

CANADA / JUDGMENT

Healey v. Mault

2024 BCCA 100

COURT

British Columbia Court of Appeal

DECIDED

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2024 BCCA 100 Healey v. Mault

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

Healey v. Mault,

2024 BCCA 100

Date: 20240314

Docket: CA47948

Between:

Jessica Healey

Appellant

(Plaintiff)

And

Craig Mault

Respondent

(Defendant)

Before:

The Honourable Madam Justice Fenlon

The Honourable Mr. Justice Fitch

The Honourable Madam Justice DeWitt-Van Oosten

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

November 10, 2021 (Healey v. Mault, 2021 BCSC 2197,
Vancouver Docket M187344).

Counsel for the Appellant:

A. Leoni

Counsel for the Respondent:

A.M. Gunn, K.C.

F. Lin

Place and Date of Hearing:

Vancouver, British Columbia

January 25, 2024

Place and Date of Judgment:

Vancouver, British Columbia

March 14, 2024

Written Reasons by:

The Honourable Mr. Justice Fitch

Concurred in by:

The Honourable Madam Justice Fenlon

The Honourable Madam Justice DeWitt-Van Oosten

Summary:

Appeal from an award of \$80,000 for loss of future earning capacity. The accident occurred in mid 2016 when the appellant was 24 years of age. She was 29 at the time of trial. Her accident-related injuries are likely to be permanent and will prevent her from accessing future job opportunities that are physically demanding. At the time of the accident, the appellant had a sporadic work history and no clearly defined career path. The judge found that the appellant was able to return to full-time work by January 2018. She did not do so. Instead, at the end of 2018, she moved to a remote property to pursue a personal relationship and her interests in animal husbandry. She has not been gainfully employed since then. The judge rejected the appellant's position that, but for the accident, there was a real and substantial possibility she would have pursued a career in the marine industry. On the evidence, the appellant's residual earning capacity from a position requiring sedentary or light work likely exceeds her potential income from the physically demanding work that is now foreclosed to her. The appellant argues that the trial judge erred: (1) by finding no real and substantial possibility that she would have pursued a career in the marine industry; (2) in her application of the capital asset approach; and (3) by making an award that is

"inordinately low". Held: Appeal dismissed. The trial judge's finding that the appellant had no real and substantial possibility of pursuing a career in the marine industry is grounded in evidence and untainted by palpable and overriding error. It was open to the judge in this case to value the appellant's capital asset loss at \$80,000 using the "annual income method." The judge made no reversible methodological errors in her approach. The "inordinately low" standard of review will generally be of no assistance on appeals that challenge the valuation of a future loss of earning capacity.

Reasons for Judgment of the Honourable Mr. Justice Fitch:

I. Introduction

- [1] This is an appeal from an \$80,000 award for loss of future earning capacity arising out of injuries the appellant sustained in a motor vehicle accident on June 16, 2016. The appellant, Jessica Healey, does not challenge the awards made for non-pecuniary damages (\$100,000), past income loss (\$52,000), cost of future care (\$8,000) or special damages (\$9,477).
- [2] The appellant was 24 years old at the time of the accident and 29 at the time of trial. She had a sporadic work history prior to the accident and no clearly defined career path. The trial judge found that the appellant was able to resume full-time work in a position involving sedentary or light duties by January 2018, about 18 months after the accident. Apart from relatively small amounts of cash the appellant made for "under the table" work performed in the post-accident period, there is no evidence that she made any significant income between the accident and the trial in mid-2021. She did not file an income tax return between 2015 and 2020.
- [3] In 2018, the appellant moved to a hobby farm near Pike Mountain to pursue a romantic relationship. I will refer to this property as "Pike Mountain," which, as described by the judge, is an "off the grid" property located about 100 kilometres from Kamloops. Since 2018, the appellant has assisted in managing the property by tending a vegetable garden and researching animal husbandry. The appellant is not financially compensated for the work she does at Pike Mountain. She testified that she enjoys her life at Pike Mountain "a lot". There was no evidence she is at all motivated to change her lifestyle in the foreseeable future.
- [4] Against this background, the appellant argued at trial that the present value of her future income loss, before contingencies, was \$6,662,144. The sought-after award was based on the appellant pursuing a career in the marine industry, starting as a deckhand and working her way up the ladder from first mate, to captain, and finally to harbour pilot. Discounting the award to reflect the relative likelihood of the appellant becoming a captain or harbour pilot, reducing the award by a further 20% to take account of labour market contingencies, and allowing for her residual earning capacity, the appellant sought an award for future loss of earning capacity in the amount of \$4,250,000.

