

CANADA / JUDGMENT

Dunn v. Heise

2022 BCCA 242

COURT

British Columbia Court of Appeal

DECIDED

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2022 BCCA 242 Dunn v. Heise

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

Dunn v. Heise,

2022 BCCA 242

Date: 20220711

Docket: CA47490

Between:

Nicolas Dunn and Her Majesty the Queen in Right of Alberta

Respondents

(Plaintiffs)

And

Ernest Alan Heise, Add Capital Corp., and Legendery Holdings Inc.

Appellants

(Defendants)

Corrected Judgment: The judgment was corrected at para. 64 on July 12, 2022

Before:

The Honourable Mr. Justice Harris

The Honourable Madam Justice Stromberg-Stein

The Honourable Mr. Justice Marchand

On appeal from: An order of the Supreme Court of British Columbia, dated April 23, 2021 (Dunn v. Heise, 2021 BCSC 754, Vancouver Docket M184390).

Counsel for the Appellant:

A.M. Gunn, Q.C.

F. Lin

Counsel for the Respondent:

A. Paladeau

P.J. Bosco

H. Hunter-Loubert

Place and Date of Hearing:

Vancouver, British Columbia

May 11, 2022

Place and Date of Judgment:

Vancouver, British Columbia

July 11, 2022

Written Reasons by:

The Honourable Mr. Justice Marchand

Concurred in by:

The Honourable Mr. Justice Harris

The Honourable Madam Justice Stromberg-Stein

Summary:

The appellants challenge two aspects of an order for damages resulting from a motor vehicle accident. The appellants allege the judge's assessment of the respondent's loss of future income earning capacity was not grounded in evidence and failed to account for his residual earning capacity. The appellants also allege the judge failed to apply contingencies to the assessment of the respondent's cost of future care. Held: Appeal allowed in part. The judge's determination on Mr. Dunn's future annual income was not supported by the record. That portion of the award is set aside and an award of \$370,000 is substituted. However, the balance of the appellant's grounds of appeal are dismissed.

Reasons for Judgment of the Honourable Mr. Justice Marchand:

Introduction

- [1] On May 26, 2016, Nicolas Dunn was seriously injured when a semi-truck carrying a load of wooden telephone poles rear-ended the vehicle he was driving. The accident occurred on Highway 1, near Rogers Pass, British Columbia. Ernest Heise was the driver of the semi-truck. The defendants/appellants admitted liability.
- [2] As a result of the accident, Mr. Dunn suffered lacerations to his dominant left hand, complex fractures to both bones in his right forearm, soft-tissue injuries to his neck, back and right shoulder and various psychological injuries. Some of these injuries had resolved by the date of trial in January 2021. The judge found, however, that Mr. Dunn continued to suffer from post-traumatic stress disorder, somatic symptom disorder (chronic pain), moderate major depressive disorder and generalized anxiety disorder of moderate severity.
- [3] The trial judge awarded Mr. Dunn a total of \$834,631 in damages. The appellants appeal only the judge's awards of \$485,000 for Mr. Dunn's loss of future earning capacity and \$100,541 for Mr. Dunn's cost of future care. The judge's reasons for judgment are indexed as 2021 BCSC 754.
- [4] The appellants do not take issue with the judge's statement of the legal principles for assessing loss of future earning capacity and cost of future care. Rather, they assert that: (1) the judge's assessment of Mr. Dunn's loss of future earning capacity was not grounded in the evidence and failed to properly account for his residual earning capacity; and (2) the judge's assessment of Mr. Dunn's cost of future care failed to apply contingencies.
- [5] The appellants ask this Court to set aside the contested awards and substitute awards of \$50,000 to \$90,000 for Mr. Dunn's loss of future earning capacity and \$90,486.90 for Mr. Dunn's cost of future care.
- [6] Despite the very capable arguments advanced on behalf of Mr. Dunn, in my view, one aspect of the judge's assessment of Mr. Dunn's pre-accident earning capacity was not grounded in the evidence. I would, therefore, set aside the award for Mr. Dunn's loss of future earning capacity and substitute an award of \$370,000.
- [7] In my view, the appellants have not demonstrated any error in the judge's assessment of Mr. Dunn's cost of future care. I would dismiss the appeal of the award for cost of future care.

