
CANADA / JUDGMENT

Shapiro v. Dailey

2012 BCCA 128

COURT

British Columbia Court of Appeal

DECIDED

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2012 BCCA 128 Shapiro v. Dailey

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

Shapiro v. Dailey,

2012 BCCA 128

Date: 20120319

Docket: CA038247

Between:

Laura Rose Shapiro

Respondent

(Plaintiff)

And

Randy Wayne Dailey

Appellant

(Defendant)

And

J & S Dickson Enterprises Ltd.

(Defendant)

And

Insurance Corporation of British Columbia

Appellant

(Third Party)

Before:

The Honourable Madam Justice Ryan

The Honourable Mr. Justice Tysoe

The Honourable Madam Justice Neilson

On appeal from: Supreme Court of British Columbia, June 1, 2010

(Shapiro v. Dailey, 2010 BCSC 770, Vancouver Docket No. M070925)

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Place and Date of Hearing:

Vancouver, British Columbia

November 7, 2011

Place and Date of Judgment:

Vancouver, British Columbia

March 19, 2012

Written Reasons by:

The Honourable Madam Justice Neilson

Concurred in by:

The Honourable Madam Justice Ryan

The Honourable Mr. Justice Tysoe

Reasons for Judgment of the Honourable Madam Justice Neilson:

[1] On March 2, 2005 the respondent was injured when her vehicle was struck by a vehicle driven by the appellant Mr. Dailey and owned by J & S Dickson Enterprises Ltd. ("Dickson"). Ms. Shapiro brought an action in the Supreme Court to recover damages for her injuries. Mr. Dailey, who was impaired at the time of the accident, did not participate and Ms. Shapiro's claim was defended by Dickson and the appellant, the Insurance Corporation of British Columbia ("ICBC"). Ms. Shapiro ultimately withdrew her claim against Dickson. On June 1, 2010 the trial judge delivered reasons for judgment (2010 BCSC 770). He found Mr. Dailey wholly responsible for the accident and awarded Ms. Shapiro with the following damages:

Non-pecuniary damages

\$110,000.00

Past loss of income (gross)

\$128,764.78

Loss of future income earning capacity

\$900,000.00

Future care costs

\$286,846.00

Special damages

\$2,182.59

[2] On appeal, the appellants allege the trial judge erred in three respects:

- 1) in failing to find Ms. Shapiro was contributorily negligent for the accident;
- 2) in assessing Ms. Shapiro's claim for loss of future earning capacity; and
- 3) in assessing damages for the future cost of nanny services and homemaking.

1. Did the trial judge err in failing to find Ms. Shapiro contributorily negligent for the accident?

[3] The accident occurred at the intersection of Dundas and Nanaimo Streets. Ms. Shapiro was eastbound on Dundas in the southern-most of two left-turn lanes, preparing to turn left to go north on Nanaimo on the advance left-turn signal. The trial judge found that the signal was green when she entered the intersection to turn. Mr. Dailey was driving west on Dundas. The trial judge found he entered the intersection on a red light.

