

CANADA / JUDGMENT

Lamarque v. Rouse

2023 BCCA 392

COURT

British Columbia Court of Appeal

DECIDED

26 October 2023

Source: bccourts.ca · Research copy typeset by Esheria. Not court-issued or certified.

2023 BCCA 392 Lamarque v. Rouse

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

Lamarque v. Rouse,

2023 BCCA 392

Date: 20231026

Docket: CA48450

Between:

Mary Lamarque and Joseph Lamarque

Appellants/

Respondents on Cross Appeal

(Defendants)

And

James Christopher Rouse

Respondent/

Appellant on Cross Appeal

(Plaintiff)

Corrected Judgment: The cover page of the judgment was corrected
on November 2, 2023.

Before:

The Honourable Mr. Justice Fitch

The Honourable Madam Justice Horsman

The Honourable Justice Skolrood

On appeal from: An order of the Supreme Court of British Columbia, dated
July 5, 2022 (Rouse v. Lamarque, 2022 BCSC 1131, Vancouver Docket M170544).

Counsel for the Appellants:

R.C. Brun, K.C.

J.J.L. Brun, K.C.

Counsel for the Respondent:

D.S. Jarrett

W. Wafa, Articled Student

Place and Date of Hearing:

Vancouver, British Columbia

September 11, 2023

Place and Date of Judgment:

Vancouver, British Columbia

October 26, 2023

Written Reasons by:

The Honourable Madam Justice Horsman

Concurred in by:

The Honourable Mr. Justice Fitch

The Honourable Justice Skolrood

Summary:

The respondent suffered injuries in a motor vehicle accident. The appellant appeals the trial judge's award of damages to the respondent for loss of earning capacity, past and future, on the basis that the award is not supported by the evidence. The respondent cross-appeals the trial judge's order applying a contingency deduction to all heads of damages to account for the possibility that a future treatment would prove beneficial. The respondent applies to adduce new evidence to show that the treatment has not been beneficial.

Held: Appeal allowed to the extent of setting aside the award of damages for loss of past earning capacity; cross-appeal dismissed. The trial judge erred in awarding damages for loss of past earning capacity in the absence of any evidence to establish the real and substantial possibility that the respondent suffered pecuniary loss in the pre-trial period due to his accident-related injuries. The trial judge erred in principle in his approach to quantifying damages for loss of future earning capacity, but the award can be supported on an alternative basis. The respondent's new evidence application is dismissed, and therefore his cross-appeal fails.

Reasons for Judgment of the Honourable Madam Justice Horsman:

- [1] The appellants appeal an award of damages to the respondent for injuries he suffered in a motor vehicle accident in 2015. The trial judge awarded \$30,000 for loss of past earning capacity, and \$102,000 for loss of future earning capacity. The appellants argue that these awards are ungrounded in the evidence. On appeal, they seek an order setting aside or reducing damages for loss of earning capacity.
- [2] On his cross-appeal, the respondent seeks an order increasing the trial award of damages. The respondent challenges the trial judge's decision to deduct ten percent from all heads of damages to reflect the contingency that a treatment that the respondent intended to access in the future--namely, hyaluronic acid injections--would improve his pain and functionality. The respondent applies to adduce further evidence of his experience receiving this treatment post-trial. He says the further evidence shows that the injections did not, in fact, improve his condition, and this undermines the trial judge's decision to apply the contingency deduction.
- [3] For the reasons that follow, I would allow the appeal to the extent of setting aside the award of damages for loss of past earning capacity. I would dismiss the cross-appeal.

Background

- [4] The accident occurred in February 2015. The respondent was riding his bicycle home from downtown Vancouver. He was struck by a vehicle driven by the first-named appellant at the south end of the Burrard Bridge at the intersection with Cornwall Avenue. The respondent was crossing the intersection on a dedicated green light for cyclists, and had the right-of-way. The appellants admitted liability.
- [5] The respondent was 47 years old at the time of the accident, and 53 at the time of trial. He suffered various injuries in the accident, most of which had resolved by the time of trial. The most significant ongoing injury was osteoarthritis in the respondent's right hip. As a result of this injury, the respondent experiences persistent pain in his right hip that is exacerbated by prolonged sitting and standing.
- [6] At the time of the accident, the respondent was working as a Vice-President of Marketing for a Vancouver software company, Symmetrics Business Intelligence Solutions Inc. ("Symmetrics"). The respondent did not take time off after the accident, and did not

experience any disruption in his income. His employment with Symmetrics ended on April 1, 2017 when the company was sold. The respondent received severance pay in the amount of \$150,000 pursuant to a change of control clause in his employment contract. The severance amount was determined by a formula that included consideration of the sale price of the company.

