

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Insurance Corporation of British Columbia
v. Dhaliwal,*
2025 BCCA 142

Date: 20250501
Dockets: CA48529; CA48530

Docket: CA48529

Between:

Insurance Corporation of British Columbia

Appellant
(Third Party)

And

Belinda McCuish

Appellant
(Defendant)

And

Balbir Beverly Dhaliwal

Respondent
(Plaintiff)

- and -

Docket: CA48530

Between:

Norma Steven

Appellant
(Defendant)

And

Balbir Beverly Dhaliwal

Respondent
(Plaintiff)

Before: The Honourable Mr. Justice Groberman
The Honourable Justice Fleming
The Honourable Justice Riley

On appeal from: An order of the Supreme Court of British Columbia, dated August 17, 2022 (*Dhaliwal v. McCuish*, 2022 BCSC 1404, New Westminster Dockets M188481 and M205204).

Counsel for the Appellants: R.C. Brun, K.C.
J.J.L. Brun, K.C.

Counsel for the Respondent: G. Allen
D.C. Wierenga

Place and Date of Hearing: Vancouver, British Columbia
November 7, 2024

Place and Date of Judgment: Vancouver, British Columbia
May 1, 2025

Written Reasons by:
The Honourable Justice Fleming

Concurring Reasons by:
The Honourable Justice Riley (Page 29, para. 105)

Dissenting Reasons by:
The Honourable Mr. Justice Groberman (Page 30, para. 106)

Summary:

Majority (per Justice Fleming): The appellants challenge the quantum of damages awarded for losses of past and future earning capacity arising out of two motor vehicle accidents. They assert the trial judge erred in (1) misapprehending a concession in relation to part of one claim for past loss of employment income, (2) awarding inordinately high damages for future loss of earning capacity relating to employment, and (3) assessing damages for loss of past and future earning capacity with respect to property development. Held: Appeal dismissed, Justice Riley concurring and Justice Groberman dissenting on issue one. The judge misapprehended the scope of the appellants' concession on the past loss claim. The judge's interpretation of the concession is a question of fact subject to the standard of palpable and overriding error. While the error in this case is palpable, it is not overriding; there was no live issue regarding the unconceded aspect of the claim; the appellants did not dispute the particular past loss claim in their written and oral submissions. The award was also supported by the evidence and the judge's findings. On the second ground of appeal, the judge did not err in assessing the award for future loss of earning capacity relating to employment; the reasons, read as a whole, explain the basis of the award which was reasonable based on the evidence. Finally, there was no error in assessing damages relating to property development. The judge did not make inconsistent findings on this issue; the findings and the award are supported by the evidence.

Concurrence (per Justice Riley): The issue of the concession is reviewable on the standard of palpable and overriding error and the error in this case is not overriding. While the assessment of this head of damages was at issue before the judge, the amount awarded was supported by the evidence and the judge's findings.

Dissent (per Justice Groberman): The issue of the concession is not owed deference on appeal as it was not founded on the judge's assessment of the evidence. Concessions must be clear and deliberate. A judge's reliance on a concession, which does not meet such requirements raises an extricable question of law. Even if the applicable standard is palpable and overriding error, the judge's misapprehension here constitutes a reversible error which would require the matter to be remitted to the trial court.

Reasons for Judgment of the Honourable Justice Fleming:

[1] This appeal concerns damages awarded to the respondent Ms. Dhaliwal for losses of past and future earning capacity arising from two motor vehicle accidents.

[2] Ms. Dhaliwal’s actions in relation to each accident, were tried together in July and August 2022. She was 62 years old by then and planned to retire at 70.

[3] Before the accidents, Ms. Dhaliwal and some of her family members had a long history of involvement in federal politics. She ran successful federal election campaigns for her older brother Herb Dhaliwal, who served for many years as a Member of Parliament and a cabinet minister, and another politician, Sukh Dhaliwal¹. She also assisted some provincial politicians with their election campaigns. In addition, she had her own political ambitions. From 2006 until 2011, Ms. Dhaliwal worked as Sukh’s senior constituency assistant (“SCA”). Her income earning history also included many years of real estate investing and other employment.

[4] When the first accident occurred in May 2015, Ms. Dhaliwal was working about 30 hours per week for Vancity Visa and looking for a full-time job. Injured in the accident, she took a leave from Vancity Visa before starting a full-time position with Service Canada in early August 2015.

[5] Sukh was re-elected in November 2015 and Ms. Dhaliwal became his SCA again. After the second accident in May 2017, she took a leave from her SCA job, due to her accident-related injuries, and had not returned by the time of the trial.

[6] In reasons for judgment indexed at 2022 BCSC 1404 (the “Reasons”), the trial judge awarded three amounts for loss of past and future earning capacity from employment:

- a) gross amounts of \$280,000 and \$58,765 for past loss from employment income as an SCA and from employment with Vancity Visa, respectively

¹ Because they share the same last name, for reasons of clarity only, I will refer to Herb Dhaliwal as Herb and Sukh Dhaliwal as Sukh.

(calculated to, together, amount to a net award of \$270,386.75 in the entered order);

- b) \$175,000 for future loss from employment as an SCA; and
- c) a gross amount of \$200,000 for loss of past and future income from property development (calculated to amount to a net award of \$123,076.92 in the entered order).

[7] The appellants assert the trial judge made reversible errors in relation to three aspects of the awards for loss of past and future earning capacity that include:

- 1. Misunderstanding they had conceded the respondent's (gross) past loss of income from employment with Vancity Visa was \$56,765.00 instead of \$6,765.00;
- 2. Erring in assessing inordinately high damages for future loss of earning capacity from employment as an SCA at \$175,000 instead of \$122,500; and
- 3. Erring in assessing damages for the loss of past and future earning capacity with respect to property development at \$200,000 based on:
 - i. inconsistent factual findings,
 - ii. insufficient evidence, or
 - iii. a failure to engage in the requisite legal analysis.

[8] For the reasons that follow I would dismiss the appeal.

Background

[9] I turn first to aspects of the evidence at trial that play a role in addressing the grounds of appeal.

[10] Ms. Dhaliwal's witnesses included Herb, Sukh and Gurpal Sahota, her brother-in-law and an experienced property investor and developer. Both Herb and Sukh gave evidence that Ms. Dhaliwal's work on their campaigns was superlative. Herb testified that she is a perfectionist, an overachiever, organized to the hilt and

an especially hard worker. He attributed his success in three elections to her skill and ability.

