

CANADA / JUDGMENT

Johnstone v. Rogic

2019 BCCA 469

COURT

British Columbia Court of Appeal

DECIDED

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2019 BCCA 469 Johnstone v. Rogic

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

Johnstone v. Rogic,

2019 BCCA 469

Date: 20191219

Docket: CA45439

Between:

Julie Lily Johnstone

Respondent

(Plaintiff)

And

Steve Rogic and Ridgemont Constructions Management Ltd.

Appellants

(Defendants)

Before:

The Honourable Madam Justice Saunders

The Honourable Madam Justice Stromberg-Stein

The Honourable Madam Justice Griffin

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

dated June 15, 2018 (Johnstone v. Rogic, 2018 BCSC 988,
Vancouver Registry M154630).

Counsel for the Appellants:

G. Ritchey

Counsel for the Respondent:

T. Pettit

K.M. Green

Place and Date of Hearing:

Vancouver, British Columbia

November 28, 2019

Place and Date of Judgment:

Vancouver, British Columbia

December 19, 2019

Written Reasons by:

The Honourable Madam Justice Griffin

Concurred in by:

The Honourable Madam Justice Saunders

The Honourable Madam Justice Stromberg-Stein

Summary:

The appellants injured the respondent in a motor vehicle accident. They appeal the judge's award of damages to the respondent for loss of future earning capacity. Held: Appeal dismissed. There was evidentiary support for the judge's findings and no basis for interference with it on appeal.

Reasons for Judgment of the Honourable Madam Justice Griffin:

- [1] The appellants, Mr. Steve Rogic and Ridgemont Constructions Management Ltd., were the driver and owner of a van that crashed into the rear-end of a car driven by the respondent, Ms. Julie Johnstone, as she was stopped at a pedestrian light. The accident happened on November 18, 2013. Ms. Johnstone suffered injuries and sued for damages.
- [2] At the time of the accident, Ms. Johnstone was 38 years old and very successful in her full-time employment as a quality assurance manager at a large engineering company. She had and has a very strong work ethic and worked long hours, earning a very good salary. She returned to work after the accident but her injuries plagued her, causing her to suffer from

significant pain. She had two young children, a 9-year-old and a 6-year-old, and her pain and exhaustion at the end of her workday was affecting her relationship with them and her husband. She had not yet suffered a loss of income, but the judge found she had proven a loss of future earning capacity.

[3] The judge assessed Ms. Johnstone's loss of future earning capacity at \$1.5 million.

Issue

[4] The appellants raise as the only issue on appeal that the judge erred in her assessment of damages for loss of future earning capacity.

[5] The appellants submit that the award of damages for loss of future earning capacity should be no more than \$170,000.

[6] At its core this is an appeal of findings of fact, and absent a palpable and overriding error, findings of fact cannot be overturned: *Housen v. Nikolaisen*, 2002 SCC 33.

[7] A palpable error has been described as one that "is in the nature not of a needle in a haystack, but of a beam in the eye", and an overriding error as one that is determinative of the outcome of the case: *Salomon v. Matte-Thompson*, 2019 SCC 14 at para. 33, quoting *J.G. v. Nadeau*, 2016 QCCA 167 at para. 77.

[8] As described in *Benhaim v. St-Germain*, 2016 SCC 48 at para. 38, when applying the palpable and overriding error standard, it is not "enough to pull at leaves and branches and leave the tree standing. The entire tree must fall": quoting *Canada v. South Yukon Forest Corporation*, 2012 FCA 165 at para. 46.

[9] In this case, the findings of fact and inferences as to future events that were drawn by the judge were reasonably supported by evidence, and as such it is not this Court's role to interfere: *H.L. v. Canada (Attorney General)*, 2005 SCC 25.

[10] For the reasons that follow, I would dismiss the appeal.

Trial Judgment

[11] I will start with a review of the trial judgment.

[12] The judge made a number of findings regarding the injuries sustained by Ms. Johnstone, relevant to the findings of loss of earning capacity:

- a) The accident caused Ms. Johnstone myofascial injuries and significant pain to her lower back. This lower back condition was eventually diagnosed by Dr. le Nobel, a physiatrist, as a chronic pain condition. Likewise, Dr. Stolar, a rheumatologist, diagnosed her with chronic lumbar pain. The accident also caused Ms. Johnstone associated hip pain (paras. 10, 21-25).

