COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Lewis v. Gibeau,*
2025 BCCA 127

Date: 20250417
Docket: CA49121

Between:

Catherine Dianne Lewis

Appellant
(Plaintiff)

And

Tania Nina Gibeau, George Bridges, and Dianne Bridges

Respondents
(Defendants)

Before: The Honourable Madam Justice Fisher
The Honourable Justice Winteringham
The Honourable Justice Riley

On appeal from: An order of the Supreme Court of British Columbia, dated May 10, 2023 (*Lewis v. Gibeau*, 2023 BCSC 784, Victoria Docket S185128).

Counsel for the Appellant: D.D. McKnight
G.B. Armbrust, Articled Student

Counsel for the Respondents: J.A. Hemmerling
M. Prah

Place and Date of Hearing: Vancouver, British Columbia
January 28, 2025

Place and Date of Judgment: Vancouver, British Columbia
April 17, 2025

Written Reasons by:
The Honourable Justice Riley

Concurred in by:
The Honourable Madam Justice Fisher
The Honourable Justice Winteringham

Summary:

The appellant, Ms. Lewis, appeals from a damages award to her for personal injuries in connection with a motor vehicle accident. Ms. Lewis argues that the trial judge's "global" award of $89,641.02 for loss of past and future earning capacity was the product of multiple errors, and that the trial judge also erred in rejecting her claim of $162,000 for future cost of housekeeping services. HELD: appeal allowed in part. The trial judge erred in (1) using the capital asset approach for valuing the loss of earning capacity, in circumstances where the appellant had an established career with a proven earnings history, (2) lumping together the claims for loss of past and future earning capacity, and (3) failing to properly analyze negative contingencies. The trial judge's "global" award is set aside and replaced with awards of (i) $25,995 (minus required reductions) for past loss of earning capacity, and (ii) $206,583.56 for loss of future earning capacity. The trial judge did not err in dismissing the appellant's claim for future cost of housekeeping services.

Reasons for Judgment of the Honourable Justice Riley:

Overview

[1] This is an appeal from a trial judge's award of damages for personal injuries in connection with a motor vehicle accident. The defendants admitted liability, and the only issues at trial were causation and the appropriate quantum of damages to compensate the appellant, Ms. Lewis, for her loss. The trial judge awarded $220,000 in non-pecuniary damages, $89,641.02 for loss of past and future earning capacity, $6,397 in special damages, and costs of future care fixed at $5,200 plus additional amounts for specified categories of future costs, to be agreed upon by the parties or determined by way of a registrar's reference. The trial judge's reasons are indexed as 2023 BCSC 784. On appeal, Ms. Lewis takes issue with the award for loss of past and future earning capacity, and the rejection of her claim for future costs of housekeeping services.

[2] I would allow the appeal in part. For the reasons given below, I find that the trial judge erred in her analysis of Ms. Lewis's claims for loss of past and future earning capacity, but committed no error in rejecting her claim for future cost of housekeeping services. I would set aside the judge's global loss of earning capacity award, and substitute awards of: (i) $25,995, less deduction for taxes as required

under ss. 95 and 98 of the *Insurance (Vehicle) Act*, R.S.B.C. 1996, c. 231 for past loss of earning capacity, and (ii) $206,583.56 for loss of future earning capacity.

Factual Background

Ms. Lewis's Personal Circumstances and Pre-Collision Lifestyle

[3] Prior to the collision, Ms. Lewis was in good health and led an active life. She was a fitness enthusiast and, with her husband, an avid boater. At home, Ms. Lewis did all of the cooking, more or less all of the housework, and many of the outside chores. She had been working as a hairstylist for almost 40 years. She enjoyed her job and had developed a sizeable client base. She worked full-time, from Tuesday to Friday, 8 to 10 hours each day.

[4] Ms. Lewis's work as a hairstylist had two major physical components. The first related to hairstyling itself, which placed physical demands on her arms, shoulders, back, and neck. Ms. Lewis would frequently work with two clients at a time, which involved multitasking that required mental acuity and considerable upper body movement. The other physical aspect of Ms. Lewis's job had to do with upkeep of the salon, including stocking products and sweeping.

Ms. Lewis's Injuries

[5] The trial judge accepted that the collision caused Ms. Lewis to suffer a mild traumatic brain injury. In the immediate aftermath, Ms. Lewis experienced pain in her neck, back, and shoulders. She also had occasional bouts of dizziness and mild forgetfulness, but these issues resolved over time.

[6] Ms. Lewis's collision-related injuries and their resulting impacts can be grouped into four categories.

[7] First, the mild traumatic brain injury caused Ms. Lewis to suffer from post-traumatic brain injury syndrome, manifesting itself in headaches, dizziness, memory issues, sleeplessness, diminished concentration and attention span, and diminished self-confidence. The trial judge found that, "while some of these symptoms linger,

they largely resolved by the spring of 2018", some 15 to 18 months after the collision.

[8] Second, Ms. Lewis's neck, back, and shoulder injuries led to ongoing neck pain, left-side pain, and headaches. On the advice of her treatment providers, Ms. Lewis has been managing these symptoms with medial branch nerve block injections every six months or so. These injections reduce Ms. Lewis's pain and headaches by as much as 60 to 70%, although the benefits inevitably wear off over time. On the basis of all the evidence, the trial judge concluded that these conditions were permanent.

[9] Third, Ms. Lewis developed frozen shoulder syndrome, secondary to her collision-related shoulder injuries. Although the frozen shoulder condition did not materialize until some three years after the fact, the trial judge was satisfied on all the evidence that it was caused by the collision. The judge also accepted the expert opinion of an orthopaedic specialist that 85% of patients with frozen shoulder syndrome see their symptoms resolve without surgical intervention within 12 to 24 months. Where this is not the case, the condition can often be successfully treated with surgery. The trial judge found that surgery "could be a viable treatment option" for Ms. Lewis, whose symptoms continued for more than two years after their initial onset.