[11] Addressing Ms. Dhaliwal's work as an SCA, Sukh said she was 100% committed, very meticulous and one of the most capable people around. Sukh and Ms. Dhaliwal also gave evidence about the demands of her SCA job, describing his constituency office as the busiest in Canada. With Sukh away in Ottawa half of the time and also busy attending events in the riding, Ms. Dhaliwal had a great deal of responsibility. In addition to running the office, training and managing staff, Ms. Dhaliwal dealt directly with a wide range of complex case files. She worked six days a week the first time she was Sukh's SCA. After returning in late 2015, the hours were more regular. Although there were still some early mornings and late nights, Ms. Dhaliwal indicated there was flexibility and she could leave early if she needed to.

[12] Although she was still on leave from her SCA position at the trial, Ms. Dhaliwal did work on Sukh's election campaigns in 2019 and 2021.

[13] Ms. Dhaliwal gave detailed evidence about investing in about eight properties starting at a young age. Her investments included development properties, rental properties and some of her own residences. Ms. Dhaliwal testified to investing in properties with various others, including a former spouse, her current partner and Mr. Sahota. Ms. Dhaliwal identified herself as the one who was primarily responsible for managing the properties, which included dealing with municipal governments, recruiting and managing tenants, managing demolitions, renovations, and in one instance, the construction of a house.

[14] Ms. Dhaliwal's first investment with Mr. Sahota was in 1998. The two of them bought a one-acre development property in Surrey as equal partners for around \$250,000 with joint financing. They sold it in November 2015 for \$1.37 million. Ms. Dhaliwal estimated her share of the profits at \$418,000 before taxes. She also described having a plan with Mr. Sahota — before the first accident — to invest as a 50% partner in an almost five-acre development property in Langley that he had

agreed to purchase in 2012 for \$3.8 million, with a down payment of \$200,000 (the “Langley Property”). The transaction did not close until 2016. Ms. Dhaliwal told him after the first accident that she would invest as a 25% partner instead, but this did not happen and Mr. Sahota completed the purchase and developed the Langley Property with another investor. Ms. Dhaliwal also gave evidence about a second smaller Langley development property (the “Second Langley Property”) that Mr. Sahota discussed with her after the second accident in June 2017. He had purchased the property with another partner who wanted to be bought out. Mr. Sahota asked Ms. Dhaliwal to take on the project as a 50% partner, which would have required an investment of \$1.5 million. Ms. Dhaliwal said she told him she could not, describing herself as “drastically” struggling with her injuries at that time.

[15] Mr. Sahota gave very similar evidence about engaging and planning to engage in real estate investments with Ms. Dhaliwal, including the Langley Property and the Second Langley Property. He also corroborated her evidence about her management role, indicating she handled the “mental” aspects of the investments.

[16] Ms. Dhaliwal’s documentary evidence included her tax returns. During her testimony, she addressed entries for rental income and capital gains from the sale of her interest in three properties in 2011, 2012 and 2015.

[17] Regarding her Vancity Visa employment, Ms. Dhaliwal said she started there in September 2014. Before that, she had worked for Peoples Jewellers since November 2012, although she had been off for six months with job-related wrist injuries. Ms. Dhaliwal’s plan was to return to Peoples Jewellers part-time and continue working at Vancity Visa. However, when she tried a gradual return, she found it painful on her wrists, so she resigned from Peoples Jewellers in January 2015.

[18] By that time, Ms. Dhaliwal was also helping with childcare because her daughter-in-law’s maternity leave ended.

[19] The Vancity Visa job required a minimum of 18 hours per week and the shifts were six hours long. Ms. Dhaliwal worked about 30 hours per week and really enjoyed the job, which she experienced as helping people.

[20] She did not have any other employment when the first accident occurred in May 2015, but was receiving some rental income. Ms. Dhaliwal agreed she needed more income to finance the investment in the Langley Property and indicated that she had been applying for full time jobs. She also said she knew, before the first accident happened, that she had passed the interview with Service Canada.

[21] During her leave from Vancity Visa after the first accident, in or about mid-July 2015, Service Canada offered her a job, which required four months of training. Still on leave from Vancity Visa, Ms. Dhaliwal started at Service Canada full time on August 4, 2015.

[22] Ms. Dhaliwal gave evidence that absent the first accident, her intention was to work both at Service Canada, which was 37.5 hours per week Monday to Friday, and at Vancity Visa, 18 hours per week. She said she told Vancity Visa about being hired by Service Canada and asked to be put on casual status due to her injuries. She resigned when they informed her casual status was not available. Ms. Dhaliwal was still completing the training at Service Canada when she resumed working as an SCA for Sukh on November 23, 2015.

[23] In cross-examination, Ms. Dhaliwal was questioned about the feasibility of working at both Vancity Visa and Service Canada, as well as continuing with family commitments, her real estate work and pursuing her own political aspirations. Her response was that she intended to do shifts at Vancity Visa on the weekends, and to continue helping with her grandson when she could, while still pursuing her involvement in real estate as well as her own political future. When it was suggested to her that all of this was “quite an undertaking”, she responded “that’s what I did pretty much all my grown-up life”.

[24] Ms. Dhaliwal relied on the expert opinion evidence of her long-time family physician Dr. van Eeden, psychologist and neuropsychologist Dr. Schmidt and psychiatrist Dr. Sangha.

[25] Dr. van Eeden's immediate post-accident diagnoses are set out in the trial judge's reasons. Not included are his further diagnoses of "chronic MVA-related neck and shoulder strain" and "Adjustment Disorder with a Depressed Mood vs Major Depressive Disorder" on June 22, 2017, and those same diagnoses as well as "MVA-related cognitive deficits: no change" on February 22, 2022.

[26] In Dr. Schmidt's report dated May 13, 2021, he observed that both accidents left Ms. Dhaliwal with significant levels of pain and other physical complaints and were emotionally traumatic. His accident-related diagnoses included Post-traumatic Stress Disorder ("PTSD") superimposed with Adjustment Disorder with mixed anxiety and depressed mood. He explained that in addition to leading to the development of PTSD, the effects of the accidents, particularly problems with pain and disturbed sleep, led to further emotional disruption involving significant levels of generalized irritability, anxiety and depression. He further opined that Ms. Dhaliwal might also be suffering from Somatic Symptom Disorder ("SSD") but it was difficult to untangle the related symptoms from the PTSD and Adjustment Disorder. Dr. Schmidt provided a guarded prognosis. Noting Ms. Dhaliwal was motivated to overcome her problems and had found the psychological treatment she had received helpful, he identified the persistence of her symptoms despite the passage of time and treatment as very concerning. As a result, he predicted further treatment would most likely have the benefit of preventing deterioration rather than significant improvement in her psychosocial functioning.

