COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Perren v. Lalari*,
2010 BCCA 140

Date: 20100318
Docket: CA036410

2010 BCCA 140 (CanLII)

Between:

Michelle Lee Perren

Respondent
(Plaintiff)

And

Kahmir Singh Lalari

Appellant
(Defendant)

Corrected Judgment: The front page of the judgment was corrected to reflect counsel names. K. Duncan appeared as counsel for the respondent and M-H. Wright and J.W. Joudrey appeared as counsel for the appellant.

Before: The Honourable Madam Justice Levine
The Honourable Mr. Justice Groberman
The Honourable Madam Justice Garson

On appeal from: Supreme Court of British Columbia, August 19, 2008,
(*Perren v. Lalari*, 2008 BCSC 1117, Victoria Docket 06 4420)

Counsel for the Appellant: M-H. Wright and J.W. Joudrey

Counsel for the Respondent: K. Duncan

Place and Date of Hearing: Vancouver, British Columbia
February 5, 2010

Place and Date of Judgment: Vancouver, British Columbia
March 18, 2010

Written Reasons by:
The Honourable Madam Justice Garson

Concurred in by:
The Honourable Madam Justice Levine
The Honourable Mr. Justice Groberman

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Reasons for Judgment of the Honourable Madam Justice Garson:

[1] This is an appeal by the defendant/appellant against an award of $10,000 for future loss of earning capacity made in circumstances where the plaintiff, although still suffering some effects of her injury, remained at her pre-accident employment and would, according to the trial judge, probably remain in that employment. The judgment appealed from is indexed at 2008 BCSC 1117.

[2] The trial judge said:

> [48] The loss of future earning capacity in the present case renders the plaintiff less marketable than she was before the accident but not in a way that demonstrates any substantial possibility that she will suffer an associated loss. Her talent and inclination are in the fields of office work and management. Ms. Perren would not give up her current employment voluntarily except, perhaps, to move into a related position. She can likely earn more as a manager than she could in a more physical position.
>
> [49] The impairment of the plaintiff's future earning capacity will have slight, if any, actual impact on her future earnings. Nonetheless, she has suffered some impairment under the *Pallos* test. I consider $10,000 to be an appropriately modest award in the circumstances.

[3] The issue framed by the parties is whether the trial judge erred in awarding damages for loss of future earning capacity when he had also found that the plaintiff had not demonstrated any substantial possibility that she would suffer a loss.

[4] Put another way, the question is whether a plaintiff who demonstrates a diminishment in her earning capacity no matter how slight, is entitled to some award of damages, even where she cannot demonstrate any substantial possibility that that lost capacity will result in a pecuniary loss.

Reasons for Judgment

[5] Ms. Perren, aged 34 at the date of the trial, was injured in a motor vehicle accident. At the time of the accident, Ms. Perren was employed by the provincial government in a management position. She suffered soft tissue injuries in the accident.

[6] The trial judge found her symptoms were likely to continue, on a chronic basis, into the indefinite future. The trial judge found that she was not competitively employable in a position that would require heavy or repetitive work. However, he noted that her employment did not require heavy or repetitive work and that there was no real possibility that she would turn to such employment.

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[7] Despite his conclusion that the plaintiff had not demonstrated a real possibility she would suffer a loss of income, he awarded the plaintiff damages for loss of earning capacity, in reliance on this Court's judgment in *Pallos v. Insurance Corp. of British Columbia* (1995), 100 B.C.L.R. (2d) 260, 53 B.C.A.C. 310, in which Finch J.A. (as he then was) found in that case that the loss of future earning capacity was suffered, even though the plaintiff continued to earn the same wage from the same employer, as he had before the accident.

[8] The trial judge carefully reviewed the jurisprudence on this point in not only *Pallos*, but also *Steenblok v. Funk* (1990), 46 B.C.L.R. (2d) 133 (C.A.); *Steward v. Berezan*, 2007 BCCA 150, 64 B.C.L.R. (4th) 152; *Parypa v. Wickware*, 1999 BCCA 88, 169 D.L.R. (4th) 661; *Chang v. Feng*, 2008 BCSC 49, 55 C.C.L.T. (3d) 203; and *Djukic v. Hahn*, 2007 BCCA 203, 66 B.C.L.R. (4th) 314, and held that he could not reconcile the judgments in *Steward* and *Pallos* on this question of whether an award for loss of future earning capacity should be made in the absence of proof of a substantial possibility of future pecuniary loss.

