

CANADA / JUDGMENT

Ploskon-Ciesla v. Brophy

2022 BCCA 217

COURT

British Columbia Court of Appeal

DECIDED

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2022 BCCA 217 Ploskon-Ciesla v. Brophy

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

Ploskon-Ciesla v. Brophy,

2022 BCCA 217

Date: 20220617

Docket: CA47195

Between:

Anna Maria Ploskon-Ciesla

Respondent

(Plaintiff)

And

Marianne Brophy

Appellant

(Defendant)

Before:

The Honourable Mr. Justice Harris

The Honourable Madam Justice Stromberg-Stein

The Honourable Mr. Justice Voith

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

December 1, 2020 (Ploskon-Ciesla v. Brophy, 2020 BCSC 1873,
New Westminster Docket M202992).

Counsel for the Appellant:

M.H. Wright

J.E. Fergusson

Counsel for the Respondent:

T. Dennis

J. Fearon

(via videoconference)

Place and Date of Hearing:

Vancouver, British Columbia

May 12, 2022

Place and Date of Judgment:

Vancouver, British Columbia

June 17, 2022

Written Reasons by:

The Honourable Mr. Justice Harris

Concurred in by:

The Honourable Madam Justice Stromberg-Stein

The Honourable Mr. Justice Voith

Summary:

This is an appeal of awards for loss of future earning capacity, housekeeping capacity, and cost of future care. The appellant alleged that entitlement to none of these awards had been established in the evidence. Held: Appeal allowed, damage awards set aside, and different awards substituted. Although the judge erred in his quantification of the awards, the respondent had established a basis of entitlement for some award in each contested case. Rather than send the matter back for a new trial and a proper quantification of the awards, the Court concluded the record was sufficient, on the basis of uncontested facts, to substitute a proper award under each heading.

Reasons for Judgment of the Honourable Mr. Justice Harris:

Introduction

- [1] This is an appeal of awards for loss of future earning capacity, loss of housekeeping capacity, and cost of future care as compensation for injuries arising from a motor vehicle accident. The appellant, Marianne Brophy, and the respondent, Anna Maria Ploskon-Ciesla, were involved in a motor vehicle accident on June 1, 2017. Ms. Ploskon-Ciesla sustained soft tissue injuries to her neck, right shoulder, lower back, and right buttock.
- [2] The prognosis of Ms. Ploskon-Ciesla experiencing a greater than 80% improvement of her neck and shoulder symptoms with appropriate rehabilitation was good, though a prognosis for complete recovery was poor. She was restricted in her activities. The judge awarded \$90,000 in non-pecuniary damages. That award is not under appeal, but it gives some indication of the continuing severity of Ms. Ploskon-Ciesla's injuries.
- [3] Ms. Brophy submits that Ms. Ploskon-Ciesla failed to prove there was a real and substantial possibility she would have earned more in the future without the accident, than she will likely earn given the accident. Further, Ms. Brophy argues Ms. Ploskon-Ciesla failed to prove facts capable of supporting an award for loss of future earning capacity. The error Ms. Brophy alleges in respect of housekeeping capacity is, as I understand it, misapprehension of the evidence giving rise to the claim. Finally, Ms. Brophy contends the judge erred in the award of cost of future care because no evidence supported the duration of the award.
- [4] For the reasons below, I would allow the appeal in respect of the loss of future earning capacity, cost of future care and future loss of housekeeping capacity and substitute different awards as set out below.

Standard of Review

- [5] I will analyse the issues on appeal by topic. At the outset, it is important to remember the standard of review in reviewing damage assessments. In *Reilly v. Lynn*, 2003 BCCA 49, leave to appeal ref'd [2003] S.C.C.A. No. 221, this Court described the standard of review in the following terms:
- [99] We cannot alter a damage award simply because, on the evidence, we would come to a conclusion different from that of the trial judge. However, we may vary a damage award if we conclude that the trial judge in assessing the damage award applied a wrong principle of law (as by taking into account some irrelevant factor or leaving out of account some relevant one); or if the amount awarded is either so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage. The two cases often cited in this court in this regard are *Woelk v. Halvorson*, [1980] 2 S.C.R. 430 and *Cory v. Marsh* (1993), 77 B.C.L.R. (2d) 248 (C.A.).
- [100] An award for loss of earning capacity presents particular difficulties. As Dickson J. (as he then was) said, in *Andrews v. Grand & Toy Alberta Ltd.*, [1978] 2 S.C.R. 229 at 251:

We must now gaze more deeply into the crystal ball. What sort of a career would the accident victim have had? What were his prospects and potential prior to the accident? It is not loss of earnings but, rather, loss of earning capacity for which compensation must be made: *The Queen v. Jennings*, [[1966] S.C.R. 532]. A capital asset has been lost: what was its value?