[27] The appellants relied on the expert opinion evidence of Dr. Wittenberg who, like Dr. Schmidt, is a psychologist and neuropsychologist. Her report dated January 17, 2022, focused on the results of Ms. Dhaliwal's neuropsychological or cognitive testing, which showed her intellect was "generally intact". As a result, Dr. Wittenberg opined there was "no reason to anticipate" any functional limitations

related to cognitive function. But she also opined that Ms. Dhaliwal met the diagnostic criteria for SSD (mild) with predominant pain and sleep disturbance. In this context, Dr. Wittenberg predicted Ms. Dhaliwal's daily functioning should improve with adequate treatment of her SSD.

[28] The trial lasted eight days. The closing submissions of counsel comprised the last two days. Both provided written as well as oral submissions.

The Reasons

[29] The Reasons start with a brief discussion of Ms. Dhaliwal's background, followed by the circumstances of each accident and some of her immediate post-accident symptom complaints and medical treatment.

[30] The trial judge highlighted what he identified as a lack of evidence about the two accidents "to assist in determining that they caused all the losses the Plaintiff asserts": at para. 5. He also commented on the limited third-party evidence about changes in Ms. Dhaliwal's condition before and after the accidents, as well as the absence of evidence from potential witnesses such as her sons. Related to this, he stated that almost all the evidence of what caused the alleged losses and their extent was rooted in Ms. Dhaliwal's self-reporting, which in turn gave rise to the opinions of the medical experts.

[31] Although the trial judge did not explicitly canvass the various injuries and symptoms that Ms. Dhaliwal alleged, some emerge from his review of Dr. van Eeden's summary of Ms. Dhaliwal's "pre-existing medical condition" from 1999 to 2015 "confined to matters 'implicated' by the two MVAs": at para. 14.

[32] Reviewing some of Dr. van Eeden's other evidence, the trial judge wrote that two days after the first accident, Ms. Dhaliwal was diagnosed with "strains of shoulders, arms, lower back [and] neck"; and nine days after the second accident with "MVA-related acute neck, chest, and lower back strain" and "[c]losed head injury and possible concussion (mild)".

[33] Under the heading of general damages, the trial judge discussed Herb and Sukh's testimony regarding her work performance and the demands of her campaign and SCA work. Although the Reasons indicate Herb was not questioned about the impact of the accidents, the transcript shows he was asked if he had noticed any changes in Ms. Dhaliwal's ability to function and perform based on their interactions related to dealing with their elderly parents' care. Herb testified that he thought she was sometimes irritable, did not have the same patience, and would get upset with small things, which he had not noticed before. He also offered an example.

[34] The Reasons do include that Sukh testified to noticing Ms. Dhaliwal was forgetful, unfocused and anxious after the second accident, along with not noticing any adverse impacts after the first. The Reasons also highlight other evidence of Sukh including: that he would "love for" Ms. Dhaliwal to return to her SCA position which would remain available to her as long as he was in office; he had also told her she could work part-time; he was hoping she would run his fall (2022) mayoral election campaign; and Ms. Dhaliwal was the logical and desirable candidate to succeed him as MP.

[35] Still under the heading of general damages, the trial judge remarked that the evidence he had addressed up to that point did not "demonstrate a case for [Ms. Dhaliwal] having been seriously impaired in her work capacity as a result of the two accidents". He found her demeanour as a witness left the same impression for two reasons. First, over several days, she stood to give her evidence and presented as intelligent, articulate, energized, somewhat controlling and possessing an impeccable memory. She also impressed the trial judge as "...someone an employer or business partner might very well want for any task within her experience". Second, Ms. Dhaliwal was prone to overstating the difficulty of her circumstances, which he observed was consistent with the extreme descriptions of her problems that she and one of her sons had provided to Dr. Schmidt.

[36] However, after setting out the opinions of the medical experts, the trial judge also highlighted Ms. Dhaliwal’s testimony that she had hit “rock bottom” in the fall of 2020 when she met with Drs. Schmidt and Sangha, and the timing of Dr. Wittenberg’s “relatively optimistic prognosis” about 14 months later. He reasoned that her prognosis was consistent with how Ms. Dhaliwal “appeared to be getting along” and may be attributable to improvement during that period: at para. 31.

[37] Ultimately, the trial judge concluded that Ms. Dhaliwal should receive \$120,000 in non-pecuniary damages.

[38] The Reasons discuss loss of past and future income earning capacity from employment at paras. 36–42. In addressing the past loss the trial judge stated:

[38] The assessment here, for past loss of capacity to earn employment income, is brief because the parties have reached agreement about that. Ms. Dhaliwal claims \$280,000 as the gross amount for the past loss of capacity to earn income as an SCA, and \$56,765 as the gross amount for past loss of capacity to earn income from her employment with Vancity Visa. The Defendants agreed at trial to pay those amounts after counsel confer to reduce them to net amount

[39] Regarding the future loss, the trial judge observed that Ms. Dhaliwal’s proposal of \$400,000 was based on the annual salary (averaging a little over \$50,000 per year) multiplied by nine years (age 70), for a total of \$501,078 that was then reduced for “contingencies”; and the appellants’ suggested award of \$122,500 represented just over two years of gross pay from the SCA job.

[40] In assessing the loss, the trial judge wrote:

[42] Of course, the Plaintiff, self-disciplined and hard-working though she is, may choose to retire before age 70 for factors entirely apart from the two accidents. Also, it is my view that Ms. Dhaliwal will be capable of returning to work as an SCA for Mr. Dhaliwal. Comparing the observations of Dr. Schmidt and Dr. Wittenberg, her condition continues to improve from her “rock bottom” in the fall of 2020 ... Sukh Dhaliwal testified that he will have a job available for the Plaintiff as long as he is in office. That is not surprising, given the Plaintiff’s capacities, at least as I observed them in the course of her testimony. But who knows how long Mr. Dhaliwal will have a position for her, given the vagaries of holding political office? Taking those contingencies into account, I consider that \$175,000 is a reasonable gross award for Ms. Dhaliwal’s future loss of capacity to earn employment income as an SCA.

[41] The trial judge dealt with Ms. Dhaliwal's claim for past and future loss of capacity related to property development at paras. 44–65.

