

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Pickwell v. Rajwan*,
2025 BCCA 32

Date: 20250204
Dockets: CA48064; CA48081

Docket: CA48064

Between:

Scott Pickwell

Appellant
(Plaintiff)

And

Ranjit Rajwan

Respondent
(Defendant)

- and -

Docket: CA48081

Between:

Scott Pickwell

Appellant
(Plaintiff)

And

Svetlana Rotter and Daniel Rotter

Respondents
(Defendants)

Before: The Honourable Madam Justice Fenlon
The Honourable Justice Dickson
The Honourable Justice Fleming

On appeal from: An order of the Supreme Court of British Columbia, dated
January 10, 2022 (*Pickwell v. Rotter*, 2022 BCSC 18,
New Westminster Dockets M176212 and M183822).

Counsel for the Appellant: J.E. Shragge

Counsel for the Respondents: C.C. Godwin
T.M. Reid

Place and Date of Hearing: Vancouver, British Columbia
October 1, 2024

Place and Date of Judgment, with Written
Reasons to follow: Vancouver, British Columbia
October 1, 2024

Place and Date of Written Reasons: Vancouver, British Columbia
February 4, 2025

Written Reasons of the Court

Summary:

The appellant seeks leave to resile from the position he took at trial regarding the proper quantum of damages for loss of future earning capacity in his personal injury claim. In the event that leave to resile is granted, the appellant intends to ask this Court to substitute a much higher award. Held: Leave to resile is not granted. Permitting the appellant to resile from his position at trial would not be in the interests of justice. The appellant's trial counsel made a series of strategic decisions in arguing the question of damages. These decisions bind the appellant, who has demonstrated no exceptional circumstances warranting a departure from this general rule.

Reasons for Judgment of the Court:**Introduction**

[1] The appellant, Scott Pickwell, appeals the award of \$407,761 for loss of future earning capacity in a personal injury claim. The sole issue raised on appeal is whether the award is inordinately low because the trial judge misapplied the framework in *Rab v. Prescott*, 2021 BCCA 345. Before us, Mr. Pickwell sought leave to resile from the position he took at trial, namely, that damages for the loss of future earning capacity should be assessed at \$500,000. In the event leave was granted, he wished to ask this Court to substitute a much higher award.

[2] After hearing Mr. Pickwell's application we declined to grant him leave to resile from his trial position, with reasons to follow. These are our reasons for dismissing the leave application.

Background

[3] Mr. Pickwell was injured in two motor vehicle accidents: the first on December 16, 2013; the second on September 23, 2014. At the time of both accidents, he was 27 years old. The respondents admitted liability and the case went to trial to determine Mr. Pickwell's damages. His three most severe injuries were chronic back pain, major depressive disorder, and persistent postural perceptual dizziness.

[4] Mr. Pickwell graduated from high school in 2004. Before the accidents, he worked minimum wage or entry level jobs, mostly in retail, interrupted by lengthy

periods of unemployment. He was single, had never married, and had lived with his parents for most of his adult life. His average annual income for the years 2004-2013 was \$14,808, which average accounts for the periods of unemployment.

[5] Six days before the first accident, Mr. Pickwell began working at Dlask Arms, a firearms retailer. He was hired on a temporary part-time basis and paid \$12 per hour. He missed two days of work following the first accident, then continued to work until February 14, 2014, when his employment ended for reasons unrelated to the accident. He never worked again.

[6] The trial was heard intermittently over three weeks between September 8, 2020, and October 22, 2021.

At Trial

[7] At trial, counsel for Mr. Pickwell and the respondents made closing submissions both orally and in writing. As noted, Mr. Pickwell's counsel sought an award of \$500,000 for the loss of future earning capacity. In doing so, he stated that the magnitude of the loss was the same whether it was assessed using an earnings approach or a capital asset approach.

