COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *McColl v. Sullivan,*
2021 BCCA 181

Date: 20210430
Docket: CA46708

Between:

Alissa McColl

Respondent
(Plaintiff)

And

Jason Sullivan and Yong H. Lee

Appellants
(Defendants)

Before: The Honourable Madam Justice Newbury
The Honourable Mr. Justice Abrioux
The Honourable Mr. Justice Voith

On appeal from: An order of the Supreme Court of British Columbia, dated February 6, 2020 (*McColl v. Sullivan*, 2020 BCSC 137, Vancouver Docket M153118).

Counsel for the Appellants (via videoconference):	R.C. Brun, Q.C. J.J.L. Brun
Counsel for the Respondent (via videoconference):	E.L. Goodman T. O'Mahony
Place and Date of Hearing:	Vancouver, British Columbia March 15, 2021
Place and Date of Judgment:	Vancouver, British Columbia April 30, 2021

Written Reasons by:
The Honourable Mr. Justice Abrioux

Concurred in by:
The Honourable Madam Justice Newbury
The Honourable Mr. Justice Voith

Summary:

The respondent, Alissa McColl, was injured in two motor vehicle accidents. She was 25 years old at the time of the second accident and was pursuing a career as an editor for film and television. At trial, the judge held that Ms. McColl's damages for future loss of earning capacity were to be assessed using male labour market contingency statistics, which were absent in the expert evidence. The judge directed the parties to calculate the present value of Ms. McColl's future loss on the basis of a set of assumptions and directions she provided, failing which the calculation was to be referred to the Registrar. The judge having given no instructions to return before her, the parties agreed to a figure and it was incorporated into the order without further submissions. The appellants argue the judge erred in (1) relying on male, rather than female, labour market contingency statistics; and (2) in failing to review the overall fairness of the award once the parties had agreed upon the present value figure. Held: Appeal allowed. The judge erred in failing to assess the overall fairness of the award. While the judge appears to have wrongly treated the use of male statistics as a "default" position, any error in this respect is interrelated with her failure to conduct a final assessment of the award. The appropriate remedy is to remit the award for loss of future earning capacity for reconsideration in accordance with these reasons.

Reasons for Judgment of the Honourable Mr. Justice Abrioux:

Introduction

[1] The respondent, Alissa McColl, was injured in two rear-end motor vehicle accidents in December 2013 and March 2014. She was 25 years old at the time of the second accident and was pursuing a career as an editor for film and television.

[2] Liability was admitted in both accidents and the damages were assessed cumulatively at the trial.

[3] The only issues on appeal are whether the trial judge erred in assessing damages for loss of future earning capacity by (1) relying on male labour market contingencies, or (2) by directing the parties—without instructions to return before her—to calculate the present value of Ms. McColl's future loss on the basis of a set of assumptions and directions, failing which the calculation was to be referred to the Registrar.

[4] The parties agreed upon $1,542,866.50 as the present value of the appellant's future loss of earning capacity. That amount became part of the order after trial entered on November 23, 2020.

[5] The appellants argue it was for the judge to assess and give judgment for the future loss of earning capacity award. In doing so, she had a responsibility to determine whether the amount was fair and reasonable in the circumstances.

[6] I would allow the appeal and remit the award for loss of earning capacity of $1,542,866.50 to the trial judge for reconsideration in accordance with these reasons.

Trial Reasons for Judgment

[7] In reasons for judgment indexed at 2020 BCSC 137, the judge found that as a result of the accidents, Ms. McColl suffered myofascial pain in her shoulder, neck and chest muscles; severe thoracic outlet syndrome ("TOS"); cervicogenic headaches; and psychological and emotional symptoms resulting from her physical injuries: at para. 62.

[8] With respect to prognosis, the judge noted that Ms. McColl had undertaken all courses of treatment recommended by her treating professionals, including various forms of therapy. These treatments provided short term but not permanent relief. The judge stated that Ms. McColl will suffer ongoing myofascial pain and TOS throughout her life, and that while she may experience some improvement over time, she is unlikely to recover to her pre-accident state: at para. 75. She also concluded that Ms. McColl's psychological health would improve with therapy and her ongoing pain management, but that she will continue to suffer from some emotional and psychological symptoms as long as her physical injuries persist: at para. 77.