[42] In concluding her primary claim of \$6 million related to the Langley Property must fail, the trial judge identified the absence of any corroborating documentary evidence as significant and the claim as “too speculative”. He also rejected Ms. Dhaliwal's assertion that the first accident deprived her of the necessary decision-making ability and inclination to invest in the Langley Property. Finding instead that it was highly improbable her injuries after the first accident would have precluded her from participating in this investment, he emphasized how hard working she was after the first accident until the second accident and the demanding and stressful nature of her SCA and political campaign work. Further, the trial judge found Ms. Dhaliwal could not have afforded to finance her participation in the Langley Property, which would have included her share as either a 25% or 50% partner of the \$3.8 million purchase price and the cost of the development project up to that point.

[43] Turning to Ms. Dhaliwal's alternative claim for \$1,316,165, the trial judge specified that it was based on capital gains of \$788,000 earned from the sale of three properties in 2011, 2012 and 2015; and an annual average of \$157,600 (over five years) projected over seven years from the first accident to the time of trial, resulting in total average earnings of \$1.1 million. He noted that, coupled with her own present value calculation, this resulted in “pre-injury” or without accident earnings of \$1,316,165; and put another way Ms. Dhaliwal was claiming \$157,600 per year until age 70.

[44] The trial judge also noted that most of the capital gains (\$400,000) were from the sale of one property in 2015, which she had owned since 1998 and the appellants' submission that Ms. Dhaliwal's “track record” in real estate investment up to the first accident was irregular and not systematic enough to support the conclusion that future revenue from real estate investments was anything more than speculation.

[45] Taking the position that no damages should be awarded for either the primary or alternative claim, the appellants had also submitted that Ms. Dhaliwal could not make out any of the steps in *Rab v. Prescott*, 2021 BCCA 345 [*Rab*], based on their view that this aspect of her earning capacity had not been impaired, and relying in part on testimony she gave that she had been pursuing the subdivision of an investment property in Delta, supported by emails exchanged with the municipality and “stakeholders” in November 2021.

[46] Implicitly rejecting the appellants’ assertion about the absence of impairment, the trial judge made a finding of fact about an accident-related psychological injury:

[64] It was common ground among the expert witnesses, that Ms. Dhaliwal was more impaired psychologically after the second accident as compared to the first one. In other words, land investment decisions would likely have been more difficult from the time of the second accident onward, for at least some period.

[47] Based on this finding, he also found Ms. Dhaliwal had demonstrated a real and substantial possibility she “will” suffer some pecuniary loss from a “somewhat diminished capacity for real estate investment after the second accident for some period of time”. Next, the trial judge underscored the difficulty involved in accurately calculating an award based on losses from possible future real estate investments, likening the circumstances to those faced by the trial judge in *Wallman v. John Doe*, 2014 BCSC 79. From there he recognized the requirement for an assessment as opposed to a calculation, and the court’s obligation to “do its best” to assess the loss by considering all the evidence and the fairness and reasonableness of the award, before setting out the award of \$200,000.

Standard of Review

[48] It is well established that an award of damages is subject to a highly deferential standard of review on appeal. An appellate court may intervene only where there was no evidence to support the trial judge’s conclusion, the judge proceeded on a mistaken or wrong principle, or the award was so inordinately high or low that it must be a wholly erroneous estimate of the damage: *Deegan v.*

L'Heureux, 2023 BCCA 159 at para. 41; *Charters v. Jordan*, 2024 BCCA 351 at para. 27.

[49] The standard of review for findings of fact, inferences drawn from those facts and findings of mixed fact and law is palpable and overriding error: *Deegan* at para. 42; *Charters* at para. 25. A trial judge's assessment of damages raises questions of fact or of mixed fact and law: *Gregory v. Insurance Corporation of British Columbia*, 2011 BCCA 144 at para. 14; *Ledwon v. Baines*, 2021 BCCA 239 at para. 16; *Charters* at para. 26. Where a question of mixed fact and law involves a legal principle that is readily extricable from the factual context, the standard of correctness applies: *Housen v. Nikolaisen*, 2002 SCC 33 at paras. 33–35.

[50] Importantly, appeals are from orders not reasons. Thus, while the failure to engage in the proper analysis may be an error in principle, this does not inevitably lead to a different outcome. “[E]ven in the absence of a judge making explicit findings of fact”, a damages award “may prove to be justifiable on the evidence, or the basis of the award may be capable of being discerned on the record, and attract deference”: *Tigas v. Close*, 2024 BCCA 223 at para. 24.

Discussion

Misunderstanding the Vancity Visa Concession

[51] Ms. Dhaliwal's past loss claim, based on her employment at Vancity Visa, had two components. The first, \$6,765, was the amount of the gross loss of income from the time of the first accident in May 2015 until August 4, 2015 when she started working at Service Canada. The second component, \$50,000, was based on Ms. Dhaliwal's assertion that, absent her accident-related injuries, she would have continued working part-time at Vancity Visa, as well as at Service Canada, and then as an SCA.

[52] The appellants contend that the trial judge made a factual error by misunderstanding their closing submissions as conceding the whole amount of this claim. They say they only agreed to pay the \$6,765 portion (net), not \$56,765.

[53] Ms. Dhaliwal addressed the Vancity Visa claim in both her written and oral submissions. Regarding the \$50,000 component her counsel stated:

In paragraph 47, we briefly touched on this in the morning. She testified that absent her injuries, her intention was to continue working at Vancity for a minimum of the 18 hours per week. That was the contract position. At the rate of pay, 18 hours per week, if she had in fact done that, she would have earned 133,000 over the roughly seven – almost seven years in question.

The plaintiff submits that an award of damage in relation to this particular loss of capacity to earn income is obviously hypothetical. And as such, the assessment of the award should reflect the likelihood that the loss would arise, assuming the collision didn't happen and having regards for the demands of her job as a senior constituency assistant, along also with her expected efforts in relation to the 82nd Avenue had that proceeded as planned. The plaintiff submits it's appropriate to apply a very significant contingency to this aspect of the award because the combined demands that she would have found herself in would have made it problematic for her to continue in that capacity.

We seek an award of \$50,000, doing the best we can to try and find the contingency, the reasonable allowance for uncertainty there.

[54] The appellants' written and oral closing submissions do not mention the Vancity Visa past loss claim, although they addressed every other aspect of Ms. Dhaliwal's claim for loss of past earning capacity (or wage loss) and were generally comprehensive.

[55] Taking the position she had not proven any past loss relating to either real estate investing or her political aspirations, the appellants' written submissions proposed an award for past loss from her SCA employment only. They argued the net amount of \$183,750, based on what she would have earned over the previous five years (2017 to 2022).