[10] Fourth, as a result of her physical injuries and associated pain and headaches, Ms. Lewis suffered from continuing anxiety and depression. Although the extent of these conditions diminished over time, the trial judge found that Ms. Lewis's "anxiety and low mood symptoms persist and are likely permanent".

Ms. Lewis's Post-Collision Circumstances and Work Status

[11] Ms. Lewis returned to her shared hair salon ten days after the collision but found the work difficult and much less enjoyable due to her ongoing pain and associated physical limitations.

[12] Ms. Lewis gave testimony at trial that she reduced her hours and earned less after the collision. However, at some point she decided to compress her work week, from four days per week into three. This gave her a longer weekend but meant that she worked more hours on each of her working days.

[13] The trial judge observed that Ms. Lewis's income actually increased in the two to three years after the collision, up until work disruptions occasioned by the COVID-19 pandemic in 2020. Although the judge had no concerns about Ms. Lewis's credibility, she did not find her testimony about reduced hours of work and associated post-collision loss in income to be reliable and therefore did not accept it.

[14] In any event, Ms. Lewis eventually found the pain and physical limitations from her collision-related injuries to be too much and stopped working entirely in January 2022. She was 58 years old at the time. Prior to the collision, she enjoyed her work and had no plans to retire. She had a large roster of clients with whom she had close relationships. She testified that leaving her work was like breaking up with 200 people all at once, but she felt that she simply could not continue. She also testified that, were it not for her collision-related injuries, she would likely have continued to work into her mid-to-late sixties.

[15] The trial judge accepted that Ms. Lewis's decision to stop working in January 2022 was a reasonable one and found it likely that, had the collision never occurred, Ms. Lewis would have continued to work until the age of 65.

Trial Judge's Reasons

[16] What follows is a summary of the trial judge's reasons in relation to the two heads of damage under appeal, namely: (i) loss of earning capacity, and (ii) future costs of housekeeping services.

Loss of Earning Capacity

[17] The trial judge first reviewed the applicable legal principles, noting that claims for both past loss of earnings (up to the date of trial) and future loss of earnings (from the date of trial forward) focus on loss of capacity, and require a consideration

of hypothetical events and positive and negative contingencies. With regard to past loss, the court is to consider the plaintiff's actual post-accident working life and compare it to the working life the plaintiff would hypothetically have had if the accident had never occurred. With regard to future loss, the court is to consider the plaintiff's future earning trajectory, without and with the accident. In either situation, relevant hypothetical events are to be considered on the basis of "real and substantial possibility", not mere speculation: reasons at para. 34, citing *Athey v. Leonati*, [1996] 3 S.C.R. 458 at para. 27; *Grewal v. Naumann*, 2017 BCCA 158 at para. 48; *Kim v. Morier*, 2014 BCCA 63 at para. 8.

[18] The trial judge cited *Rosvold v. Dunlop*, 2001 BCCA 1 at para. 10 for its discussion of what she referred to as "factors relevant to assessing the erosion of a plaintiff's capital asset representing their ability to earn income in the future": reasons at para. 45.

[19] The trial judge also referred to *Kinakin v. Nguyen*, 2023 BCSC 94 at paras. 117–119, summarizing a "trio of 2021 decisions" from this Court, namely *Dornan v. Silva*, 2021 BCCA 228 at paras. 160–161, *Rab v. Prescott*, 2021 BCCA 345 at para. 47, and *Lo v. Vos*, 2021 BCCA 421 at paras. 71–74: reasons at para. 35.

[20] In *Rab*, this Court described a three-step process for assessing future loss of earning capacity claims, asking: (i) whether the evidence discloses a future possible event that could lead to a loss of earning capacity, (ii) whether the evidence discloses a real and substantial possibility that the future event will cause a financial loss to the plaintiff, and (iii) given the relative likelihood of the future loss occurring, what is its value. Once this analysis is complete, the court "must consider the overall fairness and reasonableness of the award in light of all of the evidence": *Ploskon-Ciesla v. Brophy*, 2022 BCCA 217 at para. 60; *Lo* at para. 117.

[21] The trial judge went on to consider the claims for past loss of earning capacity and future loss of earning capacity together in a single analysis, finding that on a

consideration of "the factors set out in *Rosvold*", Ms. Lewis's "income-earning capacity, past and future, has been eroded": reasons at paras. 37–46.

[22] The judge accepted that Ms. Lewis's decision to retire at the age of 58 was made as a result of her collision-related injuries, citing *Morlan v. Barrett*, 2012 BCCA 66 at para. 41, for the logical proposition that "persistent and enduring pain can have an adverse impact on a person's ability to persevere in their efforts to earn income". The judge also cited *Austin v. Reardon*, 2014 BCSC 37 at para. 72 in support of the assertion that "when a plaintiff concludes that the pain associated with the physical demands of their work is going to continue unabated and indefinitely, it may be considered reasonable for them to decide that the satisfaction and financial benefit arising from their work 'is simply not worth the price' in terms of physical discomfort and fatigue": reasons at para. 53.

[23] The trial judge accepted that, if the collision had never occurred, Ms. Lewis would not have retired until the age of 65. She did not accept the position of plaintiff's counsel that Ms. Lewis would have continued working full-time until the age of 70, a conclusion that is not challenged on appeal.

[24] The trial judge also expressly undertook the three-step analysis described in *Rab*, finding that the first two steps were easily satisfied: reasons at paras. 41–42.

[25] The judge considered the third step of the *Rab* analysis — valuation of the loss — to be the most challenging aspect of the plaintiff's claim for loss of earning capacity. As the trial judge put it, "[t]he challenge with respect to the plaintiff's loss of earning capacity claim is the valuation of that loss, both past and future": reasons at para. 47.

