# COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Pickwell v. Rajwan,*
2025 BCCA 314

Date: 20250911
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 Chief Justice Marchand
The Honourable Justice Griffin
The Honourable Justice Mayer

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

Counsel for the Appellant: J.E. Shragge

Counsel for the Respondents: C.C. Godwin

Place and Date of Hearing: Vancouver, British Columbia
June 9, 2025

Place and Date of Judgment: Vancouver, British Columbia
September 11, 2025

**Written Reasons by:**
The Honourable Justice Mayer

**Concurred in by:**
The Honourable Chief Justice Marchand
The Honourable Justice Griffin

***Summary:***

*The appellant appeals an award of future loss of earning capacity resulting from injuries sustained in two motor vehicle accidents. The appellant submits the trial judge erred by: (1) finding that, but for the accidents, he would never have earned more than minimum wage, and calculating his loss of future earning capacity on that basis; (2) failing to analyze the relative likelihood of his experiencing lengthy periods of unemployment or underemployment in determining and then applying a 40 percent contingency deduction; and (3) failing to analyze the relative likelihood that he would sufficiently recover from his injuries to engage in paid employment in the future in determining and then applying a further 15 percent contingency deduction. Held: Appeal dismissed. The judge did not make any palpable and overriding errors of fact or any errors in law or principle in assessing the appellant's future loss of earning capacity. The judge was entitled to rely on the appellant's submission that minimum wage earnings per year provide a baseline for the calculation of the appellant's without-accident earning capacity. Further, the judge's relative likelihood analysis, with respect to the two contingency deductions, does not disclose any reversible error.*

**Reasons for Judgment of the Honourable Justice Mayer:**

**Overview**

[1] The appellant, Scott Pickwell, sustained injuries in two motor vehicle accidents: the first on December 16, 2013; the second on September 23, 2014 (together, the "Accidents"). At the time of the first accident Mr. Pickwell was 27 years old. In the nine years before the Accidents, he worked sporadically in entry-level retail jobs. His average annual income during this period was $14,808.

[2] The respondents admitted liability for the Accidents. In reasons pronounced January 10, 2022, after a 10-day damages-only trial, the trial judge awarded Mr. Pickwell $407,761 for future loss of earning capacity. The judge also awarded amounts for non-pecuniary damages, past loss of earning capacity and cost of future care: *Pickwell v. Rotter,* 2022 BCSC 18 (the "Trial Reasons").

[3] The sole issue raised in this appeal is the judge's award for future loss of earning capacity.

[4] Mr. Pickwell contends that the judge erred in assessing his damages for future loss of 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 analyze the relative likelihood that he would experience lengthy periods of unemployment and underemployment; and

c) failing to meaningfully analyze the relative likelihood that he might recover from his injuries enough to engage in future paid employment.

[5] He submits that the effect of these errors is to result in an award that is so inordinately low that it is a wholly erroneous estimate of the damage. He seeks an order allowing this appeal and substituting a higher award for future loss of earning capacity.

[6] The respondents contend the judge made no errors of law or palpable and overriding errors of fact. They submit the judge's analysis in assessing future loss of earning capacity was consistent with the method of analysis urged on her at trial by Mr. Pickwell. They say Mr. Pickwell's appeal should be dismissed.

[7] In a previous application before this Court, Mr. Pickwell sought leave to resile from the position he took at trial on the method of assessing future loss of earning capacity and the $500,000 award he sought under this head. His application for leave to resile was dismissed: *Pickwell v. Rajwan*, 2025 BCCA 32 (the "Leave Decision").

## Legal Framework

### Standard of review

[8] An award of damages can only be revisited on appeal where: (i) there is no evidence to support the trial judge's conclusion; (ii) the trial judge erred in law or proceeded on a mistaken or wrong principle; or (iii) the award is so inordinately low or high that it must be a wholly erroneous estimate of the damage: *Lewis v. Gibeau,* 2025 BCCA 127 at para. 41; *Malak v. Hanna*, 2024 BCCA 370 at para. 53.