[9] The judge then considered Ms. McColl's entitlement to damages. On appeal, the appellants do not challenge the awards for non-pecuniary damages ($120,000), past loss of earning capacity ($260,000), and special damages ($20,682). An issue

pertaining to the calculation of the award for cost of future care ($324,132) was resolved prior to the hearing of the appeal.

[10] The judge found that Ms. McColl had failed to fully mitigate her losses by failing to actively search for employment consistent with her abilities. This resulted in a 20% reduction to the pre-trial loss of earnings: at para. 120.

[11] The judge's findings regarding Ms. McColl's injuries underlie the award for loss of future earning capacity.

[12] In that regard, having referred to *Perren v. Lalari,* 2010 BCCA 140 and *Brown v. Golaiy* (1985), 26 B.C.L.R. (3d) 353 (S.C.), which set out some of the factors to consider in assessing a claim for loss of earning capacity, the judge stated:

> [123] I find that Ms. McColl has established that her earning capacity has been impaired as a result of the injuries she sustained in the accidents. Ms. McColl had successfully trained in a specialized career, obtained a good job in the film industry, and was doing very well in that job. This career would have returned her a very good income. The evidence before me was overwhelming that she will no longer be able to pursue the career she trained in and loved.

[13] The judge further found:

> [125] In addition, not only will Ms. McColl be unable to return to her chosen career in the film industry, she will be faced a number of restrictions in other work opportunities. There is no question that Ms. McColl has been rendered less marketable as a result of her injuries.
>
> [126] In terms of assessing her loss, the questions before me include how long she would have stayed in the film industry, what level would she have ultimately reached, and what her future prospects are with her injuries.
>
> [127] Ms. McColl says she would have worked until she was 70. She points to her father as an example of someone who is still working at age 64. While one witness acknowledged he knew of a few people who worked past the normal retirement age, no evidence was tendered to establish that people in the film industry typically work past the normal retirement age of 65. I am not satisfied that Ms. McColl has established a real and substantial possibility that she would have worked to age 70. Her loss will be assessed to age 65.

[14] The judge was satisfied that Ms. McColl had established a real and substantial possibility that she would have become an editor in the film industry. She

found that a conservative but reasonable estimate of the respondent's annual earning capacity until 2023 was $100,000/year, and from 2023 to the end of her working life, $130,000/year: at para. 130.

[15] In considering Ms. McColl's residual earning capacity, the judge found Ms. McColl had not done "all that she can in terms of obtaining work": at para. 132. She assessed the loss of future earning capacity to be 60% of Ms. McColl's likely earnings but for the accidents.

[16] The judge then considered present value adjustments, noting a meaningful discrepancy between calculations that use female as opposed to male statistics. Citing *Gill v. Lai*, 2019 BCCA 103 [*Gill*] the judge found that this discrepancy has been accepted in courts in this province as indicative of gender bias and historical inequality. She found that it would be inappropriate to rely on female statistics, particularly since Ms. McColl intended to be competitively employed in the film industry until her retirement: at para. 144. The judge was not persuaded, however, that Ms. McColl's "tenacity, ambition and passion took her outside the statistical norm": at para. 146.

[17] Accordingly, the judge determined:

> [150] In the result, the parties are directed to assess the present value of Ms. McColl's future loss, using the following assumptions and directions:
>
> a) Ms. McColl will work until age 65,
>
> b) Ms. McColl's loss from April 1, 2019 until December 31, 2022 is $60,000 per annum,
>
> c) Ms. McColl's loss from January 1, 2023 until her 65th birthday is $78,000 per annum,
>
> d) calculations will be prepared using economic multipliers, including all conventional non-participation factors, and
>
> e) male earning statistics will be used.
>
> [151] If the parties are unable to agree on the present value calculation, I refer the present value calculation to be assessed before a Registrar.
>
> [Emphasis added.]

[18] As I have noted, the parties agreed on the present value calculation. The entered order after trial provides in part:

> THIS COURT ORDERS that:
>
> 1. The Defendants pay to the Plaintiff:
>
> …
>
> c. $1,542,866.50 for future loss of earning capacity;…

Grounds of Appeal

[19] As framed by the appellants, the judge erred:

a) in concluding that Ms. McColl's award for loss of future income earning capacity should be calculated relying solely on labour market contingency tables for Canadian males;

b) in instructing the parties to calculate Ms. McColl's loss of capacity on the basis of a list of directions and then delegating the resolution of any disagreement between the parties as to the correct calculation to a Registrar of the court;…

Analysis

Is the Appeal Moot?