- [4] Ms. Shapiro testified that as she entered the intersection she saw the left-turn arrow flashing green and so carried on with her turn. She saw no oncoming traffic, nor did she see a car stopped in the turning lane to her left. She said the collision with Mr. Dailey occurred as she straightened her wheel out of the turn.
- [5] The driver of the car to Ms. Shapiro's left, Ms. Marlatt, could not recall the accident, but her evidence was entered as past recollection recorded in the form of a statement she prepared at the time. In her statement, she said the advance left-turn signal went off just as she reached the intersection and so she stopped. The main green signal was still on. She saw Mr. Dailey's silver vehicle driving fairly fast toward her on Dundas. Ms. Shapiro's car in the lane to her right continued to turn until it was struck by Mr. Dailey. Ms. Marlatt could not recall whether Ms. Shapiro's vehicle entered the intersection before or after she had stopped.
- [6] At trial it was not seriously disputed that Mr. Dailey was negligent. The appellants maintain that Ms. Shapiro should have been found contributorily negligent because she should have stopped before entering the intersection as Ms. Marlatt did, either because the left-turn signal had turned to amber, or because she should have seen Mr. Dailey's oncoming vehicle.
- [7] The trial judge rejected that argument. He found the appellants had not met the onus to prove contributory negligence because Ms. Marlatt's evidence was not clear enough to challenge Ms. Shapiro's testimony that the turn signal was green as she entered the intersection. As to Ms. Shapiro's failure to see Mr. Dailey's oncoming vehicle, the trial judge observed that an overhead photo of the intersection showed her perspective of oncoming vehicles was quite different from that of Ms. Marlatt because there was an island with a tree on it on the opposite side of the intersection that appeared to be in Ms. Shapiro's sightline. He found the evidence failed to establish whether Ms. Shapiro would or should have been able to see and react to Mr. Dailey's vehicle through the island and tree. He also found Ms. Marlatt stopped because the left-turn signal ended, not because she saw Mr. Dailey's vehicle.
- [8] The appellants say the trial judge's findings were based on speculation and there was no reliable evidence establishing the traffic island and tree obscured Ms. Shapiro's view. They complain the trial judge raised this as a possibility on his own initiative during submissions, and so they had no opportunity to lead evidence about it. His finding was based solely on an overhead photo that provided no details of the size of the tree or its potential to obscure oncoming traffic. The appellants maintain the trial judge found as a fact that Ms. Marlatt saw Mr. Dailey's vehicle and Ms. Shapiro did not, and say that finding establishes contributory negligence.
- [9] A finding of negligence is a question of mixed fact and law, which, in this case, is dependent on the trial judge's findings of fact. This Court must approach those findings with deference, absent palpable and overriding error: *Housen v. Nikolaisen*, 2002 SCC 33 at paras. 29-36, [2002] 2 S.C.R. 235.

[10] The trial judge correctly observed that the onus to prove contributory negligence rested on the appellants. Here, their argument is based solely on the thesis that because Ms. Marlatt stopped and saw Mr. Dailey's car approaching, Ms. Shapiro could and should have stopped in time to avoid the collision. This ignores several distinctions between the circumstances facing Ms. Shapiro and Ms. Marlatt. Significantly, Ms. Marlatt saw Mr. Dailey's vehicle only after she had stopped. She could not recall whether Ms. Shapiro's vehicle entered the intersection before or after this. Ms. Shapiro was the dominant driver with the right of way as she entered on the green left-turn signal. It was reasonable for her to assume a red light for westbound traffic, and focus on making her turn. While the details of the traffic island are unknown, the evidence did establish Ms. Shapiro's sightline differed from that of Ms. Marlatt. In my view, the trial judge could properly conclude there was insufficient evidence to support a finding that Ms. Shapiro could have reasonably become aware of Mr. Dailey, and had a sufficient opportunity to avoid the collision. Any doubt in that respect must be resolved against Mr. Dailey: *Walker v. Brownlee*, [1952] 2 D.L.R. 450 (S.C.C.) at 461.

[11] I would not accede to this ground of appeal.

2. Did the trial judge err in assessing damages?

[12] The trial judge found Ms. Shapiro to be a credible and reliable witness, and accepted the experts' evidence that her complaints of pain were legitimately experienced. He accepted that she suffered soft tissue injuries to her cervical, lumbar, and sacral spine in the accident, and that these had left her with a multitude of problems. He summarized her injuries and their impact at paras. 58 and 59 of his reasons:

On the whole of the evidence, I am satisfied that, as a result of the motor vehicle collision that is the subject of this action, Ms. Shapiro suffered soft tissue injuries to her cervical, lumbar and sacral spine that, through no fault of her own, have left her with:

- disabling cervicogenic headaches, and periodic headaches of a migraine nature;
- chronic pain disorder, manifesting itself as myofascial pain syndrome and post-traumatic fibromyalgia syndrome;
- depressive symptoms falling short of depressive disorder;
- mood disorder including resolving post-traumatic stress disorder, anxiety disorder and panic attacks;
- mild, but not insignificant, cognitive difficulties in concentration and memory.