- b) The accident also exacerbated and made worse some pre-existing conditions, namely, the symptoms of fibromyalgia, of which she had not received treatment for at least four years prior to the accident. She had Type 1 Diabetes but this was controlled with an insulin pump. Ms. Johnstone had managed her pre-existing conditions effectively prior to the accident and the judge found that she would have been able to do so in the future, so that her income would have continued to rise but for the accident (paras. 16, 19, 29, 30, 61).
 - c) Ms. Johnstone followed all advice and spent considerable time and energy to attempt to treat her lower back injury, without success (para. 25).
 - d) The treatments Ms. Johnstone has undergone for her pain from the injuries caused by the accident include: visiting pain specialists and attending pain clinics; taking botox injections and acupuncture treatment; chiropractor and massage therapy; prolotherapy; opioid medications; trigger point injections for pain; and a 24-hour Butrans opioid patch at increasing dosages (paras. 10, 47).
 - e) Ms. Johnstone had not recovered from her injuries. There is no doubt she has "severe chronic pain". She has approached her injuries in a stoic manner and worked hard to get better and maintain her job and family duties. She is relatively young and unfortunately her prognosis is guarded and uncertain (paras. 30, 38).
- [13] The judge also made findings regarding Ms. Johnstone's personality and behaviour generally, before and after the accident:
- a) Before the accident outside of work she was like a "TV" mom who baked, was cheerful with a "bubbly" and outgoing personality, was constantly active and loving with the family, and enjoyed an active recreational lifestyle including cycling and hiking (paras. 13, 14, 32).
 - b) Before the accident, she shared the care and maintenance of the home with her husband (para. 13).
 - c) After the accident, she has been unable to engage in the same recreational activities because they aggravate her symptoms. She no longer walks the dog and cannot pursue activities with the children such as playing with them or tent camping or skating. Her interactions with her husband and children are significantly impeded (paras. 31, 32).
 - d) Since the accident, when she comes home from work she is exhausted and has to lie down to rest (para. 32).
 - e) Since the accident, she is no longer cheerful or bubbly or outgoing; she is more short-tempered at home and at work (para. 15).
 - f) Since the accident, she has been unable to properly care for her young children or do necessary household tasks, and her husband must do the majority of household chores (para. 13).

- g) Prior to the accident, Ms. Johnstone, a highly driven person, was effectively managing her pre-existing conditions and enjoying success at work and in her social and family life, and she would have continued to do so but for the accident (para. 39).
- h) The severe chronic pain caused by the accident has had a significant impairment on her life, permeating every aspect of it in a fundamental way, including her personal, family, social relationships as well as her work (para. 40).
- [14] Pausing there, there was evidence at trial in support of the above findings, both by way of medical expert evidence and the testimony of Ms. Johnstone and a number of witnesses who saw her in her daily life before and after the accident: her husband, two close friends, and a co-worker.
- [15] The judge instructed herself on the principles that apply to determining whether a plaintiff is entitled to an award of damages for loss of earning capacity:
- [44] The principles for assessment of loss of capacity are set out in *Perren v. Lalari*, 2010 BCCA 140 and *Graydon v. Harris*, 2014 BCCA 412. Entitlement to an award for loss of future earning capacity is a two-step process:
1. The plaintiff must always prove that there is a real and substantial possibility of a future event leading to an income loss.
 2. If the first step is met, then, the court must assess the loss. This is generally done either by an earnings approach or a capital asset approach.
- [16] Both sides in final argument at trial put forward to the judge scenarios for assessing damages for loss of earning capacity that were based on the "capital asset approach", and the judge adopted this approach as follows:
- [55] As noted in the submissions, to determine a loss of future earnings using this approach, the four factors from *Brown v. Gola* (1985), 26 B.C.L.R. (3d) 353 (S.C.) at para. 8 must be applied:
1. Whether the plaintiff has been rendered less capable overall from earning income from all types of employment;
 2. Whether the plaintiff is less marketable or attractive as an employee to potential employers;
 3. Whether the plaintiff has lost the ability to take advantage of all job opportunities which might otherwise have been open to her had she not been injured; and
 4. Whether the plaintiff is less valuable to herself as a person capable of earning income in a competitive labour market.
- [56] The assessment of loss of capacity is a matter of judgment: *Teunissen* at para. 142 quoting *Hardychuk v. Johnstone*, 2012 BCSC 1359 and *Rosvold v. Dunlop*, 2001 BCCA 1. A plaintiff is to be put in the position she would have been in, from a work/life perspective, but for the

injuries caused by the defendant's negligence. The court must 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 its occurrence: Teunissen at para. 142 quoting Hardychuk and Lines v. W & D Logging Co. Ltd., 2009 BCCA 106.

