NOVA SCOTIA COURT OF APPEAL

Citation: *Blenus v. Fraser*, 2022 NSCA 73

Date: 20221207
Docket: CA 508019
Registry: Halifax

Between:

Donald Blenus

Appellant

v.

Charles Fraser

Respondent

Judge: The Honourable Justice Elizabeth Van den Eynden

Appeal Heard: May 19, 2022, in Halifax, Nova Scotia

Subject: Assessment of damages; loss of income; diminished earning capacity; causation; duty to mitigate

Summary: Mr. Blenus appeals from a decision wherein the trial judge denied his damage claims for loss of income and diminished earning capacity. Mr. Blenus suffered injuries in a motor vehicle accident. He sued the respondent. Liability was not at issue; damages and their causation were. The judge rejected his premise that the injuries caused him to close his profitable construction business, resulting in financial loss. The judge also found Mr. Blenus could have mitigated any financial loss but elected not to do so. Specific findings of fact, including an unfavourable credibility and reliability assessment of Mr. Blenus (none of which are challenged on appeal), underpinned the judge's determination. Nevertheless, Mr. Blenus contends the judge still erred by failing to award any amount of damage for these claims.

Issues: Did the judge err in his assessment of damages related to loss of income and/or diminished earning capacity?

Result: Appeal dismissed with costs. Mr. Blenus did not demonstrate any error committed by the judge. The judge's unchallenged factual findings including his unfavourable credibility and reliability assessment of Mr. Blenus (all well anchored in the record) were fatal to Mr. Blenus's loss of income and diminished earning capacity claims.

This information sheet does not form part of the court's judgment. Quotes must be from the judgment, not this cover sheet. The full court judgment consists of 17 pages.

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Appellant

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Charles Fraser

Respondent

Judges:	Bryson, Van den Eynden and Derrick JJ.A.
Appeal Heard:	May 19, 2022, in Halifax, Nova Scotia
Written Release	December 7, 2022
Held:	Appeal dismissed with costs, per reasons for judgment of Van den Eynden J.A.; Bryson and Derrick, JJ.A. concurring.
Counsel:	Jamie MacGillivray, for the appellant Christine Nault, for the respondent

Reasons for judgment:

Overview

[1] The appellant (Mr. Blenus) suffered injuries in a motor vehicle accident. He was driving his motorcycle and was struck by a motor vehicle driven by the respondent (Mr. Fraser). Mr. Blenus sued Mr. Fraser. Accident liability (fault) was not an issue at trial; damages and their causation were.

[2] Justice Gregory M. Warner presided over the trial. He awarded damages of $150,000 to Mr. Blenus being comprised of $100,000 for general damages, $25,000 for loss of housekeeping and valuable services and $25,000 for costs of future care. He reduced these damages by 25% due to Mr. Blenus's failure to mitigate. These awards are not challenged on appeal.

[3] At trial, the most significant heads of damage advanced by Mr. Blenus were for loss of income arising from the closure of his business and diminished earning capacity. Having determined Mr. Blenus failed to establish grounds for such awards, the judge rejected these claims. The judge's decision is reported as 2021 NSSC 79. Mr. Blenus appeals claiming the judge erred in rejecting these claims.

[4] The judge's rejection of these claims flowed directly from specific findings of fact including his unfavourable credibility and reliability assessment of Mr. Blenus—none of which are challenged on appeal. Nevertheless, Mr. Blenus contends the judge still erred by not awarding damages for these claims.

[5] With respect, the arguments Mr. Blenus advances on appeal are not persuasive. He did not demonstrate any error of law committed by the judge. The judge's unchallenged factual findings together with his credibility and reliability assessment (all well anchored in the record) were fatal to Mr. Blenus's loss of income and diminished earning capacity claims.

[6] I would dismiss the appeal with costs. My reasons follow, beginning with a statement of the issues, followed by the contextual background, the standard of review engaged and my analysis.

Issues

[7] Mr. Blenus framed the issues on appeal this way:

1. Did the judge err in law with respect to mitigation and in his application of the law on that issue to his findings of fact?

2. Did the judge err in law relating to causation and in his application of the law on that issue to his findings of fact?

3. Did the judge make errors of law and in the application of the law to his findings of fact with respect to past and future loss of income and diminished earning capacity?

[8] These issues can be reframed by asking this question:

1. Did the judge err in his assessment of damages related to loss of income and/or diminished earning capacity?

Background

[9] Mr. Blenus's challenge is confined to the judge's assessment of damages related to his alleged loss of income arising from the closure of his business and diminished earning capacity. The contextual background focuses on these claims.

