COURT OF APPEAL OF YUKON

Citation: *Knapp v. O'Neill*,
2017 YKCA 10

Date: 20170704
Whitehorse Docket: 15-YU759

Between:

Angelika Knapp

Appellant
(Plaintiff)

And

James P. O'Neill, and James H. Brown Professional Corporation, operating as James H. Brown & Associates

Respondents
(Defendants)

Before: The Honourable Madam Justice D. Smith
The Honourable Mr. Justice Savage
The Honourable Mr. Justice Fitch

On appeal from: An order of the Supreme Court of Yukon, dated June 4, 2015
(*Knapp v. O'Neill*, 2015 YKSC 22, Whitehorse Registry 04-A0118).

Counsel for the Appellant: J.J. McIntyre

Counsel for the Respondents: B. Comba

Place and Date of Hearing: Vancouver, British Columbia
June 1, 2017

Place and Date of Judgment: Vancouver, British Columbia
July 4, 2017

Written Reasons by:
The Honourable Mr. Justice Savage

Concurred in by:
The Honourable Madam Justice D. Smith
The Honourable Mr. Justice Fitch

Summary:

Ms. Knapp appeals an order of the Supreme Court of Yukon, challenging the award of $70,000 for loss of future earning capacity in her successful professional negligence claim arising from a mishandled personal injury suit. She says the judge misapprehended the evidence, failed to consider her earning potential but for the accident, and made an inordinately low award. Held: appeal allowed. The judge misapprehended the functional capacity evaluation, leading him to erroneously reject the economic evidence. His award for loss of future earning capacity was disproportionately low compared to the award for past income loss. As almost 18 years have elapsed since the injury, this is an appropriate case for this Court to conduct its own assessment of damages. Using the economic evidence and factual findings as an anchor and assuming employment as a bookkeeper, the appropriate award is $211,000.

Reasons for Judgment of the Honourable Mr. Justice Savage:

I. Introduction

[1] Ms. Knapp appeals from an order of the Supreme Court of Yukon challenging the amount awarded for loss of future earning capacity in her professional negligence claim arising out of a mishandled personal injury suit. The judge below conducted a "trial within a trial", adjudicating the personal injury claim within the professional negligence proceeding.

[2] On September 28, 1999, Ms. Knapp was injured in a motor vehicle accident northwest of Dawson City, Yukon, while lying unrestrained in the sleeper of a truck driven by her partner, Mr. Dufresne. The truck slid off the road in snowy conditions, entered a ditch, and rolled, leaving Ms. Knapp trapped in the truck. After two hours she was extracted and transported by ambulance to a nursing station. Ms. Knapp retained a lawyer to pursue a negligence action against Mr. Dufresne; that action was settled in 2002. She later brought a professional negligence claim against the lawyer.

[3] The judge found that an enforceable settlement of the action was achieved but the lawyer was negligent in his representation of Ms. Knapp. The negligence included failing to research or address the loss of future earning capacity claim, "which even at a modest amount on an annual basis could be significant over

Ms. Knapp's lifetime". Ms. Knapp was awarded $268,450 in the trial within a trial, including $70,000 for loss of future earning capacity.

[4] Ms. Knapp appeals the award for loss of future earning capacity, arguing that the trial judge misapprehended the evidence, failed to consider her earning potential but for the accident, and in any event, made an award that was inordinately low. The respondents support the judge's assessment of damages for loss of earning capacity, saying that it was not capable of exact measurement, "there is inherent subjectivity in the procedure", and the trial judge's determination is owed deference.

II. Trial Decision (2015 YKSC 22)

[5] With respect to the loss of future earning capacity claim, the trial judge referred to several principles applicable to establishing such awards. He referred to the decision of Mr. Justice Donald, speaking for this Court in *Morris v. Rose Estate* (1996), 23 B.C.L.R. (3d) 256 at para. 24, 75 B.C.A.C. 263, noting that assessing damages in this area involves estimates and not mathematical certainty.

[6] The judge considered the threshold required to establish such an award and the means of assigning a dollar value to an award outlined in *Pallos v. Insurance Corporation of British Columbia* (1995), 100 B.C.L.R. (2d) 260 at paras. 23-29, 53 B.C.A.C. 310. He also referred to the more recent decision of this Court in *Perren v. Lalari*, 2010 BCCA 140, finding that Ms. Knapp had discharged the burden of proof warranting such an award, namely, proving a real and substantial possibility of a future event leading to an income loss.