Loss of Future Earning Capacity

- [6] I will return to the relevant facts and evidence later. For now, I note there was a relative paucity of evidence bearing on Ms. Ploskon-Ciesla's future prospects and plans. She was qualified to work as a counsellor and a massage therapist in Poland but, after immigrating to Canada, mostly took on several part-time jobs, including as an unregistered massage therapist, bookkeeper, and server, each for various lengths of time. Additionally, the accident did not cause Ms. Ploskon-Ciesla any past wage loss; after the accident, she was able to take on all of the hours her part-time position at the time offered.

Operative Principles

- [7] The assessment of an individual's loss of future earning capacity involves comparing a plaintiff's likely future had the accident not happened to their future after the accident. This is not a mathematical exercise; it is an assessment, but one that depends on the type and severity of a plaintiff's injuries and the nature of the anticipated employment in issue: *Gregory v. Insurance Corporation of British Columbia*, 2011 BCCA 144. Despite this lack of mathematical precision, economic and statistical evidence "provide[s] a useful tool to assist in determining what is fair and reasonable in the circumstances": *Dunbar v. Mendez*, 2016 BCCA 211 at para. 21, citing *Parypa v. Wickware*, 1999 BCCA 88 at para. 70.
- [8] Courts should undertake a tripartite test to assess damages for the loss of future earning capacity. In *Rab v. Prescott*, 2021 BCCA 345, Grauer J.A. clarified this approach. Although the judge did not have the benefit of *Rab* when he wrote his reasons, the principles summarized therein are not novel; they have been the applicable law for a considerable time.
- [9] I will repeat those principles here, drawing heavily on *Rab*. I do so because it is clear the judge did not undertake the requisite steps when assessing damages, nor did he make the findings of fact necessary to quantify an award. This dearth of analysis leaves us to speculate on the basis for the award, as it did in *Schenker v. Scott*, 2014 BCCA 203 at paras. 55-56.
- [10] Justice Grauer in *Rab* described the three steps to assess damages for the loss of future earning capacity:
- [47] ... The first is evidentiary: whether the evidence discloses a potential future event that could lead to a loss of capacity (e.g., chronic injury, future surgery or risk of arthritis, giving rise to the sort of considerations discussed in *Brown*). The second is whether, on the evidence, there is a real and substantial possibility that the future event in question will cause a pecuniary loss. If such a real and substantial possibility exists, the third step is to assess the value of that possible future loss, which step must include assessing the relative likelihood of

the possibility occurring--see the discussion in Dornan at paras. 93-95.

First Step

- [11] With respect to the first step, I note two considerations as outlined in Rab at paras. 29-30. First, there are, broadly, two types of cases involving the loss of future earning capacity: (1) more straightforward cases, for example, when an accident causes injuries that render a plaintiff unable to work at the time of trial and into the foreseeable future; and (2) less clear-cut cases, including those in which a plaintiff's injuries have led to continuing deficits, but their income at trial is similar to what it was at the time of the accident. In the former set of cases, the first and second step of the analysis may well be foregone conclusions. The plaintiff has clearly lost capacity and income. However, in these situations, it will still be necessary to assess the probability of future hypothetical events occurring that may affect the quantification of the loss, such as potential positive or negative contingencies. In less obvious cases, the second set, the first and second steps of the analysis take on increased importance.
- [12] Second, with respect to the second set of cases, that is, situations in which there has been no clear loss of income at the time of trial, the Brown factors, as outlined in *Brown v. Golaiy* (1985), 26 B.C.L.R. (3d) 353 (S.C.), come into play. The Brown factors are, according to Rab, considerations that:
- [36] are not to be taken as means for assessing the dollar value of a future loss; they provide no formula of that nature. Rather, they comprise means of assessing whether there has been an impairment of the capital asset, which will then be helpful in assessing the value of the lost asset.
- [37] If there has been a loss of the capital asset, the question then becomes whether there is a real and substantial possibility of that impairment or diminishment leading to a loss of income.
- [13] For ease of reference, the Brown considerations set out at para. 8 of that decision include whether:
1. The plaintiff has been rendered less capable overall from earning income from all types of employment;
 2. the plaintiff is less marketable or attractive as an employee to potential employers;
 3. the plaintiff has lost the ability to take advantage of all job opportunities which might otherwise have been open to him, had he not been injured; and
 4. the plaintiff is less valuable to himself as a person capable of earning income in a competitive labour market.

- [14] Recall, however, that a plaintiff is not entitled to an award for a loss of earning capacity in the absence of any real and substantial possibility of a future event leading to income loss: *Rab*; *Perren v. Lalari*, 2010 BCCA 140. That is, even if the plaintiff makes out one or more of the Brown factors, and thus demonstrates a loss of earning capacity, this does not necessarily mean they have made out a real and substantial possibility this diminished earning capacity would lead to a loss of income in their particular circumstances. This is where the second step comes in.

