COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Laurin v. Tiemer,*
2025 BCCA 55

Date: 20250228
Docket: CA48347

Between:

Alissa Laurin

Appellant on Cross Appeal
(Plaintiff)

And

Jessica Tiemer and Christine Atkinson

Respondents on Cross Appeal
(Defendants)

Before: The Honourable Justice Griffin
The Honourable Mr. Justice Abrioux
The Honourable Justice Fleming

On appeal from: An order of the Supreme Court of British Columbia, dated May 19, 2022 (*Laurin v. Tiemer*, 2022 BCSC 847, Victoria Docket M171750).

Counsel for the Appellant on Cross Appeal:	R.P. Helme, K.C.
Counsel for the Respondents on Cross Appeal:	C.C. Godwin
Place and Date of Hearing:	Victoria, British Columbia October 7, 2024
Place and Date of Judgment:	Vancouver, British Columbia February 28, 2025

Written Reasons by:
The Honourable Mr. Justice Abrioux

Concurred in by:
The Honourable Justice Griffin
The Honourable Justice Fleming

Summary:

Cross appeal of an award for the loss of future earning capacity. Ms. Laurin submits that the judge erred in disregarding the report of an expert economist and, relatedly, in assessing her loss. Held: The cross appeal is allowed. The judge made material errors of law and fact in disregarding the expert report, which errors are reflected in the quantum of his award. On a reassessment of Ms. Laurin's loss of future earning capacity, the award should be increased to $1,000,000.

Reasons for Judgment of the Honourable Mr. Justice Abrioux:

Introduction

[1] The cross-appellant, Ms. Laurin, was injured in a motor vehicle accident in the vicinity of Victoria, B.C. on August 29, 2015. The respondents on the cross appeal (hereafter, the "respondents") admitted liability, and a trial took place to assess damages. The trial judge awarded Ms. Laurin a total of $754,914.10, which included non-pecuniary damages ($125,000), damages for past income loss ($130,000), and damages for the loss of future earning capacity ($463,289.00). The judge's reasons are indexed as 2022 BCSC 847.

[2] The respondents abandoned their appeal. The only issue on the cross appeal concerns the award of damages for the loss of future earning capacity, which Ms. Laurin says should be significantly increased on the basis that the judge erred: (1) in misapprehending and disregarding the evidence of her expert economist and (2) in his assessment of the award itself.

[3] For the reasons that follow, I would allow the cross appeal and increase the award for future loss of earning capacity from $463,289.00 to $1,000,000.

Background

[4] The accident occurred on August 29, 2015. Ms. Laurin was driving on a highway outside Victoria, B.C., near Royal Roads University. She was slowing and coming to a stop at an intersection when she was struck from the rear by a vehicle driven by the respondent, Ms. Tiemer, which was owned by the respondent, Ms. Atkinson.

[5] Ms. Laurin was 27 years old on the day of the accident, and 34 years old at the time of trial. She studied communications at Camosun College and received a diploma in 2010. While at college, she interned at A Channel (BCTV Vancouver Island, a division of Bell Media). After graduating from college, she obtained casual work at A Channel in 2011.

[6] At A Channel, Ms. Laurin received increasing responsibilities and was managing several projects and collaborations with community charities just before the accident. Her work at A Channel could be described as 'high energy': she was "constantly attending events [and] networking", often serving as A Channel's "public face": at para. 6. The work environment was an "open door" one, "where people were constantly coming and going, meeting and talking": at para. 6.

[7] Prior to obtaining full-time work at A Channel, Ms. Laurin applied for and was accepted at Royal Roads University to study for a Bachelor's degree in Communications. She deferred her studies after obtaining full-time work with A Channel, having learned that, with some years of work experience, she could study towards a Master's degree instead of a Bachelor's. She planned to begin studies at Royal Roads in two to three years, and obtained a residence near the University: at para. 7. The accident occurred while she was moving her belongings to her new residence: at para. 10.

[8] Before the accident, Ms. Laurin was very active in many areas of her life. While employed at A Channel, she worked several different part-time jobs, was a peer counsellor, and planned fashion shows at a local mall: at para. 8. She also had "a busy social life including a number of exercise programs": at para. 8.

[9] Prior to the accident, Ms. Laurin experienced intermittent migraines but had no other significant health issues. The respondents' neurologist, Dr. Tessler, did not consider these migraines to be significant: at para. 9.

[10] After the accident, Ms. Laurin was absent from work for seven weeks. She reported pain, significant headaches, instances of confusion, and was overwhelmed

and disoriented by bright lighting in public places. Her family physician diagnosed her with whiplash injuries. While some other physicians who saw Ms. Laurin in the period following the accident diagnosed her with post-concussion syndrome, the judge found that she had not experienced a concussion (also referred to as a “mild traumatic brain injury”, or “MTBI”), but rather experienced fatigue and certain other mild cognitive effects as a result of the severe headaches she experienced following the accident: at para. 50.

[11] Ms. Laurin attempted a return to work on a graduated basis, about two or three days per week, of four hours each, and her employer was very supportive. But she found her workspace challenging: she was overwhelmed and distracted by the noise and movement around her, as well as the bright lighting. She eventually moved to her own private space, where it was quieter. At one point, she tried working five days a week, but this was too much for her: at para. 21.

[12] Despite these challenges, Ms. Laurin was promoted to the position of Promotions Director for the A Channel stations on Vancouver Island: at para. 22. Her ongoing symptoms posed a challenge in this new role: she testified that headaches and neck pain continued to trouble her and that she found the work very physically and mentally tiring: at paras. 22–23. She did not return to her other part-time work and exercised very little: at para. 25.