[26] The trial judge noted the position of plaintiff's counsel that the loss should be valued at $529,830, using the earnings approach: reasons at para. 43.[1] As I read the

[1] In fact, in closing submissions, counsel for Ms. Lewis argued for a past loss of earning capacity award of $54,437, less applicable deductions (Ts. p. 441), plus a future loss of earning capacity award of $529,830, adjusted by the relevant discount factor (Ts. p. 455).

decision, the trial judge gave five reasons for not accepting this position, although she did not expressly enumerate them as I will do below for clarity.

[27] The first reason was the trial judge's difficulty ascertaining the effects of the collision on Ms. Lewis's actual post-event income, which in fact increased in the two to three years following the collision, up until the COVID-19 pandemic. The trial judge found that Ms. Lewis's "ability to recall and convey" her hours of work following the collision was not reliable and there was "no other evidence led to fill the void": reasons at para. 48.

[28] Second, as already described above, the trial judge rejected Ms. Lewis's position that if the collision had not occurred, she would have worked until the age of 70, finding it more likely that she would have retired at 65: reasons at paras. 49–52.

[29] Third, in the judge's view, Ms. Lewis's claim failed to account for two negative contingencies that had to be considered in assessing the value of her loss. One of these was the "real and substantial possibility" that Ms. Lewis might have been able to continue in her job if she worked fewer hours per day, by stretching her work hours out over four days, rather than compressing them to three days of work per week: reasons at para. 53. The other negative contingency was "the real and substantial possibility" that Ms. Lewis's frozen shoulder condition would improve: reasons at para. 54.

[30] Fourth, the trial judge found it difficult to ascertain the appropriate annual income figure for the purposes of an earnings analysis. The trial judge had evidence before her of Ms. Lewis's gross and net (of expenses) income figures for each year from 2014 through to 2021. However, the judge concluded that Ms. Lewis's earnings history was "simply inconsistent with her working, or earning, significantly less following the accident": reasons at paras. 55–57.

[31] Fifth and finally, the trial judge did not consider "the methodology employed by the plaintiff" to be reliable. In particular, the trial judge was not inclined to accept: (i) the selection of the year before the collision — 2015, which happened to be

Ms. Lewis's highest earning year prior to the collision — as the baseline for determining future loss, and (ii) the plaintiff's method of accounting for her asserted drop in income during the COVID-19 lockdown period: reasons at paras. 58–59.

[32] In light of these difficulties, the trial judge declined to use the earnings approach as a basis for assessing Ms. Lewis's loss of earning capacity. The trial judge reasoned that "[t]he typical means of approaching a loss of earning capacity when there is no identifiable loss of income, as is the situation in this case, is the capital asset approach, where the Court makes an award for the plaintiff's loss of opportunity": reasons at para. 60, citing *McKee v. Hicks*, 2023 BCCA 109 at para. 77 and *Ploskon-Ciesla* at para. 17.

[33] The judge repeated her earlier findings that Ms. Lewis had clearly lost some capacity, and found Ms. Lewis's position — that, if the collision had never occurred, she would not have retired until later — to be "logical". The judge also referred to the evidence that Ms. Lewis "had been working as a hairstylist for almost 40 years and had a reliable client base": reasons at paras. 61–62.

[34] The trial judge concluded that "[f]or all these reasons", this was "one of those circumstances where it is appropriate to use the capital asset approach to assess the plaintiff's loss of earning capacity", recognizing that it cannot be used as a "panacea" for situations where the plaintiff's claim has not been proven or is lacking in evidence: reasons at para. 62.

[35] On what she described as a "rough and ready" capital asset approach, the trial judge assessed Ms. Lewis's "past net loss of earning capacity and future earning capacity globally" at $89,641.02: reasons at para. 63.

Cost of Future Housekeeping Services

[36] The only feature of the cost of future care determination at issue is the judge's refusal to make any award for the future cost of housekeeping services. In her initial reasons, the trial judge overlooked this aspect of Ms. Lewis's claim.

[37] To explain, counsel for Ms. Lewis fairly conceded at trial that the impact of Ms. Lewis's injuries on her housekeeping duties was properly considered as an aspect of the non-pecuniary award, and this was not an appropriate case for a pecuniary award based on loss of housekeeping capacity: reasons at para. 30. However, the trial judge did not appreciate that, despite this concession, Ms. Lewis was still advancing a discrete claim for costs of future care relating to housekeeping.

[38] Upon realizing that the trial judge had overlooked this claim, Ms. Lewis applied to re-open, prior to the entry of the order. After a further hearing, the trial judge gave amended reasons, addressing and dismissing this aspect of the claim.

[39] In the amended reasons, the trial judge cited her previous finding that the impact of Ms. Lewis's injuries was more in the nature of a loss of amenities or increased pain and suffering than a true loss of housekeeping capacity: reasons at paras. 30, 67. Further, in the judge's view, the division of labour between Ms. Lewis and her husband following the collision reflected the "normal give and take" of family life, making an award for future housekeeping costs "unreasonable" in the circumstances of this case: reasons at para. 67.

Issues on Appeal

[40] Ms. Lewis argues that the trial judge erred in: (1) using the capital asset approach to value her loss of earning capacity, (2) lumping together the analysis of past loss of earning capacity and future loss of earning capacity, (3) improperly applying certain contingencies to discount the loss of earning capacity award, and (4) rejecting her claim for future costs of housekeeping services.

Analysis

Standard of Review

[41] The appeal court cannot intervene simply because it would have made a damages award different from the one made by the trial judge. An award of damages can be revisited on appeal only where: (i) there is no evidence to support the trial judge's conclusion, (ii) the trial judge erred in law or proceeded on a

mistaken or wrong principle, or (iii) the award is "wholly erroneous", or so "inordinately" low or high that it must be "a wholly erroneous estimate of the damage": *Valley Traffic Systems Inc. v. Malak*, 2024 BCCA 370 at para. 48; *Reilly v. Lynn*, 2003 BCCA 49 at para. 99; *Woelk v. Halvorson*, [1980] 2 S.C.R. 430 at 435.