[9] A trial judge's underlying findings of fact, inferences drawn from those findings and findings of mixed fact and law are entitled to deference, subject to a finding that the judge made a palpable and overriding error in making the relevant finding: *Lewis* at para. 42.

### Assessment of future loss of earning capacity

[10] The assessment of future loss of earning capacity involves a comparison of a plaintiff's likely future if an accident had not occurred, to their future after the accident: *Ploskon-Ciesla v. Brophy,* 2022 BCCA 217 at para. 7.

[11] In *Rab v. Prescott*, 2021 BCCA 345, this Court helpfully summarized the usual analytical process for completing this assessment:

> [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 must include assessing the relative likelihood of the possibility occurring—see the discussion in *Dornan* at paras. 93–95.

[12] While the judge cited the approach in *Rab*, Mr. Pickwell contends she erred in the application of the third step: the assessment of the value of his possible future loss.

**The Leave to Resile Application**

[13] It is first necessary to review the position Mr. Pickwell took at trial concerning the method for assessing his future loss of earning capacity and the decision of this Court dismissing his application to resile from this position in this appeal.

[14] In his submissions at trial, Mr. Pickwell's quantification of his without-Accidents earning capacity was based on annual earnings of approximately $30,000 calculated using the then-prevailing hourly minimum wage, plus $10,000 to reflect the possibility of an increase over time. His counsel submitted:

> Having said all of that, My Lady, Mr. Bisceglia 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.

[15] Mr. Pickwell sought an award of $500,000 for future loss of earning capacity. His counsel explained how this amount was calculated:

> I do want to tell Your Ladyship how we got to the number that we're asking Your Ladyship to order. And just to be clear on that number, My Lady, it's $500,000. I've set that out in paragraph 27. As to how we got there, if you go to paragraph 74 my submissions …
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> And so to get to this $500,000 number, My Lady, that number -- what we did was we said, all right, if he makes $40,000, and I told Your Ladyship how I got to that, and then let's assume he lost half of it. So that would be $20,000 a year for the rest of his life which is double that $240,000 figure that Mr. Pivnenko sets out, and I've added something, some small amount, My Lady, it wasn't noted exactly, for the loss of benefits. That's how we got to stand here before Your Ladyship and say $500,000.

[16] Mr. Pickwell's counsel explained that the proposed $500,000 award factored in the possibility that Mr. Pickwell may improve and return to work during his lifetime—although he did not propose a particular percentage to account for this possibility:

> 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.



[17] In Mr. Pickwell's leave to resile application he submitted that a fair and reasonable award for future loss of earning capacity is $986,820, or slightly less. He submitted that, given the significant difference between such an award and the $500,000 he sought at trial, that he should be permitted to resile. Further, he submitted that allowing him to resile from the approach taken at trial on assessment of these damages would not prejudice the respondents in any meaningful way because: (1) his new approach was simply an alternative way of quantifying his loss; (2) his new approach was not inconsistent with the pleadings or evidence; (3) the judge's errors were apparent on the face of the reasons; and (4) the respondents did not defend the action based on his trial position: Leave Decision at paras. 16, 26.

[18] This Court concluded that it would not be in the interests of justice to allow Mr. Pickwell to resile from the position he had taken on the method of assessing damages for future loss of earning capacity or the $500,000 award he sought: Leave Decision at para. 30. This Court made the following observations:

> [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.
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> [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.

[19] In summary, as a result of the Leave Decision Mr. Pickwell is not entitled to argue in this appeal that the judge erred in assessing his without-Accidents future stream of income using annual "minimum wage" earnings as the starting point or that it was inappropriate for the judge to apply a contingency deduction to reflect the possibility that he may have experienced periods of unemployment or underemployment in the without-Accidents future. As well, Mr. Pickwell is not entitled to seek more than $500,000 in damages for future loss of earning capacity.

[20] In submissions before this Court, Mr. Pickwell acknowledged he is unable to seek an award of greater than $500,000 for future loss of earning capacity. As well, he confirmed he was not strenuously arguing that the judge erred in applying a 40 percent contingency deduction to her calculation of his without-Accident earning capacity, to account for possible periods of unemployment or underemployment.