[7] The judge found that "Ms. Knapp has suffered a serious injury with permanent and painful consequences that impact her ability to earn income" and that "there is no question that Ms. Knapp has been rendered less capable overall of earning income from all types of employment, less marketable as an employee to potential employers, and less valuable as a person capable of earning income in a competitive labour market as a result of the injuries she sustained on September 28, 1999".

[8] With respect to Ms. Knapp's employment history the judge said:

> [218] Prior to 1995, Ms. Knapp worked in Austria and Switzerland as a tax consultant, banker, waitress, factory worker, barmaid, tax advisor and bookkeeper. She earned incomes ranging from $30,000 to over $50,000 CAD (except for lower incomes in 1983 – 1985). From March 1995 to March 2000, she attended university full-time and had income in the same range from employment and scholarships.
>
> [219] Her highest earning year was December 1999 to September 2000, when she worked as a tax auditor in Switzerland. She earned the Canadian equivalent of approximately $90,000 - $100,000.
>
> [220] In September of 2000, she learned of her acceptance as a permanent resident of Canada and she emigrated in November 2000.
>
> [221] Ms. Knapp was advised not to work by Dr. Attalla, her Whitehorse doctor, until she had an examination by an orthopaedic surgeon.
>
> [222] Ms. Knapp had planned to work in Europe during each winter but that did not happen, which I find was because she had started a relationship with Mr. Dufresne, she wanted to come to Canada, and because of her injury.
>
> [223] Ms. Knapp did some part-time bookkeeping work with Ms. Fournier, a self-employed bookkeeper in 2003 and 2004 from approximately February – May in each year at tax time. She was unable to work on a full-time basis because of limitations from her injury.
>
> [224] However, in the years 2002 – 2003, Ms. Knapp operated a business called A. Knapp Accounting Services, which earned less than $5,000 each year. She also operated a business called North Star Adventures, which made equipment expenditures for outdoor adventure but earned modest amounts. She also provided pilot car services for Mr. Dufresne.

[9] The judge first assessed damages for loss of future earning capacity and then damages for past wage loss. He rejected the "mathematical calculations" of an economist because of the "mild to moderate nature of her disability and the fact that accommodations can be made as established by Ms. McClung [the physiotherapist who prepared the functional capacity evaluation]". He said only this in assessing damages for loss of earning capacity:

> [225] … taking into account the mild to moderate nature of her disability and the fact that accommodations can be made as established by Ms. McClung, I am not of the view that the mathematical calculations of Mr. Szekely, the consulting economist, is the approach to take.
>
> [226] I agree with the assessment of Finch J.A. [in *Pallos*] that the various methods of assessing this loss of capacity to earn income are "equally arbitrary". While Ms. Knapp is a very capable bookkeeper/accountant, she does have a disability in sitting for long periods of time and dealing with her back pain. I assess this loss at $70,000.

[10] With respect to past wage loss he awarded $57,450 comprised of two sums, $27,450 for the period between December 1999 and February 2000 (when she worked for the Swiss tax authority in a reduced capacity due to her injuries), and an additional $30,000 for the period prior to seeing an orthopaedic surgeon, when she was in Canada but unable to work due to her injuries.

III. Submissions on Appeal

[11] Ms. Knapp says that the mathematical model put forward by the consulting economist establishes guidelines for determining her loss of future earning capacity. For example, the consulting economist (Mr. Szekely) gave $14,035 as a present value for a loss of $1,000 per year in income over the balance of her working life. He gave evidence regarding average earnings, length of employment, and present value calculations, including accounting for labour market contingencies.

[12] There was evidence of a statistical average income of $30,000 per year for female bookkeepers. Ms. Knapp was awarded $30,000 for the two-year period in the Yukon prior to consultation with her orthopaedic surgeon, or $15,000 per year. She only earned $5,000 per year for the period 2002-2004. Her loss over that and later periods, unless attributable to other causes, would be significant.

[13] Ms. Knapp says that even after considering positive and negative contingencies the amount awarded by the judge for loss of earning capacity is "totally disproportionate" to her loss. She says this Court should vary the award by replacing it with our own assessment pursuant to s. 1 of the *Court of Appeal Act*, R.S.Y. 2002, c. 47 (referring to *Court of Appeal Act*, R.S.B.C. 1960, c. 82, s. 9).

