

## QUANTUM/DAMAGES ISSUES

A \$200,000 loss of future income earning capacity award to a 25 year old student able to continue working full time was upheld where she had no settled employment pattern relying on comparator cases, without a mathematical calculation.

### ***Layes v. Stevens*, 2018 BCCA 415**

#### **FACTS AND ISSUES:**

The Appellant, Layes, was injured in a vehicle driven and owned by the Respondent Stevens. Liability was admitted. The trial proceeded as an assessment of damages. Following a 10-day trial, the trial judge concluded that Layes had suffered soft tissue injury to the neck, shoulders and back leading to chronic pain and headaches, and which contributed to her depression and anxiety. The trial judge rejected Layes' claims for a minor traumatic brain injury, post-concussion syndrome, major depression and Post-Traumatic Pain Disorder. She made the following awards:

- \$85,000 for non-pecuniary loss;
- \$53,233 for past wage loss;
- \$200,000 for loss of future earning capacity;
- \$61,308 for cost of future care; and
- \$8,741.20 for special damages

With respect to the \$200,000 award for loss of future earning capacity, Layes was in her mid-twenties (and so, did not have a settled pattern of employment), and there were no precise mathematical anchors available for assessing loss of future earning capacity. Layes was working full time. Although the evidence established that she lost some earning capacity generally, it did not establish that her injuries caused her inability to retain employment in her chosen career field.

Layes appealed, submitting that the judge erred in assessing her loss of earning capacity by referencing other case law rather than the particular facts and evidence of the case. She also argued that the award was inordinately low and was a wholly erroneous estimate of Layes' loss.

**HELD:** For the Defendant/Respondent; appeal dismissed.

Citing *Woelk v. Halvorson*, 1980 CanLII 17 (SCC), the Court of Appeal noted that an assessment of damages is a finding of fact. As such, the applicable standard of review is deferential.

The Court acknowledged the general proposition that “comparator cases do not perform the same useful function as they do in the assessment of non-pecuniary losses”, but declined to find that the trial judge committed any error. In this case, there were simply no reliable mathematical anchors upon which she could rely.

Considering *Sinnott v. Boggs*, 2007 BCCA 267 (CanLII) and *Jurczak v. Mauro*, 2013 BCCA 507 the Court noted that the approach to be taken in circumstances where a young person has not yet established a career and has no settled pattern of employment at the time of their personal injury: “[i]n cases where the future is hard to predict, a global approach to assessing the loss of future earning capacity is preferable.”

1. In the present case, the Court considered the trial judge’s decision in light of the fact that the Appellant was 25 years old, in the final year of her education, and that she had not yet embarked on any particular career. Given her work history, the Court found no error in the manner in which the Trial Judge determined the loss of future earning capacity claim.

The Court held that the award was not inordinately low.

- a. The Court rejected Layes’ argument that awards for future loss of earning capacity and past loss of income should bear a proportional relationship to each other:

[37] With respect, there is no authority for the proposition that awards for future loss of earning capacity and awards for past wage loss must bear some numerical or directly proportional relationship to each other. In some cases they will, if the relevant facts underlying each head of damages are the same. However, due to the different tests and circumstances involved in each, it is entirely conceivable — and in fact common place — for an award of future loss of capacity to differ markedly from an award of past wage loss.

[38] In this case the award of past wage loss covers a period of four years. Those years include the time in which Ms. Layes was most affected by her injuries. Further, the award for past wage loss was inflated because of Ms. Layes’ failure to maintain her full-time positions as a court reporter and administrative assistant. If she had succeeded in either of those jobs, her past wage claim would have been significantly reduced. I find no merit in the suggestion that the differential between the awards for past wage loss and loss of future earning capacity in the circumstances of this case suggests any error in the trial judge’s determination of the appropriate amount.

2. The Court also emphasized that this was a case where Layes was able to work, although there were some things that she could not do as well as before the accident:

[39] Nor do I accept the submission that the award for future loss of capacity did not reflect the findings of fact made by the trial judge. The key finding, a finding not challenged on appeal, is that Ms.

Layes can work on a full-time basis. While there may be some tasks that she can no longer perform, there are scores of jobs available to her.

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