Second Step

- [15] The reference to paras. 93-95 of *Dornan v. Silva*, 2021 BCCA 228, in para. 47 of *Rab*, above, regards the standard of proof at this stage: a real and substantial possibility. This standard of proof "is a lower threshold than a balance of probabilities but a higher threshold than that of something that is only possible and speculative": *Gao v. Dietrich*, 2018 BCCA 372 at para. 34.

Third Step

- [16] As touched upon above, depending on the circumstances, the third and final step--valuation--may involve either the "earnings approach" or the "capital asset approach": *Perren* at para. 32. The earnings approach is often appropriate where there is an identifiable loss of income at the time of trial, that is, the first set of cases described above. Often, this occurs when a plaintiff has an established work history and a clear career trajectory.
- [17] Where there has been no loss of income at the time of trial, as here, courts should generally undertake the capital asset approach. This approach reflects the fact that in cases such as these, it is not a loss of earnings the plaintiff has suffered, but rather a loss of earning capacity, a capital asset: *Brown* at para. 9. Furthermore, the capital asset approach is particularly helpful when a plaintiff has yet to establish a settled career path, as it allays the risk of under compensation by creating a more holistic picture of a plaintiff's potential future.

The Trial Judge's Analysis and Alleged Errors

- [18] In *Rab*, the error of the judge was to skip a step in the analysis. He moved directly from the first step to the third step. After concluding that pain, increased migraines, and a loss of energy--that is, the future event in question--resulted in a loss of capacity, he immediately concluded this loss of capacity would cause a pecuniary loss in the future. He did not analyse whether there was a real and substantial possibility the loss of capacity would cause a pecuniary loss in the future, nor did he assess the relative likelihood of any such possibility occurring.
- [19] In my respectful opinion, the trial judge in this case fell into similar errors as the judge in *Rab*.

Reasons for Judgment

- [20] The trial judge applied the capital asset approach. This was the right approach given Ms. Ploskon-Ciesla's age and work history.
- [21] The core of the judge's analysis is found at the following paragraphs:
- [96] The evidence in this case, as provided by Dr. Helper [a physiatrist who gave a medical opinion], supports a finding that the plaintiff has suffered injuries that will cause sustained postures to be difficult and, without further recovery, would not allow the plaintiff to work more than 20 hours per week without escalating pain responses during a full work day (Report of Dr. Helper at line 645). That said, according to Dr. Helper, if the plaintiff participated in a new course of rehabilitation, she may experience moderate improvements, though not to the level of full-time employment, but rather to a level of approximately 32 hours per week if "accommodated by an ergonomic setup with sit/stand desk" (Report of Dr. Helper at lines 660-662). Dr. Helper found that a return by the plaintiff to consistent work as a massage therapist would be highly speculative and the results would be, at best, unpredictable.
- [97] Dr. Helper, testifying for the plaintiff as an expert witness, has confirmed continuing symptoms which will impair and impede her future employability. However, Dr. Helper expects, with a course of rehabilitative therapy, that she can be expected to be capable of performing desk work at 80% of full time hours each day, five days a week.
- [99] It is clear from the review of the medical report cited above that the plaintiff will have grave difficulty entering into any, except a limited number of, sedentary work situations. Many employment options, including the potential occupation as a massage therapist, have apparently been foreclosed as speculative.
- [100] While the defence did not make extensive submissions on this point, the plaintiff's submissions were drawn on the case of *Andrews*, cited above. Contingencies, both negative and positive, are to be based on evidence, as noted by Mr. Justice Willcock in *Smith v. Fremlin*, 2014 BCCA 253 at para. 28. The court should be careful, of course, not to reduce an award based on standard labour market contingencies and then erroneously include another deduction based on other contingencies which are a repetition of the first deduction. Other contingencies typically include:
1. Unemployment, approximately 4% per year (*Corey v. Kruger Products L.P.*, 2018 BCSC 1510);
 2. Participation rate; and
 3. Part-time employment.

- [101] Positive contingencies, which increase losses, include the possibility that the plaintiff: would have worked beyond the normal age of retirement; would have worked greater than full-time hours; or may have supplemented her income by other activities such as a second job. Another contingency which may reduce the plaintiff's residual earning capacity is the possibility that the plaintiff may take time off to raise children.
- [102] I am satisfied that the reduced earning capacity of the plaintiff, taking into account the nature of the work being done by the plaintiff, is appropriate in this case and that the plaintiff's loss of earning capacity, with contingencies applied, will be awarded in the amount of \$255,000.