[20] I will first deal with a preliminary argument advanced by Ms. McColl. She submits that since the appellants agreed to the present value calculation, with that amount forming part of the order after trial, the issues on appeal are moot.

[21] I would not accede to this argument. As I explain in more detail below, the judge did not provide the parties any pathway to return before her in the event they agreed on the calculation. The matter ended with their agreement, whether they were satisfied with the overall result or not. In this context, the issues clearly remain live and open to appellate review.

Standard of Review

[22] The assessment of damages is a question of fact: *Steinebach v. O'Brien,* 2011 BCCA 302 [*Steinebach*] at para. 23; *Crimeni v. Chandra,* 2015 BCCA 131 [*Crimeni*] at para. 14. It is, therefore, reviewable on a standard of palpable and overriding error: *Housen v. Nikolaisen*, 2002 SCC 33 at para. 10.

[23] And yet the second ground of appeal, which I would accede to, raises a question of law which is reviewable on a standard of correctness: *Housen* at para. 8.

Did the Judge Err in Directing the Parties to Use Male Labour Market Contingency Tables?

Background

[24] The parties led competing expert reports on the present value of Ms. McColl's future income loss.

[25] Ms. McColl's expert, Mr. Darren Benning, presented two tables calculating present value multipliers for "females and males with Bachelor's degrees (other than law) in BC": at para. 140. His report provided calculations reflecting statistics for premature death (actuarial multipliers) and statistics for "premature death, non-participation, unemployment and part-time/part-year employment (economic multipliers)": at para. 140. The latter only accounted for risks related to disability.

[26] The appellants' expert, Mr. Mark Gosling, reviewed Mr. Benning's report and provided adjusted calculations. In his view, Mr. Benning's report was flawed in excluding contingencies unrelated to disability, including "preference for leisure (including retirement) over paid work, and preference for unpaid household work (including caring for children or disabled family members) over work": at para. 141. Mr. Gosling provided present value calculations for females only, but agreed in his testimony that he was unaware of any discrepancy between the earnings of male and female film editors and that "if a female will behave like a male, the male projection would be okay": at para. 142.

[27] The judge noted that there was a "meaningful discrepancy between the calculations done using female statistics, as against male statistics": at para. 143. Citing this Court's decision in *Gill*, she noted that such discrepancies may reflect "embedded gender bias and historical inequality in the underlying statistical information": at para. 143. Given Ms. McColl's intention to be "competitively employed in the film industry until her retirement", she found male statistics should be used: at para. 144.

[28] The judge, however, also rejected the male multipliers prepared by Mr. Benning for their "restricted assessment of non-participation factors": at para. 145. She noted that if McColl:

> [147] … was out of the ordinary in terms of tenacity and ambition, I would have expected such extraordinary tenacity and ambition to drive her forward following her injuries in way she has not demonstrated.

She added that Ms. McColl had many creative interests, wished to start a family and had parents who might need assistance as they aged: at para. 148. She concluded that Ms. McColl's circumstances were not "so extraordinary that non-participation factors should be restricted to disability alone": at para. 149.

[29] The appellants argue the judge erred in not using Mr. Gosling's female labour market contingency tables. They submit the judge misconstrued three authorities of this Court—*Steinebach*, *Crimeni* and *Gill*—in rejecting female statistics as reflective of gender bias and historical inequalities. They submit that gender-based statistics must be treated with caution but cannot be dismissed, and argue that the judge's finding relied on assumptions about convergence in male and female incomes that were contradicted by Mr. Gosling's testimony.

[30] They also argue that Mr. Gosling's female labour market contingency tables were a more appropriate measure in that, amongst other factors, the respondent is a young female whose employment trajectory was uncertain, whose degree of "tenacity, ambition and passion" was within the statistical norm, and who planned to form a family in the future. In the absence of evidence that she was less likely than the average female to reduce working hours due to family formation, they submit, average female contingency data was the most accurate measure of her likely trajectory.