- [7] Between April 2017 and January 2020, the respondent took a voluntary break from employment to travel and contemplate his career options. In January 2020, he passed the examination to become a mortgage broker. The respondent then began employment with City Wide Mortgage Services ("City Wide"), where he continued to work at the time of trial. The respondent had earned limited income in his employment at City Wide as of the date of trial--\$0 in 2020, \$8,100 in 2021, and \$0 in 2022.
- [8] The respondent had an active lifestyle at the time of the accident. He was a recreational runner and cyclist, and a competitive rower. The respondent was not able to return to cycling or running after the accident, although he did continue to row. The respondent's reduced activity level has affected his physical and emotional health. There is no issue on this appeal that the respondent's accident-related injuries have had a significant impact on his quality of life.

The trial judgment: 2022 BCSC 1131

- [9] The trial judge noted the general agreement of the experts with respect to the causation and prognosis of the respondent's right hip injury. He accepted the opinions of the experts that the respondent's osteoarthritis was caused by the accident, that the condition could progress and worsen over time, and that it would likely necessitate hip replacement surgery at a younger age than otherwise may have been required. Given this timing, the operation will likely require the respondent to take time off work: at para. 12. The trial judge noted that the respondent's condition could degenerate to the point that he needed hip replacement surgery within months or within years: at para. 51.
- [10] The respondent had a pre-existing condition that caused impingement in his right hip. The trial judge found that, due to this pre-existing condition, there was a real and substantial possibility that the respondent would have required a hip replacement in any event. He reduced all heads of damages by five percent to reflect this risk: at para. 20.
- [11] The trial judge found that the respondent had benefitted from interim treatments for his hip pain, including the cortisone injections. He noted that as of the time of trial, the respondent had not yet received hyaluronic acid injections into the hip joint. The trial judge referenced the opinion of Dr. Robert Froh, an orthopedic surgeon who testified for the appellants, that 60 to 70 percent of patients derive benefit from such treatments. The trial judge stated:

[15] Frustratingly, the plaintiff only obtained a referral for such treatments literally the month of trial, and the Court is in the dark as to whether this seemingly promising treatment would assist this plaintiff a little, a lot, or not at all. Based on Dr. Froh's evidence, the Court will deduct ten percent from all heads of damage based on the contingency that that the hyaluronic injections will or would have improved pain and functionality to some degree.

[Footnote omitted.]

[12] The trial judge awarded the respondent \$150,000 in non-pecuniary damages, and \$25,000 in damages for the cost of future care, subject to the deductions outlined above. Other than with respect to the contingency deduction to reflect the potential benefit of the hyaluronic injections, these heads of damages are not in issue on appeal.

Past loss of earning capacity

[13] The trial judge began his consideration of the respondent's claim for damages for past and future loss of earning capacity with the following observations:

[42] The plaintiff has established that there is a real and substantial possibility, amounting to a near-certainty, that the plaintiff's work will continue to be affected by his injury, in a manner that makes him marginally less functional and competitive, and in a manner that will continue to drag down his earnings potential, albeit modestly. That said, the plaintiff has not acquitted his persuasive burden to show any significant lost past or future wages or other remuneration or capacity as a result of the accident. The main past events affecting his earnings -- the sale of Symmetrics at its sale price, his decision to change vocations, and the initial steep earnings curve in his new job -- have no connection to the accident. Further, as set out above under non-pecuniary damages, his functional limitations in his white-collar non-labour past, present, and future can largely be addressed through modest adaptations such as stand-up desks, shifting physical positions, work breaks, physiotherapy, and over-the-counter medication.

[14] The respondent advanced two theories to support an award of damages for loss of past earning capacity. First, he argued that he received less in severance pay from Symmetrics than he would have if the accident had not occurred because his injuries affected his ability to obtain clients. This, the respondent argued, impacted the value of Symmetrics at the time of the sale, which in turn impacted the quantum of his severance payment. The respondent proposed an award of \$30,000 to compensate for this loss: at para. 43.