- [17] The judge correctly understood the applicable legal principles.
- [18] I turn to the judge's findings regarding whether Ms. Johnstone in fact suffered a loss of future earning capacity.
- [19] Applying the test in Perren v. Lalari, as above, the judge found that there was a real and substantial possibility that Ms. Johnstone would suffer a loss of income in the future:
- [48] Ms. Johnstone is in a high level executive in a position - quality-control - that requires a high degree of concentration. In 2013 she was paid an annual salary of \$146,567 and had benefits associated with her position. By 2016, her employment income was \$174,330. The evidence made clear Ms. Johnstone was on a stellar career path.
- [49] The medical evidence, however, establishes the impairment that the pain condition now places upon her ability to do her work. Both Dr. le Nobel and Dr. Stolar attested to this with Dr. Stolar noting "the low back pain has had a significant impact on the quality of her life and has not allowed her to function without significant pain in the workplace and home." This affects her concentration and ability to travel which can be part of her job requirements.
- [50] Both Dr. Stolar and Jodie Fischer, an occupational therapist called by the plaintiff, noted the plaintiff should reduce her hours or work part-time. While Ms. Johnstone could work full-time, it adversely impacts her personal and family life. Ultimately, this is not sustainable long-term.
- [51] Ms. Johnstone is now in the position of being required to pick between two positions at work both of which involve considerable stress and cannot be undertaken on a part-time basis. The evidence is also clear there are potential cognitive effects from long-term use of Butrans as noted by Dr. le Nobel and Dr. Stolar.
- [52] While the defendants point out Ms. Johnstone is a very valued employee, this comes at the cost of her personal and family life. As noted above this is simply not sustainable. The defendants cannot overcome this reality and simply chose to ignore it. While Ms. Johnstone continues to be rated as "excellent" in the workplace performance reviews, she has reduced her hours to four days a week. Ms. Johnstone has outlined the debilitating effects of the travel required as part of her position and testified as to her mobility and exhaustion problems. This is all corroborated by testimony from work colleagues, friends and family.
- [53] Ultimately, it is apparent from these and other factors that there is a real and substantial possibility of a loss of income in the future.

- [20] Next, having found that Ms. Johnstone had proven a real and substantial possibility of a loss of future income, the judge assessed the damages for this loss of future earning capacity.
- [21] The judge acknowledged the defence argument that even absent the accident, Ms. Johnstone faced health issues that would have affected her income (paras. 59-60). However, the judge found that but for the accident, Ms. Johnstone would have managed her pre-existing conditions and continued to see income growth.
- [22] The judge found that the injuries caused by the accident made Ms. Johnstone's present employment unsustainable. The judge found:
- [61] As noted above, I find that, but for the accident, Ms. Johnstone would have continued to manage her pre-existing conditions effectively. Her income would have continued to rise. The injuries sustained in the accident are the cause of the unsustainable situation she finds herself in with respect to meeting both her workplace and family obligations.
- [62] As noted by Ms. Johnstone, the evidence is overwhelming that her "absent accident" career trajectory has been negatively impacted by injuries associated with the accident. There was strong evidence Ms. Johnstone was being considered for a promotion that would result in an increase in earnings. There was also strong evidence she was effectively managing her medical issues at the time.
- [63] Ms. Johnstone has testified she will decline the offered promotion due to her present accident-related pain. Ms. Johnstone definitively said she would not take either available job. She at present is in a precarious position due to the acquisition of the company and her inability to continue to function at this level and undertake any of her other obligations to her family. It is simply not realistic on the evidence that Ms. Johnstone can continue at this level.
- [64] I accept this reality and note it is overwhelmingly supported by the medical and other evidence. I also note the evidence of Ms. Johnstone that this may eventually lead to job loss. Ms. Johnstone's work is demanding and requires travel, sometimes by airplane. This is largely debilitating due to her lower back pain as noted by Dr. Stolar. Ms. Johnstone also testified to the significant pain and debilitating effect of plane travel required in her work position. Once again, her present position is not sustainable long-term. Mr. Johnstone noted the daily exhaustion she suffers from work which requires her to rest immediately on her return home.
- [65] I conclude it is more than likely that Ms. Johnstone would undertake part-time work or part-time consulting. Ms. Johnstone has reduced her hours to four days per week. This, however, requires use of "personal time off" hours. Both Ms. Fischer's report and Dr. Stolar agreed that Ms. Johnstone is better suited for part-time work. The reality, however, is that job loss for Ms. Johnstone is likely if she works part-time. Ms. Johnstone nearly lost her job in 2010 in a previous transition. Jacobs Engineering is now going through a large acquisition and merger. Mr. Sawyer testified this puts certain departments at risk, including quality