- [5] In lengthy, fact-laden reasons for judgment indexed as 2021 BCSC 2197 ("RFJ"), the judge found that the appellant failed to establish a real and substantial possibility that, but for the accident, she would have become a deckhand, let alone reached higher echelon positions in the marine industry.
- [6] The judge accepted, however, that the appellant had established a real and substantial possibility of a future pecuniary loss attributable to the accident, as she is now unable to take advantage of job opportunities requiring heavy or strenuous work. In light of the appellant's undeveloped work history and the related difficulties associated with applying the "earnings approach" to the assessment of her damages, the judge determined to rely on the "capital asset approach". Recognizing that assessing the appellant's future income loss was a "particularly challenging" task, the judge awarded her \$80,000, representing approximately two years' earnings based on an amount slightly more than the highest annual income she had earned pre-accident.
- [7] On appeal, the appellant says the judge committed an error in principle or, alternatively, a palpable and overriding error in finding that she failed to demonstrate a real and substantial possibility of achieving any of her stated employment goals in the marine industry. The appellant also argues that the judge erred in principle by tethering her analysis to the use of an "at large" or multiplier approach in assessing the appellant's capital asset loss. She says this resulted in the judge making an inordinately low award for loss of future earning capacity.
- [8] The appellant seeks an order allowing the appeal, setting aside the award made by the judge, and substituting an award of \$750,000 for loss of future earning capacity.
- [9] I am not persuaded that the judge erred in principle or in fact in making the award she did. To borrow the language of Justice Southin in *Cooper v. Miller* (1998), 6 B.C.A.C. 288 at 292, 1991 CanLII 713 (B.C.C.A.), the judge was required to gaze into the crystal ball and compare the appellant's working life, had the accident not happened, with her post-accident working life. In light of the considerable challenges the judge faced on the record before her, what can be said is this: she gazed and, while her assessment was necessarily a bit "rough and ready", I am quite unable to say that she did so with any less acuity of vision that is required of her. I see no principled basis upon which we can or should interfere with the award the judge made for loss of future earning capacity.
- [10] For these reasons, which are further developed below, I would dismiss the appeal.

II. Background

1. The Appellant Prior to the Accident

- [11] The appellant graduated from high school in 2010. While undoubtedly an intelligent person, the appellant was an average student. She has no post-secondary education.

- [12] After graduating, the appellant took a number of jobs, the first of which was a service job in the restaurant industry. In 2011, she moved to Langley to live with her grandmother. She enrolled in a biology course at Kwantlen Polytechnic University with the hopes of upgrading her high school marks. She was dissatisfied with the course and quit without completing it. For six months in 2011, she worked for a tool company before moving to Kamloops in January 2012.
- [13] While living in Kamloops, the appellant worked as housecleaner for a while (making \$20-\$25/hour), at a bookstore (for minimum wage), and at a café (for minimum wage and tips).
- [14] In 2013, the appellant started working as a live-in support worker providing one-on-one assistance for adults and youth with developmental disabilities. She quit after about six months. The appellant's 2013 tax return reported total T4 earnings of \$16,985.
- [15] In 2013 or 2014, the appellant obtained work with another family resource agency as a live-in support worker. The appellant's 2014 tax return reported total T4 earnings of \$38,045. This was the highest annual income the appellant would earn to the date of the trial in June 2021. It was relied on by the judge to assess the appellant's past and future loss of income earning capacity. The appellant's work with this agency ended at the beginning of 2015.
- [16] The appellant was largely unemployed from 2015 until the accident in June 2016, although she did occasionally engage in some "under the table" work for cash. She was unable to provide any cogent evidence as to her income in either 2015 or 2016.
- [17] The appellant testified that, at the time of the accident, it was her plan to return to the lower mainland, work as a nanny for an uncle, and commence the necessary education and training to become a deckhand, with the intention of eventually moving up through the ranks of the marine industry.
- [18] The idea of training to be a deckhand had been discussed with the appellant's uncles, both of whom work in high level positions in the marine industry. The appellant's uncles testified that the appellant could complete the course work and practical training necessary to become a deckhand in 9-12 months. They expressed confidence in her ability to qualify for and discharge the responsibilities of the position. The base rate for a tug boat deckhand in the lower mainland is \$80,000-\$110,000/year. A first mate would make \$100,000-\$110,000. A captain would make \$120,000-\$180,000, without overtime. A harbour pilot could make \$425,000 after four years of active service. The appellant's uncles understandably wanted the best for her and one of them was prepared to assist her in this career path, including by paying for her child care services and course work.
- [19] The judge noted that the appellant had not taken any steps to sign up for the necessary courses to become a deckhand at the time of the accident. The appellant could not recall what they were, and did not know how much they would cost. The appellant told Dr. Waseem, a physiatrist she called at trial, that her career ambition was to gain employment as a mental health worker, and to "continue working in this capacity indefinitely". The judge