[42] With regard to a trial judge's underlying findings of fact, inferences drawn from those findings, and findings of mixed fact and law, the standard of review is palpable and overriding error: *Housen v. Nikolaisen*, 2002 SCC 33 at paras. 19–23. On questions of law, including errors in principle or overall approach relating to assessment of damages, the standard of review is correctness: *Lo* at paras. 45–46.

Issue (1): Trial Judge's Use of the Capital Asset Approach to Value the Appellant's Loss of Earning Capacity

Appellant's Position

[43] Ms. Lewis takes issue with the trial judge's use of the capital asset approach to award her the equivalent of two years income for both her past and future loss of earning capacity. The award of $89,641.02 — which works out to seven months income for her past loss of earning capacity, and 17 months of income for her loss of future earning capacity — is, in Ms. Lewis's submission, "inexplicable". Ms. Lewis says the trial judge erred by valuing her loss of earning capacity via the capital asset approach, which is "better suited to cases in which the loss is not easily measurable". Ms. Lewis says that given the uncontroverted evidence that she worked in a single occupation for some 40 years, had an established earnings history, and had no intention of changing occupations before reaching retirement, the trial judge ought to have used the earnings approach to value her loss of earning capacity.

Respondents' Position

[44] The respondents stress that the trial judge expressly rejected Ms. Lewis's methodology for assessing her loss of earning capacity. They say Ms. Lewis was "unable to provide sufficiently detailed reliable evidence about her reduced hours of work after the accident", which undermined her past loss of earning capacity claim,

and precluded any reliable forecasting with respect to her future loss of capacity. Accordingly, the respondents submit that the trial judge did not err in using a capital asset approach to value the loss of earning capacity. They rely on *McKee* at para. 77 and *Ploskon-Ciesla* at para. 17 to say that the earnings approach is typically relied upon where there is an "identifiable loss of income", contrasted with situations where there is no identifiable loss at the time of trial, such that the loss must be valued based on an assessment of the loss of work capacity as a capital asset.

Analysis

[45] The trial judge considered the three-step analysis advocated in *Rab*, concluding that the first two steps of the analysis were easily satisfied. This is not surprising. As Justice Grauer explained in *Rab* at para. 29:

> … In cases where, for instance, the evidence establishes that the accident caused significant and lasting injury that left the plaintiff unable to work at the time of the trial and for the foreseeable future, the existence of a real and substantial possibility of an event giving rise to future loss may be obvious and the assessment of its relative likelihood superfluous.

[46] This was one of those cases. The trial judge found that in January 2022, at the age of 58, Ms. Lewis stopped working because her perseverance had been worn down by continuing pain, headaches, and physical limitations arising from her collision-related injuries. The trial judge also found that, if the collision had never happened, Ms. Lewis would likely have kept working until she was 65. Neither party takes issue with those findings on appeal.

[47] Later in the reasons, the judge acknowledged that the real challenge in this case was not in determining whether Ms. Lewis had suffered a loss in capacity, but in valuing the loss: reasons at para. 47. The trial judge had earlier cited *Perren v. Lalari*, 2010 BCCA 140 at para. 32 for its discussion of the earnings approach and the capital asset approach as two different means of valuing loss of earning capacity: reasons at para. 36.

[48] In deciding between the two approaches, courts have taken guidance from two propositions frequently stated in tandem. On the one hand, the earnings approach is often most appropriate where there is an "identifiable loss of income at the time of trial", or "a demonstrated work history with a clear trajectory". On the other hand, the capital asset approach is "particularly helpful" where the plaintiff has "yet to establish a settled career path", or where there is no clearly identifiable earnings history to be used as a yardstick for future earning capacity: *Ploskon-Ciesla* at paras. 16–17; see also *Perren* at paras. 12, 32; *McKee* at para. 77. These propositions are intended to provide guidance, not to dictate a particular result. The overarching concern is that the manner in which the loss is valued must be "grounded in the evidence": *Deegan v. L'Heureux*, 2023 BCCA 159 at para. 71; *Rosvold* at para. 11; *Morlan* at paras. 59, 61.

[49] In my respectful view, the trial judge erred in principle by valuing the loss using the capital asset approach. Her reasons for doing so do not stand up to scrutiny.

[50] The trial judge reasoned that "[t]he typical means of approaching a loss of earning capacity when there is no identifiable loss of income, as is the situation in this case, is the capital asset approach, where the Court makes an award for the plaintiff's loss of opportunity" [emphasis added]. With respect, this reasoning is not grounded in the evidence and does not fit with the trial judge's own finding that, in January 2022, Ms. Lewis stopped working due to an inability to cope with her collision-related injuries. From January 2022 onward, her income was zero. It therefore cannot be said that Ms. Lewis had "no identifiable loss of income".

[51] Further, Ms. Lewis had a demonstrated work history as a hair stylist working full-time for some 40 years. The uncontroverted evidence is that in the eight years immediately preceding her retirement, Ms. Lewis had an average net income of $44,451 per year. I conclude that the trial judge erred in principle in resorting to the capital approach as a "rough and ready" basis for quantifying Ms. Lewis's loss of both past and future earning capacity.

Issue (2): Trial Judge's "Lumping Together" of Past and Future Loss of Earning Capacity in a Single Analysis

Appellant's Position

[52] Ms. Lewis argues that the trial judge erred by using net (after tax) calculations in assessing both past loss of earning capacity and future loss of earning capacity. Ms. Lewis submits that future loss of earning capacity is awarded on the basis of gross, pre-tax earnings. This can be distinguished from past loss of earning capacity, which is awarded net of taxes. Ms. Lewis says this error arises from the trial judge's erroneous approach of "lumping together" past loss of earning capacity and future loss of earning capacity.

Respondents' Position

[53] The respondents' factum does not respond directly to the assertion that the trial judge erred by using net (after tax) calculations to value both Ms. Lewis's past and future loss of earning capacity. However, at a higher level, the respondents take issue with Ms. Lewis's submission that the trial judge's award of $89,641.02 for loss of past and future earning capacity together works out to seven months income for her past loss of earning capacity, and 17 months of income for her loss of future earning capacity. The respondents say there is nothing in the judge's reasons to suggest that she assessed the value of Ms. Lewis's loss of earning capacity in this way. The respondents appear to take the position that the trial judge made a global award for both past and future loss of earning capacity, using the capital asset approach, and basing the award on two years of Ms. Lewis's income.

