

CANADA / JUDGMENT

Murphy v. Snippa

2024 BCCA 30

COURT

British Columbia Court of Appeal

DECIDED

26 January 2024

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2024 BCCA 30 Murphy v. Snippa

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

Murphy v. Snippa,

2024 BCCA 30

Date: 20240126

Docket: CA48506

Between:

Kim Elizabeth Murphy

Appellant

(Plaintiff)

And

Douglas Snippa, 0854584 B.C. Ltd. dba

Sardis Park Wines and O'Connor Motors Ltd.

Respondents

(Defendants)

Before:

The Honourable Justice MacKenzie

The Honourable Justice Dickson

The Honourable Mr. Justice Abrioux

On appeal from: An order of the Supreme Court of British Columbia, dated August 17, 2022 (Murphy v. Snippa, 2022 BCSC 1418, Chilliwack Docket M36982).

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Place and Date of Hearing:

Vancouver, British Columbia

December 1, 2023

Place and Date of Judgment:

Vancouver, British Columbia

January 26, 2024

Written Reasons by:

The Honourable Justice MacKenzie

Concurred in by:

The Honourable Justice Dickson

The Honourable Mr. Justice Abrioux

Summary:

The appellant was injured in a motor vehicle accident for which the respondents admitted liability. The judge awarded the appellant non-pecuniary damages, damages for cost of future care and loss of future earning capacity. The judge declined to make an award for past loss of income and deducted 25% from all the damage awards for "causation" based on the appellant's pre-existing alcohol-use disorder that the judge found would have progressed even without the accident. The judge also deducted 20% from all the awards for the appellant's failure to mitigate primarily her hand injuries. Finally, the judge deducted a further 25% contingency from the loss of future earning capacity award based on the prospect the appellant would return to work in the wine industry, but in another capacity. She further determined the appellant would only work five more years because of her alcohol-use disorder. The appellant challenges all the deductions and argues the judge erred in failing to make an award for past loss of income on the basis of her employment between the accident and trial.

Held: Appeal allowed. The judge did not apply the "Dornan" analysis for contingencies and erred in making a 25% "causation" deduction to all the damage awards. The judge also failed to apply the legal test for mitigation. As to loss of future earning capacity, the judge improperly limited the award to five years based on speculation that the appellant's career would end then. It was also speculative for the judge to deduct an additional 25% contingency based on the possibility that the appellant would find a new form of work in the wine industry. Finally, as to past loss of income, the judge overlooked the evidence of the appellant's part-time earnings in the kitchen cabinet industry between the accident and the trial. Given the nature of the errors, a new trial is ordered.

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Introduction

[1] In May 2018, the appellant, Kim Elizabeth Murphy, was injured in a motor vehicle accident for which the respondents, Mr. Snippa and 0854584 B.C. Ltd. dba Sardis Park Wines, admitted liability. The appellant discontinued the action against O'Connor Motors Ltd. The case went to trial on damages.

[2] The trial judge awarded a net \$95,165.88 in damages as follows:

- a) \$57,000 for non-pecuniary damages (including loss of housekeeping capacity);
- b) \$4,290 for cost of future care;
- c) \$32,219 for loss of future earning capacity; and,
- d) \$1,656.88 in special damages.

The judge dismissed the claim for past loss of income.

[3] The appellant alleges the judge erred in:

- a) making a deduction to all the damage awards for "causation";
- b) making a deduction to all the damage awards for failure to mitigate;
- c) limiting the loss of future earning capacity award to five years and making a contingency deduction; and
- d) dismissing the appellant's claim for past loss of income.

[4] For the reasons that follow, I would allow the appeal, set aside the order below, and order a new trial.

Background

The Accident and the Injuries

[5] The appellant was born on March 14, 1971. She was 47 years old at the time of the accident and 51 at trial.

[6] The accident occurred on May 11, 2018, just north of Kamloops. The jeep driven by Mr. Snippa, the appellant's spouse, rolled over several times before landing upside down in a ditch. The appellant braced herself by grabbing the roll bar over her head. Her hand was pinned between the roll bar and the ground for about half an hour.

- [7] Inland Hospital's emergency care assessment failed to identify a fracture in the appellant's right ring-finger.
- [8] On May 18, 2018, a week after the accident, the appellant saw her family physician, Dr. John Hamilton, and reported back pain. Dr. Hamilton suggested physiotherapy for her back pain and referred her for hand physiotherapy (2022 BCSC 1418 at para. 47). The appellant then underwent some hand physiotherapy sessions in July or August 2018 (before the correct diagnosis) and did not return after she found a certain treatment was painful (at para. 99).
- [9] The appellant saw Dr. Hamilton again in September 2018. He ordered an x-ray, which revealed a fracture to the appellant's right ring-finger. Dr. Hamilton referred the appellant to Dr. Grover, a hand specialist, who saw her in October 2018. Dr. Grover recommended hand therapy and suggested a follow-up appointment with him in two months.
- [10] The appellant did not make a follow-up appointment with Dr. Grover, but resumed hand therapy in February 2019, the first available appointment after her hand injuries were properly diagnosed.
- [11] The judge determined the appellant sustained the following injuries in the accident:
- [75] The plaintiff suffers from neck and back injuries. These injuries impact her mobility and can cause headaches. The plaintiff suffered damage to her right hand, from the bone fracture, and a soft tissue injury that will continue to impact her and limit her functional ability to use that hand.
- [76] There is possibility for improvement with counselling and an exercise program. I accept Dr. Paramonoff's opinion that the plaintiff has developed a "kinesiophobia", which prevents her from moving and resulting in deconditioning. Dr. Sangha reflected this opinion in his discussion about people "cocooning" while in pain, which leads to deconditioning. The physical challenges the plaintiff experiences may be addressed through a program to restore movement and address the kinesiophobia that the plaintiff suffers from. A plan to restore mobility could improve her prognosis, increase her mobility, and reduce pain.
- [77] The plaintiff experiences a moderate degree of chronic pain associated with her right hand. There is some possibility for improvement with work with an occupational therapist to maximize and maintain function.
- [78] The plaintiff suffers from somatic symptom disorder, major depressive disorder, and anxiety. The plaintiff suffers driving anxiety, which pre-existed, and was exacerbated by the Accident. This condition can be treated with therapy.
- [79] The plaintiff had pre-existing alcohol-use disorder. The plaintiff's alcohol-use disorder worsened significantly, post-Accident, to the point where Dr. Mok said she is now a "full-blown alcoholic".

[Emphasis added.]

The undisputed finding of a pre-existing alcohol-use disorder, emphasized above, lies at the heart of this appeal.

Work History

- [12] The appellant spent most of her career in British Columbia's wine industry. She obtained a Vintners Quality Alliance ("VQA") license, a licensing scheme intended to promote high-quality wines wholly produced in B.C.
- [13] In 2010, the appellant opened Sardis Park Wines (the "Wine Store") and developed an associated wine club subscription (the "Wine Club"). The Wine Club was a significant source of revenue for the Wine Store.
- [14] In the spring of 2016, the Wine Store moved to a larger new location for which the appellant signed a 23-year lease. The appellant testified that she intended to work until age 68, based on the term of her new lease.
- [15] Soon after the move, the Wine Store struggled with expenses. The Wine Club also lost some subscribers. About a year after the Wine Store moved, the appellant's landlord asked her to exchange units with another business. The appellant testified that she reluctantly sold the Wine Store. The judge found the appellant made a business decision to sell the VQA license and wind down the Wine Store, which was no longer profitable (at para. 14).
- [16] In February 2018, the appellant closed the Wine Store and sold her VQA license to a large grocery chain for \$725,000.
- [17] From March 2018 to May 2018, the appellant rented office space to continue the Wine Club. She ordered wines through a store in Vancouver called Swirl Wines. She picked up the wine and distributed boxes to clients. This required moving large amounts of wine from location to location. Wine Club subscriptions fell during this period (at para. 16).
- [18] Around May 9, 2018, days before the accident, the appellant purchased a commercial property (at para. 18) as part of her plan to start a restaurant centered on wine and food pairings (the "Restaurant").
- [19] The accident happened on May 11, 2018.
- [20] After the accident, the appellant rented space to continue the Wine Club pending the completion of renovations to the Restaurant.
- [21] The Restaurant opened on April 26, 2019. The appellant intended to host Wine Club events at the Restaurant. However, a liquor inspector advised the appellant that she could not operate the Wine Club under the Restaurant's food-primary liquor license. She would need a liquor primary license to do so.