[56] In oral submission, again, there was no mention of the Vancity Visa past loss claim, until the trial judge asked whether the net amount of \$183,750 corresponded to the "gross figure of \$280,000" that Ms. Dhaliwal was proposing for her past loss from the SCA job. The exchange between the trial judge and appellants' counsel included:

THE COURT: All right. Just a moment. Is this the one that your friend says is the gross of 280?

...

THE COURT: -- use 280 as gross and do some further homework to get to the net?

CNSL R. BASRA: Yeah. We would have to come to an agreement, and that's something that counsel often do.

CNSL G. SMITH: That's agreeable from the plaintiff as well.

THE COURT: All right. Just so I have it. I just want to minimize my own homework. The – what I can say is that it's common ground that the gross figure is 280 and that counsel will work out the net figure.

CNSL R. BASRA: That is correct.

...CNSL R. BASRA: So instead of saying that the net figure is 183,750 –

THE COURT: I understand.

CNSL R. BASRA: Yes.

THE COURT: Just let me make a note of it. Thanks.

CNSL R. BASRA: And I know my friend has calculated – there may be – I'm not sure if my friend has calculated the Vancity as a past wage loss as well.

CNSL G. SMITH: Yeah.

CNSL R. BASRA: Yeah. So we didn't – we did not include – there wasn't much off – it's the \$6,000, and we can agree on that number as well.

CNSL G. SMITH: That was also a gross number, and perhaps the same agreement might be made on that as well.

CNSL R. BASRA: Yeah. So we're not going to dispute those.

THE COURT: All right. That's helpful.

[Emphasis added.]

[57] In the context of both parties' submissions and the appellants' silence on the \$50,000 component of the \$56,765 claim, Ms. Dhaliwal argues it was entirely reasonable for the trial judge to conclude the appellants had consented to the whole Vancity Visa claim. She also says the trial judge was entitled to assume that if the appellants were contesting the \$50,000 component, they would have said so.

[58] With the benefit of the transcript, it is apparent that counsel was conceding only "\$6000", or the first component the Vancity Visa claim and the judge misapprehended what was being conceded.

[59] We were not referred to any case dealing with the standard of review regarding a misapprehension of a concession.

[60] The question was very recently addressed in *Dignard v. Dignard*, 2025 BCCA 43. The case involved a family law dispute over property division. The trial judge misunderstood the appellant’s submissions as conceding the respondent was entitled to an exclusion in a particular amount. Justice Horsman held a trial judge’s interpretation of a concession “in this context” was a finding of fact and therefore subject to review on the standard of palpable and overriding error: at para. 26. Similarly, in *BCI Bulkhaul Carriers Inc. v. Wallace*, 2017 BCCA 180, the trial judge was found to have misapprehended the facts by misunderstanding counsel’s submissions as making a concession.

[61] Applying this approach, given the appellants did not consent to the \$50,000 component of the Vancity Visa claim, it is clear the trial judge’s conclusion the appellants had conceded or agreed to pay the net amount of the gross award of \$56,765 is an obvious or palpable error. Ordinarily such an error would also be overriding based on the resulting failure to assess the merits of the claim. In the particular circumstances of this case, however, I am not persuaded the trial judge’s error was material. Faced with Ms. Dhaliwal’s written and oral submissions in support of the \$50,000 component of the claim, the appellants deliberately chose not to address it in their comprehensive written and oral submissions. There was then no live issue regarding the \$50,000 component. However, it is also my view that the award of \$56,765 is supported by the evidence and the trial judge’s finding that Ms. Dhaliwal was a remarkably capable and hardworking person.

[62] Consequently, I would not accede to this ground of appeal.

Alleged Errors in Assessing Loss of Past and Future Earning Capacity

[63] The remaining grounds impugn the trial judge’s assessment of Ms. Dhaliwal’s past loss of earning capacity (from real estate investing) — as well as her future loss of earning capacity based on both employment as an SCA and real estate investing.

Legal Principles

[64] Generally speaking, an award for loss of past earning capacity compensates the plaintiff for the loss of the value of the work they would have, not could have, performed but were unable to, because of their accident-related injuries: *Rowe v. Bobell Express Ltd.*, 2005 BCCA 141 at para. 30; *Lamarque v. Rouse*, 2023 BCCA 392 at para. 29. In assessing the past loss, the court typically compares what the plaintiff would have earned but for the accident with their actual earnings.

[65] Similarly, the central task in assessing loss of future earning capacity involves a comparison between the plaintiff's likely future working life if the accident had not occurred with their likely future working life after the accident: *Dorman v. Silva*, 2021 BCCA 228 at paras. 156–157; *Ploskon-Ciesla v. Brophy*, 2022 BCCA 217 at para. 7 [*Brophy*].

[66] While past events must be proven on a balance of probabilities, the standard of proof for hypothetical events, past and future, is whether there is a real and substantial possibility that they would or will occur. This requires proof that is lower than a balance of probabilities but higher than something that is only possible and speculative: *Gao v. Dietrich*, 2018 BCCA 372 at para. 34; *Brophy* at para. 15. If a real and substantial possibility is established, the court determines the measure of damages by assessing the likelihood of the hypothetical event occurring: *Lamarque* at paras. 29–30.

[67] *Rab* clarified there is a three-step approach to the assessment of damages for loss of past and future earning capacity, which Justice Grauer articulated in this way:

[47] ... The first is evidentiary: whether the evidence discloses a *potential* future event that could lead to a loss of capacity (e.g., chronic injury, future surgery or risk of arthritis, giving rise to the sort of considerations discussed in *Brown*). The second is whether, on the evidence, there is a real and substantial possibility that the future event in question will cause a pecuniary loss. If such a real and substantial possibility exists, the third step is to assess the value of that possible future loss, which step which must include assessing the relative likelihood of the possibility occurring ...

[Emphasis in original.]

[68] *Brophy* recognized that in cases where the plaintiff is still unable to work at the time of the trial due to accident related injuries and has therefore clearly lost capacity and income, the first and second steps of *Rab* may well be foregone conclusions: at para. 11.

[69] Valuing the future loss at the third step may involve either an earnings approach, typically where there is an identifiable or calculable loss of income, or a “capital asset approach”, which is recognized as more suitable when the loss is less easily measured: *Rab* at paras. 28–31; *Perren v. Lalari*, 2010 BCCA 140 at para. 32. In *Pallos v. Insurance Co. of British Columbia* (1995), 100 B.C.L.R. (2d) 260, 1995 CanLII 2871 (C.A.), this Court described various approaches to “assigning a dollar figure” to the loss of capacity:

[43] ... One method is to postulate a minimum annual income loss for the plaintiff’s remaining years of work, to multiply the annual projected loss times the numbers of year[s] remaining, and to calculate the present value of this sum. Another is to award the plaintiff’s entire annual income for one or more years. Another is to award the present value of some nominal percentage loss per annum applied against the plaintiff’s expected annual income. ...