Alleged Errors

- [22] Ms. Brophy contends that the judge's analysis does not reflect a proper application of the principles relevant to a loss of future earning capacity. She says the judge did not engage in an analysis of whether Ms. Ploskon-Ciesla had proven a real and substantial possibility of a future event leading to a loss of income. In particular, he did not examine whether Ms. Ploskon-Ciesla had realistic alternative occupations available to her that were foreclosed because of the accident.
- [23] She argues Ms. Ploskon-Ciesla only gave evidence about two realistic possible career paths. The first was massage therapy, in one form or another, including opening a spa. The second was a continuation of her work at the time of the accident as a bookkeeper. Ms. Brophy says the judge relied exclusively on Dr. Helper's opinion, set out above, but misapprehended both what it said and what Ms. Ploskon-Ciesla had said about her future plans. A third possible career path was counselling, but Ms. Ploskon-Ciesla appeared to have ruled this out before the accident.
- [24] According to Ms. Brophy, Dr. Helper did not rule out massage therapy as a possible future occupation, nor did he opine that Ms. Ploskon-Ciesla was limited to sedentary occupations, and other employment opportunities were foreclosed. Rather, Dr. Helper opined that how Ms. Ploskon-Ciesla might tolerate a return to working as a massage therapist was "difficult to predict" but that "she might surprisingly find it easier than a desk job". In any event, Ms. Ploskon-Ciesla gave little evidence about her desire or ability to work as a massage therapist. She had not worked in that field since 2015 because she found the occupation too much work for the money she received. Finally, the judge undertook no analysis of the possibility that Ms. Ploskon-Ciesla could return to work as a counsellor.
- [25] The next criticism levelled at the judgment is the absence of any analysis of Ms. Ploskon-Ciesla's likely earnings if the accident had not happened. Indeed, Ms. Ploskon-Ciesla had returned to the bookkeeping job she had held before the accident. She had been able to work all the hours available to her, despite the accident, resuming her pre-accident hours. She did not lose income as a result of the accident. Moreover, Ms. Brophy argues, the judge did not undertake any analysis of her likely future employment earnings. Rather, he relied

on Dr. Helper's general evidence that Ms. Ploskon-Ciesla would likely be able to work only 80% of a full-time position. There is no analysis of what type of work would realistically be available to Ms. Ploskon-Ciesla in her injured condition, or the probability of moving to full-time work either with or without the accident.

- [26] Taking these criticisms together, Ms. Brophy submits Ms. Ploskon-Ciesla had not proven a real and substantial possibility of a future event giving rise to a loss of future earning capacity.
- [27] Ms. Brophy also contends the quantification of the award rests on error. The judge gave no indication of the factual basis for awarding \$255,000. The only relevant factual basis was that Ms. Ploskon-Ciesla would continue working part-time in her current position, and it was merely speculative that she would pursue any other form of employment, including massage therapy (either registered or unregistered; as an employee or in her own spa).
- [28] The judge, says Ms. Brophy, made no findings about Ms. Ploskon-Ciesla's residual earning capacity, nor did he explain the evidentiary basis for or quantification of contingencies. In particular, there was no evidence Ms. Ploskon-Ciesla would have worked more than full-time hours, taken a second job, or worked beyond retirement age.
- [29] In short, the judge did not engage in the required task. He did not apply the test to the evidence, and did not make the necessary findings of fact to support the award. Moreover, the evidence did not support any award, so we should set it aside.
- [30] Ms. Ploskon-Ciesla argues the judge did not make any legal errors. He identified the test, and made factual findings open to him on the evidence. In Ms. Ploskon-Ciesla's view, the award is supportable in light of the evidence, including her plans for future employment. While the judge may not have considered certain matters expressly, the award is fair and reasonable. It is, she contends, certainly not so inordinately high as to warrant appellate intervention.

Analysis

- [31] In my opinion, the award must be set aside. The judge did not apply the correct legal basis for assessing the award. It is an error of law to use an incorrect basis for determining whether an individual has suffered a loss of future earning capacity: *Brown; Amador v. Mo*, 2005 BCCA 514; *Kwei v. Boisclair* (1991), 60 B.C.L.R. (2d) 393 (C.A.).
- [32] While the judge did not expressly consider whether Ms. Ploskon-Ciesla had suffered a loss of earning capacity by applying the Brown factors, it appears he implicitly found such a loss had occurred. The judge referred to the injuries she suffered, and the effect they would have on her capacity to work full-time. He referred, in a general way, to restrictions on the range of employment opportunities open to her, including a possible return to working as a massage therapist.