assurance. There is no seniority protection in a lay-off.

[Emphasis added.]

- [23] The judge then assessed the damages for loss of earning capacity. I will return to the assessment after addressing the appellants' argument regarding some of the judge's findings of fact.

Analysis

Was there a palpable and overriding error of fact?

- [24] The appellants concede that the judge did not err in finding that Ms. Johnstone proved that she suffered a loss of future earning capacity. They submit that the judge either made errors in some of her findings of fact or gave too much weight to certain facts and not enough weight to other facts.
- [25] The appellants' position in part seems to be grounded on the argument that since Ms. Johnstone had not in fact suffered lost income by the time of trial, and had continued to work full-time in her pre-accident employment, there was no evidence in support of a conclusion that she would suffer a loss of earning capacity in the future. Respectfully, this ignores the evidence that Ms. Johnstone was a stoic person, which the judge was entitled to and did accept.
- [26] The evidence supported the conclusion that Ms. Johnstone made many sacrifices to be able to keep her employment after the accident: to her health, in that she had to take increasing amounts of an opiate painkiller, just to manage her pain and keep functioning, thus risking all the attendant side effects; and to her family relationships, in that she was so exhausted from managing her pain and working full-time that she was not able to participate in and enjoy the ordinary pleasures of a life with her children and her husband outside of work. Just because a stoic plaintiff makes sacrifices to be able to stay working for a time, and therefore does not claim a past income loss at trial, does not necessarily mean that the person will be able to continue in that vein and so does not have a valid claim for future loss of earning capacity.
- [27] Ms. Johnstone's husband and two close friends testified as to the dramatic change in Ms. Johnstone after the accident, as she struggled with the pain from her injuries in her daily life.
- [28] The fact Ms. Johnstone continued to work and earn a full-time income post-accident until the time of trial is of course relevant evidence and could lead to an inference that she would be able to continue doing so, but it is simply one possible inference. There was other evidence from which the judge could draw a different inference, that is, that she would not be able to continue working as she had done.

- [29] The judge was entitled to look at the toll that working full-time had taken on Ms. Johnstone and to conclude that Ms. Johnstone would not be able to continue bearing it. In the judge's words, it was unsustainable.
- [30] There was a variety of evidence that supported a conclusion that Ms. Johnstone would not be able to continue working full-time because she simply would not be able to manage the severe pain caused by her injuries on top of her job responsibilities and any sort of family life. There was also evidence to support the conclusion that there would be no material change in Ms. Johnstone's prognosis for the better.
- [31] Ms. Johnstone testified at length as to how the injuries caused by the accident affected her, and in particular, affected her severe pain.
- [32] Ms. Johnstone worked in a senior position in quality assurance for a large engineering firm. Her position at times required travel long-distance, for example to Chile, or to Australia, or to Texas. Other senior positions required travel between 50 to 80% of the time. After the injuries caused by the accident long flights made her pain even worse. In order to try to cut back her time travelling, she changed her employment profile to indicate her preference that she have limited travel, less than 10%. Because of the necessary medications to manage her pain and associated costs, she also indicated an unwillingness to relocate to other countries. These self-imposed limitations were due to her injuries.
- [33] Prior to the accident Ms. Johnstone worked 50 to 60 hours per week, and sometimes as much as 70 hours. After the accident she was unable to sustain these hours. She was desperate for anything to help with the pain. At times she could not function or work and she considered quitting. In 2015, she considered quitting her job because of the pain, but that is when she was put on the Butrans patch and it enabled her to keep working. Her dosages of the Butrans patch pain medication had to keep being increased as the effectiveness of the medication diminished. By May of 2017, she was on the maximum available dosage of the Butrans patch but was not managing the hours she used to manage, working approximately 40 to 45 hours per week. She was finding diminishing benefit from the medication and by November 2017, in approximately the month before trial, Ms. Johnstone had cut back her days at the office from five days a week to four, staying home Mondays. She was trying to work only 30 hours per week. She did this because of her pain from her injuries.
- [34] There was also medical evidence that with the Butrans medication there was not only decreasing efficacy over time, there was a risk of habituation, cognitive diminishment, sedation and fatigue. Ms. Johnstone testified about having fatigue, being exhausted at home and having to go to bed early.