Alleged Error in Assessing Loss of Future Earning Capacity from SCA Employment

[70] The appellants take the position that the trial judge erred in assessing inordinately high damages for this aspect of Ms. Dhaliwal’s future earning capacity at \$175,000, while acknowledging the evidence satisfies steps one and two of the three step approach, even though *Rab* is not expressly discussed in the Reasons.

[71] Alleging an error at the third step then, the appellants argued the amount of the award is unreasonable and inordinately high, in light of the trial judge’s findings that Ms. Dhaliwal had not been seriously injured “in her work capacity” as a result of the two accidents; she would return to work as an SCA; the position remained available; and Dr. Wittenberg’s “positive” prognosis. Regarding the last asserted finding, however, the trial judge did not simply accept what he identified as Dr. Wittenberg’s “relatively optimistic prognosis”. Instead, he considered it in conjunction with the evidence of Dr. Schmidt, Sukh’s description of Ms. Dhaliwal’s

overall capability, as well as how she presented at trial, to conclude that her condition continued to improve from her “rock bottom” in the fall of 2020.

[72] The appellants further assert it becomes even clearer the award is inordinately high when those same asserted findings are considered along with the contingencies the trial judge “mentioned” — retiring earlier than age 70 for unrelated reasons and the unknown factor of how long Sukh would remain in office. To the extent the appellants argue the trial judge erred by failing to actually take those contingencies into account, they are mistaken. At para. 40 he does so expressly.

[73] On this same point, however, the appellants made a different assertion on appeal — that the contingency involved in Sukh no longer remaining in office was irrelevant because Ms. Dhaliwal could do something else, such as work again for Service Canada, which is true, although it does not appear the trial judge was asked to consider this. It is also the case, that the trial judge found Ms. Dhaliwal presented very well as a potential employee or investment partner. The other reality is that both of the contingencies are not specific to Ms. Dhaliwal’s “with accident” future working life. She could also have retired early absent the accidents and Sukh’s time in office would have ended at some point in any event.

[74] The effect of all of this practically speaking it to undermine the significance of the identified negative contingencies, in the assessment of Ms. Dhaliwal’s loss of future earning capacity based on the comparison of her likely future working life with and without the accidents.

[75] At the hearing of the appeal, the appellants also emphasized that the trial judge failed to engage in a proper analysis or to provide a justification for the amount of \$175,000, which they characterized as roughly equivalent to three years of salary under the capital asset approach. They too relied on this approach, in suggesting an award of \$122,500 that represented “just over” two years gross pay in the SCA role. In other words, the appellants impugned the lack of analysis but did not assert that the trial judge proceeded on a wrong principle by implicitly using the capital asset approach.

[76] Putting aside the complaints about the lack of reasons for one moment, in my view the appellants have not identified a reviewable error in the trial judge's assessment of the damage award.

[77] Rather than suggesting there is no evidence to support his conclusion that \$175,000 was reasonable, the appellants contend the award is unrealistic and inordinately high because, on their view of his findings, the conclusion cannot be justified.

[78] When the Reasons are read holistically and functionally, the appellants' central assertion that the amount of \$175,000 is inconsistent with the factual findings and the (considered) contingencies does not stand. The particular finding that Ms. Dhaliwal had not been "seriously impaired in her work capacity" has to be considered together with other express findings including that she "will" be, not is, capable of returning to the SCA job at an unspecified time in the future. Plainly, accepting she would be unable to return to the SCA job for an undetermined amount of additional time, plus the more than five years since the second accident, reflects the view that her injuries and symptoms resulted in significant work-related impairment. Similarly, there is the unchallenged award of \$120,000 for non-pecuniary damages indicating an acceptance that Ms. Dhaliwal's injuries and symptoms were generally significant and ongoing in their impact.

[79] The trial judge's other findings that Ms. Dhaliwal was hard working, self disciplined, and very capable along with the demanding nature of SCA job are also relevant.

[80] Leaving aside the negative contingencies then, what emerges from the whole is a range of circumstances, some in tension, involving long-term, ongoing impairment, a difficult job, an accommodating employer and a hard working, disciplined and highly capable plaintiff.

[81] Some of the appellants' closing submissions acknowledging Ms. Dhaliwal's impairment with respect to her SCA employment are also important to a contextual

interpretation of the Reasons. In addition to accepting she was injured by the accidents and conceding that she had “lost potential” with respect to her SCA job, having not returned since the second accident, he also submitted “the plaintiff may one day return to her job with the right treatment” for her SSD, and “there’s a lost capital asset” although “not to the degree that she can’t work at all in the future”.

[82] These submissions are more than consistent with a longer or greater than roughly two year period of ongoing loss of employment income that equates with the appellants’ proposed award.

[83] An inordinately high award involves a wholly erroneous estimate of the damages. Based on my interpretation of the Reasons, this is not that.

[84] This interpretation also addresses the appellants’ complaint about a lack of analysis regarding the assessment of the value of Ms. Dhaliwal’s future loss. I would reject their suggestion the trial judge simply plucked \$175,000 from the air. Although it is true the Reasons do not discuss the probability or likelihood of future events occurring, the approach to valuation or a comparison of her future working life with and without the accidents, in my view they are nonetheless sufficient. There is no question the trial judge received more than adequate submissions about the applicable legal principles. The appellants do not take issue with his apparent use of the capital asset approach. Again, the amount of the award is supported by a range of express and implicit findings considered together. Further, any realistic quantification of Ms. Dhaliwal’s future loss had to involve a rough assessment, given the constellation of circumstances and the uncertainty of some of them, including most significantly when she would be capable of returning to the SCA job. Satisfied the Reasons adequately explain the trial judge’s conclusion, I also regard the award of \$175,000 as a reasonable one on the evidence.

[85] Accordingly, I would not accede to this ground of appeal.

Alleged Error in Assessing Loss of Capacity for Real Estate Investing

[86] The appellants assert the trial judge erred in assessing damages of \$200,000 for Ms. Dhaliwal’s loss of past and future earning capacity from real estate investing, based on a range of submissions that are not clearly delineated. Ms. Dhaliwal frames them as threefold, which I articulate as follows: (1) the award cannot be sustained given the judge’s findings of fact; (2) there was insufficient evidence to support the key finding of a real and substantial possibility that she will suffer a pecuniary loss from a somewhat diminished capacity for real estate investment; and (3) the judge failed to engage in the analysis required at steps two and three of the *Rab* framework.

