COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Keller v. Sparks,*
2023 BCCA 194

Date: 20230310
Docket: CA48162

Between:

Lauren Ginny Rae Keller

Appellant
(Defendant)

And

Brandi Colleen Sparks

Respondent
(Plaintiff)

Before: The Honourable Madam Justice Saunders
The Honourable Madam Justice Fenlon
The Honourable Mr. Justice Hunter

On appeal from: An order of the Supreme Court of British Columbia, dated February 14, 2022 (*Sparks v. Keller*, 2022 BCSC 231, Vancouver Docket M182238).

Oral Reasons for Judgment

Counsel for the Appellant:	R.C. Brun, K.C. J.J.L. Brun, K.C.
Counsel for the Respondent:	D.J. Taylor
Place and Date of Hearing:	Vancouver, British Columbia March 7, 2023
Place and Date of Judgment:	Vancouver, British Columbia March 10, 2023

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Summary:

The respondent was injured in a car accident for which fault was admitted. The appellant challenges the award of $450,000 for loss of future earning capacity. She submits the judge erred in not considering evidence that the respondent's psychological health could improve, in assessing earning capacity with regard to the respondent's income in a year in which she worked two jobs, when she worked only one prior to the accident, and by failing to properly account for contingencies. Held: Appeal dismissed. The judge's finding that the respondent's health was unlikely to improve was open to her on the record. The judge did not err in using the respondent's 2016 earnings as a marker in assessing damages, as she was using the capital asset approach—a method not based on a line by line mathematical calculation. The magnitude of the award and the relatively minimal contingency discount reflect the judge's assessment of the respondent's extraordinary work ethic.

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[1] **FENLON J.A.**: The question before us is whether the trial judge overcompensated the respondent, Brandi Sparks, for loss of future earning capacity.

[2] Ms. Sparks was injured in a car accident in July 2017. Fault for the accident was admitted and a trial was held to assess various categories of damages. On appeal, the appellant, Lauren Keller, challenges only the award of $450,000 for loss of future earning capacity, contending the judge made three main errors:

1. failing to recognize potential for improvement in the respondent's condition following psychological treatment;

2. using the wrong base number for past earnings to assess future wage loss; and

3. failing to account for negative contingencies and double counting positive ones.

1. Real and Substantial Potential for Improvement

[3] The appellant submits that both the medical experts, physiatrist Dr. Hugh Anton and psychiatrist Dr. Mitchell Spivak, concluded the respondent was probably suffering from Somatic Symptom Disorder ("SSD"), which, once treated, could potentially enable Ms. Sparks to recover some of her work-related capacity.

The appellant says the judge failed to recognize this evidence and to take it into account in discounting the award for loss of future earning capacity.

[4] I see no error in the judge's decision not to discount the damage award based on the potential for improvement in the respondent's psychological health. The judge considered the evidence of Dr. Anton and Dr. Spivak but concluded that the respondent was unlikely to improve: at para. 87. That finding was open to her on the record.

[5] Dr. Anton said only that it was possible the respondent was suffering from SSD and suggested an assessment by a psychiatrist. Dr. Spivak opined that the respondent was probably suffering from SSD, but he also said that the respondent's situation was unique in that her SSD stemmed from a physical injury and, as the judge noted, he could not say to what degree the respondent's pain and incapacity were caused by her physical injuries as opposed to a psychological overlay. Dr. Spivak also testified that "largely speaking, when it comes to pain…if it's been this many years we don't expect things to change dramatically, despite interventions". Finally, I note that the judge had before her evidence that the respondent had received psychological treatment in the form of cognitive behavioural therapy from her family physician.

2. Use of the Wrong Base Number to Assess Future Wage Loss

[6] Assessing this ground of appeal requires some understanding of the respondent's circumstances before the accident. She was 44 years old at trial. She had dropped out of high school in grade 11. The judge found that throughout the respondent's working life, she had worked at physically demanding jobs that did not pay much more than minimum wage, including in fast food restaurants, a metal shop, an upholstery shop, and an autobody shop: at para. 8. The judge described the respondent's work history in the years before the accident as follows:

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> [10] In 2013, the plaintiff started working the midnight shift at a Tim Horton's. This enabled her to earn money and see her children off to school in the morning. The plaintiff wanted them to have a stable upbringing and a strong parental presence. The plaintiff's job duties included cleaning the bathroom, mopping the floors in the store, cooking, cleaning, and lifting and carrying heavy boxes of supplies.
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> [11] The plaintiff left her job at Tim Horton's to work as a barista at a Starbuck's coffee shop, but since she was not receiving full-time hours she looked for another job. In August 2015, she was hired to work in the deli at the Safeway in Peninsula Village in White Rock.
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> [12] The plaintiff's duties as a deli clerk included lifting boxes of chicken that weighed 40 pounds or more, standing for long periods of time and bending down and reaching for items in the deli case. At just over 5' tall, the plaintiff had to bend over and reach far into the deli cases to take out products for customers. The plaintiff also cooked items for sale in the deli, made sandwiches, cleaned the deli and served customers.
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> [13] Between August 2015 and January 2017, the plaintiff worked at both Safeway and Starbucks. From January 2017 until the Accident, she worked full-time at Safeway.

[7] In early 2017, the respondent stopped working part-time at Starbucks because she could not commit to working seven days a week.

[8] Prior to the accident, despite working more than full-time, the respondent was almost entirely responsible for domestic chores including cutting the grass, preparing meals, cleaning the house, and home maintenance such as sanding and staining a deck. It was common ground that she was extraordinarily hard-working, and strongly motivated to provide a better life for her three children who were aged 11, 16 and 19 at trial.

[9] The judge described the respondent's employment after the accident as follows:

> [24] The plaintiff managed to work for four days at Safeway after the Accident, but was sent home as she could not physically manage her duties. Four months later, in October 2017, she started back at work on light duties for two hours per day. The plaintiff was unable to perform light duties and had to quit the Safeway job in December 2017.
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> [25] The plaintiff's doctors recommended that she stay off work until she recovered from her injuries. Dr. Sawhney assisted her with an application for Canada Pension Plan disability benefits ("CPPDB"), which was successful. The plaintiff has been receiving a CPPDB since 2019.

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> [26] The plaintiff has made efforts to find more sedentary employment. She has taken two courses towards her GED: Grade 11 accounting and law 12. The plaintiff took the courses online and went to school to meet with the instructor periodically for assistance. She found returning to course work difficult and felt that her memory problems held her back. At one point the plaintiff was prescribed Dexedrine and found that it helped, although she discontinued the medication after a time and could not complete other courses she had signed up for.
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> [27] The plaintiff received good grades in her courses, but found being online made her nauseous. She also felt that her memory was poor and she had to repeat things. As one example, she said she had to draft several versions of an email before she sent it, although I observe this is not unusual.
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> [28] The plaintiff consulted with an occupational therapist, Shereen Enns, and with Work BC to find employment that she was physically capable of doing. As of the date of trial she has not found anything suitable. She is very concerned about her inability to contribute financially to the household as she once did.

[10] The judge began her assessment of future loss of earning capacity by reviewing the applicable jurisprudence and in particular observing that there are two methods for quantifying the loss of future earning capacity: the earnings approach based on the plaintiff's projected annual salary, and the capital asset approach where future lost earnings are not readily measurable, citing *Perren v. Lalari*, 2010 BCCA 140 at para. 32. She observed that the parties agreed in the case before her that the capital asset approach should be used in this case, although both parties acknowledged that the same result would be achieved through the earnings approach given that the respondent's earnings were consistently at the minimum wage level: at para. 84.

[11] At trial, the appellant submitted that an appropriate award for the loss of earning capacity in this case would be equivalent to three years of full-time salary prior to the accident, or $90,000. The judge rejected that submission, finding that sum would not adequately compensate the respondent for her actual loss: at para. 94.

[12] At trial, the respondent proposed using her income for the last year of full-time work prior to the accident of $28,455, multiplied by the number of years between the

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accident and the respondent turning age 65, for a total of $509,347, and then applying a 20% discount to account for contingencies, leaving $407,478: at para. 88.

[13] The appellant submits the judge accepted that proposal for determining loss of future earning capacity, but reduced the discount to 10%, resulting in an award of $450,000. She says the judge erred in adopting the respondent's use of a base salary of $28,455 because that number reflects the respondent's income in 2016, when she was working at Starbucks and earning $5,105 annually in addition to her earnings at Safeway—which was no longer the case as of January 2017, well before the accident. The appellant submits the base number should have included only the respondent's Safeway salary of $23,350.

[14] I note that a base salary of $28,000 could be justified by the past work history of the respondent which included taking on second jobs, and the judge's finding that, because the respondent's children were now older, she would be able to work more hours: at para. 85.