[10] The motor vehicle accident happened on July 28, 2013. Mr. Blenus was 51 years old at that time and the owner/sole proprietor of a successful construction business.

[11] Mr. Blenus left school in grade 8 to work. By the time he reached his early twenties he had established a general construction business. Over time, the business concentrated on the construction of agricultural buildings.

[12] Mr. Blenus suffered numerous injuries in the accident. The judge found:

> [97] Based on all the evidence, the court is satisfied that the Plaintiff has experienced pain and suffering as a result of the injuries sustained in the accident. As discussed above, he suffered a right clavicle and scapula fracture, which required shoulder surgery and insertion of a plate, which was later repaired after becoming loose, and ultimately removed. He suffered right rib fractures (3-8), a collapsed lung, and subsequent soft tissue and back pain. He also experienced thoracic spinal fractures, specifically, right T5 and T6 transverse process fractures. These injuries were caused by the motor vehicle accident, and by the defendant's negligence. Subject to my comments below about mitigation, the plaintiff has ongoing pain arising from these injuries.

> [98] The evidence does not support a causal link between the Defendant's negligence and the symptoms that arose in 2016, which may or may not have been attributable to Lyme Disease. As described above, the evidence does not support a finding that the Plaintiff suffered a head injury in the collision. The 2016 symptoms resolved through Lyme Disease treatment. I place no weight on the Plaintiff's later subjective opinion that he had in fact suffered a "brain infection" as a result of the collision, which only manifested itself three years later.

[13] Mr. Blenus was hospitalized for 10 days following the accident and then returned to work in his construction business. Pre-accident he was hands on in day-to-day business operations – including attending and supervising work sites and often performing manual labour.

[14] Mr. Blenus's business was doing well at the time of the accident. Notwithstanding the injuries Mr. Blenus suffered in the accident and the associated pain and physical limitations which impacted the work tasks he could undertake, his business continued to grow. In fact, it thrived after the accident. The growth was due in most part to an innovative and profitable steel framed chicken barn Mr. Blenus designed. That building was in high demand and resulted in significant revenue growth. Notwithstanding the viability and profitability of the business post-accident, Mr. Blenus closed the business in the spring of 2017. The trial occurred over several days in January 2019.

[15] The underlying reason for the closure of the business is central to the judge's rejection of Mr. Blenus's claim for loss of income or diminished earning capacity. I will return to Mr. Blenus's explanation for shutting down his business and what the judge found, after setting out some additional details.

[16] Mr. Blenus employed two of his adult children in his business, his daughter Terri-Lee Eaton and his son Evan Blenus. Terri-Lee worked with her father from about 2005 - 2008 and then returned in 2014 and continued until he closed the business. Evan worked in his father's business from 2002 – until closure.

[17] Both children were involved with several aspects of the business and assisted their father in many ways. The judge explained their involvement in the years between the accident and closure of the business, and that Evan was viewed as second-in-command to Mr. Blenus:

> [122] Over the five years after his father's accident, Evan said, they completed eight or nine chicken barns, plus several other barns. He had a crew of 15. His sister worked with him, and was able to do everything, including supervising jobs

> as well as the same physical work as the crew. Contrary to his father's evidence that he and his sister were only "employees", Evan described himself as a "supervisor" and effectively his father's second-in-command. …
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> …
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> [127] Before her father was injured, Ms. Eaton said, he was at the sites pouring concrete and doing everything. After the accident, she said, he did a little excavation but only if Evan was not available to do it. After she returned to work for him, she said, her father would give daily directions and visit the work sites but did no manual labour. Their projects were mostly chicken barns and garages. She recalled building seven chicken barns from 2014 to 2017.
>
> [128] Ms. Eaton described her brother Evan as her boss and next in line to her father when he was not present. …

[18] Both children testified at trial. The plan had been for Evan to eventually take over the business. That did not happen. Instead, Mr. Blenus decided to shutter his viable business and sell off its assets piecemeal. It is evident from the record that Mr. Blenus's decision to abruptly close the business in the spring of 2017 was controversial and unwelcomed by his children, particularly Evan.