[8] Mr. Pickwell's counsel went on to explain that the \$500,000 award he sought represented approximately one-half of the present value of the loss of \$40,000 annually. He described in detail "how we got to the number that we're asking Your Ladyship to order ... \$500,000", submitting, first, that, but for the accidents, Mr. Pickwell would have earned approximately \$40,000 in annual income and worked to age 65:

... Having said that, My Lady, [co-counsel] and I when we sat there did was we said, all right, \$15 an hour. That's minimum wage, full work, full year. That's 30 or \$31,000. Then we added something, and there was no art to this. There was no mathematical calculation to this. We added something for the fact he was young. Yes. He moved about, but that's what young people do. Young people move up in the world. So we got to a number of \$40,000. Now, again, Your Ladyship may say that's too much or too little or whatever.

[9] Next, Mr. Pickwell's counsel discussed the process by which he reached the \$500,000 figure based on an assumed annual income of \$40,000. In summary, he stated, he applied the present value income multiplier provided by Mr. Pickwell's economic expert, Segiy Pivnenko, which resulted in a without-accidents future stream of income, to age 65, of \$962,080, and then applied a global 50 percent contingency deduction. This produced a net without-accidents lifetime earning capacity of \$481,040. Thereafter, he rounded the \$481,040 figure up to \$500,000 to account for non-wage benefits that Mr. Pickwell would have received during his working life. As to the prospect that Mr. Pickwell might work again in the future, his counsel said this:

Again, My Lady, we weren't prepared to stand before Your Ladyship and say, well, he's never going to work again. He's never going to improve. I've said the prognosis is guarded or gloomy or whatever, and I submit that it is. But in doing our future loss calculation, we put in some adjustment for the fact that he may improve. He may not. He may go back to some part-time work, whatever. That's how we got to the \$500,000.

[10] For his part, counsel for the respondents submitted, first, that there was insufficient evidence to enable the judge to ascertain Mr. Pickwell's likely without-accidents future income. Alternatively, he argued, quantification of the loss should begin with the premise that, but for the accidents, Mr. Pickwell would have worked in minimum wage retail jobs and earned approximately \$30,000 per year. Using the present value income multiplier provided by the respondents' economic expert, Douglas Hildebrand, their counsel calculated Mr. Pickwell's without-accidents lifetime earning capacity to age 60, net of labour market contingencies, as \$473,250. After accounting for Mr. Pickwell's residual earning capacity, he submitted that damages for loss of future earning capacity would be in the range of \$100,000 to \$225,000.

Reasons for Judgment: 2022 BCSC 18

[11] The judge began her analysis of the loss of future earning capacity by outlining the three-part test articulated in *Rab*. After noting that the respondents conceded the first part of the *Rab* test was met, she considered and rejected their

argument that there was insufficient evidence to ascertain Mr. Pickwell’s likely future income but for the accidents. In her view, the real question was the quantification of Mr. Pickwell’s loss.

[12] The judge held that “any assessment of Mr. Pickwell’s future loss of income capacity must be made with reference to the evidence of what he did in the nine years before the Accidents”: at para. 96. She agreed with the respondents that quantification of his without-accidents lifetime earning capacity should rest on the provincial minimum wage, namely, \$15.20 per hour, which produced a full-time annual salary of just over \$30,000. The judge found that “the only real and substantial possibility is that, but for the Accidents, Mr. Pickwell was going to continue to earn minimum wage for the duration of his career”: at para. 97. She also found that he would likely have worked until age 70 for financial reasons: at para. 97.

[13] The judge went on to apply Mr. Pivnenko’s present value income multiplier to the \$30,000 annual wage figure. Unlike the multiplier provided by Mr. Hildebrand, Mr. Pivnenko’s multiplier incorporated a discount rate of 1.5 percent plus the risk of mortality, but not labour market contingencies: at para. 98. Then the judge applied a contingency discount “for the real and substantial possibility ... that, but for the Accidents, Mr. Pickwell would have lengthy periods of unemployment and underemployment for the duration of his career”: at para. 99. She assessed that possibility at 40 percent “[b]ased on the evidence”, which produced a \$479,718 figure: at para. 100. Finally, she applied a further negative contingency to account for the real and substantial possibility that Mr. Pickwell would recover from his injuries enough to engage in paid future employment, which possibility she assessed at 15 percent based on the expert opinion evidence: at para. 101.