relied on this evidence in finding there was no real and substantial possibility that, but for the accident, the appellant would have completed the required courses and training to become a deckhand.

2. The Accident and the Appellant's Injuries

- [20] The appellant was a passenger in a friend's car at the time of the accident. The vehicle in which she was travelling was cut off by a truck driven by the respondent, Craig Mault. The impact was significant and, no doubt, traumatic.
- [21] The appellant experienced debilitating headaches and pain in her neck, back, shoulders and hips immediately after the accident. She also experienced sleep disturbance. Her symptoms were confirmed by family members and friends.
- [22] The appellant was assessed by Dr. Waseem in 2018 and 2020, and by Samantha Gallagher, a vocational rehabilitation consultant, in 2021.
- [23] In his 2018 report, Dr. Waseem concluded that the appellant sustained soft tissue injuries to her neck, upper back, lower back, and chest. These injuries have resulted in chronic myofascial pain and frequent cervicogenic headaches. Dr. Waseem assessed the prognosis for a full symptomatic recovery as "poor". While he thought the appellant might experience improvement by following certain physical rehabilitation recommendations, he reported that, "[h]er physical condition [should] be considered chronic and unremitting and, therefore, permanent".
- [24] Dr. Waseem noted that the appellant "would probably be more successful in employment without a significant physical component". His opinion did not materially change after reassessing the appellant in 2020. By then, the appellant had moved to Pike Mountain. Dr. Waseem observed that the type of employment available to the appellant in this remote location would generally involve physical labour. He concluded that the appellant "has the capacity to work in a sedentary to light capacity". At no point in either of his reports or in his evidence did Dr. Waseem say the appellant could only work part-time.
- [25] The appellant continued to engage in "under the table" work after the accident for minimal amounts of money. She stopped doing so when she moved to Pike Mountain in 2018. She has not engaged in any form of remunerative employment since early to mid 2019.
- [26] In her report, Ms. Gallagher noted that the appellant said she had no plans to return to remunerative work and "intends to continue living on the farm". Without further training, the appellant would be limited to direct-entry occupations. Like Dr. Waseem, Ms. Gallagher reported that, in remote locations, employment options tend to involve manual labour and that such positions were no longer accessible to the appellant. As she put it, "[t]he most significant vocational barrier at this time is [the appellant's] geographical location. She lives in a very remote place where light-duty jobs are not readily available."

[27] Ms. Gallagher reported that the appellant would have to look for work she could do from her home at Pike Mountain, which would significantly limit the options available to her. She concluded, however, that the appellant has significant potential for retraining that would open up a variety of suitable positions for her. Like Dr. Waseem, Ms. Gallagher did not opine that the appellant was only able to work on a part-time basis.

[28] Both Ms. Gallagher and Dr. Denise Hall, a vocational consultant and occupational health specialist who provided an opinion responding to Ms. Gallagher's report, testified that a variety of occupations were available to the appellant despite her physical limitations. Ms. Gallagher focused on sedentary work the appellant could do from home, whereas Dr. Hall identified all occupations the appellant could perform with her physical limitations. As this evidence is relevant to quantification of the appellant's future loss of earning capacity. I will return to it later in these reasons.