[19] In his decision, the judge set out the increase in business revenue and corresponding increase in Mr. Blenus's income. He observed:

> [100] Mr. Blenus' evidence was that his business was growing in the years before he shut it down, largely due to his design and construction of a new type of chicken barn. The evidence (mainly based on tax returns and notices of assessment) indicates that Mr. Blenus' gross business income, and Line 150 personal income for the years 2008 to 2016, was as follows:

Year	Gross Business Income	Line 150 Personal Income
2008	$1,214,866.00	$107,635.00
2009	$834,690.00	$53,731.00
2010	$1,638,106.00	$42,507.00
2011	$1,399,663.00	$40,574.00
2012	$1,246,420.00	$32,265.00
2013	$1,313,181.00	$33,929.00
(Accident: July 28, 2013)		
2014	$1,898,423.00	$33,716.00
2015	**$2,361,096.00**	**$187,993.00**

2016 $1,773,863.00 $122,047.00

...

> [130] It is undisputed that Mr. Blenus' business was expanding, and his revenues generally increasing, in the years after the accident. The evidence indicates, and I find, that this was in large part attributable to the new chicken barn design he developed**. Between the accident and April 2017 (when he closed the business), Mr. Blenus' crews built nine of these new-style chicken barns with the help of his son Evan Blenus and his daughter Terri-Lee Eaton. He was still getting requests to build them after he closed the business; as he testified, he "could be building chicken barns every day for a long time."**
>
> [emphasis added]

[20] Although there was a continued future demand for the construction of the chicken barns, Mr. Blenus did not permit his son to continue building them on his own. The Judge noted:

> [118] Asked what he told Evan about his decision to close down the business, Mr. Blenus replied that he told him that he was going to shut it down because of his own injuries and pain. He told Evan to "grab a few guys and do some small jobs" but would not let him continue building the profitable chicken barns.

[21] To quantify his claim for economic loss, Mr. Blenus presented expert evidence. The expert presented three scenarios for economic loss, with the loss commencing in 2017. He worked on the understanding there was no loss from the date of the 2013 accident to the closure of the business in 2017. The projected loss ranged from $586, 648 to $1,264,451. Further, although Mr. Blenus complained about incremental labour costs due to his reduced capacity to work, the expert was unable to quantify any such loss. The Judge explained:

> [103] In quantifying his economic loss, the Plaintiff relies on the expert report of Jarrett Reaume. Mr. Reaume was qualified as a chartered professional accountant and a certified forensic accountant capable of giving evidence on the subject of income and economic loss. Mr. Reaume is a partner and senior vice president in the Halifax office of Matson, Driscoll & Damico Ltd. (MDD), a forensic accounting firm.
>
> [104] Mr. Reaume provided a report on the economic losses sustained by the Plaintiff as a result of the motor vehicle accident of July 28, 2013. He worked on the assumption that the Plaintiff would have retired at age 65 and that his life expectancy and rate of disability remained in line with the Canadian male average. He understood that the business ceased operating on April 30, 2017.

> [105] … Mr. Reaume projected the Plaintiff's gross income, absent the incident, for 2013 to 2016 based on actual income**. The Plaintiff had indicated that "there was no loss up to the year the Business ceased"** … From 2017 onward, the assumption was that the Plaintiff would have zero actual income, as he had indicated that his injuries made him unable to return to work 9MDD report, para.46). [emphasis added]
>
> …
>
> [107] For gross income from 2017 forward, Mr. Reaume provided three scenarios of economic loss. …(1) based on average income for a full-time construction manager in Nova Scotia; (2) based on the actual average income available to the plaintiff from 2008 to 2016, based on the bookkeeper's unadjusted calculations, including the erroneous double-expensing of portions of inventory; and (3) based on the actual average income available to the plaintiff from 2008 to 2016, without the double-expensing of inventory. As for future pre-tax losses, the three scenarios considered by Mr. Reaume gave the following totals:
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> Scenario 1: $620,113;
>
> Scenario 2: $586,648;
>
> Scenario 3: $1,264,451 (MDD report. para. 50).
>
> [108] These loss calculations were prior to the deduction of any collateral benefits and did not take into account income tax gross-ups or prejudgment interest. All scenarios were adjusted for inflation. Mr. Reaume used a net discount rate of 2.5 percent, in accordance with Civil Procedure Rule 70.06(1).
>
> [109] Mr. Reaume assumed that, absent the accident, the Plaintiff would have sold the assets of the business when he retired at age 65. He assumed that the assets disposed of in 2017 and 2018 were sold for their approximate fair market values. Mr. Reaume found that the Plaintiff had a benefit from selling the capital assets earlier that he would have sold them absent the accident, and calculated an early disposition benefit of $151, 259 reflecting the time value of the money (MDD report, paras 47-49).
>
> …
>
> [113] **With respect to his detailed findings, Mr. Reaume noted that the Plaintiff had indicated that he had incurred incremental labour costs to replace his reduced working capacity after the accident**, MDD had been **"unable to calculate any incremental payroll"** (MDD report, para. 33).
>
> [emphasis added]