- [22] In March 2020, when COVID-19 slowed the Restaurant's business, the appellant began working in kitchen design and sales with Starline Cabinets. Her employment was terminated in May 2021 (at para. 31).
- [23] The appellant then had short periods of employment with Progressive Cabinets and Van Dyke Cabinets. As of the date of trial in May 2022, the appellant had worked part-time for Marr-Tech Kitchens in cabinet sales for two weeks from 8am to 2pm daily.
- [24] In January 2021, after receiving the advice from the liquor inspector, the appellant closed the Wine Club, which had been operating as a delivery service.
- [25] The appellant testified that she shut down the Wine Club because her accident-related injuries prevented her from packing and moving wine bottles, thereby delaying deliveries. She said she had to personally load each package because her employees' lack of experience led to reputation-damaging mistakes. The judge rejected that testimony, saying her employees could have been properly trained. The judge found that like the appellant's reasons for selling her VQA license, winding down the Wine Club was a business decision (at para. 28).
- [26] The judge also concluded the appellant lost her ability to generate income from the Wine Club when she sold her VQA license in February 2018. The judge determined the appellant failed to establish that she had any legal basis to operate the Wine Club under the Restaurant's food-primary liquor license (at paras. 29, 121-122).
- [27] The Restaurant remained open until early 2022. By the time of trial in May 2022, the Restaurant was closed.

At Trial

- [28] The witnesses at trial included the appellant, three of her friends and family, and several medical professionals.
- [29] Dr. Hamilton, the appellant's family doctor, gave evidence by video deposition as the appellant's treating physician.
- [30] The appellant tendered expert reports from Dr. Sangha, a specialist in physical medicine and rehabilitation, and Dr. Mok, a psychiatrist. The respondents produced expert reports from Dr. Gatha, a specialist in orthopedic medicine, and Dr. Paramonoff, a specialist in physical medicine and rehabilitation. These medical experts also testified and gave largely overlapping evidence on the diagnosis of the appellant's injuries, although they differed slightly on the severity of the injuries and prognosis for recovery (at para. 54).

- [31] Dr. Sangha opined that the appellant had suffered a vocational disability as a result of the accident and had reached maximum medical recovery. He believed the appellant's impairments were permanent. He opined that the appellant was unable to work anywhere near her pre-accident capacity. He did not anticipate her having the capacity to work any more than her current part-time kitchen designer role (at para. 63).
- [32] Dr. Gatha said the appellant had a moderate to severe permanent disability related to unresolved soft tissue injuries to her right hand and a moderate disability related to her neck and lower back pain, neither likely to improve. Dr. Gatha also opined that the injuries had significantly affected the appellant's ability to work, which would not improve in the future. He too said she had reached maximum medical improvement.
- [33] Dr. Paramonoff said the appellant was likely "close to her baseline of symptoms" with respect to her right hand and finger injuries. Dr. Paramonoff also opined that with steps to manage the appellant's residual symptoms, "there is no contraindication to [her] continuing employment going forward" (at para. 59). She also said that if the appellant's activity changed--for example, if she changed her employment--that occupational therapy would help manage her symptoms.
- [34] The judge's findings on the appellant's alcohol-use disorder were based primarily on evidence of the appellant's pre- and post-accident alcohol consumption as explained in Dr. Mok's written report, and on some of his trial testimony. Dr. Mok said the appellant's alcohol-use disorder worsened significantly post-accident to the point where she had become a "full-blown alcoholic". He testified that before the accident, she functioned well; the appellant's alcohol-use did not affect her life in a major way, nor was her functioning significantly declining until after the accident when the disorder worsened significantly. After the accident, the appellant used alcohol to deal with her accident-related pain (at paras. 69, 79).
- [35] Several of the appellant's friends, Heather Vegh, Karen Torget, and Karen Stanton, testified they were not concerned about the appellant's pre-accident functioning or alcohol consumption.
- [36] The judge generally found all the witnesses credible, but had doubts about the appellant's own credibility. The judge found the appellant at times gave untruthful testimony. For example, the appellant testified she "won" the wrongful dismissal case concerning the termination of her employment with Starline Cabinets when in fact the case settled, and the appellant received \$7,000. As a result of the adverse credibility finding, the judge sought supporting evidence in deciding whether to accept the appellant's testimony on particular points (at para. 8).

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- [37] As noted above, the judge made awards for non-pecuniary damages, cost of future care, and loss of future earning capacity, but declined to make an award for past loss of income.

- [38] The judge made a 25% "causation" deduction to all the awards based on her finding that the appellant had a pre-existing alcohol-use disorder. The judge said this disorder would have progressed even without the accident, such that damages related to the appellant's worsening alcohol-use disorder could not be entirely attributed to the accident.
- [39] The judge also made a 20% deduction to all the awards for failure to mitigate based primarily on the appellant's failure to seek earlier medical treatment for her hand and finger injuries. She also found the appellant's alcohol-use disorder and comorbid depression impacted her ability to participate in the treatment necessary to address her physical injuries.
- [40] The judge limited the loss of future earning capacity award to five years on the basis that the appellant's pre-existing alcohol-use disorder would have progressed and ended her career even without the accident. The judge also deducted a 25% positive contingency from the same award for the possibility that the appellant would find alternative work in the wine industry that did not involve lifting and moving boxes of wine.
- [41] Finally, the judge declined to make an award for past loss of income because the appellant had no legal basis to earn an income from wine sales after she sold her VQA license.

Issues

- [42] The appellant asserts the judge erred by:
- a) applying a 25% "causation" deduction to all the damage awards based on her finding that the appellant's pre-existing alcohol-use disorder would have worsened even without the accident;
 - b) applying a 20% deduction to all the damage awards for failure to mitigate based on findings that:
 - i. the delay in obtaining hand therapy was partly attributable to the appellant;
 - ii. the appellant's pre-existing alcohol-use disorder impacted her ability to participate in treatments necessary to address her injuries;
 - c) limiting the award for loss of future earning capacity to five years based on speculation and applying a 25% deduction based on speculation that the appellant would find alternative work in the wine industry; and
 - d) declining to make an award for past loss of income, thereby overlooking the appellant's part-time work in the kitchen cabinet industry.

Standard of Review

[43] A trial judge's award of damages is owed significant deference on appeal, since an assessment of damages is largely a fact-finding exercise (*Lamarque v. Rouse*, 2023 BCCA 392, at para. 27). An appellate court may 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'" (*Lamarque*, at para. 27).

Discussion

Issue 1: Did the judge err in applying a 25% "causation" deduction to all the damage awards based on the pre-existing alcohol-use disorder?

[44] The judge determined that causation was an issue in this case because of the appellant's pre-existing alcohol-use disorder (at para. 81). Accordingly, the judge instructed herself against putting the appellant in a position better than her "original position", thereby overcompensating the plaintiff. In the judge's view, the appellant's "original position" was that even without the accident, her alcohol-use disorder would have progressed or "worsened" over time (at paras. 81, 92).

[45] The judge made a global "causation" deduction of 25% from all of the damage awards for the appellant's alcohol-use disorder and her pre-existing driving anxiety (at para. 93).

[46] As stated earlier, the appellant's alcohol-use disorder is at the heart of this appeal. The only expert to opine on this question at trial was Dr. Mok, a psychiatrist. Dr. Mok testified remotely by video link. The connection was broken several times and had to be restored (at para. 72). As the court transcriber noted, the transcript of his evidence "contains a large number of missed words due to the quality of the remote audio". The number of "indiscernibles" may have led to some confusion in his evidence or its interpretation.

[47] The judge said she relied chiefly on Dr. Mok's written report to conclude the appellant had an alcohol-use disorder before the accident (at para. 72). The judge also accepted Dr. Mok's testimony that after the accident, the appellant became "a full-blown alcoholic" (at para. 79). The judge concluded the accident exacerbated the appellant's alcohol-use disorder but was not its predominant cause (at para. 90).

[48] The judge referred to the appellant's testimony that when she was deciding whether to sell her VQA license in February 2018, the stress led her to drink about a bottle of wine per day (at para. 84).