Inconsistent Findings

[87] As with the previous ground, the appellants point to a number of factual findings that they say are inconsistent with the award.

[88] Some of those findings deal with Ms. Dhaliwal’s lack of impairment in respect of her property-investment aptitude and skills (so as to preclude her from investing in the Langley Property) and her ability to continue working after the first accident until the second accident. Other findings include the absence of documentary evidence (in relation to the Langley Property), the “serious question” about whether Ms. Dhaliwal could afford to participate in the Langley Property development and again the asserted acceptance of Dr. Wittenberg’s relatively optimistic prognosis.

[89] Respectfully, the appellants fail to acknowledge that these findings were “temporal in nature”. What the trial judge found as a fact was that Ms. Dhaliwal was unlikely to have been incapacitated in any meaningful way so as to preclude her from investing in the Langley Property, which closed in 2016. He similarly concluded there was no evidence that her capacities as a potential investor in real estate were impaired “up to an after the closing date on the Langley Property”. Her ability to continue working as an SCA ended with the second accident in May 2017.

[90] In asserting the award is based on inconsistent findings, the appellants also do not address the trial judge’s central finding in support of the award, which is specific to the period after the second accident — that Ms. Dhaliwal was more impaired psychologically after the second accident, making investment decisions more difficult from then onward “for at least some period”. It was this impairment and its effect that resulted in the other key finding of a real and substantial possibility that she “will” suffer some pecuniary loss from a somewhat diminished capacity for real estate investment, “after the second accident onward, for at least some period”.

[91] Although the appellants also make the assertion the alternative claim lacked supporting medical evidence, they do not suggest the finding of psychological impairment involves a palpable and overriding error, or a misapprehension of the evidence. I would also observe the finding is supported by various aspects of the evidence, including: the diagnoses and prognosis of Dr. Schmidt; Ms. Dhaliwal’s evidence about the lost real estate investment opportunity involving the second Langley property in June 2017 due to her symptoms; Sukh’s observations of Ms. Dhaliwal after the second accident; and to a more limited extent, those of Herb. The finding is also consistent with the diagnosis and prognosis of Dr. Wittenberg regarding Ms. Dhaliwal’s SSD.

[92] In my view, there is no merit to this argument.

Insufficient Evidence

[93] The appellants also appear to allege there was insufficient evidence to support the finding of a real and substantial possibility of some pecuniary loss from Ms. Dhaliwal’s somewhat diminished capacity for real estate investing. The appellants rely on a “total lack of documentary support” for the “claimed losses”, a lack of medical evidence, which I do not intend to address again, and what they say was the trial judge’s finding that the alternative claim was too speculative. That finding was made with respect to the Langley Property claim, not the alternative claim.

[94] What the trial judge actually found, in attempting to value the pecuniary loss from Ms. Dhaliwal's somewhat diminished capacity for real estate investment, was the evidence was "too speculative to attempt an accurate calculation of any award based on losses from possible future investments". In other words, it was not the likelihood of the loss that was speculative. The trial judge was making the point that the nature of the loss was not amendable to accurate calculation and what was required was an assessment that considered all the relevant evidence and the fairness and reasonableness of the award.

[95] As I have discussed, there was documentary evidence in the form of tax returns showing Ms. Dhaliwal's capital gains revenue and rental income, in addition to her detailed evidence about a long history of real estate investing involving approximately eight properties, corroborated by Mr. Sahota with respect to their shared investments. He also corroborated her account of the lost June 2017 investment, contrary to the appellants' suggestion there was no such evidence. Appreciating the appellants' view that neither Ms. Dhaliwal nor Mr. Sahota was credible or reliable, the Reasons do not suggest the trial judge's impression that Ms. Dhaliwal was prone to overstating her difficulties, extended to exaggerating let alone inventing other circumstances. He did not make findings regarding Mr. Sahota's credibility or reliability.

[96] I do not agree then that there was insufficient evidence to support the award.

Failure to Engage in the Requisite Analysis

[97] The appellants seem to assert that the trial judge erred by failing to undertake steps two and three of the *Rab* framework, relying on the absence of any reference to *Rab*'s three-part approach and other recent appellate authority in the Reasons, and the absence of analysis in support of an award for loss of future earning capacity that was overturned in *Brophy* (at paras. 33–36).

[98] On this first point, to the extent the appellants suggest the trial judge failed to consider the applicable law, it is clear the operative principles and *Rab* and *Brophy* were amply reviewed by the parties in their writing and oral closing submissions.

Further, as Ms. Dhaliwal points out, the trial judge actually engaged in colloquy with the appellants' counsel regarding aspects of the legal framework during his oral closing submissions.

[99] Regarding the second point, there are many features of *Brophy* that distinguish it from this case. For example, the trial judge in *Brophy* gave no indication of the factual basis for the loss of future capacity award, evidence regarding the plaintiff's future plans and prospects was lacking and the absence of analysis pervaded a multitude of issues. Significantly, there was nothing straightforward about whether the evidence disclosed a potential future event that could lead to a loss of capacity or whether there was a real and substantial possibility that the future event would cause a pecuniary loss. Further, Justice Harris also concluded it was impossible to discern the basis for the award: at para. 36.

[100] I also agree with Ms. Dhaliwal that ultimately the appellants are raising a sufficiency of reasons issue.

[101] I have already concluded the award and the key findings of fact are supported by sufficient evidence, some of it discussed in the Reasons, along with other findings of fact. In brief summary, the evidence and factual findings include: Ms. Dhaliwal's long history of investing in real estate; her income from real estate investing during the five years prior to the first accident; her accident-related lost opportunities; her increased psychological impairments; its impact on making investment decisions; and the resulting real and substantial possibility she would suffer a future pecuniary loss due to a somewhat diminished capacity for real estate investing following the second accident and going forward into the future.

[102] All of this satisfies steps one and two of the three step approach to assessing damages for the loss of past and future earning capacity.

[103] Although the trial judge does not provide a specific explanation for arriving at the \$200,000 amount beyond the analysis I have already discussed, whether or not this means he erred in principle, in my view the award is justifiable on the evidence. In other words, I am satisfied that any failure to engage in the analysis required by the third step does not constitute reversible error.

Disposition

[104] I would dismiss the appeal.