3. The Factual Findings of the Trial Judge

[29] I will summarize the critical factual findings made by the trial judge:

- The appellant is an unreliable historian who has difficulty recalling past events with precision;
- Although the appellant has the propensity to overstate her symptoms and their impact on her daily life, the accident caused her chronic myofascial pain, cervicogenic headaches, and chronic chest pain;
- While it is possible the appellant will experience some improvement if she follows Dr. Waseem's recommendations, her current physical condition is likely permanent;
- The appellant's physical condition significantly limits her ability to perform heavy or physically strenuous work;
- The appellant has the capacity to work full-time in sedentary to light capacity jobs;
- The appellant was able to return to full-time work by January 2018. She has not pursued remunerative employment since moving to Pike Mountain;
- The appellant chose to move to Pike Mountain to pursue a personal relationship. Her decision to do so necessarily limits her access to suitable employment opportunities given her physical limitations;
- There is no real and substantial possibility that, but for the accident, the appellant would have completed the required courses and training to become a deckhand. The notion that the appellant would have pursued such a career absent the accident was mere speculation;
- The appellant told Dr. Waseem that she wanted to pursue gainful employment in her chosen field as a mental health worker, and to work in that capacity indefinitely. While the appellant denied saying this to Dr. Waseem, the judge found that her evidence on this point was "not believable";

- The confidence with which one of the appellant's uncles testified that the appellant would succeed as a deckhand was found not to be very compelling;
- The discussions the appellant had with her uncles about working in the marine industry were very general. The appellant had done virtually nothing before the accident to pursue her musings about a career in the marine industry. The notion of pursuing such a career never rose above the level of "speculation" in the appellant's mind; and
- There was "no objective evidence" that the appellant had any particular aptitude for work as a deckhand, or that she would persevere in the face of obstacles such that a career in the marine industry was a real and substantial possibility. Indeed, the appellant had not demonstrated perseverance in the face of academic obstacles (she withdrew from her marine biology course), or the capacity to work under stressful circumstances (her employment with the family resource agency ended in 2015 because of mistakes made by the appellant which she attributed to job-related stress). The appellant had no recollection of ever even being on a boat with either of her uncles.

4. The Judge's Approach to the Award for Future Loss of Earning Capacity

- [30] The judge recognized that the earnings approach will generally be more useful when the loss is easily measurable. When it is not, the capital asset approach to the assessment of damages may be more appropriate: *Perren v. Lalari*, 2010 BCCA 140 at paras. 12, 32.
- [31] The judge concluded that the appellant's claim did not lend itself to an earnings approach given the absence of an earnings history, her relative youth and undeveloped career path.
- [32] The judge's analysis of the appellant's entitlement to an award for future loss of earning capacity is set out below:
- [190] I have rejected the [appellant's] argument that there is a real and substantial possibility that Ms. Healey would have successfully entered and continued on for the rest of her career in the marine industry.
- [191] However, I accept that Ms. Healey has proven a real and substantial possibility that she has lost the ability to take advantage of job opportunities that require heavy or strenuous work. Further, Ms. Healey's sporadic work history shows that her previous employment always required a component of heavy or strenuous work. Therefore, an award for loss of earning capacity is appropriate, as Ms. Healey has clearly lost the ability to take advantage of all job opportunities that might otherwise have been open, and she is arguably less valuable to herself as a person capable of earning income in a competitive labour market: per the factors in [*Brown v. Golaiy* (1985), 26 B.C.L.R. (3d) 353 (S.C.), 1985 CanLII 149 (B.C.S.C.)].
- [192] Before the Accident, Ms. Healey was active and was able to do physically demanding jobs and work long hours. Some of the jobs she worked before the accident, for example as a housekeeper, are no longer reasonable options for her given the physical demands. Before the Accident, Ms. Healey had the stamina to work 24-hour shifts as a support worker. She is

no longer able to take advantage of these same opportunities with her injuries, and she should be compensated for that loss. I accept Dr. Waseem's assessment that Ms. Healey is limited in her ability to pursue physically demanding work and would be successful in light or sedentary work.

[193] I am satisfied that Ms. Healey is capable of working full-time hours at a light or sedentary job, with breaks and possibly accommodations, depending on the nature of the job. This is supported by Ms. Healey's current role on the farm at Pike Mountain. While her work researching animal care and doing other light farm tasks is unpaid, it is valuable work, and it is evidence of her current capacity to work. The assessments of both vocational counsellors also indicated that Ms. Healey is intellectually bright and capable of pursuing a number of career paths with her injuries.