[13] Ms. Laurin moved to Cowichan Bay with her now-husband in 2017. The longer commute proved to be prohibitive of her continuing to work for A Channel, and she resigned in October, 2017 after a discussion with her physician: at para. 26. As of the time of trial, she worked at WorkBC, three days a week, eight hours per day: at para. 28. She tried to increase her hours at WorkBC in 2021 but was unable to do so: at para. 28.

[14] Of Ms. Laurin’s health and circumstances as of the time of trial, the judge observed:

> [29] The migraine headaches are worse, lasting two to five hours, sometimes resolving with an episode of vomiting. They occur randomly with the last one occurring a week before trial and the one before that a couple of days before. Before the 2015 accident she would have migraines a couple of times a year. She also gets "tension headaches" which she described a stabbing on the right side of her head that moves to the upper front of her face around her eye. She wakes up at night with them sometimes.
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> [30] In her spare time now the plaintiff exercises by walking her dog. She said she tried jogging but it hurt her neck. She also tried weights and stretching but she nearly threw up. She testified "I am not who I was", she has different and fewer friends and a generally quieter life than before the 2015 accident. She is still thinking about Royal Roads University and she attended an information meeting in January 2021. She testified that they would be accommodating with things such as permitting more time to complete projects.

The Trial Judgment

[15] There were several issues at trial, including: whether Ms. Laurin suffered an MTBI in the accident; special damages; damages for past loss of income; non-pecuniary damages; damages for the loss of earning capacity; and damages for the costs of future care: at para. 34. Because the cross appeal narrowly concerns the judge's award of damages for the loss of earning capacity, my summary will focus on this issue. There is, however, some overlap between the judge's findings and conclusions relating to past and future loss of income as they relate to both grounds of appeal.

Past Loss of Income

[16] The appellant, relying on the expert report of the economist Robert Wickson, sought $270,000 for damages for past loss of income. In his report, Mr. Wickson provided the average net earnings, as disclosed by the 2016 Census, of the occupation group "Advertising, Marketing and Public Relations Manager". From the date of the accident to the date of the trial, the average net earnings for this occupation group were $402,600. Having earned $129,492 (after taxes) in that period, Ms. Laurin characterized her net loss as $273,108, being the difference between her actual earnings and average census group earnings: at para. 58.

[17] The judge concluded that he was "unable to find the very general averages used by the expert economist are determinative": at para. 64. He provided two reasons for rejecting Ms. Laurin's approach.

[18] The first was that it assumed all her lost income was a result of the accident: at para. 59. The judge accepted that Ms. Laurin could no longer continue to work at A Channel and that full-time employment did not appear to be a viable option for her: at para. 60. In particular, he observed:

> [60] … the plaintiff's headaches are a significant negative contingency for the future (and now) because she cannot concentrate in noisy and busy work sites on a full-time basis. Those conditions also make getting restorative sleep difficult which also makes working full-time difficult. I also conclude that the plaintiff's change to part-time work is consistent with her limitations. The evidence is that the prospects of a recovery…are not good.

[19] However, the judge found that Ms. Laurin's decision to relocate to Cowichan Bay was not a result of the accident, observing that she had testified that part of the reason she resigned from A Channel was due to the increased stress of her commute to Victoria and that following her transition to Cowichan Bay, it took some time to find another suitable position: at para. 61. Accordingly, the judge concluded that Ms. Laurin's loss of income was not solely attributable to the accident, in that it partially resulted from her move to Cowichan Bay and the resulting transition to different work: at para. 61.

[20] Second, in the judge's view, using what "appear[ed] to be national averages from the 2016 census" failed to adequately address the appellant's individual circumstances: at para. 62. He noted that it was not possible to determine if the appellant matched the profile of the average income earner in the census data or to what extent the Cowichan Valley- or British Columbia-specific data compared with other cities or provinces: at para. 62.

[21] Having rejected Ms. Laurin's claim of a past loss of $273,108, which relied on Mr. Wickson's report, the judge returned to the evidence. He found that the appellant did not lose income from employment in 2015, following the accident, because she received her full salary during that time. In his view, any loss of income began in

October 2017, following her resignation from A Channel: at para. 63. Furthermore, he was "unable to find [that the appellant] is entitled to damages for income loss in 2019", because that loss was "a result of the move and the plaintiff adjusting to her new environment" (at para. 65), although then went on to find some loss for a period including that year: at para. 66. In particular, he found:

> [65] … With respect to 2018, 2019 and 2020 I find that, but for the 2015 accident, the plaintiff would have continued her work at A Channel and she would have earned $50,000 per year. The total for those three years is $150,000. She actually earned a total of $19,637 in 2018, 2019 and 2020 for a loss of past income in the amount of $130,363 ($150,000 less $19,637) for the three-year period.

Future Loss of Earning Capacity

[22] At trial, Ms. Laurin sought damages for the loss of future earning capacity in the amount of $1,223,000. The respondents accepted that there had been a loss of earning capacity, but "submit[ted] that determining any loss of earnings is speculative at best and [that] using a multiplier of two to three years of [Ms. Laurin's] current salary is the only practical way to calculate future loss": at para. 92.