[49] However, the judge also accepted the evidence of several of the appellant's friends as to her ability to function well before the accident. Ms. Vegh testified that she was unconcerned about the appellant's alcohol consumption before the accident. Drinking was simply a reflection of the culture in their social circle (at para. 86). Ms. Torget said she noticed before the accident that the appellant sometimes had one or two too many drinks in social settings

(at para. 87). Ms. Stanton testified that while the appellant's pre-accident drinking was above what she would consider normal, it did not impair the appellant's ability to function (at para. 88).

- [50] The judge also referred to the evidence of Dr. Hamilton, the appellant's treating physician, who testified about his ongoing discussions with the appellant regarding her alcohol-use. He gave no expert opinion evidence.
- [51] The judge concluded that a 25% "causation" deduction was necessary to account for the appellant's pre-existing alcohol-use disorder, which worsened after the accident, such that she is now a "full-blown alcoholic" according to Dr. Mok. She held that "on a balance of probabilities", the accident was not the sole or predominant cause of the plaintiff's worsened alcohol-use disorder (at para. 90). Rather, the appellant's sale of her VQA license and her wine store closure, as well as the struggle of her restaurant, were "of greater significance to the plaintiff's worsened alcohol-use disorder than the injuries suffered in the Accident" (at para. 91).
- [52] Importantly, the judge also referred to the evidence of Dr. Mok and Dr. Hamilton in concluding that alcohol-use disorder is an inevitably progressive disorder that would have worsened for the appellant even absent the accident (at paras. 79, 90-93). This was the judge's rationale for applying a 25% deduction to all the damage awards. This finding was also significant to the judge's mitigation analysis.

Legal Framework

- [53] A tortfeasor need not compensate a plaintiff for injuries they would have suffered in any event (*Athey v. Leonati*, [1996] 3 S.C.R. 458, 1996 CanLII 183, at paras. 32-35). This flows from the "most basic principle of tort law that the plaintiff must be placed in the position he or she would have been in absent the defendant's negligence", i.e., the plaintiff's "original position" (*Athey*, at para. 32). If a plaintiff has a pre-existing condition, the judge must ensure the damage award does not put the plaintiff in a better position than they would otherwise have been in, thereby overcompensating the plaintiff.
- [54] A pre-existing condition can have important legal implications, including the contingency analysis discussed in *Dornan v. Silva*, 2021 BCCA 228, at paras. 62-64.
- [55] A pre-existing condition may affect the plaintiff's entitlement to damages. The damages owed to the plaintiff consist of the difference between the plaintiff's "original position"--namely the position they would have been in had the accident never occurred--and their actual position after the negligently-caused injury (*Blackwater v. Plint*, 2005 SCC 58, at para. 78). A plaintiff who would have suffered some or all of the injuries resulting from the defendant's negligence, even absent that negligence, is sometimes referred to as a "crumbling skull" plaintiff. In such a case, the court determines what debilitating effects the plaintiff would have suffered in any event, and ensures the defendant is not held liable for those (*Athey*, at para. 35).

- [56] In the case of a plaintiff who suffers from a pre-existing condition that may get progressively worse, the question is whether there is a "measurable risk" that the pre-existing condition would have affected the plaintiff in the future, regardless of the defendant's negligence (see Dornan, at para. 45; and Athey, at paras. 35-36). If such a measurable risk is demonstrated, the overall damage award can be adjusted accordingly.
- [57] Determining how a crumbling skull plaintiff "would have been without the accident" requires discerning (with evidence) how their pre-existing condition would have progressed even absent the accident. It is not accurate to describe the crumbling skull rule as giving rise to a "causation" deduction (as the judge did here at para. 117); instead, it is simply a recognition of the plaintiff's entitlement to damages in light of their "original position".
- [58] The judge referred to the appellant as a crumbling skull plaintiff. Her alcohol-use disorder was manifest before the accident. The judge appeared to identify the crumbling skull analysis as relevant to the appellant's alcohol-use disorder (at para. 81).
- [59] On the other hand, a pre-existing condition may also manifest as a future hypothetical event, i.e., a contingency, that must be assessed in accordance with the Dornan analysis of contingencies. Dornan can address how a pre-existing condition might manifest itself as a particular future event that may have deleterious effects on the plaintiff. A court must assess the likelihood of this event by tethering it to evidence specific to the plaintiff. The likelihood of the event is represented by the percentage deduction to the damages award. This analysis will typically require additional evidence than what is necessary to demonstrate a crumbling skull plaintiff's "original position" (Lo v. Vos, 2021 BCCA 421, at para. 78).

The Parties' Positions

- [60] It is common ground on appeal that the appellant had an alcohol-use disorder before the accident that was exacerbated by, and worsened significantly after, the accident.
- [61] However, the appellant argues the judge erred in finding, without evidence, that the appellant's pre-existing alcohol-use disorder would have worsened even without the accident. The appellant says the judge substituted her own judgment for that of medical evidence in concluding the appellant's pre-existing condition would have worsened in any event.
- [62] The respondents repeat the judge's findings on causation to argue the appellant has not identified a reviewable error. The respondents say the judge's finding was supported by Dr. Mok, who testified that alcohol-use disorder "can be" progressive.

Analysis

- [63] In my respectful view, the judge's misapprehension of the relevant evidence and failure to apply the relevant principles from Athey, as discussed in Dornan, at paras. 62-64, led her to err and apply a 25% "causation" deduction to all the damage awards. This misapprehension

of the evidence, as discussed below, was linked to the judge's failure to apply the governing legal frameworks. These intertwined errors went on to affect her reasoning as to the heads of damages. Finally, the judge conflated causation and damages in applying a 25% deduction for "causation".

The judge made a finding of fact without supporting evidence

- [64] The existence of a pre-existing condition may have significant implications for the plaintiff's "original position". A judge must compare the plaintiff's likely state in the absence of the accident--her "original position"--to the plaintiff's injured state post-accident. For someone with a progressive condition, the "original position" must account for how the disease would likely have unfolded had the accident never occurred.
- [65] The judge appeared to regard the appellant's pre-existing alcohol-use disorder as an indication that she was a crumbling skull plaintiff (at paras. 81-83). The judge combined this finding with the proposition that "alcoholism is a progressive disorder" to impose the 25% deduction, saying:
- [92] I find, on a balance of probabilities, it more likely than not that the plaintiff's alcohol-use disorder would have worsened in any event, absent-Accident. Alcoholism is a progressive disorder and had been an issue with the plaintiff for some time, as evidenced by Dr. Mok's written report, Dr. Hamilton's evidence, and the evidence of the plaintiff herself.
- [Emphasis added.]
- [66] The judge relied on Dr. Mok's general proposition that alcoholism "can be" a progressive disorder, but she did not otherwise refer to any specific evidence about the progression of the appellant's alcohol-use disorder. In my view, this was an error.
- [67] As Justice Groberman explained in *Gordon v. Ahn*, 2017 BCCA 221, "[d]escribing a plaintiff as coming within the 'crumbling skull doctrine' does not eliminate the need for a complete analysis of the pain and suffering caused by the accident" (at para. 33). The judge must consider the degree to which the plaintiff's health was damaged by the accident, which "would have required a detailed consideration of her pre-accident and post-accident mental health, as well as an assessment of the likelihood that a deterioration would have occurred even in the absence of an accident" (*Gordon*, at para. 36; emphasis added).
- [68] The judge's own conclusion that alcohol-use disorder is a progressive disease does not refer to the appellant's particular circumstances or to any medical evidence. Absent medical evidence as to a measurable risk of progression of the appellant's alcohol-use disorder, it was an error for the judge to draw the inference that it would have progressed absent the accident (*Gordon*, at para. 32).

[69] Indeed, the judge appears to have misapprehended Dr. Mok's evidence. Dr. Mok was careful to say only that alcohol-use disorder "can" be a progressive disease--that progression was "possible". Dr. Mok's statement was clearly couched in the language of a general possibility. He said:

Q Okay. And you agree with me that alcohol use disorder is a progressive disease?

A Yes, can be.

Q Right. And a point of progression, or the point of start of the progression could be October 2017 or February 2017.

A Possible, yes, could be, yeah.

Q And the reason why alcohol use disorder is a progressive disease, is that one has to take more alcohol to obtain the same effect over time; is that correct?

A Yes, can be, yeah.