- [33] What the judge did not do was undertake step two of the test, as well as the likelihood assessment in step three. He did not engage in any analysis of whether there was a real and substantial possibility that Ms. Ploskon-Ciesla's injuries would cause a loss of future earning capacity in relation to her plans and intentions. As part of this error, the judge did not adequately demonstrate how these injuries would restrict Ms. Ploskon-Ciesla's future earning capacity. That is, he failed to examine what opportunities were realistically open to her given the accident. He undertook no analysis of what Voith J., as he then was, described as the central task of comparing the likely future of Ms. Ploskon-Ciesla's working life if the accident had not occurred with her likely future working life after the accident: *Pololos v. Cinnamon-Lopez*, 2016 BCSC 81 at para. 133.
- [34] Additionally, the judge did not compare the probabilities affecting her future earning capacity absent the accident, to her future earning capacity given the accident. That is, he did not fully complete the third step of the analysis, and failed to determine the likelihood of these various potential future events. He did not analyse the likelihood that Ms. Ploskon-Ciesla would return to full-time work, or what work that might be. He did not assess the likelihood she would return to massage therapy in either a registered or unregistered capacity, open her own spa, or return to counselling. A few of these options required retraining, but there was no analysis of the likelihood she would retrain given the time and cost involved. Moreover, there was no analysis of the potential earnings associated with various alternatives.
- [35] Further, a trial judge addressing future losses must account for negative and positive contingencies by engaging in a fact-intensive, case-specific inquiry: *Gregory* at para. 33. Although the judge referred to both positive and negative contingencies, he did not undertake the task described in *Rosvold v. Dunlop*, 2001 BCCA 1:
- [9] ... Possibilities and probabilities, chances, opportunities, and risks must all be considered, so long as they are a real and substantial possibility and not mere speculation. These possibilities are to be given weight according to the percentage chance they would have happened or will happen.
- [36] Moreover, it is impossible to discern the basis of the judge's assessment of damages at \$255,000. This lack of clarity stems from the errors I described above. There is no clear analysis of whether Ms. Ploskon-Ciesla proved a real and substantial possibility of loss of future earning capacity derived from her diminished marketability. There is no analysis of the general level of earnings she realistically would have achieved, but for the accident, considering her intentions and the probabilities of achieving them. There is no projection of her likely earnings considering her injuries and other relevant contingencies. Although the judge did make findings on a number of relevant matters, he did not apply those findings in a reasoned analysis to explain and justify the award. Rather, he appears to have plucked a number from the air, leaving this Court and the parties to speculate on the basis for the award.

- [37] This brings us to the question of whether it is possible for this Court to examine the evidence to determine an accurate award. This Court occasionally reassesses damages where the unchallenged findings of fact and the evidentiary record are sufficient to do so, and the interests of justice weigh strongly against ordering a new trial. That was the case in *Pallos v. Insurance Corporation of British Columbia* (1995), 100 B.C.L.R. (2d) 260 at paras. 33-34 (C.A.).
- [38] It seems to me that a certain number of facts are not in issue. The judge summarized the pertinent background facts:
- [6] The plaintiff is in her mid-thirties and is the mother of three children. In 1984, she was born in Debica, Poland, and was raised there.
- [7] In 2007, the plaintiff met her husband, Rafal Ciesla, in her mother's restaurant in Poland, where she worked as a server. She used her serving skills later in life as will be discussed below. The plaintiff was a competitive dancer and skier, and also enjoyed outdoor pursuits, including running and hiking.
- [8] She moved to Canada with her husband. The plaintiff holds a Masters degree in counselling from the Jesuit University Ignatianum in Kraków, which she obtained in 2009. She also obtained a diploma in massage therapy from the Kraków School of Therapeutic Massage in 2009. After a practicum in a prison setting, following the completion of her counselling degree, she concluded that counselling was not a positive career choice for her.
- [9] In January 2010, the plaintiff and Mr. Ciesla got married. In September 2010, they moved to Canada. The massage therapist qualifications of the plaintiff were not readily transferrable to Canada, so she began working in White Rock, B.C. as a server in an ABC Country Restaurant on a full-time basis.
- [10] After about six months in Canada, she began working full-time at a green house arranging tropical plants for shipping. Mr. Ciesla was working in construction applying stucco surfaces.
- [11] In September 2011, the couple left the plaintiff's grandparents' home in Surrey, B.C., where they had been living, and moved into an apartment in Burnaby, B.C.
- [12] On February 25, 2013, the plaintiff gave birth to her first child, K.C. Following the end of her maternity leave, she began to work in three different part-time employment positions, including: as a massage therapist; as a server at an ABC Country Restaurant; and doing data entry and bookkeeping at Master Stucco Ltd., the company where her husband was employed. She found that the massage therapy work required too much work for insufficient pay and so she left the massage therapy position after a few months.
- [13] The plaintiff became pregnant in 2015 and her second child, A.C., was born on February 5, 2016.