[15] Second, the respondent argued that his difficulties in sitting, standing, and walking had impacted his capacity to work as a mortgage broker. He sought an award of \$33,750, based on the income of another broker at City Wide who had started at the same time as the respondent: at para. 45.

- [16] The trial judge concluded that the evidence did not support an award of damages for past wage loss on either of these bases. As to the first theory, the trial judge noted that there was no evidence from Symmetrics witnesses that the respondent's injuries had caused any lost sales, lost customers, or diminishment in the Symmetrics sale price: at para. 44. As to the second theory, the trial judge found the evidence established that it could take a few years for a mortgage broker to establish a profitable business, and he found comparisons to other brokers to be of little use. The trial judge concluded that the respondent's limited ability to market himself as a mortgage broker in the pre-trial period was due to COVID-19-related impacts rather than the hip injury: at para. 46.
- [17] Nevertheless, the trial judge found that the respondent had established an entitlement to damages for past loss of earning capacity. He reasoned:
- [47] That said, this head of damages seeks to compensate for diminished earning capacity, rather than specific losses. The effect of the injuries on his ability to sit, stand, and walk, and his need for breaks, rendered him notionally less marketable and less dynamic as a sales executive or a mortgage broker. The Court awards \$30,000 for past lost earning capacity over the seven years since the accident.
- [Emphasis added.]
- [18] The above-quoted paragraph is the extent of the trial judge's reasons for the award of \$30,000 for loss of past earning capacity.

Future loss of earning capacity

- [19] The respondent sought an award of \$400,000 for loss of future earning capacity, using the capital asset approach. This was premised on the theory that the respondent's accident-related hip injury creates the real and substantial risk that he will not be successful in his career as a mortgage broker, or will earn less than he would have without the accident. The \$400,000 award proposed by the respondent amounted to two years of income for the average mortgage broker at City Wide: at para. 48.
- [20] The appellants conceded at trial that the respondent was entitled to some award of damages for loss of future earning capacity to reflect the risk that he would require hip surgery at a younger age, which in turn may require him to take time off work. The appellants proposed that this risk warranted an award of damages for loss of future earning capacity in the amount of \$30,000.
- [21] The trial judge held that the evidence did not support the respondent's theory of damages. He noted that there was no specific evidence that the respondent would "have any future difficulty excelling as a mortgage broker": at para. 49. He referenced the evidence of the respondent's present colleagues and supervisors who were universal in their praise of the respondent's abilities and work ethic: at para. 49. The trial judge then summarized his conclusions as follows:

[50] Again, the Court does not find that the plaintiff's success as a mortgage broker, or in any alternative career, will be significantly affected by the accident injury. Again, at best, the plaintiff is entitled to nominal damages, for his notionally diminished professional marketability, drive, and functionality.

[Emphasis added.]

[22] The trial judge noted that when the respondent undergoes hip replacement surgery, he will be unable to work for several weeks, and will suffer functional limitations for a period of up to six months after. The trial judge found that after six months, "it is highly likely that his day-to-day limitations on sitting, standing, and walking will largely disappear": at para. 51. He stated:

[52] With an eye to all of the factors, including the medical impossibility of knowing when the disruptive but curative hip replacement will occur, and in the context of the difficulty in quantifying the effects of this modest but near-certain diminished capacity, the Court ascribes a nominal annual value of \$6,000 for future income loss. Based on a retirement age of 70 years, the Court awards, as its best assessment of a full and reasonable award, \$102,000 for future loss of earning capacity, on the capital asset approach.

[23] The trial judge valued the respondent's damages for the lost income stream by multiplying the annual amount (\$6,000) by the number of years before the respondent reached his retirement age (17). He did not apply a discount rate to determine the present value of the award.

The issues on appeal and cross-appeal

[24] On appeal, the appellants allege the trial judge made the following errors in principle:

- a) He awarded \$30,000 in damages for loss of past earning capacity in the absence of any evidence that the respondent suffered a loss for reasons related to the accident in the pre-trial period;
- b) He awarded \$102,000 in damages for loss of future earning capacity, despite finding there was no specific evidence to indicate that the respondent will have any future difficulty excelling in his chosen career;
- c) He assessed the respondent's damages for loss of future earning capacity on the basis that he would suffer an annual income loss of \$6,000 over 17 years, without discounting the award to its present value.

[25] The appellants seek orders setting aside the award for loss of past earning capacity, and reducing the award for loss of future earning capacity.

