidence given by Mr. Kochems, even though "credible and reliable evidence was available from the appellant's testimony": Appellant's Factum at para. 28.

- [50] With the benefit of hindsight, I accept that when considering the second step, the judge could have been more precise in explaining or giving context to his earlier finding that:
- [80] Mr. Kochems offered Ms. Charters additional work hours but she was unable to do more work for him because of her online studies and part-time work as a server, not because of pain symptoms caused by the Accident.
- [51] In particular, the judge could have more expressly correlated Mr. Kochems' testimony on the question of Ms. Charters' exhaustion and reasons for turning down work to Ms. Charters' evidence on this issue. This, however, in my view, is an insufficient basis to overturn his decision, since the factual basis is intelligible (G.F. at paras. 71-73) even if it was not expressed as well as it could have been.
- [52] It is worth noting, moreover, that even if the judge had found that Ms. Charters did turn down extra work because of exhaustion relating to her wrist injury, it would not necessarily follow that she had established that the wrist injury--which he had found "might lead to a loss of capacity"--posed, on the totality of the evidence before him, a "real and substantial possibility [of causing] a future loss of income": at para. 130. To assume otherwise conflates the first and second stages of the analytical framework set out in *Rab*.
- [53] In addition, as noted above, it is not for an appellate court to second-guess the weight that a trial judge attributes to particular pieces of evidence. The question before this Court is not whether the judge could have approached the evidence before him differently. Rather, it is whether his conclusions have a basis in the evidence (G.F. at paras. 71-73) and are not the result of a palpable and overriding error.
- [54] Reading the reasons contextually and as a whole, I am not prepared to conclude that the judge forgot or misapprehended Ms. Charters' testimony of being exhausted at the end of an eight-hour shift due to her wrist injury such that she did prove a real and substantial possibility of a future event leading to an income loss.
- [55] In any event, even if the judge did misapprehend this evidence, I am of the view that this would not have amounted to a material misapprehension or an "overriding" error that would have altered the outcome in this case. The dismissal of the future loss of income earning capacity claim 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.
- [56] This is because there was other evidence that the judge referred to in his reasons for reaching his conclusion that the claim for loss of future earning capacity should be dismissed. This included the evidence of Dr. Vaisler, Dr. J.P. Thompson, and the occupational therapist Mr. Padvaiskas. The judge also referred to the evidence regarding a pre-existing congenital problem with Ms. Charters' right wrist and referred to expert testimony that a custom-made splint would help alleviate her irritation and discomfort. There was also the evidence of Mr. Kochems that he expected Ms. Charters to return to work for him when he recommenced his painting activities in the spring of 2023 and that he was

very pleased with her performance.

[57] It is worth noting that on the hearing of this appeal, Counsel for Ms. Charters acknowledged that there was no direct evidence linking her claim that she was exhausted after eight hours of work to her wrist injury. In the context of Mr. Kochems' testimony about Ms. Charters' exhaustion and reasons for turning down overtime work, the following exchange occurred between the Court and Counsel for Ms. Charters:

Q Do you accept that from what is set out at paragraph ten of your factum, there isn't a link to the plaintiff being too exhausted after 8 hours of work due to symptomology arising from the wrist injury? She is too exhausted? She's got another job, she's got other things which don't link to the wrist injury. That doesn't appear to be considered here. Do you accept that?

A I do accept that. But taken in conjunction with the appellant's own testimony, I believe an inference could be drawn that the exhaustion could be connected to the wrist symptoms.

[58] Furthermore, Counsel for Ms. Charters acknowledged that there was evidence before the judge to support the inference that he did draw, which was that she turned down overtime offers due to school and other work and not because of her wrist:

Q Was it not open to [the judge] in this case to draw the inference that the wrist injury did not cause Ms. Charters to turn down extra work?

A It was open to the trial judge to make that inference.

[59] Ms. Charters cannot also maintain, in my view, that the judge's finding that she did not turn down additional work due to her wrist injury was the result of a palpable and overriding error.

[60] Ms. Charters also submitted that an alternative inference--that she turned down work because of her wrist injury--was available to the trial judge. That may be so, but it is not for this Court to re-weigh the evidence and draw alternative inferences absent an error of fact that is both palpable and overriding.

[61] Overall, I am satisfied that there was sufficient evidence on the record for the judge to find that Ms. Charters had turned down additional work as a painter because of school and other work commitments, and not as a result of exhaustion specifically linked to her wrist injury.

The Trial Judge's Dismissal of the Claim

[62] I will turn now to whether the trial judge erred in declining to award Ms. Charters damages for loss of future income earning capacity.

[63] The judge correctly summarized the applicable analytical framework, which was set out in Rab, stating:

[106] In Rab v. Prescott, 2021 BCCA 345 at para. 47, our Court of Appeal set out a three-step process to assess damages for the loss of future earning capacity:

- 1) Whether the evidence discloses a potential future event that could lead to a loss of capacity?
- 2) Whether, on the evidence, there is a real and substantial possibility that the future event in question will cause a pecuniary loss?
- 3) If yes, the court must assess the value of that possible future loss, which must include assessing the relative likelihood of the possibility occurring.