Analysis

[54] In addressing the appellant's contention that the trial judge erred by lumping together the claims for past and future loss of earning capacity, it is helpful to first define the terms. A claim for past loss of earning capacity relates to loss of income from the date of the tortious event to the date of trial. A claim for future loss of earning capacity relates to loss of earnings from the date of the trial forward.

[55] The overarching purposes of damages awards for loss of past and future earning capacity are the same. As Justice Horsman explained in *Charters v. Jordan*, 2024 BCCA 351 at para. 121, "[t]he restorative purpose of tort damages requires that a plaintiff be compensated for pecuniary loss arising from the impairment of earning capacity, whether the loss occurs before or after trial".

[56] The trial judge correctly observed that both past and future loss of earning capacity are based on a plaintiff's loss of capacity to earn income, that is, loss of an asset: *Ibbitson v. Cooper*, 2012 BCCA 249 at para. 19; *Lamarque v. Rouse*, 2023 BCCA 392 at para. 30.

[57] Both kinds of loss also involve a consideration of hypothetical events that must be established on the basis of real and substantial possibilities, with damages determined by assessing the likelihood of the event: *Grewal* at paras. 48–49 (Goepel J.A. in dissent), para. 66 (D. Smith J.A. agreeing on this point). Determining damages for both also requires consideration of positive and negative contingencies: *Dornan* at paras. 83, 85. Thus, "the same principles apply to the assessment of past and future hypothetical events" when considering claims for past loss or future loss of earning capacity: *Charters* at para. 121, citing *Tigas v. Close*, 2024 BCCA 223 at para. 22.

[58] However, despite the similarities, there are also differences between claims for past and future loss of earning capacity. I can conceive of at least three differences, although there may be others.

[59] First, the lens is somewhat different. With regard to past loss, the court must look backward from the date of the trial to the date of the collision, comparing the plaintiff's actual post-collision working life to the working life the plaintiff would hypothetically have had if the collision had never occurred. With regard to future loss, the court must consider the plaintiff's future earning trajectory, without and with the collision. The trial judge acknowledged the difference in perspective in her reasons, but, with respect, she lost sight of it in her subsequent analysis.

[60] A second important difference, which is perhaps a function of the first, is that not all relevant events will be hypothetical for past claims and the "real and substantial possibilities" and "contingencies" at play in any particular case may operate differently as between claims for past and future loss of income capacity: *Dornan* at paras. 81–82; *Charters* at paras. 122–123. As discussed under issue (3) below, the trial judge's lumping together of the past and future loss of earning capacity in this case did not account for the fact that neither of the two negative contingencies she identified had come to fruition by the time of trial. These contingencies were only relevant to Ms. Lewis's future loss of earning capacity.

[61] A third, more technical difference has to do with the distinction between loss of income net of taxes on the one hand, and gross loss of income on the other. Awards for past loss of earning capacity are generally made on a net-of-tax basis as mandated by what are now ss. 95 and 98 of the *Insurance (Vehicle) Act*, although the judge has some discretion to determine or allocate the time periods that are subject to this determination: *Hudniuk v. Warkentin*, 2003 BCSC 62; *Lines v. W & D Logging Co. Ltd.*, 2009 BCCA 106 at paras. 181–186; *Laxdal v. Robbins*, 2010 BCCA 565 at paras. 11–24. Awards for future loss of earning capacity are not subject to these considerations.

[62] Furthermore, lumping together past and future loss of earning capacity awards can detract from the transparency of the result. This brings me to Ms. Lewis's argument in the case at bar. She says the trial judge erred by valuing the loss using a net-of-tax approach for both past and future loss of earning capacity.

[63] In her reasons at paragraph 63, the trial judge stated "[u]sing a rough and ready approach, I would assess the plaintiff's past net[4] loss of earning capacity and future earning capacity globally at $89,641.02, based on two years of her average net income". In footnote 4 to the reasons, the judge cited s. 98 of the *Insurance (Vehicle) Act*. This suggests the judge's intent was to determine Ms. Lewis's past

loss of earning capacity net of taxes, and her loss of future earning capacity on a pre-tax basis.

[64] However, because the trial judge ultimately lumped together the loss of past and future earning capacity awards based on “two years of [Ms. Lewis’s] average net business income”, it is not possible to determine whether or how the judge actually adjusted the figure to account for taxes in the past loss of earning capacity component of the award. The judge’s use of the phrases “average net income” and “average net business income” do not assist, because it is clear from the reasons as a whole that these phrases were references to Ms. Lewis’s income after expenses, not references to her after tax income. In the end, I find myself unable to ascertain whether or how the judge made an adjustment to the past loss of earning capacity component of the award as required under s. 98 of the *Insurance (Vehicle) Act*.

Issue (3): Trial Judge’s Consideration of Negative Contingencies to Reduce the Loss of Earning Capacity Award

Appellant’s Position

[65] Ms. Lewis argues that the trial judge erred in her application of negative contingencies to reduce the award for loss of earning capacity. Ms. Lewis says that in order to make a specific contingency deduction, the trial judge was required to ascertain whether there are was a measurable risk arising from the evidence, as contemplated in *Dornan* at para. 77, *Lo* at paras. 76–79 and *Steinlauf v. Deol*, 2022 BCCA 96 at paras. 89–91. In this case, the only specific contingency that arose from the evidence was the possibility that Ms. Lewis’s frozen shoulder condition might be successfully treated. Ms. Lewis says the judge placed “far too much weight” on this contingency, taking into account the testimony of Ms. Lewis, who the trial judge found to be a credible witness. Ms. Lewis further submits that none of the contingencies referred to by the trial judge justified a reduction of the award for loss of earning capacity by as much as 70% of the amount claimed.