[22] The judge extensively reviewed the medical evidence in his decision at paras. 12 to 87. It is clear from the record Mr. Blenus has a complicated medical history. In addition to the 2013 accident, Mr. Blenus had some pre-existing

conditions. He also sustained injuries from other mishaps that happened after the 2013 accident. And at one point in 2016, he believed he was suffering very serious complications from Lyme disease. The following excerpts from the judge's decision illustrate this history:

> [16] On September 20, 2013, some seven weeks after the July 27 accident … Mr. Blenus travelled ... to an annual auction in Truro... At the venue, parking spots were marked off by ropes, one of which he tripped over, falling onto his right arm and injured shoulder. An ambulance was called. At trial Mr. Blenus confirmed that he downplayed his condition, because he did not want to go the hospital. The EHS incident indicates that he was aware of his injuries, that he understood the EHS concern about his refusal to receive medical attention, and released EHS from liability (JEB, pp. 90-95). In reality, he was in extreme pain.
>
> [17] Mr. Blenus agreed on cross-examination that he had taken a lot of morphine to deal with pain before he went to the auction. He acknowledged that it was serious fall on his right shoulder. He felt that he had rebroken his shoulder and "bent and messed up the plate" in his surgically-repaired shoulder. He acknowledged that he was triaged by EHS, and that he lied to them, downplaying his injuries. He did not want to tell them that he was on morphine, or why he did not want to go to the hospital, even though he was (in his own words) "dying in pain." He also described the pain as "excruciating".
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> …
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> [28] In April 2016, … Dr. Gallie's report … noted that Mr. Blenus had reported that he had experienced "about ten significant head injuries", and he appeared to be suffering from post-concussion vision syndrome. Mr. Blenus acknowledged at trial that he had suffered from prior concussions. He was cross-examined on the notes of an osteopath, Sarah Hayes, who he consulted starting in 2008, having injured his back jumping off a roof on a worksite. He confirmed at trial that, as suggested in Ms. Hayes's notes, he had experienced multiple head injuries from hitting his head on construction sites. He also confirmed an apparent 2009 back injury from lifting a heavy weight.
>
> [29] In July 2016 Mr. Blenus began seeing a naturopath, Dr. Bryan Rade, about his head issues. Mr. Blenus had concluded from internet searches that he had Lyme Disease….
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> …
>
> [31] … On November 28, 2016, Mr. Blenus reported that his cognitive and head symptoms had largely resolved. On March 27, 2017, Mr. Blenus reported that he was on a long list of Lyme Disease meds and "feeling 1000% better, aches gone, ringing in head gone, sea sickness gone" (JEB, pp. 19-20). He also reported that his back pain was being managed with the THC butter. …

> [32] Mr. Blenus attended for an independent physiatry assessment with Dr. Max Kleinman, on August 25, 2016. … Mr. Blenus was asked why he did not raise Lyme disease in the lengthy questionnaire he completed for Dr. Kleinman and in his interview with Dr. Kleinman on August 25, 2016. His answer was to the effect that he had described his symptoms truthfully to Dr. Rade and thought he had Lyme Disease at the time, but "now knows" that it was a head injury. …
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> …
>
> [36] Mr. Blenus acknowledged falling when climbing from a wharf onto a boat on August 31, 2016. He attended the hospital, believing he had fractured his lower right leg, and had x-rays. He testified that he was not hurt, however. The description he gave to the court of this incident differed vastly from the description he gave in discovery. Similarly, he acknowledged tripping and falling in some grease on a garage floor on November 4, 2018. Again, he attended at the hospital, and acknowledged the triage notes, but claims he received no treatment.
>
> …
>
> [67] The first of the Kings Physiotherapy notes refers to Mr. Blenus' attendance for physiotherapy on April 28, 2008 in relation to pain resulting from jumping off a roof onto frozen ground a month earlier. At that time, the notes indicate, Mr. Blenus reported: (1) having had back pain for ten years and taking morphine for it; (2) suffering whiplash from a motor vehicle accident at the age 20; (3) back pain from a skidoo accident; (4) several concussions; (5) a snowmobile accident many years previous, and (6) as a child, he "couldn't stand for long." Mr. Blenus received further physiotherapy treatment on May 9 and May 23, 2008.
>
> [68] According to the next Kings Physiotherapy note, on December 7, 2009, Mr. Blenus reported that "a month earlier, he was lifting a heavy weight at work, turned and hurt himself. He was tender and treated for "EDEMA" of L5/S1"." …
>
> [69] A further note related to an attendance on January 19, 2010, when Mr. Blenus was treated for lower back and heel pain. He reported that since he was a teenager, he had to sit after standing for 15 or 20 minutes. On a February 12, 2010, attendance, he reported that his back was better, but he still had pain in his heels.