[15] More importantly, the judge was not using the earnings approach to assess damages. She was, rather, using the capital asset approach adopted by both parties—a method that is not based on a line by line mathematical calculation.

[16] In keeping with the capital asset approach, the judge analysed the four factors set out in *Perren*, addressing: whether the respondent was less capable overall from earning income from all types of employment; whether she was less marketable or attractive as a potential employee; whether she had lost the ability to take advantage of all job opportunities; and whether she was less valuable to herself as a person capable of earning income in a competitive labour market. It was only after conducting that analysis that the judge stated she was "satisfied that an award of $450,000 is a fair and reasonable assessment of the plaintiff's future loss of capacity": at para. 97.

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[17] What is notable about the judge's award is that the respondent, using a mathematical calculation, had sought a lesser award of $407,478. The judge's reasons for awarding the higher number are set out at para. 97:

> [97] I am satisfied that an award of $450,000 is a fair and reasonable assessment of the plaintiff's future loss of capacity. It is slightly less than 90% of what she would have earned had she continued on at Safeway or similar employment. This takes into account the negative contingency of possible retraining and returning to the workforce in several years. However, it also considers the positive contingencies such as the likelihood that the plaintiff might have earned more at Safeway in a junior management role, as envisioned by her former supervisor, potential overtime in her current role, and the potential benefits of future minimum wage increases.

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[18] As I read this part of the judge's reasons, she has landed on an award of $450,000, using the loss of future earning capacity approach, and then has done a "reality check" on this figure by determining it was slightly less than 90% of what the respondent would have earned had she been able to continue in her pre-accident employment.

[19] In this context, despite the able submissions of Mr. Brun, I am not persuaded that the use of the 2016 earnings as a marker in assessing fair and reasonable damages for loss of future earning capacity constitutes reviewable error. Assessing damages is a matter of judgment: The role of the court is to assess losses based on the evidence, not to calculate them mathematically: *Rosvold v. Dunlop*, 2001 BCCA 1 at paras. 11, 18. As the appellant acknowledges, assessing damages for loss of future earnings is a notoriously difficult task given the multitude of factors and future uncertainties at play.

3. Failure to Properly Account for Contingencies

[20] The appellant submits the judge erred in identifying and taking into account the applicable contingencies when valuing the respondent's loss of capacity claim which, if assessed properly, would justify a contingency deduction of 40%.

[21] The first deficiency is said to be a failure to account for the likelihood of the respondent's psychological health improving. As I have already concluded that the

judge did not err in finding there was no substantial likelihood of improvement with psychological treatment, it follows that no contingency deduction for that factor was required.

[22] Next, the appellant points to the judge's failure to account for negative labour market contingencies such as illness, injury, early retirement or death. On the positive side, the appellant says the judge identified overtime when that was already included in the base Safeway salary of $23,000. Further, the appellant says the judge counted the positive contingencies of inflation and increased minimum wages twice, identifying each of them as a positive contingency despite the fact that the CIVJI present value discount used by the respondent already included inflation and wage increases.

[23] With respect to overtime wages being counted twice, the judge found that the respondent would be able to work more hours as her children grew older, which could account for a positive contingency for greater overtime in the future than that reflected in her Safeway earnings in 2016. Furthermore, the 2016 overtime would have been constrained by the hours the respondent was working that year at her second job at Starbucks. I note as well that, although minimum wage increases were already accounted for in the CIVJI present value multiplier, the respondent's entitlement to wage increases based on years of service were not.

[24] The judge concluded that a 10% discount was appropriate after balancing the respondent's potential for promotion and wage increases against the negative contingencies of the respondent potentially retraining and returning to work. She expressly rejected the appellant's arguments that the award should be reduced to account for the respondent working less in future to care for grandchildren, or for degenerative changes eventually causing her to be unable to work at the same level.

[25] The award of damages for loss of future earning capacity is a generous one. But the magnitude of the award, and the relatively minimal contingency discount used by the judge to test her lump sum award, can only be taken to reflect the judge's assessment that this extraordinarily driven and hard-working woman would

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not have been likely to retire early, or cut back her hours due to ill health, and would have been likely to work more and advance in her career. In light of the extraordinary work ethic of this respondent, I do not find that the judge erred in so doing, or that the award was unfair or unreasonable.

[26] For these reasons, I would dismiss the appeal.

[27] **SAUNDERS J.A.**: I agree.

[28] **HUNTER J.A.**: I agree.

[29] **SAUNDERS J.A.**: The appeal is dismissed.

"The Honourable Madam Justice Fenlon"

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