IV. Analysis

(a) The standard of review for a damages award

[14] This Court will only interfere with a trial judge's assessment of damages where there "was no evidence upon which a trial judge could have reached this conclusion, or where he proceeded upon a mistaken or wrong principle, or where the result reached at the trial was wholly erroneous". This standard requires the judge to

have "applied a wrong principle of law", made a "manifest error", or made an award "either so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage". See *Woelk v. Halvorson*, [1980] 2 S.C.R. 430, 114 D.L.R. (3d) 385 at 388-89, citing *Andrews v. Grand & Toy Alberta Ltd.*, [1978] 2 S.C.R. 229, 83 D.L.R. (3d) 452. See also *Le v. Luz,* 2003 BCCA 640 at paras. 12-13; *Marois v. Pelech,* 2009 BCCA 286 at paras. 21-22; *Sabo v. Canada (Attorney General),* 2013 YKCA 2 at paras. 80–83; *Minet v. Kossler,* 2008 YKCA 12 at para. 27; *Carey v. Richert,* 1997 CarswellYukon 32 (WL), [1997] Y.J. No. 47 (QL) (C.A.).

[15] In *Le v. Luz*, Donald J.A., speaking for the Court, said this:

> [12] Recently the Supreme Court of Canada used a different formulation for the review of damage awards generally. Chief Justice McLachlin in *M.B. v. British Columbia*, 2003 SCC 53 said that as damages are a question of fact only palpable and overriding error can justify interference. She put it this way at para. 54:
>
> > The trial judge's assessment of what proportion of the damage sustained by M.B. was caused by the foster father's assault is a judgment of fact, which an appellate court cannot set aside absent "palpable and overriding error": *Housen v. Nikolaisen*, [2002] 2 S.C.R. 235, 2002 SCC 33. I can find no palpable and overriding error in the trial judge's approach. The Court of Appeal therefore erred in substituting its own assessment of the appropriate quantum of damages.
>
> [13] In identifying an error of that magnitude I propose to draw from the earlier cases the usages that have guided courts for many years, "inordinately high or low", "wholly out of proportion", "unreasonable and unjust", each of which would, in my view, demonstrate palpable and overriding error.

[16] Inadequate reasons explaining a damages award are not a stand-alone basis for intervention, but may facilitate a conclusion the award is based on an error of law, a misapprehension of evidence, or is inordinately high or low: *Jurczak v. Mauro,* 2013 BCCA 507 at paras. 28-29, citing *Gregory v. Insurance Corporation of British Columbia,* 2011 BCCA 144 at para. 16.

(b) Assessing loss of earning capacity

[17] Both the capital asset and earnings approaches are valid methods of assessing the loss of earning capacity: *Perren v. Lalari* at paras. 12, 32. However, in

my view, even where a judge determines the capital asset approach is indicated on the record, the court should ground itself as much as possible in factual and mathematical anchors. Adopting the capital asset approach does not justify an undisciplined approach.

[18] It can be helpful under either approach for the judge to consider the *quantum* of the award in light of the range of possibilities indicated by economic analysis. Mathematical aids and economic analysis facilitate a "bracketing" exercise that indicates the high and low extremities of possible awards in a given case, as was recently considered by this Court in *Grewal v. Naumann,* 2017 BCCA 158 at paras. 70-73 (majority per D. Smith J.A.) and paras. 56-58 (Goepel J.A., dissenting).

[19] Courts, where they can, should endeavor to use factual and mathematical anchors as a foundation to quantify loss of future earning capacity, including economist reports and a plaintiff's pre-accident employment history, training, and capabilities: *Jurczak v. Mauro* at paras. 35-37; *Lampkin v. Walls,* 2016 BCSC 1003 at paras. 181-184, 192-210; *Carey v. Richert* at paras. 14-19; *Summers v. Boneham* (1994), 45 B.C.A.C. 306, 1994 CanLII 1520. In addition, a plaintiff's personality, work ethic, and attitude should all be considered where possible; it may constitute an error to ignore such factors: *Spencer v. Rosati* (1985), 50 O.R. (2d) 661 at paras. 11-13, 1 C.P.C. (2d) 301 (C.A.).

(c) Errors in the Court below included misapprehension of evidence, inadequate reasons, and an inordinately low award

[20] In this case the judge, conducting a trial within a trial, had a difficult task. That said, the cryptic discussion of the assessment of damages for loss of future earning capacity was inadequate and involved a material misapprehension of the evidence. The judge in this case also assessed damages for loss of future earning capacity before assessing the damages for past income loss.

[21] In my view, it is generally preferable to first assess past income loss, then move on to assess loss of future earning capacity. Although assessing either involves hypotheticals, proceeding in this manner involves moving from something

generally better known and understood (i.e., historical income loss) to something generally less well known and understood (i.e., loss of future earning capacity). In this case, the approach taken may have contributed to the judge's failure to anchor the award for loss of future earning capacity.