[31] Ms. McColl submits that the judge's application of male statistics was grounded in her assessment that Ms. McColl intended to be "competitively employed" until retirement. This finding, she says, was amply supported in the evidence—including her "ambition [and] love for her career in a flourishing industry",

her “explicit intention to be a working mom” and the lack of evidence of a pay gap in film editing. The judge’s reasoning was accordingly consistent with the “individual approach” endorsed in *Gill* and did not rely on improper inferences about convergence between male and female incomes or other misinterpretations of the case law.

Discussion

[32] Defendants found liable in negligence are responsible for putting the plaintiff in the position they would have been in but for their injuries. In applying this principle, courts are tasked with “gaz[ing] … into the crystal ball” (*Andrews v. Grand & Toy Alberta Ltd.,* [1978] 2 S.C.R. 229 at 251) with respect to loss of future earning capacity. This may include extrapolating from general statistics that reflect societal inequalities. The question which arises is: to what extent should these statistics serve as a measure of a disadvantaged group member’s damages?

[33] In approaching this question it is necessary to review *Steinebach, Crimeni* and *Gill*.

[34] In *Steinebach,* the defendant health authority was found liable for brain damage suffered by the infant plaintiff due to oxygen deprivation at her birth. The trial judge awarded $890,000 for loss of future earning capacity. In arriving at this figure, he noted that male earning capacity for somebody with the plaintiff’s profile would have been $916,600 and female earning capacity $532,000. He projected that female earnings would rise to 97% of the projected male earning capacity over the plaintiff’s lifetime and awarded damages on the basis of that projection, despite no evidence being led on the issue of convergence.

[35] Justices K. Mackenzie and Groberman issued separate opinions, which were both joined by Justice D. Smith. Justice Mackenzie found that the judge erred in applying a “minimal discount from male earnings” given the “40% gap between lifetime male and female earning capacities” in the plaintiff’s category: at para. 42. While it was “reasonably open to project a substantial convergence on the basis of judicial notice”, the evidence did not support “near parity with current male earnings”:

at para. 43. Following the approach in *Walker v. Ritchie* (2005), 197 O.A.C. 81 (Ont. C.A.), var'd on other grounds, 2006 SCC 45, he instead awarded $750,000, as the mid-point between the male and female figures: at para. 43.

[36] Justice Groberman agreed in the disposition of the appeal, but expanded on the use of gender-based statistics. He noted that in projecting an infant's future income loss, courts are "generally driven to use statistical data drawn from the general population": at para. 49. These statistics often regard the sex of the child as an important factor because of the "differences in the way that men and women participate in the workforce, and because … even factoring out participation rates, women are, on average, paid less for their work than are men": at para. 50. In part, these differences may reflect historical realities that no longer prevail: at para. 56.

[37] Evidence reflecting current realities, however, cannot necessarily be taken at face value. In his view, female earning statistics should be understood as composite of many factors, voluntary and involuntary:

> [60] There are, in fact, a number of different components that account for the difference between women's average earnings and those of men. Some are simply discriminatory — they reflect historical patterns of undervaluing the work that women do, and paying them less than men for similar work. The defendants appear to concede that such factors should not be used to reduce damage awards for infant female plaintiffs.
>
> [61] It seems to me that such a concession is appropriate. It is no longer seen as acceptable that women should earn less than men simply by virtue of their sex. It would appear that such blatant discrimination is vanishing; in any event, the courts should not countenance such discrimination by incorporating it into damages awards.
>
> [62] Others components of the difference between men's and women's average earnings may, indeed, reflect lifestyle choices. Of particular importance are patterns of earning related to childbearing and child-rearing. Women, to a much greater extent than men, leave the workforce or engage in part-time work so that they are able to bear and raise children.

[38] Noting that the evidence at trial did not fully address these concerns, Justice Groberman accepted that Justice Mackenzie's substituted award fell within an "acceptable range": at para. 75.