[23] In determining Ms. Laurin's loss of earning capacity, the judge began by citing the general approach as set out in *Tsalamandris v. McLeod*, 2012 BCCA 239 [*McLeod*]. In *McLeod* (at para. 31, cited by the judge at para. 93), this Court held that the following principles govern the assessment of damages for the loss of future earning capacity:

> 1. the assessment of damages is not a precise mathematical calculation but a matter of judgment;
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> 2. a plaintiff is entitled to be put in the position she would have been but for the accident;
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> 3. an award for loss of earning capacity recognizes that the ability to earn income is an asset and the plaintiff deserves compensation if this asset has been taken away or impaired;
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> 4. since these damages must often be based on a hypothetical, the standard of proof of a hypothetical is "real and substantial possibility" and not mere speculation;
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> 5. the court must consider the real and substantial possibilities, and give weight to them according to the percentage chance they would have happened or will happen;

> 6. one starting approach to valuation may be to compare the likely future of the plaintiff had the accident not happened, and the likely future of the plaintiff after the accident has happened, and to consider the present value of the difference between the amounts earned under these two scenarios…
>
> 7. however, the overall fairness and reasonableness of the award must be considered, taking into account all of the evidence.

[24] Next, the judge considered the approach to the assessment of claims for loss of future earning capacity that this Court recently set out in *Rab v. Prescott,* 2021 BCCA 345 [*Rab*]: at paras. 95–96. The analytical framework from *Rab,* as summarised at para. 47, comprises three distinct inquiries:

a) First, whether the evidence discloses a *potential* future event that could lead to a loss of capacity;

b) Second, whether, on the evidence, there is a real and substantial possibility that the future event in question will cause a pecuniary loss;

c) Third, if such a real and substantial possibility is proven, the court must determine the value of that possible future loss, which determination must include assessing the relative likelihood of the possibility occurring.

[25] Relying on Mr. Wickson's report, Ms. Laurin sought an award of $1,223,000, which resulted from comparing average census earnings to her actual post-accident earnings, assuming a retirement age of 70: at para. 112.

[26] The judge reiterated that he did not agree with the use of averages in assessing individual damages:

> [113] … Averages may be relevant by providing broad context but they do not explain the individual circumstances of individual plaintiffs; by definition some members of the sample will earn more than the average and some will earn less. The unreliability of using averages is particularly problematic when the averages are national ones that include disparate areas of the country with different average incomes.
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> [Emphasis added.]

[27] Further, he noted that Mr. Wickson relied on the opinion of the clinical- and neuro-psychologist Dr. Friesen as to Ms. Laurin's limitations resulting from the

accident, in particular, Dr. Friesen's conclusion that Ms. Laurin had suffered a concussion or mild traumatic brain injury. The judge noted that Dr. Friesen's conclusion on this issue was contrary to his own finding, and held that this thereby "weakened" Mr. Wickson's report: at para. 114.

[28] Returning to the *Rab* framework, the judge accepted that the first two steps were satisfied, and stated that his focus would be on assessing Ms. Laurin's future loss: at paras. 98–199. He did so by comparing the appellant's pre-accident earnings in 2017 ($50,026) with her earnings at WorkBC following her move to Cowichan Bay ($33,277), which resulted in an annual loss of $16,749: at para. 116. The judge found that but for the accident, the appellant would have worked until the age of 70: at para. 117. He assessed Ms. Laurin's loss of future earning capacity by multiplying the number of working years until retirement (36 years) by the annual loss ($16,749). Applying the statutory discount rate of 1.5% resulted in a present value award of $463,289: at paras. 117–118.

On Appeal

[29] The issues on appeal are whether the trial judge erred:

(a) by disregarding the evidence of Ms. Laurin's expert economist, Mr. Wickson, which set out average future earnings for B.C. women;

(b) in finding that the extent of Ms. Laurin's loss of future earning capacity should be assessed based on a constant annual loss of $16,749, from the date of trial to her prospective retirement at age 70.

Standard of Review

[30] The standard of review that applies to a trial judge's assessment of damages is a deferential one. Findings and inferences of fact made in the assessment of compensatory damages are reviewable on the standard of palpable and overriding error: *Southwind v. Canada,* 2021 SCC 28 at para. 85. A "palpable" error is one that is "plainly seen" (*Housen v. Nikolaisen,* 2002 SCC 33 [*Housen*] at para. 6) or "obvious": *Salomon v. Matte-Thompson,* 2019 SCC 14 [*Salomon*] at para. 33: An

error will be “overriding” where it is determinative of a case’s outcome (*Salomon* at para. 33) in the sense that the decision cannot stand without it: *Benhaim v. St-Germain,* 2016 SCC 48 at para. 38.

[31] As to damage awards themselves, an appellate court will only intervene where it has been shown that the judge’s award was, in the result, “palpably incorrect” or “wholly erroneous” or that the judge made an error of law, misapprehended the evidence, considered irrelevant factors, or made an award without a foundation in the evidence: *Woelk v. Halvorson,* [1980] 2 S.C.R. 430 at 435–436; *Naylor Group Inc. v. Ellis-Don Construction Ltd.,* 2001 SCC 58 at para. 80; *Rab* at paras. 22–24; *Lines v. W & D Logging Co. Ltd.,* 2009 BCCA 106 [*Lines*] at para. 9, leave to appeal ref’d [2009] S.C.C.A. 197.

[32] However, where a reviewable error has occurred, an appellate court may, as far as the record permits, draw its own conclusions of law or fact regarding the issue in question: *Salomon* at para. 32; *Housen* at para. 8.

