

CANADA / JUDGMENT

Deegan v. L'Heureux

2023 BCCA 159

COURT

British Columbia Court of Appeal

DECIDED

17 April 2023

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2023 BCCA 159 Deegan v. L'Heureux

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

Deegan v. L'Heureux,

2023 BCCA 159

Date: 20230417

Docket: CA48206

Between:

Ross Deegan and Unicorn Trucking Ltd.

Appellants

(Defendants)

And

Kylee Dean L'Heureux

Respondent

(Plaintiff)

Before:

The Honourable Madam Justice Saunders

The Honourable Justice Marchand

The Honourable Madam Justice Horsman

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

March 10, 2022 (L'Heureux v. Deegan, 2022 BCSC 382,
New Westminster Docket M178340).

Counsel for the Appellants:

M-H. Wright

M.D. Mirosolin

Counsel for the Respondent:

G. Cameron

I. Ponomarenko, Articled Student

Place and Date of Hearing:

Vancouver, British Columbia

February 8, 2023

Place and Date of Judgment:

Vancouver, British Columbia

April 17, 2023

Written Reasons by:

The Honourable Justice Marchand

Concurred in by:

The Honourable Madam Justice Saunders

The Honourable Madam Justice Horsman

Summary:

The respondent was injured in a motor vehicle accident for which the appellants were 90% liable. She was 20 years old at the time and had yet to establish herself in a career. The trial judge awarded her \$250,000 for her loss of future earning capacity and \$34,267.02 for the cost of future chiropractic treatments. The appellants challenge these awards principally on the basis that there was no medical evidence of an actual employment-related impairment or of the need for ongoing chiropractic treatments. Held: Appeal allowed in part. While the evidentiary record regarding the heads of damage at issue was sparse, there was an evidentiary foundation for the judge to make awards for loss of future earning capacity and cost of future care. However, the record did not support the judge's award of \$250,000 for the respondent's loss of future earning capacity. That award is set aside and an award of \$70,000 is substituted. The appeal of the award for cost of future care is dismissed.

Reasons for Judgment of the Honourable Justice Marchand:

Introduction

- [1] In June 2014, the respondent Kylee Dean L'Heureux was injured in a motor vehicle accident. She was 20 years old and had yet to establish herself in a career. As a result of the accident she suffered from anxiety and headaches and developed chronic pain. Although she missed little work due to her injuries in the seven years between the accident and trial, she sought (amongst other things) substantial damages for her loss of future earning capacity and cost of future care.
- [2] Following an eight-day "fast track" trial, the judge apportioned liability 10% to her and 90% to the appellants. He assessed her damages to be \$364,016.16, including \$250,000 for her loss of future earning capacity. After reducing her damages by 10% for her contributory negligence, he awarded her \$327,614.54.
- [3] The judge also quantified but did not award her \$34,267.02 for her cost of future care. He understood that the appellants' insurer would pay her cost of future care under s. 83 of the Insurance (Vehicle) Act, R.S.B.C. 1996, c. 231 and Part 7 of the Insurance (Vehicle) Regulation, B.C. Reg. 447/83. To facilitate the appeal, the parties had the trial order rectified to include the judge's quantification of Ms. L'Heureux's cost of future care (less 10% for her contributory negligence) in the judge's award. The judge's reasons for judgment are indexed at 2022 BCSC 382.
- [4] The appellants appeal the judge's awards for Ms. L'Heureux's loss of future earning capacity and cost of future care. They say both awards are based on errors of fact and law principally flowing from what they say is an absence of medical evidence of (1) actual employment-related impairment and (2) the need for ongoing chiropractic treatments.
- [5] While the judge was left with a spare body of evidence as to the heads of damage at issue on appeal, there was an adequate evidentiary foundation for the judge to make awards for loss of future earning capacity and cost of future care. However, the record does not support the judge's award of \$250,000 for the respondent's loss of future earning capacity. For these reasons and those that follow, I would set aside that award and substitute for it an award of \$70,000. I would dismiss the appeal of the award for cost of future care.

Background

- [6] Ms. L'Heureux graduated from high school in 2012. Prior to the accident, she was living with her mother and step-father. She had no physical limitations. She had experienced some anxiety before tests in school or when she had too many work commitments but had never sought mental health support. She was physically active, worked as a server at a restaurant and helped with various domestic duties at home.

- [7] The details of the June 6, 2014 accident are not relevant to the appeal. Of relevance is that after the accident, Ms. L'Heureux experienced ongoing anxiety, headaches and pain in her neck, shoulders and upper back.
- [8] After the accident, Ms. L'Heureux was taken by ambulance to a local hospital. She followed up with her family doctor, Dr. Daniel Wong, the next week. At various times up to the date of trial, she took prescribed medications, attended physiotherapy, participated in an active rehabilitation program with a kinesiologist, engaged in a home exercise program, tried massage therapy and had chiropractic treatments. Although her condition improved, she was unable to engage in employment, household and recreational activities to the same level as she had prior to the accident. She was eventually diagnosed with chronic myofascial pain and associated cervicogenic headaches.
- [9] As a result of the accident, Ms. L'Heureux was off work for a little over a month. She then returned to work on reduced hours for another month. By mid-August 2014, she had resumed working full shifts as a server but was unable to meet all of the physical demands of her job.
- [10] In September 2015, Ms. L'Heureux found her serving job to be too physically demanding. So, she began working as a nanny for a family with two children aged eight and ten. Then, starting in September 2017, she began working for the Hemeon family who had two children aged one and two. The driving and lifting requirements of her nanny positions aggravated her symptoms.
- [11] In July 2019, the Hemeon family no longer required the services of a nanny so Ms. L'Heureux decided to take an education program to become an administrative assistant. Sitting at a desk and working continuously on a computer aggravated her neck, shoulder and upper back pain.
- [12] After successfully completing her education program, in January 2020, Ms. L'Heureux obtained employment as a receptionist with Port Coquitlam Community Fire Prevention earning \$17 per hour (an amount over the minimum wage rate). The desk time associated with the position also caused an increase in her neck, shoulder and upper back pain. In March 2020, Ms. L'Heureux lost her receptionist position due to the COVID-19 pandemic.
- [13] The day after losing her receptionist position, Ms. L'Heureux learned she was pregnant. She did not work during her pregnancy and her symptoms decreased. Her baby arrived in November 2020. The physical demands of motherhood then caused her symptoms to increase.
- [14] At the time of trial, Ms. L'Heureux had not returned to work outside the home. The judge described her future plans:

[52] The plaintiff hopes to become certified to open an in-home daycare when her child is two or three years old. Certification requires completion of a 20-hour online program, a certification which she has previously held. The plaintiff believes that she could manage a five-child in-home daycare. She is concerned about lifting children in her care, but appreciates that ongoing symptoms will hinder her activity in the future.