Whether some of these diagnoses overlap in terms of their symptomatology matters not. What is clear is that Ms. Shapiro genuinely suffers from the symptoms, and that the whole is greater than the sum of its parts. This has wrought a profound change in every aspect of her life, from interpersonal relationships with her family, friends and partner to her ability to love, work, play, exercise, relax, sleep, and her ability to move forward with her life. I find that her prognosis is not hopeless, but is extremely guarded. Although Ms. Shapiro is the type of person who will work

hard to achieve as much improvement as is possible, I am satisfied that, on a balance of probabilities, nothing more than a modest improvement can reasonably be expected. Accordingly, at the age of 29, Ms. Shapiro faces a lifetime of struggling with pain and fatigue in everything she does.

[13] Those findings are not disputed on appeal. The only issues are whether the trial judge's award of \$900,000 for loss of future earning capacity was too high, and whether his award for future nanny services and homemaking was justified. These awards are rooted in the trial judge's findings of fact, and cannot be reversed unless he made a palpable and overriding error: *Housen* at para. 10.

A. The Appeal of the Award for Loss of Future Earning Capacity

i) Background and Findings of the Trial Judge

[14] Ms. Shapiro was 29 years old at trial. Prior to the accident, she was described as a happy, bright, and active young woman with a sunny, ambitious and outgoing personality. She had been active in swimming, dancing and gymnastics as both a participant and teacher. She was an average student at high school and graduated in 1999. Since 1997, she had worked at her father's law firm as a "girl Friday", and taken courses at Capilano College with variable results. Prior to the accident, she was considering a career in real estate, law, or business, but had not yet made any decisions about her future.

[15] The accident brought dramatic changes to all aspects of her life. She has become introverted, and her struggle to remain in the workforce comes at a cost of significantly reduced activities at home and recreationally.

[16] Following the accident, Ms. Shapiro continued to work for her father's firm as that employer was sympathetic and able to accommodate her injuries.

[17] In July 2006, with her father's urging, she obtained employment as a recruiter with The Personnel Department, a recruitment and placement business. Her base salary was \$35,000, supplemented by incentives based on exceeding a minimum performance budget. The evidence indicated hard-working employees could earn \$90,000 to \$120,000 by their second year.

[18] Ms. Shapiro did not reach that level. The job involved sitting at a computer for up to nine hours a day and making cold calls. She found it physically difficult and was unable to be sufficiently productive to earn any significant amount of commission.

[19] In 2008 Ms. Shapiro registered for a real estate course but did not attend it because she was admitted to a pain clinic. When she completed the clinic, she returned to The Personnel Department but reduced her work week to four days and moved to the position of account manager. Her base salary in that position was \$40,000, prorated for her reduced work week. Incentives typically produced income of up to \$100,000 in the second year of employment, and \$120,000 in the third year. Ms. Shapiro's situation, however, did not improve. The

physical demands of the job were similar to that of a recruiter and she found it hard to be productive. She could not work continuously due to pain, and had many absences.

- [20] In April 2009, Ms. Shapiro left The Personnel Department and began working in sales for the Yellow Pages Group at a base salary of \$22,000, supplemented by sales commissions that produced an annual income of \$86,000 if she met her target, and up to \$200,000 if she accomplished sales of 200% of her target. This position was better suited to her physical problems as she was able to work at home and control her own schedule. At trial, she said she had achieved 167% of her initial target, but because she had been employed in the position for only seven months, this produced income of \$86,000. Her pain still limited her performance, however, and she had to work long hours to meet her targets. As well, performing well at work took its toll on other aspects of her life.
- [21] Despite her difficulties, Ms. Shapiro received positive comments from her employers, and had a strong commitment to remain in the workforce.
- [22] The trial judge concluded there was no doubt Ms. Shapiro's ability to earn income had been limited by her injuries. He examined her earnings in the last three years to calculate her claim for past loss of income and made the following findings. In 2007 she earned \$6,200.48 from her father's law firm and \$43,238 from The Personnel Department and, but for the accident, would have earned \$70,000. In 2008 and the first three months of 2009 Ms. Shapiro earned \$64,197.70 with The Personnel Department and but for the accident, would have earned \$130,000 during that period. In the remaining months of 2009, Ms. Shapiro earned \$50,634.21 with the Yellow Pages Group and, but for the accident, would have earned a further \$30,000. Her total past loss of income for those three years was thus \$128,764.78.
- [23] As to future loss of earning capacity, the trial judge accepted the opinion of Dr. Hunt, an emergency physician with expertise in pain management, that Ms. Shapiro was disabled from performing full-time work and should be working part-time. It was Dr. Hunt's view that she remained in full-time employment only due to her own determination, and her persistence in full-time work would lead to deterioration in her condition over time. The judge also accepted the evidence of Mr. Trainor, an expert in vocational rehabilitation, that, because of her injuries, Ms. Shapiro was less competitively employable, had fewer employment opportunities open to her, and was a less attractive candidate for those opportunities that remained within her abilities. He concluded the accident left Ms. Shapiro with a number of chronic and disabling conditions and a prognosis limited to modest improvement at best.
- [24] After reviewing the applicable law, the trial judge found "no doubt" that Ms. Shapiro had established the probability of future income loss, and endorsed a capital asset approach in his assessment. He listed the factors he took into account in assessing her loss at para. 104 of his reasons:

In assessing Ms. Shapiro's loss of income earning capacity, I have taken into account the following factors which I find to have been established by the evidence:

- (a) Ms. Shapiro's capabilities and areas of employment interest are such that very little discount should be made for the difference in earning capacities of males and females, even taking into account the likelihood of having a child. Her attachment to the workforce has been proven to be very strong.
- (b) Ms. Shapiro is currently pushing herself to the limit, as noted by Dr. Hunt. She is unlikely to be able to keep that up, but even if she does, her ability to earn income is reduced.
- (c) I anticipate a modest improvement in Ms. Shapiro's condition which will ameliorate Dr. Hunt's concerns to at least some extent. In short, although I find that Ms. Shapiro is unlikely to be able to work at the full-time level of which she was formerly capable, I do not accept that working half-time is the best that the future holds.
- (d) A number of careers that would have been open to Ms. Shapiro offer potential earnings that would be significantly impacted by Ms. Shapiro's impairment and her inability to work full-time. I include among these the law, her father's profession, and real estate, which has provided her mother and stepfather with generous incomes.
- (e) The area of employment in which Ms. Shapiro has worked to date, sales (presently media sales), is one which is typically (again to quote Mr. Meingast) "highly incentivized". The greatest reward comes with the greatest effort. This limits Ms. Shapiro's income earning ability in this field because of the need for her to control her working environment at her schedule, and her inability to devote the number of hours necessary to maximize the available income.

[25] In response to the defendants' argument that the award should be low because Ms. Shapiro was able to work full-time and earn a good income, the trial judge found that, although she put in a full week, her productivity was equivalent to part-time work. He stated:

[109] Assessing Ms. Shapiro's loss of income earning capacity is not, of course, a matter of precedent. It is a matter of evidence. She remains capable of earning a good income, at least in her present job. Unimpaired, she would be doing better, and would have much greater security. As it is, she is at risk of finding herself unable to meet the employer's requirements, in which event she would be hard-pressed to replace even the lower level of income she had been capable of earning.

[26] For assistance in calculating the present value of the award, the trial judge turned to the multipliers provided by two actuarial experts. Mr. Carson, called by Ms. Shapiro, gave a multiplier of \$23,556 for each \$1,000 annual loss to age 65 and \$25,277 for each \$1,000 annual loss to age 70. Mr. Szekely, the defence expert, provided a multiplier of \$15,227 for each \$1,000 annual loss to age 70. The trial judge observed the difference in the multipliers arose primarily from their treatment of contingencies. Mr. Carson took into account only the mortality risk, and did not adjust his calculations for labour market contingencies or

positive contingencies. Mr. Szekely, on the other hand, applied a number of labour market contingencies in addition to mortality risk. As well, his calculations were based on statistics from similarly situated females only. The trial judge determined the proper multiplier would fall toward Mr. Carson's range, since Ms. Shapiro's attachment to the workforce indicated she would be more accurately compared to statistics for males of her education rather than those pertaining solely to females. He concluded:

- [114] More importantly, what these multipliers suggest to me is that Ms. Shapiro, given her pre-accident abilities and capabilities, had a lifetime earning capacity in the range of \$3 million-\$5 million on up. That capacity has been significantly impaired. Not only is she unable to devote the time required to maximize her earnings from her present employment in sales, but she is also unable to take advantage of other remunerative areas of potential employment, such as real estate. In addition, she is much more vulnerable to unemployment and under employment.
- [115] The exercise, however, is not purely mathematical. Balancing all of the factors as best I can, and bearing in mind the need to be reasonable to both sides, I assess her loss of income earning capacity at \$900,000.

ii) Analysis

- [27] The appellants argue the award of \$900,000 was excessive and say a proper award would fall between \$200,000 and \$300,000. They maintain the judge's assessment was based on a number of errors, and submit there is an overarching problem in determining their impact because his reasons are insufficient. They say he fails to reveal the basis for his award and, in the absence of a reasoned analysis, one can only speculate as to how the trial judge arrived at an assessment of \$900,000. Thus, there cannot be meaningful appellate review.
- [28] I find it useful to first consider the alleged errors put forward by the appellants. These can be usefully summarized as three points. First, the award rested on misapprehensions of evidence by the trial judge. Second, the trial judge ignored the evidence showing Ms. Shapiro is performing satisfactorily in full-time work. Third, the award is based on a mathematical calculation of her loss, instead of a proper assessment.
- [29] The appellants say there was no evidentiary basis for the trial judge's finding that Ms. Shapiro's injuries precluded her from becoming a lawyer or a real estate agent. With respect to the former, Mr. Trainor opined that Ms. Shapiro's pre-accident academic performance and aptitudes indicated law school or an MBA were unrealistic aspirations. As to the latter, the evidence did not support a finding she was foreclosed from pursuing a career in real estate. The appellants also submit there was no evidence to support the judge's finding that Ms. Shapiro's mother and stepfather earned "generous income" from real estate, let alone that she would have had "remunerative" employment in that field. They say these misapprehensions led the trial judge to wrongly conclude that Ms. Shapiro was destined for a lucrative career in law or real estate, and contributed to his erroneous view that she had pre-accident earning capacity of \$3,000,000 to \$5,000,000. This in turn led him to begin his

assessment of her lost future earning capacity from an unreasonably inflated starting point, and resulted in an award that was excessive, unrealistic, and unsupported by the evidence.

- [30] I agree with the appellants' assessment of this evidence. Mr. Trainor's testimony as to Ms. Shapiro's academic aptitudes was unchallenged. She did register for a real estate course but withdrew to attend a pain clinic. While her mother testified she believed Ms. Shapiro was not able to work as a realtor due to the long hours and lifting required for the job, Ms. Shapiro gave no evidence herself as to why she did not pursue this avenue. Nor did anything in Mr. Trainor's opinion indicate she was precluded from working in real estate. While the evidence indicated Ms. Shapiro's stepfather was a highly successful realtor, it provided no details as to his income or that of her mother. As to the judge's assessment of pre-accident earning capacity of \$3,000,000 to \$5,000,000, I accept the appellants' point that, using a multiplier of \$20,000, this assessment assumes Ms. Shapiro would earn annual income in the range of \$150,000 to \$250,000 for each year of her working life.
- [31] I am not persuaded, however, that these aspects of the judge's decision played a material role in his assessment of Ms. Shapiro's loss of future earning capacity, or produced an award that was not supportable on the evidence as a whole. The reference to careers in law and real estate at paras. 104(d) and 114 of the judge's reasons were only examples, although perhaps ill-chosen, of the broader and undisputed fact that her injuries foreclosed career paths that required strength and endurance beyond her capabilities. As to the judge's assessment of potential lifetime earnings in the range of \$3,000,000 to \$5,000,000, I do not agree this had no evidentiary basis. The evidence indicated that a motivated and energetic second-year employee at The Personnel Department could earn \$120,000 in a year, and it was viable for a similar employee to make up to \$200,000 annually with the Yellow Pages Group. The trial judge's choice of a multiplier at the upper end of the range is not challenged. Using a multiplier of \$22,000, those incomes produce a range of lifetime income of \$2.6 million to \$4.4 million.
- [32] The appellants' second argument is a reiteration of their submission at trial that, since 2007, Ms. Shapiro has been able to work full-time and earn income that matched or exceeded the average annual earnings of \$48,000 for people who, like her, are categorized as "non-technical sales representatives" in the National Occupation Code for Canada. They point out that in 2009 she achieved well over her target for sales with the Yellow Pages Group and, based on the trial judge's calculation of past loss of income for that year, earned almost \$70,000. The appellants maintain that Ms. Shapiro's high level of achievement demonstrates the trial judge erred by overestimating her level of disability and by limiting her productivity to part-time work.
- [33] Comparing Ms. Shapiro to others in similar positions in this manner is not helpful, and the trial judge cannot be faulted for rejecting this argument. The evidence was clear that, even with her injuries, Ms. Shapiro was capable of performing more successfully in her sales environment than her statistical cohorts. The objective of damages is to restore her to the position she would have been in but for the accident. The evidence of Ms. Shapiro's own