Discussion

[33] Both grounds of appeal relate to the third stage of *Rab*, that is, to the quantification of the loss of future earning capacity. The quantification of such a loss may be accomplished using two methods: the “earnings approach” and the “capital asset approach”: *Rab* at para. 28; *Dong v. Li,* 2024 BCCA 404 [*Dong*] at para. 14; *Perren v. Lalari,* 2010 BCCA 140 at para. 32. The earnings approach is most useful where the loss in question can be more easily measured (*Rab* at para. 46), and involves comparing post-injury earnings to what the injured party would have earned but for the loss (*Steenblok v. Funk* (1990), 46 B.C.L.R. (2d) 133 (C.A.)). The capital asset approach treats a person’s earning capacity as an asset, the value of which has been diminished or destroyed by the injury: *Brown v. Golaiy* (1985), 26 B.C.L.R. (3d) 353 (S.C.). The capital asset approach is generally appropriate where a plaintiff has sustained an injury that has led to continuing issues, or that has exposed them to future problems, but has an income at the time of trial that is at or near the level of earnings they enjoyed before the injury: *Rab* at para. 30.

[34] In this instance, the judge does not appear to have selected either approach, writing:

> [99] … As I read *Rab*, the primary focus of the Court of Appeal was on the issue of loss of earning capacity. Here the issue is more one of loss of earnings (and that is how her loss is argued). As the cases demonstrate there is not a hard line between the two approaches because, for example, a loss of earning capacity can be assessed by looking at a demonstrated loss of earnings. The need for transparency remains regardless of what approach is used.
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> [Emphasis added.]

[35] While this point is not precisely material to the matters on appeal, I would observe that the judge's characterisation that this case is "more one of loss of earnings", given that there was a demonstrated loss of earnings (rather than a future, hypothetical one), indicates that the earnings approach was appropriate under the circumstances.

Issue #1: Did the Trial Judge Err by Disregarding Mr. Wickson's Expert Evidence?

Positions of the Parties

[36] Ms. Laurin's position is that the judge erred by disregarding Mr. Wickson's report, which was based on census data and set out the average future earnings for women in British Columbia working in the group classified under the National Occupational Classification for Statistics (NOCS) as "Advertising, Marketing and Public Relations Manager". She submits that the judge made two errors related to disregarding Mr. Wickson's report. The first was in misapprehending the nature of the report as relying on national averages, when it in fact contemplated provincial averages; the second alleged error consisted in the judge's rejection of statistical averages as a basis for determining damages, which Ms. Laurin argues is contrary to this Court's precedent. She refers to *Reaume v. Rossetto,* 2024 BCSC 61 [*Reaume*], as an example of the proper approach to assessing damages using available economic data.

[37] Ms. Laurin also submits that the judge also misapprehended the evidence when he found that Mr. Wickson's report was weakened to the extent that he "accepted that [Ms. Laurin] suffered an MTBI": at para. 114. She argues that Mr. Wickson did not "accept" any medical opinions and that the question of whether she suffered an MTBI had no bearing on his report.

[38] The respondents stress the deferential standard of review that applies to a judge's assessment of damages. They submit that the judge cited and considered the appropriate authorities and committed no reviewable error in preferring to ground his analysis on the appellant's actual income pre- and post-accident.

[39] The respondents also submit that the judge did not rely on Mr. Wickson's evidence regarding the claim for loss of future earning capacity for the same reasons that he did not consider it of assistance in his analysis regarding the claim for *past* loss of capacity. Since no appeal is taken from the judge's award for past loss of capacity, they submit that the ground of appeal relating to the future loss of capacity claim should fail.

Analysis

[40] Assessing damages flowing from a loss of earning capacity is not a mathematical exercise, and it is true that a deferential standard applies to the review of such assessments on appeal. However, an appellate court may interfere with an assessment of damages where it is satisfied that the judge erred in law, that there was no evidence upon which the judge could have made their decision, or that the result reached was a wholly erroneous estimate of the damage: *Woelk* at 435–436; *Rab* at paras. 22–24; *Lines* at para. 9.

[41] This Court has repeatedly recognised that economic and statistical evidence "provide[s] a useful tool to assist in determining what is fair and reasonable in the circumstances": *Dunbar v. Mendez*, 2016 BCCA 211 [*Dunbar*] at para. 21, citing *Parypa v. Wickware*, 1999 BCCA 88 [*Parypa*] at para. 70. As this Court affirmed in *Dunbar,* such evidence provides "helpful context…by identifying in a general sense

the magnitude of the plaintiff's loss": at para. 20. Justice Groberman recently affirmed, in *Dong,* that:

> [27] .... A judge is required to assess the damages in each individual case after full consideration of the evidence.
>
> [28] Although an award for loss of future earning capacity is not a simple mathematical calculation, "if there are mathematical aids that may be of some assistance, the court should start its analysis by considering them" (*Jurczak v. Mauro*, 2013 BCCA 507 at para. 37) and should not brush them aside without reason (*Fatla* at paras. 40–43).
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> [Emphasis added.]

[42] Indeed, in *McHatten v. Insurance Corporation of British Columbia,* 2023 BCCA 271 [*McHatten*], this Court recognised that a judge's failure to analyze available economic evidence, in comparing a plaintiff's with- and without-accident earnings, may constitute a reviewable error: at para. 26; see also *Jurczak v. Mauro,* 2013 BCCA 507 at para. 37.

[43] Respectfully, in my view, the judge made several material errors in considering, and then disregarding, Mr. Wickson's evidence. I shall refer to four.