“The Honourable Justice Fleming”

Reasons for Judgment of the Honourable Justice Riley

[105] I have had the benefit of reviewing the reasons of my colleagues. I am in agreement with the reasoning of Justice Fleming, although I wish to add the following brief comments about the Vancity Visa concession. I agree with Fleming J.A. on the standard of review, and with her conclusion that the judge’s error, while palpable, was not overriding. To be more precise, while I do not ascribe to the view that there was “no live issue” with respect to the \$50,000 component of Ms. Dhaliwal’s claim, I agree with Fleming J.A. that the award in the full amount of \$56,765 was supported by the evidence and the trial judge’s findings. I also consider it significant that while the appellant did not concede the \$50,000 component of the claim, counsel said nothing in response to this aspect of Ms. Dhaliwal’s claim in detailed closing submissions.

“The Honourable Justice Riley”

Reasons for Judgment of the Honourable Mr. Justice Groberman

[106] I have had the advantage of reading the reasons of my colleagues, Justice Fleming and Justice Riley. For the most part, I am in agreement with Justice Fleming’s reasons. I do not however, agree with her analysis of the judge’s misapprehension of the scope of the concession made by the appellant in respect of the plaintiff’s loss of earnings from Vancity Visa, and so have decided to write dissenting reasons.

[107] I acknowledge that in *Dignard v. Dignard*, 2025 BCCA 43, the Court treated the judge’s interpretation of a concession as if it were a “finding of fact” subject to a standard of review of “palpable and overriding error”. In that case, the Court found that the judge’s finding was, even on that fairly deferential standard, erroneous.

[108] I am not convinced that a trial judge’s misapprehension of a concession should be analysed on that deferential standard. A trial judge is entitled to considerable deference with respect to ordinary issues of fact (and of mixed fact and law) because the judge is in a unique position to assess evidence, including the credibility and reliability of witnesses. The assessment of evidence is the exclusive province of the trial judge and is not to be lightly interfered with.

[109] Where a judge relies on a concession, however, it is the antithesis of an assessment of evidence. It is the withdrawal of an issue from the judge’s purview. There is no basis to defer to the judge’s conclusion in such a case, as the judge has not undertaken any analysis.

[110] Concessions are, strictly speaking, a matter of pleading. Rule 3-3(2)(b) of the *Supreme Court Civil Rules*, B.C. Reg. 168/2009 requires a defendant to indicate, in the response to civil claim, whether it consents to, opposes, or takes no position on the granting of relief claimed. In both of the claims brought by the plaintiff, the appellant stated that it opposed the granting of all of the relief sought in the notice of civil claim.

[111] It has long been clear that a concession will only be valid if it is clear and deliberate: (see, for example *British Columbia Ferry Corp. v. T&N, plc* (1993), 31 C.P.C. (3d) 379 (BC SC); *Adams v. Fairmont Hotels & Resorts Inc.*, 2008 BCCA 444; and *Deng v. Zhang*, 2022 BCCA 271).

[112] Of course, a party may, after denying a fact or opposing relief in its pleading, choose to concede the matter as the litigation progresses. While the party may do so by formally amending its pleading, it is also common for counsel to simply indicate to the trial judge that a matter is conceded, or that opposition to a remedy is withdrawn. The concession must still be clear and deliberate. A mere failure to focus argument on an issue does not amount to a concession and does not absolve the trial judge from the need to grapple with the evidence to determine whether a plaintiff has satisfied the burden of proof (see, for example, the comments of Justice Horsman in *JM Food Services Ltd. v. Waheed*, 2024 BCCA 381 at para. 55).

[113] In its pleadings, the appellant denied that the plaintiff suffered the losses alleged in the notices of civil claim and opposed her claim for monetary relief. At that stage, the onus was clearly on the plaintiff to satisfy the judge with respect to the quantum of damages.

[114] The appellant made a clear concession in its submissions at trial with respect to part of the plaintiff's losses from employment at Vancity Visa. It conceded that the plaintiff was entitled to the amount of \$6,765, representing the loss of employment between May 2015 (the date of the first accident) and August 4, 2015 (the date that the plaintiff commenced work with Service Canada). It made no concession with respect to the period after August 4, 2015, a period for which the plaintiff was claiming \$50,000.

[115] In my view, when a judge fails to ensure that a concession is clear and deliberate, the judge makes an extricable error of law and is not entitled to any deference in interpreting the concession. However, even if, contrary to my views, the standard of review is "palpable and overriding error", it seems to me that the error

has been made out. As my colleague indicates, the error in this case is a “palpable” one.

[116] I accept that not every error made by a trial judge demands appellate correction. Where the error is one that is not material to the decision, it can safely be ignored. In this case, however, the error was a material one, as it led the judge to refrain from assessing the evidence. He reached a conclusion on the quantum of damages (in respect of the Vancity Visa claim) without considering the evidence at all. In doing so, he committed a material (and “overriding”) error.

[117] While my colleague says that “there was ... no live issue regarding the \$50,000 component”, I am not persuaded that that is the case. The claim for damages was opposed in the pleadings, and, except to the limited extent of counsel’s concession, it remained an issue at trial. The trial judge was required to make an assessment. As a result of his misapprehension of the concession, he failed to do so. That was a reversible error.

[118] Ordinarily, an error of this sort would result in the matter being remitted to the trial court, where it would go back before the judge who presided over the case. That judge would be in a position to assess the evidence and make an order. Unfortunately, such a course of action is not possible in this case, as the judge who presided over the trial has retired.

[119] Recognizing that there is no economically viable way to have this matter assessed in the trial court, the appellant has requested that this Court review the evidence and circumstances of the case and make a final determination.

[120] This is far from an ideal solution: the judges of this Court were not present for the trial and had no opportunity to hear the witnesses. While we do have a complete transcript, it is a poor substitute for actually having heard and seen the witnesses. The assessment of damages in this case is far from straightforward. While there is significant evidence suggesting that the plaintiff might have been capable of

performing two jobs (particularly in her own testimony), the trial judge expressed some reluctance to rely too heavily on the plaintiff's self-assessment.

[121] The question of whether the plaintiff was likely to sustain such a heavy workload over the long term was one that required a full assessment of nuances of the testimony. It is not one readily answered by simply looking at the transcript.

[122] In light of my colleagues' views that the trial judgment is not tainted by reversible error, there is nothing to be gained by embarking on the exercise of making an independent assessment of the transcript, particularly given the weaknesses inherent in any such analysis. Accordingly, I simply say that, in my view, the judge did make a reversible error that would ordinarily lead to the matter being returned to the trial court for reconsideration, and I would have allowed the appeal on that basis. I agree with my colleagues that the other grounds of appeal do not disclose reversible error. Accordingly, I would, like them, dismiss those other grounds.

"The Honourable Mr. Justice Groberman"