This three-step process applies to both past and future income earning capacity claims: *Siu v. Regehr*, 2022 BCSC 1876 at paras. 162-163.

[64] In *Rab*, Grauer J.A. observed:

[45] In *Perren*, this Court directly addressed *Pallos*, clarifying that it was not authority for the proposition that, in the absence of any real possibility of a future loss, a plaintiff is nevertheless entitled to an award for loss of earning capacity. As the Court observed at para 21, "there was no dispute that Mr. *Pallos* had proven a real possibility of future loss". Madam Justice Garson put the question before the Court this way:

[4] Put another way, the question is whether a plaintiff who demonstrates a diminishment in her earning capacity no matter how slight, is entitled to some award of damages, even where she cannot demonstrate any substantial possibility that that lost capacity will result in a pecuniary loss.

[Emphasis in original.]

[46] Justice Garson concluded:

[32] A plaintiff must always prove...that there is a real and substantial possibility of a future event leading to an income loss. If the plaintiff discharges that burden of proof, then depending upon the facts of the case, the plaintiff may prove the quantification of that loss of earning capacity, either on an earnings approach, as in [*Steenblok v. Funk* (1990), 46 B.C.L.R. (2d) 133 (C.A.)], or a capital asset approach, as in *Brown*. The former approach will be more useful when the loss is more easily measurable, as it was in *Steenblok*. The latter approach will be more useful when the loss is not as easily measurable, as in *Pallos* and [*Romanchych v. Vallianatos*, 2010 BCCA 20].

[Emphasis in original.]

[65] The standard of proof to establish a real and substantial possibility of a future event leading to income loss "is a lower threshold than a balance of probabilities but a higher threshold than that of something that is only possible and speculative": *Gao v. Dietrich*, 2018 BCCA 372 at para. 34 (cited post-*Rab* in *Ploskon-Ciesla v. Brophy*, 2022 BCCA 217 at para. 15).

[66] Since the judge, in my view, correctly stated the applicable law, the only question at this juncture is whether on the totality of the evidence the judge made a reversible error in concluding that Ms. Charters had not satisfied the second stage of the *Rab* framework.

- [67] In my view, he did not. The judge's correct statement of the applicable principles, along with the evidentiary basis for his decision, which included that of the experts to whom he referred, are sufficient to dispose of Ms. Charters' challenge to his decision not to award damages for future loss of earning capacity.
- [68] The judge's dismissal of this claim is also supported, and is entirely consistent with his treatment of Ms. Charters' claim for past loss of earning capacity, which Ms. Charters has not appealed.
- [69] The judge summarized the parties' positions regarding the past loss of income earning capacity claim this way:
- [108] Ms. Charters asserts that but for the Accident, she would have continued working full-time at Artisan until January 2020 when she moved to Powell River. Taking into account her actual earnings during this period, an estimate of \$1,000 for lost wages as a painter, deductions for income taxes and employment insurance premiums, and other contingencies, she claims net past wage loss of \$19,000.
- [109] The defendants deny that Ms. Charters regularly worked 40 hours a week at Artisan and point out that there was only one pay period in which she recorded this many hours. They therefore deny that she would have earned \$38,000 per year as a baker at Artisan.
- [110] The defendants note that Ms. Charters was able to do all of the required tasks as a server, with some modifications, and that aside from the two month period immediately after the Accident, she did not miss any time from work for reasons attributable to it. They assert that Ms. Charters is entitled to \$5,000 in respect of past wage loss, taking into account the necessary deductions for income tax and employment insurance premiums.
- [Emphasis added.]
- [70] In his analysis of the past loss of earning capacity claim, the judge stated:
- [114] I agree with Mr. Padvaiskas' finding that the occasional wrist pain experienced by Ms. Charters is more of a temporary irritation rather than disabling and limiting level of pain and discomfort. This is because Ms. Charters successfully worked and thrived as a house painter and server while continuing to do a range of physically demanding recreational pursuits. Mr. Kochems is entirely satisfied with the quality of Ms. Charters' work and he intends to rehire her in 2023. She was unable to do more work for him because of her online studies and part-time work as a server, not because of symptoms from the Accident. Taken together, this evidence suggests that her wrist symptoms are not disabling.

[115] Although Ms. Charters suggested that she aspired to become self-employed as a carpenter or a registered massage therapist, she took no concrete steps towards these career goals. Her academic history is uneven. Taking courses such as high school math and biology are not sufficiently tangible steps taken in furtherance of these career objectives. I accept that carpentry and massage therapy may be too hand-intensive for her but I am not convinced that she would have pursued these careers but for the Accident.

[116] Ms. Charters is entitled to \$5,000 in respect of past loss of income-earning capacity for the period of work she missed immediately after the Accident. She has not established a real and substantial possibility that she lost any other income attributable to it.

[Emphasis added.]

[71] In his reasons, the judge referred to *Siu v. Regehr*, 2022 BCSC 1876 at paras. 162-163, Citing *Siu*, the judge correctly observed that the Rab framework applies to both past and future income earning capacity claims: at para. 106. This was recently confirmed in *Hartman v. MMS Homes Ltd.*, 2023 BCCA 400 at para. 36.