[44] First, the judge misapprehended the evidence when he found that the statistical data in question related to national averages. It did not. Mr. Wickson's report provided information regarding the appellant's earnings as compared to those of British Columbians working in alternative earnings groups as well as the present value of future earnings of British Columbians working in those identified groups. This error is "palpable" in the sense that it is obvious or can be plainly seen: *Housen* at para. 6; *Salomon* at para. 33. And, in my view, this error is also "overriding". While the precise basis of the judge's decision to disregard Mr. Wickson's evidence is not readily disclosed by his reasons, it is clear that his mistaken conclusion that the report relied upon national statistics featured heavily in his overall view about the usefulness (more precisely, the lack thereof) of using averages to assess damages for both past and future loss of income: see, in particular, para. 113.

[45] Second, in my view, the judge erred in law insofar as part of his rationale for disregarding Mr. Wickson's report appears to have been that while averages "are useful to a point…they do not adequately address individual circumstances": at para. 62. It is certainly true—indeed, axiomatic—that compensatory damages are individualised and are meant to compensate plaintiffs for their *particular* losses. However, in the assessment of damages, it is necessary that the perfect not become the enemy of the good: judges must do what they can with the evidence before them to reach an estimate of the loss that is fair and reasonable in the circumstances: *Parypa* at para. 70; *Dunbar* at para. 21. As this Court observed in *McHatten,* in certain cases, "statistical data is often the best evidence available": at para. 25. The judge's implicit conclusion that statistical evidence is categorically insufficient to be relied upon in assessing damages, owing to its imprecision, runs contrary to a wealth of precedent and constitutes an error of law.

[46] Furthermore, the data referred to by Mr. Wickson did not apply to a particular group that "arguably included the [cross-]appellant", as submitted by the respondents. His testimony at the trial went further than that, being that the specific occupation group identified—"Advertising, Marketing and Public Relations Managers"—was "basically the kind of job that [Ms. Laurin] was doing at the time of the accident". Mr. Wickson also agreed with the proposition that "it would be fair that that's about the closest occupation that you could find". Mr. Wickson's evidence on this point was not challenged in his very brief cross-examination by the respondents' trial counsel who, I would observe, was not their counsel in this Court.

[47] Third, the judge's conclusion, at para. 62, that the statistical data was "general" and did "not adequately address individual circumstances" (in addition to revealing an error of law, as I described above) was not in accordance with the undisputed evidence. It is significant that Ms. Laurin's actual earnings in the pre-accident period were very close to the averages set out in Mr. Wickson's report: in the three years prior to the accident, Ms. Laurin earned only $533, or 1.2%, less than the average British Columbian in the "Advertising, Marketing, or Public Relations Manager" field. That Ms. Laurin's earnings fell so close to the average

renders the judge's insistence that "we do not know where [Ms. Laurin] is situated in the group making up the average" rather peculiar. Indeed, in my view, the judge's conclusion on this issue evinces a misapprehension of the evidence before him.

[48] Finally, the judge's conclusion that Mr. Wickson's evidence was "weakened to the extent he accepted that the plaintiff suffered an MTBI" was also materially in error.

[49] As was made clear in his cross-examination, Mr. Wickson did not purport to opine on the impact of the limitations Ms. Laurin may have sustained in the accident:

> Q All right. Looking at your report, the only information specific to Ms. Laurin are the seven bullets found at page 3, is that right?
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> A Yes.
>
> Q Okay. And one of the things that you have been asked to look at is the effect of limitations on a person's earning capabilities, is that right?
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> A That's right.
>
> Q Okay. And at page 9, you're quite candid and you say you don't know how limitations will affect her earnings. Is that a fair comment?
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> A That's exactly right. It's the job of the Court to understand the impacts of those limitations.
>
> Q Okay. So, that means --
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> A My job is simply to show you how to do the math.
>
> [Emphasis added.]

[50] In outlining the assumptions underlying his report, Mr. Wickson did refer to Dr. Friesen's report. But it is clear that he relied on this report only to the extent that Dr. Friesen suggested that Ms. Laurin would experience difficulties with full-time work, which is entirely *consistent* with the trial judge's own findings: at para. 64. In his report, Mr. Wickson wrote:

> - We understand that if Ms. Laurin is able to return to work she will have limitations in the kind and amount of work she will be able to perform. Dr. Ingred Friesen outlines a number of limitations that Ms. Laurin will face in the future…including "*…difficulty working a full eight-hour day or energy to engage in recreational activities after meeting occupational obligations".*
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> [Emphasis in original.]

[51] Mr. Wickson's report makes no reference to Dr. Friesen's opinion that Ms. Laurin suffered an MTBI. In light of this, and to what I have referred above, there was no basis upon which the judge could find that Mr. Wickson's report was weakened to the extent he "accepted" that the appellant suffered a mild traumatic brain injury in the accident. Mr. Wickson simply did not do this. Whether or not Ms. Laurin suffered such an injury (that is, the cause of her limitations) was not an issue addressed by Mr. Wickson, and has no bearing on the substance of his report.

[52] In conclusion, Ms. Laurin's income before the accident was clearly situated very close to the average of her peers in the "advertising, marketing or public relations manager" field. Mr. Wickson's report, in particular Table 8—which set out the present value for future earnings for the occupation group in question—was a mathematical tool that was both relevant and useful in the assessment of the cross-appellant's likely "without-accident" future earnings: *Dunbar* at para. 21. Respectfully, the judge's reasons for disregarding this report reflect the errors of fact and law I have identified.

[53] I would accede to this first ground of appeal.

Issue #2: Did the Trial Judge Err in His Assessment of the Appellant's Damages for Loss of Future Income Earning Capacity?