[35] There was no suggestion in the evidence that in the lead-up to trial Ms. Johnstone cut back her work hours needlessly. When she was asked in her evidence about cutting back on her work hours, she became emotionally upset, and then apologized and explained it was because she really likes her work and having to admit this made her feel very sad. She testified:

Because I can't -- I can't continue to work full-time with all the pain I have and no energy and I've been doing it -- trying to do it for so long, but now that I know my prognosis is not likely to change, you know, there's been nothing that's fixed these injuries, I can't keep killing myself to the detriment of myself and my family. I'll basically put myself in an early grave if I do that. Sorry.

[36] Ms. Johnstone did not officially ask for part-time work, as she feared it would mean her employment would be terminated, so she drew from a bank of vacation days when she reduced her work-week to four days per week.

[37] The appellants submit that the judge made factual errors in finding that Ms. Johnstone was going to have to choose between two positions offered by her employer, and if she did not take one of them, that she would lose her job; and in finding that Ms. Johnstone was at risk of losing her job because of the employer's planned acquisition of another company.

[38] It must be remembered that the judge was not making findings of what would happen in the future with certainty, but what was a real and substantial possibility. There was evidence to support the conclusion Ms. Johnstone would not be able to continue to work full-time, because of the pain caused by her injuries. That was the important finding: even if her job did not change, she could not sustain her pace of working full-time. That made it necessary to consider what she might be able to do if not working full-time.

[39] Ms. Johnstone's testimony made it clear that there were real risks she would not be able to sustain her position if she permanently sought to decrease her hours due to health issues. Not only was this because of the heavy demands of her senior position, but also because of workplace culture. This was also especially so in the context where the company was expected to be merging with or acquiring another company, and there would be some expected consolidation of the workforce.

[40] Ms. Johnstone explained she was told by her superior at work that she would need to take either one of two new positions with the company if a planned and impending acquisition of another company completed. Both opportunities had enhanced responsibilities; one was a promotion and one required extensive travel. The appellants did not challenge this evidence, and indeed relied on it in final argument at trial to submit that Ms. Johnstone was getting promoted at her work and hence had not suffered a loss of earning capacity.

- [41] Ms. Johnstone testified that she felt she did not have the physical ability to take either new position. It was her expectation that if she did not take either new position she would be "made redundant" or laid off, but that she would hope she would be able to do some consulting for her employer on a part-time basis. She said she did not have energy to look for a new job.
- [42] A co-worker, Paul Sawyer, a member of the senior management team of Ms. Johnstone's employer, also testified. He confirmed that senior management had been discussing giving Ms. Johnstone a new role. He did not think that her present position would be available as a part-time position. He confirmed that the employer was in the midst of acquiring another company and there was a risk of some consolidation in Ms. Johnstone's field. Mr. Sawyer was not challenged in cross-examination as to the truth of the impending corporate acquisition. He did agree he did not know that anyone would lose their jobs, but he said he thought it was "pretty certain". Importantly, he was not challenged on his view that Ms. Johnstone's present position would not be available on a part-time basis.
- [43] Mr. Sawyer also testified as to changes in Ms. Johnstone's work performance post accident: occasional sporadic attendance (to attend medical appointments, time she made up), sometimes leaving meetings because of pain, and her demeanor as less patient, tolerant, and friendly, and more abrupt and emotional.
- [44] The appellants suggest that Ms. Johnstone's evidence regarding her employer's pending corporate acquisition and the positions she was being considered for, was inadmissible hearsay evidence. They submit she ought to have called as a witness her immediate superior at her employment to testify about these things. I disagree for a couple of reasons. First, the appellants did not object to Ms. Johnstone giving this evidence and given her senior position and experience, it was within her knowledge as to the nature of her employment responsibilities and the prospects being offered to her at her place of work. The reliability of her evidence could be tested in cross-examination. Second, the evidence was relevant as to Ms. Johnstone's future employment possibilities, which could not be known with certainty and had to be inferred from a variety of evidence, some of it necessarily indirect.
- [45] It simply was not necessary to call Ms. Johnstone's immediate superior in this case given the other evidence available to the judge that supported the conclusion that Ms. Johnstone was physically not going to be able to continue working full-time due to her own limitations.
- [46] The appellants also submit that the judge erred in finding that two experts recommended that Ms. Johnstone reduce her work hours, Dr. Stolar, a rheumatologist, and Jodi Fischer, an occupational therapist.
- [47] The judge's finding in this regard was a summary of their evidence, after having reviewed it in detail, at para. 50:

Both Dr. Stolar and Jodie Fischer, an occupational therapist called by the plaintiff, noted the plaintiff should reduce her hours or work part-time. While Ms. Johnstone could work full-time, it adversely impacts her personal and family life. Ultimately, this is not sustainable long-term.

[48] I find that the judge did not misapprehend the import of the evidence of Dr. Stolar and Ms. Fischer.

[49] Dr. Stolar provided three written expert opinions and testified at trial as a witness called on behalf of Ms. Johnstone. She testified that it was unlikely that Ms. Johnstone would return to her pre-accident state. She stated that she would like to get Ms. Johnstone off the narcotics but after attempts and multiple treatments nothing else seemed an option to give her enough pain relief to keep functioning. Dr. Stolar recommended they try to reduce the dose of the medication but so far they had been unable to do so perhaps because of the long work hours. She testified that they would have to try other things, and she recommended they would need to try finding some "work/life balance". In this regard, Dr. Stolar stated that she often advised patients to see if they could reduce work such as taking two days off during the week, which she described as a slow but supportive process.

[50] As for Ms. Fischer's evidence, she provided a functional work capacity evaluation report and testified at trial. She performed two days of testing on Ms. Johnstone, and noted important differences on the second day, including signs of increased pain, and an affect that was quieter and weary. Her report stated that while Ms. Johnstone was capable of full-time work she was better suited to working part-time because of her functional limitations; reliance on pain medications; and little reserve for activities after work with her family. She expanded on this at trial, explaining that for her health Ms. Johnstone was better suited to working part-time rather than full-time.

[51] I conclude that the judge's finding that Ms. Johnstone's current work pace was not sustainable was supported by evidence. There was therefore evidence to support the resultant finding that Ms. Johnstone had proven that the accident caused her a loss of future earning capacity, and to assess that loss from the perspective that Ms. Johnstone would not be able to continue working as she had in the past.

[52] The appellants took issue with other facts found by the judge but it is my observation that they simply urge a different interpretation of some of the evidence regarding future possibilities. Nothing that they raise rises to the level of an appealable error. Simply put, I am not persuaded that the judge misapprehended or overlooked any evidence that was material to her decision.

Was there an error of law?

[53] The appellants submit that the judge made an error of law in assuming that Ms. Johnstone would have worked as a consultant in the future, earning \$100,000 per year, because there was no evidence of what she might be able to earn as a consultant or even of employment options for her as a consultant.