capabilities and potential has more relevance in that exercise than the average performance of others in similar jobs.

- [34] That evidence is apparent in the trial judge's award of past loss of income, which was not challenged. He found Ms. Shapiro's loss totalled \$128,764.78 in the three years before trial, or \$42,921.59 annually. In assessing the fairness and reasonableness of the trial judge's award for future loss, it is instructive to use that amount as an indicator of Ms. Shapiro's annual loss of future income. If one employs a multiplier of \$22,000, this produces a loss of approximately \$944,000 over the duration of Ms. Shapiro's working life.
- [35] The appellants' third complaint is that if the trial judge used the approach I have just set out to assess Ms. Shapiro's loss of income, he erred by relying too heavily on a strictly mathematical approach, and ignored other relevant factors, notably negative contingencies and the fairness of the award on all of the evidence. Referring to *Rosvold v. Dunlop*, 2001 BCCA 1 at para. 11, 84 B.C.L.R. (3d) 158, the appellants maintain that while a judge may use the present value of the difference between the plaintiff's pre-injury and post-injury future career paths as a starting point in his assessment, that cannot be the end of the matter. The court must go on to consider the overall fairness and reasonableness of the award, taking into account all of the evidence. The appellants say the trial judge erred by failing to discount the award for labour market contingencies and for the possibility that Ms. Shapiro will be capable of working full-time throughout her career.
- [36] It is correct that Mr. Carson did not deduct for labour market contingencies. I note, however, that he testified that successful employees generally earn more with increasing age and experience, and a young person with strong commitment to the workforce on average earns 60% to 65% more in their 50s than they did in their 30s. As well, the trial judge was entitled to accept Dr. Hunt's opinion that Ms. Shapiro's ability to work full-time will deteriorate and she may be consigned to part-time work for most of her career. Finally, while she plans to have children, it is her intent to leave the workforce only for maternity leaves of up to 12 months. In my view, it was open to the trial judge to find that positive and negative contingencies were balanced.
- [37] Finally, in assessing the adequacy of the reasons of the trial judge, an appellate court must proceed with deference and consider the reasons not by themselves but in their entire context, which will include the evidentiary record, the submissions of counsel and the issues at trial. The question is whether, viewed in that context, the reasons for judgment reveal that the trial judge understood the substance of the critical issues and provided a basis for the verdict: *R. v. R.E.M.*, 2008 SCC 51 at para. 55, [2008] 3 S.C.R. 3.
- [38] The Supreme Court reiterated these principles in the context of civil cases in *F.H. v. McDougall*, 2008 SCC 53 at para. 99, [2008] 3 S.C.R. 41:

... an appeal court cannot intervene merely because it believes the trial judge did a poor job of expressing herself. Nor is a failure to give adequate reasons a free standing basis for appeal. At para. 20 of Walker, Binnie J. states:

Equally, however, Sheppard holds that "[t]he appellate court is not given the power to intervene simply because it thinks the trial court did a poor job of expressing itself" (para. 26). Reasons are sufficient if they are responsive to the case's live issues and the parties' key arguments. Their sufficiency should be measured not in the abstract, but as they respond to the substance of what was in issue... . The duty to give reasons "should be given a functional and purposeful interpretation" and the failure to live up to the duty does not provide "a free-standing right of appeal" or "in itself confere[r] entitlement to appellate intervention" (para. 53).