[70] Dr. Mok was not cross-examined as to whether there was a measurable risk that the appellant's alcohol-use disorder would have worsened even without the accident, such that she would have become a "full-blown alcoholic" in any event. Dr. Mok was cross-examined only on the effects of alcohol-use disorder on a hypothetical person. Again, he answered in the language of general possibilities rather than anything specific to this appellant:

Q A person who's a heavy user -- or a person who uses alcohol -- well, the reserves to cope with alcohol use decline over time; is that correct?

A Possible, yes, correct, yeah.

Q That is why people in their forties and fifties, who are heavy users of alcohol, begin to function much less.

A Yeah, possible, yeah.

Q Alcohol use disorder is -- contributes to - to depression; is that not true?

A Yes, if you -- prolonged alcohol use, that can happen.

Q If -- an alcohol-use disorder and depression are comorbidities; is that not true?

A They can be comorbidities with prolonged alcohol use, yes.

[71] Furthermore, the record evinced the appellant's ability to reduce her wine consumption when the circumstances in her life were improving. After the appellant sold her VQA license, "her wine consumption dropped back down to several glasses a day" (at para. 84). Moreover, the appellant points to Dr. Mok's evidence that her alcohol-use did not affect her life in any major way until after the accident. The appellant says this testimony was supported by her friends, none of whom observed that alcohol affected her functioning before the accident. I agree with the appellant that the evidence of her three friends

supported Dr. Mok's opinion.

- [72] To be clear, although it was open to the judge to conclude that the appellant had an alcohol-use disorder before the accident, the judge went beyond Dr. Mok's evidence when she concluded that "alcohol-use disorder worsens over time" and that "[a]lcoholism is a progressive disorder" (at paras. 73, 92) as if this were inevitable for the plaintiff rather than merely possible in general. The judge's misapprehension of Dr. Mok's evidence led to a conclusion that was speculative.
- [73] A misapprehension of evidence must be material to warrant appellate intervention (*Tian v. Yu*, 2023 BCCA 421, at para. 39). The judge's misapprehension here was material, as the judge applied her "causation" deduction to every award (except special damages). Accordingly, this was prejudicial to the appellant.
- [74] It is an error of law to make a finding of fact for which there is no supporting evidence (*R. v. J.M.H.*, 2011 SCC 45, at para. 25). In the present case, there was no medical evidence that the individual appellant's pre-existing condition would have progressed further without the accident, or that her post-accident depression was linked to or "comorbid" with her alcohol-use disorder (see the discussion in *Lo*, at paras. 71-80).

The judge failed to apply the Dornan analysis

- [75] As discussed above, a pre-existing condition can be significant when it gives rise to a real and substantial possibility, or a measurable risk, of a future hypothetical event leading to a pecuniary loss. At times, the judge appeared to reason that the "causation" deduction was justified because of a contingency related to the appellant's pre-existing alcohol-use disorder (at para. 92).
- [76] A pre-existing condition may give rise to a specific contingency that would negatively affect the plaintiff's ability to earn certain income. But such contingencies are subject to the analysis articulated in *Dornan* (at paras. 63-64 and 93-95). In this case, the analysis is:
- a) on the evidence, did the appellant suffer from a pre-existing condition with the potential to affect her ability to earn income;
 - b) on the evidence, is there a measurable risk (i.e., a real and substantial possibility) that this pre-existing condition would detrimentally affect the appellant in the future, regardless of the respondents' negligence; and,
 - c) on the evidence, what is the relative likelihood of that possibility occurring?

Again, the operative word is "evidence," as discussed in *Dornan*.

- [77] Here, the judge failed to apply the second step of the *Dornan* analysis. Rather than conclude, as she did, that the appellant's alcohol-use disorder was an inevitably progressive condition, the judge was required to consider whether there was a measurable risk or real and substantial possibility that it would worsen even without the accident. Further, the judge

failed to consider the relative likelihood of the appellant being in the same condition without the accident because of her alcohol-use disorder. The 25% figure the judge chose had no particular connection to the evidence. It was arbitrary.

- [78] As noted above, there was evidence that the appellant managed to reduce her alcohol consumption twice before the accident. This evidence should have been factored into the judge's analysis to determine the likelihood that the appellant would become a "full-blown alcoholic" even absent the accident (Gordon, at para. 36). First, the appellant reduced her alcohol consumption when she was no longer stressed about whether to sell her VQA license and had made that decision. Second, the appellant testified that she cut down her alcohol consumption after seeing Dr. Hamilton three weeks before trial to inquire about a prescription to address her alcohol usage. While Dr. Hamilton did prescribe medication, he advised the appellant to first reduce her alcohol consumption on her own. The appellant testified to having made such a reduction in the week before trial. The judge did not address this evidence.
- [79] It is settled law that trial judges are presumed to be familiar with the law with which they work and need not recite uncontroversial legal principles (*Barendregt v. Greblunias*, 2022 SCC 22, at para. 104; *R. v. G.F.*, 2021 SCC 20, at para. 74; *Hague v. Hague*, 2022 BCCA 325, at para. 22). However, this is not a case where the judge simply failed to state the correct test but properly applied it. Rather than conduct the "measurable risk" analysis discussed in *Athey*, *Dornan*, and *Lo*, the judge appeared to apply a different standard entirely. This error is apparent in the judge's "causation" analysis, where she articulated what she took to be the applicable principles. For convenience, I refer again to the following paragraph:
- [92] I find, on a balance of probabilities, it more likely than not that the plaintiff's alcohol-use disorder would have worsened in any event, absent-Accident. Alcoholism is a progressive disorder and had been an issue with the plaintiff for some time, as evinced by Dr. Mok's written report, Dr. Hamilton's evidence, and the evidence of the plaintiff herself.
- [Emphasis added.]
- [80] The proper test, as discussed above, is not a balance of probabilities, but whether the evidence establishes a real and substantial possibility, or measurable risk: see *Athey*, at para. 35. As this court said in *Dornan*, at para 63: "A risk that is a real and substantial possibility, and not mere speculation, is a risk that is measurable". In this case, the evidence supported nothing more than mere speculation. While the judge at para. 81 quoted the "measurable risk" language from *Athey*, those words do not appear again and were not tethered to any evidence. The failure to conduct the proper analysis is an error of law that justifies appellate intervention (*Lamarque*, at para. 35).

The judge improperly apportioned damages

- [81] Finally, in applying the 25% deduction for "causation", the judge appeared to conflate causation and damages. As Blackwater said, "it is important to distinguish between causation as the source of the loss and the rules of damage assessment in tort" (at para. 78). With respect to causation, as long as the defendant is one cause of the plaintiff's injury, the defendant is wholly liable. The defendant need not be the sole cause of that injury to be held wholly liable (Athey, at para. 17). As to damage assessment, the fundamental principle is that the defendant need not put the plaintiff in a better position than the original position. But the judge did not approach the plaintiff's pre-existing alcohol use disorder that way. Instead, she applied a causation analysis, improperly apportioning liability between the respondents and the appellant on the basis of the pre-existing condition.
- [82] Causation is established where the plaintiff proves that the defendant's tortious conduct caused or contributed to the plaintiff's injury (Athey, at para. 13; *Snell v. Farrell*, [1990] 2 S.C.R. 311, 1990 CanLII 70, at 326). "There is no basis for a reduction of liability because of the existence of other preconditions" (Athey, at para. 17). Apportionment of liability between a tortious cause (the negligently-caused accident) and a non-tortious cause (the appellant's pre-existing alcohol-use disorder) is an error of law (Athey, at para. 20; Blackwater, at para. 78).
- [83] Here, the judge improperly apportioned liability between the appellant and the respondents by applying a 25% deduction for "causation":
- [90] I find that the plaintiff was suffering from alcohol-use disorder pre-Accident, and this condition worsened significantly, in and around the period post-Accident. I find on a balance of probabilities, that the Accident was not solely, or even predominantly, responsible for the plaintiff's worsened alcohol-use disorder
- [93] Overall, I reduce the damage awards made to the plaintiff by 25%, to account for her pre-existing alcohol-use disorder and driving anxiety.
- [Emphasis added.]
- [84] The judge's finding at para. 90 above should not have affected causation. Accordingly, it cannot be the basis for a 25% "causation" deduction. It is clear the judge found that the respondents' negligence was a contributing cause of the appellant's injuries. The judge said the appellant's "alcohol-use disorder worsened significantly, post-Accident" (at para. 79). According to Athey, that made the respondents liable for the totality of the appellant's injuries. The judge's decision to make a 25% global "causation" deduction was therefore an error of law.
- [85] For these reasons, I would accede to this ground of appeal.