[72] It is noteworthy, in my view, that the evidentiary basis for the alleged past lost of capacity to work as a painter was the same as that being advanced for the future loss of earning capacity claim: exhaustion at the end of an eight-hour shift due to the wrist injury which led Ms. Charters to decline other work opportunities which were offered to her. This is the evidence Ms. Charters submits that the judge misapprehended, and which she says constituted a palpable and overriding error.

[73] Indeed, it would have been internally inconsistent--and, I would observe, potentially in error--for the judge to dismiss the past loss of income claim (apart for the \$5,000 income loss sustained because Ms. Charters was absent from her work at the bakery immediately after the accident) and yet find that the very same evidence, in light of the same legal test, established that Ms. Charters had proven a real and substantial possibility of a future event causing income loss.

[74] I have had the privilege of reading in draft form the reasons for judgment of Horsman J.A. Respectfully, I do not agree with the result my colleague proposes, which is to grant the appeal on the basis that the judge committed an error in law in dismissing Ms. Charter's claim for damages for future loss of income earning capacity.

[75] While I generally accept her analysis of the legal framework, two examples from my colleague's reasons illustrate our disagreement. This difference of opinion stems from her approach to the application of the Rab framework, specifically the second stage, to the circumstances of this case.

- [76] First, at para. 103 of her reasons, my colleague correctly recognizes the difference between the first two stages of the Rab approach, observing that "where the plaintiff establishes an impaired earning capacity by reference to the Brown factors, it is still necessary for the court to go on and determine whether there is a real and substantial possibility that the impairment will lead to a future income loss."
- [77] Then, at para. 119, my colleague provides two examples of the judge's findings that she finds difficult to reconcile being: (1) that Ms. Charters is not less capable overall, less marketable, or unable to take advantage of all jobs, with his earlier conclusion, at the first stage of the Rab process, that her injury could lead to a future loss of capacity; and (2) with the evidence seemingly accepted by the judge that demonstrated Ms. Charters experienced physical limitations in carrying out tasks that required the repetitive use of her right hand, experienced persistent pain and required some modifications in carrying out her current employment duties, and she would be unable to perform heavy strength work.
- [78] My colleague accepts, as observed in Perren and Rab, that "[a] plaintiff must always prove...that there is a real and substantial possibility of a future event leading to an income loss": Perren at para. 32; Rab at para. 46.
- [79] At stage two of the analysis, however, the trial judge can only "go on and determine [that] there is a real and substantial possibility that the impairment will lead to a future income loss" if the plaintiff has in fact proven that real and substantial possibility on the lower burden of proof that governs hypothetical events. It is not for the court to determine that a real and substantial possibility of the hypothetical event has been established on the basis that the plaintiff has satisfied stage one. That is the purpose of stage two, where the plaintiff also bears the burden of proof.
- [80] For my part, I have no difficulty reconciling the two examples of alleged error my colleague identifies at para. 119 of her reasons. This is because the analysis at stage two is different from that at stage one, and the requirements of the second stage are not automatically established on proof of those which apply to the first.
- [81] I would add that when I consider the reasons contextually, I am of the view that the judge was very much alive to the Brown v. Golaiy, 26 B.C.L.R. (3d) 353, 1985 CanLII 149 (S.C.), capital asset approach at stage two of the analysis regarding both the past and the future loss of income-earning capacity claims. This approach is specifically referred to at para. 120 of the reasons, and the judge observed that the Rab framework applies to both past and future loss of earning capacity claims. It is true that the kinds of factual findings and inferences a judge is called upon to make may differ when considering the past and the future, but, as the judge and my colleague have both rightly noted, the same legal principles govern the analysis in both cases.

- [82] In my view, this appeal comes down to whether, at stage two of the Rab framework, Ms. Charters proved, on the evidence, a real and substantial possibility that the future event will cause a pecuniary loss. And for the reasons I have identified above, the judge's conclusion that Ms. Charters had failed to do so was open to him on the totality of the evidence, in particular the evidence he accepted and from which he took the inferences he considered appropriate.
- [83] In other words, the judge did what my colleague indicates he ought to have done, when she observes, at para. 107 of her reasons, that "a plaintiff may suffer an impairment of earning capacity yet cannot show, in light of their personal circumstances, that there is a real and substantial possibility that this impairment will lead to a future loss of income". This is precisely how the judge approached stage two of Rab, and in doing so he determined Ms. Charters had not proven a real and substantial possibility of future income loss.
- [84] Respectfully, I also disagree with my colleague's views that the judge erroneously based his conclusion regarding stage two of his future loss of income earning capacity analysis in part on evidence that only related to the past loss of income earning capacity.
- [85] It is of assistance to consider the manner in which the judge structured his reasons. Below para. 58, he includes the following headings:

Loss of Income-Earning Capacity

Factual Findings

- [86] After a lengthy summary of the evidence presented and his factual findings, the judge went on to consider the past loss and future loss claims separately, both under the general "loss of income-earning capacity" heading. This structure indicates that the judge's factual findings applied, to the extent he considered appropriate, to both the past and future income earning capacity claims.
- [87] At para. 121 of her reasons, my colleague addresses what I considered would have been an internal inconsistency had the judge awarded damages for the future claim having dismissed the past loss of capacity claim (except for the time frame immediately following the accident). While I agree that the dismissal of a past capacity claim is not necessarily "dispositive" of the future claim, in certain cases, such as this one, it may well be that the analyses for past and future loss "hang together" based on the totality of the evidence.
- [88] The judge's findings concerning the past loss of income earning capacity claim regarding, for example, Mr. Padvaiskas' evidence that the occasional wrist pain experienced by Ms. Charters is not disabling (at para. 114) are incorporated by reference in the judge's future loss of income-earning capacity analysis (for example, at para. 126). And this evidence informs, in part, the judge's conclusion that while Ms. Charters' injury might lead to a loss of capacity (stage one of the Rab framework):

[130] I am not convinced that there is a real and substantial possibility that this injury will cause a future loss of income. It has not affected her ability to earn income in varied roles as a care aide, server, or painter, all of which involve some level of physical exertion. Accordingly, I do not find that she has established that she is less capable overall, less marketable, or unable to take advantage of all jobs that may be available to her because of this injury.

[Emphasis added.]

[89] At para. 118 of her reasons, my colleague suggests that the judge erred by drawing a conclusion about whether there was a real and substantial possibility of a future loss of income based on whether Ms. Charters' income had to the date of trial been affected by the accident.

[90] Reading his reasons as a whole, however, the judge did not entirely rely on evidence about the past. It is important to note that he accepted Dr. Vaisler and Dr. Thompson's evidence that Ms. Charters' wrist symptoms "are unlikely to degenerate": at para. 125. Viewing the reasons contextually, then, the judge's findings support the conclusion that Ms. Charters' wrist symptoms were unlikely to degenerate below their current level, that is, not disabling and, importantly, insufficient to ground a claim for future loss of income earning capacity.

[91] It is in this sense, and with the benefit of Dr. Vaisler and Dr. Thompson's evidence, that the judge relied upon evidence about the past to inform an inference about the future. And in this way, the claims of past and future loss are interrelated in the circumstances of this case.

[92] Had the judge viewed the totality of the evidence differently, including accepting Mr. Altieri's evidence that Ms. Charters' might not be able to durably continue working as a painter or server, then my colleague's analysis and conclusion at para. 129 of her reasons (which are premised on the finding of an error of law), is one that would have been open to him to make.

[93] But he did not. Instead, he accepted the evidence of Dr. Vaisler, Dr. Thompson, and the occupational therapist Mr. Padvaiskas, which spoke to both the past and future loss of earning capacity claims.

[94] In my view, the judge articulated and correctly applied the legal framework. While there were alternative conclusions to be drawn, his dismissal of the future loss of earning capacity claim was supported by the facts as he found them, and the inferences drawn from the facts he found were reasonable. To find otherwise, as would my colleague, respectfully goes beyond the appropriate parameters of appellate review in that it adopts alternative inferences on the same record, which this Court cannot do absent a palpable and overriding error. *West Moberly First Nations v. British Columbia*, 2020 BCCA 138 at para. 297; *Housen* at para. 10.

[95] I can see no basis for this Court to interfere with the judge's decision.

Disposition

[96] I would dismiss the appeal.

"The Honourable Mr. Justice Abrioux"

Reasons for Judgment of the Honourable Madam Justice Horsman:

[97] I have had the privilege of reading the reasons for judgment of my colleague, Justice Abrioux. I agree, for the reasons he states, that the judge did not make a palpable and overriding error of fact in finding that the appellant had not, by the time of trial, turned down additional hours in her painting job as a result of the physical symptoms caused by the accident. While the evidence on this point was ambiguous, it was open to the trial judge to interpret it in the manner he did. The fact that alternative inferences might have been drawn from the evidence does not constitute palpable and overriding error.

[98] However, I depart from my colleague on the third issue raised on appeal--the trial judge's application of the principles that govern the assessment of a claim for loss of future earning capacity. I agree that, at paragraphs 117-118 of the trial judgment, the trial judge correctly states the principles that govern the assessment of a claim for future loss of earning capacity, including the three-step process set out in *Rab v. Prescott*, 2021 BCCA 345. However, for the reasons that follow, I conclude that he did not apply those principles correctly, which is an error of law: *Rooney v. Galloway*, 2024 BCCA 8 at para. 168; *Housen v. Nikolaisen*, 2002 SCC 33 at para. 36.

Legal principles

[99] To explain my view, it is necessary to review some of the guiding principles.

[100] The central task for a court faced with a claim for future loss of earning capacity is to compare the plaintiff's likely future working life with and without the accident: *Dornan v. Silva*, 2021 BCCA 228 at paras. 156-157. This is, as has often been observed, a "notoriously difficult task": *Davies v. Penner*, 2023 BCCA 300 at para. 3. Damages are only assessed once, and therefore the court must make findings about the pecuniary impact of the plaintiff's accident-related injuries over the remainder of their working life. In conducting the necessary analysis, the court must consider hypothetical future events, which need not be proved on a balance of probabilities. A hypothetical possibility will be accounted for as long as it is a real and substantial possibility and not mere speculation: *Reilly v. Lynn*, 2003 BCCA 49 at para. 101.