Ms. L'Heureux's Employment Income

[15] The judge helpfully summarized Ms. L'Heureux's pre- and post-accident earnings at para. 47 of the reasons for judgment. I reproduce his chart below:

Tax Year

Income and Sources

2012

\$3,544 (McDonalds and Thrifty Foods)

2013

\$9,931 (Thrifty Foods and The Well at the Casino)

2014

\$11,397 (The Well at the Casino)

2015

\$15,429 (1st Nanny Position and the Well at the Casino and Vacation Pay)

2016

\$17,251 (1st Nanny position)

2017

\$20,878 (1st and 2nd Nanny position)

2018

Missing

2019

\$18,027 (2nd Nanny position)

2020

\$22,869 (Port Coquitlam Community Fire Prevention for approximately three months, Employment Insurance and maternity leave)

Expert Medical Evidence

- [16] Ms. L'Heureux adduced expert medical evidence from her family doctor, Dr. Wong, as well as two physiatrists, Drs. Cecil Hershler and Zeeshan Waseem. The appellants did not adduce any expert medical evidence.
- [17] In Dr. Wong's first report dated December 5, 2016, he recounted Ms. L'Heureux's post-accident complaints, diagnoses and treatment. He indicated that her recovery was "complete" as of November 2016. He recognized that future strenuous exercise "may, at times, aggravate her soft tissues and her symptoms may return." However, he anticipated that any such symptoms would "be easy to manage and should not cause [Ms. L'Heureux] any significant disabilities." He did not anticipate complications.
- [18] In Dr. Wong's second report dated December 16, 2018, he recounted that Ms. L'Heureux's symptoms had returned with increased employment-related and recreational activities. He outlined that he and his locum had recommended that she take anti-inflammatory medication for symptomatic relief and build up her tolerance to activities. He also noted that chiropractic treatments were helping her headaches and that "[s]he needed further help such as chiropractic [treatments] to help her to alleviate her symptoms."
- [19] Dr. Wong addressed the conclusion in his first report that Ms. L'Heureux's recovery was "complete" by saying that he had been "wrong". While Ms. L'Heureux's diagnosis of myofascial pain had not changed, he indicated that the symptoms "tend[ed] to linger." Dr. Wong stated that he "would not be surprised that [Ms. L'Heureux's] symptoms would linger on for another year or two if she performed strenuous exercises." He was optimistic that rest and occasional use of anti-inflammatory medication would alleviate her symptoms and that she had "good prospect for a complete recovery."
- [20] Dr. Hershler assessed Ms. L'Heureux on September 26, 2018. In his report dated September 27, 2018, he recounted the details of the accident as well as her complaints and treatment. He noted that massage therapy had not been effective but that chiropractic treatments had "effectively eliminated" her headaches.
- [21] Dr. Hershler diagnosed Ms. L'Heureux with myofascial pain and cervicogenic headaches caused by the accident. He indicated that in his practice, "80% of patients with similar types of injury take three years to recover, while another 10% take five years and 10% will have permanent symptoms." He cautioned that by "recover" he meant that "the symptoms diminish to tolerable levels (albeit in a fluctuating pattern) and do not affect function." He considered it likely that Ms. L'Heureux would remain symptomatic for "at least another one-to-two years, if not longer." He testified that when a patient has experienced pain for five years with no change, the patient is deemed to have chronic pain and the symptoms are likely to continue indefinitely.

- [22] For further rehabilitation, Dr. Hershler recommended topical anti-inflammatory/muscle relaxant cream and a stretching routine. In his opinion, Ms. L'Heureux "should be able to continue working in her current fashion." (At the time, she was working as a nanny.)
- [23] Dr. Waseem assessed Ms. L'Heureux on March 18, 2021. In his report dated April 1, 2021, he reviewed Ms. L'Heureux's pre-accident medical history, functional status and education and employment history. He then described the accident, summarized the course of her post-accident symptoms and treatment, and outlined her then-current symptoms. He specifically noted that she had experienced continuous neck, trapezius and upper back pain and headaches since the accident. He reported that her symptoms were alleviated by medications and stretching and that her condition was "much improved since onset and stable for at least the past several months."
- [24] In terms of Ms. L'Heureux's post-accident function, Dr. Waseem reported that she was able to complete most of her housekeeping duties, "though at a reduced frequency due to pain." He also reported that she was experiencing "more neck/upper back pain with lifting, carrying and holding her child" who was then four months old. He reviewed her work history noting that she had not worked since she lost her receptionist position due to the pandemic.
- [25] Dr. Waseem next reviewed the results of his physical examination of Ms. L'Heureux in detail. He concluded by offering his opinion that the injuries Ms. L'Heureux suffered in the accident had resulted in "chronic myofascial pain of the affected regions with associated cervicogenic headaches." He considered her prognosis to be "fair" and stated that "she is unlikely to fully recover from the accident-related injuries and more likely than not will continue to experience pain and headaches."
- [26] That said, Dr. Waseem was of the view that her symptoms were "much improved", she did not appear to have any "negative prognostic indicators" and despite her pain she had shown "resilience" such that there was "no residual disability." He explained in his testimony:

So, what I meant by that is Ms. L'Heureux is able to do things despite having pain. So, she's not necessarily precluded from physical activity and normal function. When she overexerts herself, that's when she notices symptoms getting worse which might require treatment.

- [27] Dr. Waseem recommended stretching and anti-inflammatory medication to manage Ms. L'Heureux's symptoms.