- [14] After the end of her maternity leave following the birth of the second child, in April or May 2016, she began working full-time for the stucco company. Her husband took paternity leave, and due to the nature of her work, she was able to perform work from her home. She continued this working arrangement until February 2017, when her husband returned to work applying stucco. The plaintiff wanted to spend more time with her children, but continued to work on an on-call basis for the stucco company.
- [15] The plaintiff was involved in regular physical activity with weekly running, gym workouts, and yoga once or twice each week. The Ploskon-Ciesla family was active, hiking in local mountains and near Whistler and Pemberton.
- [16] The plaintiff had worked as a registered massage therapist in Poland and as an unregistered massage therapist in Burnaby following the birth of her first child. Her qualifications required upgrading before she could work as a registered massage therapist in British Columbia. She had planned to begin that upgrading process, but was delayed by the first accident and by the birth of her third child in July 2019.
- [39] Ms. Ploskon-Ciesla did not incur any past wage loss due to the accident. At the time of trial, she was working any hours her bookkeeping job offered. Ms. Ploskon-Ciesla's history of working a number of different jobs, typically part-time, to some degree reflects the reality of her relatively recent immigration to Canada with qualifications not recognized here, as well as the fact that she had a young family. I expect these factors to be less influential on her work patterns as time goes by, especially as Ms. Ploskon-Ciesla is clearly an intelligent and hard-working person. It is not obvious what occupations her injuries entirely foreclose, aside from manual labour, as opposed to potentially limiting her capacity to work in them full-time. In particular, there is no evidence of the foreclosure of more remunerative employment options than those she has recently undertaken.
- [40] While working briefly as an unregistered massage therapist before the accident, Ms. Ploskon-Ciesla earned about \$30 to \$35 per hour, including tips. She quit that job because it was too much work for the amount of money she earned. While working as a bookkeeper, she was earning \$30 per hour.
- [41] Although there was a period when she worked full-time, she also took time off before the accident.
- [42] In the years before the accident, Ms. Ploskon-Ciesla had not taken steps to become a registered massage therapist in British Columbia. Despite her Polish counselling qualifications, the judge found she had rejected counselling as a career option.
- [43] Ms. Ploskon-Ciesla gave little evidence about her plans before or after the accident. She said she thought about or planned to return to full-time work when her youngest child was about one and a half years old, perhaps as a massage therapist. Even if she did not retrain, she said she could always open her own spa.

- [44] The judge found that working as a massage therapist was effectively precluded as a result of the accident. Ms. Brophy says this finding rests on a misapprehension of Dr. Helper's evidence.
- [45] I agree that Dr. Helper's opinion was less categorical than the judge stated. Dr. Helper concluded that Ms. Ploskon-Ciesla would have difficulty with full-time desk work (that is, work involving "sustained postures"). At the time of his opinion, Dr. Helper concluded that, in her current state, Ms. Ploskon-Ciesla would not be able to work in her bookkeeping job beyond 20 hours per week, but he anticipated her eventually being able to work 75-80% of full-time hours, that is, up to 32 hours per week with an ergonomic setup. He did not recommend "labour-based activities", giving the example of construction work. He opined that Ms. Ploskon-Ciesla's ability to work as a massage therapist would be "surprisingly unpredictable". She could be "totally intolerant" of massage therapy, "or she might surprisingly find it easier than a desk job" given the opportunity "to move around and change positions on a regular basis" in such an environment.
- [46] In my view, the judge misapprehended Dr. Helper's evidence, consequently erring in his characterization of Ms. Ploskon-Ciesla's loss of capacity. In particular, it was an error to find she would have grave difficulty entering into any except a limited number of sedentary work situations. It was also an error to conclude that many employment options, including massage therapy, were foreclosed as speculative.
- [47] Returning to the test, I accept the evidence establishes a potential future event that could lead to a loss of capacity. I also accept there is a real and substantial possibility that the future event in question will cause a pecuniary loss. Ms. Ploskon-Ciesla has an injury that will continue to limit her ability to work; it gives rise to a real and substantial possibility that her hours of work may be restricted in her current or similar lines of work, or that other lines of work may be more difficult than would otherwise be the case.
- [48] Given that such a real and substantial possibility exists, the next step is to assess the value of that possible future loss. This assessment necessarily includes determining the relative likelihood of the possible future loss occurring.
- [49] I accept there is some likelihood Ms. Ploskon-Ciesla would have worked more hours in the future without the accident than she now can. Certainly, as her children grow up, there will be more opportunity to do so. But it is difficult to evaluate that likelihood on this record.
- [50] Ms. Ploskon-Ciesla's evidence equivocated between thinking about whether to and, in response to an improper leading question, planning to start full-time work when her youngest child reached one and a half years of age. Her evidence about whether, before the accident, she intended to go back to school and incur the cost of becoming qualified as a massage therapist in British Columbia was similarly vague and uncertain. It amounted to little more than something she was thinking about. The same is true of her testimony that she planned on opening her own spa. There was no evidence about the cost of doing so or that she had, at any time, taken any steps to turn the thought into action. At best, this

evidence supports a minimal likelihood that she would have, absent the accident, pursued any alternative career paths beyond working more hours than previously.