[39] The issue was again addressed in *Crimeni.* The plaintiff was injured in two car accidents, the latter during her fourth year of university. She testified that she anticipated becoming a lawyer and led evidence on the average earning capacity of women with law degrees, which the trial judge regarded as "very conservative" given the influence of historical discrimination: *D.(J.) v. Chandra,* 2014 BCSC 466 at paras. 190–192. The trial judge awarded her 20% of the present value of the lifetime earnings of a female lawyer: at para. 195. The appellants challenged the award on the basis that the judge underestimated the income gap between men and women with law degrees. This Court disagreed. As Justice Willcock explained:

> [23] Experts are frequently asked to estimate the income losses by using gender-specific historical income figures. Such figures may be useful where they can fairly be said to be the most accurate predictor of the lost stream of earnings. However, there is authority for the proposition that the use of female earning statistics may incorporate gender bias into the assessment of damages. There is also authority for taking judicial notice of convergence in gender incomes: *Steinebach*….
>
> [24] It is certainly not an error, in my view, for a trial judge to recognize that the use of historical data can reflect such bias and, to the extent the circumstances giving rise to the bias may be expected to diminish, to view the evidence as conservative.
>
> [25] I can see no error in the judge's consideration of the plaintiff's pre-injury earning potential.

[40] The same issue arose more recently in *Gill.* The plaintiff was a working pharmacist who was injured in two car accidents. In assessing her damages for loss of future earning capacity, the trial judge used male labour market contingency statistics, reasoning that the plaintiff had "shown a particular adherence to the work force", valued her financial independence and had working parents: at para. 52. Further, the judge noted he was "reticent to give weight to female labour market contingencies which may have embedded discrimination": at para. 52. The appellants argued there was no evidence of embedded discrimination and the evidence of female labour market contingencies "accurately reflect[ed] the real and substantial possibilities for the respondent": at para. 53. This Court again disagreed, Justice Willcock explaining:

> [54] Judges can and do recognize income statistics may incorporate historic and inequitable gender-based pay differences and, as such, have increasingly taken a cautious approach to gender-based income statistics.…
>
> [55] In my view, the same can be said of labour market contingencies. It is not an error to recognize gender-based contingencies can incorporate bias. Having said that, we must bear in mind the quantification of damages necessitates an individual approach.
>
> [56] In the case at bar, the trial judge did not fail to deal with the parties before him. The respondent had borne children, made effective arrangements for childcare, participated on a full-time basis in the labour market, and was motivated to continue to participate full-time. It was certainly open to the trial judge to find she was unlikely to be affected by some of the contingencies reflected in female labour market statistics, and there was a reasonable basis upon which he could conclude the use of statistical evidence of contingencies affecting males in the labour market would result in a realistic prediction of the respondent's future. I would dismiss this ground of appeal.
>
> [Emphasis added.]

[41] In my view, the following principles can be drawn from the above:

a. damages for loss of future earning capacity are to be assessed on an individual basis: *Gill* at para. 55;

b. gender-based earning statistics "may be useful where they can fairly be said to be the most accurate predictor of the lost stream of earnings": *Crimeni* at para. 23;

c. however, gender-based earning statistics require caution because they may incorporate bias: *Steinebach* at para. 55; *Crimeni* at para. 23; *Gill* at para. 54; and

d. it may be reasonable, depending on the evidence, for a court to assume a convergence in earnings: *Crimeni* at para. 23.

[42] What courts should in fact *do* about statistical bias is a difficult question which raises evidentiary issues and issues of principle. Discerning when the statistics reflect "bias" rather than "lifestyle choices" is not necessarily straightforward. This is also the case, as *Steinebach* notes, with projecting convergence. For reasons I

explain, however, those issues are not directly before us. I would leave them for another case.

[43] Suffice it to say, gender-specific statistics *guide* rather than *determine* damages. Gender-specific statistics may incidentally align with a plaintiff's gender, but not invariably so. Two examples illustrate this point. To the extent that female economic multipliers reflect a greater likelihood of leaving the workforce to care for children, they may be appropriate for a male plaintiff who intends to be a "stay at home dad". Those same statistics may be inappropriate for a female plaintiff who intends to remain in the workforce without interruption. In every case, the burden is on the plaintiff to demonstrate their future losses.

[44] It is within this context that I find the judge's direction that "male earning statistics will be used" (at para. 150) to be somewhat troublesome.

[45] That is because her Reasons seem to imply that male earning statistics, including those that relate to "conventional non participation factors" (at para. 150), essentially amount to a "default" position: see para. 143.

[46] I note that the expert evidence for the use of male versus female statistics was relatively slim in this case. Although the judge highlighted Mr. Gosling's comment that he was unaware of "data indicating that female editors earned less than male editors" (at para. 142), there was no evidence of male labour market contingencies in the economists' reports, since Mr. Benning had not been asked to address that issue and Mr. Gosling had restricted his report to female statistics. In fact, it was this lack of evidence on the point, apart from Mr. Gosling's generic testimony, which appears to have led the judge to direct the parties/the Registrar to calculate the present value of Ms. McColl's loss of future earning capacity.