Reasons for Judgment of the Trial Judge

- [28] The trial judge began his reasons for judgment by describing the accident. He then reviewed the evidence of Ms. L'Heureux and the five lay witnesses she called, including a witness to the accident as well as her mother, fiancé and former employer, Ms. Hemeon. The judge next reviewed the expert medical and collision evidence. He completed his review of the evidence by outlining the evidence provided by the personal appellant. The judge

commented that it was not necessary to review the evidence provided by the president of the corporate appellant as he had not witnessed the accident.

- [29] The judge summarized the positions of the parties. Ms. L'Heureux was seeking a total of \$408,283.18 in damages, comprised of \$120,000 in non-pecuniary damages, \$2,415.21 in past wage losses, \$250,000 in loss of future earning capacity, \$34,267.02 for cost of future care and \$1,600.95 in special damages.
- [30] The appellants took the position that Ms. L'Heureux was 100% responsible for the accident such that no damages were payable. They also advanced an argument that Ms. L'Heureux's damages were capped at \$100,000 based on the wording of the "fast track" litigation rule. The judge indicated that the appellants made no alternative arguments regarding damages. However, a review of the transcript reveals that the appellants relied on Dr. Wong's first report and submitted that Ms. L'Heureux had fully recovered by November 2016, which suggested she was entitled to a modest award of damages only.
- [31] Relying on *Rakic v. Stolz*, 2019 BCSC 2300 and *Lensu v. Victorio*, 2019 BCSC 59, the judge rejected the appellants' fast track litigation argument. The judge then undertook a lengthy liability analysis. As noted, he found Ms. L'Heureux 10% and the appellants 90% liable for the accident. The judge's conclusion regarding the fast track litigation rule and his liability findings are not at issue on appeal. The judge next turned to his assessment of Ms. L'Heureux's damages.
- [32] The judge accepted the expert medical opinions that the accident had caused injuries to Ms. L'Heureux's neck, back and shoulders, and caused cervicogenic headaches along with chronic mental injury. He found that Ms. L'Heureux was "significantly injured and that these injuries caused significant pain and resulted in the plaintiff's experience and enjoyment of life being significantly reduced." He surveyed similar cases and awarded non-pecuniary damages of \$110,000.
- [33] Regarding Ms. L'Heureux's past wage loss claim, the judge held that she had missed a total of 235.63 hours of work in 2014, which led to a loss of \$2,415.21. The judge awarded this amount to Ms. L'Heureux.
- [34] The judge began his analysis of Ms. L'Heureux's loss of future earning capacity claim by reviewing her employment history and how her injuries had affected her work. He specifically noted that she had "not intend[ed] to make a nanny position her career path, but did intend, subject to her physical limitations, to open a licensed daycare." He outlined her evidence regarding her future plans:
- [203] The evidence of the plaintiff was that she hopes to open a licensed childcare facility for up to five children in the next couple of years, assuming that her physical condition allows. There is a limit of seven children for homebased daycare, but Ms. L'Heureux testified that she did not expect to be able to care for that many children and anticipated potential difficulty with lifting children.

[Emphasis added.]

[35] The judge then cited the following commentary from *Ehrichiou v. Esguerra*, 2021 BCSC 39 regarding the assessment of loss of future earning capacity:

[143] A claim for loss of future earning capacity raises two key questions: (1) has the plaintiff's earning capacity been impaired by their injuries; and, if so, (2) what compensation should be awarded for the resulting harm that will accrue over time?

[144] The decision in *Pololos v. Cinnamon-Lopez*, 2016 BCSC 81, provides an excellent summary of the applicable leading principles on the assessment of loss of future earning capacity:

[133] The relevant legal principles are well-established:

- a) To the extent possible, a plaintiff should be put in the position he/she would have been in, but for the injuries caused by the defendant's negligence; *Lines v. W & D Logging Co. Ltd.*, 2009 BCCA 106 at para. 185, leave to appeal ref'd [2009] S.C.C.A. No. 197;
- b) The central task of the Court is to compare the likely future of the plaintiff's working life if the Accident had not occurred with the plaintiff's likely future working life after the Accident; *Gregory v. Insurance Corporation of British Columbia*, 2011 BCCA 144 at para. 32;
- c) The assessment of loss must be based on the evidence, but requires an exercise of judgment and is not a mathematical calculation; *Rosvold v. Dunlop*, 2001 BCCA 1 at para. 18;
- d) The two possible approaches to assessment of loss of future earning capacity are the "earnings approach" and the "capital asset approach"; *Brown v. Golaiy* (1985), 1985 CanLII 149 (BC SC), 26 B.C.L.R. (3d) 353 at para. 7 (S.C.); and *Perren v. Lalari*, 2010 BCCA 140 at paras. 11-12;
- e) Under either approach, the plaintiff must prove that there is a "real and substantial possibility" of various future events leading to an income loss; *Perren* at para. 33;
- f) The earnings approach will be more appropriate when the loss is more easily measurable; *Westbroek v. Brizuela*, 2014 BCCA 48 at para. 64. Furthermore, while assessing an award for future loss of income is not a purely mathematical exercise, the Court should endeavour to use factual mathematical anchors as a starting foundation to quantify such loss; *Jurczak v. Mauro*, 2013 BCCA 507 at paras. 36-37.
- g) When relying on an "earnings approach", the Court must nevertheless always consider the overall fairness and reasonableness of the award, taking into account all of the evidence; *Rosvold* at para. 11.

[145] In *Grewal v. Naumann*, 2017 BCCA 158 at paras. 48-49, the Court of Appeal provided a summary of the assessment of loss of future earning capacity and the application of the "real and substantial possibility" standard:

- [48] In summary, an assessment of loss of both past and future earning capacity involves a consideration of hypothetical events. The plaintiff is not required to prove these hypothetical events on a balance of probabilities. A future or hypothetical possibility will be taken into consideration as long as it is a real and substantial possibility and not mere speculation. If the plaintiff establishes a real and substantial possibility, the Court must then determine the measure of damages by assessing the likelihood of the event. Depending on the facts of the case, a loss may be quantified either on an earnings approach or on a capital asset approach: *Perren v. Lalari*, 2010 BCCA 140 at para. 32.
- [49] The assessment of past or future loss requires the court to estimate a pecuniary loss by weighing possibilities and probabilities of hypothetical events. The use of economic and statistical evidence does not turn the assessment into a calculation but can be a helpful tool in determining what is fair and reasonable in the circumstances: *Dunbar v. Mendez*, 2016 BCCA 211 at para. 21.
- [36] The judge found that Ms. L'Heureux had proven that each of the well-known considerations in *Brown v. Golaiv*, (1985), 26 B.C.L.R. (3d) 353, 1985 CanLII 149 applied to her situation and that she had suffered a loss of future earning capacity. In other words, he accepted that Ms. L'Heureux had proven that as a result of the injuries she suffered in the accident:
- she had been rendered less capable overall from earning income from all types of employment;
 - she was less marketable or attractive as an employee to potential employers;
 - she had lost the ability to take advantage of all job opportunities which might otherwise have been open to her, had she not been injured; and
 - she was less valuable to herself as a person capable of earning income in a competitive labour market.
- [37] The judge's analytical path to his award of \$250,000 for Ms. L'Heureux's loss of future earning capacity is at issue. So, I set it out in full:
- [209] At the time of the Accident, the plaintiff was 20 years old and her career path had not been established. She would have 45 years of potential employment before retirement at 65 years of age. She attempted work at various jobs, including as a server, a nanny or daycare worker, and as an administrative employee. Her injuries made more difficult employment which required lifting, sitting for work at a computer screen or carrying anything from heavy bus trays to children. She also found it difficult to respond to the rapid movements of children or the bending and stretching necessary to attend to the needs of children. She attempted to find employment in an administrative field, but found sitting for the hours of a regular working day was painful. The foregoing are factors to be considered in assessing, not calculating, damages for loss of future income-earning capacity.

- [210] It is [a] very real difficulty in the case at bar to assess a loss of future earning capacity where there were no submissions of either party that addressed before the Court the opportunities of the plaintiff in an uncertain future employment setting or a selection of future employment scenarios, which might form the basis for such an assessment.
- [211] Based on the cases cited, in the present case, it is appropriate to use the capital asset approach to the assessment of damages for loss of future income-earning capacity.
- [212] In the case of *Firman v. Asadi*, 2019 BCSC 270, a 40-year-old plaintiff was injured in a motor vehicle accident. Given the uncertainty in calculating her past income and the impact of her injuries on her ability to work in the future, Verhoeven J. applied the capital asset approach. He found that a realistic positive scenario would involve the plaintiff recovering so that she would earn an income similar to her without accident income in the near or medium term, leaving her with some losses in the near term and future of approximately \$112,455, based upon the expert economist's evidence. A realistic negative scenario would involve her condition not markedly improving and the plaintiff being unable to obtain other employment until her retirement at age 65, which would leave her with losses around \$300,000 when adjusted for contingencies. Verhoeven J. found the midpoint between these two scenarios was too low as the negative scenario was more likely, and awarded \$250,000 in damages for loss of future earning capacity. I found this case instructive in the assessment of damages in circumstances where the Accident which has affected the potential future income of the plaintiff took place when she was young and there were decades to potential retirement.
- [213] In the case at bar, the income earned by the plaintiff prior to and after the Accident is set out above at para. 47.
- [214] These figures provide little assistance in measuring the impact of the Accident on the plaintiff's earning capacity. At the time of the Accident, the plaintiff was 20 years old and her career path had not yet been established. The injuries the plaintiff suffered in the Accident clearly impacted her subsequent career plans as she attempted to find a career path that was possible given her injuries. It is not clear what her earning potential could have been had she not been injured.
- [215] On the facts of the case at bar, there are a number of activities, including the childcare activities and working as a server, that have caused pain and restricted those activities. Potentially the pain caused may restrict activity and increase impairment; a future loss of capacity.
- [216] A future increase in impairment would be expected to reduce and restrict income. This is demonstrated on losses of income in the past directly related to loss of capacity caused by the Accident. Reduction in capacity of the plaintiff will, on the medical evidence, be ongoing, and may increase because of activity such as child care. Dr. Hershler's opinion was that as the plaintiff had experienced significant pain for over five years without change, she has chronic pain which will likely continue indefinitely. Dr. Waseem gave the opinion

the plaintiff is unlikely to fully recover from the Accident-related injuries and more likely than not will continue to experience pain and cervicogenic headaches.

[217] In the past, none of the plaintiff's employment has allowed for comfortable working situations, but situations where pain and stiffness in the neck, shoulders and upper back has been constant. None of the past working situations has lasted for long enough to indicate the plaintiff has a demonstrated career path. The Accident occurred when the plaintiff was 20, her age at trial was 27, and there is no obvious, nor clear, working future to a retirement at age 65 or even age 60.

[218] The plaintiff is required to prove future negative contingencies on a "real and substantial possibility" of occurrence (*Perren v. Lalari*, 2010 BCCA 140 at para. 32), a lower threshold than a balance of probabilities, but a higher threshold than something only possible and speculative.

[219] [D]espite the injuries caused, the plaintiff has demonstrated on the evidence, notwithstanding pain and stiffness caused by the Accident, she intends to continue working, perhaps as a childcare worker (a positive contingency). However, she will not be able to do so with the same energy, number of working hours, or potential income (negative contingencies), even if she is able to hold an employment position for a career of some decades which lay ahead.

[220] On the evidence..., including the expert opinions of the only medical doctors called in this case that the symptoms of the injuries from the Accident will persist on chronic basis, there [is] a clear evidentiary basis for a substantial award of damages for loss of future earning capacity. Taking the foregoing contingencies into account, I conclude that a fair and reasonable assessment for loss of future income-earning capacity, taking into account both positive and negative contingencies, is \$250,000.

[Emphasis added.]

[38] Regarding Ms. L'Heureux's claim for cost of future care, the judge accepted her evidence that she will require two chiropractic treatments each month until she retires. Using ICBC's published rate for chiropractic treatments, a multiplier from Appendix E of CIVJI: Civil Jury Instructions, 2nd ed. (Vancouver: Continuing Legal Education Society of British Columbia, 2009) (loose-leaf 2021 update) and a 2% discount rate as required by the Law and Equity Act, R.S.B.C. 1996, c. 253, the judge determined the present value of Ms. L'Heureux's future care needs to be \$34,267.02. The judge's methodology for valuing Ms. L'Heureux's cost of future care is not at issue on appeal. The appellants challenge its evidentiary foundation.