[194] Ms. Healey's actual likely income loss as a result of the injuries is difficult to assess. Her sporadic work history, previous employment on a cash basis and lack of any employment at the time of trial all make this a particularly challenging assessment. However, I am satisfied that the evidence establishes that Ms. Healey's physical condition is likely permanent, and there is a real and substantial possibility that her inability to perform heavy labour will impact her employment opportunities. It is highly probable that she will require some form of retraining to be able to focus her employment search for opportunities that are sedentary in nature.

[196] Considering all of Ms. Healey's relevant circumstances, I find that Ms. Healey has established a real and substantial possibility that her earning capacity has been impaired and that she will suffer a corresponding pecuniary loss as a result. Using the capital asset approach, I award Ms. Healey \$80,000, which equates to approximately two years' earnings (as based on her 2014 income, which is the only available accurate information). In doing so, I have considered various contingencies that may affect her earnings and the fact that Ms. Healey was young and without a set career path at the time of the Accident. I have also considered the fact that her injuries are likely permanent and will likely have long-term negative effects.

[197] However I have not considered the impact that Ms. Healey's decision to move to Pike Mountain may have on her job prospects. It was Ms. Healey's decision to move to Pike Mountain, and she (not the defendant) is solely responsible for any impact that move may have on her future earnings. It may very well be that there are fewer appropriate light and sedentary jobs available to her in that remote location or that she will have to look at jobs she can do remotely, but as the move was Ms. Healey's choice, she is solely responsible for the consequences of that choice.

III. The Grounds of Appeal

- [33] Before addressing the grounds of appeal, I will say a few words about the trilogy of cases recently decided by this Court and the standard of review applicable to appeals from a damage award.
- [34] This Court's judgments in *Dornan v. Silva*, 2021 BCCA 228, *Rab v. Prescott*, 2021 BCCA 345 and *Lo v. Vos*, 2021 BCCA 421 were released when judgment was on reserve. The parties did not seek to make supplementary submissions in the trial court when these judgments were released, and the appellant acknowledges that the trilogy merely worked to consolidate already established principles. The appellant's position on this point is consistent with the observations made in *Ploskon-Ciesla v. Brophy*, 2022 BCCA 217 at para. 8 and *Ker v. Sidhu*, 2023 BCCA 158 at para. 42. In the result, it is of no consequence that the judge did not have the benefit of these judgments in deciding the case.
- [35] The trilogy does confirm that a three-part test is to be followed in considering claims for loss of future earning capacity. In the first two stages, the court must determine whether the evidence discloses a potential future event that could lead to a loss of capacity and whether, on that evidence, there is a real and substantial possibility that the future event in question will cause a pecuniary loss: *Rab* at para. 47. Successfully demonstrating an accident-related loss of capacity does not necessarily establish a real and substantial possibility of a future event leading to a loss of income: *Bains v. Cheema*, 2022 BCCA 430 at para. 22. And, a plaintiff must always prove a real and substantial possibility of a future event leading to an income loss. If the plaintiff discharges that burden of proof, then, depending upon the facts of the case, the plaintiff may prove the quantification of that loss of earning capacity, either on an earnings approach or a capital asset approach: *Perren* at para. 32.
- [36] The standard of review in appeals from damages awards is also well established. It was compendiously addressed in *Reilly v. Lynn*, 2003 BCCA 49, leave to appeal ref'd, 2003 S.C.C.A. No. 221 in these terms:
- [99] We cannot alter a damage award simply because, on the evidence, we would come to a conclusion different from that of the trial judge. However, we may vary a damage award if we conclude that the trial judge in assessing the damage award applied a wrong principle of law (as by taking into account some irrelevant factor or leaving out of account some relevant one); or if the amount awarded is either so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage.
- [37] It is an error of law to use an incorrect basis for determining whether a loss of earning capacity has been suffered: *Ploskon-Ciesla* at para. 31; *Neufeldt v. Insurance Corporation of British Columbia*, 2021 BCCA 327 at para. 105; *Rab* at para. 24.
- [38] Challenges to findings of fact are, of course, reviewable on a standard of palpable and overriding error: *Rab* at para. 23.