- [26] On his cross-appeal, the respondent argues that this Court should admit further evidence relating to his post-trial experience in receiving hyaluronic acid injections. He says this further evidence demonstrates that the injections had no beneficial effect, and therefore there is no basis for the ten percent contingency reduction of all heads of damages ordered by the trial judge. He seeks an order setting aside the trial judge's contingency reduction.

Standard of review

- [27] The appellant's challenge to the trial judge's award of damages attracts a highly deferential standard of review on appeal. An assessment of damages is generally a fact-finding exercise. An appellate court is entitled to intervene only where the trial judge made a palpable and overriding error of fact, proceeded upon a mistaken or wrong principle, or awarded an amount so inordinately high or low as to constitute "a wholly erroneous estimate of the damage": *Deegan v. L'Heureux*, 2023 BCCA 159 at para. 41, citing *Woelk v. Halvorson*, [1980] 2 S.C.R. 430, 1980 CanLII 17 at 435-436.
- [28] The issue of standard of appellate review does not arise on the cross-appeal. The respondent does not allege that the trial judge erred in fact or law. Instead, he invites this Court to review the contingency deduction on the basis of new evidence that was not before the trial judge.

The appeal

Loss of past earning capacity

Legal principles

- [29] An award of damages for loss of past earning capacity compensates the claimant for the loss of the value of the work they would have, not could have, performed, but were unable to perform due to the accident-related injury: *Rowe v. Bobell Express Ltd.*, 2005 BCCA 141 at para. 30; *M.B. v. British Columbia*, 2003 SCC 53 at para. 49. The standard of proof for past hypothetical events is: whether there is a "real and substantial possibility" that the events would occur: *Grewal v. Naumann*, 2017 BCCA 158, at para. 48; *Rousta v. MacKay*, 2018 BCCA 29 at para. 14. If the claimant establishes a real and substantial possibility, the court must then determine the measure of damages by assessing the likelihood of the event: *Grewal* at para. 48.
- [30] In many cases, a claimant's actual lost income will be the most reliable measure of a loss of earning capacity. However, there is no hard and fast rule that only loss of actual income is compensable. It must be remembered that it is not the actual lost income that is compensable, but the loss of capacity: *Ibbitson v. Cooper*, 2012 BCCA 249 at para. 19. An award of damages for past loss of earning capacity compensates a claimant for any pecuniary loss resulting in an inability to work, and evidence supporting such loss can take different forms. In *Ibbitson*, for example, the plaintiff, who worked in the forest industry, maintained his pre-accident level of income by working longer hours. Thus, he was found to

have suffered a pecuniary disadvantage that was compensable through an award of damages for loss of earning capacity: Ibbitson at paras. 20-21.

Discussion

- [31] The appellants do not argue that the respondent is not entitled to damages for loss of past earning capacity simply because he did not suffer an actual income loss. Rather, they say that there is no evidence to establish a real and substantial possibility that the respondent suffered any pecuniary loss resulting from an inability to work in the pre-trial period. They say the trial judge did not identify any past hypothetical event that may have led to an income loss. Instead, the appellants argue, he awarded damages for a "notional" (i.e., abstract or hypothetical) loss, without explaining the rationale for such an award. Further, the respondents say, the award is contrary to the trial judge's factual findings, which dispel the possibility of any finding of a compensable loss.
- [32] The respondent says that the award of \$30,000 for loss of past earning capacity is consistent with the trial judge's finding that the respondent experienced a modest impairment of his earning capacity as a result of the accident. The respondent emphasizes that the judge's reasons must be read holistically, and without an over-emphasis on particular words (such as "notional") that may not fully capture his reasoning. The respondent argues that the award for loss of past earning capacity is fully justified by the medical evidence, and the judge's factual finding, at para. 42, that the respondent has established to a "near certainty" that the respondent's work will continue to be affected by his accident-related injury "in a manner that will continue to drag down his earning potential, albeit modestly".
- [33] I accept the respondent's submission that the trial judge's reasons need to be read holistically. I also accept that in his use of the term "notional", the trial judge should be taken to have intended to describe a modest impairment of earning capacity rather than a hypothetical one. However, this does not overcome the fundamental difficulty that is highlighted by the appellants: the award of damages for past loss of earning capacity has no apparent support in the evidence, and it is contrary to the trial judge's factual findings. In particular, I note the following:
- a) Between the time of the accident on February 6, 2015, and the termination of his employment with Symmetrics on April 1, 2017, the respondent worked as a salaried employee. There is no evidence that the respondent lost out on bonus opportunities, or any other forms of salary increases, due to the accident. His employment with Symmetrics ended for reasons unrelated to the accident. The only theory of pecuniary loss the respondent advanced in relation to his employment at Symmetrics--a reduction in severance pay due to his reduced capacity--was rejected by the trial judge: at paras. 42-44.