[39] The judge accepted Ms. L'Heureux's quantification of her claim for special damages and awarded her \$1,600.95.

- [40] The judge assessed Ms. L'Heureux's total damages (not including cost of future care) to be \$364,016.16. After deducting 10% to account for her contributory negligence, he awarded her \$327,614.54.

Standard of Review

- [41] The standard of review for damage awards is highly deferential: *Westbroek v. Brizuela*, 2014 BCCA 48 at para. 27. An appeal court may not alter a damage award made at trial merely because, on its view of the evidence, it would have come to a different conclusion. 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.
- [42] The standard of review for findings of fact, including inferences drawn from those facts, and findings of mixed fact and law is palpable and overriding error: *Housen v. Nikolaisen*, 2002 SCC 33 at paras. 19-23; *H.L. v. Canada (Attorney General)*, 2005 SCC 25 at paras. 53-56. The standard of review for questions of law is correctness: *Housen* at para. 8.

Loss of Future Earning Capacity

- [43] Following a comprehensive review of the leading authorities, in *Rab v. Prescott*, 2021 BCCA 345, Justice Grauer outlined a three-step process for assessing loss of future earning capacity claims:
- [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.
- [44] In their factum, the appellants state that "all of the steps from *Rab* are brought into question on this appeal." However, their submissions address only the second and third steps.
- [45] First, at the second step, the appellants submit that the judge's finding at para. 215--that pain caused to Ms. L'Heureux from activities such as child care "[p]otentially may restrict activity and increase impairment" (emphasis added) leading to a future loss of capacity--was speculative and did not equate to a finding of a real and substantial possibility that Ms. L'Heureux would suffer a future pecuniary loss.

- [46] Second, also at the second step, the appellants submit that the judge misapprehended the medical evidence. More specifically, the appellants submit there was no medical evidence that Ms. L'Heureux would experience any "[re]duction in capacity", never mind one that would be "ongoing" or "increase because of activity such as child care." The appellants say the judge conflated Ms. L'Heureux's chronic pain with impairment of her earning capacity and that his findings were not rooted in the evidence.
- [47] Third, at the third step, the appellants submit the judge provided no reasoned analysis in support of the quantification of his award. The appellants highlight that Ms. L'Heureux had worked for years post-accident without interruption. They acknowledge that Ms. L'Heureux testified about her plan to run a licenced day care and that she believed she would be restricted to five children rather than the maximum seven. But the appellants point out that there was no evidence Ms. L'Heureux's home would be suitable to be licenced and submit that her self-perception of her limits provided insufficient support for the judge's award. They further say there was no evidence Ms. L'Heureux would be prevented from obtaining employment that would pay her as much as her absent-injury potential jobs. Finally, they say the judge failed to assess the reasonableness of the award.

Speculation

- [48] The appellants' submission that the judge's finding that Ms. L'Heureux's pain "[p]otentially may restrict activity and increase impairment" leading to a loss of capacity was speculative and did not equate to a finding of a real and substantial possibility rests on this Court's decision in *Kim v. Morier*, 2014 BCCA 63.
- [49] In *Kim*, the trial judge awarded the plaintiff \$10,000 for "her loss of a capital asset, namely her own self-perception that she is less valuable as an employee." This Court set aside the award on the basis that the judge erred in "equating the loss of capital asset here with the plaintiff's own perception." The Court held that the plaintiff had failed to show that it was "a realistic possibility she [would] be less able to compete in the marketplace--with economic consequences, not merely psychological ones": at paras. 5, 8.
- [50] The Court in *Kim* also commented on a statement made by the judge after the award was pronounced that the plaintiff "'may' be less capable of maintaining her disciplined approach to work." In the Court's view, the word "may" was "essentially speculative" and fell short of establishing a real possibility of a future loss: at paras. 7-8.
- [51] I agree that, on its own, the judge's finding at para. 215 about what "potentially may" happen in the future fell short of satisfying the second step in *Rab*. That step required Ms. L'Heureux to establish a real and substantial possibility of a future pecuniary loss. But, respectfully, the judge's finding at para. 215 was not directed to the second-step. Rather, although not couched as such, the judge's finding at para. 215 spoke to the first step.

- [52] The first step in Rab requires an examination of the evidence to determine whether it discloses a potential future event that could lead to a loss of capacity (which I understand to mean a possibility that the injury manifests or will manifest itself in a way that causes financial loss in the future). This is exactly the question the judge answered affirmatively when he spoke of what "potentially may" happen to Ms. L'Heureux in the future. The speculative nature of his answer is not problematic at the first step.
- [53] Further, and notably, Rab identifies the development of chronic injury leading to the sort of considerations discussed in Brown as one type of "event" that may satisfy the first step. Here, the judge expressly found both that (1) Ms. L'Heureux was experiencing chronic pain due to the accident and (2) she had proven that each of the Brown considerations arose in her case. Accordingly, the judge's finding at para. 215 of his reasons discloses no error.
- [54] The main thrust of the appellants' submission that the judge's finding at para. 215 was speculative is that the judge lacked an evidentiary foundation to find a real and substantial possibility of a future pecuniary loss. In support of this position, they submit the judge misapprehended the medical evidence and/or conflated Ms. L'Heureux's chronic pain with an impairment of her earning capacity. I will consider these submissions next.

Misapprehension of the Medical Evidence

- [55] The appellants focus their submission that the judge misapprehended the medical evidence and/or conflated Ms. L'Heureux's chronic pain with an impairment of her earning capacity on para. 216 of the reasons for judgment. For convenience, I set out that paragraph in full below, highlighting the sentence at the heart of the appellants' submission:
- [216] A future increase in impairment would be expected to reduce and restrict income. This is demonstrated on losses of income in the past directly related to loss of capacity caused by the Accident. Reduction in capacity of the plaintiff will, on the medical evidence, be ongoing, and may increase because of activity such as child care. Dr. Hershler's opinion was that as the plaintiff had experienced significant pain for over five years without change, she has chronic pain which will likely continue indefinitely. Dr. Waseem gave the opinion the plaintiff is unlikely to fully recover from the Accident-related injuries and more likely than not will continue to experience pain and cervicogenic headaches.
- [Emphasis added.]
- [56] It is true, as the appellants assert, that there was no medical evidence Ms. L'Heureux would experience a reduction in her capacity to earn income as a result of her accident-related injuries. In September 2018, Dr. Hershler was of the view that Ms. L'Heureux "should be able to continue working in her current fashion." In December 2018, Dr. Wong's final prognosis was that Ms. L'Heureux had a "good prospect for a complete recovery." He said nothing about a loss of earning capacity. Finally, in April 2021, Dr. Waseem reported that Ms. L'Heureux had shown "resilience" such that there was "no residual disability."