[39] Applying those principles here, I am not persuaded the trial judge's reasons were inadequate, or precluded meaningful appellate review. The trial judge clearly appreciated the difficulties inherent in calculating future loss. His reasons reveal an understanding of the issues, a detailed review of the evidence, and clear findings of fact with respect to the extent of Ms. Shapiro's disability, its impact on her employment, her continuing commitment to the workforce, and her earning potential. He conducted a thorough assessment of the expert evidence with respect to Ms. Shapiro's future potential, and properly relied on guidance from the actuarial experts in assessing the award. In my preceding analysis, I have found the trial judge's reasons provided an adequate basis on which to review the appellants' grounds of appeal.

[40] The inherent difficulties of assessing awards for hypothetical future events are well-known. The exercise has been variously described as "gazing into a crystal ball" (*Andrews v. Grand & Toy Alberta Ltd.*, [1978] 2 S.C.R. 229, 83 D.L.R. (3d) 452 at 469) and "an estimate based on prophecies" (*Morris v. Rose Estate* (1996), 23 B.C.L.R. (3d) 256 at 263). In *Morris*, as Mr. Justice Donald observed at 264:

... The defendant's arguments unduly focus on the mechanics of the judge's calculation and they fail to recognize that in the end it is the judge's sense of what is fair compensation that matters. There is much more art than science in the process. Accordingly, on appeal any missteps that may have occurred in arriving at an award are unimportant if the figure falls within the range of reasonable compensation.

[41] I appreciate the trial judge did not enunciate the express basis on which he reached his assessment of \$900,000, and I agree that award falls at the high end of the spectrum. I am nevertheless satisfied that there is an evidentiary basis to support the award and, to apply the time-honoured standard from *Nance v. B.C. Electric Railway*, [1951] A.C. 601 (J.C.P.C.), it is not so inordinately high that it represents a wholly erroneous estimate of Ms. Shapiro's loss of future earning capacity.

[42] I would therefore dismiss the appeal of the award for loss of future earning capacity.

B. Did the trial judge err in calculating the award for future nanny services and homemaking?

[43] The appellants challenge two items awarded by the trial judge for future care: the costs of a nanny, and homemaking assistance. They say these represent a windfall to Ms. Shapiro as the trial judge accepted that she planned to be a working mother and she would therefore have required these services in any event.

i) Background

[44] At the time of the accident, Ms. Shapiro was living with her boyfriend, Mr. Fox. They shared household duties equally and planned a life together. Ms. Shapiro testified they wanted to have two children, three to four years apart. She said she never planned to be a full-time mother, and intended to employ a nanny and return to work after 6 to 12 months' maternity leave with each child.

[45] Following the accident, Ms. Shapiro and Mr. Fox became engaged and purchased a home in Langley. Initially, Mr. Fox assumed over 90% of the household duties due to Ms. Shapiro's injuries. By the trial date, Ms. Shapiro had been able to resume some of the household duties but was precluded from performing those requiring heavier work. They still wished to have children, but worried whether Ms. Shapiro would be able to manage the physical demands of raising them.

[46] Ms. Barry, an occupational therapist, provided expert evidence about what she perceived to be Ms. Shapiro's multiple future care needs. These were assessed at a present value of \$536,292, using figures provided by Mr. Carson.

[47] As to nanny services, Ms. Barry recommended full-time assistance in the form of a live-in nanny for four to seven years until Ms. Shapiro's younger child was four years old, due primarily to the physical demands of lifting and carrying children. She estimated the annual cost of this to be \$14,724.

[48] As to homemaking services, Ms. Barry recommended six hours a week to age 80 to assist with heavier tasks that Ms. Shapiro was unable to perform, at an estimated annual cost of \$11,856, except for the four to seven years during which Ms. Shapiro would have a nanny who would undertake the homemaking tasks.