- b) Between April 1, 2017 and January 2020, the respondent was voluntarily unemployed, having decided to take time off to travel and to contemplate his future career path. The trial judge found that these events, and the respondent's subsequent decision to become a mortgage broker, had no connection to the accident: at paras. 40, 42.
 - c) Between January 2020 and the start of trial in May 2022, the respondent earned limited income as a mortgage broker at City Wide. The trial judge accepted the respondent's evidence that he did not expect to make much money in the first three to five years working as a mortgage broker, as this was typical of the industry. The trial judge found that the "initial steep earnings curve" in the respondent's employment at City Wide also had no connection to the accident: at para. 43, 46.
- [34] In light of these findings, the trial judge's decision to award \$30,000 in damages for loss of past earning capacity over the seven-year pre-trial period is unsupportable. In making the award, the trial judge did not engage in the analysis required to assess the respondent's entitlement to damages for loss of past earning capacity; that is, to determine the value (if any) of work the respondent would have performed in the pre-trial period but was unable to perform due to his injuries. In light of the trial judge's factual findings, the accident had no pecuniary impact on the respondent in terms of his past earning capacity. He was in the same position at the time of trial as he would have been without the accident.
- [35] The trial judge's failure to conduct the requisite analysis constitutes an error of law that justifies appellate interference. If the requisite analysis had been conducted, it could only lead to one outcome: the respondent did not establish a real and substantial possibility that he suffered any pecuniary loss in the pre-trial period resulting from an inability to work due to his accident-related injuries. Accordingly, I would set aside the award of \$30,000 in damages for loss of past earning capacity.

Loss of future earning capacity

Legal principles

- [36] The legal principles that govern the assessment of damages for future loss of earning capacity are also not in dispute.
- [37] The central task for the court in assessing a claim for loss of future earning capacity is to compare the claimant's likely future working life with and without the accident: *Dornan v. Silva*, 2021 BCCA 228 at paras. 156-157. As with past hypothetical events, future hypothetical events need not be proven on a balance of probabilities. A hypothetical future possibility will be accounted for as long as it is a real and substantial possibility. If a claimant establishes a real and substantial possibility of a future income loss, then the court must measure damages by assessing the likelihood of the event: *Rab v. Prescott*, 2021 BCCA 345 at para. 28 [Rab], citing *Goepel J.A.*, dissenting on other grounds, in *Grewal* at para. 48.

- [38] A diminishment in earning capacity does not justify an award of damages for future loss of earning capacity in the absence of evidence that the impairment will result in a pecuniary loss. A claimant must always prove there is a real and substantial possibility of a future event leading to an income loss. If the claimant discharges that burden, then the loss must be quantified based on either an earnings approach or a capital asset approach. The earnings approach is more useful when the loss is easily measurable: *Perren v. Lalari*, 2010 BCCA 140 at paras. 4 and 32.
- [39] In *Rab*, this Court set out a three-step process for considering claims for loss of future earning capacity: (1) does the evidence disclose a potential future event that could give rise to a loss of capacity?; (2) is there a real and substantial possibility that the future event will cause a loss of capacity; and (3) what is the value of that possible future loss, having regard to the relative likelihood of the possibility occurring?: *Rab* at para. 47.
- [40] The process of quantifying damages for loss of capacity at the third step of the *Rab* test is often challenging. Courts have adopted various approaches to assigning a dollar figure to the loss of capacity to earn income, including, where appropriate, awarding a claimant's entire income for one or more years: *Pallos v. Insurance Corporation of British Columbia* (1995), 100 B.C.L.R. (2d) 260 (C.A.), 1995 CanLII 2871 at para. 43. Any approach that is adopted must be supported by the evidence: *Rab* at para. 75.