Loss of Future Earning Capacity

Background

- [8] The judge prepared clear and comprehensive reasons for judgment. Her findings of fact are not in issue. I will therefore provide only a high-level summary of the background relevant to Mr. Dunn's loss of future earning capacity award. Interested readers looking for greater detail can refer to the judge's reasons for judgment.

- [9] At the time of the accident, Mr. Dunn was 24 years old. He was living in Calgary, Alberta. He was healthy, active, working more than full-time hours installing high-end audio-visual equipment and earning \$2,400 per month. These earnings were similar to his pre-accident earnings working as a cabinet-maker and delivery driver and less than his pre-accident earnings working in the oil industry. All of Mr. Dunn's pre-accident jobs were physically demanding.
- [10] Looking forward, Mr. Dunn planned to continue installing audio-visual equipment as he worked towards earning a stake in his boss' business. He had considered additional training in network security to complement the business but testified that the idea "drained away" the more he thought about it. He had also considered additional training in the architectural field but had not seriously pursued the idea.
- [11] The judge found that the business opportunity Mr. Dunn was working towards was terminated for reasons not related to the accident. The judge made no finding that Mr. Dunn would have pursued a career in architecture.
- [12] As a result of his injuries, the judge found that Mr. Dunn is no longer capable of working in two fields he was passionate about, audio-visual installation and cabinet-making. The judge did not make a specific finding regarding Mr. Dunn's capacity to return to work in the oil industry. However, Mr. Dunn did not enjoy the work and expressed no desire to return to that industry.
- [13] Following the accident, Mr. Dunn was off work for several months. In late 2016, Mr. Dunn obtained work with his current employer, Indigo. He was initially hired on a part-time, seasonal basis as a "tasker." Soon after, he obtained a permanent position and was working full-time hours. Mr. Dunn has advanced within Indigo to his current position as a Customer Experience Manager. He is in charge of the Children's Department at a Chapters retail outlet in Calgary. He was earning \$46,000 per year at the time of trial.

The Judge's Reasons for Judgment

- [14] At paras. 173-176, 179, the judge set out a number of uncontroversial principles regarding the assessment of awards for loss of future earning capacity, including:
- Assessing an award for loss of future earning capacity involves a comparison between the likely future of the plaintiff if the accident had not happened and their likely future after the accident has happened (*Gregory v. Insurance Corporation of British Columbia*, 2011 BCCA 144 at para. 32);
 - The plaintiff must prove a real and substantial possibility that their earning capacity has been impaired. If the plaintiff does so, then their loss of future earning capacity is assessed using either an earnings approach or a capital asset approach (*Perren v. Lalari*, 2010 BCCA 140 at para. 32);

· When quantifying the plaintiff's loss, the court should apply the following general principles (Falati v. Smith, 2010 BCSC 465 at para. 41, aff'd 2011 BCCA 45):

- o The court should assess damages rather than calculate them mathematically;
- o The standard of proof is not the balance of probabilities. The plaintiff need only establish a real and substantial possibility of loss, one which is not mere speculation, and hypothetical events are weighed according to their relative likelihood;
- o Allowances must be made for the contingencies that the assumptions upon which an award is based may prove to be wrong; and
- o The overall goal of the assessment is to be fair and reasonable.

· Plaintiffs who earn as much or more post-accident are not precluded from advancing an evidentiary basis to establish a real and substantial possibility of future income loss (Clark v. Kouba, 2014 BCCA 50 at paras. 32-36).

[15] The judge found that Mr. Dunn has chronic pain and entrenched psychological health problems that will affect him for the rest of his life. She accepted medical opinion evidence that his post-traumatic stress disorder, depression, and anxiety would wax and wane and that stress could exacerbate his conditions or cause flare-ups. She concluded that Mr. Dunn was therefore vulnerable to being involuntarily out of the workforce and unable to pursue work "that may subject him to inadvisable levels of stress": at para. 182.

[16] Despite uncertainty regarding the viability of Mr. Dunn's business opportunity with his boss, at para. 187, the judge concluded there was a real and substantial possibility that he would have successfully continued to pursue a career in audio-visual installation or a related field, had the accident not occurred.

[17] Given Mr. Dunn's young age, uncertainty as to his vocational future, and lack of established career path, at para. 190, the judge concluded it would be difficult to assess his loss of future earning capacity by comparing likely with and without accident income streams. She therefore employed the capital asset approach.