[47] I would add that certain lower court decisions have regarded the use of female statistics for female plaintiffs as "not appropriate" as a general matter: *Fancello v. Cupskey,* 2019 BCSC 1724 at para. 233 and *Orregaard v. Clapci,* 2020 BCSC 1726 at para. 229. This may erroneously imply that female statistics

may never be appropriate or of assistance to the court and/or that male statistics should be considered as a default position.

[48] If that is what the judge intended in this case then I would consider it to be in error.

[49] In my view, the legal framework to be applied with respect to the use of gender-based statistics is that which I have set out at para. 41 above.

Did the Judge Err in Failing to Assess the Overall Fairness and Reasonableness of the Award?

Background

[50] The appellants' position regarding this ground of appeal is that the judge effectively abdicated her responsibility to assess Ms. McColl's loss of future earning capacity. They submit that by having the parties or the Registrar calculate the present value of the future economic loss, with that amount to become the judgment for the award under this head of damages, the judge wrongly reduced the issue to a mathematical calculation.

[51] They say that once the present value had been determined, the judge had a duty to assess the "overall fairness and reasonableness of the award": *Rosvold v. Dunlop,* 2001 BCCA 1 at para. 11.

[52] Ms. McColl argues that the judge's approach was consistent with R. 18-1 of the *Supreme Court Civil Rules,* B.C. Reg. 168/2009, which permits the court to "direct that an inquiry, assessment or accounting be held by a master, registrar or special referee". Since the judge did not direct that the registrar's assessment be certified under R. 18-1(2), she retained responsibility for the ultimate assessment should the parties fail to agree pursuant to Rules 18-1(3) and (4).

[53] The appellants note in reply that the judge did not direct the parties to return before her for a final assessment following an agreement or a decision from the Registrar.

[54] It is of assistance at this point to repeat para. 150 of the Reasons:

> [150] In the result, the parties are directed to assess the present value of Ms. McColl's future loss, using the following assumptions and directions:
>
> a) Ms. McColl will work until age 65,
>
> b) Ms. McColl's loss from April 1, 2019 until December 31, 2022 is $60,000 per annum,
>
> c) Ms. McColl's loss from January 1, 2023 until her 65th birthday is $78,000 per annum,
>
> d) calculations will be prepared using economic multipliers, including all conventional non-participation factors, and
>
> e) male earning statistics will be used.
>
> [151] If the parties are unable to agree on the present value calculation, I refer the present value calculation to be assessed before a Registrar.
>
> [Emphasis added.]

[55] As I have noted, the parties agreed to a "present value calculation" of $1,542,866.50, with this figure then becoming the Court's judgment for future loss of earning capacity as reflected in the entered trial order.

Discussion

[56] Respectfully, I have concluded that the process followed by the judge was fundamentally flawed such that the appropriate remedy is to remit the award for future loss of earning capacity to her for reconsideration in accordance with these reasons.

[57] As Justice Huddart explained in *Rosvold*:

> [11] The task of the court is to assess damages, not to calculate them according to some mathematical formula: *Mulholland (Guardian ad litem of) v. Riley Estate* (1995), 12 B.C.L.R. (3d) 248 (C.A.). Once impairment of a plaintiff's earning capacity as a capital asset has been established, that impairment must be valued. The valuation may involve a comparison of the likely future of the plaintiff if the accident had not happened with the plaintiff's likely future after the accident has happened. As a starting point, a trial judge may determine the present value of the difference between the amounts earned under those two scenarios. But if this is done, it is not to be the end of the inquiry: *Ryder (Guardian ad litem of) v. Jubbal*, [1995] B.C.J. No. 644 (C.A.) (Q.L.); *Parypa v. Wickware* (1999), 65 B.C.L.R. (3d) 155*, supra*.

> The overall fairness and reasonableness of the award must be considered taking into account all the evidence.
>
> [Emphasis added.]

[58] Allowances must also be made for the contingency that the assumptions upon which the award is based may prove to be wrong: *Milina v. Bartsch* (1985), 49 B.C.L.R. (2d) 33 (S.C.) at 93, aff'd (1987), 49 B.C.L.R. (2d) 99 (C.A.).