[21] Mr. Pickwell maintains the judge erred in applying a further 15 percent contingency deduction to reflect the possibility of his obtaining paid employment at some point in the future, which he submits is untethered to any evidence. He concedes that as a result of the position he took at trial, he is unable to argue that a deduction to reflect this possibility was unwarranted but takes issue with the percentage applied by the judge.

## Analysis

### Trial Reasons

[22] The judge applied the three-part analytical process set out in *Rab* for evaluating a claim for future loss of earning capacity. First, she found the evidence disclosed a potential future event that could lead to a loss of earning capacity. She noted that Mr. Pickwell had not worked since February 2014 and found that it was

unlikely he would work again. Second, she found there was a real and substantial possibility that, but for the Accidents, he would have engaged in paid employment: Trial Reasons at paras. 92–94.

[23] Next the judge considered and rejected opinion evidence of Sergiy Pivnenko, the expert economist called by Mr. Pickwell, who had prepared a report estimating Mr. Pickwell's without-Accidents earnings. She noted that Mr. Pivnenko based his estimate on census data for average earnings of males in British Columbia with high school diplomas. She set out her concern that Mr. Pivnenko had not considered Mr. Pickwell's specific experience in the labour market. In this respect, she noted that between 2004 and 2013, Mr. Pickwell had worked seven jobs, mostly part-time, and had lengthy periods of unemployment. She stated 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": Trial Reasons at paras. 95–96.

[24] The judge concluded, based on Mr. Pickwell's lack of career aspirations, his inconsistent work history and his past employment in entry-level retail jobs, there was not a real and substantial possibility his income would rise to the level of the average for males in BC with his level of education. She found the only real and substantial possibility was that if the Accidents had not occurred, Mr. Pickwell would have continued to earn minimum wage for the duration of his career, but that he would likely have to work until age 70 for financial reasons: Trial Reasons at para. 97.

[25] The judge then commenced her assessment of the value of Mr. Pickwell's future loss of earning capacity. She noted that minimum wage in British Columbia was $15.20 per hour, which equates to a "full-time minimum wage salary" of just over $30,000 per year. She also noted that, with the exception of 2011, there was no

year pre-Accidents when Mr. Pickwell worked full-time for the duration of a calendar year: Trial Reasons, para. 99.

[26] The judge next considered whether to apply the multiplier provided by Mr. Pivneko or the respondents' expert, Mr. Hildebrand, in calculating the value of Mr. Pickwell's possible future income loss. She decided that the labour market contingencies used by Mr. Hildebrand were too low. Instead, she chose to apply the multiplier provided by Mr. Pivnenko, which did not account for labour market contingencies, and then to deduct 40 percent. The 40 percent deduction reflected her conclusion that even if the Accidents had not occurred, there was a real and substantial possibility that Mr. Pickwell would experience lengthy periods of unemployment or underemployment: Trial Reasons at para. 99.

[27] Based on an assumed without-Accidents annual earning capacity of $30,000, and using Mr. Pivnenko's multiplier for age 70, the judge calculated the value of Mr. Pickwell's without-Accident earnings potential to be $799,530, before deductions. After deducting 40 percent ($319,812) to reflect periods of unemployment or underemployment, the judge deducted a further 15 percent ($71,957) for the real and substantial possibility that Mr. Pickwell would recover enough to engage in paid employment in the future, resulting in the award of $407,761: Trial Reasons at paras. 100–101.

**Did the judge err in finding the only real and substantial possibility was that Mr. Pickwell would never have earned more than minimum wage?**

[28] Mr. Pickwell submits the judge erred in finding the only real and substantial possibility was that he would never have earned more than minimum wage. He divides this alleged error into two components: that the evidence demonstrated he had always earned more than minimum wage per hour; and that the judge failed to analyze the possibility he had the potential to improve his earning capacity over time.

[29] With respect to his hourly earnings, he submits there was evidence before the judge that before the Accidents he always earned more than minimum wage. The respondents concede this was the case.