- [51] Nor is there much by way of probative evidence of Ms. Ploskon-Ciesla's earning capacity, either with or without the accident. There was some evidence about her earnings as a massage therapist and as a bookkeeper, but no economic evidence of earnings in other possible careers. I acknowledge the judge made this assessment on a capital asset approach, but such evidence may nonetheless assist a court without turning the assessment into an earnings approach.
- [52] Finally, beyond indicating that she had no plans to retire, Ms. Ploskon-Ciesla gave no evidence to ground any positive contingencies.
- [53] We are left in a difficult position. The judge did not undertake a proper capital asset analysis. We have virtually no evidence with which to assess Ms. Ploskon-Ciesla's without-accident or residual earning capacity. There is very little in the evidence that would permit us to assess the likelihood of various events in order to determine the value of the loss of future earning capacity.
- [54] It is tempting to agree with Ms. Brophy that Ms. Ploskon-Ciesla did not discharge the onus of proving the value of her lost future earning capacity, and set aside the award in its entirety. But that, in my view, would be wrong. As I said, I think Ms. Ploskon-Ciesla has, at the most general level, proven a real and substantial possibility of a loss of capacity leading to future income loss. There is evidence that the plaintiff is unlikely to be able to work at more than 80% of full-time hours in her current job. That evidence anchors the plaintiff's claim, at least to a modest degree.
- [55] The weakness in her case is in the failure to provide cogent evidence necessary to evaluate the likelihood of her with- and without-accident futures, and thus the quantification of the loss of earning capacity. Moreover, while the evidence is thin, it would be wrong to discount entirely the possibility that Ms. Ploskon-Ciesla would have engaged more fully in remunerative employment, and earned more than she is now able to do. She is entitled to some award because, in the future, her ability to engage in some occupations is likely restricted or closed. Further, it is impossible to say that, over her working life, the impairment will not harm her income earning ability.
- [56] What then, should we do? We could set aside the award and remit the matter for a new trial, possibly restricted to this one issue. I do not think that course of action is in the interests of justice, and doing so is fraught with potential difficulties. Here, it seems to me, the problem lies not in the fact of a loss, but in its quantification. In those circumstances, a trial court would have to do the best it can to assess the loss, despite the frailties in the evidence. In these circumstances, in my opinion, to attempt to quantify the loss ourselves is the better course. The evidence that she had some intention or plan to work on a full-time basis is sufficient to ground some award for loss of future earning capacity, subject to considering the likelihood of her doing so and other contingencies. In my opinion, on the record, we are

able to undertake that analysis.

- [57] We know there is a risk Ms. Ploskon-Ciesla will likely be restricted to about 80% of a full-time job. If she would have worked full-time, continuing on as a bookkeeper (assuming the hours were available) or another equivalent job, she would likely have earned around \$50,000 a year. Working at 80% of full-time represents an income of about \$40,000; a difference of \$10,000. However, there is no certainty she would have taken that course, and no evidence she would have earned more in a different occupation.
- [58] Ms. Ploskon-Ciesla provided very little useful evidence about any alternative career paths that would assist in grounding a quantification analysis. The burden was on her to demonstrate a real and substantial possibility that there were other realistic options available to her. She provided almost no evidence capable of discharging that burden and, accordingly, very little weight can be given to them. Moreover, even to the extent that there is some evidence about some possibilities that are arguably foreclosed or restricted, there is nothing to suggest that her earnings from those occupations would have been any greater than she could earn in bookkeeping or an equivalent occupation. There is nothing to indicate what her earnings might be if she opened a spa. As a result, the analysis focuses for practical purposes on limitations on full-time work in bookkeeping or a similar occupation.
- [59] Returning then to an assessment, an income loss of \$10,000 a year, in my opinion, is a reasonable maximum measure of lost residual capacity. Of course, I must adjust this maximum to reflect the uncertainties associated with Ms. Ploskon-Ciesla's plans. This adjustment should reflect the reality that, as her children grow and she perhaps settles into a more defined career path, her income would likely grow. But it also has to recognize the significant uncertainty about both her plans and future recovery. Accepting the onus Ms. Ploskon-Ciesla had to prove her case, I would discount the maximum annual loss by 50%. To this, I would apply an additional 20% discount to reflect negative conventional contingencies such as the risks of future unemployment, illness and so on which typically require no formal proof. In my view, on this record these positive contingencies are not supportable on the evidence.
- [60] I have borne in mind that "[a]llowances must be made for the contingency that the assumptions upon which the award is based may prove to be wrong": *McColl v. Sullivan*, 2021 BCCA 181 at para. 58. Furthermore, I have taken into account the fact that, at the end of the analysis, the judge must consider the overall fairness and reasonableness of the award in light of all of the evidence.
- [61] The judge's award of \$255,000 reflected an annual loss of \$10,834 to age 65. In my view, and in rough terms, with the discounts I have applied, an award of \$75,000 is fair and reasonable in the circumstances.

Cost of Future Care

- [62] The judge awarded three years of physiotherapy, allocating one session per week at \$110.25 per session, for a total of \$17,199.
- [63] Ms. Brophy submits there was no evidentiary basis for this award. The only evidence supporting the duration for future care came from Dr. Helper, who recommended physiotherapy for one year. Moreover, the hourly rate the judge applied corresponded to massage therapy, not physiotherapy. Ms. Ploskon-Ciesla concedes the latter point and acknowledges the correct rate is \$79 per session.
- [64] While I accept Dr. Helper said he would defer to the physiotherapist about the frequency and duration of treatment, his recommendation was for one year. There was no evidence to support any longer. I would thus set aside the award of \$17,199 and substitute an award of one year of physiotherapy, allocating one session per week at \$79 per session, for a total of \$4,108.