[54] Ms. Laurin submits that the judge erred in finding that her loss of future income earning capacity should be assessed based on a constant annual loss of $16,749. Relying on *Reaume* and *Smith v. Fremlin,* 2014 BCCA 253 [*Smith*], she says that the judge did not provide a reasoned analysis in support of his quantification of the award for loss of future earning capacity. He simply selected—arbitrarily, in her view—one year of her post-accident earnings and calculated the difference between that figure and another year of post-accident earnings, and then multiplied that difference by her remaining years to the age of 70. This approach, she argues, "was particularly inadequate given the availability of a highly relevant economist's report".

[55] The respondents' position is that deference should be given to the judge's analysis and conclusions. They say that he did not ignore the statistical evidence. Rather, in their view, he considered that evidence, identified its weaknesses, and provided reasons as to why he preferred the factual evidence of Ms. Laurin's actual income earning history. The respondents submit that it was entirely within his discretion to do so.

[56] I have already found that the judge made several material errors in the course of disregarding Mr. Wickson's expert report. In my view, these errors are inextricable from the judge's decision to quantify Ms. Laurin's loss of future earning capacity based on a constant annual loss of $16,749, representing the yearly difference between her earnings immediately before the accident and her earnings at WorkBC: at para. 116. The judge adopted this method because he determined that it was inappropriate to use averages to quantify Ms. Laurin's loss (at paras. 111–119, in particular paras. 113–114). It is trite that, as the respondents urge, a trial judge's assessment of damages is discretionary. But it is just as elementary that discretion cannot be exercised on an erroneous basis, as was the case here.

[57] The question becomes whether this Court can reassess the damages owing to Ms. Laurin. As I reviewed above, where there has been a material error, it is open to an appellate court to substitute its own view on the question at issue, as far as, and only as far as, the record permits it to do so.

Issue #3: The Reassessment of Damages

Discussion

[58] This Court may make or give any order that could have been made or given by the court or tribunal appealed from and may draw inferences of fact and 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.

[59] Appellate courts will reassess damages where the error in question is discrete; the record, including unchallenged findings of fact, is sufficient to allow this

Court to reach its own conclusion without engaging in speculation; and the interests of justice strongly weigh against ordering a new trial: *Neufeldt v. Insurance Corporation of British Columbia*, 2021 BCCA 327 at para. 130.

[60] I agree with the parties that the trial record is sufficient for this Court to reach its own conclusion regarding an appropriate award for loss of future earning capacity and that it would be in the interest of justice, if appropriate, to substitute a different sum than the one awarded by the trial judge: *Lines* at para. 52. The question is whether the award of $463,289.00 is "fair and reasonable" to both parties. My analysis will be within the context of the income earnings approach identified in *Pallos v. Insurance Corp of British Columbia* (1995), 100 B.C.L.R. (2d) 260 (C.A.) (though not ultimately followed in that case) and affirmed in *Rab.*

[61] The five-day trial in this case fully canvassed Ms. Laurin's work history, limitations, and future plans. Five expert medical witnesses testified and provided broadly consistent opinions as to Ms. Laurin's ongoing disability.

[62] It is clear from the reasons for judgment that the judge was of the view that Ms. Laurin was unable to continue to work full-time in her chosen field after the accident. His findings included the following:

a) Ms. Laurin was unable to continue work at her previous work at A Channel, despite a promotion and increase in income (at para. 60);

b) Her change to part-time work after the accident was consistent with her limitations and that the "the prospects of a recovery for the plaintiff are not good" (at para. 60);

c) The headaches were a "significant negative contingency for the future (and now) because she cannot concentrate in noisy and busy work sites on a full-time basis" (at para. 60). The judge also observed that this "negative contingency remains of the plaintiff's condition becoming worse so she has to again adjust her work" (at para. 98);

d) Ms. Laurin had “realistically adapted to the limitations arising from the accident” and that “this is not a situation of attempting to assess hypothetical events in the future but interpreting real and contemporaneous events” (at para. 98);

e) The reports of the respondents’ medical expert witnesses were consistent in that “the presence of [Ms. Laurin’s] current headache experience means that she is not capable of dependably working full time” (at para. 108); and

f) But for the accident, Ms. Laurin would have retired on or about age 70: at para. 117.

[63] Overall, the impression I gather from the evidence is that Ms. Laurin was a “rising star” as a promotions director at A Channel. She was also evidently a hard worker, supplementing her work at A Channel with part-time employment at the Save-on-Foods Memorial Arena. There is no reason to suppose that Ms. Laurin’s professional drive and success would have diminished as the years passed. Furthermore, Ms. Laurin’s income in the three calendar years prior to her accident was within 1.2% of the average income of a British Columbian working as an “advertising, marketing and public relations manager” over the same period, according to Mr. Wickson’s report. The respondents did not challenge this evidence at trial. The injuries she sustained in the accident also caused Ms. Laurin to change occupations to a less busy and noisy field, and to reduce her work hours to part-time—an adaptation that, as I noted above, the trial judge accepted was necessary under the circumstances.

[64] Within this factual matrix, Ms. Laurin submits that the approach outlined by this Court in *Lines, Smith,* and *Reaume* should be used to assess her damages for future loss of income earning capacity in this case.

[65] *Lines* is to be distinguished from the case at bar in that this Court found that the judge below erred in failing to address the likelihood that the plaintiff would not achieve his career goals, which the judge had treated as a certainty in assessing his

loss of future earning capacity. In substituting a new award, this Court approved of the trial judge's general approach—which was substantively the same as the approach taken by Mr. Wickson in this case—and only altered the award to the extent of addressing the overlooked contingency: at paras. 54–66.