Analysis

[9] I turn to a consideration of those cases, and several other cases cited within those mentioned by the trial judge.

[10] In *Steenblok*, the plaintiff, aged 47, had been employed as a raker on a paving crew (before he was injured). He returned to that work three months after he was injured, but eventually (because of his injuries) sought alternative, less strenuous employment. He worked briefly as a security guard but gave that up because he did not like the work. The trial judge dismissed the claim for loss of

future earning capacity. In doing so, the trial judge held that the plaintiff had failed to show on a balance of probabilities that his chronic pain was irreversible. On appeal, the judgment turned on the question of the appropriate onus of proof for the assessment of damages for future losses. Mr. Justice Hutcheon (Legg J.A. concurring and Gibbs J.A. dissenting) stated what he considered to be the established proposition that (at 136), "in dealing with future loss substantial possibilities must be considered by estimating the chance of the event occurring and the balance of probabilities is confined to determining whether it did in fact happen in the past." The appeal was allowed by increasing the damages awarded by the trial judge by $150,000 for loss of future earning capacity. Mr. Steenblok's award was based on the difference between his earnings as a raker and his earnings either as a security guard, or as a raker, working one-quarter of his usual time. The evidence was such that the court could easily quantify (once the court corrected the error concerning the standard of proof) the pecuniary loss.

[11] *Kwei v. Boisclair* (1991), 60 B.C.L.R. (2d) 393, 6 B.C.A.C. 314, was cited by Finch J.A. in *Pallos*. In *Kwei*, where it was not possible to assess damages in a pecuniary way as was done in *Steenblok*, Taggart J.A., speaking for the Court, held that the correct approach was to consider the factors described by Finch J., as he then was, in *Brown v. Golaiy* (1985), 26 B.C.L.R. (3d) 353. Mr. Kwei had suffered a significant head injury with significant permanent sequelae that impaired his intellectual functioning. However, both before and after the accident, he worked at a variety of low paying jobs, thus making it difficult for him to demonstrate a pecuniary loss. Mr. Justice Taggart cited the *Brown* factors with approval:

> [25] The trial judge, as I have said, referred to the judgment of Mr. Justice Finch in *Brown v. Golaiy*. Future loss of earning capacity was at issue in that case. It stemmed from quite a different type of injury than the injury sustained by the plaintiff in the case at bar. But I think the considerations referred to by Mr. Justice Finch at p. 4 of his reasons have application in cases where loss of future earning capacity is in issue. I refer to this language at p. 4 of Mr. Justice Finch's judgment:
>
>> The means by which the value of the lost, or impaired, asset is to be assessed varies of course from case to case. Some of the considerations to take into account in making that assessment include whether:

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> 1. The plaintiff has been rendered less capable overall from earning income from all types of employment;
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> 2. The plaintiff is less marketable or attractive as an employee to potential employers;
>
> 3. The plaintiff has lost the ability to take advantage of all job opportunities which might otherwise have been open to him, had he not been injured; and
>
> 4. The plaintiff is less valuable to himself as a person capable of earning income in a competitive labour market.

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[12] These cases, *Steenblok, Brown,* and *Kwei*, illustrate the two (both correct) approaches to the assessment of future loss of earning capacity. One is what was later called by Finch J.A. in *Pallos* the 'real possibility' approach. Such an approach may be appropriate where a demonstrated pecuniary loss is quantifiable in a measurable way; however, even where the loss is assessable in a measurable way (as it was in *Steenblok*), it remains a loss of capacity that is being compensated. The other approach is more appropriate where the loss, though proven, is not measurable in a pecuniary way. An obvious example of the *Brown* approach is a young person whose career path is uncertain. In my view, the cases that follow do not alter these basic propositions I have mentioned. Nor do I consider that these cases illustrate an inconsistency in the jurisprudence on the question of proof of future loss of earning capacity.

[13] I continue my review of the cases mentioned by the trial judge.