- [54] When dealing with hypotheticals, it is not unusual for a plaintiff to be unable to point to a specific job opportunity and specific salary that is lost with the lost future capacity, or to be unable to point to a replacement lesser job opportunity that will be obtained with the plaintiff's residual earning capacity. The court may make common sense inferences from the evidence as to the person's capabilities and realistic job opportunities, in the absence of evidence as to a specific position and salary being available, see for example *Tsalamandris v. McLeod*, 2012 BCCA 239 at paras. 38-39.
- [55] When plaintiffs are more specific in their claims as to the loss of a particular future opportunity, such as loss of a promotion, or loss of the ability to qualify for medical school, more specific evidence may be needed to persuade the judge that the opportunity was a realistic one: see for example *Morlan v. Barrett*, 2012 BCCA 66; *Gill v. Lai*, 2019 BCCA 103; *J.D. v. Chandra*, 2014 BCSC 466, *aff'd Crimeni v. Chandra*, 2015 BCCA 131.
- [56] The judge drew a common sense inference as to the remaining earning capacity held by Ms. Johnstone. It was necessary to draw an inference given the supportable conclusion that she would not be able to sustain working full-time.
- [57] The judge approached the issue starting from an analysis of what Ms. Johnstone would have earned if she worked full-time and had not suffered a loss of earning capacity. She was earning just over \$171,000 working full-time. For purposes of assessing damages, the judge assumed that but for the accident, Ms. Johnstone would have continued at that income in the future, without any promotions or raises. This was a complete discount of the positive contingency that, given her employment record and young age, Ms. Johnstone would likely have received promotions and income raises in the future, but for the accident.
- [58] As an illustration of Ms. Johnstone's stellar career with her employer, she had started out earning approximately \$87,000 in 2007. Over the seven years prior to trial she received several significant raises, reaching up to her roughly \$171,000 income by the time of trial. Just before trial she was being presented with a choice of another promotion, which was expected to come with another increase in income, a promotion she testified she would have to turn down as she was not physically capable of taking it.
- [59] On the other side of the assessment equation, the judge considered what would be a reasonable assessment of Ms. Johnstone's residual earning capacity, if she worked less than full-time. The evidence was that Ms. Johnstone was highly qualified in her position and thought she might have open to her some consulting opportunity with her employer if she did not work full-time. Her view was that she would be unlikely to be given a part-time job doing the same work for her employer. The residual earning capacity the judge estimated she might be able to earn as a consultant was \$100,000.
- [60] The judge used multipliers from an economist's evidence to assess present value of loss of future earning capacity based on a net loss of \$71,605 per year, using a pre-injury capacity of \$171,605 less the residual capacity of \$100,000. She also used the same economist's evidence to determine associated loss of pension benefits and supplementary retirement savings

plan. While the figures on this approach worked out mathematically to \$1,537,440.41, the judge rounded the number down to \$1,500,000 as an appropriate assessment of loss of future earning capacity.

- [61] The appellants have not argued that there was any error in the judge's use of multipliers and calculations based on this approach, just that the baseline of \$100,000 residual capacity was unsupported by evidence. The appellants submit that given the lack of evidence that Ms. Johnstone could earn \$100,000 as a consultant, the judge ought to have chosen another approach. They say the judge ought to have started from the annual income Ms. Johnstone was earning at the time of trial, \$171,000 approximately, and then assessed loss of future earning capacity by either one of three approaches:
- a) multiplying it by some factor of partial years or years, such as two;
 - b) taking a percentage of it as representing the remaining earning capacity, such as 80%, and then calculating the present value loss of 20% over the working life of the plaintiff;
 - c) assuming that the plaintiff would continue with that annual income and work full-time in the future, but assuming also that she might retire five years earlier than she would have done but for the injuries caused by the accident.
- [62] The appellants argue on appeal that damages for loss of future earning capacity should be re-assessed by this Court based on the appellants' theory that there is only a very minimal risk that Ms. Johnstone will work less than full-time in the future.
- [63] The appellants are correct that there was no evidence as to what Ms. Johnstone might make as a consultant if she was no longer to work full-time for her employer.
- [64] The judge's approach was in substance very similar to the second approach suggested by the appellants on appeal. The judge cannot have been unaware that there was no evidence as to what a consultant such as Ms. Johnstone might earn or even that there would be opportunities for her to consult. Rather, the judge's assessment was roughly equivalent to estimating that Ms. Johnstone had a residual earning capacity of close to 60% of what she had been earning full-time. It was assuming an almost straight-line reduction in income, as if Ms. Johnstone could earn the same hourly rate as she did working for her employer full-time, but working less hours as a consultant.
- [65] It has to be kept in mind that the income Ms. Johnstone was earning was after several promotions and was for a very demanding job with many responsibilities. To assume that working less hours as a consultant she could earn the same rate of income if roughly calculated on an hourly basis, was an inference that was fair to the appellants, as it is optimistic about Ms. Johnstone's residual future earning capacity. The judge reached this conclusion based in part on her conclusion that despite Ms. Johnstone's debilitating injuries, she was very motivated (para. 66).