Respondents' Position

[66] The respondents say there was evidence to support the two negative contingencies found by the trial judge, namely the "real and substantial possibility" that Ms. Lewis (i) might have been able to continue working if she had staggered her work days instead of compressing them into three consecutive longer days, and (ii) could be expected to experience a full recovery from her frozen shoulder condition, such that she could return to work without any further loss of income.

Analysis

[67] The first of the two negative contingencies relied upon by the trial judge to notionally reduce Ms. Lewis's loss of earning capacity award was the "real and substantial possibility" that Ms. Lewis might have been able to "continue working" if she stretched her work week out and worked fewer hours per day, instead of compressing her work week from four days into three. This finding was based on the trial judge's acceptance of the functional capacity evaluator's expert opinion, asserting that Ms. Lewis's injuries likely restricted her to working three to five hours per day, every second weekday: reasons at para. 53. The finding that Ms. Lewis might have been able to "continue working" on a staggered schedule is difficult to square with the reality that Ms. Lewis in fact stopped working in January 2022,[2] and the judge's finding that it was reasonable for Ms. Lewis to do so. Nevertheless, the functional capacity evaluator's evidence — which the trial judge accepted — leaves open the possibility that Ms. Lewis might have returned to work, part time, on a staggered schedule.

[68] The second negative contingency identified by the trial judge was "the real and substantial possibility" that Ms. Lewis's frozen shoulder condition would improve, to the point that Ms. Lewis might decide to return to work. I disagree with Ms. Lewis's submission that this finding was unsupported by the evidence. The basis for this finding came from an orthopaedic specialist, whose expert opinion was

[2] Ms. Lewis in fact stopped working one month before the functional capacity examination was conducted, and three months before the functional capacity evaluator's report was completed.

that 85% of the time, frozen shoulder conditions spontaneously resolve within 12 to 24 months, and where they do not, they can often be successfully treated with surgery. The trial judge found on all the evidence that surgery could be a "viable treatment option" for Ms. Lewis: reasons at para. 54.

[69] However, I agree with Ms. Lewis's submission that the trial judge erred in her overall approach to the consideration of both of these negative contingencies.

[70] First, the trial judge erred by assessing the claims for past and future loss of earning capacity in a single analysis, and in considering the contingencies without acknowledging that they applied only to the future loss and not the past loss. Neither: (i) the possibility that Ms. Lewis might have been able to return to work on a staggered schedule, nor (ii) the possibility that Ms. Lewis's frozen shoulder might improve, had materialized by the time of trial. These contingencies therefore had no relevance to Ms. Lewis's past loss of earning capacity claim. Their only possible relevance was in relation to the claim for future loss of earning capacity. The judge did not acknowledge this in her reasons, and it is impossible to tell how it factored into her "global" award of $89,641.02 for loss of past and future earning capacity.

[71] Second, and perhaps more fundamentally, the trial judge failed to apply the proper approach for "specific contingency" deductions.

[72] For each such "specific contingency", the trial judge must determine whether its occurrence is a "real and substantial possibility", and if so, the judge must go on to assess "the relative likelihood of it occurring": *Dornan* at para. 133. By this means, the judge "may make a contingency deduction, linked to the evidence, that reflects the relative likelihood of the positive or negative contingency occurring": *Murphy v. Snippa*, 2024 BCCA 30 at para. 133. It is important to acknowledge that the task of assigning a relative likelihood to a future hypothetical event is not easy, because by its very nature the process involves an assessment of possibilities. While there is generally "no one right answer", the entire exercise must be "tethered to the evidence": *Dornan* at para. 134.

[73] In this case, the trial judge found that both of the aforementioned contingencies were “real and substantial possibilities”, but failed to complete the analysis by assessing their relative likelihood and then making specific contingency deductions. The judge essentially found free-floating negative contingencies, without ascertaining their actual impact on Ms. Lewis’s loss of earning capacity.

Varying the Loss of Earning Capacity Award

[74] Having found reversible errors, the question then becomes whether it is possible for this Court to “substitute a proper award that is consistent with the evidence and the findings of fact”, as opposed to ordering a new trial on the issue: *Lo* at para. 107. The appeal court may reassess damages “where the unchallenged findings of fact and the evidentiary record are sufficient, and the interests of justice strongly weigh against ordering a new trial”: *Neufeldt v. Insurance Corporation of British Columbia*, 2021 BCCA 327 at para. 130.

[75] The trial judge’s findings of fact and the evidentiary record are sufficient to permit a proper assessment of the damages for past and future loss of earnings, as opposed to remitting the matter to the trial court. Remitting the matter would also involve delay and additional legal cost that could be disproportionate to the amounts in issue. I conclude that it is in the interests of justice for this Court to substitute a proper award.

[76] The trial judge’s key findings of fact relevant to the claims for loss of earning capacity are as follows:

i) Prior to the collision, Ms. Lewis had worked for almost 40 years, full-time, as a hair stylist.

ii) In the wake of the collision, Ms. Lewis has suffered and continues to suffer from headaches and ongoing back, neck, and shoulder pain, limiting her ability to work as a hairstylist. Most of Ms. Lewis’s collision-related maladies are permanent. The only exception relates to the frozen shoulder condition, discussed below.

iii) Ms. Lewis's testimony asserting that, after the collision, she worked and earned less was not reliable, and there was no other evidence to show that Ms. Lewis's income dropped between the date of the collision in December 2016 and the date of her retirement in January 2022.

iv) In January 2022, Ms. Lewis stopped working because her perseverance had been worn down by continuing pain, headaches, and physical limitations arising from her collision-related injuries. Her decision to stop working for these reasons was accepted as reasonable in the circumstances.

v) If the collision had never occurred, Ms. Lewis would likely have continued to work until the age of 65.

vi) The trial judge's findings support two real and substantial possibilities that could form the basis of negative contingencies. The first is that Ms. Lewis might return to work on a staggered schedule. The second is that Ms. Lewis's frozen shoulder condition could resolve, leading to a return to work. The trial judge found these to be negative contingencies, without completing the analysis by assessing their relative likelihood of occurrence, or valuing their impact on Ms. Lewis's loss of earning capacity.