[14] In *Parypa*, the plaintiff, a 40 year old nurse-in-training, was seriously injured. At trial, the defendant did not dispute that the plaintiff could not work as a nurse in the future, as she had planned before the accident. Mr. Justice Cumming summarized what he described as the well-established principles relevant to determining the quantum of damages for future loss of earning capacity. Of relevance to this case he noted:

- It is not loss of earnings but, rather, loss of earning capacity, a capital asset, for which compensation must be made (para. 62).

- Even a plaintiff able to earn as much after his injury as before his injury is entitled to compensation for the impairment, because some occupations will be closed to him, "and it is impossible to say that over his working life the impairment will not harm his income earning capacity" (para. 63).

- Hypothetical events (such as how the plaintiff's life would have proceeded but for the accident) or future events are given weight according to their relative likelihood (para. 66).

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[15] After summarizing the foregoing, and other relevant points, Cumming J.A. summarized the law as follows, at para. 67:

> These cases demonstrate that the trier of fact, in determining the extent of future loss of earning capacity, <u>must take into account all substantial possibilities and give them weight according to how likely they are to occur, in light of all the evidence</u> ...
>
> [Emphasis added.]

[16] I now return to the judgment in *Pallos*. *Pallos* is the judgment that the trial judge in this case considered to be in conflict with a later judgment of this Court in *Steward*.

[17] The plaintiff, Mr. Pallos, who was 34 years of age at the time of his trial, suffered a comminuted fracture of his leg when he was struck by a car. Before the accident, Mr. Pallos worked as a foreman at a scrap metal recycling company. At trial, the defendant conceded that Mr. Pallos suffered permanent pain, which limited his capacity to perform certain activities, and would continue to do so in the future.

[18] Mr. Justice Finch observed at para. 29, after summarizing the evidence, that "The loss of capacity has been suffered even though he is still employed by his pre-accident employer, and may continue to be so employed indefinitely."

[19] At paras. 23-29, Finch J.A. summarized the jurisprudence on the approaches to the assessment of loss of future earning capacity. He said:

> [23] The plaintiff also contends, that in limiting his consideration to the test set out in *Steenblok v. Funk* (supra), the trial judge overlooked another, and

more appropriate, test in claims of this sort. Counsel referred us to *Brown v. Golaiy*, [1985] B.C.J. No. 31 (13 December 1985), Vancouver Reg. No. B831458 (S.C.); *Andrews v. Grand & Toy (Alta.) Ltd.*, [1978] 2 S.C.R. 229, 83 D.L.R. (3d) 452, [1978] 1 W.W.R. 577, 8 A.R. 182, 3 C.C.L.T. 225, 19 N.R. 50; *Earnshaw v. Despins* (1990), 45 B.C.L.R. (2d) 380 (C.A.); and *Palmer v. Goodall* (1991), 53 B.C.L.R. (2d) 44 (C.A.).

[24] In addition to those cases cited by counsel, I would also refer to *Kwei v. Boisclair* (1991), 60 B.C.L.R. (2d) 393 (C.A.). There Mr. Justice Taggart quoted with approval from *Brown v. Golaiy* (supra) as follows (at pp. 399-400):

> [quoted above]

[25] In *Palmer v. Goodall* (supra) Madam Justice Southin said at p. 59:

> Because it is impairment that is being redressed, even a plaintiff who is apparently going to be able to earn as much as he could have earned if not injured or who, with retraining, on the balance of probabilities will be able to do so, is entitled to some compensation for the impairment. He is entitled to it because for the rest of his life some occupations will be closed to him and it is impossible to say that over his working life the impairment will not harm his income earning ability.

[26] In *Earnshaw v. Despins* (supra) Madam Justice Southin said (at p. 399):

> In my opinion, the true questions the jury must address in a claim such as this are:
>
> 1. Has the plaintiff's earning capacity been impaired to any degree by his injuries?
>
> 2. If so, what amount in the light of all the evidence should be awarded for that impairment?
>
> As Dickson J., as he then was, said in *Andrews v. Grand & Toy (Alta.) Ltd.*, [1978] 2 S.C.R. 229 at 251 ...
>
> > "It is not loss of earnings but rather, loss of earning capacity for which compensation must be made ... A capital asset has been lost: what was its value?"
>
> In catastrophic injury cases, the whole of the capital asset is lost. But there may be much less serious injuries which cause permanent impairment although the loss cannot be determined with any degree of exactitude.
>
> The learned judge ought to have addressed the question as one of impairment and pointed out that there was evidence of a limitation on earning ability. The jury might well have rejected the plaintiff's inordinate claim but appreciated that there are jobs now closed to the plaintiff which, as he grew older, he might have chosen and given him something more for that and future care than slightly under $12,000.