Discussion

- [41] The disagreement between the parties in the present case is a relatively focussed one. The appellants agree that the first two steps of the *Rab* test are met, and the only issue is one of valuing the respondent's loss of capacity in the future. The parties also agree that the plaintiff's future income loss is not easily measurable, and therefore the capital asset approach should be used to value the loss.
- [42] The appellants say that the future event that may cause a loss of capacity is the possibility that the respondent may require hip replacement surgery during his working life due to the osteoarthritis in his right hip. In that event, the evidence suggests he will need to be off work for a few weeks, and may have some further period of functional limitations in the months following. The appellants say that \$30,000 is a fair and reasonable award of damages to compensate for this loss. However, they maintain that there is no basis in the evidence for the trial judge's conclusion that the respondent will suffer an annual loss of earnings of \$6,000 for the next 17 years. The appellants say that the trial judge did not identify any future event that would justify such an award, but rather applied a purely mathematical calculation that was ungrounded in the evidence.
- [43] Further, and in the alternative, the appellants argue that the trial judge erred in law in failing to determine the present value of this loss of future income stream through application of the 1.5% per annum discount rate required by s. 56 of the *Law and Equity Act*, R.S.B.C. 1996, c. 253, and the *Law and Equity Regulation*, B.C. Reg. 352/81. The appellants

say that in the event that this Court upholds the trial judge's award of \$6,000 a year in lost income to the respondent to age 70, the Court should direct the parties to calculate the net present value of the award: *Orr v. Graemond Holdings Ltd.*, 2022 BCCA 156 at paras. 81-85.

- [44] The respondent counters that the trial judge's award of a modest amount of damages on an annual basis is supported by his factual findings, and is fair and reasonable to both parties. As the appellants have not shown a palpable and overriding error in the trial judge's factual findings, the respondent says the award should be upheld. The respondent concedes that the trial judge ought to have applied a discount rate to the award, as required by s. 56 of the Law and Equity Act. However, he says the appellants could have addressed this point through a post-trial application to the trial judge. For this reason, the respondent says that the appellants should not receive their costs on appeal in relation to this issue in the event that this Court issues the direction requested by the appellants.
- [45] I agree with the appellants that the trial judge's method of assessing damages for future loss of earning capacity on the basis of the respondent will suffer an annual loss of earnings of \$6,000 for the next 17 years is not easily reconciled with the evidence in this case, or the judge's factual findings. The future event that may lead to a loss of capacity is, as the appellants emphasize, the hip replacement surgery. Otherwise, the trial judge found that the respondent's functional limitations in his job as a mortgage broker can "largely be addressed through modest adaptations", and that his career will not be significantly affected by his accident injury: at para. 42, 50. Further, the trial judge found that once the respondent recovers from hip surgery, it is highly likely that his day-to-day functional limitations will largely disappear: at para. 51.
- [46] In light of these findings, it is difficult to see how an award premised on an annual earning loss of \$6,000 until the respondent reaches age 70 provides a principled or rational basis for assessing damages for future loss of earning capacity on the facts of this case. The trial judge did not follow, at least not transparently, the three-step process set out in *Rab*. In the absence of clear findings at the second step of *Rab*, the trial judge's exercise of quantifying damages was undertaken in isolation from the evidence and facts of this case.
- [47] The trial judge's analysis, therefore, reflects an error in principle. However, I consider that his quantification of damages can be supported on an alternative basis that is consistent with the evidence and the factual findings in this case.
- [48] The future event that may lead to an income loss for the respondent is the deterioration of his osteoarthritis to the point that he requires hip replacement surgery earlier than otherwise would have been the case. This, on the evidence, is highly likely. The medical experts agree that the respondent's osteoarthritis caused by the accident will progress and worsen over time: at para. 12. There is, therefore, a real and substantial possibility that the respondent's condition will deteriorate to the point that he will suffer an income loss even before he receives a hip replacement. This, on the evidence, is moderately likely.