[30] In my view, this alleged error fails to apply a functional and contextual approach to reading the judge's reasons. It is true the judge stated that Mr. Pickwell "was going to continue to earn minimum wage for the duration of his career", at para. 97. Mr. Pickwell focuses on these words, and argues they reveal error because Mr. Pickwell had in the past earned, on an hourly basis, more than minimum wage. However, a reading of the judge's reasons as a whole show her focus was on what Mr. Pickwell earned annually, not on an hourly basis, and he had never earned annually anything close to someone working full-time and being paid minimum wage.

[31] The fact that Mr. Pickwell never had annual earnings approaching what a full-time minimum wage earner would make, likely explains why during closing submissions at trial, Mr. Pickwell's counsel chose to apply the provincial minimum wage in his calculation of Mr. Pickwell's baseline without-Accident earnings, and not some higher hourly wage. This annual minimum wage salary was assumed to be just over $30,000 which compared favourably to Mr. Pickwell's historical average annual earnings of $14,808. It is clear the judge relied on that submission, and used the $30,000 assumed annual minimum wage salary as her starting point. It was open to the judge to reject Mr. Pickwell's argument that there should be a positive contingency applied to the $30,000, lifting it to $40,000, before applying negative contingencies.

[32] As I said earlier, given the Leave Decision, it is not open to Mr. Pickwell to argue in this appeal that the judge erred in relying on his submission that a starting point would be an assumed annual salary of $30,000.

[33] Despite the approach he took at trial, Mr. Pickwell also takes issue with the judge's decision not to consider Mr. Pivnenko's calculation of his future income loss, which relied on census data. As noted earlier, at paras. 95 and 96 of the Trial Reasons the judge set out her concern that it was inappropriate to rely solely on census data for average earnings of males with high school diplomas, without considering Mr. Pickwell's work history which underperformed compared to his statistical peers. I see no error in this approach.

[34] Relying on census data for average earnings to estimate potential future earnings may be and indeed is often helpful, especially where there is insufficient evidence regarding a plaintiff's future career aspirations and earnings potential. In this case, the judge had evidence before her concerning Mr. Pickwell's sporadic employment history in the nine-year period before the Accidents, and a dearth of evidence that he held future career or educational aspirations. Counsel for Mr. Pickwell concedes that his work history was a relevant consideration.

[35] Mr. Pickwell refers to the reasons in *Dornan,* at para. 166, in support of the proposition that the courts in this province routinely rely upon census data concerning average earnings. It is correct that in *Dornan* this Court used an estimate of future earning capacity completed by an economist, Mr. Benning. Mr. Benning had relied on data concerning the earnings profile for males of a like age and education to that of the plaintiff. What distinguishes *Dornan* is in that case this Court found it was possible, for various reasons grounded in the evidence, that Mr. Dornan would have advanced his earning capacity absent the accident: *Dornan,* at para. 167. As stated earlier, the judge did not find this to be the case for Mr. Pickwell.

[36] I refer again to para. 97 of the Trial Reasons, where the judge noted "Mr. Pickwell's apparent lack of career aspirations". No challenge to this finding is made in this appeal. In my view, the Trial Reasons demonstrate the judge

considered Mr. Pickwell's without-Accidents employment prospects and the possibility of his annual income increasing to the average for British Columbia males with high school diplomas. She found there was no real and substantial possibility that this would occur. Further, I note the judge did not state there was no possibility of any increase in his earnings.

[37] The Trial Reasons demonstrate the judge did not assess Mr. Pickwell's future earning capacity solely on the basis of his pre-Accidents earnings history remaining static. As I have already discussed, the evidence at trial was that Mr. Pickwell had earned, on average, $14,808 per year in the nine years before the first accident. The judge did not apply this average, but instead used the approach suggested by Mr. Pickwell's counsel, taking $30,000 in annual earnings as the starting point for assessing his future loss of earning capacity. Even after applying a 40 percent contingency deduction to reflect Mr. Pickwell's low attachment to the work force, the resulting annual figure was more than he had earned. Although evidence of his pre-Accidents earnings history informed the judge's analysis, it was clearly not the sole basis for estimating his without-Accidents earnings potential.