Issue 2: Did the judge err in applying a 20% deduction to all the damage awards for a failure to mitigate?

- [86] The judge's mitigation analysis focussed primarily on the appellant's hand injuries. The judge found the appellant failed to mitigate (a) by missing several appointments that would have resulted in an earlier diagnosis and better treatment of her hand injury; and (b) because she suffered from a pre-existing alcohol-use disorder that limited her ability to seek and benefit from treatment (at paras. 102-103).
- [87] The judge quoted the following passage from *Gilbert v. Bottle*, 2011 BCSC 1389:
- [201] The plaintiff has a positive duty to mitigate by taking all reasonable measures to reduce loss and damages caused by the defendant's negligence. This duty includes an obligation to undertake reasonably available treatment that would assist in alleviating or curing his or her injuries. The principle of mitigation is based on the general proposition that a defendant should not be held liable for loss and damages the plaintiff could have reasonably avoided: *Janiak v. Ippolito*, 1995 CanLII 62 (SCC), [1985] 1 S.C.R. 146; *Danicek v. Alexander Holburn Beaudin & Lang*, 2010 BCSC 1111.

[Emphasis in original.]

From this, the judge concluded that "the standard required for mitigation efforts is reasonableness and sincerity in pursuing treatments to address injuries suffered" (at para. 96).

- [88] The judge determined that the appellant had not taken reasonable steps to mitigate her damages. The judge referred to the evidence of Dr. Paramonoff and Dr. Gatha, whom the judge said testified that the appellant's prognosis would have been better had she undertaken treatment earlier, particularly for her hand (at para. 97). The judge also found the appellant did not consistently attend physiotherapy. The judge held the appellant responsible in part for not seeking treatment earlier when her hand was not healing and for not being more diligent in pursuing her prescribed physiotherapy (at para. 101).
- [89] The judge accepted as a partial explanation that Inland Hospital emergency care's failure to diagnose her ring-finger fracture after the accident led to her delay in seeking treatment. The judge also held that the appellant's "outcome would have been better" had she not missed so many appointments (at para. 102).
- [90] Accordingly, the judge reached the following conclusion on mitigation:
- [103] I find that the plaintiff has not taken reasonable steps to mitigate her damages, and did not undertake the full course of treatments for her hand or back injuries recommended by medical professionals. The plaintiff's delay in seeking treatment and failure to follow treatment plans put in place, led to a poorer prognosis for recovery than she otherwise would have had. I further find that the plaintiff's pre-existing alcohol-use disorder, worsened due to the Accident and other events in the plaintiff's life, and co-morbid depression, have impacted her ability to participate in the treatments necessary to address her physical injuries.
- [104] Accordingly, I reduce any damages awarded to the plaintiff by 20% for failure to mitigate.

[Emphasis added.]

- [91] As the emphasized portion above demonstrates, the judge also considered the appellant's pre-existing alcohol-use disorder and "comorbid" depression in addressing mitigation. The judge reasoned that these disorders meant the appellant did not--or was not able to--properly mitigate her damages.

Legal Principles

- [92] The legal principles on mitigation limit an injured party's recovery based on that party's "unreasonable failure to take reasonable steps to limit his or her loss" (Graham v. Rogers, 2001 BCCA 432, at para. 35).
- [93] The onus of proof and the two-step test for failure to mitigate by not pursuing a recommended course of treatment is set out in Chiu v. Chiu, 2002 BCCA 618:
- [57] The onus is on the defendant to prove that the plaintiff could have avoided all or a portion of his loss. In a personal injury case in which the plaintiff has not pursued a course of medical treatment recommended to him by doctors, the defendant must prove two things: (1) that the plaintiff acted unreasonably in eschewing the recommended treatment, and (2) the extent, if any, to which the plaintiff's damages would have been reduced had he acted reasonably
- [94] This test has been applied numerous times by this Court, including in Haug v. Funk, 2023 BCCA 110, at para. 22; Wahl v. Sidhu, 2012 BCCA 111, at para. 32; and Gregory v. Insurance Corp. of British Columbia, 2011 BCCA 144, at para. 53. A defendant bears the onus of proving both branches of the Chiu test on a balance of probabilities (Haug, at paras. 55 and 61). Where this test is satisfied, a judge must reduce the damages awarded to the plaintiff. The defendant does not owe compensation to the extent the plaintiff's injuries could have been avoided with mitigation (Haug, at para. 61).

The Parties' Positions

- [95] The appellant says the judge misapprehended the evidence that underlies her conclusion concerning mitigation, and that the governing Chiu test was neither applied nor satisfied on the evidence. The appellant therefore asks this Court to set aside the 20% mitigation-based deduction.
- [96] For their part, the respondents say the judge properly instructed herself on the law of mitigation by citing Gilbert, at para. 201 and Danicek v. Alexander Holburn & Lang, 2010 BCSC 1111, at para. 234.

- [97] The respondents repeat the trial judge's reasons for applying the 20% mitigation deduction. They say that had the appellant undergone hand and back physiotherapy treatments as recommended rather than missing several appointments, she would have made a better recovery.
- [98] The respondents argue the judge's findings were open to her on the evidence of Dr. Gatha and Dr. Paramonoff. The respondents say Dr. Gatha blamed the appellant for failing to revisit her family doctor or seek reassessment between the date of the accident and September 2018, when she again saw Dr. Hamilton. The respondents note Dr. Gatha testified that after the accident, the appellant would have been in severe pain that would have prompted "a reasonable person" to seek an earlier re-assessment.
- [99] The respondents also point to Dr. Paramonoff's report of January 2022 (almost four years post-accident) in which she recommended exercise and physiotherapy. The respondents say this evidence shows that even now, the appellant would improve with mitigating therapies. The respondents say this shows the appellant failed in the past to mitigate her damages.

Analysis

- [100] In my view, the judge erred in law in applying a global 20% deduction to the damage awards based on a failure to mitigate.

The judge failed to apply the Chiu test

- [101] I agree with the appellant that the judge failed to apply the governing test from Chiu, as recently affirmed in Haug.
- [102] Chiu requires that the defendant prove both branches of the test on a balance of probabilities. The judge's reasons do not reflect either that she applied the two-step test for mitigation in Chiu or, in particular, instructed herself on the relevant onus and burden of proof. While Haug was decided after the trial judge released her decision, Haug simply re-affirmed and clarified long-standing principles articulated in Janiak v. Ippolito, [1985] 1 S.C.R. 146, 1985 CanLII 62 and Gregory (see Haug, at para. 61). The judge did not refer to the applicable onus or standard of proof. Indeed, the judge appeared to place the onus on the appellant.
- [103] This is not a case where, although the judge did not articulate the legal test, she clearly conducted the correct analysis. Instead, as referred to earlier, the judge appeared to rely on the following test for mitigation:
- [96] The standard required for mitigation efforts is reasonableness and sincerity in pursuing treatments to address injuries suffered.

This does not reflect the test from Gilbert or Chiu in form or substance.

- [104] The first branch of the Chiu test requires the court to determine whether the defendant has shown that the plaintiff unreasonably eschewed a recommendation. In the present case, the appellant arguably did not have the opportunity to unreasonably "eschew" a recommendation until after she was properly diagnosed and the window for mitigating her damages had already closed. (Any earlier recommendation was made in the absence of the proper diagnosis.) The fact the appellant did not pursue hand physiotherapy in the summer of 2018 might not have been unreasonable because she had not been correctly diagnosed. The onus was on the respondent to show that the appellant acted unreasonably in eschewing the initial hand therapy recommendation despite operating under an inadequate, delayed diagnosis. The judge did not consider the evidence of the appellant's actions in light of this test and the applicable onus.
- [105] The second branch of the Chiu test requires the court to consider the extent to which the plaintiff's damages would have been reduced had they acted reasonably. This step requires specificity as to the degree to which the eventual injury would have been avoided. Instead, the judge described the appellant's lost opportunity for better recovery in general and conclusory terms, as follows (and I repeat para. 103 for convenience):
- [101] The [plaintiff] argues that the failure to diagnose the finger fracture at the initial emergency treatment led to the delay in the plaintiff seeking treatment. While some responsibility rests with the failure of the initial emergency care which failed to identify the finger fracture, the plaintiff also bears some responsibility. Had the plaintiff sought treatment earlier when it was clear her hand was not healing, or had she been diligent in pursuing the hand therapy that she was prescribed, her outcome would have been better.
- [102] If the plaintiff had undergone hand and physiotherapy treatments as recommended, if she had participated fully, and not missed so many appointments, her outcome would have been better.
- [103] I find that the plaintiff has not taken reasonable steps to mitigate her damages, and did not undertake the full course of treatments for her hand or back injuries recommended by medical professionals. The plaintiff's delay in seeking treatment and failure to follow treatment plans put in place, led to a poorer prognosis for recovery than she otherwise would have had.
- [Emphasis added.]
- [106] Here, there was evidence that mitigation may not have made any difference at all. The appellant says the judge misapprehended the evidence when she explained that "the evidence of the experts, Drs. Paramonoff and Gatha, was that the prognosis for the appellant would have been better had she undertaken treatment earlier, particularly for her hand" (at para. 97). The appellant says neither expert provided such evidence.