[23] The judge comments further on Mr. Blenus's medical history at paras. 161 to 163 during his analysis of whether Mr. Blenus acted reasonably in mitigating the damages the judge did award (general damages $100,000, loss of housekeeping and valuable services $25,000 and future care costs $25,000):

> [161] I conclude that the Plaintiff has not met his duty to mitigate. Numerous of his own acts and omissions have contributed to worsening his condition or undermined his ability to recover. For instance, after the slip-and-fall incident in Truro, he not only refused EHS assistance, but did not seek medical attention, and

> did not disclose the fall to his treating physicians until the following spring. (I am mindful that the evidence did not establish an immediate injury or damage to the shoulder plate, but the Plaintiff's own evidence was that the fall brought on severe pain.) The failure to inform Dr. Murphy about the fall on his repaired shoulder in Truro was among many other instances examples of Mr. Blenus not acting prudently for his own well-being. Similarly, Mr. Blenus did not recall telling Dr. Kleinman on August 25, 2016, about reinjuring his shoulder at Truro, or about the broken plate. He did tell Dr. Kleinman that he tripped in a parking lot approximately two weeks post collision. At trial, he blamed this error on the fact that he suffered a "brain injury" in the accident.
>
> [162] Similarly, despite the extent of pain he describes, the Plaintiff took no steps to inquire about his status at the Berwick Pain Clinic after being referred there and apparently registering. Dr. Segato later reiterated to Mr. Blenus that the referral was in place and should be pursued. Dr. Segato also testified that he would have discussed Dr. Kleinman's recommendation for an interdisciplinary pain program with Mr. Blenus. Both Drs. Segato and Kleinman testified that the failure to pursue recommended treatment modalities could have a negative impact on a patient's recovery.
>
> [163] These and other abuses of himself (including, in particular, the taking of illicit drugs, failing to continue his physiotherapy, and/or cooperating with his treating physicians) clearly aggravated his circumstances. (I do not, however, conclude that the Plaintiff's use of marihuana butter in place of the prescribed form of marihuana constitutes a failure to mitigate. There was no evidence on which to find that Mr. Blenus' pain control would have been more effective had he filled the prescription rather than buying, and later producing, his own.)
>
> [164] Accordingly, the court finds that the Plaintiff has not acted reasonably to mitigate his damages. I conclude that his damages should be reduced by 25 percent to reflect the failure to mitigate.
>
> [165] The Plaintiff specifically denies any psychological trauma arising from the accident, insisting that his injuries are purely physical. As such, there is no basis on which to find that he is suffering from a psychological infirmity that deprives him of the capacity to make rational choices, as contemplated by *Janiak*.[1]

[24] Mr. Blenus tendered and relied upon an independent physiatry assessment completed by Dr. Max Kleinman in which he opined about the injuries Mr. Blenus suffered in the 2013 subject accident:

> [59] Dr. Kleinman concluded that Mr. Blenus' "collision-related impairments" consisted of the following (at JEB, pp. 323-325):

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[1] Janick v, Ippolito [1985] 1 S.C.R.146

> (1) Chronic pain syndrome with associated depressive symptomatology. The relevant factors included use of medication to control chronic pain; dependence on health care providers and family for assistance; secondary physical deconditioning ; withdrawal from social milieu; failure to restore pre-injury function; and development of anxiety, depression, and other "non-organic illness behaviours."
>
> (2) Biomechanical disorder of the cervicothoracic and lumbrosacral spine. Dr. Kleinman concluded that "the muscles, ligaments and capsules of the spine underwent sudden overstretching and partial tearing and strain" in the collision, and the "initial soft tissue pathology has now given way to the development of chronic scar tissue that impacts Mr. Blenus in a way that is both physically painful and functionally disabling."

> (3) Right shoulder, chronic dysfunction secondary to clavicular/scapular fracture with subsequent non-union. This referred to the ongoing pain in the right shoulder.
>
> (4) Chronic post-traumatic headaches. Dr. Kleinman was of the view that the "presentation and description of his headaches" suggested "a mixed origin including a cervicogenic (originating from the neck) component with a muscular tension contribution." However, he believed it was also relevant that Mr. Blenus "was thrown from the motorcycle and it is quite likely that he sustained a traumatic brain injury. Further comment as it relates to a specific diagnosis would be deferred..."
>
> (5) Upper and lower extremity referral (i.e. "numbness and tingling in both the upper and lower extremities").
>
> (6) Chest wall pain ("chronic sprain/strain secondary to the original fracture sight").