[18] The judge cited, at para. 191, the four non-exhaustive factors from Brown v. Golaiy (1985), 26 B.C.L.R. (3d) 353, 1985 CanLII 149 (S.C.) as "the basis of the analysis under the capital asset approach." She noted that economic evidence provides helpful context to the application of these factors "by identifying in a general sense the magnitude of the plaintiff's loss and determining what is fair and reasonable in the circumstances": at para. 192.

[19] The judge, at para. 193, concluded that Mr. Dunn is:

· not capable of working in jobs involving regular heavy lifting or repetitive physical demands and is therefore less capable overall than he was before the accident; and

· less valuable to himself and/or employers because of his mental health challenges, vulnerability to stress and diminished self-confidence.

[20] In the judge's view, the vocational experts were unable to offer much assistance in estimating Mr. Dunn's future earnings. Had Mr. Dunn pursued networking education or his interest in architecture, the judge found the additional training might lead to annual earnings of over \$50,000 and perhaps up to \$100,000. She did not regard such earnings to be "markedly different from his pre-accident potential trajectory, recognizing the sparse evidence on which that can be predicted": at para. 195. Further, on either of these paths, the judge concluded that Mr. Dunn's range of opportunities to earn higher incomes had been reduced and the potential for him to be out of the workforce from time to time had increased. She also concluded, at para. 195, that Mr. Dunn now has more limited opportunities if his employment ends or is interrupted.

[21] Based on her application of the Brown factors, the judge found that Mr. Dunn suffered a significant reduction in his capital asset. More specifically, she found that the accident reduced his earning capacity by 25 to 35%: at para. 199.

[22] To assess Mr. Dunn's loss of future earning capacity, the judge engaged in a bracketing exercise to estimate the low and high end of the present value of Mr. Dunn's future lifetime earnings. As a starting point, she found Mr. Dunn's pre-accident average annual income to be \$44,000. To determine the low end of the range, she assumed Mr. Dunn would have maintained his pre-accident annual income of \$44,000 per year to age 65. To determine the high end of the range, she assumed Mr. Dunn would earn \$44,000 in 2021 with annual increases of \$5,000 per year until age 50, when he would earn an annual income of \$149,000. She then assumed that Mr. Dunn's annual income would remain steady at \$149,000 until age 65: at para. 204.

[23] The judge used Civil Jury Instruction multipliers to calculate the present value of the low end of Mr. Dunn's without accident lifetime earning capacity to age 65 to be \$1,217,070. She appears to have used the standard mathematical formula appended to Mr. Dunn's factum (with the legislated 1.5% discount rate) to calculate the present value of the high end to be \$3,088,158. She referred to these numbers as "financial guide posts to establish a reasonable range of potential post-trial lifetime earnings to assist in assessing the loss of the capital asset": at para. 204.

[24] For further guidance, the judge reviewed loss of future earning capacity awards made to young persons who had suffered injuries that restricted but did not eliminate their lifetime earnings. She recognized that loss of future earning capacity assessments are very fact specific and that the cases she reviewed therefore had limited utility as precedents. Nevertheless, as a check on her assessment, the cases demonstrated that somewhat similar cases often resulted in awards of "hundreds of thousands of dollars or more": at paras. 206-211.

- [25] The judge rejected the defence suggestion that she award Mr. Dunn one or two years of his pre-accident earnings. Though referred to decisions in which that approach had been taken, in the judge's view, such an approach was inappropriate given Mr. Dunn's age and the conclusions she had reached "about his without accident income-earning capital asset and the impairment to it": at para. 213.
- [26] The judge assessed Mr. Dunn's future loss of earning capacity based on 30% of the mean of the low and high-end of his lifetime earnings, namely \$646,000 ($\$2,153,000 \times 30\% = \$646,000$). She then reduced this amount by 25% to take into account various negative and positive contingencies she identified. Her final award was therefore \$485,000.

Discussion

- [27] In *Rab v. Prescott*, 2021 BCCA 345, this Court distilled the process for evaluating whether a plaintiff has established a future loss of earning capacity:
- [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.
- [28] Although *Rab* was decided after the judge released her reasons for judgment, it is evident that she completed all three steps of the analytical process set out in that decision.
- [29] First, the judge found a potential future event that could lead to a loss of capacity. In particular, she found that Mr. Dunn will be coping with chronic pain and mental health issues for the rest of his life: at para. 96.
- [30] Second, the judge identified a number of real and substantial possibilities as to how Mr. Dunn's chronic pain and mental health issues will cause a pecuniary loss. In particular, she found that Mr. Dunn is: vulnerable to being involuntarily out of the workforce due to his conditions; unable to pursue work that may subject him to inadvisable levels of stress; unable to pursue a career in audio-visual installation or a related field; and more limited in the opportunities he can pursue if his employment ends or is interrupted: at paras. 182-187 and 195.