[14] In the result, the judge awarded Mr. Pickwell \$407,761 for the loss of future earning capacity.

On Appeal

[15] Mr. Pickwell contends the judge erred in assessing his damages for loss of future earning capacity by:

- a) finding the only real and substantial possibility was that he would never have earned more than minimum wage and then calculating his without-accidents lifetime earnings on that basis;
- b) failing to analyse the relative likelihood that he would experience lengthy periods of unemployment and underemployment; and
- c) failing to analyse the relative likelihood that he might recover from his injuries enough to engage in future paid employment.

[16] On a proper application of the *Rab* test to the facts and evidence, he says, a fair and reasonable award for his loss of future earning capacity is \$986,820 or slightly less, depending on the underlying assumptions applied on a principled reassessment. Given the significant difference between such an award and that sought at trial, Mr. Pickwell asks for leave to resile from his trial position that a \$500,000 award is appropriate, and submits that doing so would not prejudice the respondents or bring the administration of justice into disrepute. Moreover, he says, it would enable us to cure material errors made in the court below without unduly fettering our analysis by imposing an unprincipled \$500,000 cap. In other words, he says, permitting him to recast his trial counsel's arguments on his loss of future earning capacity would serve the interests of justice.

[17] The respondents resist Mr. Pickwell's application. They argue that his trial position on the appropriate method of analysis and quantum of damages for loss of future earning capacity reflected a strategic decision that was deliberately adopted by trial counsel and relied on by the judge. In the circumstances, they submit, a re-thinking of that strategy by appellate counsel does not justify permitting Mr. Pickwell to change tack in this Court.

Discussion

Legal Framework

General Principles

[18] On occasion, this Court will allow an issue that was not raised in the court below to be raised on appeal pursuant to its power to “exercise any original jurisdiction that may be necessary or incidental to the hearing and determination of an appeal”: *Court of Appeal Act*, S.B.C. 2021, c. 6, s. 24(2)(c); *1052387 B.C. Ltd. v. Forjay Management Ltd.*, 2024 BCCA 81 at para. 63. The Court also has ancillary jurisdiction to prevent an abuse of its own process, which may include a party taking inconsistent positions in legal proceedings: *Keremelevski v. Guisti Nairne*, 2020 BCCA 372 at para. 13; *Argo Ventures Inc. v. Choi*, 2020 BCCA 17 at para. 31.

[19] This Court’s discretionary power to grant a party leave to raise a new issue on appeal is exercised sparingly: *Forjay* at para. 63. The salient legal principles were recently explained in *Deissner v. Boorsma*, 2023 BCCA 476, where the Court emphasized that a restrained approach will be adopted when these principles are applied. In particular, the Court affirmed that, generally speaking, a new issue should not be raised unless it could not have been illuminated further had it been raised at the proper time: at para. 16.

[20] In addition, there is a distinction between raising a new issue on appeal and resiling from a position deliberately taken in the tribunal of first instance. As Abrioux J.A. explained in *Argo Ventures*:

[31] ... Generally, this court has not permitted a party that has chosen a particular position in the trial court to abandon that position on appeal: *Sahlin v. The Nature Trust of British Columbia, Inc.*, 2011 BCCA 157 at para. 38. Furthermore, taking inconsistent positions in legal proceedings can constitute an abuse of process: *Fortinet Technologies (Canada) ULC v. Bell Canada*, 2018 BCCA 277 at para. 23.

[21] When a party seeks leave to resile from a trial position for the purpose of advancing an inconsistent position on appeal, the threshold question is whether the interests of justice are served by allowing them to raise the new argument. In

resolving that question the Court considers all the circumstances, including any prejudice the other parties would suffer if the applicant were to be granted leave to resile. Other relevant factors for consideration include the finality principle, the importance of the issues raised, the nature of the pleadings, and the reason(s) advanced for adopting the inconsistent position at the appellate level. Although a party's interest in obtaining an error-free judgment is also relevant, it is only one factor to be weighed along with all the others that bear on the interests of justice in a given case: *Deissner* at paras. 22–29; *Forjay* at paras. 63–66.