[22] Although not required or even possible in every case, where there is an employment history, employment qualifications, and a demonstrated work ethic, a court should consider and discuss both pre-accident earnings and post-accident earnings and earnings potential. In this way, the court can consider a range of income loss against which contingencies might be applied.

[23] I say that the assessment of damages in this case involved a material misapprehension of the evidence because the judge discounted the consulting economist's evidence based on a misapprehension of the evidence of the physiotherapist who prepared the functional capacity evaluation, Ms. McClung.

[24] Ms. McClung's report went in by consent. She was not cross-examined. The judge said, "taking into account the mild to moderate nature of her disability and the fact that accommodations can be made as established by Ms. McClung, I am not of the view that the mathematical calculations of Mr. Szekely, the consulting economist, is the approach to take" (at para. 225).

[25] In fact, Ms. McClung's evidence was as follows (a passage the judge had accurately reproduced earlier in his reasons at para. 204 in relation to general damages):

> <u>Ms. Knapp did not demonstrate the ability to complete the job demands of a job in the field of an accounting related profession</u>. This type of work requires constant sitting which is one of the most aggravating postures for Ms. Knapp. Bending, reaching and twisting further aggravate the pain in her mid back.
>
> <u>Ms. Knapp should seek work that allows her to change position frequently from sitting to dynamic standing with not more than 45 minutes in sitting or two hours in standing duration. I would suggest that she sit a maximum for two hours per day, broken up throughout the day</u>. Ms. Knapp demonstrated the ability to lift and carry in the light to medium levels. I would recommend that lifting not be a significant part of any job that Ms. Knapp pursues as her lifestyle already requires her to lift to near her capacity during the day. As she currently does, she should pursue a schedule that allows flexibility for breaks

> during the day so that she can self manage her pain level. She should avoid repetitive or prolonged bending, twisting, unsupported reaching or overhead work.
>
> [Emphasis added.]

[26] In my view, the reasons given for both the rejection of the economic evidence and the assessment of damages under this head were both unsupported and otherwise inadequate given the live issues in the case. The rejection of the economic evidence was based on the judge's misapprehension of Ms. McClung's evidence. Those errors resulted in an award which was, in my view, inordinately low.

(c) Should this Court assess damages?

[27] The question, then, is whether this is an appropriate case for this Court to exercise its jurisdiction to replace the trial judge's assessment with our own assessment, pursuant to s. 1 of the *Court of Appeal Act* (Yukon). The alternative is to remit the matter to the trial judge. The appellant urged us to make our own assessment rather than remitting the matter to the trial judge, due to the passage of time since the accident.

[28] Where the threshold for interfering with a damages award is satisfied, this Court may conduct its own assessment of damages, provided the record is adequate to the task and there are no issues turning solely on credibility: *Le v. Luz* at paras. 16-17.

[29] In another motor vehicle case, *Saadati v. Moorhead,* 2017 SCC 28, the accidents occurred some 12 years before the matter reached the Supreme Court of Canada. The Court highlighted that the time elapsed since the injury is a factor in the appellate court's decision whether to conduct its own assessment:

> [44] As to the quantum of the award, I note that both accidents at the root of this appeal occurred nearly 12 years ago, and that the litigation — in which the respondents have admitted liability — is now (as of this month) fully 10 years old. Further, the modest award in this case is not out of step with non-pecuniary damage awards from British Columbia courts for injuries causing personality changes and cognitive difficulties with similar consequences upon the plaintiff's enjoyment of life (e.g. *Zawadzki v. Calimoso*, 2011 BCSC 45).

> [45] The Court's power to remand to a court of appeal is discretionary (*Supreme Court Act*, R.S.C. 1985, c. S-26, s. 46.1; *Wells v. Newfoundland*, [1999] 3 S.C.R. 199, at para. 68). The passage of time since the acknowledged wrong against Mr. Saadati and the commencement of these proceedings militates against remand. As in *Wells*, the damages assessed by the trial judge are reasonable, supported by the record, and fairly compensate the appellant's loss. I conclude, therefore, that it would not "be just in the circumstances" (s. 46.1) to remand this matter to the Court of Appeal.
>
> [Emphasis added.]

[30] Similarly, in a situation where ten years had elapsed since the accident and nearly three years had elapsed since the trial began, it was appropriate for this Court to assess the damages at issue in that case: *Grewal v. Naumann* at para. 55 (dissenting). Although the majority disagreed as to whether intervention was justified, the Court did not disagree with the propriety of that approach.

[31] In the present case, the motor vehicle accident giving rise to this litigation occurred in September 1999. The personal injury claim was commenced September 2001 and settled in October 2002. The subsequent professional negligence claim was commenced October 2004.