- [31] Third, the judge assessed the value of Mr. Dunn's possible future loss by taking into account the relative likelihood of the possibility occurring. In particular, by basing her award on the mean of the low and high end of Mr. Dunn's without accident earnings (at para. 214), she must be taken to have found that the likelihood of scenarios above and below the mean were roughly equal.
- [32] Despite the judge following the correct analytical framework for assessing Mr. Dunn's loss of future earning capacity, in my respectful view, she fell into error in projecting the high end of Mr. Dunn's without accident earnings. This error was more than a mere misstatement of an upper bracket for the judge's assessment. It translated directly through the judge's calculations to her award--the judge's high end of Mr. Dunn's pre-accident earning capacity was used to determine a mean which was multiplied by 30% to determine the value of Mr. Dunn's impairment. The value of Mr. Dunn's impairment was then further reduced by 25% for contingencies to arrive at the final award.
- [33] This Court has recognized that it is difficult in cases such as this to assess a plaintiff's loss of future earning capacity. Although such losses are not amenable to precise calculation, the judge is obliged to make the best estimate they can. The estimate must be based on the evidence and supported by a meaningful analysis: *Dornan v. Silva*, 2021 BCCA 228 at para. 151.
- [34] In my view, it was appropriate for the judge to use the capital asset approach to assess Mr. Dunn's loss of future earning capacity. He was a young man with demonstrated potential whose career path was uncertain: *Perren v. Lalari*, 2010 BCCA 140 at paras. 12 and 32.
- [35] There were a number of approaches open to the judge to assess Mr. Dunn's loss. 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:
- 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.
- [36] In the circumstances before her, the judge was justified in employing the third of these options. I do not understand the appellants to suggest otherwise. The difficulty is that the judge's projection of the high end of Mr. Dunn's without accident earnings was not grounded in the evidence and was therefore impermissibly speculative.
- [37] Mr. Dunn submits that "the evidence of earnings of the professions and the careers Mr. Dunn may have pursued, absent the accident, approach or exceed" the high end of the range projected by the judge. I do not agree.

- [38] Mr. Dunn points to three possible careers that he may have pursued: audio-visual installer, network security and architect/architecture technologist.
- [39] The expert evidence for the earnings of "electronics installer" in 2020 topped out at \$38.46/hour which translates to less than \$80,000 per year. There was no evidence to project that Mr. Dunn could increase his earnings from his pre-accident average annual earnings of \$44,000 to eventually earn almost double the top of the range for electronics installers--even with additional training or experience or if he had realized his dream of owning a stake in his boss' business and managing a retail store.
- [40] The expert evidence for the earnings of workers in network security in 2020 topped out at \$67.31/hour which is about \$140,000 per year. Although the judge identified the possibility that Mr. Dunn may have taken some training to upgrade his skills, she recognized that the purpose of the training would have been to compliment his audio-visual installation work: at paras. 167-168.
- [41] Even ignoring Mr. Dunn's testimony that the idea of studying network security had "drained away," there was no evidence that Mr. Dunn would have worked exclusively in network security or increased his earnings from his pre-accident average annual earnings of \$44,000 to eventually exceed the top of the range for that field. Further, any such projection would have to take into account the time it would have taken Mr. Dunn to complete the necessary training.
- [42] The expert evidence for the earnings of an architectural technologist and technician (or similar field) topped out at far less than annual earnings of \$149,000. While the earnings of an architect could exceed \$149,000 per year, the judge, at para. 215 (d), did not find it to be likely or possible for Mr. Dunn to pursue the necessary university education to become a fully qualified architect. Even if there had been such evidence, the judge's projection of the high end of the range of Mr. Dunn's future earnings would have to take into account a significant delay in his entry into the field to complete the necessary training.
- [43] As can be seen, the record does not support the judge's high-end projection of Mr. Dunn's pre-accident future earning capacity.
- [44] The appellants assert that the judge further erred by failing to properly assess Mr. Dunn's residual earning capacity and, in particular, his "bright future" at Indigo. They argue Mr. Dunn's injuries have forced him to abandon physically demanding work and employ his earning capacity in a less physically demanding but more remunerative way. They have developed a projection that would see Mr. Dunn become a Regional Manager with Indigo earning up to \$146,000 per year, which they say exceeds Mr. Dunn's realistic pre-accident earnings.
- [45] I do not agree that the judge failed to adequately address Mr. Dunn's residual earning capacity.