[25] However, the judge placed limited weight on Dr. Kleinman's opinion. That was primarily due to incomplete information Mr. Blenus provided to him and in part by opining on matters outside his area of expertise. The judge stated:

> [70] Dr. Kleinman acknowledged that he was told nothing about these injuries or treatments [see quoted paras 67 to 69 above] in the questionnaire or his interview. He agreed that these were inaccuracies.
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> …
>
> [72] Dr. Kleinman acknowledged that Mr. Blenus had not reported any prior head injuries to him. Dr. Kleinman was told by counsel that Mr. Blenus had testified that he sustained many injuries on the job site, and had subsequent symptoms that included seeing stars, head spinning, and headaches. Dr. Kleinman acknowledged that Mr. Blenus did not report these to him and agreed that these were distortions or inaccuracies.

> …
>
> [77] Dr. Kleinman was then directed to the opinion section of his report, and specifically his statement that all his opinions were within the context of his expertise of physical medicine and rehabilitation. His opinion was that Mr. Blenus suffered from six collision-related impairments. With respect to the first opinion: chronic pain syndrome and mood disorder, he acknowledged that this was outside his area of expertise and required a DSM-5 evaluation by a psychiatrist or psychologist.
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> …
>
> [82] Mr. Blenus testified that he was very badly hurt in Truro, that it was a serious fall, that he smashed his right shoulder again, and bent the plate in his shoulder, and that the pain was excruciating, with him shaking and in shock. Dr. Kleinman, relying on Mr. Blenus' subjective description of the incident, was aware only that he had tripped in a parking lot, that an ambulance came, and he went home. He acknowledged that if Mr. Blenus had told him what he was reported to have told the Court about his Truro injury, it would have been reflected in his report.

[26] Next, I turn to the judge's finding that Mr. Blenus was neither a credible nor reliable witness. The judge rightly observed that the issues he had to determine rested, to a considerable extent, on his assessment of Mr. Blenus's credibility and reliability. He stated:

> [88] The determination of the issues in this case will rest heavily on the court's assessment of the Plaintiff's credibility and reliability, in view of all the evidence. …

[27] After reference to the governing legal principles respecting the assessment of a witnesses' credibility and reliability the judge determined:

> [90] The Court has serious concerns with both the credibility and the reliability of the Plaintiff's evidence. These concerns rest both on the Plaintiff's evidence itself and on the other testimonial and documentary evidence relevant to assessing his evidence. The Plaintiff presented as an individual who, in his own view, always knows best, and is not inclined to listen to advice, particularly medical advice. He had a tendency to self-diagnose, and these self-diagnoses often shifted over time, to accord with whatever set of facts was most convenient at the relevant time. This was also the case with reported symptoms. An example of this phenomenon is the sudden announcement some three years post-accident that the plaintiff now believed that he had lost consciousness in the accident. Another example is the Plaintiff's shifting views on whether he had Lyme Disease.

> [91] The evidence also demonstrates the Plaintiff's tendency to not make full disclosure to medical professionals of the circumstances relevant to his condition at any given time, for instance, the failure to answer the questions about not disclosing the impact of the Truro trip and fall on his shoulder injury or disclosing his Lyme disease diagnosis.
>
> [92] Whether these tendencies were the result of deliberate exaggeration and an intention to shape the evidence in way favourable to his legal position, or whether the Plaintiff actually believes in the accuracy of his evidence, is somewhat beside the point. These issues cause the court to question the credibility and reliability of almost everything Mr. Blenus said.

[28] As noted, on appeal, the appellant does not challenge these negative findings respecting his credibility and reliability.

[29] I return to Mr. Blenus's explanation for shutting down his business. Mr. Blenus had attempted to persuade the judge that his decision to close the business was caused by the injuries he suffered in the 2013 accident. The judge rejected his causation theory.

[30] After setting out the legal principles that govern causation, Justice Warner addressed the issue of lost future income and diminished earning capacity in paras. 99 – 135 of his decision. The judge found as a fact that Mr. Blenus's decision to close the business was not caused by the injuries he suffered in the 2013 accident.

[31] Although the judge was satisfied Mr. Blenus suffered injuries in the 2013 accident, which affected his ability to perform physical work and limited his ability to attend at work sites, he concluded the decision to close his business did not follow. To the contrary, the judge found as a fact that Mr. Blenus chose to close his business because of relationship issues he had with his son Evan. In the alternative, the judge found that even if the injuries had been the cause of the business closure, Mr. Blenus could have mitigated any income loss, but declined to do so.