[22] This Court declined to grant the appellants leave to resile from their position taken at trial in *Deissner*. Given Mr. Pickwell's reliance on the differences between that case and this case discussed below, I will review *Deissner* in some detail.

Deissner v. Boorsma, 2023 BCCA 476

[23] In *Deissner*, the respondent agreed to sell a property to the appellants subject to a lease-back condition. When the parties failed to agree on the terms of the proposed tenancy, the respondent claimed the appellants had repudiated the contract and refused to complete the sale. In response, the appellants sued for breach of contract and sought specific performance. In their pleadings and on summary trial, the appellants argued that the lease-back clause was simply an "agreement to agree" that was neither binding nor enforceable, and that, in any event, the lease-back clause was severable from the respondent's obligation to sell. The summary trial judge accepted some, but not all, of their arguments. Specifically, she found that the lease-back clause was unenforceable, but it could not be severed. As a result, she held that the contract was unenforceable and dismissed the appellants' specific performance claim.

[24] On appeal, the appellants in *Deissner* contended that the judge erroneously based her enforceability analysis on the subjective intentions of the parties, rather than on their objective intentions. In advancing their appeal, they wished to argue that: the lease-back clause was enforceable and not severable; the respondent repudiated the contract by refusing to complete the sale in accordance with that

clause; and they were entitled to an order for specific performance with a new completion date. In other words, they wished to make new arguments on appeal that were directly contrary to the position they took at trial.

[25] This Court concluded that it would not be in the interests of justice to allow the appellants “to take a position entirely inconsistent with the position taken at trial” and declined to grant them leave to resile from their trial position: at para. 22. In doing so, the Court noted the appellants’ new position was inconsistent with their pleadings and found that allowing the new argument would prejudice the respondent: at para. 22. Further, the Court stated: granting leave would violate the principle of finality; the litigation would have been avoided had the new position been taken from the outset; and the appellants had not explained why the new position was not adopted earlier: at paras. 24–26. Moreover, the Court observed, although the judge erroneously used the parties’ subjective intentions to determine whether they reached an agreement on the lease-back condition, that error was just one factor for consideration when determining the interests of justice: at para. 29.

Analysis

[26] Mr. Pickwell contends that this Court should grant him leave to change his trial position on the proper method of analysis and quantum of damages for his loss of future earning capacity. In his submission, the new approach he wishes to advance is simply an alternative way of quantifying his loss. In addition, he says, his new approach is not inconsistent with the pleadings or evidence, the judge’s errors are apparent on the face of the reasons, and the respondents did not defend the action based on his trial position, all of which distinguish this case from *Deissner*. In the circumstances, he says, allowing him to advance the proposed new position on appeal would not prejudice the respondents in any meaningful way.

[27] Moreover, Mr. Pickwell submits, the finality principle is not strongly engaged in the circumstances of this case. He acknowledges the admonition in *Deissner* at para. 24 that “[a] party is not entitled to try one strategy at trial, and if it proves to be unsuccessful, to adopt a different strategy on appeal, effectively seeking a ‘do over’”.

However, he says, that general statement must be conditioned by the principle explained in *Dornan v. Silva*, 2021 BCCA 228 at para. 163, namely, that this Court may substitute a proper damages award for personal injuries that is consistent with the evidence and factual findings at trial. According to Mr. Pickwell, if this Court accepts that the judge erred in assessing his damages for loss of future earning capacity some sort of “do over” is inevitable. Therefore, he submits, the real question is whether on a reassessment he should be held “on principle” to the approach adopted by his counsel at trial.