[32] Ms. Knapp was injured almost 18 years ago. She has been embroiled in the present litigation for almost 13 years. The record is fulsome and sufficient to conduct an assessment of damages. In all the circumstances, I am of the view this is an appropriate case for this Court to exercise its discretion to conduct its own assessment of damages rather than remitting the *quantum* of the award for loss of future earning capacity to the trial court.

(d) Assessment of damages for future loss of earning capacity

[33] The trial judge awarded $70,000 for future loss of earning capacity (at para. 226). Using the equation provided by the consulting economist to adjust for contingencies and present value, that award amounts to a loss of approximately $5,000 per year. By contrast, the judge awarded $30,000 for past income loss over a two-year period (in Canada), which amounts to $15,000 per year (at para. 229). The

damages awarded for past income loss and loss of future earning capacity are disproportionate.

[34] Moreover, the loss of future earning capacity was premised on a misapprehension of Ms. McClung's evidence that there were accommodations available for Ms. Knapp. A review of the medical evidence and Ms. McClung's report indicates instead a consensus that Ms. Knapp suffers from permanent effects of the injury sustained in the motor vehicle accident and is partially disabled.

[35] However, in my view, the awards proposed by the appellant are far too generous. The appellant urged a figure of $771,295. That figure is premised on Ms. Knapp working in Switzerland and earning a high rate of income there, which did not reflect her previous earnings history or potential earnings in Canada. In June 1999, prior to the accident, Ms. Knapp applied to be admitted to Canada as a permanent resident. Immediately thereafter she returned to Canada. In August of 1999 she began what turned out to be an enduring relationship with Mr. Dufresne.

[36] The trial judge found that Ms. Knapp planned to remain in Canada rather than work in Switzerland. He found that her relationship with Mr. Dufresne was one of several reasons for that decision. However, when Ms. Knapp met Mr. Dufresne she had already applied for permanent residency. The previous earnings in Switzerland also play no part in the last two years of Ms. Knapp's past income loss, as determined by the judge. Even within her European employment history, the recent Swiss earnings are an outlier compared to her earlier employment income.

[37] I am of the view that a reasonable approach to the analysis is to determine a reasonable income for Ms. Knapp in Canada as a bookkeeper. Employment as a bookkeeper is also the respondents' experts most probable scenario. Table 4 in Mr. Szekely's report represents this earnings projection. The projection for employment as a bookkeeper, with benefits, amounts to approximately $30,000 per year, factoring in labour market contingencies.

[38] While Mr. Szekely's report assumes a Canadian female with a Master's degree, Ms. Knapp had foreign university education and was completing accounting accreditations at the time of her injury. The respondents' economist's report suggested replacing the assumption of a Master's degree with that of a two-year diploma. The difference in lifetime earnings from those two assumptions is less than $30,000. In short, the difference is not significant compared to the effect of other contingencies.

[39] If the loss of earning capacity is a sum equivalent to the past income loss on a per year basis, after Ms. Knapp settled in Canada, this amounts to $15,000 per year. The past income loss award is uncontested on appeal. An amount of $15,000 for each of 2002 and 2003 is also within the range for past income loss proposed by the respondent's experts. This would represent a 50% disability, which, in my view, is in keeping with the medical evidence that Ms. Knapp was mildly to moderately disabled and faced deteriorating health conditions without future anterior thoracic T10-T12 fusion surgery.

[40] A $15,000 per annum income loss is approximately half of what she would otherwise have earned. That results in an award of $210,525 for future loss of earning capacity (($15,000/1000) x 14,035 = $210,525). This is approximately half of the projected future earnings for a Canadian female bookkeeper in 2002 dollars with a 10-year earnings delay (which was $427,627, per Mr. Szekely's report).

[41] I am aware that Ms. Knapp's actual earnings were much less than what would represent her residual earning capacity through this approach. The use of her actual earnings to measure her loss, however, would be inappropriately using hindsight. In any event, as the respondent rightly argued, Ms. Knapp's actual income is the product of a number of things, including her decision to move to Faro, a small Yukon town, and to engage in business ventures that encountered legal difficulties and failed for those and other reasons.

[42] On the basis of the evidence before us, I would assess Ms. Knapp's damages for loss of future earning capacity at $211,000.

V. Disposition

[43] I would allow the appeal and substitute an award of $211,000 for loss of future earning capacity. The appellant is entitled to costs.

"The Honourable Mr. Justice Savage"

I agree:

"The Honourable Madam Justice D. Smith"

I agree:

"The Honourable Mr. Justice Fitch"