- [57] While the judge did not express himself particularly clearly in para. 216, I am not satisfied that he misapprehended the medical evidence or conflated Ms. L'Heureux's chronic pain with an impairment of her earning capacity.
- [58] "Bad reasons" are not a free-standing ground of appeal: *R. v. G.F.*, 2021 SCC 20 at para. 70; *F.H. v. McDougall*, 2008 SCC 53 at para. 99. Further, trial reasons are not to be finely parsed in search for error. Rather, they are to be read as a whole, functionally and in the context of the live issues at trial, informed by the submissions of the parties: *G.F.* at para. 69.
- [59] When read in the appropriate way, the judge's reasons make clear that he had a good grasp of the medical evidence and based his finding of a real and substantial possibility of future pecuniary loss on the full record before him.
- [60] First of all, at paras. 107-128, the judge thoroughly and accurately summarized the expert medical evidence. He relied on this and other evidence in reaching his factual conclusion, not challenged on appeal, that Ms. L'Heureux was suffering from chronic pain. He accurately repeated the key findings of Drs. Hershler and Waseem immediately following the controversial sentence in para. 216 and again in making his award at para. 220.
- [61] Next, at para. 205, the judge cited a passage from *Ehirciou* that correctly set out the second step in *Rab*, namely, that the onus was on Ms. L'Heureux to prove a real and substantial possibility of a future event leading to a loss of income. He displayed his understanding of the onus on Ms. L'Heureux at para. 218 where he held that she was required to prove a real and substantial possibility of "future negative contingencies". As I read the judge's reasons, he used the term "future negative contingencies" in para. 218 to mean future events adversely affecting Ms. L'Heureux's income due to her injuries (see *Perren v. Lalari*, 2010 BCCA 140 at para. 32).
- [62] Finally, the judge considered the medical evidence in the context of the lay evidence, including that of Ms. L'Heureux's mother, fiancé and former employer, to reach his conclusion that there was a real and substantial possibility of Ms. L'Heureux experiencing a future pecuniary loss due to her injuries. He found at paras. 198-202 and 209 that she had left her waitressing job and struggled in her work as a nanny, her studies and her work as a receptionist due to her injuries. These findings amply supported his conclusion at para. 219 that, despite her injuries, Ms. L'Heureux intended to continue working but "will not be able to do so with the same energy, number of working hours, or potential income".
- [63] In light of the full record and reading the reasons as a whole, the judge was entitled to find that there was a real and substantial possibility that Ms. L'Heureux's chronic pain would likely hold her back from working to her full capacity in the future and cause her to suffer a loss of income. As a young person "without a settled line of work" who "face[d] limitations on her ability to work competitively in jobs that were previously open to her", Ms. L'Heureux established "an adequate foundation for the trial judge's award": *Sinnott v. Boggs*, 2007 BCCA 267 at para. 17.

- [64] Having established her entitlement to an award for loss of future earning capacity, the real questions are: (1) "How did the judge arrive at his award of \$250,000?" and (2) "Does the record support the award?"

Justification for and Reasonableness of the Award

- [65] The judge lamented the lack of assistance he received from the parties with respect to the difficult task of quantifying Ms. L'Heureux's loss of future earning capacity claim. Perhaps in an effort to squeeze her case into the "fast track" litigation rule (which is intended to limit trials under the rule to no more than three days), Ms. L'Heureux did not adduce the type of expert evidence typically adduced by young, chronically injured plaintiffs seeking a substantial award for loss of future earning capacity in circumstances where their future careers are uncertain. In particular, she did not adduce a functional capacity evaluation, vocational rehabilitation assessment or labour economist report. The appellants submitted that Ms. L'Heureux was not entitled to an award for loss of future earning capacity. They offered no evidence on the issue and made no alternative submissions to help guide the judge's decision-making process.
- [66] Most of the judge's analysis of Ms. L'Heureux's loss of future earning capacity claim focused on the first two steps of the Rab analysis. On one reading of his reasons for judgment, he essentially skipped the third step of assessing the loss and either based his award on the award made in the factually dissimilar case of *Firman v. Asadi*, 2019 BCSC 270 or picked a number out of thin air.
- [67] I agree with the appellants that the judge's assessment methodology is not clear from his reasons for judgment. But, at the risk of repeating myself, the judge's reasons must be read as a whole, functionally and in the context of the live issues at trial, informed by the submissions of the parties: G.F. at para. 69.
- [68] To begin, the excerpt the judge cited from *Ehrichtiou* correctly set out a number of the legal principles applicable to the task before the trial judge. The excerpt identified that there were two possible approaches to assessing Ms. L'Heureux's loss of future earning capacity, namely, the "earnings approach" and the "capital asset approach." The excerpt also identified that the assessment involved weighing the likelihood of the real and substantial future possibilities to arrive at a fair and reasonable award that would, to the extent possible, put Ms. L'Heureux in the position she would have been in if she had not been injured.
- [69] After citing these and other relevant principles, the judge sensibly settled on the capital asset approach to assess Ms. L'Heureux's loss. "The earnings approach is typically used in cases where there is an identifiable loss of income, for example, where the plaintiff has an established work history. On the other hand, the capital asset approach is typically used when that is not the case and the court makes an award for the plaintiff's loss of opportunity, for example, with a young plaintiff whose career path is uncertain": *Kringhaug v. Men*, 2022 BCCA 186 at para. 43; see also *Perren* at paras. 12 and 32.