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> As I have said, this difficulty with the charge was not raised by counsel for the plaintiff with the learned trial judge. Indeed, he did not raise it before us.
>
> [27] It does not appear that the trial judge had his attention drawn to any of these cases, or to the approach they suggest. These cases all treat a person's capacity to earn income as a capital asset, whose value may be lost or impaired by injury. It is a different approach from that taken in *Steenblok v. Funk* (supra), and similar cases, where the court is asked to determine the likelihood of some future event leading to loss of income. Those cases say, if there is a "real possibility" or a "substantial possibility" of such a future event, an award for future loss of earning may be made. There is nothing in the case law to suggest that the "capital asset" approach and the "real possibility" approach are in any way mutually exclusive. They are simply different ways of attempting to assess the same head of damages, future loss of income. It is to be regretted that plaintiff's counsel did not advance the case at trial using both approaches, in the alternative.
>
> [28] ...
>
> [29] In my respectful view, a consideration of this issue should not have been limited to the test established in *Steenblok v. Funk* (supra). The plaintiff's claim in this case, properly considered, is that he has a permanent injury, and permanent pain, which limit him in his capacity to perform certain activities and which, therefore, impair his income earning capacity. The loss of capacity has been suffered even though he is still employed by his pre-accident employer, and may continue to be so employed indefinitely.

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[20] In assessing damages at $40,000, pursuant to s. 9(1) of the *Court of Appeal Act*, S.B.C. 1982, c. 7, Finch J.A. held as follows:

> [41] In sum, there is no clear medical evidence that the plaintiff has a diminished ability to earn income in the future, or, if so, the extent to which that ability is diminished. On the other hand, there is uncontradicted medical evidence of partial permanent physical disability which could have an effect on his capacity to work, and on his employability. <u>I would conclude that his earning capacity has been reduced</u>, even though he presently earns more than he did before he was injured.
>
> [42] Applying the test referred to in *Kwei v. Boisclair* (supra) to the uncontradicted medical evidence and the plaintiff's work history, I think the only reasonable conclusion is that the plaintiff was rendered: less capable from earning income from all types of employment; less attractive as a potential employee to new employers; unable to take advantage of all job opportunities previously open to him; and less valuable to himself, as a person capable of earning income in a competitive labour market.
>
> [Emphasis added.]

[21] I observe first that on its facts, *Pallos* is distinguishable from the case at bar. While it is true that, like Ms. Perren, Mr. Pallos continued to earn the same income

from the same employer as he did before the accident, he was disabled from his previous duties. His employer had assigned him to lighter duties. He was disabled from his usual duties and had proven a loss of income earning capacity. Second, I observe that Finch J.A. found that the error of the *Pallos* trial judge was in following the *Steenblok* approach or test where it was clearly inapplicable. *Pallos* is not authority for the proposition that, in the absence of any real possibility of a future loss, a plaintiff is nevertheless entitled to an award for loss of earning capacity. It must be remembered that there was no dispute that Mr. Pallos had proven a real possibility of future loss.

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[22] I turn next to the *Steward* case. *Steward* is the case the trial judge considered to be irreconcilable with *Pallos*. Mr. Justice Donald (speaking for the Court), considered *Parypa* in his reasons for judgment, but not *Pallos*. At para. 9, he quoted from the factum of the appellants/defendants in which the appellants stated their position as follows:

> 50. Here, the trial judge awarded $50,000, as “compensation for the impairment of his earning capacity in other occupations that may now be closed to him” (Reasons para. 45, A.R. p. 32). But there was no suggestion that the Respondent had any intention to go into a career in which his injuries would be an impediment. So, the award appears to be compensation for a mere theoretical loss. Also, there was no indication of a substantial possibility of actual future loss. Indeed, the rise of income between 2001-2004 suggests that the future does not hold in store a risk of reduced income-earning capacity. Thus, to have awarded any damage for future loss of earning capacity was an error of law (or at best an error of mixed fact and law).