[66] *Smith* concerned a young lawyer who was injured in a motor vehicle collision. In the trial court, the judge found that the plaintiff would be able to function at about 70% capacity as a lawyer, working on a modified schedule and in a limited area of practice: at para. 9. The judge assessed the plaintiff's 30% loss using statistical evidence of the average earnings of female lawyers in British Columbia. The appellants objected to the use of this evidence on similar grounds as the judge did in the case at bar (at para. 22), but this Court did not accede to their submission, for substantially the same reasons as I gave above: at para. 23.

[67] *Reaume* was a recent case in the B.C. Supreme Court in which the plaintiff sought, *inter alia*, damages for the loss of future earning capacity following a motor vehicle collision. At the time of the accident, the plaintiff was in her early twenties, had just obtained a college diploma in Visual Arts, and worked approximately 32 hours per week at Starbucks as a shift supervisor. Following the accident, she sustained an undisputed impairment in her earning capacity: at para. 53. In quantifying the plaintiff's loss, the judge began by assessing the plaintiff's without-accident earnings potential based on several different employment scenarios, to each of which he assigned a percent likelihood: at paras. 52–65. After considering the evidence going to the plaintiff's post-accident earning potential, the judge made an award of $850,000: at para. 79. This award was calculated by subtracting the present value of the plaintiff's estimated post-accident earnings from the present value of her estimated without-accident earnings (a difference of $1,089,261), with a reduction for various labour market contingencies: at paras. 68, 76–79.

[68] The judge in the case at bar awarded Ms. Laurin $463,289 in damages for loss of future earning capacity, representing 36 years of a constant annual loss of $16,749, less the applicable deductions pursuant to the *Law and Equity Act,*

R.S.B.C. 1996, c. 253, s. 56(3). In my view, this finding cannot be sustained in light of the judge's failure to consider Mr. Wickson's evidence, which flowed from a misapprehension of the evidence as well as being an error of law. Mr. Wickson's evidence was not that Ms. Laurin's income would be essentially *frozen* for her entire working life at $50,000 (as of the valuation date of January 24, 2022). Notably, 'freezing' Ms. Laurin's income in this way reflects the implicit—and unsupported—assumption that Ms. Laurin's income would effectively *decrease* year-over-year, assuming a positive inflation rate.

[69] For the occupation group in which Mr. Wickson placed Ms. Laurin (whose classification was not challenged on cross-examination), the evidence can be described as follows. Mr. Wickson provided several estimates of the present value of future earnings of British Columbians working in several earning groups relevant to Ms. Laurin. These estimates were based on 2016 Census data and allowed for wage inflation since the date of the Census, used statistical data to make allowances for certain employment contingencies, and allowed for the average value of employer-provided benefits. The estimates were:

a) For the 50th percentile of the earning group, "College or Other Non-university Certificate or Diploma – Total": $1,388,470.

b) For the 75th percentile of the earning group, "College or Other Non-university Certificate or Diploma – Total": $1,716,269.

c) For the 50th percentile of the earning group, "Advertising, Marketing and Public Relations Managers": $2,039,584.

d) For the 50th percentile of the earning group, "College or Other Non-university Certificate or Diploma – Total", assuming part-time work: $641,601.

[70] Mr. Wickson identified few negative contingencies, including part-time work, unemployment, and non-participation in the labour force. When one considers that Ms. Laurin had intended to take a master's program at Royal Roads University—

which is an institution whose programs are developed in part for professionals who continue to work when furthering their education—it seems to me that the $57,766 referred to by Mr. Wickson was, if anything, a conservative number. Indeed, Mr. Wickson noted that while Ms. Laurin's income in the years preceding the accident fell very close to the average in her occupation area, she had recently received a promotion, such that:

> … to the extent that she received an (sic) larger increase in pay sooner than others of her age and with her education level or in her occupation group, the comparisons of earnings in this section might understate the earnings she could have expected to earn relative to her peers.
>
> [Emphasis added.]

[71] Relying on *Smith,* Ms. Laurin submits that Mr. Wickson's report provides the best evidence upon which a fair and reasonable award should be based, namely, the cumulative present value of earnings for an individual in the "Advertising, marketing and public relations manager" earning category: $2,039,584.

[72] Relying on *McHatten* and *Smith,* the respondents argue that while statistical economic evidence may be the best available evidence in circumstances involving a young plaintiff with little or no earning history, it becomes less helpful when such a history exists. They do acknowledge in their factum, however, "that the extent to which such evidence is relied upon would depend on the facts of the case and the available evidence of the plaintiff's earnings history".

[73] It cannot be said, in my view, that statistical economic evidence is generally restricted to instances where there is a young plaintiff or where there is little or no evidence of a plaintiff's work and earnings history. Absent a material error, which I would find to be the case here, it is for the trial judge in the particular circumstances of a given case to determine what assistance is to be obtained from statistical evidence. I observe that in *Dong,* in which this Court recently affirmed the utility of statistical evidence in assessing damages for loss of future earning capacity, the plaintiff was 40 years old when the accident occurred, 44 years old at the time of trial, and had a well-established earnings history.

[74] When the judge's findings, the other evidence, and factors to which I have referred above are considered, Mr. Wickson's estimate of $2,039,584 represents more than just a useful starting point in the "without accident" aspect of the analysis: it represents the most feasible benchmark of a value that is fair and reasonable to both parties. This is particularly so in light of two facts: first, the figure reflects the present value of future earnings of an average income earner, despite Ms. Laurin's promotion at A Channel, which likely would have placed her *above* the average; and, second, the respondents did not challenge Mr. Wickson's opinion that Ms. Laurin fell within the "Advertising, Marketing, and Public Relations Manager" income group on cross-examination.