1. Alleged Error in Principle, or Palpable and Overriding Error, in Finding No Real and Substantial Possibility the Appellant Would Have Entered and Progressed in a Career in the Marine Industry
- [39] The appellant submits that the judge committed three errors in principle in assessing her stated pre-accident career goals. The respondent was not called on at the hearing to respond to this ground of appeal, but I will deal with each of the alleged errors below.
- [40] First, the appellant submits that the judge erred by "bundling" together the hierarchy of positions within the marine industry (deckhand, first mate, captain, harbour pilot), and requiring her to demonstrate a real and substantial possibility of success at each level. By starting her analysis with this "all or nothing" or "holus bolus" approach, the judge is said to have erred in principle by dismissing any possibility of remunerative work in the marine industry, including as a deckhand.
- [41] Respectfully, the judge did no such thing. She concluded that there was no real and substantial possibility of the appellant becoming a deckhand: RFJ at para. 161. It follows that there was no real and substantial possibility of the appellant advancing to higher paying jobs from this entry-level position.
- [42] Next, the appellant submits that the judge created "an insurmountable hurdle" by "requiring" her to adduce "objective evidence" to ground a real and substantial possibility that a future hypothetical event would occur; in this case, that the appellant would have pursued and qualified for an entry-level deckhand position in the marine industry. The appellant submits there can never be objective evidence of a hypothetical future plan.
- [43] Again, I see no merit in this submission. The appellant concedes she had the onus of establishing a real and substantial possibility she would have entered a profession now closed to her as a consequence of the accident. The judge was entitled to look to all sources of evidence in considering this issue. She was entitled to consider "objective" sources of evidence--for example, that the appellant had taken no meaningful steps to pursue a career in the marine industry at the time of the accident, and had informed Dr. Waseem in 2018 of her desire to pursue a career as a mental health worker. The judge was also entitled to consider "non-objective evidence", including the appellant's testimony about her intended career path and the evidence of her uncles respecting their subjective assessment of her abilities to succeed in the marine industry. There is nothing in the reasons for judgment to suggest that the judge imposed upon the appellant any obligation to adduce a particular kind of evidence to make out her entitlement to damages for future loss of earning capacity based on a career in the marine industry.
- [44] Third, the appellant submits that the judge erred in principle by effectively equating a "future hypothetical event" with "speculation". Again, I am not persuaded that the judge committed this error. Citing well-established authority, including *Grewal v. Naumann*, 2017 BCCA 158 at para. 48, the judge instructed herself that a future or hypothetical possibility will be taken into consideration as long as it is a real and substantial possibility and not

mere speculation. Further, she recognized that 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. I see no error in principle in this approach.

[45] The judge was tasked with deciding whether the appellant established a real and substantial possibility that, but for the accident, she would have trained and qualified as a deckhand. She resolved this fundamental issue against the appellant for reasons she expressed. She found no real and substantial possibility that the appellant would have pursued a career in the marine industry and successfully qualified as a deckhand. These are findings of fact. They are supported by the evidence. They have not been shown to be tainted by palpable and overriding error. Based on these factual findings, the judge could not proceed to the valuation stage of the analysis premised on a future pecuniary loss tied to the appellant's post-accident inability to pursue a career in the marine industry.

[46] For the foregoing reasons, I would not give effect to this ground of appeal.

2. Alleged Error in Applying the Capital Asset Approach

[47] I do not understand the appellant to argue that the judge erred in principle by adopting the capital asset approach per se. Instead, I understand the appellant to submit that, in resorting to the capital asset approach, the judge erroneously adopted an "at large" approach using a multiple of years without considering mathematical aids that were available to her in valuing the future loss. Relying on *McKee v. Hicks*, 2023 BCCA 109 at paras. 82-85 and *McHatten v. Insurance Corporation of British Columbia*, 2023 BCCA 271 at paras. 20-22, the appellant submits that her failure to do so constitutes error in principle.

[48] In addition, the appellant submits that the judge failed to compare the appellant's pre- and post-accident futures with her permanent physical injuries in mind--injuries that would disqualify her from engaging in physically demanding employment.

[49] The appellant says these methodological errors resulted in an award that is not explained and amounts to little more than plucking a number from the air--an approach that fails to reflect the application of principles and warrants appellate intervention. In support of this position she relies on *Dornan* at paras. 151, 158.