- [49] Following the surgery, the respondent is likely to be off work for several weeks, to suffer from pronounced functional limitations for two months, and to suffer some functional limitations for another four months: at para. 51. There is, therefore, a real and substantial possibility that the respondent will experience full or partial income loss for a period of up to six months following the surgery, the likelihood of which, on the evidence, is high.
- [50] The experts opine that surgery has a 90 to 95% success rate. There is, accordingly, a real and substantial possibility that the respondent's surgery will not succeed in improving his condition, and he will suffer long-term income impacts from the injury he suffered in the accident. Though the likelihood of this appears to be low, the impact would be high. The experts also opine that even if the surgery is successful, the respondent may continue to experience pain and stiffness in his hip. There is, therefore, a real and substantial possibility of some ongoing income loss even following successful surgery. On the evidence, the likelihood of this is on the low side.
- [51] What cannot be assessed at this point is when these events might occur. On the evidence, they could occur within a matter of months or a matter of years. This makes the assessment of the respondent's loss of income earning capacity particularly challenging.
- [52] In these circumstances, it is appropriate to adopt a "rough and readier" approach to valuing the loss of capacity, as described in *Pallos* and endorsed in *Rab*. But as this Court made clear in *Rab*, any method of valuing loss must relate to the evidence. The method adopted by the trial judge--assessing damages on the basis of a minimal annual income loss over the respondent's remaining years of work--is not connected to the evidence in this case, or the judge's factual findings. The same can be said of the respondent's position at trial that an award in the amount of \$400,000--equating to two years of income for the average mortgage broker at City Wide-- was appropriate.
- [53] In my view, accounting for the various contingencies, an award of damages that equates to six months' current income for an average mortgage broker at City Wide is a fair and reasonable estimation of the value of the respondent's loss of future capacity. Viewed this way, it cannot be said that the trial judge's award was inordinately high. It is consistent with a proper application of principle, and I would therefore dismiss the appellants' challenge on appeal to the award of damages for loss of future earning capacity.

The cross-appeal

- [54] The respondent's cross-appeal turns on the admission of further evidence in the form of an affidavit sworn by the respondent on November 24, 2022. The affidavit speaks to the respondent's experience in receiving a hyaluronic acid injection at UBC Hospital on June 29, 2022, which was after the trial ended but before judgment was rendered. In the affidavit, the respondent states that his right hip pain increased for a period of two to three weeks after the injection, following which his pain returned to pre-injection levels. He explains that he does not intend to continue this treatment because he believes he received no benefit. The

respondent's affidavit does not include any supporting medical records, and does not identify the name of the doctor who provided the treatment.

Legal framework

- [55] The admission of further evidence on appeal is typically governed by the four criteria set out in *Palmer v. The Queen*, [1980] 1 S.C.R. 759, 1979 CanLII 8:
- (i) the evidence could not, by the exercise of due diligence have been obtained for trial;
 - (ii) the evidence is relevant in that it bears upon a decisive or potentially decisive issue;
 - (iii) the evidence is credible in the sense that it is reasonably capable of belief; and
 - (iv) the evidence is such that, if believed, could have affected the result at trial.
- [56] In *Barendregt v. Grebliunas*, 2022 SCC 22, the Supreme Court of Canada described the Palmer test as "purposive, fact-specific, and driven by an overarching concern for the interests of justice": at para. 31. The test strikes a balance between the principles of finality and order in the justice system, and reaching a just result in the context of the proceeding: at para. 32. The Palmer criteria apply whenever a party seeks to adduce further evidence on appeal, regardless of whether the evidence relates to facts that occurred before or after trial: *Barendregt* at paras. 48-55.
- [57] *Barendregt* holds that the due diligence criterion properly applies to new evidence--evidence of facts arising after trial--because its focus is on the conduct of the party seeking to adduce the evidence rather than the evidence itself. The question is whether the applicant could, with due diligence, have acted in a way that would have rendered the evidence available for trial: at para. 59. The last three of the Palmer criteria require appellate courts to admit further evidence where it is relevant, credible, and could have affected the result at trial. These criteria reflect one of the animating principles of the Palmer test: the importance of reaching a just result in the context of the proceeding. "Evidence that is unreliable, not credible, or not probative of the issues in dispute may hinder, rather than facilitate, the search for truth": *Barendregt* at para. 45.
- [58] There are pre-*Barendregt* decisions of this Court that have addressed applications to adduce new evidence in the context of appeals from a trial award of personal injury damages. Generally speaking, the scope for the admission of new evidence is narrow in such circumstances. The function of an appellate court is not to re-try the case, but to determine whether the trial judge has committed an error warranting appellate intervention. In assessing damages, the trial court is often called upon to make predictions about the future. The actual course of events will frequently, perhaps invariably, differ from the judge's predictions. Yet absent a reversible error in the trial judgment, parties are generally not entitled to retry a case on appeal simply because events have unfolded in a manner that departs from a trial judge's predictions. Among other concerns, such a retrial would engage an appellate court in an inquiry it is not equipped to carry out: *Ledwon v. Baines*, 2021 BCCA

239 at para. 60; Knutson (Guardian ad litem of) v. Farr (1984), 55 B.C.L.R. 145, 1984 CanLII 556 (C.A.) at 169-173 (per Esson J.A., dissenting on other grounds).