[75] What remains is to determine how Ms. Laurin's loss should be assessed, in light of all the evidence and the statistical evidence of the present value of future earnings of those in her income group. In my view, there are at least two ways to assess her loss, both of which she presented to this Court in written and oral argument (although I have made some necessary modifications for the sake of accuracy).

[76] The first method is as follows. In her occupation at WorkBC, which the trial judge found to be a suitable benchmark for Ms. Laurin's with-accident earning capacity going forward (at paras. 115–116), she earned $33,277 in the valuation year (2022): at para. 116. The judge erred in comparing this income to Ms. Laurin's income in 2017 ($50,026, which she earned after the accident but prior to resigning her position at A Channel), because his rejection of the average figure for the valuation year offered by Mr. Wickson ($57,766, as per his report) flowed from the errors I have canvassed above. I would also note that the judge did not apparently appreciate that his comparison failed to account for the difference in value of '2017 dollars' and '2022 dollars': in failing to address the question of how much Ms. Laurin's 2017 income was worth as of the valuation date (in 2022), he further underestimated the extent of her loss.

[77] Accepting Mr. Wickson's evidence that the average earnings, in 2022, of those within Ms. Laurin's income group were $57,766, it becomes evident that Ms. Laurin's with-accident earnings amounted to approximately 57% of that average. 57% of the present value of future earnings for the earning group, "Advertising, Marketing, and Public Relations Manager" ($2,039,584) is $1,162,563. This represents Ms. Laurin's with-accident earnings, expressed as a proportion of the present value of her without-accident earnings equivalent to the proportion of the 2022 average earnings for her income group that she ultimately earned at WorkBC. Subtracting $1,162,563 from $2,039,584 yields an award of $877,021.

[78] The second method of assessing Ms. Laurin's loss is outlined in Mr. Wickson's report and yields a higher figure.

[79] On this approach, Ms. Laurin's loss is assessed by subtracting the present value of her with-accident future earnings from the present value of her without-accident future earnings. Present value is a way of representing the value of a future income stream as of a given valuation date. Because money is assumed to bear interest-earning potential, present value is ordinarily less than future value; this is because, received 'today', the sum representing the present value can be expected to grow over time. The present value of a constant income stream can be calculated using multipliers, either single period factors (which calculate the present value of a one-time payment at a certain point in the future) or cumulative factors (being the *sum* of all single period factors over a given timespan).

[80] The trial judge found that in Ms. Laurin's new employment with WorkBC, she earned $33,277 per year (as of the time of trial). The judge also found that Ms. Laurin would work for 36 years, up to the age of 70. The present value of this income stream (assuming that Ms. Laurin's income remains constant) can be calculated by multiplying this annual payment by the relevant 'cumulative factor' (a multiplier representing the sum of present value factors over the relevant period). Based on Mr. Wickson's report, the relevant cumulative factor for this 36-year period

is 26.967. Multiplying this cumulative factor by $33,277 yields a present value of $897,503.

[81] At this juncture, I would note that the cumulative factor used above (26.967) is slightly less than that which the judge used in calculating the present value of a constant $16,749 loss. The judge applied a cumulative factor of 27.6607, which is the factor suggested in certain model jury instructions provided by the Continuing Legal Education Society of British Columbia: at para. 118. I am inclined to use the cumulative factor identified by Mr. Wickson because it is more precisely tailored to Ms. Laurin's situation, including the probability that a female in British Columbia of Ms. Laurin's age will be alive during each valuation period. Mr. Wickson's cumulative factor also incorporates the mandatory 1.5% yearly discount rate set out at ss. 56(2)–(3) of the *Law and Equity Act.*

[82] On this second method of loss valuation, Ms. Laurin's loss is represented as the difference between the present value of her without-accident future earnings ($2,039,584) and the present value of her with-accident future earnings ($897,503). This results in an award of $1,142,081.

[83] There is a significant ($265,060) difference between these two methods which is explained this way. The first assumes that because Ms. Laurin will earn 57% of what she otherwise would have earned (a yearly loss of 43%), her loss corresponds to 43% of the present value of her without-accident future earnings. The second generates a higher value because, unlike the first method, it is sensitive to the concept of compounding interest (i.e., the more money there is, the more money is earned, and earnings in each period reflect each addition of income as well as all the interest earned on the growing sum). As such, if Ms. Laurin continues to earn 57% of her without-accident yearly earnings (as I have assumed, and as seems reasonable on the evidence), she will not, as time passes, *have* 57% of what she otherwise would have had. Because she will be earning less, she will earn less interest, and her actual proportion of what she otherwise would have had will

steadily decrease over time. The second method of assessing her loss does not have this effect, because it accounts for compounding interest.

[84] The assessment of damages for loss of future earning capacity is not a mathematical calculation and damages awards must be ultimately reasonable and fair. This is a discretionary exercise. Having regard to these principles, and the fact that Ms. Laurin offered both the first and second methods of valuation to this Court, it is fair and reasonable, in my view, in the circumstances in this case, to make an award that falls in the middle point between them. Accordingly, I would award Ms. Laurin damages for the loss of future earning capacity in the amount of $1,000,000.

Disposition

[85] I would allow the appeal and vary the order to provide for an award of damages for loss of future earning capacity of $1,000,000.

"The Honourable Mr. Justice Abrioux"

I AGREE:

"The Honourable Justice Griffin"

I AGREE:

"The Honourable Justice Fleming"