- [107] Dr. Paramonoff's prognosis, the appellant notes, was that the appellant was at the baseline of her symptoms. Dr. Gatha confirmed that the fracture in the appellant's hand was not diagnosed until September 2018. He testified that the benefit from hand therapy diminishes significantly if it does not occur within six months of the initial injury. The appellant testified that the first available appointment for hand therapy after the hand fracture was diagnosed was February 2019--approximately nine months after the accident. (The appellant also relies on Dr. Gatha's testimony that there was no recommendation for hand therapy until Dr. Hamilton referred her to Dr. Grover, whom she first saw in October 2018. However, the evidence showed and the judge found that Dr. Hamilton had first recommended hand therapy to the appellant in May 2018, just after the accident occurred). Further, Dr. Sangha gave evidence that the fracture diagnosis was so delayed and the severity of the injury so high that earlier intervention may not have made a difference.
- [108] I agree that the judge erred by failing to consider the extent to which the appellant's injuries would have been reduced in light of this evidence. The judge's failure to apply the requisite test and burden of proof is an error of law.

The judge improperly relied on Dr. Paramonoff's evidence

- [109] Furthermore, I do not accept the respondents' reliance on Dr. Paramonoff's "recommendation" for exercise and physiotherapy, which came in the context of a medical-legal report prepared for litigation, rather than in the role of treating physician. A physician retained by a plaintiff's counsel to provide a medical-legal report is not a treating physician whose recommendations a plaintiff can be said to have been obliged to follow (*Thomasson v. Moeller*, 2016 BCCA 14, at para. 39).
- [110] Dr. Paramonoff was retained by the respondents to provide an independent medical-legal report. She was not a treating physician whose recommendations the appellant was obliged to follow. Indeed, as the appellant points out, there was no evidence at trial that she even received Dr. Paramonoff's report. It is dated January 24, 2022, well into the litigation process, nearly four years after the accident and close to trial. For the purposes of a mitigation analysis, her report could not form the basis for a reasonable "recommendation" at all, let alone a recommendation that the appellant unreasonably eschewed. An injured person cannot be faulted for not pursuing a treatment not recommended to them by a treating physician and in a medical-legal report prepared shortly before trial.

The judge improperly applied her findings on causation to mitigation

- [111] In my view, for inter-related reasons, the judge also erred in considering the appellant's pre-existing alcohol-use disorder in the context of mitigation.
- [112] The judge had already discussed the appellant's pre-existing alcohol-use disorder in the context of "causation". Part of the judge's reasons for applying a 20% mitigation-based deduction appears to replicate her rationale for applying a 25% deduction for "causation".

Both concern the appellant's alleged pre-existing condition. Thus, even if the judge had properly applied a "causation" deduction for the appellant's pre-existing condition (and in my view, she erred in doing so), the judge "double counted" by applying yet another deduction in the context of mitigation.

[113] Moreover, a pre-existing condition may contribute to a reason why a plaintiff might reasonably fail to undertake mitigation steps, rather than constitute an unreasonable eschewal or deliberate avoidance of such steps. The judge's decision to apply her findings on "causation" and the appellant's pre-existing condition in the context of mitigation appears counter-intuitive (at para. 103). It is at least ambiguous.

[114] Finally, the judge's conclusion that the appellant's pre-existing alcohol-use disorder and comorbid depression affected her ability to participate in necessary treatments (at para. 103) was not supported by medical evidence. Dr. Mok gave no such evidence. Nor was this theory suggested to him, or to the appellant, in cross-examination.

[115] I would accede to this ground of appeal.

Issue 3: Did the judge err with respect to the loss of future earning capacity award?

[116] The judge awarded the appellant a net \$32,219 for loss of future earning capacity after the deductions for "causation" and failure to mitigate, and after yet a further 25% deduction for the contingency that the appellant would work again in the wine industry, but in a different capacity than before.

[117] The judge began her analysis of loss of future earning capacity by setting out the three-part test from *Rab v. Prescott*, 2021 BCCA 345, at para. 47 (at para. 127). She noted that step three of the *Rab* test involves considering positive and negative contingencies (at para. 130).

[118] The judge declined to use the appellant's earnings from the Wine Club as a basis for a loss of future earning capacity because the appellant had sold her VQA license before the accident. This meant the accident did not cause a loss of income related to the Wine Club (at paras. 132-133). The appellant does not seriously challenge this finding.

[119] Accordingly, the judge determined the value of the award by referring only to the appellant's post-accident employment in the kitchen cabinet industry.

[120] The judge determined that the appellant's accident-exacerbated alcohol-use disorder, depression, anxiety, and chronic back and hand pain disclosed a potential future event that could lead to a loss of earning capacity that was a real and substantial possibility (at paras. 138-139).

[121] The judge quantified this loss at \$16,331 per year for five years (at para. 144).

[122] The judge concluded that without the accident, the appellant was likely to work only five more years post-trial due to the inevitably progressive nature of her pre-existing alcohol-use disorder:

[142] The plaintiff works in the kitchen cabinet industry 62.5% of the time, and would make approximately \$43,550 if she were able to work full-time. I assess the plaintiff's loss of future income through an earnings approach, calculated based on a loss of \$16,331 per year, which is the difference in what the plaintiff makes working part-time vs. what she would earn working full-time in the kitchen cabinet industry. I find it likely the plaintiff would have continued to work for five more years. The plaintiff suffers from alcohol-use disorder, which is a progressive disease and there is a significant likelihood she would have been unable to work past five years, absent-Accident.

[Emphasis added.]

I observe that the finding underscored above relies on the judge's same misapprehension of the evidence, and conclusion reached in the absence of supporting evidence, discussed earlier in these reasons: that the appellant's alcohol-use disorder was inevitably progressive.

[123] The judge applied present value multipliers to reach the sum of \$78,105 for five more years of work before adjustment for positive and negative contingencies (at para. 144).

[124] The judge then deducted a 25% positive contingency to reflect the possibility that the appellant would return to work in another wine industry role--one that did not require her to conduct the physical labour that her injuries now prevented (at para. 147).

[125] Finally, the judge applied her "causation" and mitigation deductions to reach a net award of \$32,219.

Legal Principles

[126] Rab set out the three-step analytical framework for determining loss of future earning capacity. Under the first step, the court considers whether the evidence substantiates a potential future event that could lead to a loss of earning capacity. Next, the court asks whether, on the evidence, there is a real and substantial possibility that the future event will cause a pecuniary loss. If so, then under the third step, the court assesses the value of that possible future loss, which involves assessing the relative likelihood of the possibility occurring (Rab, at para. 48).

[127] Where this test is applied to circumstances where a plaintiff is unable to work at the time of trial and into the foreseeable future, it is clear the plaintiff has lost their future capacity to work. Here, the appellant was unable to work full-time. However, it was still necessary to assess the probability (i.e., likelihood) of future hypothetical events occurring which may affect the quantification of the loss of future income, including negative and positive contingencies (*Ploskon-Ciesla v. Brophy*, 2022 BCCA 217, at para. 11). Negative contingencies include the possibility that the plaintiff would have experienced certain income-reducing events in any case. Positive contingencies include the possibility the plaintiff may return to work.