[49] Mr. Carson's calculation of future care costs placed the present value of the homemaking services at \$275,344. He acknowledged the overlap between those services and a nanny by deducting the annual cost of homemaking, \$11,856, from the annual cost of the nanny, \$14,724, for the six years that he estimated a nanny would be in the home. This produced what he labelled an "incremental annual cost" of \$2,868 for the nanny, and a present value for that cost over six years of \$13,506.

[50] The trial judge acknowledged the defendants' challenge to most of Ms. Barry's recommendations, and reduced the award significantly, to \$286,846. As to homemaking, the trial judge acknowledged that if Ms. Shapiro had not been injured, her commitment to full-time employment would have necessitated some housekeeping expense in any event. He therefore reduced Ms. Barry's recommendation from six to four hours a week to age 70, and

calculated the present value of this at \$180,359. He awarded \$32,115 for nanny services, referring to this as the "higher incremental cost" without an explanation of that term.

ii) Analysis

- [51] Assessing damages for costs of future care, like other hypothetical future events, has an element of prediction and prophecy. The award should reflect reasonable expectations of what the injured person will require with the aim of placing her in the position she would normally have occupied, but for the accident. The assessment is objective, based on the evidence, and must result in an award that is fair to both parties: *Krangle (Guardian ad litem of) v. Brisco*, 2002 SCC 9 at paras. 21-22, [2002] 1 S.C.R. 205.
- [52] At the hearing of this appeal Ms. Shapiro's counsel provided calculations that demonstrated the manner in which the judge assessed the award for homemaking services, and the resulting adjustment required to the nanny cost due to his reduction from six to four hours for homemaking assistance. Counsel agreed this was a strict mathematical calculation downward that accurately reflected his adjustments to both heads of damage.
- [53] I am satisfied the trial judge made no error in assessing damages for homemaking assistance at \$180,359. He was entitled to find that Ms. Shapiro's career plans would have required her to retain some homemaking services in any event, but her injuries increased the amount of time she would require these. In my view, this award is reasonable and fair to both parties, and I discern no basis on which this Court could interfere with it.
- [54] As to the award of \$32,115 for nanny costs, the respondent's calculations demonstrate that, using Mr. Carson's figures, the effect of reducing homemaking hours requires a commensurate increase in the incremental annual cost for a nanny from \$2,868 to \$6,820 each year. That adjustment produces a revised cost of \$32,115 for a nanny for six years. I am satisfied that properly calculates the set-off envisioned by Mr. Carson and accepted by the trial judge. The only remaining issue is whether any award for a nanny was justified, given the clear evidence of Ms. Shapiro's commitment to the workforce and her pre-accident plans to be a working mother and have a nanny in place for child care.
- [55] I agree with the appellants that the award for nanny services was not justified. The trial judge made a deduction from the award for housekeeping on the basis that Ms. Shapiro would have required these services anyway due to her career. He erred in failing to apply the same approach to the claim for a nanny. Further, since that would be a full-time position, there is no basis for reducing it proportionately as was done with the homemaking services.
- [56] I have considered whether it would be appropriate to award a smaller amount for nanny services, representing the fact that Ms. Shapiro's disability will require her to have a nanny even while she is on maternity leave, something that might not have been necessary absent her injuries. I have concluded, however, that, the many contingencies and uncertainties surrounding the terms and timing of a nanny's retainer make such an award too speculative.

[57] I would allow the appeal with respect to damages to the extent of reducing the award for future care by \$32,115.

Conclusion

[58] In the result I would not accede to the ground of appeal that the trial judge erred in the award he made with respect to loss of future earning capacity. Nor would I accede to the ground of appeal that the learned trial judge erred in calculating the award for future homemaking services. I would, however, accede to the ground of appeal challenging the amount of the award for future nanny services. Consequently, I would allow the appeal to the extent of reducing the award for future care by \$32,115.

"The Honourable Madam Justice Neilson"

I AGREE:

"The Honourable Madam Justice Ryan"

I AGREE:

"The Honourable Mr. Justice Tysoe"

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