[101] As noted in *Rab*, some claims for loss of future earning capacity are less challenging than others. A plaintiff who has, as a result of the accident, suffered a significant disabling injury that leaves them unable to work at the time of trial and for the foreseeable future will clearly be entitled to an award of damages for future income loss, although the quantification of the loss may prove challenging. More difficult are cases, such as the present one, where the plaintiff has suffered accident-related injuries that may impact their

future ability to earn an income but that have not yet impacted their income as of the time of trial: Rab at paras. 29-30.

[102] Prior to Rab, British Columbia courts adopted a "capital asset" approach to quantifying claims for loss of future earning capacity in the latter category of cases. This approach recognizes that a plaintiff's ability to earn an income is an asset that may be impaired by the plaintiff's injuries, even if the impairment has not manifested in actual income loss at the time of trial. In his influential judgment in *Brown v. Golaiy*, 26 B.C.L.R. (3d) 353, 1985 CanLII 149 (S.C.) at para. 8, Finch J., as he then was, cited a list of factors to be taken into account in assessing the impairment of the asset:

- (1) The plaintiff has been rendered less capable overall from earning income from all types of employment;
- (2) The plaintiff is less marketable or attractive as an employee to potential employers;
- (3) 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) The plaintiff is less valuable to himself as a person capable of earning an income in a competitive labour market.

(the "Brown factors").

[103] In Rab, this Court clarified that the Brown factors do not provide a means for assessing the value of the future loss, but rather a means of assessing whether the capacity to earn an income has been impaired: Rab at para. 36. Put another way, even where the plaintiff establishes an impaired earning capacity by reference to the Brown factors, it is still necessary for the court to go on and determine whether there is a real and substantial possibility that the impairment will lead to a future income loss. The final step is to quantify that loss. Hence, the three-step approach set out in Rab:

[47] From these cases, a three-step process emerges for considering claims for loss of future earning capacity, particularly where the evidence indicates no loss of income at the time of trial. The first is evidentiary: whether the evidence discloses a potential future event that could lead to a loss of capacity (e.g., chronic injury, future surgery or risk of arthritis, giving rise to the sort of considerations discussed in *Brown*). The second is whether, on the evidence, there is a real and substantial possibility that the future event in question will cause a pecuniary loss. If such a real and substantial possibility exists, the third step is to assess the value of that possible future loss, which step must include assessing the relative likelihood of the possibility occurring--see the discussion in *Dornan* at paras 93-95.

[*Italic emphasis in original; underline emphasis added.*]

- [104] The distinction drawn in *Rab* between a loss or impairment of capacity and a real and substantial possibility of a future income loss is usefully illustrated by two cases that are reviewed in *Rab*.
- [105] In *Steward v. Berezan*, 2007 BCCA 150, the plaintiff was 55 years old at the time of trial, and had been working as a realtor for 20 years. The trial judge found that the plaintiff's accident-related injuries prevented him from working in his former occupation as a carpenter, and she awarded him \$50,000 in damages for future loss of earning capacity. This award was set aside on appeal. The Court held that the trial judge erred in awarding damages without addressing the prospect of the plaintiff returning to carpentry. On the evidence, given the plaintiff's age and successful experience in real estate, there was nothing to suggest that such a change in occupation was a realistic prospect, and therefore there was no basis for an award of damages for future loss of earning capacity.
- [106] In *Perren v. Lalari*, 2010 BCCA 140, the plaintiff was employed as a manager in the provincial government at the time of trial. She suffered soft tissue injuries in the accident, leading to chronic symptoms that rendered her competitively unemployable in positions that required heavy or repetitive work. The trial judge noted that there was no real possibility that the plaintiff would ever turn to such employment, yet nevertheless awarded damages of \$10,000 for future loss of earning capacity. The award was also set aside on appeal. This Court reaffirmed that a plaintiff must always prove that there is a real and substantial possibility of a future income loss. An inability to perform duties associated with a certain occupation does not establish the possibility of a future income loss if the occupation is not a realistic prospect for the plaintiff: *Perren* at para. 32.
- [107] These cases illustrate the principle that a plaintiff may suffer an impairment of earning capacity in the sense described in *Brown*, yet cannot show, in light of their personal circumstances, that there is a real and substantial possibility that this impairment will lead to a future loss of income: *Rab* at para. 44.
- [108] The inquiry at the second step of *Rab* must be answered based on the whole of the relevant evidence. A real and substantial possibility is a higher bar than "mere speculation", but it does not require proof on a balance of probabilities: *Davies* at para. 27. Furthermore, the court should take a common-sense approach to the evidence in assessing the effect of pain on a plaintiff's ability to work over time. It is, for example, open to a trial judge to find as a matter of common sense that constant and continuous pain may take its toll over time in terms of a plaintiff's ability to work: *Gill v. Davis*, 2023 BCCA 381 at para. 12, citing *Morlan v. Barrett*, 2012 BCCA 66 at para. 41; *Davies* at para. 40.