- [128] The first step is evidentiary. Where the event giving rise to a future loss is manifest and continuing at the time of trial, that step is a given (as in the present case) (*Steinlauf v. Deol*, 2022 BCCA 96, at para. 52).
- [129] The second step concerns whether the possible future event will cause a pecuniary loss. The plaintiff need not prove on a balance of probabilities that this possibility will impair future earning capacity. The plaintiff must only show the hypothetical occurrence is a "real and substantial possibility and not mere speculation" (*Grewal v. Naumann*, 2017 BCCA 158, at para. 48, per Goepel J.A. in dissent, but not on this principle).
- [130] The third and final step concerns valuation or quantification of the loss. That is, what is the relative likelihood of the pecuniary loss occurring (*Rab*, at para. 47)? Gregory explained that the quantification process involves comparing the plaintiff's likely future had the accident not happened, and the plaintiff's likely future after the accident has happened (at para. 32). Accordingly, the task for the judge was to assess the appellant's likely future earnings had the accident not occurred.
- [131] This Court has distinguished between general contingencies--i.e., the vicissitudes of life likely to occur to everyone, such as illnesses and promotions--and specific contingencies or risks, namely the more particular events that attach to some individuals based on their characteristics and lifestyle (*Dornan*, at para. 92). Only specific contingencies are at issue in this appeal.
- [132] A specific contingency must be proven by evidence capable of supporting the conclusion that the occurrence of the contingency is a "real and substantial possibility" (*Lo*, at para. 74). This standard is not as onerous as "a balance of probabilities" but requires a basis in the evidence that is more than mere speculation (*Dornan*, at para. 94, citing *Gao v. Dietrich*, 2018 BCCA 372, at para. 34).
- [133] If the contingency is substantiated according to this test, the judge may make a contingency deduction, linked to the evidence, that reflects the relative likelihood of the positive or negative contingency occurring (*Dornan*, at paras. 133-134). The deduction cannot be rooted in "averages and approximations based on imprecise evidence" (*Dornan*, at para. 134).

The Parties' Positions

- [134] The appellant argues the judge made two errors with respect to the loss of future earning capacity. First, she erred in finding the appellant would have been unable to work more than five years after trial, even absent the accident.
- [135] Second, the judge erred by deducting a further 25% positive contingency based on the speculation that the appellant could find alternative work in the wine industry.

- [136] The appellant asks this Court to substitute a loss of future earning capacity award of \$215,545, based on the present value of a loss of \$16,331 per year over 17 years.
- [137] The respondents say the judge's findings were open to her on the evidence. That is, there was a real and substantial possibility that the appellant's alcohol-use disorder would have progressed to the point of curtailing her career and that the appellant had the ability to seek out alternative work in the wine industry.
- [138] The respondents also suggest the appellant's pre-existing alcohol-use disorder was the reason for the pre-accident "decline" of her businesses between 2015 and 2018. The respondents say this supports the judge's conclusion that the appellant's pre-existing alcohol-use disorder would have resulted in a vocational disability that would limit her working life to another five years.

Analysis

The judge imposed a five-year limit on the loss of future earning capacity award without evidence

- [139] The judge appears to have imposed the five-year limit on the appellant's career as a specific contingency, but without the use of a deduction. The judge placed an outer limit on the period she expected the appellant to work even without the accident, truncating the award. The appellant says there was no evidence that her pre-existing alcohol-use disorder justified this cap on her future capacity to work and therefore the loss of future earning capacity award was artificially limited to five years. I agree. The judge erred in law by limiting the award to five years without evidence to support that limit.
- [140] The judge found evidence of alcohol-use disorder to satisfy the first step in Rab (at para. 142). She also determined there was a real and substantial possibility that in the future--specifically in five years--the appellant would have to stop working (at para. 143).
- [141] However, the judge failed to conduct the third step, namely, analyzing the relative likelihood of the appellant's career ending in five years. The judge assigned no explicit likelihood to this possibility, effectively finding it was 100% likely without tethering that conclusion to any evidence. This was speculation.
- [142] In fact, as the appellant points out, the uncontradicted evidence was that the appellant intended to work until she reached the age of 68 given the length of the lease on her commercial property. There was no evidence that the accident changed this intention. Importantly, the respondents neither cross-examined the appellant on this theory nor raised it in argument.

[143] I am also unpersuaded by the respondents' speculative suggestion that the appellant's pre-existing alcohol-use disorder precipitated a "decline" in the appellant's businesses between 2015 and 2018. There was no evidence to support this alleged connection. Once again, this theory was not put to the appellant in cross-examination.

[144] The appellant's friends and Dr. Mok testified that her alcohol consumption before the accident did not affect her functioning. She functioned well then. The judge accepted the testimony of these witnesses. The judge appeared to accept that the Wine Club, Wine Store, and Restaurant struggled due to the unit change required by the appellant's landlord, the effects of COVID-19 on businesses, the lack of a suitable liquor license, and worker shortages (at paras. 122, 133).

The judge speculated by imposing a contingency deduction for the prospect of returning to work

[145] A similar analysis applies to the 25% deduction from the award for loss of future earning capacity based on the positive contingency that the appellant could find alternative work within the wine industry. The judge reasoned this way:

[147] However, given the plaintiff's knowledge of the wine industry, and lifelong passion for that industry, I find it is reasonably likely that she will become employed again, or pursue other business ventures, within the wine industry. Accordingly, I find the award for future loss of earning capacity should be reduced by 25% to reflect this positive contingency (-25%) = \$58,579.

[Emphasis added.]

[146] The judge concluded the appellant's physical injuries would not prevent her from using her extensive wine knowledge in a future business endeavor or employment that did not involve transporting and lifting wine bottles:

[134] Within the plaintiff's own testimony, it was clear that her strength and main asset as an entrepreneur in the wine business was in her years of accumulated knowledge of BC wines, her ability to choose wines, and curate wine pairings, not in her ability to lift and carry bottles and boxes of wine.

[135] The plaintiff could still find a job which relies on her knowledge of the wine industry and cumulative experience. Her physical injuries do not impact this knowledge. The plaintiff did not advance a claim that she could not operate a wine business in the future due to her alcohol-use disorder.

[147] However, the judge did not connect the possibility of the appellant finding "a job which relies on her knowledge of the wine industry and cumulative experience" to any evidence about whether such a job existed, its working conditions, or provide any specific examples. In my view, her conclusion amounted to speculation.

- [148] At trial, the appellant was employed solely in the kitchen cabinet industry. There was no evidence she could obtain future work in the wine industry.
- [149] The respondents point to Dr. Paramonoff's evidence that the appellant could continue to work after the injury. However, this evidence was not about specific alternative forms of wine industry work. Indeed, after noting that she was working part-time in a kitchen design role, Dr. Sangha opined that the appellant's "capacity to work at anything greater is in my opinion suspect".
- [150] Moreover, the respondents did not argue the appellant could find alternative work in the wine industry and the appellant was not cross-examined on this theory, or on the existence of such work.
- [151] At the hearing of this appeal, the respondents submitted the appellant did not show that she could not do alternative work in the wine industry. But the onus was on the respondents, not the appellant, to provide such evidence (Lo, at paras. 39, 79).
- [152] Finally, the judge's conclusion that the appellant could obtain alternative work in the wine industry is inconsistent with the judge's refusal to base the appellant's loss of future earning capacity on anything other than her earnings in the kitchen cabinet industry. Given that the judge calculated the loss of future earning capacity based on the assumption that the appellant had no future in the wine industry, it was illogical to simultaneously make a deduction for the positive contingency of the appellant returning to work in that industry.
- [153] I would sustain the appellant's submissions and accede to this ground of appeal.

Issue 4: Did the judge err in dismissing the appellant's claim for past loss of income?

- [154] The appellant's claim for past loss of income is for the period from March 2020 to the date of trial in May 2022.
- [155] The judge declined to make an award for past loss of income on the basis that the appellant's ability to generate income arose solely from the Wine Club, which she lost after selling her VQA license in 2017.
- [156] The judge did not discuss any pre-trial loss of earnings arising from the appellant's employment in the kitchen cabinet industry. The judge's only mention of this work regarding past loss of income is the following:
- [123] The plaintiff has gone through multiple employers in the kitchen cabinet industry. She attributed this to her Accident-related injuries and her strong female personality "being foreign" in a male-dominated industry, leading to personality conflicts. The plaintiff did not give evidence that she had an inability to maintain employment with various kitchen cabinet employers due to her alcohol-use disorder.