[50] The appellant further submits that these methodological errors resulted in a dramatic undervaluation of the plaintiff's future loss of earning capacity. Invoking the applicable standard of review, she submits that the award is "inordinately low". Although tethered to the first two submissions, I will deal with the last submission as an independent ground of appeal, consistent with the way in which the grounds of appeal were stated by the appellant in her factum.

[51] I find it convenient to deal first with the appellant's contention that the judge erred in principle by failing to compare the appellant's with- and without-accident futures.

- [52] I see no merit in this ground of appeal. What the appellant says the judge failed to do was, in fact, defined by the judge as the "essential task" of the court--"to compare the likely future of the plaintiff's working life if the accident had not happened with the plaintiff's likely future working life after the accident": RFJ at para. 183. Reading the reasons as a whole, it is apparent to me that the judge embarked on this essential task and found that the appellant would not have pursued a career in the marine industry had the accident not occurred, but would have worked in physically demanding jobs. As a consequence of the accident, the judge found the appellant to be capable of working full-time, but only in positions offering sedentary to light work.
- [53] Turning to the appellant's next point, I do not understand her to question the proposition that, depending on the circumstances, it may be appropriate to value a loss of capacity to earn income by awarding a multiple of the plaintiff's annual income: see *Pallos v. Insurance Corporation of British Columbia* (1995), 100 B.C.L.R. (2d) 260, 1995 CanLII 2871 (C.A.) at para. 43. Rather, relying on *Rab* at para. 72, she argues that this approach to valuation should be reserved for cases in which the plaintiff continues to earn income at or close to their pre-accident level, but has suffered an impairment that may affect their ability to continue doing so in the future. The appellant says this case bears no similarity to the type of case contemplated in *Rab*.
- [54] I disagree. The appellant is capable of working full-time hours in a sedentary to light position. She has chosen not to do so. In the result, comparing the appellant's pre- and post-accident earning capacity could only be undertaken by imputing to her a post-accident earning capacity. As I will explain later in these reasons, had the judge undertaken this analysis, she would necessarily have concluded that the plaintiff has a residual earning capacity on par with or greater than her best (and only significant) pre-accident annual earnings. As the judge acknowledged, the appellant has, however, suffered an impairment because she has lost the ability to take advantage of job opportunities that require heavy or strenuous work.
- [55] Based on the abbreviated submissions we heard on this point (which was raised for the first time in oral argument), it is not obvious to me that this case is dissimilar to the situation contemplated in *Rab*. Accordingly, I am unpersuaded by the appellant's submission that it was not open to the judge to value the appellant's capital asset loss using the "annual income method".
- [56] There is arguable merit to the appellant's position that the judge erred in principle by failing to consider mathematical aids to assist in quantifying her loss. Mathematical aids may, at minimum, serve as a useful crosscheck in determining the fairness of an award derived through application of the capital asset approach: *Jurczak v. Mauro*, 2013 BCCA 507 at paras. 33-37. In my view, it would have been preferable for the judge to have verified the fairness of the award by utilizing all of the evidence available to her in analysing the claim for future loss of earning capacity. But, for the reasons set out below, I am satisfied that doing so would not have resulted in a higher award.