[77] In the result, the trial judge found that Ms. Lewis had suffered a loss of earning capacity, and the most challenging question was how to value the loss. Neither party takes issue with that view of the matter. On this basis, I proceed to consider Ms. Lewis's claims for loss of past and future earning capacity.

Reassessment of Damages for Past Loss of Earning Capacity

[78] The value of Ms. Lewis's past loss of earning capacity relates solely to the seven-month period from Ms. Lewis's retirement in January 2022 to the commencement of the trial in September 2022. Ms. Lewis accepts this as the proper basis on which to value her past loss of earning capacity.

[79] Because Ms. Lewis had an established work history with a clear earnings pattern, her loss of earning capacity is best assessed using the earnings approach. There is uncontroverted evidence as to Ms. Lewis's actual income for the eight-year period from 2014 through to 2021 from the net income figures in her tax returns, which the trial judge accepted. Ms. Lewis's average annual income over those eight years was $44,564.[3]

[80] Applying the earnings approach, and using an average annual salary of $44,564, the gross loss of income for the seven-month period from January 2022 to September 2022 is $25,995. This represents the value of Ms. Lewis's past loss of earning capacity.

[81] I would not make any deduction for (i) the possibility that Ms. Lewis might have returned to work on a staggered schedule, or (ii) the possibility that she might have returned to work following a full resolution of her frozen shoulder condition. Neither possibility is relevant to the loss of past earning capacity claim because neither of these contingencies had materialized by the time of the trial.

[82] The loss of $25,995 must be adjusted by deducting the tax payable on this amount of income by a person in Ms. Lewis's tax bracket during the 2022 tax year: see s. 98 of the *Insurance (Vehicle) Act*. If the parties are unable to agree on the reduction, the matter can go to the registrar.

Reassessment of Damages for Loss of Future Earning Capacity

[83] I start with the trial judge's finding that, were it not for her collision-related injuries, Ms. Lewis would have worked until the age of 65. Although this is a future event that one could argue ought to be subjected to a relative likelihood of occurrence inquiry, I am not inclined to do that in this case. The trial judge considered a number of competing hypotheses related to the likelihood of Ms. Lewis's retirement. At one end of the spectrum was the theory of the

[3] The 2016 figure has been adjusted from $46,270 to $47,618 to account for the ten days immediately after the collision when Ms. Lewis did not work. All other figures are taken from the net business income column in the table set out at para. 56 of the trial judge's reasons.

respondents that, even without the collision, Ms. Lewis was on her way to retirement or might have retired early anyway. At the competing end of the spectrum was Ms. Lewis's theory that she would have continued to work until the age of 70. The trial judge rejected both of these theories, concluding that it was likely Ms. Lewis would have continued to work until the age of 65. That conclusion was grounded in the evidence. And because it was an option along a sliding scale, I do not consider it necessary or appropriate to weigh its likelihood relative to the other alternatives the judge was invited to consider, representing the polar extremes of possible future outcomes for Ms. Lewis.

[84] Given the established work history and clear pattern of earnings described above, I would adopt the earnings approach for the valuation of Ms. Lewis's loss of future earning capacity.

[85] If Ms. Lewis had not been injured in the collision, she would have had a further 5.5 years of earning potential from the date of the trial until her without-collision retirement at the age of 65. At an average annual income of $44,564, and applying the prescribed discount rate of 2.0%,[4] the total value of Ms. Lewis's loss of future earning potential is $229,537.29.

[86] I turn next to a consideration of negative contingencies.

[87] I first address the possibility that Ms. Lewis might return to work on a staggered schedule. Bearing in mind the fact that Ms. Lewis gave up her entire client base when she stopped working, and the relatively minimal financial benefit associated with returning to work for a mere nine to 15 hours per week, I find the impact of this contingency on Ms. Lewis's loss of future earning capacity to be negligible. I would therefore make no contingent deduction for this possibility.

[88] I next address the possibility that Ms. Lewis's frozen shoulder condition would resolve, leading to a return to work. The orthopaedic specialist gave evidence that

[4] *Law and Equity Act*, R.S.B.C. 1996, c. 253, s. 56(3)(a); *Law and Equity Regulation*, B.C. Reg. 352/81.

90 to 95% of those who opt for surgery and complete the subsequent physiotherapy experience a full recovery. The trial judge found that surgery was a viable option for Ms. Lewis, but again the judge did not assess the relative likelihood that this would lead to a return to work.

[89] Although the probability of successful treatment for Ms. Lewis's frozen shoulder condition is relatively high, there are two factors that serve to diminish the significance of this contingent deduction.

[90] First, there is a temporal component to consider. At the time of the trial, Ms. Lewis was on a waiting list for shoulder surgery. There was no evidence about how long it would take for her to have the surgery, recover, and complete the follow-up physiotherapy, but this contingency must be assessed against a backdrop of a plaintiff who was 59.5 years old at the time of trial, and had only 5.5 years before she reached her without-collision retirement age. Even if it only took Ms. Lewis one year to complete this entire process and experience a full recovery, she would have lost a further 18% of her remaining working life.

[91] Perhaps more importantly, Ms. Lewis's decision to retire was a function of all of her collision-related maladies, not only the frozen shoulder condition. She testified that when she made the decision to stop working, the frozen shoulder was the least of her concerns, and the trial judge found no likelihood of further improvement with respect to her other maladies. When asked if she would return to work if her frozen shoulder condition fully resolved, Ms. Lewis was not optimistic.

[92] I conclude that even accepting the trial judge's finding that there was a "substantial possibility" of Ms. Lewis's frozen shoulder condition improving, the likelihood that it would lead to a successful return to work was minimal. Further, given the temporal component identified above, the significance of this contingency is further reduced. For all of these reasons, I would reduce the future loss of earning capacity award by 10% to account for this contingency.