[32] Given these findings are not challenged on appeal, there is no need to set out the extensive evidence the judge relied upon. That said, I observe that his findings were clearly available to him on this record. As to his specific findings the judge concluded:

> [132] It does not follow, however, that the closure of the business in 2017 can reasonably be attributed to the injuries. Mr. Blenus was very much of the view that he himself was essential to the business. Contrasting himself with Evan, he said, "I was the business. He wasn't the business. He was an employee." The Plaintiff asks the Court to find as a fact that this was in fact the case, which I

> reject. Mr. Blenus agreed that his intention had been to transfer the business to Evan when he retired. It was apparent from his evidence that Mr. Blenus was disgruntled by Evan's temporary unavailability due to injury in the winter of 2016-2017. He also formed the opinion that with the potential of a child with health issues, Evan's time would be limited moving forward. This was merely Mr. Blenus' personal view, and was belied by other evidence, including Evan's own reaction to his decision to shut down the business.
>
> [133] The business was viable, and indeed expanding, and Evan, who had worked alongside his father for over 15 years, was interested in taking over. Mr. Blenus' declaration that no one else could possibly run the business runs counter to his own admission that the intention had been that Evan would eventually take over. It was the breakdown in the relationship between father and son that caused Mr. Blenus to shut down the construction business in the spring of 2017.
>
> [134] The foundation of the Plaintiff's claim for loss of earning capacity or lost future income is the premise that the closure of the construction business resulted from his injuries. While Mr. Blenus clearly became less able to take an active part in the day-to-day operation of the business as a result of his inability to do manual labour and his ongoing pain, it is not clear that this translates into any actual lost future income. This conclusion has elements of both causation and mitigation. I have found that the cause of the shut-down was not Mr. Blenus' injuries, but the circumstances between him and Evan in early 2017. But even if the injuries had been the cause of the closure, Mr. Blenus had an ability to mitigate his damages, but declined to do so. Mr. Blenus was proprietor of the business, which was, in fact, growing in the years after the accident. He had a "support system" in the form of his own children who were capable of taking charge of operations day-to-day. It is noteworthy that Mr. Reaume worked on the basis that the plaintiff had indicated that there was no loss up to the year the business ceased, which was some four years post-accident, despite Mr. Blenus' condition over those years.
>
> [135] As such, the Plaintiff has not established grounds for an award of damages for lost future income or diminished earning capacity.

[33] I will supplement background as needed in my analysis.

Standard of Review

[34] For this Court to intervene with the judge's assessment of damages we must find: (1) there was no evidence on which the judge could have reached the conclusion; or (2) the judge proceeded upon a mistaken or wrong principle; or (3) the result reached by the judge was wholly erroneous. See *Woelk v. Halvorson*, [1980] 2 S.C.R. 430 at pp. 435-436; *Partridge v. Nova Scotia (Attorney General),* 2021 NSCA 60 and *TDC Broadband Inc. v Nova Scotia (Attorney General)*, 2018 NSCA 22.

Analysis

[35] On appeal, Mr. Blenus requests we arrive at a different conclusion than the judge below. He wishes us to find that the closure of the business did not result from a lack of diligence on his part, and it is not reasonable to place the closure of his business entirely on him. He put it this way in his factum:

> ¶28 The Plaintiff asks this Court to find that the closure of the business did not result from a lack of diligence on his part. However, if this Court accepts that the Plaintiff should be penalized for not finding a way to work with his children and keep the business going, the Plaintiff then asks this Court to substitute the Trial Judge's zero award with a substantial award for diminished earning capacity. It is not reasonable to place the loss of the business entirely on the Plaintiff. The Defendant caused him to be disabled and unable to run the business on his own. If the Plaintiff should have found a way to work with his children, this would reduce the award similar to a finding of contributory negligence. The Trial Judge unequivocally found that the Plaintiff's physical capacity and overall contribution was reduced to a fraction of what it had been prior to the accident. This is a huge loss to the Plaintiff and the business, which could not have been avoided other than by the Defendant having exercised an appropriate standard of care as a driver.

[36] As to relief, Mr. Blenus requests the following damages, some of which lack any quantification:

- Damages for the loss of his business and for the 4 years pre-closure, where the business lost the benefit of his labour; or
- Alternatively, damages for the loss of his business and for the four years pre-closure where it lost the benefit of his labour but reduced by 25% for lack of diligence in preventing escalation of his damages; or
- In the further alternative, should we award no compensation for the business closure, an award for diminished earning capacity, to reflect 14 years of lost manual labour and 14 years of a reduced ability to attend at work sites and supervise.