- [46] The judge found that Mr. Dunn's earning capacity had been reduced by 25-35%. This necessarily means that she found Mr. Dunn's residual earning capacity to be 65-75% of his pre-accident earning capacity. In view of the judge's findings regarding the extent of Mr. Dunn's psychological injuries, in particular his vulnerability to stress, there is no basis to interfere with the judge's conclusion.
- [47] Further, with respect to the scenario developed by the appellants, I note that the judge did take into account the contingency that Mr. Dunn would continue to do well at Indigo and receive a promotion to regional manager. She specifically found that the contingencies that would reduce Mr. Dunn's award (including the contingency that he would become a regional manager with Indigo) would be more likely to arise than those that would increase his award. She therefore applied a 25% contingency reduction to arrive at her award for Mr. Dunn's loss of future earning capacity: at para. 216.
- [48] To summarize, the judge made no legal errors in her approach to assessing Mr. Dunn's loss of future earning capacity, but fell into error in projecting the high end of the range of his pre-accident earning capacity. The judge's projection was not supported by the record. The judge's determination of the high end of the range translated directly to the award she made which must therefore be set aside.

Remedy

- [49] The appellants submit that this Court ought to take what they refer to as the Pallos approach. Following the Pallos approach, this Court would substitute an award of one or two years of Mr. Dunn's pre-accident earnings, which the appellants have rounded up to \$50,000 to \$90,000. The appellants say this approach is justified based on their projection that Mr. Dunn will deploy his earning capacity to earn a higher income as a result of his injuries.
- [50] Respectfully, the appellants' proposed remedy was rejected by the judge for reasons that remain valid. Specifically, the judge rejected the appellants' suggested approach based on Mr. Dunn's age and her conclusion that the accident reduced his earning capacity by 25-35%. In the circumstances, I see no basis to substitute an award that is at odds with the judge's supported findings.
- [51] In the event that the appeal is allowed, Mr. Dunn submits that the matter ought to be remitted to the trial judge to be reassessed. Relying on *Neufeldt v. Insurance Corporation of British Columbia*, 2021 BCCA 327 at paras. 129-130, Mr. Dunn submits that "[a]n appellate court is ill-suited for correcting such errors as the impact of projections of promotion, contingencies, and residual earning capacity."

- [52] In Neufeldt, the plaintiff was injured in two motor vehicle accidents. This Court set aside a substantial loss of future earning capacity award on the basis that the judge erred in finding that all of the injuries suffered by the plaintiff were indivisible and failing to account for the duplication of an award for past wage loss, the plaintiff's own projections for promotion, some basic contingencies and some residual income earning capacity: Neufeldt at para. 129.
- [53] In considering the appropriate remedy, this Court recognized that appellate courts occasionally reapportion and reassess damages "where the unchallenged findings of fact and the evidentiary record are sufficient, and the interests of justice strongly weigh against ordering a new trial": Neufeldt at para. 130. Despite the lengthy and expensive process of assessing damages, this Court concluded that new findings of fact about causation, apportionment and quantum were necessary and "reluctantly" ordered a new trial: Neufeldt at paras. 134-136.
- [54] In this case, given the time that has passed, the expense and delay associated with returning the matter to the trial court and the relatively straightforward process of revising the judge's award to align with the record, it is in the interests of justice for this Court to substitute an award as was done in cases such as Dornan, Ploskon-Ciesla v. Brophy, 2022 BCCA 217 at paras. 56-61, and Schenker v. Scott, 2014 BCCA 203.
- [55] Having concluded that the judge's method of assessing Mr. Dunn's loss of future earning capacity was sound, in my view, all that needs to be done is to revise her estimate of the top end of the range of Mr. Dunn's pre-accident earning capacity.
- [56] In their factum, the appellants submit that the high end of the range of Mr. Dunn's pre-accident earning capacity can be estimated using the judge's starting point of annual income of \$44,000 with annual increases of \$5,000 to \$79,000 and Mr. Dunn's income then remaining steady at \$79,000 to age 65. I agree. The top of this range aligns with the expert evidence for the earnings of "electronics installer" and the judge's finding at para. 195 that annual earnings of between \$50,000 and \$100,000 would not be "markedly different from [Mr. Dunn's] pre-accident potential trajectory."
- [57] Using the standard formula and legislated discount rate employed by the judge, the present value of this "high end" income stream is \$2,051,265. The updated mean of the low and high end of the range of Mr. Dunn's pre-accident earning capacity is \$1,634,167.50 $[(1,217,070 + 2,051,265) / 2 = \$1,634,167.50]$. The without contingencies value of the impairment of Mr. Dunn's future earning capacity is 30% of \$1,634,167.50, which equals \$490,250.25. Reducing this amount by 25% for contingencies results in an award of \$367,687.69 which I would round up to \$370,000.
- [58] Given the judge's findings regarding Mr. Dunn's pre-accident abilities and interests and the impact of his injuries, I consider an award of \$370,000 for Mr. Dunn's loss of future earning capacity to be fair and reasonable.