[93] In the result, I would award Ms. Lewis $206,583.56 for loss of future earning capacity. Taking a step back to consider the overall fairness of this award, I conclude that it is fair and reasonable to all parties.

Issue (4): Trial Judge's Rejection of the Appellant's Claim for Future Cost of Housekeeping Services

Appellant's Position

[94] Ms. Lewis submits that the trial judge erred in law by conflating her claim for future cost of housekeeping services (a cost of future care) with a claim for loss of homemaking capacity (a capital loss). Ms. Lewis was seeking compensation for the value of housekeeping services to be rendered to her by a third-party housekeeper. She relies on the evidence of the functional capacity evaluator, who gave an unchallenged opinion that Ms. Lewis would likely require the assistance of a professional housekeeper to do heavier housekeeping work that Ms. Lewis did not have the capacity to do herself.

Respondents' Position

[95] The respondents say that the trial judge's amended reasons make it clear that she expressly considered and rejected the claim for future cost of housekeeping services, finding on the totality of the evidence that the division of housekeeping labour between Ms. Lewis and her husband reflected the "normal give and take" that is "part of family life". The respondents say the trial judge committed no reviewable error in rejecting Ms. Lewis's claim on that basis.

Analysis

[96] Normally, a plaintiff will be compensated for a loss of ability to do housekeeping either as a component of general damages, or by way of a discrete award for a "true loss of capacity" as a capital asset. The difference between these two concepts is addressed in *Kim v. Lin*, 2018 BCCA 77 at para. 33. In the instant case, Ms. Lewis accepted that this was not a proper situation for a discrete award for loss of homemaking capacity, so the judge took the impact of Ms. Lewis's collision-

related injuries on her ability to do housework into account as part of the non-pecuniary award. Ms. Lewis does not say the judge made any error in that regard.

[97] However, quite apart from this, Ms. Lewis also advanced a discrete claim for the cost of future housekeeping services. This claim was based on the functional capacity evaluator's report, which opined that due to her injuries, Ms. Lewis was no longer able to "meet all the demands required of a housekeeper", and that she would likely require assistance with physically demanding tasks such as washing windows and mirrors, changing linens, washing floors, and heavier seasonal work. The report concluded that Ms. Lewis would require four to six hours of "professional housecleaning services" every two weeks. At a cost of $7,827 per year, this amounted to some $162,458 in future costs of housekeeping services over the balance of Ms. Lewis's life.

[98] The trial judge acknowledged the theoretical possibility of a discrete award for cost of future housekeeping services under a line of reasoning found in *Fatin v. Watson*, 2018 BCSC 306 at para. 47. Nevertheless, the trial judge rejected Ms. Lewis's claim, citing her earlier finding that the impact of Ms. Lewis's injuries was more in the nature of a loss of amenities, rather than a true loss of capacity to perform housekeeping duties: reasons at paras. 30, 67. Further, in the judge's view, the "division of housekeeping labour" between Ms. Lewis and her husband reflected the "normal give and take" of family life, making an award for future housekeeping costs "unreasonable" in the circumstances of this case: reasons at para. 67.

[99] In *Fatin*, Grauer J. (as he then was) explained that an award for future cost of care is intended to compensate the plaintiff for the value of care or services to be rendered to the plaintiff in the future. On this reasoning, a plaintiff would need to show not only an inability to perform the services at issue, but also an expectation of actually retaining and paying a third party to perform the replacement services: *Fatin* at para. 47. In other words, the plaintiff would need to show "a reasonable expectation that the financial losses would be incurred": *Westbroek v. Brizuela*, 2014 BCCA 48 at paras. 75–76. In addition, any claim for replacement housekeeping

services as a cost of future care would also have to be demonstrably reasonable and medically justified: *O'Connell v. Yung*, 2012 BCCA 57 at para. 67.

[100] These are some of the reasons this Court held in both *Westbroek* and *O'Connell* that, where a case is to be made for a discrete award of damages based on a loss of actual capacity to perform housekeeping services by an ambulatory plaintiff, it is properly conceived of as a claim for loss of housekeeping capacity, not a claim for costs of future care: *Westbroek* at para. 74; *O'Connell* at paras. 59–68.

[101] Even if one were to accept the theoretical possibility of a viable claim for cost of future housekeeping services, I see no error in the trial judge's conclusion that the claim was not made out on the facts of this case. I disagree that the trial judge conflated the claim for cost of future housekeeping services with the claim for loss of amenities in relation to housekeeping as an aspect of general damages. Rather, the judge ruled that the claim for cost of future housekeeping services was not proven.

[102] The trial judge found that Ms. Lewis was not left with a complete inability to do housework, and the division of labour in her household was such that her husband was likely to perform any work beyond Ms. Lewis's capabilities. These findings speak to the absence of a reasonable likelihood that Ms. Lewis would actually hire an outside professional to do housework in the future. Indeed, Ms. Lewis acknowledged in her trial testimony that despite her collision-related limitations, she and her husband had never paid for professional housekeeping services even though they had the financial means to do so.

[103] I also see no error in the trial judge's conclusion that a discrete award for cost of future housekeeping services would not have been reasonable, given that Ms. Lewis did not find it necessary to pay for a professional housekeeper at any point over the five years between the date of the collision and the date of trial, despite having financial means to do so.

Conclusion

[104] I would allow the appeal in part. I would set aside the trial judge's global award of $89,641.02 for loss of past and future earning capacity, and substitute in its place: (i) an award of $25,955 for past loss of earning capacity, minus the required deduction under ss. 95 and 98 of the *Insurance (Vehicle) Act* in an amount to be agreed upon or to be determined by the registrar, and (ii) an award of $206,583.56 for loss of future earning capacity.

"The Honourable Justice Riley"

I AGREE:

"The Honourable Madam Justice Fisher"

I AGREE:

"The Honourable Justice Winteringham"