- [59] Despite these concerns, there are exceptional circumstances in which evidence of post-trial events may be admitted on damage appeals. In Knutson this Court admitted new evidence of the plaintiff's post-trial medical condition on appeal of an award of non-pecuniary damages in a personal injury case. The trial judge declined to make any award of damages for pain and suffering in light of the medical evidence adduced at trial that the plaintiff, who had suffered a brain injury, was unaware of his surroundings and insensitive to pain and suffering. The new evidence consisted of three medical reports suggesting that the plaintiff's perception of pain had changed. The majority adopted the test for the admission of new evidence on a damages appeal that was stated by the House of Lords in *Mulholland v. Mitchell*, [1971] 1 A.C. 666: new evidence may be admitted where it demonstrates a dramatic change in circumstances that "materially falsifies" the trial judgment: Knutson at 153.
- [60] By contrast, more recently in *Ledwon*, this Court declined to admit new evidence that the plaintiff had been reinstated to the Ontario bar following the trial judgment. The proposed new evidence contradicted assumptions the trial judge made in assessing the plaintiff's damages for loss of earning capacity. The Court held that the new evidence was speculative and should not be admitted on that basis. In any event, Saunders J.A., writing for the Court, held that it would not be in the interests of justice to adduce the evidence for a variety of reasons. Madam Justice Saunders observed, among other things, that parties do not generally get a "second go" in a case where the future diverges from a trial judge's assessment of future possibilities: *Ledwon* at para. 60.

Discussion

- [61] The respondent says that his affidavit meets the criteria set out in *Palmer* for the admission of further evidence on appeal, specifically: (1) the respondent exercised due diligence in trying to access new options for treatment; (2) the evidence is credible, and relevant to the issue of the ten percent contingency deduction; and (3) the evidence would have affected the result because it undermined the trial judge's assumption that the hyaluronic acid injections would benefit the respondent. The appellants oppose the admission of the affidavit on the basis that it meets none of the *Palmer* criteria.
- [62] I find it unnecessary to address the question of whether the respondent exercised diligence in accessing the hyaluronic acid injections, despite the limited steps he took to obtain the treatment after receiving his last cortisone injection in November 2020. The real difficulty with the respondent's application to adduce new evidence relates to the quality of the evidence rather than the conduct of the respondent. The new evidence consists solely of the respondent's subjective view--stated in a single sentence--that he received no benefit from the hyaluronic injection. The respondent's affidavit does not append any medical records. There is no objective medical assessment of the respondent's condition and functioning following the injection or at any time since, nor is there an opinion from a medical

practitioner as to whether the respondent may benefit from further injections. I am not persuaded in these circumstances that the evidence is credible or that it could have affected the result at trial.

[63] Even if I was persuaded otherwise, I would still not admit the evidence because its admission is not in the interests of justice. As a point of fairness, the matter would, at the very least, have to be remitted to the trial court to permit a full evidentiary hearing: Barendregt at para. 46. The appellants would be entitled to the production of medical records from the respondent, and an opportunity to conduct cross-examination. The parties would no doubt wish to exchange further expert reports on the issue, and conduct cross-examination of the expert witnesses. Such a prolonged relitigation process would undermine the principle of finality, which is of particular importance in the context of the assessment of damages in personal injury cases. The task faced by a judge in predicting the future course of a claimant's life is a notoriously difficult one. Litigation would be unending if parties could retry such issues any time the future deviated from a trial judge's assessment of a claimant's likely future loss. This is not the exceptional case that warrants such a post-trial relitigation of issues.

[64] As I would not admit the further evidence, it follows that I would dismiss the cross-appeal.

Disposition

[65] I would allow the appeal only to the extent of setting aside the trial judge's award of \$30,000 for loss of past earning capacity.

[66] I would dismiss the cross-appeal.

"The Honourable Madam Justice Horsman"

I AGREE:

"The Honourable Mr. Justice Fitch"

I AGREE:

"The Honourable Justice Skolrood"

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.bccourts.ca/jdb-txt/ca/23/03/2023BCCA0392cor1.htm>

CASE PAGE <https://chat.esheria.ai/case-law/canada/lamarque-v-rouse-2023>

Prepared on 28 October 2026 · Esheria