- [57] I say this for the following reasons. Excluding deckhand work, which the judge found not to be a real and substantial possibility, Ms. Gallagher listed nine potential without-accident occupations that would have been open to the appellant. The judge referred to this evidence earlier in her reasons but did not expressly allude to it in justifying the award she made. The occupations identified by Ms. Gallagher have an average median hourly wage of \$22.91. Ms. Gallagher identified seven potential with-accident occupations that will be available to the appellant (after she completes a short-term retraining program) with an average median hourly wage of \$24.93. On the evidence before the judge, the appellant likely has a residual earning capacity from light and sedentary work that exceeds her potential income from the physically demanding work that is now foreclosed to her as a result of the accident.
- [58] Even so, the judge determined to award the appellant \$80,000, representing two years earnings based on her highest (as opposed to average) reported pre-accident earnings. In doing so, the judge emphasized the appellant's youth, the permanent nature of her injuries and the likelihood that she would require retraining to focus any future employment search on opportunities that are sedentary in nature.
- [59] The appellant invites us to approach the valuation of her loss on a different footing. She asks us to determine the present value of her future loss by assuming she would work to age 65 at the salary of a group home worker--\$21/hour. Applying a present value multiplier of 27.6607 (a 36-year multiplier at a 1.5% discount rate) would yield an award of \$1,208,206. The appellant submits that this should then be discounted by 50% to take account of her residual earning capacity. The appellant justified the 50% discount on grounds that a loss of physical capacity should be roughly equated to a 50% reduction in her overall capacity to earn income from all types of employment.
- [60] There are, in my view, a number of problems with the appellant's suggested approach. First, the median wage proposed by the appellant (\$21/hour) is lower than the median wage for sedentary to light work that is available to the appellant. Second, the proposed reduction is arbitrary. I know of no binding authority and cannot conceive of a principled basis upon which a loss of capacity to perform physical labour should be treated as the appellant suggests.
3. Is the Award "Inordinately Low"?
- [61] The appellant concedes that comparator cases are of limited utility in this context because assessing a future loss of earning capacity is, of necessity, a case-specific exercise. She is right to make this concession. As this Court noted in *Gregory v. Insurance Corporation of British Columbia*, 2011 BCCA 144:
- [32] In my view comparator cases are of limited utility in the assessment of awards for future losses, generally. The degree of impairment to the plaintiff's earning capacity depends upon the type and severity of the plaintiff's injuries and the nature of the anticipated employment at issue.

[33] In valuing the award, the judge must consider the likely duration of the plaintiff's prospective working life and must account for negative and positive contingencies which are unique to each case. The final award must be fair and reasonable in all the circumstances. This assessment requires a very fact-intensive, case-specific inquiry. I am persuaded by what Macfarlane J.A. said in *Lawin v. Jones*, 98 B.C.L.R. (2d) 126, [1994] B.C.J. No. 2107 at para. 35, about the lack of utility in comparisons to other cases:

[G]iven the fact that we cannot foresee the future, it is impossible in a case like this to find any comfort in resort to other cases where the future may be more predictable. Judges will differ, perhaps widely, in making assessments in cases which have been said to depend on what may be seen in a crystal ball. What is certain is that a trial judge who hears and observes the witnesses is in a much better position than an appellate judge to come to a conclusion as to what is fair and reasonable in the circumstances.

[34] Thus, other than to provide a rough guide, comparator cases do not bear the same useful function that they perform in the assessment of non-pecuniary losses as was described in *Corey v. Marsh*. It is for that limited function only that I have referred to the cases relied upon by the parties. The comparative approach finds its roots in the assessment of damages for non-pecuniary losses, and that is the context in which it is most often applied: see Ken Cooper-Stephenson, *Personal Injury Damages In Canada*, 2d ed (Toronto: Thomson Canada, 1996) at 512-513; Cory at paras. 13-14; Dhillon at para. 7; *Marois v. Pelech*, 2009 BCCA 286 at para. 22; *T.F. v. Lush*, 2003 BCCA 579 at 32-42; and *Boyd v. Harris*, 2004 BCCA 146 at paras. 28-42.

[Emphasis added.]

[62] For the reasons set out in Gregory, the "inordinately low" standard of appellate review, which presupposes an established range of awards covering the same class of case, will generally be of no assistance on appeals that challenge the valuation of a future loss of earning capacity. For this reason, the appellant's reliance on comparator cases is misplaced--they do not perform the same useful function in respect of pecuniary awards as they do in respect of non-pecuniary awards. This is, in my view, the point Harris J.A. made in *Maingot v. Wankowicz*, 2023 BCCA 89 at para. 40, where he observed that whether an assessment of pecuniary damages is inordinately high or low or wholly erroneous cannot be evaluated in the abstract. It will, instead, generally be necessary for an appellant to demonstrate error in principle to trigger appellate intervention.

[63] In fairness, I do understand the appellant's position on this point to be tied to alleged error in principle in the judge's analysis. She submits that the award is inordinately low as a consequence of methodological errors the judge committed in valuing her future pecuniary loss. To this extent, the argument overlaps with the second ground of appeal and must fail for the same reasons.

IV. Disposition

[64] For the foregoing reasons, I would dismiss the appeal.

"The Honourable Mr. Justice Fitch"

I agree:

"The Honourable Madam Justice Fenlon"

I agree:

"The Honourable Madam Justice DeWitt-Van Oosten"

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