[23] At para. 11, Donald J.A. noted, in reference to the trial judgment:

> When the judge refers to “other occupations that may now be closed to him” she must mean the plaintiff’s former occupation as a journeyman carpenter. The record discloses no other realistic alternative. The evidence is that the plaintiff left carpentry 20 years prior to the trial to work as a realtor. He was 55 years old at trial. He built a home for his family in 1991 and made home improvements and repairs for his own benefit from time to time before the accident. The medical evidence suggests that the plaintiff’s residual disability from the accident would interfere with strenuous physical work but no one, including the plaintiff, testified that a return to carpentry was in contemplation.

and at paras. 17 and 18, Donald J.A. said, after referring to *Palmer* and *Parypa*:

> [17] But the language in question there was used in the context of appellate review and, with respect, it cannot be transposed to an original analysis at the trial level. The claimant bears the onus to prove at trial a substantial possibility of a future event leading to an income loss, and the court must then award compensation on an estimation of the chance that the event will occur: *Parypa* ¶ 65.
>
> [Emphasis added.]
>
> [18] When the record is examined according to that approach, I cannot see the basis for a substantial possibility giving rise to compensation for diminished earning capacity. There being no other realistic alternative occupation that would be impaired by the plaintiff's accident injuries, the claim for future loss must fail.

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[24] The *Djukic* case was decided later in 2007 than *Steward*. It was referred to by the trial judge but is not of particular assistance to this analysis.

[25] The last case the trial judge reviewed is *Chang v. Feng*, a 2008 decision of Bauman J. (as he then was). The plaintiff, Mr. Chang, was a 28-year-old shipper/receiver who sustained serious injuries in a motorcycle accident. He returned to his former employment ten months after the accident. His ongoing disability related to a painful foot and knee. Mr. Justice Bauman found that the plaintiff had demonstrated an ability to at least carry on his pre-accident vocation as a shipper/receiver. He also found that he was disabled from some types of work. Mr. Justice Bauman first referred to the judgment of Finch J. A. in *Pallos* in which, as already noted, Finch J.A. stated that the "capital asset" approach and the "real possibility" approach were not mutually exclusive. Mr. Justice Bauman then noted critical commentary by the New Brunswick Court of Appeal in which it was noted that "courts, particularly in British Columbia, have shown no hesitation in making awards of lost earning capacity in cases where the injured party has returned to his previous work and is earning as much as he or she earned in the pre-accident period." He then noted:

> [73] Whether, indeed, the law in British Columbia permits recovery under this head in the "absence of any evidence of a real and substantial possibility of lost earnings or profits", is complicated by the British Columbia Court of Appeal's decisions in *Parypa v. Wickware*, 1999 BCCA 88 and in *Steward v. Berezan*, 2007 BCCA 150.

> [74] In *Steward*, the court was reviewing a trial judge's award for impairment of the plaintiff's earning capacity "in other occupations that may now be closed to him".
>
> [75] Justice Donald, for the court, noted the trial judge's use of the phraseology from *Palmer v. Goodall* (1991), 53 B.C.L.R. (2d) 44 (C.A.) (at ¶ 17 and 18):
>
> [quoted above]
>
> [76] This appears to be an express direction to first enquire into whether there is a substantial possibility of future income loss before one is to embark on assessing the loss under either approach to this head of loss, in particular, under the capital asset approach as well. (I note that Justice Russell arrived at a similar conclusion in *Naidu v. Mann*, 2007 BCSC 1313 and see also *Bedwell v. McGill*, 2008 BCCA 6, para. 53.)
>
> [77] I have done so in the case at bar, and I have concluded that in the case of the plaintiff, there is such a possibility.
>
> [78] But for reasons I have stated above, I have concluded that the impact on the plaintiff's future earning capacity is not likely to be extensive and there are strong negative contingencies involved.
>
> [79] On the whole of the evidence, I award the plaintiff the sum of $20,000 under this head.
>
> [Emphasis added.]