Discussion

- [109] With those principles in mind, I turn to the trial judgment.

[110] As my colleague has reviewed, the most serious injury suffered by the appellant in the accident is to the fracture of her right wrist. The trial judge made the following findings on the appellant's post-accident condition:

[23] Her right wrist symptoms initially progressed but have not improved over the past three years. Her maximal recovery occurred within a few months of the Accident. She received treatment from a physiotherapist but did not find it helpful.

[Emphasis added.]

[111] The trial judge found that as of the time of trial--that is, four years after the accident--the appellant continued to experience pain in her wrist on a weekly basis, particularly when engaging in activities using her dominant right hand: Trial Reasons at paras. 20, 57.

[112] The trial judge found that, with some modifications, the appellant was able to perform the necessary tasks for the occupations of residential painter and server. As my colleague notes, the judge accepted the evidence of Mr. Padvaiskas, an occupational therapist, that the appellant's wrist pain was in the nature of a "temporary irritation" rather than disabling. Notably, the judge addressed this evidence most directly in assessing the appellant's claim for past loss of earning capacity. It is worth re-quoting the key passage from the trial judgment on this point:

[114] I agree with Mr. Padvaiskas' finding that the occasional wrist pain experienced by Ms. Charters is more of a temporary irritation rather than disabling and limiting level of pain and discomfort. This is because Ms. Charters successfully worked and thrived as a house painter and server while continuing to do a range of physically demanding recreational pursuits. Mr. Kochems is entirely satisfied with the quality of Ms. Charters' work and he intends to rehire her in 2023. She was unable to do more work for him because of her online studies and part-time work as a server, not because of symptoms from the Accident. Taken together, this evidence suggests that her wrist symptoms are not disabling.

[Emphasis added.]

[113] It is clear in this passage that the judge is analyzing the issue of the appellant's ability to work in the pre-trial period, not the issue of whether there is a real and substantial possibility of a future income loss. As to the claim for future loss of earning capacity, it is relevant to note that Mr. Padvaiskas also opined that: (1) in terms of work endurance, the appellant may have issues associated with forceful gripping, impact jarring on the right, or handling non-neutral and extreme wrist postures; (2) she was susceptible to pain in her right wrist during some of the testing but was able to tolerate some of the tasks on an intermittent to occasional basis; (3) while the appellant is capable of working as a painter, she reported pain symptoms from doing some of the work; (4) the appellant would be capable of working as a food and beverage server, but may have to modify some of the upper extremity demands; and (5) she is not suited to heavy strength work. The judge seemingly accepted this evidence: Trial Reasons at paras. 98-104.

- [114] The appellant testified that while she had been able to perform the necessary tasks involved in the occupations of painter and server in the pre-trial period, she required some modifications. In her serving job, the appellant could not carry dishes and trays in the way she had before the accident, and she could not lift heavy items. The painting job involved tasks--such as using a paint roller or sanding--that required the repetitive use of her right-hand. The appellant sometimes used a wrist brace, which made the performance of tasks more difficult. She testified that she was fatigued at the end of a day of work, and her wrist was sore. The appellant communicated her limitations to her employer, Mr. Kochems, and he provided her with accommodations, such as allowing her to take breaks and performing tasks for her that she was unable to perform. Mr. Kochems confirmed in his evidence that he modified components of the job for the appellant; for example, by not requiring her to lift or carry heavy objects such as ladders and furniture. The trial judge found the appellant and Mr. Kochems to be credible witnesses: Trial Reasons at para. 13.
- [115] The judge found, on the evidence, that the appellant had shown a potential future event that could lead to a loss of capacity; thus she met the first step of the Rab process. He stated:
- [122] Ms. Charters is relatively young and her right wrist symptoms have persisted since the Accident. She works as a residential painter and server and doing so periodically aggravates her right wrist symptoms. Her work actively engages her right wrist so it is possible that this injury could lead to a future loss of capacity. I am not convinced that any symptoms related to her right hip or knee could lead to a future loss of capacity.
- [Emphasis added.]
- [116] The trial judge did not elaborate further on the nature of the future loss of capacity. In any event, the respondent does not challenge this finding on appeal, and the finding is amply supported by the evidence. The appellant suffered a significant injury that has led to physical limitations and persistent pain when she uses her dominant right wrist, requires modifications when she works as a painter or server, and restricts her ability to perform certain other types of jobs (i.e., heavy strength work). As found by the trial judge, the appellant had reached maximal recovery within a few months of the accident, and therefore her condition is unlikely to improve. Accordingly, the evidence disclosed a potential future event that could lead to a loss of capacity; that is, a chronic injury "giving rise to the sort of considerations discussed in Brown": Rab at para. 47.
- [117] Having identified a potential future event that could lead to a loss of capacity, the second stage of the Rab process required the judge to assess whether there is a real and substantial possibility that the appellant will suffer a future loss of income as a result of her right wrist injury. This, in my view, is where the judge fell into error.
- [118] The task of hypothesizing about the future is undeniably challenging in a case such as this where there is a young plaintiff (29 at the time of trial) with a significant injury that has caused persistent pain symptoms, and who had no established career path and who had not suffered an income loss by the time of trial. The question for the judge was not how the