- [66] The judge's inference that Ms. Johnstone would work approximately 40% less than she did in the past was a capable inference on the evidence, given that Ms. Johnstone used to work 50-60 hours per week pre-accident and sometimes more, and was working only four days per week by the time of trial, limiting her hours to 30 hours per week. This could be seen as slightly less than 60% of the roughly 55 hours per week that she used to work, pre-injury. Further, it was clear from Ms. Johnstone's evidence at trial that she was still having difficulties at four days per week and was only managing with very strong opioid medication.
- [67] Given Ms. Johnstone's stoicism and love of work, it was reasonable for the judge to predict she will not give up work entirely, despite Ms. Fischer's observations that Ms. Johnstone was already showing signs of more pain on a second day of functional capacity evaluation. But given Dr. Stolar's evidence to the effect that she wants her patients in this situation to try to be weaned off this strong medication and that may require the person to reduce work by two days per week, it was also a possibility that to try to manage her injuries without strong medication, Ms. Johnstone would end up working no more than three days per week. In other words, there was a range of possibilities as to how much work Ms. Johnstone might manage in the future, with the judge's estimate of residual capacity, if anything, on the high side and not unreasonable.
- [68] The appellants submit that the judge did not take into account contingencies that would reduce the award, that is, negative contingencies. For example, the appellants submit that it is possible that Ms. Johnstone would not have decreased her work hours immediately, yet the judge's assessment assumes she would do so. Further, the appellants submit that the judge did not take into account one physician's opinion that there might be more that could be done to help Ms. Johnstone manage her pain.
- [69] Dealing with the last point, there was abundant medical evidence that Ms. Johnstone's prognosis was that she would not improve. The medical opinion the appellants rely on in this regard was suggesting that an exercise regime might help to some degree. It did not raise a serious possibility that she would materially improve in her functioning after all that she had tried that did not work. The evidence if anything was that she had plateaued at the maximum dosage of an opioid medication and it was losing its efficacy. The evidence was that Ms. Johnstone followed treatment recommendations and tried very hard to mitigate, and indeed the appellants do not suggest otherwise.
- [70] Counsel for Ms. Johnstone submits that her position at trial was that merely by assuming that the future income but for the accident would stay flat, and ignoring the positive contingency that it would have continued to rise as it had done in the past, the judge would more than off-set any negative contingencies. For example, even with one 10% raise, which was a real possibility with her history and the promotion opportunity available to her (but for the accident), the assessment of the present value of damages using multipliers would exceed another approximately \$250,000.

- [71] The judge appears to have adopted this approach of setting off the positive contingencies of future raises, as against negative contingencies. The judge observed that she did take into account a number of contingencies (para. 68). The judge was aware that there were positive contingencies that could have made the award higher. She found as a fact that but for the accident, Ms. Johnstone's income would have continued to rise (para. 61); and there was strong evidence that she was being considered for a promotion that would result in an increase in earnings (para. 62). The assumption that Ms. Johnstone would be able to replace her full-time work immediately and at the degree assumed by the judge, and be able to sustain it, was an assumption that factored in negative contingencies, reducing the assessment of damages for loss of future earning capacity.
- [72] The judge commented on the award being a conservative award (para. 68). What I take from the judge's comment is that there were factors that could have been interpreted to support a higher award, but in the end she concluded it was a reasonable award that was fair to all parties.
- [73] In light of the above, I do not see the judge's estimate of a residual earning capacity of \$100,000 per year as being based on a legal error. It was a finding of fact by the judge, in her attempt to assess damages for loss of earning capacity, which was a reasonable inference based on all the evidence. This was one possible approach to assessing loss of future earning capacity by valuing the loss of the plaintiff's capital asset. The judge also took into account positive and negative contingencies. I am not persuaded that the judge reached her conclusions by making a palpable and overriding error.

Conclusion

- [74] This appeal is a challenge to the findings of the trial judge that Ms. Johnstone suffered a loss of future earning capacity and the assessment of damages for that loss. There was evidence to support the judge's finding that it is unsustainable for Ms. Johnstone to work full-time, given her injuries caused by the motor vehicle accident. The judge's assessment of damages for loss of future earning capacity based on this conclusion was reasonable and supported by the evidence. There is no basis for this Court to interfere with the judge's award of damages.

- [75] I would dismiss the appeal.

"The Honourable Madam Justice Griffin"

I agree:

"The Honourable Madam Justice Saunders"

I agree:

"The Honourable Madam Justice Stromberg-Stein"

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