[26] I agree with Bauman J.'s analysis at para. 76.

[27] In the recent case of *Romanchych v. Vallianatos*, 2010 BCCA 20, the injured plaintiff was a university student. As part of her studies, she was employed as a co-op student working as a laboratory technician. Because of her injuries, the plaintiff had to leave that job for another less physically demanding job. She proved at trial that in her new position she earned slightly less, about $2,000 per annum, than in her previous job. The trial judge awarded $80,000 for future loss of earning capacity.

[28] In *Romanchych*, the defendant had contended on appeal that the trial judge erred by failing to consider the extent of any real and substantial possibilities of an actual income loss and attributing them weight according to their relative likelihood.

[29] Mr. Justice Tysoe (in oral reasons) affirmed the trial judge's approach to the test for future income loss. He held that:

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> [10] The trial judge first addressed the question of whether the plaintiff's earning capacity had been impaired to any degree by the injuries caused by the accident. She referred to *Athey v. Leonati*, [1996] 3 S.C.R. 458, 140 D.L.R. (4th) 235 at para. 27, for the proposition that a future or hypothetical possibility will be taken into consideration as long as it is a real and substantial possibility and not mere speculation. She also referred to *Sinnott v. Boggs*, 2007 BCCA 267, 69 B.C.L.R. (4th) 276, which she considered to be of particular assistance because it also involved a young person not yet settled into a career. The judge concluded that a loss of future earning capacity had been proven by the plaintiff.
>
> [11] The judge then addressed the quantum of the damages and, in that regard, made reference to the considerations set out in *Brown v. Golaiy* (1985), 26 B.C.L.R. (3d) 353 at para. 8 (S.C.). She referred generally to the various contingencies and possibilities to be encountered by a person in the position of the plaintiff and, considering there was a real and substantial possibility the plaintiff will experience an income shortfall during the rest of her working career, she fixed the award at the amount of $80,000.

[30] Having reviewed all of these cases, I conclude that none of them are inconsistent with the basic principles articulated in *Athey v. Leonati*, [1996] 3 S.C.R. 458, and *Andrews v. Grand & Toy Alberta Ltd.*, [1978] 2 S.C.R. 229. These principles are:

> 1. A future or hypothetical possibility will be taken into consideration as long as it is a real and substantial possibility and not mere speculation [*Athey* at para. 27], and
>
> 2. It is not loss of earnings but, rather, loss of earning capacity for which compensation must be made [*Andrews* at 251].

[31] Furthermore, I conclude that there is no conflict between *Steward* and the earlier judgment in *Pallos*. As mentioned earlier, *Pallos* is not authority for the proposition that mere speculation of future loss of earning capacity is sufficient to justify an award for damages for loss of future earning capacity.

[32] A plaintiff must always prove, as was noted by Donald J.A. in *Steward*, by Bauman J. in *Chang*, and by Tysoe J.A. in *Romanchych*, that there is a real and substantial possibility of a future event leading to an income loss. If the plaintiff discharges that burden of proof, then depending upon the facts of the case, the plaintiff may prove the quantification of that loss of earning capacity, either on an earnings approach, as in *Steenblok,* or a capital asset approach, as in *Brown*. The former approach will be more useful when the loss is more easily measurable, as it

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was in *Steenblok*. The latter approach will be more useful when the loss is not as easily measurable, as in *Pallos* and *Romanchych*. A plaintiff may indeed be able to prove that there is a substantial possibility of a future loss of income despite having returned to his or her usual employment. That was the case in both *Pallos* and *Parypa.* But, as Donald J.A. said in *Steward*, an inability to perform an occupation that is not a realistic alternative occupation is not proof of a future loss.

[33] On the facts of this case, the trial judge found that there was no substantial possibility of a future event leading to an income loss. That should have been the end of the enquiry. That was a reasonable conclusion on the evidence because there was no evidence that she was limited in performing any realistic alternative occupation.

[34] I would allow the appeal and set aside the award for future loss of income earning capacity.

“The Honourable Madam Justice Garson”

I agree:

“The Honourable Madam Justice Levine”

I agree:

“The Honourable Mr. Justice Groberman”