[59] It is clear that while the judge provided a mechanism for the "starting point" of the analysis, she did not perform the final step contemplated in *Rosvold*; that is, once the present value amount was known, to consider the overall fairness and reasonableness of the award in light of all of the evidence. Only then could she give judgment for that amount.

[60] It is within this context that I shall address Ms. McColl's submissions regarding R. 18-1, the relevant provisions to this appeal being (1) to (3), (4), and (12), which provide:

> (1) At any stage of a proceeding, the court may direct that an inquiry, assessment or accounting be held by a master, registrar or special referee.
>
> (2) The court may direct that the result of an inquiry, assessment or accounting be certified by the master, registrar or special referee and, in that event, the certificate, if filed under subrule (9), is binding on the parties to the proceeding.
>
> (3) If the court does not direct that the result of an inquiry, assessment or accounting be certified, the result of the inquiry, assessment or accounting must be stated in the form of a report and recommendation to the court.
>
> (4) On application by a party, the court may
>
> > (a) vary or confirm the recommendation contained in the report and recommendation referred to in subrule (3),
> >
> > (b) remit the inquiry, assessment or accounting with directions, or
> >
> > (c) order that the subject matter of the inquiry, assessment or accounting be determined as directed by the court.
>
> …
>
> (12) The court may give special directions as to the manner in which an inquiry, assessment or accounting is to be taken or made, and the directions may include
>
> > (a) the manner in which the inquiry, assessment or accounting is to be prosecuted,

> (b) the evidence to be tendered in support,
>
> (c) the parties required to attend all or any part of the proceedings,
>
> (d) the time within which each proceeding is to be taken, and
>
> (e) a direction that persons whose interest can be classified constitute a class and are to be represented by the same lawyer,
>
> and the court may fix a time for the further attendance of the parties.
>
> [Emphasis added.]

[61] In my view, the reference in R. 18-1 to an "assessment" cannot result in what occurred in this case, being that the present value calculation became the Court's award or judgment for the plaintiff's loss of future earning capacity.

[62] In that regard, I will comment on certain of the authorities relied on by the respondent which, in my view, can readily be distinguished.

[63] *Clausen v. Canada Timber & Lands Ltd.* (1925), 35 B.C.R. 461 (C.A.) is cited in the respondent's factum as authority for the proposition that "assessments" in R. 18-1 includes the assessment of damages.

[64] *Clausen* involved the assessment of damages by the Registrar following a finding by the trial judge that a contract had been repudiated. It is clear from the decision, however, that the Registrar's report was confirmed by the judge, with an appeal being taken from that order. That is not what occurred in this case.

[65] *Ilett v. Buckley,* 2016 BCSC 1407, *Liu v. Bains*, 2015 BCSC 486 and *Lewis v. Gibson*, 2018 BCSC 1713, all involved situations where the judge made an award for past loss of earning capacity, with a referral to the Registrar if counsel could not agree on the amount awarded net of taxes.

[66] In *Morrow v. Outerbridge,* 2009 BCSC 433, a male 19-year old hockey player was injured as a result of a negligently performed surgical procedure to his shoulder. Justice Bennett, as she then was, found that "the final figure for the present value of future wages, had Mr. Morrow worked in the oil patch until age 65, is $2,351,228.50", but was unable to determine the proper deduction of his likely future earnings post-injury on the expert evidence. She directed counsel to recalculate the

likely earnings on the basis of her findings of fact, stating they "may either attend at the Registrar or bring the matter back before me" if they were unable to agree: paras. 281 and 286–289.

[67] Notably, Justice Bennett, in summarizing her award for all heads of damages, found that "[f]uture wage loss, although not finalized, will be in the range of $800,000": at para. 310.

[68] On a reading of the Reasons, it is evident that Justice Bennett had identified what she considered to be a fair and reasonable award for what she described as "future wage loss" but, due to the evidentiary record, needed assistance to have that award finalized. That is also not what occurred in this case.

[69] *Edwards v. Parkinson's Heating Ltd.,* 2018 BCSC 593 concerned a couple in their late-60s and early-70s who received injuries as a result of carbon monoxide exposure from a fireplace installed by the defendant. The male plaintiff, Dr. Pinel, was Professor Emeritus in biopsychology who continued to author new editions of a textbook in his retirement.