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

[39] I will now move on to discuss the judge's decision to apply a 40 percent contingency deduction.

**Did the Judge err in applying a 40 percent contingency deduction?**

[40] At the start of oral submissions, counsel for Mr. Pickwell advised this Court that he would not be focussing on his argument concerning the judge's decision to apply a 40 percent contingency deduction for the real and substantial possibility that even absent the Accidents, he would have had lengthy periods of unemployment and underemployment. Despite this, it is still necessary to consider whether this

deduction was appropriate as it impacts the ultimate determination whether the judge's award was inordinately low.

[41] In his factum, Mr. Pickwell submits that in choosing 40 percent the judge failed to analyze the relative likelihood of the real and substantial possibility of him experiencing unemployment or underemployment for the duration of his career. He argues this reflects an error in principle, relying on *Dornan* at paras. 133–134.

[42] At para. 133 of *Dornan*, Justice Grauer set out that in the case of a specific contingency the first step is to determine there is a real and substantial possibility of an event occurring and then to determine the relative likelihood of the occurrence. At para. 134, Justice Grauer added that the determination of relative likelihood must be tethered to the evidence and not to average and approximations based on imprecise evidence.

[43] In this case, the judge's analysis concerning the 40 percent contingency deduction was brief. She stated as follows:

> [99] … in my view, Mr. Pickwell's loss can be more accurately assessed by utilizing the actuarial multiplier provided by Mr. Pivnenko, and then providing a contingency discount for the real and substantial possibility, which is clearly supported in the evidence, that, but for the Accidents, Mr. Pickwell would have lengthy periods of unemployment and underemployment for the duration of his career. Based on the evidence, I assess that possibility at 40%.
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> [100] Therefore, I calculate Mr. Pickwell's loss of income earning capacity as follows: $30,000 per year, multiplied by Mr. Pivnenko's age 70 multiplier of 26,651 per $1000 = $799,530 less 40% ($319,812) = $479,718.

[44] This analysis must be read in the context of the Trial Reasons as a whole. Earlier in the reasons, the judge demonstrated she was aware of the requirement to assess the relative likelihood of events that could increase of decrease Mr. Pickwell's loss of earning capacity:

> [94] The defendants argue that the second step is not met: there is insufficient evidence to ascertain what Mr. Pickwell's likely future income would have been but for the Accidents. I disagree. While the defendants correctly note that Mr. Pickwell did not testify about his career aspirations,

> this does not mean that it is speculative to conclude that Mr. Pickwell would have likely worked in some capacity but for the Accidents. Simply because Mr. Pickwell did not have specific career aspirations does not mean that he would have remained unemployed. The mere fact that Mr. Pickwell was employed in some capacity for most of the nine years preceding the 2013 Accidents is sufficient to establish a real and substantial possibility that, but for the Accidents, he would engage in paid employment. The real question in this case is quantifying that loss, which requires me to assess the relative likelihood of events happening that could increase or decrease the amount of Mr. Pickwell's loss.
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> [Emphasis added.]

[45] I again note the judge found there was a real and substantial possibility that, but for the Accidents, Mr. Pickwell would experience lengthy periods of unemployment and underemployment for the duration of his career: Trial Reasons, para. 99.

[46] In my view, the judge's conclusion was tethered to the evidence. This includes the following: that Mr. Pickwell experienced lengthy periods of unemployment, such as the period from March 2012 to March 2013, and April 2013 to December 2013 (para. 86); that he had worked a total of four months in the two years before the first accident (para. 89); and, there was no year pre-Accidents, other than 2011, in which Mr. Pickwell worked full-time for the duration of a calendar year (para. 99).

[47] Mr. Pickwell's work history showed his actual pre-Accidents average annual earnings were approximately 51 percent less than what the judge assumed would be the starting point for full-time annual earnings of $30,000. The judge's choice of a 40 percent contingency for less than full-time work shows that she was nuanced in her approach. Taking this approach, she did implicitly allow for the possibility Mr. Pickwell would have earned more in the future than he had in the past, absent the Accidents.