- [70] The judge cited *Firman*, in which the plaintiff was awarded \$250,000 for her loss of future earning capacity, as a helpful example of applying the capital asset approach. In particular, he said *Firman* was "instructive in the assessment of damages in circumstances where the Accident which has [a]ffected the potential future income of the plaintiff took place when she was young and there were decades to potential retirement." However, there are important factual differences between this case and *Firman*: for example, the plaintiff in *Firman* was 40 years old at the time of the accident and had an established work history as a barber and fitness trainer. Accordingly, it is doubtful that, as feared by the appellants, the judge simply awarded Ms. L'Heureux \$250,000 for her loss of future earning capacity because that same amount was awarded in *Firman*.
- [71] Based on the judge's reasons, it is fair to describe his award as being "at large" or "global" in nature. There is authority for the proposition that "[i]n cases where the future is hard to predict, a global approach to assessing the loss of future earning capacity is preferable": *Jurczak v. Mauro*, 2013 BCCA 507 at para. 38; see also *Sinnott* at paras. 16-17. But, such an award must still be grounded in the evidence: *Rosvold v. Dunlop*, 2001 BCCA 1 at para. 11; *Morlan v. Barrett*, 2012 BCCA 66 at paras. 59, 61.
- [72] In this case, the judge accepted Ms. L'Heureux's submission that she should be awarded \$250,000 for her loss of future earning capacity. The transcript of proceedings shows that Ms. L'Heureux's submission was based on the following evidence:
- At the time of the accident, she was only 20 years old and had not decided on a career path.
 - She eventually left her position as a server because it was too physically demanding for her.
 - She had difficulties in her first nanny position. Driving the eight and 10-year-old children to and from school and activities aggravated her injuries.
 - She had difficulties in her second nanny position. Lifting and carrying two young children also aggravated her injuries and she did not complete expected household chores.
 - She intended to open a licensed day care in her home in the next one to two years and anticipated being able to manage only five rather than the maximum seven children due to her physical limitations.
 - She was only 27 years old at the time of trial and had essentially her entire working life ahead of her.
- [73] Though not reiterated in submissions, Ms. L'Heureux had also given evidence that she expected to earn about \$1,000 per child per month in her day care, based on \$45 per day for children aged three and under and \$30 to \$35 per day for children over the age of three. Ms. L'Heureux testified that there is a limit of three children under the age of three at licenced day cares.

- [74] In addition, Ms. L'Heureux's mother had testified that she had run an in-home licenced day care for 29 years. She confirmed that such day cares are limited to seven children with no more than four children under four and two children under two. She testified that the prices for children under three, three to five, and over five were \$750, \$700 and \$550 per month respectively. She confirmed that Ms. L'Heureux had assisted her with the running of her day care and had previously completed at least some of the mandatory online and first aid programming to open a day care. She had also observed Ms. L'Heureux struggle with some typical day care chores and activities as a result of her injuries.
- [75] Given (1) Ms. L'Heureux's mother's success in running an in-home day care for 29 years, (2) Ms. L'Heureux's affinity for and experience working with children, and (3) Ms. L'Heureux's completion of at least some of the necessary programming to do so, there was an evidentiary foundation for the judge to conclude there was a real and substantial possibility that Ms. L'Heureux would open an in-home day care.
- [76] Given the difficulties Ms. L'Heureux had managing two older and then two younger children as a nanny (which the judge accepted), there was also an evidentiary foundation supporting Ms. L'Heureux's testimony that she would likely be able to manage only five children, not the maximum seven.
- [77] Using an average of \$650 per month per child for two children equals lost annual earnings of \$15,600. Using the multiplier employed by the trial judge to derive a present value for Ms. L'Heureux's cost of future care award (26.4406) results in a present value of lost annual earnings of \$412,473. Although subject to many contingencies, this calculation is of at least some assistance in understanding the scale of the award sought by Ms. L'Heureux and made by the judge. But was the judge's award of \$250,000 supported by the record? In my view, it was not.
- [78] The judge's award may be seen as taking account of general labour market contingencies and perhaps some additional specific contingencies but, respectfully, there were at least three significant shortcomings in Ms. L'Heureux's theory of loss.
- [79] First, Ms. L'Heureux adduced no evidence to establish that her home was suitable for hosting an in-home licenced day care for five children.
- [80] Second, she adduced no evidence to assist the judge in understanding how profitable she expected her day care to be. In particular, she adduced no evidence regarding the fixed and variable costs of running a day care, including such things as the cost of having adequate space, insurance and supplies. In other words, she adduced evidence only of her expected lost revenue but not of her expected lost profit.

- [81] Third, and perhaps most significantly, Ms. L'Heureux's theory took no account of the fact that post-accident she had proven herself capable of maintaining reasonably remunerative employment in an administrative role. Coupled with the previous point, there was no way for the judge to know whether Ms. L'Heureux would earn more or less in an administrative role paying her \$17 per hour as compared to running an in-home licenced day care.
- [82] Despite the difficulties associated with valuing the loss of a young plaintiff's loss of earning capacity and the appropriateness of making "global" awards in such contexts, it is always preferable for trial judges to transparently explain how they arrived at their award. In this instance, the judge's reasons are lacking. Although the full record makes reasonably clear that the judge accepted Ms. L'Heureux's theory of loss, there were significant shortcomings in that theory that essentially precluded its application. As a result, it must be set aside.
- [83] In cases such as *Schenker v. Scott*, 2014 BCCA 203, *Dornan v. Silva*, 2021 BCCA 228 and *McKee v. Hicks*, 2023 BCCA 109, this Court considered itself well-positioned to evaluate the plaintiffs' loss of future earning capacity claims based on the findings made by the trial judges in those cases. I consider this to be a similarly proper case to do so.
- [84] As noted above, the judge appropriately settled on the capital asset approach for assessing Ms. L'Heureux's loss of future earning capacity. In *Pallos v. Insurance Corp. of British Columbia* (1995), 100 B.C.L.R. (2d) 260, 1995 CanLII 2871 (C.A.), this Court identified three acceptable methods for doing so:
- 43 The cases to which we were referred suggest various means of assigning a dollar value to the loss of capacity to earn income. One method is to postulate a minimum annual income loss for the plaintiff's remaining years of work, to multiply the annual projected loss times the number of years remaining, and to calculate a present value of this sum. Another is to award the plaintiff's entire annual income for one or more years. Another is to award the present value of some nominal percentage loss per annum applied against the plaintiff's expected annual income.
- [85] Given the state of the evidence, this is not an appropriate case to calculate the present value of a postulated minimum annual income loss for Ms. L'Heureux or to award the present value of a nominal percentage loss against her expected annual income. Rather, it is an appropriate case to award Ms. L'Heureux a multiple of her pre-trial annual income.
- [86] Had it not been for the pandemic, Ms. L'Heureux's pre-trial annual income at \$17 per hour would have been in the range of \$35,000. In view of Ms. L'Heureux's youth, the chronic nature of her injuries and the judge's finding that her injuries would adversely affect her ability to earn income in her preferred field of child care and her youth, I consider this an appropriate case to award Ms. L'Heureux \$70,000 for her loss of future earning capacity.