Future Loss of Housekeeping Capacity

- [65] The judge made a global award of \$60,000 for past and future loss of housekeeping capacity. Of that, approximately \$42,200 represents future loss. Ms. Brophy abandoned her appeal of the award for past loss.
- [66] The judge considered the principles guiding an award for loss of housekeeping capacity set out in *Riley v. Ritsco*, 2018 BCCA 366. He concluded Ms. Ploskon-Ciesla's incapacity as a result of the accident hindered her ability to perform housekeeping tasks, resulting in actual expenditures. He found the incapacity was continuing and would continue. In making his award, he relied on the cost of pretrial housekeeping assistance, but recognized the expectation that she would recover to some degree, and the likelihood that her children would become of more assistance as they matured.
- [67] Ms. Brophy attacks the award on multiple fronts, suggesting there was no evidence to support the duration, frequency, intensity, cost, and type of the assistance she infers from the award. If one uses the cost and frequency of housekeeping services for which Ms. Ploskon-Ciesla received compensation following the accident--\$143.33 per week for 3.5 hours of housekeeping per week--the judge's award for the future constitutes an award for 5.67 years of housekeeping. She argues that both this award, and an hourly cost of \$40.95, are exorbitant. Relatedly, Ms. Brophy also submits the judge ignored Dr. Helper's evidence regarding Ms. Ploskon-Ciesla's likelihood of recovery.
- [68] Ms. Ploskon-Ciesla argues that the evidence, in particular the testimony of various parties and Dr. Helper's report, justifies the award. She also contends Ms. Brophy incorrectly assumes the judge based the future award on the same calculus as the past award, when he could have made a general assessment.

- [69] Although the judge canvassed the correct legal principles and appropriately granted a pecuniary award, he did not, however, ground the quantum of the award in the evidence. In doing so, the judge seemingly chose a number at random without providing any explanation, again leaving this Court to speculate on its basis. In particular, it is not clear whether he simply extrapolated from the evidence of past housekeeping aid, and projected those figures forward. If the judge did so, the nearly six years' worth of housekeeping is excessive.
- [70] In this way, the judge repeated the errors in his assessment of Ms. Ploskon-Ciesla's loss of future earning capacity. It cannot stand and, in my view, it is clearly inordinately high in any event.
- [71] One point of difference with the income capacity claim is that Ms. Ploskon-Ciesla was incurring housekeeping costs at the time of trial; she had a demonstrated loss at the time of trial. This fact gives a more secure basis for making an award in respect of future loss of housekeeping capacity using the historic costs. I do not think we should simply make a general assessment. Further, although Ms. Brophy now challenges the hourly cost of housekeeping the judge seemingly awarded, she abandoned her appeal of the past award, again strengthening the case for using these figures as a starting point.
- [72] At the same time, the evidence is thin, and courts are instructed to approach such awards cautiously. Although she demonstrated a need for housekeeping assistance following the accident, Ms. Ploskon-Ciesla did not testify as to how long or at what scale she might need these services going forward. Both the testimony of other parties and Dr. Helper's evidence similarly lacked detail in this regard. We do know Ms. Ploskon-Ciesla's condition is improving, and will likely continue to do so. Eventually, she should be capable of working 80% of a full-time job. She will have physiotherapy. Her husband can help around the house, and her children can contribute to housework as they mature. It is by no means clear that Ms. Ploskon-Ciesla's injuries will continue to restrict her capacity to do housekeeping for any extended time. The injuries that restrict her working full-time in a sedentary position do not obviously prevent her engaging in intermittent housekeeping activities. In light of Dr. Helper's views about the unpredictable way in which she might benefit from movement and changes of position, undertaking housekeeping could possibly be therapeutic.
- [73] Although the award cannot stand, I think we should substitute an award rather than return the matter to trial. The challenge again lies in the quantification.
- [74] Taking all of these factors into account, I would award Ms. Ploskon-Ciesla two years' worth of housekeeping costs. This makes some allowance for the possibility that her injuries will continue to restrict her capacity, even after the recommended one year for physiotherapy. Using the figures for past loss, this results in a future award of \$14,906.32, rounded to \$15,000.

Disposition

- [75] I would allow the appeal in respect of the awards for loss of future earning capacity, cost of future care, and future loss of housekeeping capacity.
- [76] I would set aside the award of \$255,000 and substitute an award of \$75,000 for loss of future earning capacity.
- [77] I would set aside the award of \$17,199 and substitute an award of \$4,108 for cost of future care.
- [78] I would set aside the award of approximately \$42,200 and substitute an award of \$15,000 for future loss of housekeeping capacity.

"The Honourable Mr. Justice Harris"

I agree:

"The Honourable Madam Justice Stromberg-Stein"

I agree:

"The Honourable Mr. Justice Voith"

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