appellant had fared in the pre-trial period, or how she appeared at the time of trial, but rather how her impaired capacity may affect her work prospects over the remainder of her working life. Instead of engaging in an analysis of the real and substantial future possibilities that arose on the evidence in this case, the judge focussed his analysis on the appellant's ability, to the date of trial, to manage her right-wrist pain and limitations without impact on her income. In effect, in assessing the claim for future loss of earning capacity, the judge repeated much of the analysis he had carried out in assessing past loss of earning capacity, including reliance on Mr. Padvaiskas' opinion. The core of the judge's analysis is reflected in the following passage:

- [130] I accept that Ms. Charters' wrist injury might lead to a loss of capacity but I am not convinced that there is a real and substantial possibility that this injury will cause a future loss of income. It has not affected her ability to earn income in varied roles as a care aide, server, or painter, all of which involve some level of physical exertion. Accordingly, I do not find that she has established that she is less capable overall, less marketable, or unable to take advantage of all jobs that may be available to her because of this injury.
- [119] I make two observations about this analysis. First, the factors referenced by the judge in the last sentence of this paragraph are some of the Brown factors. As Rab clarifies, the Brown factors comprise a means of assessing whether there has been a loss or impairment of capacity, but not a means for assessing the value of the future loss: at para. 36. It is difficult to reconcile the judge's finding that the appellant is not less capable overall, less marketable, or unable to take advantage of all jobs, with his earlier conclusion, at the first stage of the Rab process, that her injury could lead to a future loss of capacity. It is also difficult to reconcile this finding with the evidence, seemingly accepted by the judge, which demonstrated that the appellant experienced physical limitations in carrying out tasks that required the repetitive use of her right hand, that she experienced persistent pain and required some modifications in carrying out her current employment duties, and that she would be unable to perform heavy strength work.
- [120] Second, and more critically, the central basis for the judge's conclusion that there was no real and substantial possibility of a future income loss was that the injury "has not affected her ability to earn income in her varied roles as a care aide, server, or painter, all of which involve some level of physical exertion": Trial Reasons at para. 130 (emphasis added). However, the finding that the appellant's ability to earn an income had not been affected by the time of trial was not dispositive of her claim for future loss of earning capacity. The task for the judge on the claim for future loss of capacity was to compare the plaintiff's likely future working life with and without the accident. Respectfully, I do not see anywhere in the trial judgment where the judge meaningfully engaged in such an analysis.
- [121] It follows that I cannot agree with my colleague's conclusion (at para. 73 of his judgment) that it would have been inconsistent if the judge had concluded the evidence did not support an award for past loss of earning capacity in her job as a painter, but did support an award for future loss of earning capacity. Nor can I agree that the "the same legal test"

applies to the assessment of claims for past and future loss of earning capacity. It is true that a single purpose underlies claims for past and future loss of earning capacity: to restore the plaintiff to the position they would have been in absent the accident. The restorative purpose of tort damages requires that a plaintiff be compensated for pecuniary loss arising from the impairment of earning capacity, whether the loss occurs before or after trial: *Hartman v. MMS Homes Ltd.*, 2023 BCCA 400 at para. 35. It is also true that the same principles apply to the assessment of past and future hypothetical events with respect to claims for past and future loss of earning capacity: *Tigas v. Close*, 2024 BCCA 223 at para. 22.

- [122] However, the factual inquiries that a judge must undertake in valuing claims for past and future earning capacity are fundamentally different. An award of damages for loss of past earning capacity compensates the claimant for the loss of the value of the work they would have performed up to the time of trial, but were unable to perform due to the accident-related injury: *Lamarque v. Rouse*, 2023 BCCA 392 at para. 29. Not all of the relevant events are hypothetical, as by the time of trial we know what the plaintiff actually did earn prior to trial. In some cases, a claimant is able to work through their injuries up to the date of trial without a past income loss due to their stoicism. However, this does not answer the question of whether they will be able to continue to do so well into the future.
- [123] An award of damages for loss of future earning capacity, by contrast, compensates the claimant for a real and substantial possibility they will experience future income loss at any time over the remainder of their working life. For the reasons I have stated, it is not the case that the dismissal of a plaintiff's claim for past loss of earning capacity is dispositive of their claim for future loss of earning capacity. This is made clear in many cases, including *Rab*. If there is a real and substantial possibility of a future income loss, regardless of whether the impaired capacity had led to a loss of income by the time of trial, then the plaintiff should be compensated. A trial judge's finding that a youthful and physically fit plaintiff who has persistent pain symptoms due to their accident-related injury has not suffered a pecuniary loss at the time of trial does not answer the question of whether the injury might lead to an income loss when the claimant is aged 40, or 60, or older.
- [124] For these reasons, I conclude that the trial judge's failure to carry out the requisite analysis constitutes an error of law that justifies appellate intervention.