Cost of Future Care

- [87] Leaving aside the appropriateness of the judge's assessment of Ms. L'Heureux's cost of future care, counsel for both parties on appeal (not counsel at trial) acknowledge that the process followed by the judge was inappropriate. I will explain why.
- [88] During closing submissions, Ms. L'Heureux advanced a cost of future care claim for \$34,267.02, representing the present value of two chiropractic visits per month to the age of 65. The judge inquired of her trial counsel whether these amounts would constitute Part 7 benefits. Her counsel confirmed that that was his understanding. Trial counsel for the appellants made no submissions on future care costs, having taken the position that Ms. L'Heureux had fully recovered from her injuries by November 2016.
- [89] At para. 225 of his reasons for judgment, the judge stated that the cost of future care "is awarded to the plaintiff payable by the defendants in the amount of \$34,267.02." He then stated that plaintiff's counsel agreed that the award "will not be included in the award of damages, but will continue to be paid on behalf of the plaintiff by ICBC." The original entered order therefore did not contain a term requiring the appellants to pay Ms. L'Heureux's future care costs.
- [90] There are several difficulties with the judge's approach:
1. Under s. 83(4) of the Insurance (Vehicle) Act, the existence of Part 7 benefits is not to be disclosed to the court until damages have been assessed.
 2. Under s. 83(5), an application to deduct Part 7 benefits from an award is to be made only after damages have been assessed.
 3. Even if it had been appropriate for the judge to make an advance determination of what could be deducted under s. 83, there was no evidence as to whether and to what extent Part 7 benefits would cover the treatments at issue.
 4. The judge made no order compelling the appellants to pay Ms. L'Heureux an award of damages for her cost of future care.
 5. In effect, the judgment implicitly found that the appellants' insurer, ICBC (a third party to the litigation), was obliged to cover Ms. L'Heureux's future chiropractic costs as Part 7 benefits based on the "understanding" of her trial counsel. But the judge provided no method for Ms. L'Heureux to compel the appellants or ICBC to cover those costs.
- [91] Appeals are taken from orders, not reasons: *Glennie v. McDougall & Cowans Holdings Ltd.*, [1935] S.C.R. 257, 1935 CanLII 32 (S.C.C.) at 268; *R. v. R.E.M.*, 2008 SCC 51 at para. 9; *Butera v. Chown, Cairns LLP*, 2017 ONCA 783 at para. 16. In the absence of an order compelling the appellants to pay for Ms. L'Heureux's cost of future care, neither party was in a position to appeal the judge's assessment of this aspect of her claim. Had trial counsel simply reminded the judge of the requirements of s. 83 of the Insurance (Vehicle) Act, the judge would have awarded Ms. L'Heureux \$34,267.02 for her cost of future care and the appellants would have

been in a position to appeal the award.

- [92] The unfortunate unfolding of events at trial created an unnecessary conundrum that was eventually solved by a suggestion from the Court that the parties return to the trial court to rectify the order to include the judge's award for Ms. L'Heureux's cost of future care. That has now been done. I return then to the merits of the appeal.
- [93] Claims for future care must be medically justified, reasonable and fair to both parties: *Aberdeen v. Zanatta*, 2008 BCCA 420 at paras. 41-42. However, it is not necessary to have a physician testify to the medical necessity of each and every item of future care. Rather, there must be "some evidentiary link drawn between the physician's assessment of pain, disability, and recommended treatment and the care recommended by a qualified health care professional": *Gregory v. Insurance Corporation of British Columbia*, 2011 BCCA 144 at para. 39; *Gignac v. Insurance Corporation of British Columbia*, 2012 BCCA 351 at para. 31.
- [94] In this instance, the appellants contend that the award was not medically justified and there was no such link. They submit that none of the medical experts specifically recommended that Ms. L'Heureux undergo chiropractic treatments at all, never mind twice per month until she retires.
- [95] It is true that no medical expert expressly recommended that Ms. L'Heureux undergo chiropractic treatments twice per month until she retires. But the judge's award was medically justified and the necessary evidentiary link was established through a combination of: (1) the medical evidence of Ms. L'Heureux's chronic pain and associated headaches; (2) her testimony that chiropractic treatments provided her with temporary relief; (3) Dr. Wong's statement in his December 16, 2018 report that "[s]he needed further help such as chiropractic [treatments] to help her to alleviate her symptoms"; and (4) Dr. Hershler's recognition that chiropractic treatments "effectively eliminated" her headaches.
- [96] In view of the judge's findings regarding Ms. L'Heureux's chronic pain and associated headaches, it was open to him to accept Ms. L'Heureux's testimony that she would require and continue to attend chiropractic treatments, as well as her estimate of the frequency and duration of her need for such treatment.
- [97] The appellants do not challenge the methodology employed by the judge to assess the value of Ms. L'Heureux's cost of future care. My only comment is that such awards are typically adjusted for contingencies. In this case, the contingency that Ms. L'Heureux will require fewer future chiropractic treatments than awarded is offset by the contingencies that (1) she will need more treatments than awarded and (2) the actual cost of individual treatments will exceed the very modest figure of \$54 per treatment utilized by the judge.
- [98] I would not interfere with the judge's award for Ms. L'Heureux's cost of future care.

Disposition

[99] For all of these reasons, I would allow the appeal of the award for Ms. L'Heureux's loss of future earning capacity, set aside the award of \$250,000 and substitute an award of \$70,000. I would dismiss the appeal of the award for Ms. L'Heureux's cost of future care.

[100] I thank counsel for their very able assistance.

"The Honourable Justice Marchand"

I AGREE:

"The Honourable Madam Justice Saunders"

I AGREE:

"The Honourable Madam Justice Horsman"

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