[70] Having found the defendant liable, Chief Justice Hinkson found that Dr. Pinel had sustained a future "loss of income" due to his decreased ability to contribute to the 10th edition of the textbook. Estimating his earnings on the 10th edition required accounting for certain "soft costs" such as tax write-offs, the timing of the royalty payments and the US-Canadian dollar exchange rate. The judge directed the parties to "work out" the present value of this aspect of the income loss using an expert's discount figures and the average earnings from the 7th–9th editions of the textbook, with a reference to the Registrar if they could not agree: at paras. 411, 419 and 424.

[71] It is apparent, in my view, that Dr. Pinel's future "loss of income claim" was fundamentally different from Ms. McColl's. Due to Dr. Pinel's age and retired status from UBC, the basis of the past claim was restricted to the alleged loss of revenue arising from the 8th and 9th editions of the textbook, and the future claim, as found by the Chief Justice, to the loss of revenue arising from the 10th edition.

[72] In contrast, Ms. McColl's claim for loss of future earning capacity is based on 35 years of her working life, which will include a number of personal decisions and contingencies that may affect her career.

[73] The judge's direction to the parties, again, was that they should "assess the present value of Ms. McColl's future loss", failing which "the present value calculation [is] to be assessed before a Registrar".

[74] The judge did not direct that, absent an agreement, the Registrar's report would be certified under R. 18-1(2). That being the case, it is not clear from the Reasons whether the judge appreciated that the Registrar's report and recommendations would have to come back before her pursuant to R. 18-1(3).

[75] In any event, the judge did not extend a similar opportunity to make further submissions before her in the event the parties reached an agreement.

[76] I appreciate that the judge did not expressly direct that the present value calculation would become the judgment amount for this head of damages. But that is what occurred.

[77] Unlike *Morrow* and *Edwards*, there is nothing in the Reasons to the effect that the judge had decided what the approximate fair and reasonable amount was, under this head of damages, with the present value calculation necessary only to finalize that amount.

[78] What occurred in this case is an example of why the final step of the process identified in *Rosvold* is required. Armed with the present value calculation of the future loss, the parties, in my view, should have been entitled to make further submissions to the judge as to "[t]he overall fairness and reasonableness of the [loss of future earning capacity] award … taking into account all the evidence".

[79] These submissions would presumably include, but not be restricted to factors such as:

- the respondent's family and career plans. In that regard, the judge referred to Ms. McColl being "competitively employed": at para. 144. This term is usually used in a functional sense, which may include accommodation in the work place, in contrast with voluntary/involuntary economic factors such as participation in the work force;

- the extent to which the gender-based statistics, viewed in the context of the $1,542,866.50 present value calculation, could assist the judge, if at all, in arriving at a fair and reasonable award; and

- the effect of even a one-year absence from the work force from the date of the Order after trial to Ms. McColl's 65th birthday, a period of approximately 35 years. This would have a significant impact on the fairness of the award.

[80] I would add that the incorporation of the mathematical present value calculation of $1,542,866.50 into the order after trial is more in keeping with the earnings approach to future income loss, rather than the capital asset approach that the judge, correctly in my view, found was appropriate in the circumstances of this case: at para. 122. And it bears noting that the approach in *Rosvold* is to be followed "[o]nce impairment of a plaintiff's earning capacity as a capital asset has been established": *Rosvold* at para. 11, quoted at para. 57 above.

[81] Finally, the appellants submit that in the event the appeal were allowed, this Court should provide directions to the judge as to how the final step of the process identified in *Rosvold* should proceed.

[82] In my view, no additional directions are required. Now that the present value calculation has been agreed to, the judge, in considering the overall fairness and reasonableness of the award will presumably approach the use of gender-based statistics in an individual and cautious manner in accordance with these reasons.

[83] The judge's judgment for loss of future earning capacity may be approximately $1,542,866.50, lower than this amount or, for that matter, higher. This

is for her to decide taking into account all of the evidence and submissions from the parties.

Disposition

[84] I would allow the appeal and remit the judgment for loss of future earning capacity of $1,542,866.50 back to the trial judge for reconsideration in accordance with these reasons.

"The Honourable Mr. Justice Abrioux"

I AGREE:

"The Honourable Madam Justice Newbury"

I AGREE:

"The Honourable Mr. Justice Voith"