Remedy

- [125] In my view, it is unnecessary to remit this matter back to the trial court. Rather, it is feasible and in the interests of justice for this Court to conduct the necessary analysis. There are no credibility issues to resolve, and the analysis can be done fairly on the trial judge's findings of fact and the evidentiary record. In these circumstances, there is no need to put the parties to the expense and effort of a further hearing in the trial court: *West Moberly First Nations v. British Columbia*, 2020 BCCA 138 at paras. 135-136.

- [126] The trial judge found at the first step of the Rab process that the evidence established a potential future event that could give rise to a loss of capacity. As I have noted, the respondent does not challenge this decision on appeal. For the reasons I have stated, the finding is unassailable. The trial judge's findings, and the evidence, disclose that the appellant suffers right wrist pain and limitations that impacts her ability to perform work-related tasks. While she had, by the time of trial, successfully managed the pain and limitations, she did so by making modifications to her work tasks. The appellant experiences pain and fatigue at the end of her work day. Certain occupations, those involving heavy strength, are not available to her because of her injury.
- [127] The question, then, at the second stage of the Rab process is whether this loss of capacity gives rise to a real and substantial possibility of a future loss. This question is a very challenging one to answer on the facts of this case. The appellant was a relatively young plaintiff--29 years old at the time of trial. She had limited education and a varied work history. The trial judge found that the appellant will likely continue to work as a "painter, server, or in another similar vocation": Trial Reasons at para. 129. By this, I infer that he found the appellant was likely in the future to continue to work in occupations that involve physical activity and a relatively low income. This assessment appears to me to be well-supported by the evidence of the appellant's work history, limited post-high school education, and stated preference for jobs that keep her active.
- [128] Absent the accident, there is a real and substantial possibility that the appellant would have attempted to maintain full-time, or close to full-time, hours in such an occupation in order to maximize her financial security as she gets older. I would assess this possibility as strong. Other contingencies would have to be accounted for, including the real and substantial possibilities that the appellant would have worked part-time hours, or left the work force altogether for periods of time.
- [129] With the accident, it may be that the appellant could pursue the same work trajectory, although I do note that her ability to sustain full-time hours in occupations such as painter and server has been relatively untested after the accident. Taking a common-sense approach to the evidence, I consider that there is a real and substantial possibility that the appellant's ability to work through her pain in performing her job-related tasks will diminish as she ages. Thus, she may work fewer hours than she otherwise would have, resulting in a pecuniary loss. I would assess the risk of such a loss occurring as moderate. There is also a real and substantial possibility that the appellant will have to switch jobs, and will have more prolonged periods of unemployment because her need for accommodation will limit her employment prospects. This is a relatively low risk at the moment, but may increase over time if her ability to work through her wrist pain diminishes as she ages, which is a common-sense proposition. There is also a real and substantial possibility that she will be foreclosed from pursuing reasonable alternative occupations because she is unable to perform heavy strength work. This also appears to be a low risk on the evidence in light of her job history, which has not involved heavy strength

work.

[130] In sum, I consider that the evidence does disclose a real and substantial possibility of future income loss as a result of the appellant's loss of capacity. This is not a case, such as *Steward and Perren*, in which the accident-related injury impacts a plaintiff's capacity to work in occupations they had no reasonable prospect of pursuing. Here, the occupations that the appellant is likely to pursue in the future require her to perform duties that involve the repetitive use of her dominant right hand. The injury to her right wrist has already led her to modify work duties, and required her to work through pain. Even if the appellant's pain symptoms do not worsen over time, there is a real and substantial possibility that the continuation and accumulation of these symptoms will result in her in having to work through the pain over a period of many years, and possibly until she retires. Accordingly, in light of the appellant's personal circumstances, and the fact that her physical abilities have been diminished and limited by the wrist injury, there is a real and substantial possibility of future income loss.

[131] In my view, it is appropriate to adopt the approach endorsed in *Pallos v. Insurance Corp. of British Columbia*, 100 B.C.L.R. (2d) 260, 1995 CanLII 2871 (C.A.) of valuing the appellant's future income loss based on one or more years of earnings. In *Rab*, this Court recognized that such an approach may be appropriate where the plaintiff continues to earn income at or close to pre-accident levels, but has suffered an impairment that may affect their ability to continue to do so in the future: at para. 72. In the circumstances of this case, I am of the view that appellant's future loss should be valued at \$80,000. This is the equivalent of approximately two years of employment, assuming an hourly wage of \$25 (the amount she currently earns in her painting job), and a 32-hour work week. Such an approach is warranted, in my view, because of the appellant's relatively young age and the fact that her pre-accident annual earnings do not reflect her likely future earnings trajectory. It is a fair and reasonable award, and reflects an appropriate balancing of the positive and negative contingencies in the challenging circumstances of this case.

Disposition

[132] I would allow the appeal, and substitute an award of damages of \$80,000 for future loss of earning capacity in place of the trial judge's award of \$0.

"The Honourable Madam Justice Horsman"

I AGREE:

"The Honourable Madam Justice Fenlon"

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