[28] According to Mr. Pickwell, subject to one exception (and perhaps another), the interests of justice weigh against holding him to his trial position “on principle”. He acknowledges that he conceded at trial that there is a real and substantial possibility he could recover sufficiently to gain future employment, which concession the judge relied on in crafting her reasons. As a result, he says, it would not be appropriate for him to resile from his trial position on the point. However, he contends, he can appropriately argue that the extent of the related contingency deduction made by the judge is arbitrary, unprincipled, and open to variation. He can also argue that she erred in finding the only real and substantial possibility was that he would have earned minimum wage for all of his career but for the accidents and failed to conduct a principled analysis of the relative likelihood of the future events for which she applied negative contingencies.

[29] Given the judge’s manifest errors, Mr. Pickwell says this Court should consider the matter *de novo*, reassess the loss, and in doing so employ either a census-based method or adjusted wage rate to his without-accidents future stream of income, subject to evidence-based contingency deductions. He acknowledges that advocating a census-based method would depart from his trial submissions, but argues that a census-based method is consistent with the expert evidence and therefore employing it would not violate the finality principle. In addition, he submits, unlike the new position in *Deissner*, his new position is not diametrically opposed to his trial position. He also emphasizes that he did not provide trial counsel with

specific instructions on how to calculate the damages for loss of future earning capacity sought at trial.

[30] Despite counsel’s able submissions, we are not persuaded that it would be in the interests of justice to allow Mr. Pickwell to resile from his trial position on the proper method of analysing damages for his loss of future earning capacity or the \$500,000 quantum of the award sought.

[31] Trial counsel made a strategic decision to advocate the method he applied to assessing Mr. Pickwell’s loss of future earning capacity. He also made strategic decisions to: use the minimum wage as the starting point in the analysis; invite the judge to apply a 50 percent contingency deduction to Mr. Pickwell’s without-accidents future stream of income; and seek overall damages of \$500,000 for the loss of future earning capacity. Although the judge did not accept his submission that Mr. Pickwell would likely have earned \$40,000 annually or worked until age 65, she plainly accepted the general approach to assessing the loss advocated by his trial counsel and relied on it in crafting her reasons. Given the nature of the evidence and considered from a tactical perspective, trial counsel’s decision to approach the matter as he did is not hard to understand.

[32] Strategic decisions made by trial counsel typically bind their clients. If it were otherwise, the finality principle would be seriously undermined. With the benefit of fresh eyes and trial reasons, appellate counsel is well-placed to identify new and different approaches that, in hindsight, may appear to be preferable. However, to repeat, as stated in *Deissner*, “[a] party is not entitled to try one strategy at trial, and if it proves to be unsuccessful, to adopt a different strategy on appeal”: at para. 24.

[33] Like the appellants in *Deissner*, Mr. Pickwell has failed to explain why his trial counsel did not adopt the new position on the method of analysis and quantum of damages proposed by his appellate counsel. While we recognize that *Deissner* involved a more extreme proposed change, this does not detract from the underlying principle that “a change of counsel and a re-thinking of strategy does not give a party license to change tack on appeal”: *Deissner* at para. 26. Nor does it mean that the

interests of justice would be served by granting Mr. Pickwell leave to resile from his trial position on the proper method of analysis and seek nearly double the quantum of damages for loss of future earning capacity sought in the Court below.

[34] In our view, there is nothing exceptional in the circumstances that distinguishes this appeal from the many others in which the appellant alleges a misapplication of the *Rab* framework and asks this Court to reassess damages based on proper principles. In addition, in his appeal as presently framed, Mr. Pickwell challenges a factual finding made by the judge and seemingly asks this Court to reassess the loss based on different facts, which is not the role of this Court.

[35] As to the overall merits of the appeal, we make no comment. Mr. Pickwell remains entitled to proceed with the appeal within the constraints of his position taken at trial, and may choose to do so given the difference between the \$500,000 quantum sought and \$407,761 awarded. That being so, the question of merits is best left to the division hearing the appeal.

Conclusion

[36] For the foregoing reasons, we declined to grant leave to Mr. Pickwell to resile from his trial position on the proper method of analysis and quantum of damages for his loss of future earning capacity.

“The Honourable Madam Justice Fenlon”

“The Honourable Justice Dickson”

“The Honourable Justice Fleming”