Cost of Future Care

[59] The judge's award for Mr. Dunn's cost of future care was comprised of the following:

- Present value of monthly counselling to age 75: \$80,700
- Present value of travel to attend counselling: \$3,700
- Present value of sleep and anti-depressant medication: \$16,141
- Total: \$100,541

[60] The appellants do not take issue with the judge's findings that these costs were objectively supported by medical evidence, reasonable and likely to be used by Mr. Dunn. Rather, relying primarily on *Tsalamandris v. McLeod*, 2012 BCCA 239 at para. 71, they submit the judge's award ought to be reduced by 10% for contingencies reflecting "the normal vicissitudes of life and the consequences of aging."

[61] This Court fully canvassed the issue of contingencies in the recent case of *Steinlauf v. Deol*, 2022 BCCA 96. In *Steinlauf*, the defendant appealed a substantial loss of future earning capacity award to a young man who, in the trial judge's view, had a very bright future. In the course of his reasons for judgment, Justice Grauer noted there are two types of contingencies: specific contingencies and general contingencies.

[62] Specific contingencies relate specifically to the plaintiff, may be positive or negative, and must be grounded in the evidence. Where a specific contingency is found on the evidence to be a real and substantial possibility, the judge assesses its relative likelihood: *Steinlauf* at paras. 86-89 and 91.

[63] General contingencies, on the other hand, relate to "the risk that things do not always turn out as expected": *Steinlauf* at para. 90. They account for the reality that everyone's life has ups and downs. A trial judge may, not must, adjust a future pecuniary loss award for general contingencies. And, where an adjustment is based only on general contingencies, it should be modest: *Steinlauf* at para. 91, citing *Graham v. Rourke* (1990), 74 D.L.R. (4th) 1 at 14-15, 1990 CanLII 2596 (Ont. C.A.).

[64] In this case, the appellants have not identified any specific contingencies that ought to apply. They seek a 10% deduction strictly on the basis of general contingencies.

[65] Recognizing the deferential standard of review applicable to awards of damages (*Steinlauf* at para. 50), I would not interfere with the judge's award.

[66] First, *Tsalamandris* is a very different case. In *Tsalamandris*, the cost of future care award was based on the plaintiff attending Pilates four times per week for the rest of her life. In this case, the judge's award for cost of future care is based primarily on Mr. Dunn continuing to attend counselling on average once per month until age 75. Next, by using an average, the judge can be taken to have concluded that positive and negative contingencies largely offset each other. Further, by cutting off the award for counselling at age 75, the judge made some allowance for the possibility of Mr. Dunn's premature death and the possibility that Mr.

Dunn would choose or be unable to continue with his counselling to the end of his life expectancy. Finally, in view of Mr. Dunn's well-established history of taking counselling and medication, and the benefits he has derived from both, it was within the judge's purview not to apply a general contingency deduction in the specific circumstances of the case.

[67] I would dismiss this ground of appeal.

Disposition

[68] For all of these reasons, I would allow the appeal in part. I would set aside the judge's award for Mr. Dunn's loss of future earning capacity and substitute an award of \$370,000. I would dismiss the appeal of the judge's award for Mr. Dunn's cost of future care.

"The Honourable Mr. Justice Marchand"

I AGREE:

"The Honourable Mr. Justice Harris"

I AGREE:

"The Honourable Madam Justice Stromberg-Stein"

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