[37] These written submissions of the respondent (Charles Fraser) capture the substance of his position on appeal:

> 18. Critically, the Appellant admits numerous times that he is not seeking to overturn any of Warner J.’s findings of fact: …

> 19. However, the learned trial judge found <u>as fact</u> that it was the breakdown in the relationship between the Mr. Blenus and his son that caused the Appellant to shut down his business in 2017. Accordingly, this appeal must fail unless the Appellant can prove a palpable and overriding error in this conclusion. He also determined that the Appellant had not mitigated his loss, which is another application of facts to a legal standard. Yet again, the Appellant has to prove palpable and overriding error in order to succeed.
>
> …
>
> 21. The Appellant submits that there are no grounds upon which this Honourable Court may intervene in the learned trial judge's decision to decline to award loss of earnings or diminished earning capacity. The trial judge correctly quoted the governing law and applied that law to the facts before him, viewed through the unique lens of Ms. Blenus' utter lack of credibility.
>
> …
>
> 31. It is important to realize that causation in the context of this case actually has two elements. The first is causation of Mr. Blenus' various symptoms as they relate to the accident, versus unrelated causes such as his pre-existing conditions, the severe fall he suffered two months after the accident, the explosion of new symptoms he experienced starting in 2016 which he attributed to Lyme Disease, a fall from a wharf onto a boat in 2016, and another fall into a grease pit in 2018.
>
> …
>
> 34. The second element is causation as it relates to the closure of the business, and the fact that Warner J. found <u>as fact</u> that the business closed for extraneous reasons. …
>
> 35. The Appellant submits that "but for" the accident, Mr. Blenus would not have sustained a loss of income. This is incorrect. <u>Even with</u> the accident, Mr. Blenus continued to earn income. The business continued to grow and thrive. He was making money hand over fist. It was not until the causally unrelated conflict with his son that he made the choice to shut down his business. Furthermore, he admitted this was his own choice, and not medically necessitated. …
>
> …
>
> 56. One of the central themes in this case is that Mr. Blenus did not act reasonably. He did not act as a reasonable patient, nor did he act as a reasonable businessman. Warner J. was accordingly well-justified on the evidence before him to deny Mr. Blenus compensation for loss of earnings or diminished earning capacity, and to reduce the other heads of damage accordingly.
>
> [emphasis in original]

[38] Returning to the standard of review, to succeed on appeal Mr. Blenus must demonstrate: (1) there was no evidence on which the judge could have reached the

conclusion; or (2) the judge proceeded upon a mistaken or wrong principle; or (3) the result reached by the judge was wholly erroneous. Applying this standard leads to the inescapable determination this appeal must be dismissed.

[39] All the judge's factual findings as to causation and his alternate finding that Mr. Blenus failed to mitigate his alleged financial losses and diminished capacity, are not refuted and are well supported in the record. Consequently, it cannot be said there was no evidence on which the judge could have reached these conclusions. As stated earlier, in my view, the judge's unchallenged factual findings as to causation, together with his credibility and reliability assessment, were fatal to Mr. Blenus's loss of income and diminished earning capacity claims.

[40] Apart from stating the judge committed errors of law, none were demonstrated by Mr. Blenus on appeal. Mr. Blenus acknowledges the judge aptly set out the law of causation at paras. 93 – 96 of his decision. Similarly, the judge set out the legal principles that governed his conclusions respecting mitigation without error. It is clear from the record the trial judge was mindful of the governing legal principles which he applied to the facts as he found them. As a result, it cannot be said the judge proceeded upon a mistaken or wrong legal principle.

[41] Nor did Mr. Blenus establish the result reached by the judge was wholly erroneous. The judge's rejection of Mr. Blenus's income loss and diminished capacity claims flowed directly from his specific unchallenged and firmly grounded findings of fact.

[42] In effect, Mr. Blenus is requesting we reweigh the evidence and arrive at terms more financially favourable to him. That is not our role. An appeal is not a retrial. This well-established principle is worth restating in the context of the arguments advanced on appeal.

[43] I see no grounds to intervene.

Conclusion

[44] I would dismiss the appeal. As to costs, we understand no costs were ordered in favour of Mr. Blenus at trial due to settlement offer considerations. On appeal, I would order Mr. Blenus to forthwith pay costs to the respondent in the amount of $5,000, inclusive of disbursements.

Van den Eynden, J.A.

Concurred in:

Bryson, J.A.

Derrick, J.A.