Legal Principles

[157] A damages award for loss of past earning capacity compensates a plaintiff for the loss of the value of the work they would have done, but were unable to due to their injuries arising from the accident (Lamarque, at para. 29). While there is no hard and fast rule that only loss of actual income is compensable, a plaintiff's actual lost income is often the most reliable measure of their loss of earning capacity. However, it must be remembered that the loss of capacity, not the actual lost income, is compensable (Lamarque, at para. 30).

The Parties' Positions

[158] The appellant submits the judge erred in declining to make any award for past loss of income, saying: (a) the judge should have made such an award based on the appellant's earnings in the kitchen cabinet industry, which began in March 2020 and continued as of trial; and (b) the judge failed to consider the evidence that the appellant did indeed suffer wage loss from her injuries, which left her unable to lift boxes of wine and otherwise administer the Wine Club.

[159] Accordingly, the appellant asks this Court to substitute an award of \$65,324 for past loss of income.

[160] As to (a) above, the respondents contend the judge determined that the appellant had not discharged her burden of proof on a balance of probabilities to show past loss of income (at para. 125). The thrust of the respondents' argument appears to be that the judge's decision not to make an award must be read alongside her finding that the appellant had multiple employers in the kitchen cabinet industry and struggled in that industry (at paras. 30 and 123). In oral argument, the respondents added that the judge's decision not to make an award was appropriate because there was insufficient evidence to establish past loss of income, for two reasons. First, the respondents say the appellant had only been working for her latest employer in the kitchen cabinet industry for the two weeks before trial. Second, the respondents suggest that any reduction in the appellant's work hours was the result of scheduling changes imposed by her former employer, Mr. Meljars (the owner of Starline Cabinets), that were unrelated to her injuries.

[161] As to (b) above--the appellant's contention that the injuries left her unable to lift boxes of wine and administer the Wine Club--the respondents point to the judge's finding that after she sold her VQA license, the Wine Club had no ability to generate income (at paras. 121-122). The respondents say this was the legitimate basis for the judge declining to make an award for past loss of income.

Analysis

The judge overlooked the evidence regarding the appellant's kitchen cabinet industry work

- [162] I agree with the appellant that the judge erred in not making an award for past loss of income on the basis of the appellant's part-time pre-trial earnings in the kitchen cabinet industry between March 2020 (when she started in that industry) and May 2022 (the date of trial). The judge heard evidence that the appellant had income from her employment in the kitchen cabinet industry before trial, but there was evidence it was only part-time work because of her injuries. The judge appears to have misapprehended or overlooked this evidence.
- [163] The judge found the appellant's evidence as to how she operated the Wine Club without a liquor-primary license to be "murky at best", saying:
- [28] Overall, I found the plaintiff's evidence on how she operated the Wine Club, without a liquor-primary license, to be murky at best. The plaintiff has failed to show the Wine Club was a legitimate business that would have continued but for the Accident. I find that it was the lack of an appropriate liquor licence to continue to operate the Wine Club as she had done when she owned a VQA licence, rather than injuries resulting from the Accident, that caused the plaintiff to no longer be able to continue with the Wine Club. Likewise, the details of the financial arrangement with Swirl Wines, including what amounts were paid to (or, perhaps, retained by) Swirl Wines, was not clear. The plaintiff repeatedly deferred all questions to her bookkeeper or accountant, who were not called. The plaintiff is an entrepreneur and business owner. I found the plaintiff's claim to be unable to give even the most basic information about how the financial arrangements worked between herself and Swirl Wines, regarding the Wine Club, to lack credibility.
- [164] The observations above were open to the judge on the evidence. However, the judge's concerns as to sparse evidence and the appellant's evasiveness about the Wine Club did not apply to the appellant's kitchen cabinet earnings. The necessary evidence was before the judge, who was able to determine that the appellant would have been able to earn \$43,550 had she worked full-time in the kitchen cabinet industry (at para. 142). The appellant worked in that industry 62.5% of full-time work.
- [165] I am unable to agree with the respondents' two-pronged submission that there was insufficient evidence to make a past loss of income award.
- [166] First, the decision not to make an award for past loss of income is irreconcilable with the basis for the award for loss of future earning capacity. The latter award was based on the evidence of the appellant's part-time earnings in the kitchen cabinet industry, for which the judge declined to make an award for past loss of income. If there was sufficient evidence for a loss of future earning capacity award based on the appellant's part-time kitchen cabinet industry earnings, there was also sufficient evidence for a past loss of income award based

on the evidence of the same earnings.

[167] Second, the testimony of the appellant's previous employer, Mr. Meljars, was that he changed the pay structure of the appellant and others from salary to hourly because they were not working 40 hours a week. Consistent with this, the appellant testified that she worked flexible, reduced hours at Mr. Meljar's business, Starline Cabinets, as a result of her injuries.

[168] In the result, I do not consider it necessary to address the appellant's argument as to whether the respondents are resiling on appeal from a "concession" made in closing argument below that the appellant sustained a \$30,000 past loss of income.

The judge did not err respecting the award for the appellant's wine industry work

[169] The judge did not err in declining to make an award for past loss of income on the basis of the appellant's Wine Club earnings. None of the appellant's arguments challenge the judge's key finding that after the appellant sold her VQA license in 2018, the Wine Club could no longer generate income. Without challenging that finding, the appellant cannot take issue with the judge's decision not to make an award for past loss of Wine Club earnings.

[170] In addition, the appellant adduced no satisfactory evidence as to her earnings, deferring to her accountant and bookkeeper who were not called as witnesses. (The appellant pursued her claim for past loss of earning capacity on the basis of the lost earnings approach rather than the loss of a capital asset.)

[171] Indeed, in explaining the calculation for the past loss of income award sought on appeal, the appellant confirmed in oral argument she does not rely on earnings from the Wine Club. The appellant seeks an award based on the same present value figure as the judge used for the appellant's loss of future earning capacity from the kitchen cabinet industry alone--a loss of \$16,331 per year, or about 37.5% of full-time earnings of \$43,550.

[172] Accordingly, I would accede to this ground of appeal based on the judge's error in overlooking the appellant's part-time earnings in the kitchen cabinet industry earnings alone.

Disposition

[173] In summary, all the grounds of appeal have merit. In my view, the judge erred by:

- a) making a 25% "causation" deduction to all the awards;
- b) making a 20% deduction for mitigation to all the awards;
- c) limiting the loss of future earning capacity to five years and deducting 25% for the possibility that the appellant would return to work in another capacity in the wine industry; and

- d) declining to make an award for past loss of income for the appellant's work in the kitchen cabinet industry between March 2020 and the date of trial in May 2022.
- [174] With respect to remedy, the question is whether to order a new trial or substitute our own awards on appeal. In my view, the cumulative effect of the nature and number of intertwined errors means the interests of justice require a new trial.
- [175] First, several errors concern questions of law where the judge failed to conduct the required legal analysis or made findings based on speculation. Other errors involve misapprehensions of evidence, or errors of fact. As Gordon said, "[i]n the absence of clear findings of fact, it is not possible to evaluate the appropriateness of the judge's award, or to adjust it to account for errors in the judge's assessment" (at para. 42; see also *Ackley v. Audette*, 2017 BCCA 283, at para. 62).
- [176] Second, a new trial is often necessary where errors are inextricable; here, it is not possible to isolate the "causation" and mitigation errors from the individual damage awards, as those deductions were globally applied (*Wahl*, at para. 61). For example, the judge's findings are rooted in an absence of evidence of the appellant's personal prognosis for her alcohol-use disorder. All the other awards are tainted by this error in law, which also turns on the misapprehension of Dr. Mok's evidence, as discussed. Third, this Court cannot determine how the judge's adverse credibility finding regarding the appellant would influence the analysis when properly conducted (*Ackley*, at para. 62).
- [177] Furthermore, correcting the errors by simply reversing the judge's deductions for "causation" and mitigation, and basing the loss of future earning capacity on 17 years instead of five, as argued by the appellant, would result in a significant increase to the total award--nearly quadrupling it. In effect, attempting to correct the errors on appeal would substitute an entirely new award. Where the errors have a "dramatic" effect on the damage awards, the interests of justice require a new trial (*Wahl*, at para. 61).
- [178] It follows that I would allow the appeal, set aside the order below, and order a new trial.
- "The Honourable Justice MacKenzie"
- I AGREE:
- "The Honourable Justice Dickson"
- I AGREE:
- "The Honourable Mr. Justice Abrioux"

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Prepared on 29 October 2026 · Esheria