[48] As the Court held in *Dornan*, future loss of earning capacity is difficult to assess, and does not lend itself to precise calculation: at para. 151. The judge was

not obliged to provide a mathematical formula to explain her conclusion that a 40 percent deduction was appropriate. She explicitly referred to the factors that informed her decision, and in reading her analysis in the context of the record and other evidence considered throughout the reasons, her conclusion is justifiable.

[49] Mr. Pickwell also submits the judge did not factor in any potential earnings from employment insurance during periods of unemployment in her assessment of his potential without-Accident earnings. Simply because the judge did not refer to employment insurance does not mean she did not factor in potential earnings from this source in determining an appropriate contingency deduction.

[50] More importantly, as a result of the Leave Decision, Mr. Pickwell is bound by the method of assessment he proposed during submissions at trial. There is no indication he raised the issue of potential earnings from employment insurance at trial. Additionally, Mr. Pickwell confirmed that he did not receive employment insurance benefits for at least some portion of the time that he was unemployed pre-Accidents.

[51] With respect to this ground of appeal, I would not conclude that the judge made any reversible errors.

**Did the judge err in applying a 15 percent contingency for the chance of recovery?**

[52] Mr. Pickwell also submits the judge failed to meaningfully analyze the relative likelihood he would recover from his injuries to a sufficient extent as to engage in paid employment in the future. He takes issue with the judge's decision to apply a 15 percent contingency to reflect this possibility, suggesting this deduction was too large. For the reasons which follow, I would not accede to this ground of appeal.

[53] At para. 101 of the Trial Reasons the trial judge applied the analytical process for considering this contingency set out at paras. 133 and 134 of *Dornan*. First, relying on the expert medical evidence adduced at trial, she concluded there was a

real and substantial possibility Mr. Pickwell's condition could improve with therapy. Next, relying on this same evidence, the judge determined the likelihood of this occurrence to be 15 percent.

[54] Again, the determination of the appropriate contingency deduction is not a mathematical exercise. In my view, the judge applied the correct analytical process and the deduction she settled on was justified. She noted that all experts agreed his prognosis was guarded, but "none opined with certainty that he was permanently disabled"; and further, the medical consensus was that with the right therapy, his suffering from his injuries could improve: para. 101.

[55] Further, I note the submissions of Mr. Pickwell's counsel at trial that it was appropriate that some deduction be made to reflect the possibility Mr. Pickwell's health may improve allowing him to return to part-time work. As a result of the Leave Decision, Mr. Pickwell can not resile from this position. With respect to the amount of the contingency deduction, Mr. Pickwell's trial counsel did not propose a percentage. The judge's decision to apply a 15 percent deduction reflects a relatively low probability of this occurrence, which in my view is consistent with the evidence.

[56] In determining the likelihood of any occurrence, at some point a trial judge may have to settle on a percentage. That is what occurred in this case. I would not disturb the judge's conclusion that a 15 percent deduction is appropriate.

**Was the award inordinately low?**

[57] For the reasons I have expressed in addressing the above grounds of appeal, I also would not find the judge's award of damages for future loss of earning capacity to be inordinately low.

[58] The judge's assessment relied heavily on submissions of Mr. Pickwell's counsel, that a fair starting point would be the annual salary of a minimum wage earner, some $30,000, after which appropriate contingencies would need to be

applied. This starting point was more than twice Mr. Pickwell's average annual earnings in the years before the Accident. The judge's application of contingency deductions to this starting point was supported by evidence. The judge's award of $407,761 in damages for loss of future earning capacity, instead of the $500,000 claimed, was not inordinately low.

**Disposition**

[59] I would not find that the judge made any palpable and overriding errors, nor any errors in principle in assessing Mr. Pickwell's future loss of earning capacity. Further, in the context of the record, I would not find that the judge's award under this head to be is inordinately low.

[60] As a result, I would dismiss the appeal.

"The Honourable Justice Mayer"

I AGREE:

"The Honourable Chief Justice Marchand"

I AGREE:

"The Honourable Justice Griffin"